ELKH | Eötvös Loránd Kutatási Hálózat
tkjti

MTA Law Working Papers
2022/9

The Changes Undermining the Functioning of a Constitutional Democracy

Zoltán Fleck – Ágnes Kovács – Zsolt Körtvélyesi – Gábor Mészáros – Gábor Polyák – Péter Sólyom

ISSN 2064-4515
http://jog.tk.mta.hu/mtalwp
Társadalomtudományi Kutatóközpont – MTA Kiválósági Kutatóhely
Eötvös Loránd Kutatási Hálózat
Centre for Social Sciences – MTA Centre of Excellence
Eötvös Loránd Research Network

The Changes Undermining the Functioning of a Constitutional Democracy (Paper VII)

Zoltán Fleck – Ágnes Kovács – Zsolt Körtvélyesi – Gábor Mészáros – Gábor Polyák – Péter Sólyom[1]

Abstract

This paper reviews the changes that relate to institutions that play a central role in maintaining a functioning democracy. The chapters document how these institutions and areas where, one by one, transformed to undermine constitutionalism and democracy, subjecting them to a political logic that ended up undermining the autonomies that are essential to fulfil their constitutional and democratic mission. Chapter 1 discusses how essential features of parliamentarism disappeared, chapter 2 overviews the misuse of exceptional measures, and chapter 3 takes a brief look at how the independence of the judiciary has been challenged. Chapter 4 and 5 document key developments that transformed the fields of academia and media, areas that could have played an important role in checking power through public discussions.

This paper was commissioned by the Netherlands Helsinki Committee. References to Paper I through Paper VII are to other reports in this series, published consecutively as working papers:

Paper I – The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary

Paper II – Tactics Against Criticism of Autocratization. The Hungarian Government and the EU's Prolonged Toleration

Paper III – Inventing Constitutional Identity in Hungary

Paper IV – The Constitutional Court

Paper V – Is the EU toothless? An assessment of the Rule of Law enforcement toolkit

Paper VI – The CJEU and the ECtHR – High Hopes or Wishful Thinking?

Paper VII – The Changes Undermining the Functioning of a Constitutional Democracy

[1] Authors are grateful for the insightful comments by Professor Daniel R. Kelemen. As always, responsibility for any errors remains our own.

A key feature of the illiberal regime in Hungary is the hostility to independent institutions and, more generally, to limitations on power, be they internal or external, political, social or economic. This could be a matter of political taste, but this element has been leading to the gradual elimination of constitutional guarantees and blatant disregard for European standards of democracy, rule of law and human rights, as the overviews in the earlier papers in this series have shown. This paper documents and analyzes how the governmental overhaul of autonomies everywhere has undermined the preconditions of a functioning constitutional democracy.

As a result of the changes, institutions have been transformed to the extent that they can no more be recognized as exercising their role. The Parliament does not operate as a parliament; the Constitutional Court has ceased to function as a constitutional court; institutions called universities might not manifest the features associated with universities in Europe; public media functions as a platform for loyal and seamless transmission of government messages while a government-affiliated and funded media dominates the technically non-state ('private') media landscape. It is hard not to see these series of measures as part of the same line of attempts to undermine conditions vital to a functioning democracy.

The most direct evidence for how the hostility towards independent institutions has been undermining constitutional democracy is the transformation of the Parliament into a body that ceased to function as a parliament. It doesn't fulfil its role as a check on government power or as a body of deliberation presupposing meaningful opposition rights. This is further eroded, crucially, by the broken legitimacy as a result of tinkering with electoral laws. (Chapter 1) We discuss separately the misuse of emergency references in Hungarian public law that became so widespread as to amount to a normalization of emergency, further eroding the state of the rule of law in Hungary. (Chapter 2)

Another key area of constitutionalism, the judiciary has been subject to waves of government interference, with the curtailment of the powers and packing of the Constitutional Court and measures targeting courts, from the annulment law to the beheading of the judiciary, a series of new laws on judicial administration and using the power of nomination to exert direct political pressure through political loyalists. (Chapter 3)

It has become a truism that democracy cannot function without an open and plural space for public discourse. Academia, together with the press and public collections can be seen as 'knowledge institutions' essential for a constitutional democracy.[2] In the field of constitutional changes, a distinct role is played by members of the legal profession, including the academic field. The fact that institutions tasked with developing and maintaining an academic discourse on Hungarian constitutionalism has been operating under recurrent pressuring that sanctions critical voices has to a great extent undermined this vital function. (Chapter 4) More broadly, the profession that is widely recognized as a watchdog and a guarantor of transparency, the media has seen the most dramatic transformation. State funding plays an essential role while diverse legal, political and economic manoeuvres has been making sure that leading critical voices disappear or cannot reach wider audiences. (Chapter 5)

Our findings corroborate dominant views in the literature that locate the illiberal regime in Hungary outside the family of democracies.

[2] Vicki C. Jackson, Knowledge Institutions in Constitutional Democracies: Preliminary Reflections, *Canadian Journal of Comparative and Contemporary Law*, 2021/7, 156–221.

1) THE PARLIAMENT: FAKE PARLIAMENTARISM

1. Introduction

As explained in detail in previous chapters, one of the main features of the constitutional system that has been consolidated since the constitutional breakthrough after 2010[3] is that it increasingly erodes the possibilities for democratic participation and eliminates checks and balances through the misuse of law.[4] The success of this policy has been based on the re-framing of the parliamentary function, which has now lost the features of parliamentarianism associated with the constitutional functioning of parliaments in European democracies. In this chapter, the main features of this process of transformation are set out.

The revival and renewal of Hungarian parliamentarism took place after the 1989-1990 regime change. Although the learning process has not been smooth, the constitutional principles that should guide the practice have crystallised over the past two decades. The Constitutional Court has contributed to this through a series of decisions on parliamentary groups[5], the parliamentary seating arrangements[6], freedom of speech and immunity of Members of Parliament[7], the right to speak in Parliament[8], committees of inquiry[9], and the standards for the constitutionality of legislation[10]. This constitutional cooperation was broken after 2010, when the two-thirds majority began to dismantle the constitutional order.

Parliamentary performance between 1990 and 2010 was broadly in line with international trends, and had two main strengths: on the one hand, parliament provided a secure backdrop for government stability, with legislation essentially dominated by the government. On the other hand, the parliament allowed the emergence of a political alternative and the formation of a future government majority.[11] One feature of the post-2010 changes was that the further strengthening of executive power was accompanied by a weakening of parliamentary control, and new rules on parliamentary speech and disciplinary law, together with new rules on legislation, gradually made it more difficult to present a political alternative in parliament.

From the perspective of parliamentary law, the period between 2010 and 2014 was a "revolutionary" period of transformation, when the democratic system was dismantled and economic redistribution of resources was carried out in violation of existing constitutional rules.[12] Later, after 2014, the changed regulatory framework saw fewer instances of open violations of the constitutional order, with the legal framework shaped by vested interests and loyally cooperating constitutional institutions mostly effective in maintaining political and

[3] János Kis, From democracy to autocracy. System typology and the dynamics of transition. (in Hungarian) *Politikatudományi Szemle*, 2019/1, 45-74.
[4] Gábor Attila Tóth, Constitutional Markers of Authoritarianism, *Hague Journal on the Rule of Law*, 2019/1, 37-61.
[5] Decision of Constitutional Court of Hungary, 27/1998. (VI. 16.) ABH 1998, 197.
[6] Decision of Constitutional Court of Hungary 4/1999. (III. 31.) ABH 1999, 52.
[7] Decision of Constitutional Court of Hungary 34/2004. (IX. 28.) ABH 2004, 490.
[8] Decision of Constitutional Court of Hungary 12/2006. (IV. 24.) ABH 2006, 234.
[9] Decision of Constitutional Court of Hungary 50/2003. (XI. 5.) ABH 2003, 566.
[10] See: Decision of Constitutional Court of Hungary 29/1997. (IV. 29.) ABH 1997, 122, 52/1997. (X. 14.) ABH 1997, 331, 39/1999. (XII. 21.) ABH 1999, 325, 8/2003. (III. 14.) ABH 2003, 74, 63/2003. (XII. 15.) ABH 2003, 676.
[11] See Attila Gyulai: The National Assembly, (In Hungarian) in A. Körösényi (ed.) *The Hungarian political system - a quarter of a century later*, Budapest, Osiris, 2015, 135-157.
[12] See Viktor Zoltán Kazai: The Instrumentalization of Parliamentary Legislation and its Possible Remedies. Lessons from Hungary, Jus Politicum, 23 http://juspoliticum.com/article/The-Instrumentalization-of-Parliamentary-Legislation-and-its-Possible-Remedies-Lessons-from-Hungary-1309.html

economic hegemony. Parliament has a key role to play in maintaining the regime, but it can only fulfil this role with very serious losses of legitimacy.

One of the aims of this chapter is to point out that, although autocratic governments claim democratic legitimacy, this democratic legitimacy is increasingly difficult to secure in a post-2010 parliament. There are three main sources of legitimacy deficits in the functioning of parliament: (a) a lack of democratic empowerment due to illegitimate electoral arrangements and the resulting lack of credible representational performance, (2) restrictions on opposition rights and activities in violation of the existing constitution, and (3) the loss of control of the plenum over the content of laws in the legislative process. Taken together, these legitimacy deficiencies indicate that this parliamentary functioning is not capable of providing the quality of democratic legitimacy that one would expect from a body representing a free self-governing political community. [13]

Parliamentary law is closely linked to democratic national self-government, so although the concept of democracy plays a major role in the practice of human rights courts, parliamentary law has no robust international legal foundations. We have to turn to various sources of soft law to find the content of international constitutional standards. Of crucial importance in this respect is the practice of the Venice Commission, which regularly deals with the constitutional rules of States Parties relating to parliamentary law. In 2019, the Venice Commission published a comprehensive set of criteria and an exhaustive checklist on parliamentary law changes in fragile democracies. [14] In this paper, we consider this set of criteria as a normative guideline against which to judge the democratic performance of Hungarian parliamentary practice.

In this document, the Venice Commission identified the following constitutional principles as the most important principles of parliamentary functioning: "freedom, pluralism, checks and balances, loyal cooperation and respect for institutions, solidarity with society, the possibility of political change, and effective decision-making." [15] The Commission explained what it meant by these principles in six points.

First, the democratic state must respect the values of pluralism and freedom. In a democratic society, criticism of the opposition should not be seen as a destructive element and should not be interpreted as a lack of acceptance of the results of democratic elections. [16]

Secondly, a democratic state cannot exist without checks and balances between the various state institutions. As the exercise of power is shared between different democratic actors, this requires coordination between state bodies and officials with different institutional roles and interests, different loyalties and beliefs. [17]

Thirdly, checks and balances require constructive cooperation to achieve the public interest, mutual respect between state institutions belonging to different powers, and a proper balance and checks and balances between them. [18]

[13] See: Zoltán Szente: The misery of our parliamentary law (in Hungarian) *Fundamentum*, 2020/4, 5-19.
[14] CDL-AD (2019) 015, Venice Commission, Ont the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist, (Venice, 21-22 June 2019)
[15] Ibid
[16] Ibid
[17] Ibid
[18] Ibid

The fourth principle is the shared responsibility of the majority and the opposition towards society, i.e. the principle of political solidarity, which requires parties to overcome divisions. Both the majority and the opposition must act on the basis of the same common and responsible commitment to the public interest of citizens, who are the legitimate source of democratic power. This commitment must be paramount, overriding the stakes of any political confrontation - although such confrontations are normal and indispensable in a democracy. The majority, precisely because it is a majority, must exercise its power with restraint and respect for the opposition, in an inclusive and transparent manner, bearing in mind that it is likely to become an opposition group in the future, in accordance with democratic rules. [19]

Fifth, any change to the system must keep open the "channels for political change". Measures taken by the majority must not affect the rule of law and must not be aimed at changing the democratic 'rules of the game', which ultimately means the possibility of a change of power through free and fair elections. The majority must not abuse its power to make it impossible (or very difficult) for the minority to become the majority. [20]

Sixth, the system must allow for effective decision-making. The majority must be able to follow its political agenda, and the opposition, for its part, must not deliberately obstruct the normal workings of parliament. [21]

The functioning of parliament has unquestionable democratic legitimacy if it complies with these principles. In the following chapters I will try to show that Hungarian parliamentary practice has moved very far away from these principles. On the one hand, the constitutional changes have made its position very unstable, with either unlimited power or hardly any conditions for parliamentary government, depending on the election results. One of the reasons for this is the system of seat allocation that premia the winner. Another consequence of the easily attainable supermajority is the systematic erosion of opposition rights, which mainly affects the opposition's access to publicity. Finally, the most important development in the lack of legitimacy of parliamentary practice is the transformation of the legislative process, whereby the plenum has been deprived of its control over the legislative process as a whole. In the next chapter, I explain these constitutional anomalies in more detail.

2. The fuzzy contours of parliamentary democracy and the principle of separation of powers

The post-2010 constitutional changes have significantly altered the basic structure of the Hungarian political system. They enabled autocratic transformation by increasing the instability of the constitutional system. [22] The mandate premiums granted to the winner of the elections increased the possibility of the creation of an extraordinary government with constitutional powers. But on the other hand, the election of public figures loyal to Fidesz increased the chances of the emergence of a so-called cohabitational political structure, where the government could have very serious counterweights in the 'neutral' branches of power. Because of the increase in the number of cardinal laws, the conditions for parliamentary government are very limited in the case of a government without supermajority. The alternative to the autocratic exercise of power under coded institutional conditions is an explosive, highly unstable parliamentary government. The former clear contours of a parliamentary system of government

[19] Ibid
[20] Ibid
[21] Ibid
[22] András Körösényi: Constitutionalism and the Fundamental Law, (in Hungarian) in A. Körösényi (ed.) The Hungarian political system - after a quarter of a century, Budapest, Osiris, 2015, 106.

have become more confused. Scheppele has not in vain called this political structure emerging from the new constitution the 'Frankenstate'. [23] To illustrate the extremely unstable situation of Parliament in the new constitutional system, I will give just three examples. [24]

2.1 (Constitutional Court) On the one hand, Parliament's room for manoeuvre vis-à-vis the Constitutional Court has increased considerably. The new constitution has modified the powers of the Constitutional Court in such a way as to reduce the weight of constitutional review of legislation in its practice, to eliminate the possibility of abstract ex post review of norms by anyone without any interest, to exclude substantive review of constitutional amendments, and to limit the constitutional review powers of the Constitutional Court in substance, in so far as it has essentially given Parliament a free hand in matters relating to the budget, taxation and duties. These constitutional changes have undoubtedly widened the scope of the National Assembly.

2.2 (Fiscal Council) But there was another side to the changes, expressed in the constitutional arrangements for the Fiscal Council. This institution was set up in 2009 as an advisory body to the National Assembly to provide expert advice on sustainable budget planning in the aftermath of the severe consequences of the economic crisis. The Constitution continued this ambition, but with serious contradictions. On the one hand, the debt brake rules written into the constitution were combined with a reduction in the powers of the Constitutional Court, and the Fiscal Council was completely reorganised, its experts were reduced, but at the same time it was given a veto right in the budget adoption procedure, which left a rather deep wound in the institutional system of parliamentary democracy. Parliament is not in control of its own procedure in one of its most important powers.

2.3 (The example of the House Rules) The fate of the House Rules also marked a break with the tradition of Hungarian parliamentarianism. The two-tier system of sources of law created in 2012 was already a symbolic expression of this anti-parliamentarism practice. The new rules for the functioning of parliament were adopted without any substantive discussion with the opposition, which had no meaningful opportunity to have a say in their content. The new parliamentary law and the amended house rules were adopted in 2012 in a fast-track procedure (March - April 2012). A month passed between submission and adoption, with the general and detailed debate taking place in a few hours. Existential issues such as conflict of interest and MPs' allowances were discussed among the governing parties themselves. There was no multi-party preparation or wider public debate on the motions tabled by MEPs. [25] The circumstances in which the new rules were adopted were contrary to parliamentary customary law, disrespecting the principles of parliamentary self-government and autonomy by adopting them in an unfair procedure subordinated to the power aims of the government majority. The

[23] Kim Lane Scheppele: The rule of Law and the Frankenstate: Why Governance Checklists Do Not Work, *Governance: An International Journal of Policy, Administration, and Institutions*, Vol. 26, No. 4, October 2013 (pp. 559–562).

[24] See Miklós Bánkuti, Gábor Halmai and Kim Lane Scheppele: From Separation of Powers to a Government without Checks: Hungary's Old and new Constitutions, in Gábor Attila Tóth (ed.) *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest: CEU Press, 237-268. Kriszta Kovács– Gábor Attila Tóth: Hungary's Constitutional Transformatioan, *European Constitutional Law Review*, 2011/2, 183-203.

[25] Péter Smuk, A Tisztelt Ház szabályai, 2012 – új törvény az Országgyűlésről [Rules of the Honourable House, 2012 – new law on the Parliament], *Kodifikáció és Közigazgatás [Codification and Public Administration]*, 2012/1, 5–27.

circumstances in which the rules were adopted reflected the dominance of the needs of the executive over the democratic legitimacy of parliamentary representation.[26]

3. The disability of democratic empowerment and representation

Parliamentarism involves an electoral system that authentically represents the different political preferences of the electorate and bases community decision-making on compromises between different political camps. One of the key problems with the Hungarian parliament is that, because it receives its mandate in an unfair election, this mandate is not credible, and partly because of this, the resulting representative body is not representative. One source of the problem was the populist reduction in the size of parliament in 2010. The reform of the electoral system started by setting the number of MPs in stone (199). This number is unreasonably low compared to other states of similar size and population. [27]

And to add a button to the coat-tails, the electoral system was designed, an electoral system that has one element that has a dramatic effect on the functioning of parliament, and that is the Hungarian method of calculating the fractional vote, which we in Hungary call winner's compensation. The essence of this is to premise the parties that put up winning candidates in individual constituencies, and the votes cast for them can be added to the national list and added to the fractional votes channelled in for compensation purposes.

