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Fruzsina Gárdos-Orosz *Editor*

The Resilience of the Hungarian Legal System since 2010

A Failed Resilience?

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Preface

Fruzsina Gárdos-Orosz

The present volume focuses on the dynamic, direction, nature of and reasons for the change in the Hungarian legal system since 2010. How and how successfully has the Hungarian legal system showed resilience vis-a-vis emerging or renewing political, social, technological, and economic demands, and the natural challenges it has faced? To what extent can law preserve its specific values—i.e. the rule of law—so as to resist external challenges, whether it does this by adaptation, accommodation, or other means? How does law seek to be both an effective regulator and at the same time preserve its predictable normative function?

Such questions of resilience receive special readings in this book. Using the idea of resilience as a specific analytical framework, the authors examine the (d)evolution of a legal system of an EU member state, often labelled as a 'black sheep' because of the political regime change and the rule of law backsliding which has occurred since 2010.

The legal system in our conception is a complex and ever-changing social subsystem that is particularly difficult to analyse systematically. Each area of law is examined from the perspective of change using different quantitative and qualitative legal methodologies, focusing on the resilience of the legal regulation (including its ability to maintain stability). The analytical framework of the overall research has led each researcher to answer the question of whether, in the end, the changes in law have amounted to an abandonment of the inherent legal values of the respective field of legislation, or whether the legal-dogmatic consistency has remained as a preservative feature of law.

Our research hypothesis was that the influence of law on society depends to a large extent on its resilience, i.e. on the way in which the legislator and (in the end) the law recognize problems (changes in political, social, and economic conditions, new demands, crises, etc.) and react to them. By identifying the practice of legal responses to non-legal challenges, we can answer a fundamental question: how has the law adapted, resisted, or changed in Hungary since 2010 and has it preserved its resilience? A further in-depth analysis of the most relevant legal responses selected (legislation, regulations, court, and administrative decisions) can be expected to

provide an understanding of the overall resilience of the Hungarian legal system and its specificities.

Why is all this important beyond its obvious academic interest? Because this research—if we learn from its lessons—can become the basis for future strategic proposals for the development of the legal system and its main elements, i.e. for the development of the rule of law.

This volume is based on research conducted and published first in Hungarian: Gárdos-Orosz Fruzsina (ed.), A magyar jogrendszer reagálóképessége 2010–2018, HVG-ORAC, 2022. We are grateful to those colleagues who have revised the Hungarian basis of this research. Furthermore, we are grateful for different projects funded by the Hungarian Academy of Sciences (No. PC2022-5/2022, The responsiveness of the legal system in the post-COVID society: risks and opportunities) and by the National Research, Development and Innovation Office (No. 134962, Legal approaches to operationalize nationality and ethnicity; No. 143831, Support for the Rule of Law. The Cultural Preconditions of a Strong and Stable Rule of Law; No. 138965, Potential risks and opportunities in the regulation and application of Artificial Intelligence; No. 143008, The historical constitution of Hungary, then and now).

We would finally like to thank Csilla Fedinec senior research fellow, and proofreaders Simon Milton and George Seel for their essential contribution to this book.

Contents

Introduction

The (Non)Resilience of the Hungarian Legal System: From Populist Constitutionalism to a Permanent State of Danger

Fruzsina Gárdos-Orosz and Nóra Bán-Forgács

Abstract The introduction chapter provides an overview of the Hungarian constitutional system from 2010 until today. This system is best characterized by populist constitutionalism. We argue that the resilience of the Hungarian legal system suffered hardly irreplaceable damages from 2010, mostly due to the cumulative effect of external impacts (Coronavirus crisis, financial crises, migration crises, war in Ukraine etc.) coupled with decesive internal factors such as the populist term and its new constitutional order. In our chapter, we mainly focus on the role of emergency powers in the new constitutional order.

We have three central points. First, the entitlement to impose emergency powers has been overused and, by and large, misused in Hungary. Even today, the integrity of the legal system is attacked by subsequently prolonged state of emergency regulations relying on a permanent state of emergency eroding democratic processes.

Second, we argue that populist constitutionalism during the Coronavirus crisis resulted in the lack of legal certainty: the rapidly increasing number of legislations had a counter effect of maintaining the rule of law standards. Thirdly, in this introductory chapter, we argue that rapid, effective, and (often uncensored) lawmaking is not an unheard reaction to international crises. However, when they appear to be only a façade that enables populist constitutionalism to eliminate checks and balances, the rule of law and democracy are at high risk.

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1 Preliminary Thoughts

The structure and functioning of the Hungarian constitutional architecture from 2010 until current times can be understood through the characteristics of populist constitutionalism. After the victory of the right wing in Hungary in 2010, the new parliamentary supermajority, with its constitution-making and constitution-amending power, started reshaping constitutional reality in Hungary.[1] The first significant step was the adoption of a new constitution in 2011 (the Fundamental Law, FL), followed by 12 subsequent constitutional amendments.[2] The new language of the FL was reinforced by cardinal laws and legislation (re)regulating all vital parts of the state and society. The government majority was easily able to implement all constitutional changes that it found necessary for the establishment of the new regime.

The starting point of our analysis is autocratic populism and the related new constitutional order. After elaborating on this, we link populist constitutionalism with the idea of resilience, or more precisely, legal resilience. Our central claim is that constitutional populism, as with any other external political, social or environmental factor, has a far-reaching effect on the domestic and international legal system. It thus influences the legal order similarly to any other external factor, such as a global pandemic. Accordingly, in this book, our hypothesis is that although we cannot influence external factors at a time of polycrisis, we need to develop the means and tools to enable the protection of the integrity of the legal system.

Further, in this introduction, we would like to make some points about the nature of resilience in the legal system. There is now a significant literature on constitutional populism[3] and rule-of-law-related resilience. Similarly, the amount of COVID-19 legal scholarship is overwhelming.[4] However, we know very little about the resilience of the legal system under conditions of constitutional populism related to COVID-19 and other crises.

We make three central claims in the introduction. First, that the entitlement to impose emergency powers has been overused and, by and large, misused in Hungary. This is shown by the hyper-concentration of executive power. We argue that under a state of populist constitutionalism, the state of emergency powers has been extended in scope and time. Therefore, the negative consequences of the abuse of extraordinary powers are inescapable. Even today, the integrity of the legal system is challenged by unjustified regulations associated with the state of emergency declared

[1] According to Art. S(2) of the FL can be enforced and amended with a two-thirds parliamentary majority. This two-thirds majority was granted to the right-wing Fidesz–Christian Democrats (KDNP) party coalition in the general elections.

[2] The constitutional changes are described until the ninth amendment by Bodnár et al. (2020).

