Transcription

Democracy in Question? – Season 1, Episode 3

Undermining democracy by democratic means: How can we stop it?

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SR: Welcome to "Democracy in Question," the podcast series that addresses the challenges that liberal democracies face in our troubled times. I'm Shalini Randeria, the Director of the Albert Hirschman Centre on Democracy at the Graduate Institute in Geneva, and Director of the Institute for Human Sciences in Vienna. I also hold the excellence chair at the University of Bremen as part of which I direct a research group on soft authoritarianism, a kind of regime that I will discuss with my guest, Kim Scheppele, today, with reference to both Hungary and the United States. Kim is a renowned scholar of law and politics, who is Professor of Sociology and International Affairs at Princeton University. She has spent the last decade documenting the rise of what she calls *Autocratic Legalism*, first in Hungary, and then in Poland. And of course, it's spread around the world. Thank you so much for joining me today, Kim. And I'm sorry, it's such a rainy day in New Jersey, but you are at least safely indoors.

KS: Well, it's lovely to be here. And I'm sorry, we have the remnants of yet another American hurricane that it's beating down on my roof. So, you may hear this as we go along through the interview.

SR: Our conversation, I think, couldn't be more crucial and relevant today, as we are looking at the dismantling of democracies by democratic means, namely, through the use of law.
[00:01:30] Over the past 10 years, we have been witnessing new elected leaders using democratic mandates to undermine and subvert the constitutional systems of checks and balances that they inherited. How are liberal principles and institutions being hollowed out using electoral

majorities? And how are soft authoritarian leaders able to get away with it? These are not enemies of democracy in the mold of Latin American and Middle East dictators, or even the Cold War communist regimes that we were familiar with. You coined the oxymoron sounding term, *autocratic legalism* to describe this particular kind of regime. Could you explain what kind of regime this is and what does the term really mean?

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KS: So yes, I mean, I think that the world is well educated in how dictators usually come to power, you know, tanks in the streets is kind of the metaphor for when a democracy is in trouble. There are never tanks in the streets in these new kinds of takeovers. Instead, what's really visible is something that looks like normal politics. The budding autocrat doesn't say, "I'm a budding autocrat, I plan to shut down checks and balances." Instead, the budding autocrat says, "I'm just like you, and we've had this trouble with government being too slow, it needs to be speeded up and streamlined." And then when the autocrat is propelled into power, they start removing lots of checkpoints on executive power. So, very often these new autocrats say, "Well, first, we have to go after the judiciary, because the judiciary is...fill in the blank: It's against change, it's anti-democratic. Orbán came into power in 2010 and said all the old judges were communists. It had been several decades since communism was actually a thing in Hungary. And it looks like normal politics because you have an election, and the election is supposed to produce results. And what gets produced? New laws. What could possibly be wrong with this? No tanks in the streets. And yet, if you don't have an independent judiciary, if

you have judges who were put there in order to rule in favor of the person who is in power, you might as well have tanks in the streets.

SR: One of the things we're also seeing is a process of undermining or innocence manipulating, engineering, the rules of the game of the electoral process itself. Can you say something about that?

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KS: Oh, yeah, so election law, it's got to be in every country, one of the most detailed, technical, and potentially corruptible areas of law. When Orbán came to power in 2010, he won 53% of the vote, and it translated into 67% of the seats in the parliament. That's when he starts with his two-thirds majority to change the constitution and to change the electoral system. The Parliament had 450 or so representatives, which is a lot for a tiny country like Hungary. So, he said, "Let's cut the number in half and each one will be more visible, more responsible." Even the opposition thought this was a good idea. Then you suddenly have to draw the boundaries of all the new districts. And when Orbán did that with the help of consultants from the US, he designed them in such a way that there are 106 districts, and in 2014, Orbán won 98 of them.

[00:05:00] He then said to all of his MPs in the parliament, "Half of you won't be here after the next election. So, if you want me to support you for one of these fewer seats, you will have to vote for everything I tell you to." And this is how he got the party discipline in his first term to pass all kinds of outrageous things that would cement his power forever. Cutting the size of the Parliament

in half could be an entirely politically innocent act, meant for good governance. That's why the autocrats get away with it in the first place. But it also could be the entrée to them redesigning the whole election system, it's only their opponents who are going to say these things. And then it looks like a partisan political thing in which as Orbán would always say, "My critics don't like what I'm doing. But that just means I'm a success."

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SR: Let me take you, Kim, from Hungary to the US because we are in the midst of the chaos surrounding the American presidential elections. Your diagnosis of autocratic legalism would also apply in a way to Trump with the brazen attempts we've seen by him, but also by the Republican Party, to control the courts, to control the Justice Department, dismantle the Postal Service, but also change electoral laws and to suppress minority votes. But this is something that really predates Trump.