The significance of winner compensation is that without it, the government would not have had a two-thirds majority in 2014 or 2018. The winner-take-all method provides the parliamentary majority with a permanent constitutional majority, which allows it to exercise unlimited power to subordinate the entire constitutional system to its own political ends. [28] This calculation of the fractional vote, however, violates the equality of the electorate, as it unnecessarily gives greater weight to the votes cast for the winning candidates. The Constitutional Court ruled that the winner's compensation was constitutional because it could not substantiate its position with a substantive constitutional argument. [29] The Italian electoral rules, which similarly rewarded winners, were ruled unconstitutional by the Italian Constitutional Court in 2013 on the grounds that they violated the equality of electoral rights.[30]

As a result, the Hungarian electoral system is not able to credibly reflect the choice of Hungarian voters. It creates a parliament of dubious legitimacy, which prevents the political dynamics of parliamentary democracies, where the forces currently in government are pitted against the potential forces in government, who are in opposition, according to the logic of a democratic political shift economy. Rather, parties wishing to exercise government exclusively are pitted against political organisations condemned to a perpetual opposition role, which accordingly act not as opponents of the government but as political forces rejecting the entire constitutional

[26] Sonja Priebus – Astrid Lorenz: Strategische Institutionenpolitik. Inhalte, Effekte und Risiken der Parlamentsreformen in Ungarn seit 2010, *Zeitschrift für Parlamentsfragen*, 2015/2, 292-309.
[27] Csaba Tordai: Reform of the electoral system, (in Hungarian) *Fundamentum*, 2010/3, 27-38.
[28] „Fidesz won 7 extra seats by its own rules" (in Hungarian) *Index.hu*, 2018. 04.16. https://index.hu/belfold/2018/04/16/a_fidesznek_7_plusz_mandatumot_hoztak_a_maga_alkotta_szabalyai/
[29] Decision of Constitutional Court of Hungary 3141/2014. (V.9.) ABH 2014, , See: János Mécs: On the constitutionality of winner's compensation. Positive fractional votes in the light of equal voting rights, (in Hungarian) *Arsboni*, 13 October 2015.
[30] Gábor Halmai: Two (only) elections in Hungary. The AB on the parliamentary and metropolitan municipal electoral systems (in Hungarian) *Fundamentum*, 2014/4, 83-93.

system and rallying political support for the overthrow of a constitutional order with dubious legitimacy.

4. The consequence of the supermajority: the erosion of opposition rights

4.1 Election of public officials

The Hungarian constitution is a soft constitution that can be changed with the support of two-thirds of the members of parliament. A two-thirds majority is also the way other qualified majority voting is done. The election of public officials elected by parliament also requires the support of two-thirds of MPs. Those who have two-thirds have unhindered access to all branches of the constitutional system. [31] A two-thirds majority loses its power to build consensus and cannot force the parties to the negotiating table. If a political force gains a two-thirds majority in an election, which is a non-exceptional possibility given the disproportionality of the electoral system, it can dominate the entire political system and will not need the political support of the opposition on any issue. And the political weightlessness of the opposition also erodes the parliamentary rights of the opposition.

The first real demonstration of power of the two-thirds government was the change in the nomination of constitutional judges. Under the rule in force in June 2010, each parliamentary group delegated one member to the parliamentary committee that nominates constitutional judges. Under this rule, the two-thirds majority would have been in a minority on the nominating committee and would not have been able to nominate a judge without the support of the opposition. In order not to be forced to compromise, the government tabled a constitutional amendment that changed the composition of the committee, allowing parliamentary groups to send members to the nominating committee in proportion to the number of their members. The new arrangement also ensured a two-thirds majority in the nominating committee, so that there was no longer any need to consult the opposition. And the way was opened for them to fill the increased Constitutional Court with their own loyal candidates.

The opposition, because of the two-thirds majority of the government, could not prevent the government from filling the Constitutional Court with its own loyalists, including the heads of the judiciary, the President of the Republic, the Commissioner for Fundamental Rights, the Attorney General, the President of the State Audit Office, members of the Media Council, some members of the Monetary Council, etc.

4.2 Freedom of expression and parliamentary disciplinary law

Since the opposition has no meaningful opportunity to force the government majority to compromise, its most important task in parliament will be to get its policy alternative to the government out to the public. In this situation, the importance of the freedom of speech of MPs becomes even more important. According to the ideal of classical parliamentarianism, there is an overriding public interest in ensuring that parliament, while respecting the need for free debate, can function effectively and fulfil its mission in democratic societies. But, as the Strasbourg Court emphasised in the Karácsony case, "the right of national choice to sanction offensive parliamentary speech or conduct, while very important, is not unlimited, and is an essential element of the concept of parliamentary independence. The latter must be reconciled with the concepts of 'effective political democracy' and 'rule of law'. (...)(Democracy) does not

[31] Zoltán Pozsár-Szentmiklósy: Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary, *Hungarian Journal of Legal Studies*, 2017/3, 281-290.

simply mean that the views of the majority must always prevail: a balance must be struck between protecting members of minorities and preventing the abuse of power."[32] Accordingly, the independence of parliament cannot be abused to suppress the freedom of expression of parliamentarians, which is an essential element of political debate in democracies. Likewise, the rules governing the internal functioning of parliaments cannot be used as a basis for the majority to abuse its dominance over the opposition.

Finally, in the specific Hungarian case, the Court concluded from the above that, in the circumstances of the case, the interference with the freedom of expression of the applicant Members of Parliament was not proportionate to the legitimate aims pursued, since it was not accompanied by adequate procedural safeguards. The determination of the content of procedural entitlements must be adapted to the parliamentary context, taking into account the need to strike a balance between ensuring fair and appropriate treatment of the parliamentary minority and preventing abuse of the majority's dominant position. [33]

As the government also expected reprimands in the above cases, the rules of parliamentary disciplinary law were amended back in 2014 to provide an opportunity for a Member to challenge the disciplinary decision of the Speaker of Parliament, have his or her arguments heard and considered before the Committee on Discipline and, on that basis, decide whether to uphold or reject the sanctions. Apparently, this arrangement is in line with the Strasbourg Court's expectations in the Karácsony case. However, the devil is in the detail. Indeed, the Member can present his or her arguments against the disciplinary decision before the Committee on Immunity. [34] Although the Committee on Disciplinary Procedure is a parity committee, government MPs who vote with military discipline never vote in favour of the opposition MP, so there is no real chance of a majority in favour of the opposition MP in these cases. [35] The reduction of a Member's salary can be initiated by a member of the House Committee, but the House Committee decides by consensus.[36]

The situation is similar as regards the admissibility of symbolic speech. Members may use illustrative devices only with the permission of the House Committee. The House Committee is a committee of consensus, where a motion by opposition Members to allow the use of demonstrative devices before the plenary has never before received support. In the absence of consensus, the President's word is therefore decisive in these matters too.

So the story is that the opposition Member has tabled a motion for the use of visual aids, which is not supported by the House Committee because there is no consensus and the President

[32] Karácsony and Others v. Hungary, (42461/13 and 44357/13,) Judgment of May 17. 2016. 147.
[33] Karácsony and Others v. Hungary, 157.
[34] Act No. XXXVI of 2012, Art. 51/A (6) The Committee on Immunity, Conflict of Interest, Discipline and Credentials shall decide on the request of a Member pursuant to paragraph (4) or (5) within fifteen days of its receipt. If the Member so requests in his application, the Committee on Immunities, Conflicts of Interest, Discipline and Credentials shall hear the Member.
[35] Act No. XXXVI of 2012, Art. 51/A (1) The House Committee may, at the initiative of any member, order the reduction of the due honorarium of a Member within fifteen days of the performance of the activity specified in Article 48 (3), Article 49 (4) and Article 50 (1), unless other legal consequences apply. The decision to reduce the salary shall state the reasons for the reduction and, in the event of a breach of the rules of the Rules of Procedure relating to the order of deliberation, the conduct of the proceedings or the vote, the provision of the Rules of Procedure which has been breached.
[36] Act No. XXXVI of 2012, Art. 13 (6) The House Committee shall make its decisions unanimously. In the absence of a unanimous decision, the Parliament shall decide on the matters referred to in points a) and j) of paragraph (1) of Article 11, and the Speaker shall decide on other matters.

rejects it. The Opposition Member does use the visual aid. The President fined him. The Member objects. The Immunity Committee hears his arguments, but no majority is reached. The President therefore decides whether or not to uphold the objections and to submit a motion to the plenary. The majority in Parliament then votes to impose the fine.

Even if, in principle, the right to be heard in such proceedings, as emphasised in the Karácsony decision, is ultimately respected, the procedure itself has not been made fairer. There is no possibility of a meaningful review of the Speaker's practice of disregarding the principle of proportionality.

Today, the practice of parliamentary disciplinary law is drawing attention to itself with the unprecedented fines (up to four months' salary can be withheld) that the President can impose arbitrarily.

In these cases, there is still no possibility of a substantive review of the Speaker's decision. However, the Member concerned can ask the immunity committee to examine the legal basis and proportionality of the Speaker's sanction, and can explain why it is excessive or unlawful. The opposition MP would still need to win the support of the majority for the committee to overturn the Speaker's decision. And there are always three out of six who agree with the Speaker. Typically, all committee decisions are 3 to 3. But this is the better case, because at least the committee is sitting. But the law also allows for the possibility - in clear violation of Strasbourg practice - that the committee may not meet. Parliament imposed heavy fines without listening to the arguments of opposition MPs.

In this context, it is worth recalling the position of the Venice Commission, which argues that it is necessary for the opposition to have a very strong presence in the bodies reviewing disciplinary decisions, that the proceedings before them should comply with the basic requirements of due process and that the disciplinary measures imposed should be proportionate and not affect the substance of the MP's mandate. [37]

As pointed out by the Venice Commission, the fairness of dispute resolution could be enhanced if the resolution of disputes were entrusted to an external body, such as the Constitutional Court or a similar high-level judicial authority. This model, while less respectful of Parliament's autonomy, would better guarantee the independence of the adjudicating body. However, it is important to clarify which parliamentary measures can be reviewed by the Court of Justice or other external bodies and which are not subject to such review. Constitutional courts in many countries can scrutinise the process of law-making when analysing the constitutionality of laws. Serious violations of opposition rights can, at least in theory, lead to the invalidation of a law by the constitutional court. [38]

At the same time, disputes over the internal organisation of Parliament and its working procedures can be left to Parliament itself and its internal bodies, provided that the opposition is adequately represented in these bodies or that they are established on the basis of cross-party consensus. [39] Hungarian practice does not correspond to either of these options.

4.3. The emptying out of parliamentary committees of inquiry

[37] CDL-AD (2019) 015, Venice Commission, Ont the Relationship between the Parliamentary Majority and the Opposition in a Democracy: A Checklist
[38] Ibid
[39] Ibid

The most spectacular violation of opposition rights in the post-2010 restructuring of the parliamentary system was the reorganisation of the formation of committees of inquiry. In contrast to the previous legislation, the creation of a committee of inquiry is no longer compulsory on the initiative of one fifth of the members of parliament, but merely an option. According to Article 24(2) of the Ogytv., "The establishment of a committee of inquiry may be initiated by one fifth of the Members", whereas the previous version of the Rules of Procedure provided that "A committee of inquiry shall be established if it is proposed by at least one fifth of the Members." The new legislation took away this right of initiative from the opposition, essentially placing it under the control of the government majority. The legislation also narrowed the scope of issues that could be investigated, only those that could not be clarified by interpellation could be investigated anyway.[40]

4.4. Restrictions on access to information of public interest

The continued restriction of access to information of public interest, by making it subject to the payment of a fee and by extending the time limits for providing information, also constitutes a formal restriction of opposition rights. Related to this is the restriction of the right of access to public institutions.

On 16 December 2018, there were protests across the country after the Fidesz majority in parliament had passed the overtime law, the law on the establishment of special courts and other controversial provisions a few days earlier. In Budapest, protesters marched to the Kunigunda Street headquarters of state media, and opposition MPs even entered the MTVA building. According to the law on the status of members of parliament, politicians have the right of access to all public institutions, but the law states that this access "must not result in disproportionate damage to the proper functioning of the bodies concerned". The MPs wanted to talk to the MTVA management, but the state media did not seem to be open to this, and then tried to get their five-point petition - which among other things called for the repeal of the controversial laws and the bias of the state media - to be presented on the news/radio. Again, the MTVA refused to do so, and the MPs stayed in the building overnight.

Subsequently, on the morning of 17 December, Dániel Papp, the CEO of MTVA, asked the notary of Óbuda (the headquarters of the state media are located in this area) to initiate a procedure for the protection of property. This could have resulted in the opposition politicians in the building being forcibly removed by the police, but this did not happen as the MPs left the building of their own accord in the early evening of 17 December.

Not all of them left on their own accord: independent MPs Ákos Hadházy and Bernadett Szél were forcibly ejected from the building by security guards from the public television station, and DK politician László Varju was also forcibly removed. [41]

According to Péter Polt, the Prosecutor General, there was no violence against an official because the MPs "abused their right as representatives ... without the relevant legal authorisation to do so, they wanted to read out their own political demands and those of the demonstrators who had arrived at the scene with them on the public television programme, their action was political in nature, so they were not entitled to enhanced criminal protection". The

[40] See Zsolt Szabó: Der zwingende Minderheitsantrag zur Einsetzung eines Parlamentarischen Untersuchungsauschusses: eine deutsche Erfindung, die nur in Deutschland funktionfähig ist? *Zeitschrift für Parlamentsfragen*, 2015/2, 328-348.

[41] Final: opposition MPs should not have been thrown out of the MTVA headquarters, (in Hungarian) https://index.hu/belfold/2020/02/13/mtva_szekhaz_ellenzeki_kepviselok_jogeros_itelet/

security guards therefore "acted lawfully and justifiably", and the MPs were "lawfully subjected to physical coercion".[42]

The court of first instance ruled that the opposition politicians could not have been thrown out of the building. The judge said that the opposition MPs had the right to enter the MTVA building last December and that the court had to consider whether their stay had caused disproportionate harm to state media. The ruling said that under the constitution, MPs carry out their work in the public interest and cannot be ordered to do so. According to the judge, MTVA had not shown why the opposition members' 8-10 minute presentation of their demands in one programme would have caused disproportionate harm to the functioning of the state media.[43]

After the case, the majority in the government restricted the right of access of MPs to public institutions.

At the time of the incident, the Parliamentary Act stipulated that "The MP's card entitles him/her to enter all public administration bodies, public institutions and public institutions. The MP is also entitled to enter the areas of the Hungarian Defence Forces, the Military National Security Service, the law enforcement agencies and the customs authorities, as regulated by the Minister responsible for the matter. The exercise of this right may not result in disproportionate damage to the proper functioning of the bodies concerned."

Under the provision, with a few exceptions (e.g. court hearings), Members of Parliament could enter any public institution and observe how public authority is exercised and how other public functions are performed. This right of observation guarantees that Members of Parliament can fulfil one of the most important functions of Parliament: to monitor the legality of the exercise of public authority.

From 2020, MPs will be able to request information only from the heads of state bodies "by prior agreement", who have recently often refused direct requests, seeing that Parliament does not stand up for the rights of its own members.

According to Zoltán Szente, the subsequent restriction of access to public institutions was a kind of tacit admission that the legal basis for action against MEPs was not in place, and more importantly, that the National Assembly had reduced the powers of control of its own members in the case.[44]

4.5. Free mandate and the formation of political groups

One of the classic principles of parliamentary law is the principle of the free mandate. According to the Venice Commission, a free mandate means that a Member may express his or her views and cast his or her vote without risk of losing his or her mandate. The principle of a free mandate also includes the right to change party affiliation (or to "cross the aisle") or to

[42] The prosecutor's office rejected the complaint of the opposition MPs who were dragged into MTVA (in Hungarian) *hvg.hu*, 20 February 2019. https://hvg.hu/itthon/20190220_Helyben_hagyta_a_Legfobb_Ugyeszseg_a_TVszekhazban_megrangatott_ellenzekiek_elmarasztalasat

[43] Final: opposition MPs should not have been thrown out of the MTVA headquarters, (in Hungarian) https://index.hu/belfold/2020/02/13/mtva_szekhaz_ellenzeki_kepviselok_jogeros_itelet/

[44] Zoltán Szente, Parlamenti jogunk nyomorúsága [*The misery of our parliamentary law*], *Fundamentum*, 2020/4, 5–19.

become independent. A free mandate also means that you can vote against within your political group without risking exclusion. [45]

There is a clear trend in the post-2010 changes to the rules on political group formation, whereby the principle of the free mandate is being restricted, with MEPs being increasingly chained to the party group in which they have obtained a mandate. There have been limits on factional affiliations since the change of regime, but within these limits there has been the possibility for MPs to move from one faction to another. In 2012, the right to form a parliamentary group was restricted to parties with a list mandate, thus preventing MPs leaving the Socialist Party from forming a group of MPs of the Democratic Coalition. [46] And at the end of 2019, the new rules will prevent any meaningful movement between political groups and will prohibit an MEP who leaves his or her political group from joining another group for the duration of his or her mandate, if he or she remains an independent until the end of the term. This legislation is an emptying out of the principle of the free mandate and chains MEPs to parties. [47]

The Venice Commission's position on this issue is clear: the rules on membership of a political group must not run counter to the principle of the free mandate. A Member should have the right to join a political group or to be independent. [48] The Hungarian rules no longer meet these requirements either.

4.6. Restrictions on media freedom

In the view of the Venice Commission, public access to plenary debates helps the opposition to carry out its duties effectively and draws public attention to the problems and weaknesses of government policy. Not all debates are of interest to the public; however, reasonable opportunities should be provided for members of the public or journalists who wish to follow the debates (in person or online). The general rule should require that the media and the general public have reasonable access to Parliament during debates. [49]

Of course, rules on granting media access to the Parliament building or permission to broadcast debates may be subject to obvious security and policing requirements. According to the Venice Commission, the availability and modalities of live coverage or press coverage of a debate are particularly important when constitutional amendments or other important reforms are at stake. [50]

The work of the Hungarian Parliament was broadcast exclusively on the closed-circuit video system operated by the Parliament itself. This was rightly criticised by some broadcasters, who argued that it was often the self-made recordings, rather than the official ones, that gave the public a true picture of the workings of the legislature. But the exclusivity of video has not always contributed to the formation of democratic public opinion. Despite the fact that the

[45] CDL-AD (2019) 015, Venice Commission,
[46] Decision of Constitutional Court of Hungary, 10/2013 ABH.
[47] Noteworthy is the position of Péter Smuk, professor at the National University of Public Service, who argues that the essence of the free mandate is the prohibition of legally binding instructions. Under the new rules, MPs can always end their original party affiliation and support any party as a representative (by their vote or declaration). "Merely joining a political group or participating in the formation of a political group is not enough to create new obstacles; their conscientious activity is not hindered by the rules on the formation of political groups." See Smuk, Rules of the Honourable House…, 16, n.37.
[48] CDL-AD (2019) 015, Venice Commission
[49] CDL-AD (2019) 015, Venice Commission
[50] CDL-AD (2019) 015, Venice Commission

Ogytv. 59 of the Code of Obligations provides that closed-circuit recording does not affect the right of broadcasters to broadcast and record programmes at a suitable place designated by the Speaker. They may broadcast a committee meeting if there is no closed-circuit transmission from that meeting. The law requires that the Speaker may designate only a place for the broadcast or recording of a programme that does not restrict the conditions of free information necessary for the development of democratic public opinion.

The staff of Index, 24.hu, HVG and Népszabadság were banned from Parliament in spring 2016 for violating a Speaker's order that imposed an impossibly narrow limit on the area where they could film in Parliament. Journalist Tamás Fábián was again banned on 4 July 2019 for approaching the newly appointed Justice Minister and his deputy as he left the designated place and attempting to interview them.