[3] A comprehensive overview of the literature is provided by Zoltán Szente and Fruzsina Gárdos-Orosz. Szente (2023a), pp. 2–6; Gárdos-Orosz (2021a), p. 5.

[4] The latest: Florczak Wator et al. (2023).

in March 2020, first in reaction to the COVID-19 pandemic and subsequently prolonged due to Russia's full-scale war against Ukraine.

Second, we argue that the link between populist constitutionalism and COVID-19 can be traced back to the rapidly increasing number of legislative and statutory regulations, suggesting that populism involves a vague approach to legal certainty and the rule of law in general.

Finally, in this introductory chapter, we present the challenges the Hungarian legal system faces in resisting constitutional populism. There is never a defining moment or a well-defined period when political temptation should be resisted. Rather, by gradual changes in the legal system, the resilience of all constitutional stakeholders, step by step and little by little, lessens to the point where they lose their integrity and ability to defend themselves. We further elaborate on the problem of the diminishment of constitutional counterbalance and importance awarded public law, criminal law and private law legal doctrine under the Hungarian legal system.

2 Populist Constitutionalism

The Hungarian constitutional system is characterised mainly in contemporary legal scholarship as some sort of authoritarian constitutionalism. Various conceptualizations of this phenomenon have been offered. Some use the terms 'authoritarian constitutionalism'[5] or 'autocratic legalism',[6] and others 'hybrid constitutionalism',[7] 'illiberal constitutionalism',[8] 'abusive constitutionalism',[9] or 'populist constitutionalism'.[10] Blokker refers to populism as an alternative to the liberal state.[11] This idea is based on 'popular will', Rousseau's legacy of *volonté general*,[12] and the absolutization of the nation's political will. In this framework, the constitution becomes the main instrument for strengthening the absolute control of political power based on constructing an idealized people as a united nation with a common constitutional heritage.[13]

The argumentation of Corrias might best describe the kind of alternative to liberal democracy that the 'Orban regime' has introduced in Hungary. The author points out that 'populists implicitly claim that there is an absolute primacy of constituent power

[5] Tushnet (2015), Alviar and Frankenberg (2019), Halmai (2019), Tóth (2017).

[6] Scheppele (2018), pp. 545–584.

[7] Verschraegen (2011), Bencze (2021), Bozóki and Hegedűs (2018).

[8] Pinelli (2015), Uitz (2015), Drinóczi and Bień-Kacała (2019).

[9] Landau (2013).

[10] Szente (2021), Gárdos-Orosz and Hoffmann (2022), Weyland (2001), Anselmi (2019), Walker (2019), Fournier (2019).

[11] Blokker (2019).

[12] See Mudde and Kaltwasser (2017), p. 6.

[13] Anselmi (2019), Müller (2016).

vis-à-vis the constitution and the rules and powers derived from it. The people as constituent power is ultimately not bound by constitutional constraints because it is the source from which the constitution receives its legitimacy.'[14] This does not necessarily mean that populist politicians revolt against all constitutional norms and do not abide by any rules. Under a state of emergency, most restrictions are justified by the need for public policies and reference to the welfare of the people. Populists 'in practice, are actually opportunistic. [This] does, however, entail that, in terms of constitutional theory, the populist will always value the will of the people above constitutional rules and procedures and will actively search for ways to overcome or avoid these. In short, the populist reading of constituent power displays a strong preference [for] the rule of men over the rule of law and, as a consequence, a general distrust of law and procedures.'[15]

In this book, we emphasize that populist constitutionalism is not born on a blank piece of paper but rather emerges between or over the lines of written constitutional and other legal texts.[16] Therefore, what constitutes a new element in populist constitutionalism is not always obvious. Changes are gradual. Hence, the concept develops within the framework of liberal democracy and transforms the latter step by step into an illiberal framework wherein the resilience of the legal system and the integrity of the legal framework corrodes slowly and in different forms among the branches of law. Therefore, its analysis takes time. In this book, however, we argue that the time has finally arrived for a meaningful analysis of Hungarian legal changes between 2010 and 2023; we thus offer the reader a state-of-the-art review.

How is it possible that a liberal democracy can be so easily overtaken by a series of constitutional changes? How may the resilience of the legal system normally be sustained?

In this book, we explore several theoretical concepts of resilience in four different essays. Csaba Varga explains the institutional legal history of resilience, arguing that law is an ever-changing system and any comprehension of natural sciences is challenging. The essays of Márton Németh-Matyasovszky and Áron Fábián are relatively open to applying an innovative concept of law and sociology. Viktor Olivér Lőrincz and Eric Gotto make a U-turn by returning to the natural law concept of resilience, aiming to anchor the scholarly debate in the utility of the old doctrine.

The common points of the four chapters mentioned above in this book are their provision of a framework and set of tools for circumscribing the autonomous nature of law. Accordingly, autonomy is employed to mean some sort of resistance to external impact that is linked to a hierarchy of values and the stability of the legal system. Certainly, dynamics and interactions are always challenging to capture in the presence of an ever-changing organic legal system. The state of the art changes, but no social structure can survive without the core feature of resilience, according to the authors.

[14] Corrias (2016), Müller (2016).

[15] Corrias (2016), pp. 9–10. See also Müller (2016), p. 101.

[16] Gárdos-Orosz (2021a), p. 5.

By identifying legal responses to non-legal challenges, we can answer a fundamental question: how does law adapt or counterbalance the surrounding external changes in accordance with its conservative nature? From a further in-depth analysis of the selected legal responses (legislation, regulations, judicial and administrative decisions), we expect this book to increase understanding of the overall responsiveness of the Hungarian legal system and its specificities. Analyzing the reactivity and responsiveness of the legal system is a relatively new but increasingly widespread approach in legal research, and its characteristics in relation to domestic legal changes have not yet been widely disclosed. The results of our study are intended to fill a gap by providing a comprehensive analysis of the Hungarian legal system.

We hypothesise that the stronger the resilience of a legal system, the more difficult it is to alter it. So, in theory, a strong legal order can resist unwanted interference through its protective structure. Under a state of emergency—for example, in Hungary—the pressure on the legal system rises exponentially when it has already been degraded and results in much more severe harm than in those legal systems where the structure is steady and governed by the principle of the rule of law.[17]

In this respect, via our book chapters, we will see that the changes in (legal) sectors in Hungary are 'limping', they are unbalanced (in some areas, there are much more significant changes than in others), and any generalization in our conclusions is associated with a risk of oversimplification.

Gunther Teubner's "How Law Thinks" analyses several epistemological approaches applicable to law, including the theories of Jürgen Habermas, Michel Foucault and Niklas Luhmann.[18] Writing about an 'epistemic trap', he also discusses the conflict between the autonomous reality of law and the reality of other social subsystems such as science, politics, media, etc. Following in the footsteps of Teubner and Luhmann's theory of autopoiesis,[19] in this book, we have posited law as a system and examined how it responds to new challenges and new forms of social, economic or scientific development. We are primarily interested in the anticipatory, normative function and power of law.