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KS: Yes, the Republican party has been a largely *white*, less educated political party. And so, their base is shrinking. Ever since Ronald Reagan, the Republican party has been trying to figure out how to win elections with fewer and fewer votes. They got a boost actually from our original Constitution which has this thing called the Electoral College. What it is, is a system for electing the president where voters actually elect electors. And then the electors elect the president, every state gets two senators. So, you get Montana, which has very few people having the same number of senators as

California, which is one of the most populous states in the world. And right now, those states that are largely empty of people, but still have two senators, are all voting Republican. So just before there's no tampering with rules, the way the Electoral College is set up is that the Democrats have to win somewhere between 3% and 7%, more of the popular vote to be guaranteed a victory in the Electoral College. So that predated all the Republican tampering with elections. It is state officials who set the election rules for how those electors are picked.

And therefore, the Republicans very early on, decided, "We're going to try to dominate the state legislatures, who gets to vote, when they vote, how they vote, how the votes are counted." All of that is set by the states. So we have a partisan electoral machinery run in states that are overwhelmingly dominated by the Republican Party, before the election, and after the election, there are going to be a million lawsuits where the Democrats are trying to challenge the restrictive rules that Republicans have put in. And the Republicans are fighting lawsuits that try to counter any opening up of the ballot that will generate more turnout. So, Democrats went on turnout, Republicans went on voter suppression. Several weeks ahead of the election, there were still more than 200 pending cases that might change the voting rules.

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And then, of course, we know as soon as the vote is over, there are going to be more pending challenges. Both sides have lawyered up the Democrats are going to want to count every vote, the Republicans are going to want to

suppress every vote. This happens in every election. And so really, the outcome is going to depend on 50 different states and all the litigation that's going to go on in those states, when you've got a Supreme Court that now has a reliable Republican majority. I hate to say it, but we've got a rigged election system.

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SR: It's really a whole machinery has been put into place to substitute the popular vote by a legislative vote. On top of that, or underneath that is gerrymandering, which I think it would be wonderful if we can hear you explain what the term means.

KS: So, gerrymandering, it's actually probably mispronounced the guy's name was Elbridge Gerry, and Elbridge Gerry was from Connecticut, and he designed a district map. So, every member of the House of Representatives comes from a territorial district that's smaller than the state. And so, the question is, where do you draw the lines of these districts? And Elbridge Gerry had presided over a system that created a district in Connecticut that looked like a salamander. So, it came to be known as a Gerrymander, as a salamander district designed by Gerry. And so, it's since become gerrymandering. And so, gerrymandering comes from this idea of drawing the districts to look completely ridiculous. And they're designed in such a way as to produce a certain electoral result. And so, the goal, of course, is to capture the process of redrawing the districts.

And we're in the middle of that process now, too, because that's done every 10 years. And it's based on the national census. And Trump, of course, has been presiding over the census during the pandemic this year, and here too the Republicans benefit from undercounts. The Republicans don't want all those folks in the shadows to be counted. And Trump has not only not put resources into the census, but there have been no ads about the census, there has been no publicity about the census. The districts, how many seats any state gets depends on its population. So, if you can undercount, you know, all those Black and Brown people living in cities, those states get fewer representatives in the Congress.

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So, they were just two gerrymanders up before the US Supreme Court. One was a gerrymander in North Carolina, which is one of those states that splits 50/50. And their congressional delegation was, I believe it was 12 people, of whom 10 are always Republicans, which is to say they've gerrymandered that state, which should be six and six, into 10 and 2, by putting all the Democrats in two districts, essentially. And that was sent to the Supreme Court, the Supreme Court actually had evidence that that was why they were doing it. They had smoking-gun evidence that showed that they were motivated by partisan advantage. And the Supreme Court said, "Ah, we don't think that's unconstitutional, because where do you draw the line? There is no good way to draw the line. And so, we're not going to draw *any* line." So, the Supreme Court just gave a complete green light to gerrymandering with no limits, essentially.

SR: But in the Hungarian case, the opposite has been happening, isn't that right?

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KS: He's done everything. So, he did change the borders in the district. And then he swapped his electorate. So, his policies have pushed somewhere between 500,000 and a million Hungarians out of the country, which consists, by the way, of the people who don't like him, because otherwise they'd have jobs and careers in the country. He's pushed everybody else out if he can. And so, what he has done is to drive out people and then make it very hard for them to cast their votes. And in the meantime, he's given citizenship to ethnic Hungarians in the neighboring states. So, there's a million new Hungarians, and they live in Serbia, and they live in Romania. They shouldn't be voting from Ukraine and Slovakia where they're not allowed to have dual citizenship. But never mind, the Hungarian government has still signed them up. That population in the last two elections went 93%, 94%, 95% for Orbán.