The European Court of Human Rights ruled on the case on 26 May 2020. [51] According to the Court, the footage taken by the journalist was intended to document the reaction of MEPs to the alleged illicit payments to the National Bank, a matter of considerable public interest and which attracted significant media attention. Freedom of the press provides the public with one of the best means of learning about and forming an opinion on the ideas and attitudes of its political leaders. In particular, it gives politicians the opportunity to reflect and comment on issues of public concern, thereby enabling everyone to participate in the free political debate that is at the heart of the concept of a democratic society. [52]

In its deliberations, the Court took note, on the one hand, of the applicants' position that the Government had failed to demonstrate how the video recording could have interfered with the normal functioning and smooth operation of Parliament and, on the other hand, of the Government's argument that the States have a wider margin of appreciation in introducing rules governing the functioning of Parliament. In the light of the above, the Court, in its analysis, examined, as in the Karácsony decision, the procedural safeguards of the sanctions imposed on the Speaker. In doing so, it held that the Speaker's decision to ban the journalists did not contain the necessary procedural guarantees to protect freedom of expression. The Speaker did not take into account the potential consequences of his decision and the importance of the journalists' reporting before banning them. Moreover, the banned journalists could not have participated in any way in the procedure leading to their banning, as they were only informed of it afterwards, through a letter sent to their editor-in-chief. It was also unlawful that the banned journalists were not informed either by the Speaker's decision or by the regulations of the time limit for re-entry into Parliament, and that they received no reply to their subsequent registration requests. Finally, journalists were not given any legal remedy under the regulations. [53]

However, the condemnation has not had any substantive impact on the position of parliamentary journalists and the parliamentary media public, and it is still not possible to film in parliamentary channels. Under the rules, only closed-circuit video broadcasting is still allowed, and there is no possibility of alternative coverage of the proceedings. This is very problematic, because while the official coverage allows the speeches to be followed faithfully, the events outside the view of the official camera, the behaviour of Members, can be just as important for the public. Indeed, the Constitutional Court has previously found the rules to be constitutional

[51] Mándli and Others v. Hungary, 63164/16, Judgement, 26 May 2020,
[52] Ibid 66. §
[53] Ibid 74-78. §

in order to preserve the dignity of the functioning of Parliament, and has considered the editing principles of closed-circuit broadcasting to be balanced. [54]

5. Legislation as the government's playground

5.1 The "revolutionary period" of legislation between 2010 and 2014

During the first "revolutionary" phase of the autocratic breakthrough, the government majority amended the Constitution 17 times, the old Constitution twelve times and the Fundamental Law five times. During this period, the number of laws adopted by Parliament was outstanding, but at the same time the number of laws that spent less than 10 days in Parliament increased significantly (104 in total). These account for more than 10 percent of all laws passed in the 2010-2014 cycle, compared with a much lower proportion in previous cycles. In particular, the procedures were shortened to an extreme for laws whose stake was the redistribution of wealth. [55]

This was made possible by the so-called exceptional urgency procedure. The exceptional urgency procedure allowed the legislature to adopt laws on the day following the adoption of this special procedure, i.e. in a single day, with a total of three hours for the tabling of amendments.

The introduction of the exceptional urgency procedure was only voted for by ruling party MPs, i.e. there was a lack of opposition agreement on the new solution to the legislative procedure, which is worth emphasising because the ruling party subsequently adopted a total of 26 bills in this form by the end of the term.

Previously, most fast-track legislative procedures, such as the exceptional procedure or the derogation from the House rules, required a four-fifths vote, while the exceptional urgency procedure required only two-thirds.

Another feature of this period was that laws of major importance were passed by Parliament on the motion of individual Members. [56] Among individual initiatives, proposals to amend the Constitution stand out. The fact that Parliament amended the "old" 1989 Constitution 12 times between May 2010 and December 2011 is in itself a telling figure, and the picture is also nuanced by the fact that 9 of the 12 amendments were adopted on the basis of a motion by government MPs.

---

[54] Decision of Constitutional Court of Hungary, 20/2017 ABH.

[55] The motion to drastically restrict the operation of slot machines in the gambling market was adopted by the Parliament the day after it was tabled, i.e. within one day. On the second day after its tabling, the majority voted in favour of the law imposing the mandatory integration of cooperative credit institutions, which significantly restructured the ownership structure of credit institutions and the Savings Bank, increasing the state's ownership powers and severely restricting the fundamental rights of the former owners. Also two days were spent in Parliament on a motion that would essentially abolish the textbook market in public education and introduce a state monopoly in textbook publishing. See Ágnes Kovács: Children of the Sun. The case of Hungarian Constitutional Theory with Political Constitutionalism (in Hungarian), *Fundamentum*, 2015/2-3, 19-40.

[56] In the period under review, 357 independent motions were tabled by government MPs, 75% of which became law. In the two previous parliamentary terms, this figure was much lower: between 2002 and 2006, only 170 government party motions were tabled, 40% of which became law, while between 2006 and 2010, 129 such motions were tabled in Parliament, with a success rate of 37%. Compared with the practice in other countries, the number and success rate of government party proposals between 2010 and 2014 is also particularly high, and it is also striking that the parliamentary majority has made use of the possibility of tabling an independent parliamentary motion on significant legislative issues. See Kovács, ibid.

A striking example of this legislative practice is the adoption of a constitutional amendment which, for the first time, limited the Constitutional Court's powers to review public finance laws, both on the basis of a motion by an individual MP and on the same day that the Constitutional Court announced its decision annulling the 98% special tax. The new provision of the Constitution, which now created the constitutional possibility of incorporating the annulled tax into the legal system, significantly changed the constitutional status of the Constitutional Court and upset the balance that had existed between the political institutions for two decades. And, as it reacted immediately to the Constitutional Court's decision, the proposal was clearly made without any preparation or consultation, and spent a total of 21 days before Parliament, including the general, detailed and final debates, which were reduced to one day each.

In this context, the Hungarian Constitutional Court stated in its decision 61/2011 that "the successive amendments to the Constitution in order to achieve current political interests and objectives are extremely worrying from the point of view of the requirements of the democratic rule of law, in particular the stability and predictability of the constitutional legal order, its broad social legitimacy and its uncontroversial integration into the constitutional legal system." [57]

5.2. The plenary takes the legislative power out of your hands.

The new House of Representatives came into force on 6 May 2014, putting law-making on a completely new footing. Thus, the process of law-making and the procedural powers of those involved (government, committees, MPs, etc.) have been substantially changed. The most significant of these changes is the complete overhaul of the rules on detailed debate and the creation of the Legislative Committee.

The division of the legislative procedure into stages is of guarantee significance. It ensures transparency and the channelling of the impulses of society through our representatives, thus helping Parliament to fulfil its representative function. In the legislative process, the detailed debate is the stage where amendments to the bill are discussed. In contrast to the previous rules, the detailed debate is now conducted entirely by the Parliament's standing committees instead of the plenum. The new institution of the Legislative Committee is intended to synthesise the results of the detailed debates in the standing committees.

Legislation has been at the heart of the debate from the outset, but the diagnosis is clear from the experience of recent years. The committees have not even attempted to engage in in-depth technical discussions that could justify their own proposals for amendments. There is a conspicuous lack of dialogue with public bodies and professional organisations independent of government. [58]

The role of the standing committees has in principle been increased, as the detailed debate of the bills is not conducted by the plenary session of Parliament, but by the designated committee. This has in principle enhanced the committees' involvement in the law-making process, but the Legislative Committee has full control over the whole process, so in reality the new role of the standing committees is not to improve the quality of law-making but to deprive the plenary of its role.

[57] Decision of Constitutional Court of Hungary, 61/2011 ABH.
[58] Krisztián Enyedi, Spurious speech. Detailed discussion in the practice of the Committee on the Judiciary (2014-2018), (in Hungarian) *Parlamenti jogi Szemle*, 2019/2, 25-51.

It is unprecedented in democratic states for a parliament not to have the opportunity to discuss the details of the bills that have been tabled. However, according to the Hungarian Parliament's rules of procedure, the detailed debate of bills is conducted only by the standing committee appointed for that purpose, and not by the plenary session of deputies, which is supposed to be the decision-making body of the parliament. This means that the Hungarian Parliament does not have the right to debate individual amendments to bills, because it can only debate the consolidated, unified proposal of amendments supported by the Legislative Committee. In this respect, the standing committees acting are in fact no longer advisory and opinion-giving bodies of the Parliament, but substitute bodies. This procedural arrangement has essentially institutionalised the rubber-stamping nature of the plenary session. [59]

Zoltán Szente considers the elimination of the second plenary reading of bills to be seriously unconstitutional, as it seriously infringes on parliamentary publicity, and also unconstitutional if the National Assembly has to decide on bills that it has not had the opportunity to discuss in detail, even though the Basic Law has conferred legislative power on the National Assembly. [60] In his view, parliamentary committees are the working bodies of the National Assembly and are not representative bodies in their own right, and therefore cannot replace the Parliament - their classic role is to prepare the plenary session and parliamentary decisions, which can only be limited to making proposals. [61]

A necessary but not sufficient condition for the legitimacy of laws is that they are adopted by democratically elected representatives of the people. It is also a necessary condition that laws should be the result of free debate and free choice on the part of these representatives. However, if, in the general debate on proposed laws, Parliament can only discuss their necessity and principles, but not their detailed rules, this condition is hardly fulfilled. [62]

[59] Zoltán Szente, Parlamenti jogunk nyomorúsága [The misery of our parliamentary law], *Fundamentum* 2020/4, 5–19.
[60] Ibid
[61] Ibid
[62] Ibid

2) THE MISUSE OF EXCEPTIONAL MEASURES: FROM PERMANENT STATE OF EMERGENCY TO RULE WITHOUT LAW

It seems that the constantly declared emergencies (both inside and outside the constitutional order) from 2015 resulted in a permanent state of emergency[63] or a dictatorial wield of power by 2021. As we will assert, the Hungarian 'autocratic legalism'[64] was assisted by the real and fake emergencies during this period and finally resulted in a rule without law model, instead of rule by law type.[65] Our most important task is to show that the state of exception in a manner as Rossiter had presented[66] is not an exceptional but the "normal" characteristic of the Hungarian constitutional system, and one can understand the Hungarian state of emergency phenomenon as an abusive permanent state of emergency. After the Hungarian 'autocratic revolution'[67] the relevant element of the Hungarian system was a combination of the constitutional dictatorship with the phenomenon of permanent state of emergency.

According to Rossiter constitutional dictatorship serves as a general descriptive term for the various instances of emergency powers and procedures in a historical perspective in all constitutional countries. Although the theoretical background of the concept is the Roman Republic's original dictatorship, this special form is not equal with the "*legal bestowal of autocratic power on a trusted man*" who enjoy unlimited emergency powers to handle the threat but soon after its success, he hands back this power to the regular authorities.[68] Although Rossiter's phenomenon on constitutional dictatorship is more than fifty years old, it is still valid and plays an important role in the theory of emergency powers. The basics of modern constitutional or 'ideal' state of emergency paradigm can be found in the institution of the

---

[63] According to Alan Greene, state of emergency in its 'ideal' form can be defined as a "*crisis identified and labelled by a state to be of such magnitude that it is deemed to cross a threat severity threshold, necessitating urgent, exceptional, and, consequently, temporary actions by the state not permissible when normal conditions exist*." Alan Greene, *Permanent States of Emergency and the Rule of Law – Constitution in an Age of Crisis*, Hart Publishing, Oxford, 2018, 33. I accept that this definition should be used under 'laboratory conditions' which deal with the assumption that normalcy can be separated from emergency. On this dichotomy see eg. Oren Gross: Chaos and Rules: Should Responses to Violent Crises always be Constitutional?, *Yale Law Journal* 112, 2003, 1011, 1089-95. For Greene, the aftermath of 11 September 2001 has led to arguments that this dichotomy is no longer possible. Therefore, we should talk about – as Giorgio Agamben already asserted – a permanent state of emergency where the so-called exception become the norm and temporary powers eventually normalized. This could not just end the rule of law but also demote importance of state emergency paradigm, whereby its main function is to restore the normal or ordinary legal order that existed prior to the declaration of a state of emergency. Ibid, 33-34; Giorgio Agamben, *State of Exception* (trans Kevin Attell), University of Chicago Press, 2005, 4. In order to avoid this problem or the oxymoronic state of permanent emergency paradigm, some theorists disclaimed the normalcy/emergency dichotomy and was focusing on alternative models of 'crisis accommodation', which theories trying to protect the constitutional order while at the same time allowing the states to respond to the crises accordingly. See: Greene, *Permanent…*, 161-195.; Gross, *Chaos…*, 1096; Nomi Claire Lazar, State of Emergency in Liberal Democracies, Cambridge University Press, Cambridge, 2009, 136-162. The latter theory is about the absolute rejection of the state of exception 'exceptionalist' paradigm. We should also mention those who prefer the unlimited judicial review power even during exceptional times which – according to these theories – guarantee the preservation of the rule of law and constitutionalism. See: David Dyzenhaus, *The Constitution of Law – Legality in a Time of Emergency*, Cambridge University Press, Cambridge, 2006.

[64] About this phenomenon see: Kim Lane Scheppele, Autocratic Legalism, *The University of Chicago Law Review*, Vol. 85. No. 2. 2018, 545-583.

[65] Gábor Mészáros: Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of COVID-19, *Review of Central and East European Law 46 (1)*, 2021, 69-90.

[66] Clinton Rossiter: *Constitutional Dictatorship – Crisis Government in the Modern Democracies*, Transaction Publishers, New Brunswick and London, 2009 (originally published in 1948).

[67] Kim Lane Scheppele, Understanding Hungary's Constitutional Revolution in Armin von Bogdandy and Pál Sonnevend (eds.), Constitutional Crisis in the European Constitutional Area, Oxford University Press, Oxford, 2015, 113.

[68] Rossiter, *Dictatorship…*, 4-5.

extraordinary constitutional office of the dictatorship of the ancient Roman Republic.[69] Therefore, we accept that there are three important fundamental facts to deal with this phenomenon. The first argument is that the complex system of government must be democratic, and the existence of a constitutional state is evident. It is also important that the system must be designed for normal, peaceful conditions. The second statement is that during exceptional situations the values of constitutional democracy '*must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions…the government will have more power and the people fewer rights*'[70]. This aspect of constitutional dictatorship seems that it is equal with dictatorship in its original form but if we consider the constitutionally restricted style of this power, it can be easily accepted as the prelude of the modern constitutional state of emergencies in modern constitutional democracies. Thirdly the sole purpose of this regime is to preserve the independence of the state and to maintain the constitutional order and preserve the liberties of people[71]: "*to end the crisis and restore normal times.*"[72] Without these arguments we cannot speak about constitutional democratic emergency regimes. It is also important to note that in the legislative sphere 'constitutional dictatorship' accepts the delegation of legislative power. It is the most important element of emergency powers nowadays: the periodical delegation of legislative issues to the government.[73] But the delegation of this power is limited in time and scale as well. The real- and pseudo-exceptional or emergency regimes – as we will see – have used by the Hungarian Government in recent years were not just "*crossed the threshold*"[74] or resulted in "*business as usual model of emergency powers*"[75] in their normal understanding but made it clear that legal and extralegal emergency measures[76] were used to undermine the rule of law in an abusive manner.

After the 2010 parliamentary elections, the winning party Fidesz started to reshuffle the Hungarian constitutional order by using both the elements of abusive constitutionalism[77] and legislation to consolidate its political power and to undermine democracy. It is also to be noted that this was the period when emergency measures started to leak into the regular legal order

[69] See Greene, *Permanent*…, 3-4; Oren Gross – Fionnuala Ni Aoláin: *Law in Times of Crisis – Emergency Powers in Theory and Practice*, Cambridge University Press, Cambridge, 2006, 17-26; Rossiter, *Dictatorship…*, ch 2; Lazar, *State of*…, 113-135.

[70] Rossiter, *Dictatorship…*, 5.

[71] See: Rossiter, *Dictatorship…*, 5-7.

[72] Rossiter, *Dictatorship…*, 7.

[73] Rossiter, *Dictatorship…*, 9.

[74] This phenomenon reflects on the situation when the declaration of a so called "low-level" state of emergency may be more readily accepted by the public. However, this could also mean that these types of emergencies can be considered not so serious therefore may undermine the basic notion that emergencies correspond to serious threats. It could be dangerous in a way that some kind of emergency regimes become accepted, and people may think that exception is equal with normalcy. It is also threatening that some governments can introduce more strict measures than it would be necessary; so "*crossing the threshold*" could be much easier. See Gross-Ni Aoláin, *Law…* 45-46.

[75] According to the 'business as usual' model rejects the option of handling emergencies by accommodating (constitutional, legislative or even by way of judicial interpretation) by introducing changes to the existing constitutional and legal system. According to this model no emergency powers should be introduced neither ad hoc nor permanent basis. See: Gross-Ni Aoláin, *Law…* 86-109.

[76] On the original distinction of 'legal and extralegal' emergency models see: Kim Lane Scheppele, Legal and Extralegal Emergencies, in K.E, Whittington – R.D, Kelemen, G.A, Caldeira (eds.): *The Oxford Handbook of Law and Politics*, Oxford University Press, Oxford, 2008, 165-184.

[77] According to David Landau, abusive constitutionalism involves the use of the mechanism of constitutional change – both constitutional amendment and constitutional replacement – to create authoritarian or semi-authoritarian regimes. As a result, these systems still look democratic from a distance and contain various elements that are not different from liberal democratic constitutions. See: David Landau, Abusive Constitutionalism, 47 UC *Davis Law Review* (2013), 189-260, at 191.

which was a sign that political power is exercised by legal means and law finally became a useful camouflage for the authoritarian government to exercise its power by declaring that everything is formally controlled under the rule of law.[78] The Fundamental Law of Hungary created a *sui generis* state of emergency chapter, called 'Special Legal Order', which contains the descriptions of the state of national crisis[79], state of emergency[80], state of preventive defence[81], unforeseen intrusion[82], state of danger[83], and the emergency response to terrorism. This latter chapter was a result of a countrywide campaign against the mass migration in 2015, which line of events finally resulted in an amendment of the Fundamental Law.[84] The new chapter aimed to fulfil the requirements of the constitution to protect citizens and democratic institutions especially in situations that threaten the life of people and the security of the state. Meanwhile, the ultimate goal of the special law was to guarantee the return to ordinary law and order.[85] In order to fulfil this aim, the Fundamental Law has opted to regulate these issues in a very detailed manner. This approach is not unique within the European constitutionalism.[86] As we'll show, the Government were using pseudo- and real emergencies for gaining political benefits and this way did the Hungarian permanent state of emergency lead to a result that the rule of law is being drained after the responses to the COVID-19 pandemic. Though Fidesz's

[78] Although the Fundamental Law has a unified emergency powers system, the Hungarian Parliament also used ordinary legislation, which contained extra-legal measures to deal with the so-called emergencies such as the newly founded mass migration crisis in 2015 which was unknown within the Fundamental Law's relevant rules. Because of this so-called refugee crisis, the Hungarian Parliament adopted two acts on 4 and 21 September 2015 which enabled to proclaim a 'state of migration emergency', without using the Fundamental Law's emergency mechanism. Consequently, many emergency restrictions could be used without the constitutional guarantees, and the state of emergency started to leak into the regular constitutional order. See: Gábor Mészáros, The Hungarian Response to Terrorism: Blank Check for the Government, 154 *Studia Iuridica Auctoritate Universitatis Pecs Publicata*, 2016, 135-137.