We find that, among many other determining factors (the economic crisis, digitalization, globalization, migration, the climate crisis), two external challenges dominated the legal order in Hungary between 2010 and 2023: first, the successive electoral victories of the right-wing populist Fidesz–Christian Democrat (KDNP) party coalition, with all the constitutional consequences described above. Second, a very serious change-generating trauma was the emergence and persistence of the global pandemic, the COVID-19 crisis. A combined assessment of these two decisive externalities is necessary.

In terms of the areas of law, what changes occurred between 2010 and 2024? We seek to answer this question in this book. Our claim is that the Hungarian legal

[17] Szente and Gárdos-Orosz (2022), pp. 155–160.

[18] Teubner (1989), pp. 727–758.

[19] Luhmann (1984).

system lost its resilience gradually; the chapters will show how it weakened step by step, little by little.

Mátyás Bencze's chapter presents the relationship between courts and politics: he describes the gradual weakening of the Hungarian judicial system. Bencze focuses on direct and indirect factors. Special attention is paid to the government's indirect interference with the work of the latter branch through unsolicited criticism and uninvited comments. This chapter shows clearly one of the central claims of our book, namely, that the Hungarian legal system was targeted by continuous (and always gradual) legislative change, shrinking alternatives and gradually changing the organizational structure of independent courts and other constitutional institutions to the point where their resilience to further change (be this political, from a populist government, or external such as the global pandemic) could only be only figurative and formal.

Balázs Tímár's chapter describes the restructuring of the civil procedure and how, concerning traditions, the new rules offer less protection to individuals, especially regarding access to justice.

In addition to this chapter, István Balázs, György Gajduschek, and István Hoffman explain that the protection of individuals against the state—effective remedy against administrative decisions—has been degraded, mainly in the name of a more effective administration of justice.

As for the system of criminal law, Mihály Tóth describes both substantive and procedural legal changes and argues that doctrines of criminal law have suffered harm on several occasions since 2010. He therefore argues that criminal law standards and principles respected for centuries have been overruled without further consideration.

Constitutional scholar Zoltán Szente evaluates the backsliding of rule-of-law-related resilience step by step since 2010. He starts his analysis with the 'packing' of the Constitutional Court in 2010 and takes us through the subsequent twelve amendments of the FL.

Lídia Balogh, Iván Halász and András László Pap provide an overview of the changes in the concept of equality since 2010. They claim that the principle of equal protection was undermined on several occasions, resulting in more fragile human rights protection in Hungary. Regarding equality, the essay by Gábor Schweitzer explains the (non) equality of religious ideas and the situation of those denominations that were not awarded the status of churches in Hungary after 2010 in contrast to other historical churches that enjoyed this privilege.

Kitti Mezei and Anikó Träger explain that digitalization and digital regulation have also significantly affected the media market and, more generally, freedom of expression in Hungary, as the EU respects national particularities in this domain, relying on margin of appreciation. These limitations when applied to a standard rule-of-law democracy are not of concern, but considering the lack of resilience of the Hungarian system, they have resulted in more restrictions on fundamental rights.

As for the operation of the market economy, the chapter of Attila Menyhárd and Ákos Szalai focuses on the transformation of private law, most precisely contract law, since 2010 and examines how these rules have been adopted to the social

environment. Meanwhile, Márton Varju explains the state and government policy aimed at impacting the functioning of the national economy through rules on taxation and offers a theory of how taxation legislation in Hungary has functioned since 2010 vis-à-vis market economy goals.

3 Missing Checks and Balances: A Lack of Counterbalance Diminishing the Resilience of the Legal System

The separation of powers has a few hundred years of tradition in European legal history. The modern doctrine of the separation of powers was first developed by British philosopher John Locke (1632–1704). According to Locke, the legislative power has the authority to determine how the power of the state shall be best used to protect people and communities. Since laws must be consistently and constantly applied, there is a need for a permanent power to enforce the laws that are made; thus, separation of the legislative and executive powers is a must.[20] Hungarian scholar András Sajó, in his classic book *Limiting Government*, emphasizes that the constitution's purpose is to place restrictions on the activities of the state and the people who constitute the state. This is the idea of limited government. A constitution is nothing more than a dead letter or a negligible tradition without institutional guarantees. To provide such guarantees, the various branches of power need to be arranged so that they restrict each other. There are various ways to divide and arrange the branches of power, and any solution is viable so long as the possibilities for the restriction of freedom are precluded or headed off.[21]

Both the constitution-making process in 2011 and the following amending and legislative activity led not only to controversy and heated debate within Hungary but also triggered sharp criticism on an international level.[22]

[20] In Locke's classification, the third branch of power is the so-called federal power, which includes external interstate relations (international treaties, the right to declare war and the right to make peace). See: Locke (2010), pp. 46–47.

[21] Sajó (1999), pp. 69, 73.

[22] See the Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary—Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25–26 March 2011) (https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)001-e) and all subsequent opinions of the Venice Commission (https://www.venice.coe.int/webforms/documents/?country=17&year=all); Wrong Direction on Rights, Assessing the Impact of Hungary's New Constitution and Laws, Assessing the Impact of Hungary's New Constitution and Laws, Human Rights Watch, 2013 (https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws). The source of the political changes is a statement by the Hungarian prime minister back in 2014, which stated that 'the new state we are building is an illiberal state, a non-liberal state', similar to those of Singapore, China, India, Turkey, and Russia as countries of reference for Hungary. http://hungarianspectrum.wordpress.com/2014/07/31/viktor-orbans-speech-at-thexxv-balvanyos-free-summer-university-and-youth-camp-july-26-2014-baile-tusnad-tusnadfurdo/,

The most serious claim against Hungary in the international arena is that the winning right-wing coalition systematically has dismantled the principles of the separation of powers and the rule of law through four subsequent electoral terms.[23] These changes induced EU institutions to establish a mechanism for controlling the state of the rule of law, democracy and fundamental rights in Member States.[24]

4 A Failing Counterweight: The Constitutional Court and Judiciary in Hungary

Since the Constitutional Court was, from its very beginning, a powerful counterbalance to the executive power, it is not surprising that the body was involved in the constitutional changes.[25] By 2016, all the judges of the Constitutional Court were elected for 12 years instead of the former nine-year term, and all of them were approved, if not appointed, by the ruling majority.[26] Under the new constitution, the Fundamental Law of 2011 and the subsequent cardinal law on the functioning of the Constitutional Court,[27] most of the powers and competencies of the Court were either curtailed or adjusted (or both).[28] As a result, highly restricted constitutional review is exercised in Hungary (due to limitations on the scope of scrutiny) by a politically appointed body.[29]

Additionally, the new constitutional complaint introduced in 2011—a type of jurisdiction over the judicial branch that the Constitutional Court in Hungary has never had before,[30] resulted in competing and colliding competencies between regular courts and the Constitutional Court. As a consequence, there is a major erosion of both branches.[31]

Under the framework of the new cnstitution, the National Assembly (parliament) enacted new cardinal laws on the judiciary—on the organization and administration of the Hungarian court system and on the status and remuneration of judges[32]—

[23] See Kovács and Tóth (2011), Bánkuti et al. (2012a, b).