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It's also the case that you can't check those ballots, right? If somebody is voting in Serbia, they allow what's called bundling. So, one person will go around and pick up 100 ballots, drive it over the border and give it to an election official. And nobody knows if they open those ballots and throw out all the ones not for Orbán or invent new ones. The Hungarian government does not want to disclose a voter list because it would expose the Ukrainians

and the Slovakians who were not allowed to have dual citizenship. So, the opposition can't see or check any of those votes, because the government says, "We're just keeping all the secret," and Orbán wins just exactly how many of those votes he needs to get his two-thirds majority. So that's yet another election trick on top of the gerrymandering, on top of a whole series of other election rules that have kept him in power.

SR: We've been talking a lot about the legalism part of autocracy. Let's look at just a very different aspect of it. And that is the use of violence. We have, on the one hand, Orbán enabling himself with the so-called Enabling Act, with the provision which would allow him to order the military to use weapons inside the country against citizens and as the act says, I quote, "Up to but not including death." And we have in the US, a president, who has been actively encouraging militias who are all armed to come out not only as vigilantes during the process of the casting of ballots, but also afterwards.

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KS: So, there's actually two kinds of violence that Trump and Orbán are encouraging. One is private militias. So, these are armed groups that are not part of the official military and not part of the official police. Orbán started this very early. And this is one of the ways that Roma communities have been attacked in Hungary where an armed group will go in, threaten the local population and the police are withdrawn. We've seen this also in the US this has been happening in Portland where this kind of armed right-wing militias would go in against left-wing protesters, and the police are nowhere to be

seen. So, one form of violence is withdrawing the official state violence and letting private violence go into the space.

Then there's the trickier part about actually using the official military or the official police. And there what we found in the US: The military is quite well trained to not do any law enforcement within the country. There's a law that prohibits them from doing this. And so, what Trump has been doing is, he has been enlisting the state militaries, there are state militaries under governors, long story about why that happened. But the state militaries are not as well trained. And Trump set out this call to red-state governors, from his own political party saying, "Send us troops to Washington, DC." And when Trump went out and tried to stop the Black Lives Matter protesters, he was using these state-level troops.

[00:16:00] In Hungary now Orbán with the pandemic has used these extraordinary emergency powers that he's captured to put military personnel at the head of every hospital. They've infiltrated military personnel into at least 150 strategic companies, allegedly because of the pandemic. But who knows what use Orbán will make of this, and the new law gives him these extraordinary powers to use the military in the country, using force and as the law says: "Up to but not including death." Isn't that charming that you put that in a law? It means you're anticipating using force short of death, which is also pretty scary. So yeah, the forces behind these autocrats, once they're in power, once their regime becomes brittle because people start to oppose this, then they call in violence to support them.

SR: So autocratic legalism sounds as if it's all about a set of technical legal tools as if all of these autocrats are bar any ideology, that this is not about an ideological project. This is just a simple power grab and to hold onto that power.

KS: Autocrats need to be elected on some platform. And so very often they *have* a kind of populist platform. And the populist platform is something that they use at rallies to whip up voters to say what they stand for to have... they have to have something to fill in the blank of an electoral platform. Autocrats don't usually say, "Elect me, and I will be your leader for life." They don't say that. And they don't say, "Elect me, and I will crash your democracy, or I will remove all choices that you have for future elections," they just don't say that. So, there's a gap between the ideology that they profess to believe in, and what they're doing with all these laws once they come to power. What Orbán knows he'll get people excited about is putting up a statue to a raving antisemite from the 1930s, of whom there are many in Hungary.

[00:18:00] And so Orbán will announce, "We're putting up a statute as somebody who has this dreadful past," and all the opposition parties go racing over to where the statue was going up. And in the meantime, they shovel all this stuff through the parliament when nobody's looking. In fact, it's gotten to be so regular that every time there's a statue, that first thing I do is go look at what's on the parliamentary agenda and figure out what are they trying to distract us from, right? So, there's ideology as distraction. It's a cover for all this other stuff. And you know, an ideology you can overcome. You can have counter ideologies; you can educate the public that this is dangerous. But once

you've actually killed off democratic checks and balances, those are very hard to get back in part because people don't vote for those things. You know, "Vote for me, and I'll give you an independent judiciary." When was the last time you heard that as a riveting campaign line, right? But in order to reclaim their democracies, people are going to have to start voting on that basis, they're going to have to start thinking about how do we undo these concentrations of power?

SR: Can we undo them at all?