[79] According to the first paragraph, point a) of Article 48 of the Fundamental Law of Hungary, the Parliament shall declare a state of national crisis and set up a National Defense Council in the event of the declaration of a state of war or the immediate danger of an armed intrusion by a foreign power (danger of war).

[80] The Parliament shall declare a state of emergency in the event of armed actions aimed at undermining law and order or at seizing exclusive control of power, or in the event of grave acts of violence committed by force of arms or by armed groups which gravely endanger the lives and property of citizens on a mass scale [First paragraph, point b) of Article 48 of the Fundamental Law of Hungary].

[81] In the event of an imminent threat of armed invasion or if deemed necessary in connection with the country's commitment under an alliance treaty, the Parliament shall declare a state of preventive defense and simultaneously authorize the Government to introduce the emergency measures specified in an implementing act. The duration of the state of preventive defense may be extended scale [First paragraph of Article 51 of the Fundamental Law of Hungary].

[82] In the event that the territory of Hungary is subject to an unforeseen invasion by foreign armed units, the Government shall take immediate action, in accordance with the defense plan approved by the President of the Republic, using forces as commensurate with the gravity of the attack and that are equipped for such a role, prior to the declaration of a state of emergency or a state of national crisis in order to repel such attack, defend the territorial integrity of the country with the active air and air defense forces of the Hungarian and allied armed forces, maintain law and order and to protect the security of the lives and property of citizens, protect public policy and public security [First paragraph of Article 52 of the Fundamental Law of Hungary].

[83] In the event of a natural or industrial disaster endangering lives and property, or in order to mitigate the consequences thereof, the Government shall declare a state of danger, and may introduce emergency measures defined in an implementing act. [First paragraph of Article 53 of the Fundamental Law of Hungary]

[84] About the concerns of the necessity of this amendment see: Mészáros, *op.cit.* note 7, 129-142.

[85] See András Jakab, "Az Országgyűlés akadályoztatása különleges állapotokban (Incapacitation of the Parliament in Special Legal Orders)," in András Jakab (ed.), *Az alkotmány kommentárja (Commentary on the Hungarian Constitution)* (Századvég, Budapest, 2009, 2nd edition), 634.

[86] The Venice Commission in its Opinion referred to the Polish and the German model as an example. See Christoph Grabenwarter - Wolfgang Hoffmann-Riem – Hanna Suchocka – Kaarlo Tuori – Jan Velaers, *Opinion on the New Constitution of Hungary*, European Commission for Democracy through Law (Venice Commission) (Strasbourg, 20 June 2011) Opinion no. 621/2011, para. 134.

own constitution regulates states of emergency in detail, the framework for the new medical state of emergency and previously the state of migration emergency are inserted as an amendment to ordinary acts, available for use by the government as part of normal law. The new medical state of emergency began when the country's Chief Medical Officer (an appointee of the government) advises the government that a health emergency requires exceptional measures. It can be used when a sudden incident endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardizes the functioning of health care providers to such a degree that the situation may lead to a disequilibrium between the demand for health care and the locally available capabilities. Moreover, the 'state of migration emergency' - first declared in 2015, renewed six-months intervals down to present day and remains in effect even in the absence of floods of incoming migrants that justified the initiation of this – used new standards for rejecting asylum seekers and make possible for manoeuvring by exceptional measures under the ordinary legal regime.

Article 54 of the Fundamental Law also provides for the common rules relating to a special legal order such as the possibility to suspend or restrict fundamental rights beyond the extent of ordinary law standards. This Article also contains special guarantees such as the prohibition of suspension of the Fundamental Law and other temporal restrictions. According to this Article, the exercise of fundamental rights – other than the right to life and human dignity, the prohibition of torture, inhuman or degrading treatment or punishment, the prohibition of trafficking in human beings, the prohibition of medical or scientific experiment without one's free and informed consent, the prohibition of practices aimed at eugenics, making the human body and its parts as such a source of financial gain, and human cloning and some guarantees of criminal proceedings – may be suspended, or restricted beyond the extent that is necessary and proportionate to the objective pursued.

1) Autocratic legalism and emergencies

The two elections in 2014 and 2018, both of which were criticized by the OSCE as having been conducted under conditions that were unfair[87], resulted again in a two-third majority for the same party. This was also the period when emergency measures started to leak into the regular legal order, a sign of indicating the increasing use of legal means for nakedly partisan purposes. In this way, the law finally became a useful camouflage for the authoritarian government in exercising its power by declaring that everything is formally controlled under the rule of law. During this period, the Government used its supermajority to gain more political power via legislation. The hallmark of this period was the practice of the Parliament using ordinary legislation containing extra-legal measures to deal with so-called emergencies. Such situation was the newly founded emergency rules called 'state of migration emergency' in 2015, which was unknown within the Fundamental Law's relevant rules. Responding to the mass migration crisis, the Hungarian Parliament adopted two acts on 4 and 21 September 2015 which enabled to proclaim the 'state of migration emergency', without using the Fundamental Law emergency mechanism, which meant that various emergency restrictions could have been used without constitutional guarantees. This new pseudo-emergency first declared in September 2015 and renewed at six-month intervals down to the present day.

[87] OSCE Office for Democratic Institutions and Human Rights Final Report on the Hungarian Parlamentary Elections of 6 April 2014 can be found here: https://www.osce.org/files/f/documents/c/0/121098.pdf; the full report of the Parlamentary Elections of Hungary of 8 April 2018 here: https://www.osce.org/files/f/documents/0/9/385959.pdf

Consequently, it became possible to use emergency restrictions without constitutional guarantees, and the state of emergency started to leak into the ordinary legal order. This period had also contained the sixth amendment of the Fundamental Law in 2016, with the new chapter called the 'Emergency Response to Terrorism' implemented into the 'Special Legal Order', although this new emergency framework was unnecessary.[88]

2) Permanent State of Emergency Became the 'Norm'

In 2020 the Hungarian regime has finally lost its 'autocratic legalist'[89] nature because during the enforcement of the 'state of danger' the Hungarian Government itself was in breach of the Fundamental Law. With the declaration of this special legal order to handle the situation caused by the coronavirus pandemic in 2020 and with the simultaneous acceptance of the so-called 'Enabling Act'[90] it became apparent that the Governments' main aim was to hold unconstrained power without even the slightest pretense of constitutionalism.[91] After the declaration, during the first wave of the pandemic and under the first Enabling Act, the Hungarian Government issued more than a hundred decrees and with its two-thirds majority in the Parliament also used ordinary legislation to handle the situation. The most controversial was the above-mentioned 'Enabling Act', which was accepted by the Parliament on 30 March 2020 and gave the Government free rein to govern directly by decree without the constraint of the existing law. It also allowed suspension of the enforcement of specific laws, departed from statutory regulations and implemented additional extraordinary measures by decree in addition to the extraordinary measures and regulations outlined in Act CXXVIII of 2011 concerning disaster management.

However, the 'Enabling Act' lacked constitutional basis.[92] According to the Fundamental Law, it is the Government's authority to issue decrees which may suspend the application of certain laws or to derogate from the provisions of laws, and to take other extraordinary measures. The role of the Parliament is only to give the Government authorisation to extend the effect of the decree. There is no constitutional authority for the Parliament to enact new laws concerning the state of danger. Therefore, the Parliament had no authority to accept exceptional laws because the Government has its limited power to use extraordinary measures – which are defined in the implementing act – according to the Fundamental Law.[93]

So, let us assume that the Parliament enacts a new law that de facto overwrites the provisions of the Fundamental Law by extending the taxation of the constitution in an act (even if this act also adopted by the same two-thirds majority). In such case, this law is unconstitutional because the act amends the constitution without complying with the formal prescriptions.[94]

---

[88] For a more detailed description see: Mészáros, *The Hungarian…*,129-142.
[89] Kim Lane Scheppele, Autocratic Legalism, *The University of Chicago Law Review*, Vol. 85. No. 2. 2018, 545-583.
[90] Act XII of 2020 on Protecting against the Coronavirus
[91] I already pointed out the most important concerns regarding this emergency regime before in another article. See: Mészáros, *Carl Schmitt…*
[92] See: Mészáros, *Carl Schmitt…,* 15-19.
[93] Gábor Mészáros, COVID-19 flourishes and Hungarian constitutionalism withers, *Law against pandemic*, 10 April, 2020.
https://lawagainstpandemic.uj.edu.pl/2020/04/10/covid-19-flourishes-and-hungarian-constitutionalism-withers/
[94] Gábor Mészáros, The Role of Emergency Politics in Autocratic Transition in Hungary, *IACL Democracy 2020 Roundtable Blog*, November 23, 2020.
https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-xx9lz-p6k2z-y8y6h-cplw4-4bcr5-t2hdf-pt4np-nzc2g-f64jl-c53x4-d693x

3) From Emergency Legislation to Rule by Decrees: Never-ending state of exception?

Facing criticism from the EU, the Government declared an end to the March emergency in June 2020. On the same June day when the Government terminated the March 'state of danger,' however, the Parliament passed two laws, one rescinding the parliamentary confirmation of the March state of danger and the other which amended the Health Act to create a new 'medical state of emergency' that is nowhere mentioned in the detailed regulation of states of emergency in the Fundamental Law.[95] This new form of emergency, like the state of migration emergency, was inserted into ordinary law without the constitutional scaffolding that guarantees that there are serious checks on emergency powers. But the 'medical state of emergency' provided that the operation of all institutions, programs or activities that could promote the spread of the epidemic could be suspended, gave the Government the power to use special 'epidemic' measures provided in other laws, and permitted this catalogue of special powers to be supplemented by future ordinary legislation. On 17 June 2020 the Government activated this newly minted 'state of medical emergency' by decree, but it seemed that, even with this unlimited power in hand, they didn't want to accept any restrictions in order to prepare for the second wave of the pandemic now in effect. Without using the Health Act's new framework to handle the situation, though it was still in place to be used, the Government declared a state of danger on 3 November and soon after, Enabling Act II[96] was passed.[97] On 10 November 2020, Hungary has once again entered a state of danger in which ordinary constitutional government is suspended. The new state of emergency responds to the fact that the second wave of the pandemic has hit Hungary very hard. Although it seemed necessary to introduce a state of danger again, however the measures undertaken exceed those necessary to or even relevant for coping with the problem for which they are invoked and all of them could have been undertaken under ordinary law in any event.[98]

Like the previous pandemic-related emergency in March 2020[99] that stirred international fears, the November emergency gave the Government the unlimited power to govern by decree again. Unlike the previous emergency, and acknowledging international criticism, the Government's extraordinary powers under the November emergency last 90 days. According to the Fundamental Law, however, a state of danger only gives the Government the power to issue decrees that endure for a maximum of 15 days, unless each decree is specifically renewed by the Parliament. But with this new November emergency, the Parliament has given its blanket endorsement to any decree that the Government issues for 90 days without the need to return to Parliament for its approval. It was flatly unconstitutional for the Parliament to give a blank cheque for the Government to issue endless emergency decrees for 90 days without parliamentary oversight. Finally, the Parliament was also lacking the authority to prolong the declaration of the state of danger itself, although its November emergency law did so.[100]

---

[95] Gábor Halmai – Gábor Mészáros – Kim Lane Scheppele: From Emergency to Disaster – How Hungary's Second Pandemic Emergency will Further Destroy the Rule of Law, *Verfassungsblog*, May 30, 2020. https://verfassungsblog.de/from-emergency-to-disaster/

[96] Act CIX of 2020 on Protecting against the Second Wave of the Global Coronavirus Pandemic

[97] Viktor Kazai, Power Grabs in Times of Emergency, *Verfassungsblog*. November 12, 2020. https://verfassungsblog.de/power-grab-in-times-of-emergency/

[98] Gábor Halmai – Gábor Mészáros – Kim Lane Scheppele: So It Goes – Part I, *Verfassungsblog*, November 19, 2020. https://verfassungsblog.de/so-it-goes-part-i/

[99] Gábor Halmai – Kim Lane Scheppele: Don't Be Fooled by Autocrats – Why Hungary's Emergency Violates Rule of Law, *Verfassungsblog*, April 22, 2020, https://verfassungsblog.de/dont-be-fooled-by-autocrats/

[100] Halmai-Mészáros-Scheppele *So it*....

As the 90 days effect of Enabling Act II passed, the Government declared a state of danger again (for the third time in one year)[101] on 8 February 2021, but this "new" state of danger simply renewed the restrictions of the former decree[102]. Soon after, the National Assembly accepted the Enabling Act III[103], which as the previous pandemic-related emergencies gave nearly unlimited power for the Government until 22 May 2021. Before the end of the 90 day's effect of the law – the deadline given by the two-thirds majority itself – on 19 May 2021 the Parliament accepted an amendment of the Enabling Act III[104]. According to the latter modification the emergency measures will be in force until September, because as the Minister of Justice Judit Varga asserted "bolstered defenses are indispensable" as new virus mutations are present in Hungary.[105] So the state of danger is prolonged for more than 3 months, however more and more restrictions are dissolving by the Government which practice predictably lasts through the summer.[106] It seems even more controversial when Prime Minister Viktor Orbán on 21 May 2021 on the Kossuth Radio Programme "Good Morning Hungary" anticipated that after 5 million vaccinated people many restrictions will be lifted including the obligatory, universal outdoor mask-wear restrictions and the curfew.[107] Although the state of a medical emergency was still in effect, the Orbán government introduced the recent amendment to the sunset clause of Enabling Act III on 1 January 2022, which has declared that the act itself (with emergency restrictions) will be effective at until 1 June 2022. However, this system, which enables the government (in practice the Prime Minister) to rule by decree and therefore enjoys nearly unlimited power – with exemptions such as the application of the Fundamental Law may not be suspended, nor may the functioning of the Constitutional Court be restricted – does not serve effective protection. For example, instead of the dictatorial wielding of power, universal mask-wearing restrictions were included only in the middle of November when the fourth wave was already taking victims and morbidity started to reach the same numbers as we had seen in March.[108] Not to mention that before the autumn the Government Decree no. 457/2021. (VII. 3.) made clear exemptions from emergency restrictions (most importantly from the restriction of the right to assembly) to legalize various mass events such as the fireworks and commemorations about the founding of the state; the 52nd International Eucharistic Congress in Budapest; the FEI Driving European Championship for four in hand; or One with Nature, the World of Hunting and Nature Exhibition which, according to government sources, has been visited by 616 thousand people[109], a number which is relevant to the increasing cases of infection.

---

[101] Government Decree no. 27/2021. (I. 29.)
[102] Government Decree no. 478/2020. (XI. 03.)
[103] Act I of 2021 on Protecting against the Global Coronavirus Pandemic
[104] Act XL of 2021 on amending the Act I of 2021 on Protecting against the Global Pandemic, the text of the law in the National Gazette: https://magyarkozlony.hu/dokumentumok/131c0a0d4454de6ee3ae55d11a26ea9b47ddac05/megtekintes
[105] https://abouthungary.hu/blog/a-busy-day-in-the-hungarian-parliament-laws-regulating-foreign-universities-and-foreign-funded-ngos-follow-european-examples
[106] https://abouthungary.hu/news-in-brief/4-790-996-people-have-so-far-been-vaccinated-against-covid-19-in-hungary; https://abouthungary.hu/news-in-brief/4-898-866-people-have-so-far-been-vaccinated-against-covid-19-in-hungary
[107] https://hungarytoday.hu/orban-restrictions-lifted-hungary-coronavirus-5-million-vaccinated/
[108] Although the share of fully vaccinated population reached 60 percent, in the middle of November 2021 the daily infection cases were getting close to the peak of the third wave of the pandemic. E. Zalán, 'Central Europe struggles with new Covid-19 wave', *Euobserver*, 18 November 2021, <https://euobserver.com/coronavirus/153548> visited 20 November 2021.
[109] Homepage of *One with Nature 2021*, 20 October 2021 < https://onewithnature2021.org/en/news/the-series-of-programs-has-attracted-a-total-of-over-one-and-a-half-million-visitors > visited 22 November 2021.

The question is simple: why is it so important to uphold the special legal order until June 2022 whereas the most important epidemic related restrictions (face covering, social distancing, green pass checking etc.) are already lifted? There is no valid constitutional explanation for expanding the ruling with government decrees for the entire summer.

The current pseudo and real emergency powers have become hard to track, we try to recap these in the timetable on the following pages.