[24] Gárdos-Orosz (2021a), p. 10.

[25] Gárdos-Orosz (2024).

[26] Szente and Gárdos-Orosz (2018), pp. 89–110.

[27] Act CLI of 2011 on the Constitutional Court.

[28] See Gárdos-Orosz (2021b).

[29] Halmai (2019). See Fundamentum 2014 (1–2) on constitutional review at: https://www.fundamentum.hu/alkotmanybiraskodas-0.

[30] See Art. 24(2)(d) in the Fundamental Law and subsequently Art. 27 of Act CLI in 2011 on the Constitutional Court.

[31] Szente and Gárdos-Orosz (2018).

[32] Act CLXI of 2011 on the Organisation and Administration of the Courts; Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

which triggered sharp international criticism for putting unprecedented super-powers in the hands of the very few.[33] The new legislation and subsequent sub-laws vested the politically appointed President of the Kúria (Supreme Court) with unprecedented power to appoint new judges,[34] shape and reshape judicial structures, (re)assign cases between court jurisdictions, delegate and relocate judges among courts, and concentrate power and restrict the autonomy of proceeding judges, including their freedom of expression.[35] Accordingly, new legislation ordered the judgements of the Kúria (published in the Official Gazette) to be legally binding on the lower courts (limited precedent).[36]

The FL stipulates new binding rules for the judiciary concerning how to interpret the law. Accordingly, Article 28 of the FL provides that the 'the courts shall in principle interpret the laws' in light of their purpose and in accordance with the Fundamental Law. When interpreting the Fundamental Law or any other law, it shall be presumed that they are 'reasonable and of benefit to the public, serving virtuous and economical ends.'[37] Moreover, as of 2020, a contested provision granted the right to the Kúria to overrule requests (referral rulings) from proceeding judges for preliminary decisions from the Court of Justice of the European Union (CJEU). The CJEU ruled in 2022 that such a decision of the Kúria is contrary to EU law.[38]

According to Hungarian political philosopher János Kis, the new Hungarian constitution immediately after entering into force violated the principle of separation of powers on many accounts, including by mandating the early retirement of judges and granting discretional decision-making power concerning the mechanism of their replacement to political appointees.[39] Accordingly, the constitutional modifications related to the compulsory retirement age of judges involved deliberate political

[33] Opinion on Act clxii of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts of Hungary - Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16–17 March 2012). https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)001-e; Assessment of the Amended Hungarian Laws on the Judiciary. September 2012. https://helsinki.hu/wp-content/uploads/HHC-HCLU-EKINT_Assessment_of_the_Amended_Hungarian_Laws_on_the_Judiciary_092012.pdf.

[34] See Szente (2022), pp. 200–213.

[35] According to the EU Rule of Law Report, pro-government media launched smear campaigns against members of the judicial branch to silence judges. 2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary. https://commission.europa.eu/system/files/2023-07/40_1_52623_coun_chap_hungary_en.pdf.

[36] Bencze (2021), p. 1297; Szente (2022), p. 209.

[37] Additionally, the Seventh Amendment to the Fundamental Law in 2018 further circumvented the freedom of interpretation of the Judiciary by rendering that in the course of legal interpretation, preambles of the legal norms and their explanatory memorandums shall be primarily taken into consideration.

[38] Judgment of the CJEU of 23 November 2021, C-564/19, ECLI:EU:C:2021:949. The Court also held that within the scope of the preliminary ruling, no national judge shall be sanctioned for referring a case to the European Court by any disciplinary measure.

[39] Kis (2012), pp. 1–2.

interference with the integrity of the judiciary.[40] Similarly, the new constitution was re-structured so that the former democratically elected President of the Supreme Court lost their mandate mid-term. For this, the European Court of Human Rights established a violation of the Convention for the undue and premature termination of the latter's mandate.[41] On a similar note, the mandate of the former democratically elected commissioner for data protection was also unlawfully terminated, which resulted in the C-288/12 CJEU decision against Hungary.[42] These and such attempts to cement the position of the two-thirds parliamentary majority have contributed to the fragility of the constitutional system.

5 Ruling by Forcing: A Permanent State of Emergency Dismantles the Resilience of the Legal Order

An equally significant challenge to the doctrine of the separation of powers is the instrumentalization of law, resulting in an unprecedented concentration of power in the hands of the Executive. First, for the governing party, legislation has become only a tool for achieving short-term and one-sided political aims; it can immediately be changed when political will changes using the parliamentary super-majority. Second, granting extraordinary powers to the government through the definition and extension of a state of emergency is another way to erode ownership of legislative power.

The instrumentalization of law means, in populist regimes like Hungary, that the constitution represents an effective toolbox for preserving the power of those at the top of the hierarchy. However, the *formalities* of the rule of law are maintained.[43]

We further argue that, in Hungary, the related trends are the manifestation of centralised power, undermining of the rule of law, and the misuse and overuse of extraordinary powers. We note that an increasing number of statutory regulations at

[40] The mandatory retirement age of the FL was adopted by Art. 26(2) of the FL. Later, this provision was reinforced by the Cardinal Law on Judiciary. The Cardinal Law, however, was put under constitutional scrutiny subsequently. In Decision 33/2012. (VII. 17.) AB of the Hungarian Constitutional Court declared the provisions of the retirement age unconstitutional. Subsequently, Decision European Commission v. Hungary [2012] EUECJ C-286/12 declared that Hungary has failed to fulfil its obligations under EU Law for establishing a general framework for equal treatment in employment for judges.

[41] ECtHR, 23 June 2016, Baka v Hungary, no. 20261/12.

[42] The formerly overturned democratic Constitution of 1989 established first in Central and Eastern Europe the protection of personal data and freedom of information. Accordingly, cardinal law LXIII of 1992 on data protection defined a new supervisory mechanism led by the independent commissioner for data protection, elected by the Parliament for six years. His mandate was terminated at the end of 2011 after serving 2.5 years in office. See European Commission v. Hungary, C-288/12, ECLI:EU:C:2014:237. Bán-Forgács (2021).

[43] Szente (2021). Szente argues that, therefore, populist regimes are characterized by active constitution-making, as far as this is possible for them.

the expense of a declining number of legislative enactments is part of populist constitutionalism.