KS: Well, everything in politics is reversible. The question is how you reverse it with the least terrible human toll. And in some ways, what we've done is we've rolled the rock back to the 18th and 19th century when there were lots of revolutions that tried to overcome autocratic, monarchical dictatorial power. And there was a formula developed in those revolutions. That in order to topple a dictator, the first thing you do to have a peaceful transition is to set up a constitutional convention and write a new constitution. That's been the recipe for radical change, radical peaceful change for a long time.

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And so, I think in some of these places, we need to start thinking about new constitutional conventions, think about renovating a constitutional democracy by starting with redesigning the institutions. You know, we have to sort of go

back to basics and think about constitutional redesign. We've done this many times, right? So, we can do it again. And there are some new features in the modern world, like what the EU's role is in all of this as a new thing. It could be that with all the transnational associations we've built, with all the NGOs we've built, with what we know about civil sector organizations that we know to have more people at the table, and we know to have more referees in the process. But I think ultimately, we're going to go back to these old lessons from the 18th and 19th century about how do you undo autocracy and how do you undo it peacefully? And the answer is going back to basics and redoing constitutions.

SR: What could be countervailing forces against it? In the Hungarian case, the EU has been watching from the sidelines doing too little too late.

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KS: The EU, I think, did not believe what it was seeing when it was seeing it. There was a flurry of infringement actions that the EU brought against Hungary at the very beginning. And all of them were good ideas, and all of them failed miserably, even though the commission won everything that it brought to the Court of Justice. And that was because one of the characteristics of these legalistic autocrats is that they changed the law just slightly, to make it look like things are okay when it's not. And given the nature of EU law enforcement, they were never able to stay ahead of the changes.

Because as soon as they'd win a victory, Orbán would do something else that would accomplish the same purpose. And the process of litigation even when they speed it up it's hard for a case to be resolved in less than a year. For example, the European Union was all over the fact that Orbán tried to control the judiciary by lowering the judicial retirement age, just that one act got rid of the top 15% of the judiciary, including all the people with real experience. So, the EU went in and they thought of, "What's the first thing that's wrong with this?" And they said, "Age discrimination," and they won their case. Okay, so first of all, Orbán's firing judges the whole time the case is pending. So, by the time the case is solved, all the judges were already gone. And their jobs have been filled by others. So Orbán turns to the EU and says, "What do you want us to do, fire the judges?"

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They can't tell him to fire the judges even if it's all Orbán's own people because you don't fire judges, right? So, fait accompli. So, then they said, "Well, every judge who wants to go back has to be able to go back somewhere." Okay, so first of all, Orbán said, "We could put them in at the bottom, we can give them much lower salaries." Then he changes the pension law so that if a judge goes back after they've been prematurely retired, they lose their state pension. So, none of the judges *want* to go back. So, the EU standing there saying, "You've got to take these judges back." And Orbán says, "None of them want to go back. Do you want us to force them to go back?" And so: He wins. He wins! Even though the EU won everything legally, they didn't outsmart Orbán who is a much better legalist than this. So, I've been telling the commission, "What

you've got to do is get out ahead of this, you have to think like Orbán. So, you have to go after judicial independence as a thing, not age discrimination as a thing."

SR: You want to think big. But you also want to think very small, because apparently what a lot of Hungarian laws are doing are smuggling in little autocratic bits into quite harmless looking laws where you are not looking for them.
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KS: Yes, this is another thing. So, Orbán created the anti-terrorism police. And the law that created the anti-terrorism police made it look totally harmless. All it was going to do was guard the prime minister and the cabinet. And then they kept adding to the powers of this police by putting in paragraphs and unrelated laws. So, the worst part was when they put in this power of basically unlimited surveillance on anybody the government wanted to surveil. And they stuck these paragraphs into the middle of a 200-page law on waterworks and reservoirs. So that nobody, even the parliament had no idea what was in that law. So sometimes, you know, if they're going to do something really terrible by law, they smuggle it in as an amendment to some other law, and then you can't really see what's going on.

SR: Thank you so much, Kim, for these really remarkable insights into the toolbox of legal autocracy in our age. You've opened a Pandora's box.

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KS: Oh, dear.

SR: But I think you've provided us a few recipes for democratic resurgence as well.

KS: Thank you so much. This has been really a delight to talk to you.

SR: So, the conditions of the present that we have just outlined may give one little hope. Autocratic legalism disdainful of liberal democracy, institutional capture. These are all morbid symptoms of our current period if one were to use Antonio Gramsci's famous phrase that have much deeper roots and yet not only could strengthening the power of civil society and imparting civic education help against these tendencies but democratizing supranational institutions themselves may also be a step in the right direction. Thank you for listening to this podcast.