	Effective	Declared by	Most important restrictions	Remarks	Ordinary law	Special legal order
State of migration emergency	From 9 March 2016	41/2016. Governmental Decree on 9 March 2016	Temporary appropriation on moveable and immoveable assets of any business association over which the State or any municipal government exercises ownership right. The established for carrying out official police business and the Hungarian Armed Forces may participate in the registration of asylum applications. Accelerated process for refugee seekers with less legal remedies.	Gov. may declare by decree by the recommendation of the Minister, upon the initiative of the national chief of police and the head of the refugee authority. May be declared covering the entire territory of Hungary, or specific parts of Hungary when the following conditions are fulfilled: the number of asylum-seekers entering Hungary exceeds 500 per day on the monthly average, 750 per day on the average of two consecutive weeks, or 800 per day on a weekly average. It was also possible to declare this kind of 'state of emergency' if the number of persons in the transit zones of Hungary, other than the persons participating in providing care for the aliens, exceeds 1000 per day on the monthly average, 1500 per day on the average of two consecutive weeks, or 1600 per day on a weekly average. Apart from the above-mentioned cases it was also possible to declare a 'state of migration emergency' where any migration-related situation develops in any municipality that represents a direct threat to public security, public safety or public health in that community, in particular if a riot or similar disorder breaks out in the community or in a reception center located in the immediate vicinity of that community, or in any other facility for the accommodation of aliens, or if any violent acts are committed. These criterions were not fulfilled for years, however the SoME renewed six-months intervals down to present day.	√	X
State of danger (1.)	11 March 2020 – 18 June 2020	40/2020. Governmental Decree on 11th of March 2020	Under the Fundamental Law Special Legal orders chapter (Art. 53), various emergency restrictions are available; hundreds of emergency decrees were issued by the government under this emergency regime.	No sunset clause implemented in the text; according to the FL (Art. 53. Sec. 3) emergency decrees shall remain in force for 15 days except if the Government - on the basis of an authorization from Parliament - extends the effect of the decrees.	X	√

Enabling Act (1.)	30 March – 2020 – 18 June 2020 (repealed by Act LVII of 2020 on terminating the state of danger)	Act XII of 2020 on Protecting against the Coronavirus	The aim of the act was to extend the effect of the emergency decrees; however, it unconstitutionally extended the state of danger itself and gave the government a blank cheque to rule by decrees for an unlimited period.	Although the Act extended the already accepted and future decrees, but it also amended the Criminal Code (which is an ordinary law), therefore emergency rules again implemented into the ordinary law.	√	√

State of medical emergency	From 17 June 2020	283/2020. Governmental Decree on 17 June 2020	Early May the country's Chief Medical Officer (an appointee of the government) advises the government that a health emergency requires exceptional measures. This can occur when a sudden incident endangers, or disrupts lives, corporal integrity, and health of citizens, or jeopardizes the functioning of health care providers to such a degree that the situation may lead to a disequilibrium between the demand for health care and the locally available capabilities. Allows the government to order any measures it deems necessary if the measures previously specified by Parliament are inadequate to deal with the crisis. The government is explicitly authorized to restrict the exercise of fundamental rights, such as the freedom of movement or the freedom of assembly. The operation of all institutions, programs or activities that could promote the spread of the epidemic can be suspended. The government has the power to use special "epidemic" measures provided in other laws. Isolating infectious persons operation of all institutions, programs or activities that can promote the spread of the epidemic, travel by persons, or the transport of live animals or commodities from one region to another, personal contacts between persons in one region and persons in another region, visiting at healthcare facilities, leaving certain areas, the sale and consumption of certain foods, the consumption of drinking water and the keeping of certain livestock may be restricted or prohibited.	Renewed six-months intervals. Gives the government back the almost unlimited decree power without any superficial requirement that Parliament approve of the decrees issued to carry out the emergency.	√	X
State of danger (2.)	4 November 2020 – 8 February 2021	478/2020. Governmental Decree on 3rd of November 2020	See above SoD 1.		X	√

Enabling Act (2.)	11 November 2020 – 8 February 2021	Act CIX of 2020 on Protecting against the Second Wave of the Global Coronavirus Pandemic	See above EA 1.	90 days sunset clause implemented	√	X
State of danger (3.)	From 8 February 2021	27/2021 Governmental Decree on 29th of January 2021	-	-	X	√
Enabling Act (3)	From 22 February 2021	Act I of 2021 on Protecting against the Global Coronavirus Pandemic	-	90 days sunset clause implemented		
Amendment of the Enabling Act (3.)	From 22 May 2021	Act XL of 2021 on amending the Act I of 2021 on Protecting against the Global Pandemic	-	According to the modification the emergency measures and the state of danger itself will be in force until September 2021. However, more and more restrictions are dissolving by the Government after May.	X	√
Amendment of the Enabling Act (3.)	From 30 September 2021	Act CII of 2021 on amending the Act I of 2021 on Protecting against the Global Pandemic	-	Amended the sunset clause of Enabling Act (3.) therefore the special legal order will be in force until 1st January 2022. Although the state of danger was not issued by the government as the Fundamental Law requires, this amendment, by prolonging the effect of the act the Parliament, extended the effect of the special legal order without formal declaration.	√	X

Amendment of the Enabling Act (3.)	From 30 September 2021	Article 84-86 of Act CXXX. of 2021 on special rules in context of the coronavirus pandemic	-	Amended the sunset clause of Enabling Act (3.) therefore the special legal order will be in force until 31 May 2022. Although the state of danger was not issued by the government as the Fundamental Law requires, this amendment, by prolonging the effect of the act, extended the effect of the special legal order without formal declaration. Note that before the amendment there was a prohibition on organizing nationwide referendums, however this new amendment endorsed this regulation for local referendums only. Therefore, the new rules gave green light for a referendum in April 2022 on the controversial law that bans educational materials for children that are considered to promote homosexuality and gender reassignment. The relevant law was widely criticized by the opposition and civil rights activists when it was passed in June 2021. The vote will be held on April 3, the same day as Hungary's general parliamentary election.	√	X
Amendment of the Enabling Act (3.)	From 30 September 2021	Article 84-86 of Act CXXX. of 2021 on special rules in context of the coronavirus pandemic	-	Again amended the sunset clause of Enabling Act (3.) therefore the special legal order will be in force until 31 May 2022. Although the state of danger was not issued by the government as the Fundamental Law requires, this amendment, by prolonging the effect of the act, extended the effect of the special legal order without formal declaration. Note that before the amendment there was a prohibition on organizing nationwide referendums, however this new amendment endorsed this regulation for local referendums only. Therefore, the new rules gave green light for a referendum in April 2022 on the controversial law that bans educational materials for children that are considered to promote homosexuality and gender reassignment. The relevant law was widely criticized by the opposition and civil rights activists when it was passed in June 2021. The vote will be held on April 3, the same day as Hungary's general parliamentary election.	√	X

4) Regulating the Exception

During the second wave of the coronavirus pandemic the Government also submitted the ninth amendment of the Fundamental Law under the state of danger regime, which rewrote the structure of the 'Special Legal Orders', although the new rules will come into force in 2023. The most important change was the abolition of The National Defence Council from the State of National Crisis – which latter special legal order will also be repealed. The National Defence Council is supposed to govern in a state of national crisis, especially if the Parliament could not meet, in order to ensure the continuation of representative government even in adverse circumstances. During this special legal order, the Government was supposed to convene this Council, which was to consist not only of the prime minister and president but also parliamentary leaders and the leaders of the opposition.[110]

The new 'Special Legal Orders' chapter compressed the current six special legal orders into three. The 'state of national crisis', the 'state of preventive defence' and 'unforeseen intrusion' from the present constitution will be collapsed into a new 'state of war' category while the 'state of emergency' and the 'state of danger' will retain their titles, although with relevant modifications in the circumstances in which they can be invoked. Regardless of which new emergency is invoked, however, it is evident that the Government will play a central role in all three.[111] Under the new emergency regimes, the Government shall exercise the rights delegated by Parliament and may rule with special decrees. That is what the Government has done mostly unconstitutionally under all real- and fake-emergencies to date, so this authorizes him to govern in this way going forward.[112] Perhaps the most important elements in the revised constitutional regulation of special legal orders are the new provisions that substantially broaden the situations in which these emergencies can be declared.[113] Under the present constitution, declaration of a 'state of emergency' requires the presence of 'armed actions' and/or 'violence committed by force of arms or by armed groups.' The amendment removes this requirement by declaring that a 'state of emergency' may be declared in the event of any action aimed at overthrowing, overturning the constitutional order or for seizing exclusive control of power, or in the event of a serious illegal activity that poses a massive threat to the safety of life and property on a massive scale. It seems that the scope of the new provision has been greatly widened to include non-violent threats, therefore the bar for declaring such an emergency has been lowered. The most crucial element of this new 'state of emergency' is that it may be declared in the event of 'overthrowing' ('felforgatás') the constitutional order. But 'felforgatás' is a concept previously unknown in the Hungarian law and it has no clear definition. Therefore, the constitutional

[110] Halmai-Mészáros-Scheppele *So it*....

[111] According to the new Article 49 of the Fundamental Law the Parliament with a two-thirds majority of the votes of all members may declare a state of war in the event of proclamation of a military conflict or threat of war, in the event of armed aggression from abroad, an act equivalent to an external armed attack, and an imminent threat thereof, or for the purpose of fulfilment of an alliance treaty obligation of collective defence. The Parliament with the same two-thirds majority may declare a state of emergency under Article 50 in the event of any action aimed at overthrowing, overturning the constitutional order or for seizing exclusive control of power, or in the event of a serious illegal activity that poses a massive threat to the safety of life and property on a massive scale. The state of emergency may be declared for thirty days but can be extended by thirty days with the vote of two-thirds of all Members of Parliament, if the reasons giving rise to the declaration of the state of emergency persist. Finally, the state of danger may be declared by the Government for thirty days in the event of a serious incident - in particular a natural or industrial disaster - endangering lives and property, or in order to mitigate the consequences thereof. The Government may extend the state of danger by thirty days under the authorization by the two-thirds majority of the Parliament, if the reasons giving rise to the declaration of the state of danger persist.

[112] See: Halmai – Mészáros – Scheppele, *So it*...

[113] *Ibid*.

amendment rewriting the rules on special legal orders by giving the Government broad, vaguely defined new powers with even fewer checks and balances to use.

5) An ineffective judicial review

Modern emergency regimes especially under the European continental doctrine, believe that the constitutional regulation of emergencies help not just handling the threat effectively but to prevent the abuse of exceptional powers.[114] It is also important for the judiciary to review the constitutionality of the existence of emergency and the emergency measures taken by the Government. Although the Fundamental Law has no exact provision that clearly prescribe for the Constitutional Court to attend this task but according to Article 54 the functioning of the court may not be restricted under a special legal order. Therefore, it seems evident that the Constitutional Court can review the constitutionality of the state of danger and the emergency decrees as well. However, in 2020, during the first wave of the coronavirus pandemic, when emergency laws were for the first time introduced, the court were reluctant to review several important emergency decrees issued by the Government. While Hungarian NGOs urged the Government to establish strict deadlines for constitutional review procedures in order to ensure the effective supervision of emergency legislation, the Government failed to react, and the Constitutional Court decided on several complaints only when the state of danger was already terminated which resulted in a series of inadmissibility decisions. This was the case, for instance, with the decree on new labour law legislation[115] and also with the extended deadline for fulfilling all kinds of freedom of information requests. The latter decree providing a 45 plus 45-day deadline for data managers to issue public interest data were reintroduced to the legal system in November 2020, [116] just days after the court published its inadmissibility decision on the previous decree.[117] In April 2021, after around a one-year saga, the Constitutional Court did not find the decree unconstitutional.[118] This means that there is no effective control on the emergency government, neither the Parliament (with the Fidesz-KDNP two-thirds majority in it) nor the Constitutional Court can guarantee to restore normalcy and the rule of law.

6) Conclusion

In Hungary, it seems that 'unorthodox' manifestations were used to strengthen the Government's political power in the framework of antiterrorist measures. Therefore, the emergency response to terrorism became a new special legal order in 2015 but it wasn't a direct answer to a real threat instead of a countrywide campaign against mass migration.[119] It also became evident by 2020 that the Government favours the use of so-called emergency measures outside the emergency provisions of the Fundamental Law.[120] Not to mention that in the shadow of the coronavirus pandemic the Government has started to use 'Special Legal Order' (namely the state of danger) and also ordinary legislation simultaneously to handle the situation as we

[114] There are at least two main theories on how to handle emergencies: first, there are those, who prefer the crisis management and accept that no legal provisions should constrain the exceptional power; second, there are those who claim that there should be legal, constitutional norms that regulate the emergency. Among the latter "group" there are those who claim that exceptional government – although separated from regular government – has to be regulated by constitutional provisions and those who believe that special laws or executive measures are better able to confront the threat. See: John Ferejohn – Pasquale Pasquino: The Law of the Exception: A Typology of Emergency Powers, *International Journal of Constitutional Law* 2, 2004, 210-239, 229.

[115] CC Decision 3326/2020. (VIII. 5.) AB

[116] Government Decree no. 521/2020. (XI. 25.)

[117] CC Decision 3413/2020 (XI. 26.) AB

[118] Case no. IV/100/2021.

[119] Mészáros, *The Hungarian*…,129-142.

[120] Mészáros, *Carl Schmitt*...

have seen during the acceptance of the so-called 'Enabling Act'[121]. When the 'state of danger' declared again in November 2020, it brought to three the number of current emergency regimes in effect in Hungary. The 'state of migration emergency,' initiated in 2015, is nowhere mentioned in the detailed regulation of Special Legal Orders in the Fundamental Law. It has been perpetually renewed and remains in effect even in the absence of floods of incoming migrants that justified the initiation of this quasi-state of emergency in the first place.[122] When the Parliament (with the assistance of the Government) has repealed the said act and therefore formally ended the state of danger, at the same time enacted an amendment of the Health Act with the introduction of another kind of quasi-emergency situation the 'state of medical emergency.' Then the Government declared a state of danger again using the Fundamental Law's 'special legal orders' mechanism with Act I of 2021 for 90 days again, however – as we've explained – it has been prolonged until September 2021 but the Act is not observant of minimal legislative requirements and therefore not comply with the rule of law. It seems that abusive constitutional issues – such as formal legality – are not important anymore and because of the uncontrolled state of the decisions – which are actually the decisions of the prime minister itself –, the Government is above the rule of law. Between 2010 and 2020 autocratic legalism determined the ordinary legal order while the permanent state of emergency was gradually occupied the law itself. Although formal restrictions seemed important for the Government to present the 'façade of rule of law' to cast a chill over the critics from an international level, especially to demonstrate the existence of it for the European Union, but the pandemic and constantly evoked (or prolonged) state of danger without valid constitutional authorization showed that unconstrained political power is more important than demonstrating that 'legality' is still alive in Hungary.

These are clear signs suggesting that the threshold between emergency and normalcy has faded. The Government is systemically using emergency powers as ordinary everyday authorizations for what it does, instead of replying sparingly on the emergency powers provided for in the Fundamental Law which have built-in protections against abuse. It seems that the Hungarian Government's response is perhaps the most extreme example of executive overreach[123] in the pandemic. One can hardly figure out which actions taken by the Government are 'ordinary' and which are 'emergency' measures. [124] Through real and quasi-state of emergencies, the government has yet become the supreme and sole power of the political nation.

The Hungarian 'Special Legal Orders' are not open-ended, but the government neglected the constitutional guarantees. It is an important question that why the government with its two-thirds majority in Parliament enacts new so-called emergencies instead of using the Fundamental Law's special mechanism? Or why they are using emergency measures for an indefinite period as we have seen during the COVID-19 pandemic. This government is loudly proclaiming that it is committed to the rule of law, so this situation of growing numbers of unconstitutional states of emergency must be remedied.

It also seems that this story is not just about the misuse of emergency measures but about the abuse of rule of law. Most importantly the government stated many times that the rule of law

[121] Gábor Mészáros, "Rethinking the Theory of State of Exception after the Coronavirus Pandemic? – The Case of Hungary", *Regional Law Review,* Ius Nullo Continetur Loco, Belgrade, 2020, 91-100.
[122] See: Halmai-Mészáros-Scheppele *So it….*
[123] Kim Lane Scheppele – David Pozen, "Executive Overreach and Underreach in the Pandemic" in *Democracy in Times of Pandemic – Different Futures Imagined*, Miguel Poiares Maduro and Paul W. Kahn (eds.), Cambridge University Press, Cambridge, 2020, 38-53.
[124] Halmai-Mészáros-Scheppele, *So it goes...*

mechanism is false because there are various meanings of this phenomenon. This is the main reason why they were amending the constitution nine times till now; implementing emergency measures into ordinary acts; or upholding the Constitutional Court which is fully engaged for the Fidesz party etc. It seems that it is more important than anything else to strengthen their political power as soon as possible and it is not a problem that it means that extra-legality is becoming the norm. In a European level it means that the reference on rule of law by today is formally also invalid because the government don't respect their own constitution and their own theory on the rule of law.

What the Government is doing in the name of 'handling the emergency' – as we have seen – includes various unconstitutional measures, which means that the Government itself breaches his 'own' Fundamental Law, this is the reason why we are talking about the phenomenon of 'rule without law' instead of abusive constitutionalism or rule by law. According to Article 54 (par. 2) of the Fundamental Law the application of it may not be suspended under a special legal order (nor may the functioning of the Constitutional Court be restricted). Furthermore paragraph 3 of the same Article declares that if the conditions for declaration of any special legal order no longer apply it shall be terminated by the body competent to introduce it. It is a widely accepted criterion toward state of emergencies which is determining the institution till the Ancient Romans.[125] The constitutional concerns surrounding the Enabling Acts and latest amendment of the third means at least two things: firstly, the Hungarian abusive permanent state of emergency is basically a pre-emptive one, although it is prohibited in constitutional democracies[126]; secondly by prolonging the exception for an indeterminate period, not just contrary to the rule of law, because of vagueness, but it is equal with dictatorial exercise of power. This is also against the Fundamental Law itself because according to Article 54 when the special legal order no longer apply it should be terminated. The only constitutional reading of this provision is that the declaration itself and the special emergency measures/decrees also must be terminated. The Enabling Acts are unbefitting with the rule of law, the governments' decrees are clear signs of 'rule without law', which in this context means that the emergency legislation lacks constitutional entitlement.

[125] The most important requirement is that "*special legal order and the restrictions on fundamental rights should not last longer than necessitated by the conditions which triggered the declaration of emergency and should aim to restore constitutional normalcy*". See: Sajó – Uitz, *The Constitution*…, 431.
[126] Greene, *Permanent*..., 25.

3) THE JUDICIARY

The Hungarian judiciary during the two decades of democracy building took relevant steps in learning autonomous professional behavior, but the period of dismantling democracy that came after clearly shows the inadequacy of stabilizing these steps. The authoritarian political pressure significantly influences the working conditions of judges. Due to the lack of a solid culture of integrity, resistance against illegitimate acts of court leaders, attacks by governmental media, open blaming by politicians has remained weak. As part of the research project under which this report is written, we have covered the question of judicial independence at more depth (Paper V), here we are focusing some key elements that demonstrate how, in this field, developments in the past decade have been undermining the functioning of constitutional democracy.

From the very beginning, the intent of the Orban regime was clear: to diminish all the autonomies necessary for a balanced constitutional system of separation of powers and working checks on the executive. The political reshaping of the justice system established during the so-called peaceful post-communist transformation took place under several waves in the post-2010 period. It began with radical steps such as the complete overhaul of the Constitutional Court (see paper IV), the early termination of the mandate of the President of the Supreme Court (Curia), the forced retirement of hundreds of senior judges, and the introduction of a new, centralized model of court administration. The process of containing the judiciary has covered softer, less visible tools as well, but as the authoritarian project unfolded, further measures were needed. The attacks against judicial independence reached its peak very recently by taking almost full control over the Supreme Court by packing it with tried loyalists.

The fate of the two highest judicial organizations shows the strengths of the third power for the public and pushes all judges towards loyalty. Similarly, forcing a large number of judges into early retirement in 2012 was a clear message for the judiciary that the traditional guarantees of independence do not work. It is symptomatic, that this political action did not provoke any collective resistance within the organization, rather gave way to individual desires for promotion. Nevertheless, this does not mean that individual judicial independence has been totally destroyed. Despite the non-rule of law environment, a high proportion of court decisions even in politically relevant cases preserved the professional quality and independence. Likewise in other modern non-democracies.

The most spectacular and impressive institutional change in the Hungarian judicial administration was the introduction of a new model of judicial administration. Based on the really unfortunate experiences of the unbalanced and oligarchic judicial council model established in the middle of the 1990's, the Orbán-regime enacted a strongly hierarchical, one-person central administration system with fading self-administration. The National Judicial Council cannot control the activities of the President of the National Judicial Office elected by the Parliament. This way of election and the strong position of the President of the Office paved the way for political influence on the judiciary. The first President (Tünde Handó) confirmed the fears concerning the new model and fulfilled the political expectations of the Fidesz-KDNP government by selecting loyal court leaders and creating an aura of hierarchical opportunism. The tensions and malfunctions of central administration are structural in nature, so the change of the person of the President of the NJO in 2020 was insufficient to rectify the deficiencies of the system and could only treat the obviously hectic way of administration. The highly questionable process of selecting and appointing court leaders, which is the constant source of tension between the Office and the Council, has not change. Tünde Handó was heavily

criticized for the practice of annulling calls for application for leadership positions.[127] This power of the President was used regularly by Handó to circumvent the opinion of the judicial staff or the NJC and appoint interim court executives without the control of any judicial body. György Senyei, the incumbent President of the NJO has also used the option of annulling application procedures on numerous occasions. Only in 2020, this happened in 20 cases, including application processes in which the plenary session of the judges or the judicial college supported the applicant.[128] The strong political loyalty of court presidents to the ideology of the Orbán-regime has recently manifested in supporting the symbolic action of displaying the socially divisive Preamble of the 2011 Fundamental Law (National Avowal) in court buildings, in September 2021, upon the request of the government,[129] in the wake of the political campaign for the 2022 parliamentary elections.[130] Mr. Senyei has also demonstrated his political loyalty to the current political regime in several ways. As it was stated above, he has already used his power several times to annul calls for application and appoint senior court officials at its own discretion. Furthermore, he has so far failed to speak up and defend the judicial organization against outright governmental attacks. Also, he is reluctant to cooperate effectively with the judicial self-governing body.[131] The first years of Senyei's mandate has demonstrated that the problems of court administration are structural and systematic in nature and the current political regime is never mistaken in appointing reliable staff.