Political science literature suggests that autocrats are keen to use crises to justify anti-democratic measures, partly because experience shows that citizens are more reluctant to criticise such measures when their security is threatened.[44] Unequivocally, the situation in Hungary falls into this category; the transformation of its political and constitutional system since 2010 is generally seen as an example of a transition from democracy to autocracy,[45] and its governance an example of nationalist populism.[46] We must add that citizens have been reluctant to stand up against the imposition of extraordinary powers during a crisis because they value security over liberty. Some argue that the state of exception introduced to handle the COVID-19 pandemic brought the country to 'the verge of dictatorship'[47] or turned the country 'into an autocracy'.[48] Others, on the other hand, have argued that although there have been abuses of the extraordinary powers granted to the Executive, the government's 'authorization was not employed to turn the country into an overtly autocratic state'.[49]

The European Union notes that, in Hungary, legal certainty has been undermined by the unpredictable regulatory environment and the extensive and prolonged use of the government's emergency powers.[50] Emergency procedures that deviate from the standard legislative process have been in force since 11 March 2020, first justified by the outbreak of the COVID-19 crisis,[51] then continuously prolonged, last time with reference to the Russo-Ukrainian war,[52] ('having regard to the armed conflict and humanitarian disaster in Ukraine and to avert the consequence of this situation in Hungary').[53]

The EU constantly warns Hungary that emergency measures should be strictly proportionate, necessary, limited in time, and in line with European and international standards. Yet, the emergency powers thus granted are more extensive than those

[44] Levitsky and Ziblatt (2018), pp. 93–94; Levitsky et al. (2010). Way (2015).

[45] See, e.g., Pappas (2019), p. 77; Bugarič (2019a), pp. 599, 601–602, 608.

[46] Eatwell and Goodwin (2018), pp. xxv, xxviii; Bugarič (2019b), p. 45.

[47] Scheppele (2020).

[48] Uitz (2020).

[49] Győry and Weinberg (2020), pp. 330, 349.

[50] 2023 Rule of Law Report Country Chapter on the rule of law situation in Hungary.

[51] Coronavirus crisis: a 'mass human pandemic endangering the safety of life and property [. . .] in order to protect the health and lives of Hungarian citizens'. Government Decree 40/2020. (III. 11.).

[52] See 2023 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary; 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.

[53] Government Decree 180/2022. (V. 24.).

adopted in other Member States due to the combined effect of broadly defined powers and the absence of clear time limits.[54]

Parliament has no ex-ante control over individual emergency measures. In the Hungarian context, ex-post control of government-regulated emergency decrees has remained on paper, without adequate implementation.[55] Thus, parliament approved all the emergency regulations in force without individually checking and evaluating their necessity. Beyond this, it also assented *in advance* to all future government regulation without discretion.

Parliament's failure to exercise ex-post control over government-regulated emergency decrees has led to the extreme proliferation of government decrees, in some cases without any correlation to the emergency situations that they were supposed to regulate: Emergency powers are used extensively in areas not related to the COVID-19 pandemic.[56] For example, the government is systematically using its emergency powers to interfere with the administration of justice,[57] the right to strike,[58] or to limit freedom of information,[59] freedom of the press[60] as well as to confiscate significant resources from local governments already in financial difficulty because of the pandemic.[61]

In 2022, of the 637 government decrees, 267 (41.9%) were adopted as emergency decrees, either in reference to the pandemic or the war. Eighty-two were issued between November and December 2022, including a decree restructuring the state budget.[62] A significant feature of this trend is a growing amount of legislation, with

[54] Council Recommendation of 20 July 2020 on the 2020 National Reform Programme of Hungary and delivering a Council opinion on the 2020 Convergence Programme of Hungary 2020/C 282/17.

[55] Under Art. 53 of the FL, in theory, the government reports regularly to parliament about measures it introduces and the National Assembly may repeal a decree adopted by the Government during the state of danger. But these provisions are neglected.

[56] See examples in Szente and Gárdos-Orosz (2022), pp. 155–160; Szente (2023b); 2022 Rule of Law Report, Country Chapter on the rule of law situation in Hungary.

[57] For example, Government Decree 356/2022. (IX. 19.) made inaccessible—retroactively—documents of the COVID-19 Task Force and its working groups. In a court proceeding under the FOI Act, a journalist opposed to the Task Force requested the documents.

[58] Government Decree 36/2022. (II. 11.) limited teachers' right to strike. In May 2022, parliament codified emergency provisions of Act V of 2022, subsequently, the Constitutional Court dismissed an application challenging the relevant legislation (HCC Decision 1/2023. (I. 4.) AB). In retaliation for protests organized by teachers, Government Decree 4/2023. (I. 12.) on emergency rules provided grounds for the extraordinary dismissal of teachers with immediate effect.

[59] Access to information was strictly restricted on data related to COVID-19. State of emergency served as a tool for the Government to reject FOI requests from different sectors. See Bán-Forgács (2023), pp. 35–62.

[60] The 2023 Rule of Law Report points out that Government Decree 210/2022. (VI. 14.) on the rules of the dissemination of printed media during the state of danger provides that no permission is needed for newsstands that only sell newspapers and magazines containing state advertising related to the war in Ukraine. Since only pro-government media has access to state advertising, newsstands are disincentivised to sell independent newspapers.

[61] Drinóczi and Bień-Kacała (2020), Csink (2021), Hajnal et al. (2021), Várnay (2022).

[62] 2023 Rule of Law Report Country, Chapter on the rule of law situation in Hungary.

each piece becoming much shorter. Statistics show that the quality of legislative work is eroding. At the same time, the quantity is growing because the legislative activity is governed by day-to-day political concerns, not well-discussed considerations. This situation is clearly explained in the chapter by Mihály Tóth in this book and is also examined by Miklós Sebők.[63]

In summary, different types of emergency regulations have been in force for many years, often in parallel. Both the number and the extent of extraordinary legislation are subject to constant change and amendment in Hungary, making it hardly possible for practising lawyers and researchers to obtain up-to-date information on the rules to be applied. Thus, the very idea of the rule of law and legal certainty suffers from shortcomings.

András Sajó states that emergencies and crises undoubtedly call for immediate, firm, and directly executed state action, but using the latter to justify the political concentration of powers is 'ruling by cheating'.[64]

We argue that if external impacts on the legal system (war, the climate catastrophe, the global pandemic) are coupled with internal effects (pressures) such as the illiberalization of the political system, a permanent special legal order can come into being. Rapid, effective, and uncontrolled lawmaking responses are not an implausible reaction to internal and external crises. However, when they appear to be only a façade that enables populist constitution-making and degrades the institutional counterbalance of executive power, constitutionalism, rule of law and democracy are endangered.

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[63] Sebők et al. (2022).

