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Emergencies and risk regulation have been a hot topic in EU law for a long time particularly in the aftermath of terrorism attacks (9/11etc) and to what extent measures could be taken on an emergency basis to prevent risks. Moreover, risk and crises measures have been frequently discussed in the context of, e.g., the financial crisis of 2008 and the migration crisis of 2015. The current Covid-19 crisis has thrown a sharp light on public health measures and the EU borders, as well as the boundaries of emergency legislation and what measures can be taken on the basis of risk and emergency. In this context, the EU Commission has issued a communication stressing that border management at the EU level is key.^[1] The Commission highlights the challenge of protecting the health of the population whilst avoiding disruptions to the free movement of persons, and the delivery of goods and essential services across Europe. Many countries have introduced lock-downs and some countries are accused of avoiding judicial scrutiny over decisions taken. For example, in Hungary, Orbán was criticized for using the crisis as a way of passing emergency legislation.^[2] As Kim Lane Sheppele explains, among the emergency measures adopted in Hungary, for example, is a criminalization of people who disrupt the emergency laws.^[3] This is to some degree connected to the wider rule of law debate in the EU also and is interesting from the perspective of judicial review.^[4]

The paper has two parts. The first part of the paper is a doctrinal EU legal part on the question of judicial review, the rule of law and what is meant by risk and emergency. The second part of the paper is theory-oriented and discusses the notion of non-domination and constitutional theory in the light of the real time problems of emergency.

[1] COM (2020) 1753 final, Covid-19, Guidelines for border management measures to protect health and ensure the availability of goods and essential services

[2] K Lane Sheppele, 'Orban's emergency' available at, <https://verfassungsblog.de/orbans-emergency/> (29 March 2020)

[4] "Rule of Law: European Commission acts to defend judicial independence in Poland", http://europa.eu/rapid/press-release_IP-17-5367_en.htm, press release 20 December 2017