The political selection of leaders prevails in the appointment of court presidents, by now all the presidents have been replaced. Traditionally court leaders have enormous influence on the organizational culture, in enforcing judicial adaptation patterns by administering the ordinary framework of judicial activity. Judicial self-government (the National Judicial Council) has a weak position in the eyes of the judges, in this system self-governing does not seem effective in any sense. The two purest signs of neglecting the opinions and actions of the Council were the non-action of the Parliament after the motion of the Council which initiated the removal of Handó in 2019 and the election of Andras Zs. Varga as President of the Supreme Court despite of the almost unanimous rejection of the candidate by the Council. The only positive vote in

[127] See for instance, Hungarian Helsinki Committee, Attacking the Last Line of Defence – Judicial Independence in Hungary in Jeopardy, 15 June 2018, or see the Report on the fact-finding mission of the EAJ to Hungary, issued by the European Association of Judges in May 2019, the report is available: https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-EAJ-Hungary.pdf.

[128] Eötvös Károly Public Policy Institute: Judicial Independence and the Possibility of Judicial Resistance in Hungary, 2021, http://ekint.org/lib/documents/1612860445-EKINT_Judicial_Independence_and_the_Possibility_of_Judicial_Resistance_in_Hungary.pdf

[129] Government Decision no. 1543/2021 (VIII. 4.) on displaying the National Avowal in public premises

[130] See the joint action of the President of the Curia and the Prosecutor General on displaying the Preamble of the Fundamental Law in the Justice Palace where the Curia and the Office of the Prosecutor General are placed. available at https://kuria-birosag.hu/sites/default/files/sajto/2021.el_.i.a.7._kozos_lu-kuria_intezkedes_3.pdf Hungarian media reported about similar actions taken by court presidents all over the country. See https://telex.hu/belfold/2021/09/16/a-kormany-csak-kerte-megis-engedelmesen-kiteszik-a-nemzeti-hitvallast-a-magyar-birosagok-falara

[131] For instance, Senyei failed to act upon the motion of the NJC and initiate legislative amendment to the highly contested law which allows for justices of the Constitutional Court to request judicial appointment without participating in any application procedure. Recently, the NJC issued a warning and called on the President of the NJO to give access to those documents and information that help the council to perform its task of supervision over the President. Furthermore, the President still does not provide the possibility for the NJC to use the central website of the judiciary in order to share the contents about the activity of the council with the judicial organization and the public. The website of the NJC is still financed by the members of the council instead of being financed from the budget allocated to the NJC.

the NJC, characteristically came from the "ex officio" member of the council, the former President of the Curia.

Judges and the general public perceive that the critics and actions of the European institutions are insufficient to modify the will of the power, there is no helpful outside pressure on the government to stop dismantling judicial independence. The famous Baka-verdict did not change the positions of the newly nominated leaders, retired judges have lost their positions for long. The Rule of Law Reports issued by the European Commission are without any effect, and the mood of administration did not change. As we could learn from the case of Judge Vasvári, recalcitrant judges can be subject to various forms of administrative pressures.[132] A recent story of a junior judge (appointed for a fixed 3-year term) shows that judges can face even dismissal from office for their judgments unfavourable for the government.[133]

The only spectacular reversal of power was the withdrawal of the plan of establishing a special administrative court system with a separate top court (Supreme Administrative Court) in late 2019. But the political aims of capturing the ordinary judiciary and exerting control over adjudication in politically sensitive cases have remained and have been reached differently. The plan to disempower the Supreme Court by transferring administrative lawsuits to specialized courts and hence making the unified court system into a fragmented one was dropped. Instead, the government decided to empower the Supreme Court by conferring significant new powers on it and gain full control over it by highly politicized nomination procedures primarily in leading administrative positions. Accordingly, the late 2019 omnibus act introduced new tools, the so-called *limited precedent system* and the *uniformity complaint procedure* in order to strengthen the role of the Curia and make the ordinary court system more hierarchical by centralizing and homogenizing adjudication. These tools significantly restrict judicial discretion and curb the decision-making autonomy of judges. Due to the limited precedent system, lower courts must follow the published decisions of the Curia and justify any deviation from the interpretation of the top court. Furthermore, the judgments of the Curia can also be challenged in a uniformity complaint procedure in which a special panel of the Curia led by the President or Vice-President can decide and even repeal the challenged judgment and give mandatory interpretation on questions of law.

Besides, as a result of individual appointments, key positions have been filled by persons loyal to the government. The new President and Vice President of the Curia arrived from outside with very little or no judicial experience in the ordinary court system. Tailor-made laws helped them to fill their judicial office and their previous public offices and statements indicate that they are close allies of the current regime.[134] These court executives do not only have strong managerial powers within the top court, but they can exert significant influence on the jurisprudence of the Curia by adjudicating on politically sensitive cases (for instance in cases on freedom of assembly or on electoral cases) and by presiding over uniformity complaint procedures. Also

[132] Petra Bárd, The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS, *VerfBlog*, 2021/11/26, https://verfassungsblog.de/the-sanctity-of-preliminary-references/, DOI: 10.17176/20211126-215840-0.

[133] Gabriella Szabó was dismissed from her office as a result of the professional evaluation which found her not eligible for judicial service. Szabó filed a complaint with the European Commission claiming that her dismissal was likely to be politically motivated as in 2018, Szabó submitted a request for preliminary ruling to the CJEU challenging the Hungarian asylum legislation which in 2020 was found in breach of EU law by the EU court.

[134] See the analyses of the Hungarian Helsinki Committee on these two appointments: the https://helsinki.hu/en/an-illiberal-chief-justice/; https://helsinki.hu/en/yet-another-government-friendly-judicial-leader-at-the-supreme-court-of-hungary/

in 2021, a new administrative judge was appointed to the Curia who previously served as chief of staff and state secretary in the Ministry of Justice and had no previous professional experience either.[135]

Some recent examples taken from the jurisprudence of the Supreme Court clearly underlies the effectiveness of these governmental measures: the practice of the top court is becoming increasingly distant from the "old", rule of law compliant case-law, especially in cases concerning political rights such as freedom of speech, press freedom, freedom of assembly or referendum cases.[136] These developments are extremely worrying considering the increasingly centralized role of the Supreme Court within the ordinary court system, and also in light of the 2022 general elections.

[135] https://hvg.hu/itthon/20210601_Biro_hajas_barnabas_volt_igazsagugyi_allamtitkar

[136] See for instance Petra Bárd, The Tóta W. / HVG controversy: The Hungarian Supreme Court's judgment limiting freedom of expression, *Reconnect*, April 6, 2021, available at https://reconnect-europe.eu/blog/the-tota-w-hvg-controversy-the-hungarian-supreme-courts-judgment-limiting-freedom-of-expression/. See also Ábrahám Vass, Supreme Court Rules Against Gov't-Critical Klubrádió over 92.9 Frequency, *Hungarytoday*, September 29, 2021 https://hungarytoday.hu/supreme-court-govt-critical-klubradio-media-authority-press-freedom-92-9-frequency/; and Péter Cseresnyés, Hungary's Top Court Greenlights a Gov't 'Child Protection' Referendum Question, *Hungarytoday*, November 9, 2021, https://hungarytoday.hu/hungarys-top-court-greenlights-a-govt-child-protection-referendum-question/

4) ACADEMIA

The legal and academic community has traditionally been playing an important role in the public discussion on constitutional guarantees required in a democratic society.[137] As developments from Brexit to the Trump presidency have shown, the importance of the legal profession is augmented in the face of new challenges. In Hungary, questions on sustaining constitutional guarantees have been resurfacing for the past ten years while the conditions of academic discussion and independent research have been deteriorating. This has had a deteriorating impact on public discussions more generally. This section documents the state of academic freedom, the context in which constitutional scholars (and many others) work in Hungary.[138] Full disclosure: the authors are working in this field and experienced several of the described events personally.

The summary here cannot go beyond some key examples that illustrate the trend of the shrinking space for critical academic and, more closely, public law discourse.[139] Studying this field yields some insights relevant for the state of Hungarian democracy in general. First, takeover and cases of blatant censorship are but the tip of the iceberg. Less visible is the transformation of attitudes that avoid topics deemed to be politically sensitive or outright conformity with the official line in public law writings and the loosening of academic standards to the benefit of political loyalty in funding and promotion. We should note that Hungary is not Turkey[140] or Russia.[141] Yet, the logic of less severe violations, in comparison, are also detrimental to academic freedom as they send out strong messages to scholars. Due to extreme centralization, the meager chances of change in government and the anti-pluralism of the regime, violations of academic freedom and the effects of censorship radiate effectively, increasing the sense that voicing concerns based on professional ethical convictions does not pay off, and it might take unusual courage to try to maintain basic ethical standards.

1) The Politics of Censorship, Pressure and Discreditation

High-profile cases in addition to less publicized but widely rumored cases of retaliation for voicing criticism of the government has led to a chilling effect.[142] This atmosphere, unsurprisingly, also weighs heavily on academic speech.

A documented case of censorship at the largest countryside university, in Debrecen (the institution that granted honorary title to Russian premier Vladimir Putin) did not trigger any institutional or personal response from the academic or the wider community in the country. An author of this paper, a researcher active in research on judicial independence had a paper accepted in *Pro Futuro*, the journal of the Debrecen law school. Facing threatening messages relayed through university leadership, the editors decided not to publish the article that

[137] Liora Lazarus, "Constitutional Scholars as Constitutional Actors," *Federal Law Review* 48, no. 4 (December 1, 2020): 483–96, https://doi.org/10.1177/0067205X20955056.

[138] Part of this overview overlaps with the account given by one of the authors of this paper in Zsolt Körtvélyesi, "Fear and (Self-)Censorship in Academia," *Verfassungsblog* (blog), September 16, 2020, https://verfassungsblog.de/fear-and-self-censorship-in-academia/.

[139] For more on the topic, see, e.g. Petra Bárd, "The Rule of Law and Academic Freedom or the Lack of It in Hungary," *European Political Science* 19, no. 1 (March 1, 2020): 87–96, https://doi.org/10.1057/s41304-018-0171-x; Gábor Halmai, "The End of Academic Freedom in Hungary," Billet, *Droit & Société* (blog), October 21, 2019, https://ds.hypotheses.org/6368. https://verfassungsblog.de/aux-armes-comediens/; http://mek.oszk.hu/20200/20273/20273.pdf

[140] https://eua.eu/news/288:academic-freedom-in-turkey-eua-calls-for-exoneration-of-academics-facing-prison.html

[141] https://freedomhouse.org/article/russia-rules-academic-meetings-undermine-freedom-and-scholarship

[142] https://hclu.hu/en/articles/criticism-of-public-officials-is-a-right-and-a-duty-1

documented the dangers the appointment procedure poses to judicial independence.[143] (The text was made available as a working paper, noting the rejection of the publication on non-academic grounds.[144]) The blatant violation was carried out by the institution itself, leaving no hope for remedies in the form of an ethics procedure. The journal is still recognized as an academic journal by the Academy of Sciences, in the highest tier.

Also in Debrecen, Péter Kakuk, a lecturer was not promoted after passing the habilitation, as is the rule, because he agreed to be interviewed by a TV channel as a speaker in a demonstration showing solidarity with Central European University. Most cases are likely to happen to informal ways, indicating to academics that engagement in politically sensitive cases can lead to consequences in their academic career.

Századvég, a social science journal close to the government but positioning itself as an academic journal was taken over by close loyalists and the last issue before the takeover was revoked from the press. A leaked version of the issue was widely circulated afterwards, including a piece from a prominent right-wing economist, Péter Ákos Bod, about rent-seeking in the Hungarian economy.[145]

Last year, Andrea Kozáry, a long-time professor who had been teaching police students was fired after she voiced criticism on the cancellation, for political reasons, of an international conference that the university – the National University of Public Service – had earlier accepted to host. The topic was hate, including anti-LGBTQI and anti-immigrant crimes,[146] apparently inconvenient topics in the current political climate.[147] At the same program, another colleague, Ferenc Krémer was fired years earlier for more directly political reasons, according to his account, for voicing criticism of the government in the media.[148]

Many researchers voicing criticism are, as part of a smear campaign, publicly labelled 'Soros agents/mercenaries', a particularly disingenuous allegation denying agency and moral integrity.[149] One colleague, Márton Bene managed to win a court case against such labelling,[150] but most will try to avoid the spotlight that comes with research on sensitive topics.

Individuals and institutions show signs of understanding the message. Entities with probably less than direct connections to the government also show signs of understanding illiberal requirements. A right-wing think tank named after the first democratically elected prime minister fired a researcher, Boglárka Szert, in 2017, for liking a Facebook post that opposed

[143] Halmai, "The End of Academic Freedom in Hungary."
[144] https://jog.tk.mta.hu/mtalwp/ki-vedi-meg-a-magyar-birosagok-fuggetlenseget-szemelyzeti-politika-a-kozponti-igazgatasban
[145] https://index.hu/belfold/2018/09/24/egy_kormanykritikus_tanulmany_miatt_bevontak_a_szazadveg_folyoiratot_lemondott_a_szerkesztobizottsag/
[146] https://24.hu/belfold/2019/10/29/nke-tanar-kirugas-kozary-andrea-konferencia/
[147] In a comparable case, the now-defunct Equal Treatment Authority found the decision of the University of Debrecen to ban an LGBTQI event discriminatory. https://www.egyenlobanasmod.hu/hu/print/pdf/node/1420; http://en.lmbtszovetseg.hu/hirek/equal-treatment-authority-fines-hungarian-university-for-banning-lgbtqi-roundtable
[148] https://168ora.hu/itthon/nem-turhetjuk-szotlanul-63747
[149] https://hvg.hu/itthon/20180709_Sorosugynokozi_a_kormanymedia_az_akademikust_csakhogy_mar_egy_eve_nem_is_az_MTAn_dolgozik; https://www.origo.hu/itthon/20200421-world-justice-project-jelentes.html
[150] https://www.helsinki.hu/jogerosen-marasztaltak-el-a-figyelot-a-megragalmazott-kutato-ugyeben/

government plans of Olympic games in Budapest. This was one of the few cases where the retaliation was publicized and fought. The dismissal was later found discriminatory in court.[151]

The effect is clear, most scholars 'get the memo' and many think twice before wandering to 'dangerous' territory and most would think over the risks. In addition to targeting individuals, often entire field, programs or institutions are targeted.

Discrediting fields of sciences, especially in social sciences, is an important part of the political repertoire. Social scientists were attacked by Tamás Freund, a prominent researcher and academician who voiced his support for the government. He criticized those social scientists who "are not producing real value", "continue corrupting the public and the youth" and who get published internationally only because they are critical of the government.[152] This would include practically all public law scholarship that discusses populism, illiberalism etc. The comment of the now-president marks an important move to delegitimize social sciences and critical thinking in general as ideologically tainted (and motivated), not meriting the academic title or public funding. The complaint was made in a leaked letter sent to the prime minister, criticizing government plans to rid the Academy of its research institutes. Drawing the moral of the story, the majority of the voting members of the Academy moved to elect this person as the new Academy president.[153]

Gender studies was outlawed by government order.[154] The ban was combined with smear campaigns in pro-government media against people working in the field. This included making a researcher's private address public (in a reader's comment to an article questioning the academic quality of the program) which led to a sense of threat and concerns about the safety of the family home. In the field of economics, an earlier, less bold attempt to divert an academic field to terrains more friendly of government positions was spearheaded by foundations established by the National Bank[155] headed by the former finance minister in the Fidesz government.

Corvinus, the leading economics university, that was privatized recently in a way that increases government control, quickly started a family policies program. A similar privatization led to the current crisis around the taking over of the University of Theatre and Film Arts,[156] followed by the resignation of its management and students blocking access to the building in protest.[157]

2) Institutional Transformations

The fate of Central European University is well known: it was ousted by a move that is considered a violation of EU law in the opinion of Advocate General Kokott.[158] The Hungarian government sent mixed messages concerning the ousting of CEU, an institution founded by George Soros (American philanthropist and widely known and often criticized investor of Hungarian-Jewish origin). The government engaged in a double speech: One line of argument

[151] https://www.helsinki.hu/jogeros-jogserto-volt-szert-boglarka-kirugasa/
[152] https://mta.hu/mta_hirei/freund-tamas-a-miniszterelnoknek-irt-levelrol-110080
[153] https://mta.hu/mta_hirei/freund-tamas-a-magyar-tudomanyos-akademia-uj-elnoke-bemutatjuk-az-uj-vezetoket-110704
[154] https://www.insidehighered.com/quicktakes/2018/10/17/hungary-officially-ends-gender-studies-programs
[155] https://hvg.hu/gazdasag/20140827_MNBalapitvanyok_mire_megy_a_csendben_kiu
[156] https://verfassungsblog.de/aux-armes-comediens/
[157] https://www.reuters.com/article/us-hungary-politics-education-theatre/heads-of-hungarys-top-arts-university-quit-amid-fears-of-state-control-idUSKBN25R264
[158] http://curia.europa.eu/juris/document/document.jsf?text=&docid=224125&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=15433962

was that the university simply had to comply with general requirements of functioning in Hungary, and Lex CEU was merely about establishing equality. The other narrative was the anti-Soros propaganda, combining international and domestic issues from migration, loans, rights advocacy, civil society, opposition forces, and anti-Semitic tropes with a greedy banker operating a hidden international network. While one or the other might be logically true (but not factually), it is hard to maintain both arguments at the same time: if the attack is ideological, it is not a neutral enforcement of fair standards. In any case, the move inflicted great harm to Hungarian academia.