[64] Sajó (2021), pp. 279–327.

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Part I
Public Law and Resilience

Assessing Constitutional Resilience: The Performance of the 2011 Fundamental Law in Fulfilling Constitutional Functions

Zoltán Szente

Abstract This chapter examines the resilience of the 2011 Fundamental Law through a functional analysis. For this purpose, it first presents the basic functions of modern constitutions. Among these, it deals with a regulatory function, whereby the constitution contains the main rules for the exercise of public power as well as fundamental rights. However, the paper examines constitutional functions not only in a formal sense, but within the framework of modern European constitutionalism. For this reason, it also defines the requirements for constitutional regulation, such as its stability, coherence, effectiveness, and, above all, the limitation of public power and state intervention. It also identifies the representation of national identity as a further function, i.e. the social integrative function of the constitution. The Fundamental Law is a full-fledged, modern written constitution, but has fallen far short of what was expected of it: it is 'the most flexible constitution in the world', which is burdened with many internal contradictions, and many of its provisions have remained only on paper, i.e. have not been put into practice. The authoritarian transition since 2010 and the usurpation of power by the governing parties show that it has been completely unable to limit public power, which is perhaps the most important constitutional requirement of all.

1 Introduction

In the debates that accompanied the adoption of the new constitution—the 2011 Fundamental Law in Hungary, László Trócsányi, former constitutional judge and then ambassador to Paris, said that the criticisms of the new constitution were premature. For example, when it was adopted, the 1958 French Constitution also received much criticism and the opponents of President Charles de Gaulle did not

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feel it was theirs; however, it later turned out that they could live with it and all parties accepted the state organisation of the Fifth Republic.[1] In retrospect, more than 10 years later, however, it seems that the optimism regarding the Hungarian constitution was not justified and that the situation is even more serious than it was then; not only has the political and social legitimacy of the Fundamental Law not increased, but after 12 years of operation, Hungary is perceived by some European Union (EU) institutions, the international community and a large part of academic scholarship as an autocracy, or at least as an 'illiberal' regime in which the rule of law is seriously violated and which can no longer be considered a Western-style constitutional democracy.

Today, enough time has passed (12 years and 4383 days until 1 January 2024) to evaluate the functioning and performance of the Fundamental Law. A country's constitution is the foundation of its entire legal system, which defines its framework and therefore, at least in principle, has a fundamental influence on all areas of law. It is therefore difficult to imagine a high quality legal system if the constitution is dysfunctional or unenforced, or, if it is, there is a problem with the structure of the whole constitutional order, in which there is only a sham (or nominal) constitution, which by its very nature cannot guarantee the constitutional functioning of the state in the long term. In order for the constitution to fulfil its function, it needs to be sufficiently resilient to political or legal attempts to undermine constitutional values, i.e. to violate the integrity of the constitution. Constitutional resilience is therefore, in fact, the constitution's capacity for self-defence.[2]

In the following, I will examine the performance and resilience of the 2011 Fundamental Law in the most traditional way, i.e. whether it fulfils its basic functions and meets the general requirements for constitutions. The reason for this is that over the last decade, the Hungarian constitutional system has been criticised on numerous occasions,[3] including for the weak sustainability of the Fundamental Law.[4]

A functional analysis of the Constitution can provide a good framework for meaningful debate, even among those who have different political values and have been its supporters or opponents. However, it is of course no guarantee of consensus, as opinions may differ on how the Constitution has fulfilled, or even whether it has fulfilled, its most important functions. The reason why this can still be a rational analytical framework is that there is relative consensus among constitutional scholars on the functions of constitutions.

[1] Trócsányi (2011), p. 65.

[2] Jakab (2021). See also the thematic debate on constitutional resilience, https://bitly.ws/3bwwi.

[3] See infra footnotes 44–47.

[4] E.g. Grabenwater (2018).

2 The Basic Functions of Constitutions

The general functions of constitutions, or at least part of them, are often included in their definition. It is important to note that I use the term 'constitution' in the modern sense, which appeared at the end of the eighteenth century, spread from then on and gained general acceptance in the twentieth century as the main legal set of rules for the exercise of public power and fundamental rights, as opposed to the classical notion of constitution(s), which was used to describe the organised order of all political communities.[5]

One of the fundamental purposes of modern constitutions is to establish the exercise of public power through the systematic and comprehensive regulation of its institutions and their basic functions, powers and procedures.[6] This is the case even for unwritten or historical constitutions, at least in their modern form.[7] The concept of sovereignty and the establishment of a legal system are rarely included in the core definition of constitutions, because they are regarded as fundamental features of statehood which are covered by the regulation of the exercise of public power, but they are also essential subjects of modern constitutions.

Another indispensable function of modern constitutions is the recognition and guarantee of fundamental human rights as constitutional rights, often described as regulating the relationship between the state and individuals. According to most constitutional definitions, the constitution is the highest level of regulation of these two essential elements, i.e. the exercise of public power and fundamental rights.[8]

Since constitutions are conceptually the highest source of law, all public powers and the state bodies that exercise them derive their legitimacy from the constitution, just as basic rights and liberties become fundamental rights through their recognition by the constitution and thus gain constitutional protection. This function is therefore often singled out as a 'legitimating' one. Modern constitutionalism ascribes normative value to these key regulatory functions, which impose well-defined requirements on constitutions. Some of these are formal criteria, which can be logically deduced from the very concept of the constitution, while others are substantive requirements related to the content of the regulation.

Formal requirements include the stability of the constitution.[9] Modern constitutions not only have normative force, they are also the highest legal norms, from

[5] See McIlwain (1940), Mohnhaupt and Grimm (1995).

[6] Grimm (2013), p. 103.

[7] In the words of Albert Venn Dicey, a classic of the English constitution, the constitution contains 'all rules which directly or indirectly affect the distribution or the exercise of the sovereign power in the state'. Dicey (1915), pp. 22–23.

[8] The Constitution is a set of 'rules which aspire to regulate the allocation of functions, powers and duties among the various agencies and offices of government, and define the relationship between these and the public'. Finer (1979), p. 15. The French *Dictionnaire de l'Académie française* (8th ed., 2000. II.2) defines a constitution as 'the set of written or customary laws which define the form of government of a country and regulate the political rights of its citizens'.

[9] Raz (1998), p. 153; Kay (2000), p. 33; Ginsburg (2020), p. 61.

which all other laws and institutions derive their legitimacy, and therefore no other law can contradict them. Therefore, a country's constitution is usually protected by special procedural safeguards to ensure that its provisions cannot be changed unilaterally by the legislative majority of the moment, i.e. in the absence of a broad political consensus. If the constitution lays down the general framework of social coexistence, the common rules of the game if you like, it would be contrary to its purpose if it could be amended by the current majority of society (practically, by the political forces of the day) to suit their own interests. The stability of the constitution is also closely linked to the normative values of the rule of law, such as legal certainty: one can hardly trust the predictability of legal relations if even their basis, the constitution, can be changed by a simple majority in parliament.