The research institutes operating within the Academy of Sciences, comprising the leading research body in Hungary, were put under the control of a new entity with increased government control.[159] Few are convinced that the elimination of normative funding for ex-Academy research institutes do not raise the threat of ideological filtering, even if the pill is sweetened with the promise of more funding overall. The autonomy of the National Scientific Research Fund had been curtailed by a 2014 law,[160] but it was only recently that direct political control was put into effect, a first in the 35-year history of the Fund. The Ministry of Innovation and Technology overruled the decision of the life sciences expert jury, which triggered the resignation of László Acsády, the president of the life sciences college in protest.[161] As a result of the ministry's interference, a proposal evaluated by the jury as the weakest is now listed among the applications selected for funding. The president of the Academy of Sciences objected in a letter acquired by the media,[162] and research project leaders[163] (many of them ERC grantees)[164] signed public letters of protest. The minister responded that he is also an academic and he represents the welcome introduction of third-party remedy against jury decisions, and fought back by attacking people who leaked the changed list.[165]

The 2011 Fundamental Law weakened the earlier constitutional clause guaranteeing the autonomy of higher education, and a 2013 amendment further constrained the protection to allow increased government interference.[166] Under the 2011 law on higher education, the government got the power to select the rectors, which was used at times to override university decisions.[167] A prominent case included the appointment of the Debrecen rector in 2013, against a two-third support within the university senate for the alternative candidate.[168] Disregard for faculty support in the election of rectors and deans discourages many non-loyalists to even apply for positions, self-selection helping the practice of political appointments.

Soon after the mentioned amendment of the Fundamental Law the transformation of universities – which started with the Corvinus University in 2019 – from state-funded to private-

[159] https://www.nature.com/articles/d41586-019-00586-z; https://www.sciencemag.org/news/2018/07/hungarian-academy-president-vows-keep-fighting-independence-government-takes-control
[160] https://jog.tk.mta.hu/uploads/files/07_KortvelyesiZs.pdf
[161] https://24.hu/belfold/2020/08/31/kadar-rendszer-palkovics-belenyultak-otka-penzosztas/
[162] https://www.klubradio.hu/data/articles/113/1138/article-113847/Palkovics_Freund.pdf
[163] https://drive.google.com/file/d/1tV3yIPU3fCTvHTo3IjqrQdOV49l_r0vb/view
[164] https://drive.google.com/file/d/1PYdhQFNQdctjP0f2zT4gIIoMK0H5evR8/view
[165] http://www.atv.hu/belfold/20200910-palkovics-koszoni-szepen-freund-ebedmeghivasat-de-elobb-a-hasznos-dolgok
[166] The reference added in the fourth amendment to the Fundamental Law grants the government the power of supervision and "management": "The Government shall, within the framework of an Act, lay down the rules governing the management of public institutes of higher education and shall supervise their management." Last sentence of Art. X(3), https://www.kormany.hu/download/a/68/11000/The_Fundamental_Law_of_Hungary_01072016.pdf
[167] https://magyarnarancs.hu/belpol/rektort-valaszt-a-miniszter-84857
[168] https://www.dehir.hu/belfold/a-rektori-konferencia-valtoztatna-a-rektorvalasztas-szabalyain/2013/05/13/

funded model, accelerated. In January 2021, leading public universities, including the scientific universities with medical faculties like University of Debrecen, University of Szeged, University of Pécs and the leading medical school, SOTE (Budapest), were approached by the Ministry of Innovation and Technology. The institutions received an offer that was generally perceived as one that cannot be refused. In a matter of a few weeks, they had to make a 'choice' and decide whether they want to accept the government suggestion and transfer to a strange ownership structure: a private university controlled by a public foundation. While little was known about the plan, including crucial details like the competences and the composition of key bodies in the new structure, the message was clear: those who do not submit will face hardships while those opting for the plan are promised a wage increase. Many claim there was no real choice.[169] In fact, the Senates of the universities, without exception, decided as the government wanted. It is a symbolic example of the lack of clear concept of this so-called 'model change' is that the members of trustees at the University of Pécs foundation have just been announced during May, months after the Senate "decision" to become a private university controlled by public foundation.

Within these public foundations there is a great freedom for the founders to construct the structure of the body for its own benefits, however one may find few general rules for the audits. The most important body is the supervisory board which is established in the instrument of constitution by the founders. Its main task is to supervise the management in order to protect the interests of the legal person. The main problem with this construction is that the foundations are basically private law institutions, however it is evident that they are founded by the state and serves public interests. Because this private law nature the whole construction of the foundation based on the aim to protect the founders interest. Therefore, the audit's main function is to control the potential mismanagement of the body of trustees. In this model the state as a founder establish the public foundations with its instrument of constitution which latter is regulating the structure of the institution with the body of trustees (this is a board with politically appointees, with the domination of clear loyalists and often direct ties to the government, including ministers) and the supervisory body which task is to 'control' the management of the previous. This latter may have some tools to report the founder the malfunctions of the board, if the actions of this latter aggrieve the interests of the founder, but the audit is depending on the founder (state or more exactly the government). It is also important to note that the founder can designate the board of trustees to exercise the founder rights, or to transfer such rights to the trust. In this case the founder shall delegate a trust property administrator for the purpose of monitoring the exercise of such rights and the management of assets by the trust in accordance with the objectives set out in the statutes, independent of the trust's oversight body. Therefore, the story comes full circle: the delegates of the current government will be solely responsible for the management of the public foundations, formal privatization means that control by a future government, will be limited considerably over a decisive part of what used to be national universities. The state will have only one option to control the public foundation spending's: the public prosecutor has a right to check the legality of the functioning of a foundation. If he/she has concerns, it is possible to initiate various processes before the relevant court, but as we also asserted in another paper the prosecution service in Hungary has close ties to Fidesz.

[169] Tímea Drinóczi, Loyalty, Opportunism and Fear – The forced privatisation of Hungarian universities, *Verfassungsblog*, 5 February 2021.

While funding of academia is curtailed and remains low,[170] entities who are considered loyal to the government can benefit from generous funding. One of the lavishly financed institutions, the National University of Public Service was established by the regime (from the merger of earlier institutions including the police and the military academy), it is directly controlled by the government. It is favored not only financially[171] but also by creating monopolies by law[172] to secure enough students.[173] The institution was also exempted from general accreditation requirements.[174] The institution launched an emblematic research project, seeking to measure "good governance" in Hungary. It provides conclusions like the fact that the fall in decisions where the Constitutional Court finds incompatibility with the Fundamental Law "shows an improvement in legal security"[175] (against the mainstream view in academic circles which would hold that this is a result of the domestication of the institution). The research is financed by European Union funds.[176]

Alternative institutions, sometimes established explicitly to counter dominant narratives, are lavishly funded: the Veritas Institute (for presenting "true history"), Ferenc Mádl Institute (for comparative law studies), Institute for Hungarian Studies (researching "Hungarianness"), Research Institute for National Strategy (for reuniting the nation divided by state borders), Mathias Corvinus Collegium and its Migration Research Institute (co-founded by Századvég Foundation mentioned in my previous post), to name a few. Governments are of course free to establish research institutes. A crucial question is whether they live up to their stated academic credentials or act more like GONGOs that invade the NGO sphere. The minister of justice announced plans to create a V4 comparative law institute with the goal of representing the specific regional view in important topics of public law and European integration.

3) The Challenge for European Institutions

While the problems described are primarily internal and require internal responses, a couple of issues also arise for the European context. In Europe, there is a general assumption of academic legitimacy where the title indicates that it is an academic institution. Just in the case of the mutual recognition of court judgments and administrative decisions, this assumption is less and less warranted. Granting bodies and cooperating institutions should be aware that not all research institutions and universities that look like one in fact operate under commonly accepted academic standards. People working in academic positions might be less than willing to carry out the independent work that they are usually assumed to do.[177] As a result, the impact of

---

[170] István Polónyi, A hazai felsőoktatás elmúlt 10 évének néhány gazdasági jellemzője [Selected economic features of national higher education in the past ten years], http://unipub.lib.uni-corvinus.hu/3302/1/MF_2008-2017.pdf, p. 96, Figure 10, in A magyar felsőoktatás egy évtizede 2008 – 2017 [A decade of Hungarian higher education 2008 – 2017], Kováts Gergely & Temesi József (eds.), Budapest Corvinus Egyetem [Budapest Corvinus University], Nemzetközi Felsőoktatási Kutatások Központja [Center for International Higher Education Research], 2018.

[171] According to a 2017 per-student calculation, the institution receives four times the average public funding. https://index.hu/belfold/2017/09/23/meg_tobb_penzt_kap_orban_viktor_kedvenc_egyeteme/ and https://magyarnemzet.hu/archivum/belfold-archivum/omlik-a-penz-a-kozszolgalati-egyetemnek-3863670/

[172] http://eduline.hu/felsooktatas/Jovo_osszel_indul_a_nagy_tiltakozast_kivalt_E1CD2C

[173] To be fair, some of these monopolies were inherited by the university when it merged the formation of police and military forces. The creation of 'state sciences', however, was widely seen as a threat to law schools. http://old.mta.hu/data/cikk/13/65/20/cikk_136520/9_osztaly_allasfoglalas_20150617.pdf

[174] https://oktatas.atlatszo.hu/2015/06/09/a-kozszolgalati-egyetem-privilegiumai-i/

[175] https://joallamjelentes.uni-nke.hu/2019_pages_PDF/Jo_Allam_Jelentes_2019_Elso_Valtozat.pdf, p. 25.

[176] https://index.hu/gazdasag/2017/10/25/jo_allam_jelentes_2017/

[177] As in the case of the dismissed editorial board cited earlier, the new goal is "to support the government line". https://index.hu/belfold/2018/09/24/egy_kormanykritikus_tanulmany_miatt_bevontak_a_szazadveg_folyoiratot_lemondott_a_szerkesztobizottsag/

illiberalism might raise questions in academic cooperation. Standards of care and conditionality might need to be updated to respond to the changing landscape. If not else, this might take place by the decision of peers: other European institutions and researchers now have to look more closely what hides behind the academic label.

Fundamental goals of European research funding and cooperation can be undermined when spent in settings that do not meet basic academic standards in terms of independence. Decisions like the Fundamental Rights Agency holding a conference on a fundamental right at the National University of Public Service[178] might require further justification. Programs that support researchers "in exile" or call attention to academic censorship can be instrumental in the struggle for independent research. We have seen European responses to violations of academic independence in the past: the European Association for Quality Assurance in Higher Education expressed concerns about the independence and funding of the Hungarian Accreditation Committee and denied renewing its membership.[179] (The membership was later reinstated after a report based on international scrutiny.[180])

[178] https://fra.europa.eu/en/event/2020/data-protection-handbook-translation-launch

[179] http://old.mab.hu/web/index.php?option=com_content&view=article&id=467:hac-enqa-membership&catid=95&Itemid=667&lang=en

[180] http://old.mab.hu/web/index.php?option=com_content&view=article&id=661:hac-full-member-of-enqa&catid=95&Itemid=667&lang=en

5) REGULATION OF THE MEDIA AND THE PUBLIC AFTER 2010

Here we present the most important developments regarding the controlled media landscape from the past decade. A detailed discussion on these measures, prepared in relation to the same project, can be found elsewhere.[181]

1) Impact of the 2010 media laws

Legislation on media law started shortly after the elections, in the summer of 2010: on 22 July Parliament adopted the amendment to the old media law, Act I of 1996 on Radio and Television Broadcasting. This amendment abolished the former media authority, the National Radio and Television Board, and created the Media Council in October 2010. On 11 October, the members of the Media Council were elected, exclusively from Fidesz candidates. Annamarária Szalay, who passed away in 2013, was elected chair of the nine-year board and was replaced by Mónika Karas. The first members of the Media Council were János Auer, Tamás Kollarik, András Koltay and Ágnes Vass.

The new media laws were adopted later by the Parliament: on 2 November 2010, Act CIV of 2010 on Freedom of the Press and the Basic Rules of Media Content (Smtv.) and on 21 December 2010, Act CLXXXV of 2010 on Media Services and Mass Communications (Mttv.).

The media laws adopted in 2010 - Act CLXXXV of 2010 on Media Services and Mass Communications (hereinafter Mttv.) and Act CIV of 2010 on Freedom of the Press and the Basic Rules of Media Content (hereinafter Smtv.) - have brought the issue of media freedom in Hungary to the centre of domestic and international debates.

The two laws underwent a few amendments in 2010 and 2014, which did not make any conceptual changes and did not affect the essential points, and with which the Fidesz majority met the very moderate objections of the European Commission (2011), the Constitutional Court[182] (2012) and the Council of Europe[183] (2013). Having regained – albeit temporarily – a two-thirds majority in the 2014 elections, Fidesz completed the restructuring of the public media,[184] merging the formally independent public media providers in a system that had been highly centralised since 2010, while at the same time handing over all power to MTVA. Despite the Venice Commission's comprehensive criticism of Hungarian media regulation in 2015,[185] which essentially found all aspects of the media laws incompatible with freedom of the press, the Hungarian legislator did not consider a further amendment necessary. In February 2015, Fidesz lost its two-thirds majority and with it the possibility to shape the media laws as it saw fit, and media regulation was taken off the legislative agenda.

The two-thirds majority in 2018 was mostly used by the governing parties to fine-tune the regulation of frequency tenders and media concentration, and to bring the media law into line with other legislation that discriminates against homosexuality. A key change is that the limits to market concentration in the radio market have been effectively removed. While until 2019, a single operator could acquire up to 12 local or 4 local and 2 regional radio stations, since August 2019 it can now operate up to 19 local or 4 regional and 7 local radio stations. This

[181] Mérték Media Monitor, Media Landscape After a Long Storm – The Hungarian Media Politics Since 2010, December 2021, https://mertek.eu/wp-content/uploads/2021/12/MertekFuzetek25.pdf
[182] https://mertek.eu/2012/05/02/lepeskenyszer-javaslatok-es-elvarasok-a-mediatorveny-modositasahoz/
[183] https://mertek.eu/wp-content/uploads/2016/12/letter_hungarian_ngos_media_ce_2013.pdf
[184] https://mertek.eu/2014/11/28/kozszolgalati-legvarak/
[185] https://mertek.eu/2015/07/08/rajtunk-a-vilag-szeme-a-sajtoszabadsag-magyarorszagi-helyzetenek-kulfoldi-ertekelesei/

means that there is no obstacle for an operator to obtain national coverage as a network of local radio stations.

In December 2019, after the Fidesz faction had blocked the nomination process a few months earlier, the National Assembly once again elected only Fidesz candidates to the Media Council, this time until December 2028. The current members of the Media Council are László Budai, Ágnes Hankiss, László Meszleny and Károly Szadai. Their professional experience is negligible even compared to the previous board, but they have a significant political background.

Based on the Digital Switchover Act adopted in 2007 - with the joint support of MSZP and Fidesz - the digital switchover was completed on 31 October 2013, two years behind the deadline set in the Act. Antenna Hungária, the operator of the digital terrestrial television platform, was bought back by the Hungarian state from the former French investor in May 2014. This also means that the composition of the digital terrestrial television packages depends on the unregulated and uncontrolled decisions of a state-owned company. This was the reason why the newly created channels of the TV2 Group, which belonged to Andy Vajna, were included in MindigTV's free package in 2016, and at the same time Antenna Hungária removed Euronews from the package. In 2021, the majority ownership of Antenna Hungária will be transferred to 4iG Nyrt - the transaction is still pending at the time of closing the manuscript - and thus, even after a possible change of government, Fidesz-affiliated business circles[186] will decide on the digital terrestrial capacity (as well as the entire government telecom infrastructure).

The importance of media laws in 2014 is summarised in the following points[187]:

- "Without the media laws, there would be no Media Services and Asset Management Fund (MTVA) and public service broadcasting would not have reached the low point it has reached in recent years. It is clear that the operation of public service media, especially television, has lost very little of its quality, credibility and audience, but what it could have lost, it has lost. Servilism, dilettantism, wastefulness, programming failures - no one has ever managed to perform so badly with so much money. In reality, the apparent independence of public media services only makes the operation of the all-powerful MTVA, whose head can be appointed and removed at will by the President of the Media Council, and over whose operation there is no social control, more confusing and opaque.
- Without media laws, there would be no centralised news service, which seriously undermines the diversity of information in the media system as a whole. The news centre has been an important tool in the transformation of public service institutions into a propaganda machine, while it has made competition in the news agency market impossible through free news services and has been very effective in promoting government messages in the commercial media.
- Without media laws, it would not be possible to access basic information on the functioning of the media system without an endless series of lawsuits, from the way media service fees are calculated and, in the case of national radio and television, the

[186] https://magyarnarancs.hu/belpol/a-csendes-magyar-115951
[187] https://mertek.eu/2014/07/15/foglyul-ejtett-media-mediapolitikai-irasok-3/

extent to which fees are reduced, to the reasons for using radio frequencies for public service purposes and the broadcasting contracts of public service media providers, to the principles of allocating public funds to support public service media. The closed nature of the Media Council and the MTVA is the main cause of the lack of transparency. No one can see into the operation of these institutions, either from the outside or from the inside, who could restrict Fides in the implementation of its political will.

- Without media laws, the print and online press would still not be under the control of the media authorities, and the adoption of co-regulation would not have forced it to publicly legitimise media law provisions that would have at least limited its operations to a precarious framework, in order to avoid the threat of fines. The real purpose and result of the regulation of media content and the prospect of tens of millions of euros in fines for newspapers and news portals is to keep journalists, editors and, above all, media owners in a state of permanent uncertainty. Fidesz was well aware that the media law, then several sections of the new Civil Code, the tightening of criminal law adopted within days because of the faked Baja election video, or even the attack on freedom of information, could have the desired effect as an unrealised threat in the state of journalism and the media market in Hungary. Where every third journalist admits to having withheld or distorted information in order to avoid negative consequences, where these journalists lose their jobs and face total existential insecurity, where industry players say in public professional forums that commercial advertisers faithfully follow state advertising, exposing the not (sufficiently) friendly media to constant economic risk, restrictive regulation will have its effect even without the application of actual sanctions."

These findings have proved to be timeless. If you are interested in a detailed analysis of Hungarian media regulation, we still recommend our study published in 2014. [188]

The problems of the Media Council's operation, biased and opaque decision-making were first highlighted by the case of the Klubrádió Budapest frequency. In December 2010, the Media Council annulled the public service tender for the Budapest 92.9 MHz frequency already won by Klubrádió, and in December 2010 it also declared a previously unknown bidder, Autórádió Kft., the winner of the Budapest 95.3 MHz tender against Klubrádió. Both cases were the subject of years of litigation, which finally ended with the Media Council dropping the 95.3 MHz case and the 92.9 MHz case being awarded to Klubrádió by the court. It was in the court proceedings for the Budapest 95.3 MHz frequency that the Media Council argued that Klubrádió's bid was invalid due to the lack of signature of the blank backing sheets. Klubrádió was allowed to start broadcasting on Budapest 92.9 MHz as a community media service provider on 14 February 2014. This entitlement expired in February 2021, as a result of which Klubrádió is currently only available online.

While Klubrádió had lost its entire rural network by 2013, the Media Council's tendering practices had some big winners. These varied, as can be well documented, according to the individuals and economic groups close to the government. Until 2015, Lánchíd Rádió had won every frequency tender for which it had submitted a valid bid. Since the Media Law in principle

[188] Gábor Polyák - Krisztina Nagy The context, provisions and practice of media law, JURA 2014/2, 127-149, https://jura.ajk.pte.hu/JURA_2014_2.pdf.

limited the number of frequencies that could be acquired, the main legal instrument for expansion was the so-called "coverage extension". As a result, for example, the Budapest, Balatonfüred, Székesfehérvár, Zalaegerszeg and Keszthely broadcasts were formally on the same frequency, using only one of the four local media rights available. In addition, public interest data[189] obtained by Mérték revealed that at the same time that Klubrádió was being held to account by the Media Council for not signing the blank backs of its tender, and therefore declaring the tenders of other bidders invalid, Lánchíd Radio had not signed a single back of its tender, yet all its tenders were won. The radio has not won any tender since 2015.

In 2016, the role of Chain Bridge Radio was taken over by Karc FM, which is now owned by KESMA. It started operating on the Budapest 105.9 MHz frequency. In 2018, Karc FM acquired the former rural frequencies of Lánchíd Rádió, formally by creating a radio network with them. Since then, Karc FM has been continuously winning radio frequency contests and now has a nationwide network. In the last period examined by Mérték, between January 2018 and April 2021, Karc FM won a quarter of all the tenders. While the former 105.9 could reach 1.27 million people, the new frequency (Budapest 95.3 MHz, the first frequency of Klubrádió) can reach more than 2 million people, according to the call for tenders.[190] In eight other cases, only Karc FM's broadcaster submitted a tender in the procedures ongoing in April 2021. By summer 2021, Karc FM will be broadcasting on 27 local frequencies, which means that it can be heard anywhere in the country. Another interesting aspect of Karc FM's success is that it has won every tender it has entered. In total, there were six tenders in which Karc FM was one of the other bidders, typically a broadcaster of a religious radio station, and Karc FM won all of them. In each of these cases, the Media Council has chosen to adjust the subjective scoring of the programme evaluation to make Karc FM the winner. Typically, Karc FM scored the maximum 8 points for this aspect, the other candidates scoring 0 points.

Until the turnaround in media policy in 2015, Fidesz had no need for a music radio network, as Class FM, owned by Lajos Simicska, had a monopoly on the national radio market.After 2015, however, it had to acquire new positions in the music radio market. Although Class FM changed ownership in May 2016 and its original seven-year media broadcasting licence expired in November 2016, it was not yet certain that the Fidesz monopoly on the national radio market would be restored in 2016. The first and most successful means of doing so was the roll-out of the Radio 1 network. Rádió 1 won the media broadcasting licence in February 2016 and started operating in June 2016 as a media service of Radio Plus Kft., then owned by Andy Vajna. In the tender for the Budapest frequency of Rádió 1, the Media Council still clearly excluded network operation in the call for tenders,[191] i.e. it did not support an existing network or an operator wishing to expand to obtain a Budapest licence. However, shortly after Andy Vajna received the radio, he saw no problem with the networking of the frequency and the corresponding modification of the radio's public service contract. After Andy Vajna's death in 2019, Radio Plus Ltd. was taken over by Zoltán Schmidt, who had previously appeared around the business interests of Lőrinc Mészáros.

Rádió 1 is still not merged into KESMA, but it is still clearly the interest of business circles linked to Fidesz. By the end of 2017, it was already broadcasting on 31 frequencies, making it the second most listened to radio station nationwide, behind the public service Petőfi Rádió. After the launch of the national Retro Rádió in December 2017, Rádió 1's audience ranking was

[189] https://mertek.atlatszo.hu/a-mediaszabalyozas-leghatso-oldala/
[190] https://nmhh.hu/dokumentum/217518/budapest_95_3_mhz_palyazati_felhivas.pdf
[191] http://mediatanacs.hu/dokumentum/167595/Budapest964PF_2.pdf

for a while in third or fourth place nationally, but today it has overtaken Petőfi Rádió and is again in second place.[192] In 2021, the central media service provider of the Rádió 1 network, Budapest Rádió 1, has been awarded a new frequency. While the former Budapest 96.4 MHz has a reach of 1.6 million listeners,[193] the newly acquired Budapest 89.5 MHz has a reach of nearly 3.5 million listeners.[194] The larger reception area will also allow some of the network's suburban members, previously operating on their own frequency, to be switched off.

After 2018, two new players appeared on the market of music radio networks: Gong FM, now owned by KESMA, and Best FM, also linked to Fidesz business circles. These two radio stations are also winning frequencies one after the other, and based on the coverage areas, it seems that they will not be in competition with each other for the time being.

Supporting the expansion of religious radio stations with religious themes has been a well-documented element of the Media Council's frequency tendering practice since 2010. The Catholic Radio Maria and the Reformed Radio Europe were already the main winners in 2010-2011.[195] Catholic Radio started its network expansion in 2012,[196] until then only on medium wave frequencies. The Hungarian Catholic Radio was established by the Hungarian Catholic Bishops' Conference in 2004 and currently broadcasts on 25 local frequencies.[197] It is expanding partly through networking and partly by extending its coverage. In the period under review, eight cases of coverage expansion and four cases of networking were carried out. Mária Rádió is the Hungarian media service provider of the worldwide operating foundation Mária Rádió. It started broadcasting in Budapest in 2006 and is currently available on 20 frequencies, mainly in the northern part of Transdanubia. In the period under review, four frequencies were acquired through networking and one through coverage extension. Radio Europe, owned by two Reformed dioceses, acquired two frequencies in Northern Hungary. The network now covers a total of five municipalities.

2) Advertiser

The special tax on advertising came into force in July 2014 and covers not only electronic, print and online press products, but also public advertising and advertising on the internet. The rate of the special tax initially increased progressively: 0 per cent for the part of net advertising revenue below HUF 0.5 billion, 1 per cent for the part above this amount but below HUF 5 billion, rising by 10 per cent per HUF 5 billion band, and by 40 per cent (50 per cent from 2015) for the part above HUF 20 billion. The tax has imposed a significant administrative burden on businesses. In 2014 and 2015, the special tax was seen as a serious market distorting state intervention, especially in the television market, as only one national commercial channel, the market leader RTL Klub, was seriously affected. The other national broadcaster, TV2, which had just changed ownership in the same period, was largely exempted from paying the tax due to a loophole in the law. TV2, which had been operating at a loss for years, was allowed to reduce its tax base by 50% of its accumulated losses, while RTL Klub, which had been making a profit for years, was not allowed to do so, as a result of a specific amendment to the law. As a consequence, RTL Klub paid 80 percent of the total advertising tax when the first advance tax payment was made in August 2014. The amendment is presumably the result of negotiations

[192] https://nmhh.hu/cikk/218365/Budapesti_es_orszagos_napi_radiohallgatottsag_2020_november__2021_januar
[193] https://nmhh.hu/dokumentum/167595/Budapest964PF_2.pdf
[194] https://nmhh.hu/dokumentum/216617/budapest_89_5_mhz_palyazati_felhivas.pdf
[195] https://mertek.eu/2012/02/22/a-mediatanacs-frekvencia-palyaztatasi-gyakorlata/
[196] https://mertek.eu/2013/01/08/a-mediatanacs-frekvenciapalyaztatasi-gyakorlata-2-jelentes/
[197] https://media1.hu/2021/01/18/bovul-a-magyar-katolikus-radio-vetelkorzete/

between the government and RTL Group and a complaint lodged by RTL with the European Commission. The new tax rates reduced the distortive effect on the market, but also put smaller media companies in a difficult position, as they were just starting to recover from the economic crisis and the decline in the advertising market. [198]

In 2016, the European Commission classified it as prohibited state aid because of the progressive nature of the tax and the possibility to deduct losses. As a result of this - and presumably the political and economic negotiations that took place in the background - the Parliament voted in May 2015 for the amendment, and since then the tax rate has been 5.3% for all companies with a turnover above HUF 100 million. This means that large companies, especially RTL, have benefited, while the tax burden has increased for smaller companies, many of which are Hungarian-owned.

The Commission's decision was annulled by the General Court of the European Union in 2019 and confirmed by the European Court of Justice in 2021. According to the General Court and the Court of Justice,[199] the Commission has not demonstrated that the progressive nature of the tax measure in question and the partial deductibility of the losses carried forward had the effect of conferring a selective advantage on certain undertakings or the production of certain goods. In its judgment, the Court of Justice completely disregarded the specific market situation in which the legal provisions were adopted and the market distorting effect they had.

In 2020, the Court of Justice ruled that another aspect of the advertising tax was contrary to European law, following an action by Google.[200] The Court ruled that a regulatory solution allowing the tax authorities to impose successive default fines of up to several million euros over a period of a few days on service providers established in another Member State, if the service provider has not complied with its obligation to notify the Hungarian tax authorities, was unlawful.

The Act on Advertising Tax was amended again in 2019, resulting in a zero rate of advertising tax for the period 1 July 2019 to 31 December 2022.

In 2015, the legislator has also imposed strict limits on the operation of media agencies, which were previously unregulated and unproblematic. This has both increased the administrative burden for media agencies and affected their revenues. Previously, media agencies received a so-called bonus from the media, but this source of income has been eliminated by the regulation. At the same time, the law stipulates that advertisers must pay a uniform 15% of the media spend to the media agency, thus making media planning a fixed-price service. [201]

The National Communications Office, which started its work at the end of 2014, is responsible for coordinating the communication of budgetary bodies and public institutions, managing the related public procurement procedures and monitoring their implementation. The importance of the Office became apparent to the wider public in August 2015, when three media agencies

---

[198] German, T. - Szabó, Z.: Advertising tax: RTL defeats the government Index (2015.02.03) http://index.hu/gazdasag/2015/02/03/lazar_rtl_reklamado/

[199] https://curia.europa.eu/juris/document/document.jsf?text=&docid=238902&pageIndex=0&doclang=hu&mode=lst&dir=&occ=first&part=1&cid=2385873

[200] https://curia.europa.eu/juris/document/document.jsf?text=&docid=223981&pageIndex=0&doclang=hu&mode=lst&dir=&occ=first&part=1&cid=2392773

[201] Hungarian Marketing Association: the media agency bonus will be abolished. marketing. hu (2015.06.12) http://www.marketing.hu/hirek/szakmai-hirek/644-megszunik-a-mediaugynoksegi-bonusz

won a HUF 25 billion public procurement contract to handle communications for the entire public sector. Two of the three agencies have personal links to the governing party. [202]

3) Criminal law

The new Criminal Code (Act C of 2012) entered into force on 1 July 2013. This has not brought about any significant changes in the criminal law framework of expression of opinion. The most threatening provision from the point of view of the functioning of the public is the measure of making electronic data permanently inaccessible (Article 77 of the Criminal Code) and the procedural rules related to it (Articles 335-338 and 818-826 of the Criminal Code). The possibility of blocking data was later extended by the legislator not only to other criminal offences, but also to sites organising illegal gambling, to sites providing dispatching services without a dispatching licence - the latter case being part of the Uber ban - and to e-commerce sites selling products harmful to health. The database of Central Electronic Unblocking Decisions maintained by the NMHH is not public.

In November 2013, the offence of making or publishing a false sound or image recording capable of defaming defamation entered into force (Articles 226/A-226/B of the Criminal Code). The two provisions are a legislative response to the "Baja video" published on hvg.hu. [203] In the video, the participants admitted to committing electoral fraud, but it quickly turned out that the video was fake and the recorded conversation was staged. The two facts have not been applied by the court since then.

In 2016, the definition of incitement against the community was amended (Article 332 of the Criminal Code). The legislator added to the provision that not only incitement to hatred but also incitement to violence is a criminal offence. The legislator's intention was presumably to allow for a broader scope of punishment of hate speech, but in the absence of judicial practice it is unclear what the actual consequences of the addition of the provision are.

During the Covid scandal, in March 2020, the Parliament adopted a provision supplementing the definition of the crime of spreading rumours, which has caused serious controversy. The provision criminalises anyone who, during a special legal regime, publicly states or spreads false facts or distorts true facts in a manner that is likely to hinder or frustrate the effectiveness of the defence (Penal Code. Section 337 (2)). The provision referred to in government communications as the anti-fake news law does not provide a clear framework for restricting expression at all, and the meaning of the terms used in it is unclear. Although the police have prosecuted simple Facebook posts, few cases have reached the stage of prosecution on the basis of public information.

4) Civil law

The new Civil Code (Act V of 2013) entered into force in 2014. The introduction of a damage fee seemed to be the most threatening from the journalists' point of view, although the legislation did not imply the need to change the previous judicial practice on compensation for non-material damage. According to the Civil Code, the amount of the damages must be determined in particular with regard to the gravity of the infringement, its repetitive nature, the

[202] Rényi, P. D.: Among them, the state allocates 25 billion as a communication model. 444.hu (2015.08.07) http://444.hu/2015/08/07/ok-harman-osztoznak-az-allami-cegek-25-milliardjan/; Rényi, P. D.: 12 billion will be saved next year by the great wizard of communication tenders. 444.hu (13.10.2015) http://444.hu/2015/10/13/young-v3

[203] https://hvg.hu/itthon/20131018_baja_valasztasi_csalas_vesztegetes

degree of imputability, the impact of the infringement on the victim and his environment, i.e. there is no question of any kind of punitive damages.

The provision on the taking of a picture, which explicitly required the consent of the person concerned, also seemed to be a matter of concern. Again, this was a textual change in line with previous case law and did not create any additional difficulties for photographers.

The Constitutional Court had already examined the regulation on the personality rights of public figures before the entry into force of the new Civil Code and found it partially unconstitutional. According to the original provision, "*The exercise of the fundamental rights ensuring the free discussion of public affairs may restrict the protection of the personality rights of public figures to a necessary and proportionate extent, in the legitimate* public *interest, without prejudice to human dignity*". In its Decision No. 7/2014 (7.3.2014) AB, the Constitutional Court stated that "the restriction of the protection of the personality rights of public figures in the context of the discussion of public affairs, ensuring the exercise of freedom of expression, is also a constitutional interest and requirement in all cases", therefore the linking of the broader duty of tolerance of public figures to "reasonable public interest" is unconstitutional. The Constitutional Court's decision No. 3145/2018 (7 May 2018) AB on the status of public figure focuses on public figure as a position, and thus broadened the scope of public figures: 'what is typically decisive is not the status of the person concerned, but whether he or she has become a shaper of public life in a public debate on public affairs by virtue of a voluntary decision'. In practice, the definition of public actors remains unclear. While Árpád Habony and Lőrinc Mészáros have been found by the court to be public figures in relation to their economic and political activities, István Tiborcz has not been found to be a public figure in a specific case. However, the Tiborcz case did not rule that the Prime Minister's son-in-law could not be a public figure in general, but in the circumstances of the specific interview: in the interview, the television crew addressed István Tiborcz in a private situation. It does not follow from this that his wealth and business activities involving public funds could not be disclosed within the broader limits applicable to public figures.

A particular case of public personhood was the series of court and constitutional court decisions on the image of police officers. In 2012, the Curia ruled (1/2012 BKMPJE) that a police officer on duty is not a public figure and that his or her image can only be published with consent. In 2014 (28/2014 (IX. 29.) AB) and in 2016 the Constitutional Court came to the opposite conclusion: a photograph of a police action may be published without consent if the publication is not self-serving and does not violate the human dignity of the police officer.

A further provision of the new Civil Code has recently led to severe restrictions on freedom of expression and freedom of the press. Pursuant to Article 2:54 (5) of the Civil Code, any member of a community may bring an action under the law of personality if he or she has suffered "a violation of rights which is an essential characteristic of his or her personality, which is seriously offensive to the community in the public eye or which is unjustifiably offensive in its expression in connection with his or her membership of the Hungarian nation or of a national, ethnic, racial or religious community". In other words, an injury to the community as a whole infringes the individual rights of every member of the community. A substantially identical bill had already been annulled by the Constitutional Court in 2008 (96/2008 (VII.3) AB), inter alia because it did not specify which groups membership could be an essential element of personality and because the legislation would have allowed an almost infinite number of parallel actions to be brought by members of the group, which in turn would have made it impossible for the press product publishing the offending communication to operate. At the

same time, the Fourth Amendment to the Fundamental Law expressly defined the protection of the human dignity of persons belonging to the Hungarian nation, national, ethnic, racial or religious communities against the expression of opinions which offend the community as a limitation on freedom of expression. This made a substantive constitutional review of the cited provision of the Civil Code practically impossible.

On the basis of this provision, the Curia did not yet find the HVG's 2016 front page "Big Christmas" to be offensive to the Catholic religious community and did not find a violation of the plaintiff's personal rights. This judgment was upheld by the Constitutional Court in February 2021. András Varga, the Constitutional Court ruled in 2021 that the freedom of expression was significantly restricted in relation to the publicist's article by Árpád Tóta W.[204] In June 2021, in another personal rights case, the Metropolitan Court of Appeal ruled that a caricature published in Népszava[205] was directed against the Christian religion and violated the human dignity of all members of the Christian community. This interpretation of the law is a serious threat to freedom of expression and freedom of the press.

5) The shrinking space for freedom of information

The new Data Protection and Freedom of Information Act, adopted in 2011 (Act CXII of 2011 on the right to information self-determination and freedom of information), did not initially bring significant changes to the possibilities to access data of public interest. However, despite the favourable legal environment for the public, it quickly became common for data controllers not to comply with requests for access to data of public interest[206] and, in the vast majority of cases, to provide the requested data only after a decision by the National Data Protection and Freedom of Information Office or a court. On several evenings, despite a final court decision, the data controller refused to release the data.

In 2015, the law was amended to significantly limit the disclosure of data of public interest. Under the new legislation, the data controller can now claim not only reimbursement of the costs of copying and mailing, but also reimbursement of the labour costs associated with fulfilling the data request. The court has found the reimbursement of costs, often in the order of millions of euros, to be unlawful in all cases, but the obligation to pay in itself significantly narrows the scope of data requesters.

The same amendment also removed the possibility of anonymous requests, which could also have a strong deterrent effect. The so-called 'pre-decisional data' regime has been amended, allowing the refusal to disclose any data if it is used to support any 'future decision'.

In the Covid period, freedom of information has been further restricted. The centralised online public reporting itself made it significantly more difficult, if not impossible, for non-government news outlets to ask genuine questions about the outbreak. The government has extended the deadline for requesting public information to 45+45 days during the emergency, which also makes it impossible to provide up-to-date information. In addition, there is a strict ban on doctors, school principals and civil servants from making statements, so ultimately government communication on the epidemic is completely manipulated and unverifiable.

[204] https://hvg.hu/itthon/20181108_Bunuldozes_hianyaban
[205] https://papaigabor.wordpress.com/2020/04/27/kronikus/
[206] https://mertek.eu/jogi_kerdesek/a-kozerdeku-adatigenyles-elszabotalasanak-aktualis-modjai/

MTA Law Working Papers

Kiadó: Társadalomtudományi Kutatóközpont (MTA Kiválósági Kutatóhely

Székhely: 1097 Budapest, Tóth Kálmán utca 4.

Felelős kiadó: Boda Zsolt főigazgató

Felelős szerkesztő: Kecskés Gábor

Szerkesztőség: Hoffmann Tamás, Mezei Kitti, Szilágyi Emese

Honlap: http://jog.tk.mta.hu/mtalwp

E-mail: mta.law-wp@tk.mta.hu