There are no precisely definable standards for the stability of constitutions, firstly because all of them, even those which follow foreign patterns, are in a sense autochthonous legal constructs, and therefore no general lifetime valid for all countries or legal cultures can be imagined, and secondly because the adaptation of social changes is an aspect of constitution-making that is contrary to, or at least nuanced by, permanence or perpetuity.[10]

It is also a formal requirement that the constitution as a norm should form a closed logical system. This is particularly important because constitutional provisions generally have the same normative force, i.e. they are legally equivalent.[11] But the internal coherence of a constitution is also essential because the state bodies established by the constitution, precisely because of the usual procedural guarantees protecting the primacy of the constitution, do not normally have constituent power, so that it can be very difficult, if not impossible, to correct contradictions within the constitution, at least by legal means.

The most important substantive constitutional function is the limitation of public power, which primarily means the protection of individuals (and their organisations) against state interference, and the separation of power. It is also central to the modern Western concept of liberal[12] constitutionalism.[13]

[10] With the exception of the eternity clauses of some constitutions, although their actual 'eternity' is questionable both logically (it cannot be verified that they will be valid in perpetuity, of course) and historically (throughout the universal constitutional history, many legal norms, originally intended to be perpetual, have been abolished). On the relationship between eternity clauses and modern constitutionalism, see Suteu (2021).

[11] With the exception of the above mentioned eternity clauses, i.e. constitutional provisions that cannot be amended, but even beyond these, some constitutions give some of their provisions greater weight than others, which makes their amendment subject to more stringent requirements. See for example Art. 168 of the Spanish Constitution, https://bitly.ws/3bwfa.

[12] The use of the adjective 'liberal' is justified because a non-liberal conception of constitutionalism is also possible, and it can also be given a formal meaning that considers as constitutional a state in which the rules of the constitution—regardless of their content—are enforced in practice. See Tushnet (2017).

[13] McIlwain (1940), p. 24; Gordon (2002), pp. 5–7; Godden and Morison (2017); Grimm (2016), p. 22; Schütze (2019).

The constitution can only fulfil its functions of regulating public power, protecting fundamental rights and—through all these—limiting power if its provisions are also enforced in practice. The constitutional functions are not solemn declarations, but are normative in nature,[14] and even represent the highest level of legal regulation,[15] and therefore, if they are not implemented, the constitution itself loses its meaning and thus its legitimacy. The performance of constitutions is therefore determined not only by their stability but also by the extent to which they are enforced.

Another fundamental function of modern constitutions is the establishment of a relationship between the state and the people (the *demos*) who create the state, and through this, the legal articulation of national identity,[16] or, in other words, the integration of society.[17] Although this is less a constitutional function than a symbolic one, it is inevitable that it should be evaluated, as it is often identified as one of the reasons for the creation of a constitution.

Constitutions also have functions that derive from the historical-political context in which they were created. The 'constitution-making moment' is often created by socio-political needs which place specific demands on the constitution and which also have a significant influence on its content. Such special functions may include, for example, a symbolic and actual, i.e. legal break with the past, the resolution of political or armed conflicts, the abolition or replacement of a previous political and constitutional system by a new one, or, more generally, a kind of social contract or its renewal in a solemn, legal form.[18]

Of course, other classifications of constitutional functions are possible,[19] depending on the specific purpose of the constitution (for example, the establishment of a public law order for a newly created state) or the normative theory on which it is assessed (such as the improvement of democracy or the general welfare). The method used below, i.e. the assessment of constitutional performance and resilience based on the values of European constitutionalism, is not without its problems: however, this is hardly objectionable in a constitution such as the 2011 Fundamental Law of Hungary. In its introduction, it boasts that the Hungarian people 'fought in defense of Europe throughout the centuries and, by means of its ability and diligence, has contributed to the enrichment of the common European heritage'; then, it enshrines Hungary's membership of the EU, and states the principle of the separation of powers and respect for fundamental rights.

[14] Grimm (2003), p. 25; Vorländer (2012), p. 23.

[15] Hofmann (2004), p. 160.

[16] 'Constitution is not merely a juridical text or a normative set of rules, but also an expression of a cultural state of development, a means of cultural expression by the people, a mirror of a cultural heritage and the foundation of its expectations.' Häberle (2000), p. 79.

[17] See, for example, Detjen (2009), pp. 18–19.

[18] Heringa (2016), p. 4.

[19] See, for example, Breslin (2009); Ginsburg and Huq (2016); Horsley (2022), pp. 102–103.

3 Performance of the 2011 Fundamental Law, 2012–2023

3.1 The Regulatory Functions

The 2011 Fundamental Law is a complete, full-fledged written constitution: its scope covers all constitutional matters, including the most important issues of state sovereignty, fundamental rights, and the legal status and main rules of operation and procedure of public authorities. In some respects, there has also been some progress compared to the 1949/89 Constitution, in that, for example, the new constitutional text explicitly includes the principle of separation of powers,[20] which was previously only developed in the practice of the Hungarian Constitutional Court (HCC). However, while this was in fact only a recognition of a principle that had been in constitutional practice for two decades, the exclusion of public finance from constitutional control was a very serious step backwards, since the limitation of powers introduced in 2011 deprived the HCC of the power to review public finance laws (i.e. the budget, taxes, duties, levies and other financial laws) unless they violate the right to life and human dignity, the right to the protection of personal data, the right to freedom of conscience and religion, or the right to citizenship.[21] Public finance and economic governance are thus essentially exempted from constitutional review, notwithstanding the fact that the restriction is in principle only temporary: it lasts until the public debt exceeds half of the gross national product, which has been above 70 per cent since the introduction of the curtailment. In addition, although the scope of individual constitutional complaints has been extended, the limitation of the possibility of initiating the review procedure to the supreme state organs has significantly shifted the HCC's activity from constitutional review of legislation to the control of the judiciary.[22]

The scope of fundamental rights has been partly extended to certain 'third-generation' rights (such as prohibition of human cloning), but, at the same time, it has degraded social rights into state objectives, stating that Hungary only 'shall endeavour to provide social security to all its citizens', and that '[t]he nature and extent of social measures may be determined' by law 'in accordance with the usefulness to the community of the activity performed by the person who is the beneficiary of the social measure'.[23]

However, the 2011 Fundamental Law fulfils the basic regulatory functions expected of constitutions, apart from the only uncertainty coming from its official name ('Fundamental Law') and its references to the unwritten, historical constitution

[20] Art. C para (1) of the 1949/89 Constitution states that '[t]he functioning of the Hungarian State shall be based on the principle of the separation of powers'.

[21] Art. 37, para (4) of the 2011 Fundamental Law.

[22] Gárdos-Orosz (2012).

[23] Art. XIX paras (1) and (3) of the 2011 Fundamental Law.

effective before the Second World War,[24] which are interpreted by some as meaning that the constitution of the country is the Fundamental Law and the historical constitution together.[25] In reality, however, this inherently contradictory view[26] has no practical meaning, and even the loosest link between the two alleged forms of constitution—according to which the achievements of the historical constitution should be respected in the course of constitutional interpretation—has no meaningful impact on constitutional practice.[27]

The basic rules on the exercise of public power and fundamental rights have always remained in the 2011 Fundamental Law, although in the meantime, there has been intensive legislative activity (especially the rewriting of the so-called 'cardinal laws' governing the status of state bodies).[28] Since March 2020, extensive emergency legislation has resulted in numerous and frequent changes to the detailed rules, and, when necessary, the provisions of the 2011 Fundamental Law have always been adapted to political needs. But this brings us to the question of the stability of the Constitution.

The conservative coalition government, which won a two-thirds parliamentary majority and thus constitution-making power in the 2010 general elections, began to reform the Hungarian legal system with great impetus, amending the 1949/89 Constitution a total of 12 times between May 2010 and the end of November 2011. The constitution-making process was so urgent that even after the adoption of the new Fundamental Law in April 2011, the previous constitutional rules were changed several times (because the Fundamental Law only entered into force on 1 January 2012). The constitutional fever did not stop after the entry into force of the Fundamental Law: it has been amended 12 times as of the end of 2023, which means that the text of the Fundamental Law has been changed on average every year so far.

In addition, proposals for amendments to the 2011 Fundamental Law, when tabled by the government or government party MPs, have passed through the Hungarian National Assembly (Parliament)—which has lost its importance in recent years and resembles the modern parliaments only in appearance[29]—as quickly and

[24] The preamble of the Fundamental Law declares that '[w]e honour the achievements of our historical constitution and the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the national unity. We proclaim that protecting our identity, as it is rooted in our historical constitution, is a fundamental duty of the State. We refuse to recognise the suspension of our historical constitution that occurred on the strength of foreign occupation.' Art. R para (4) declares that '[t]he provisions of the Fundamental Law shall be interpreted in accordance with their intended purpose, with the Fundamental Law's National Commitment, and with the achievements of our historical Constitution', while para (4) states that '[e]ach state body shall be obliged to protect the constitutional identity [which is rooted in the historical constitution - the author] and the Christian culture of Hungary'.

[25] See, for example, Szájer (2014), pp. 825, 845.

[26] See Szente (2019).

[27] For more details, see Szente (2023).

[28] Jakab and Szilágyi (2015).

[29] See Szente (2020b), pp. 5–19.

smoothly as ordinary laws: for example, the Parliament has spent just over 30 h on the 12 amendments to the Fundamental Law, the same time it spent on the debates on the Fundamental Law. While in most countries, the adoption of a constitutional amendment usually takes months, and often years, in Hungary the general debate on a constitutional amendment never lasted more than one sitting day (and within that five hours), and the second readings of constitutional bills lasted between 15 min and 3 h—if indeed they took place at all, since the last seven amendments to the Fundamental Law were debated by Parliament in a procedure in which the plenary session was no longer able to hold a second reading.

Among the current 166 articles of the 2011 Fundamental Law, 88 have changed in the meantime (repealed, amended or inserted as new provisions). This means that more than half of the constitutional provisions in force have been affected by previous amendments, and the content of some provisions has changed several times: for example, Article 26 on the status and appointment of judges and the election of the President of the Hungary's Supreme Court (Curia) was amended three times in the Fourth, Seventh and Eighth Amendments. All the provisions relating to the special legal order have been changed, as have all the final provisions—while the former have been modified as a result of a conceptual change, the latter have been changed following several significant additions (the final chapter of the Fundamental Law now contains a total of 29 final and mixed provisions, instead of the original four).

In fact, on the very day the 2011 Fundamental Law entered into force, its own supplement, entitled 'Transitional Provisions', was published at the same time as it was promulgated, and the new constitution was amended three times in the first year of its existence. From the beginning, the Fundamental Law has played an instrumental role, which means that it has always been modified to suit the current interests of the governing parties in order to eliminate constitutional problems. This is illustrated, for example, by the First Amendment to the Fundamental Law, which was intended to prevent the Transitional Provisions from being reviewed by the HCC (unsuccessfully), while the Fourth Amendment inserted several legal provisions into the constitutional text that had previously been deemed unconstitutional, to eliminate constitutional concerns. The Second Amendment to the Fundamental Law never entered into force, the Fifth Amendment partially amended the Fourth, the Eighth amended the Seventh, and the Tenth partially amended the Ninth. The Eleventh Amendment to the Fundamental Law was of purely symbolic importance, with the aim of bringing back into Hungarian public law some pre-World War II names of certain public authorities.

In the famous words of Prime Minister Viktor Orbán, the adoption of the Fundamental Law created a 'granite foundation',[30] whereas the reality is that the

[30] Orbán: Gránitszilárdságú az alaptörvény [Orbán: The Fundamental Law created a granite foundation]. Mandiner, 2 January 2012, https://bitly.ws/3bwk8.

2011 Fundamental Law is 'the most flexible constitution in the world',[31] with about a third of its full text having changed since its entry into force in 2012.

The 2011 Fundamental Law is often seen as Fidesz's own 'party constitution', referring to the fact that the governing parties can shape the constitutional rules as they want, and they are clearly not afraid to use their constitution-making power. Since the formation of the second Orbán government in May 2010, the Fidesz—Hungarian Civic Alliance (Fidesz) and the Christian Democratic People's Party (KDNP) coalition has adopted a completely new constitution and amended the existing constitutional rules a total of 24 times (12 times each for the 1949/89 Constitution and the 2011 Fundamental Law), which means that between May 2010 and December 2023, it introduced a constitutional act every 6 months on average. One might think that, with unlimited constituent power and a determined political will, and in the absence of consultation with the opposition parties and professional-academic circles, the constitution-makers had sufficient opportunity to create a logically closed, uniform constitution. But this is not the case with the 2011 Fundamental Law.

Internal inconsistencies are well known, yet they have not been corrected, which says a lot about the importance attached to the 2011 Fundamental Law by those who created it. Thus, the well-known, apparent logical contradiction in which while the preamble, called the National Avowal, states that '[w]e refuse to recognize the communist constitution of 1949 and hence declare it to be invalid', one of the Final Provisions states that Parliament adopted 'the Fundamental Law according to Point *a)* of Paragraph (3) of Article 19 and to Paragraph (3) of Article 24 of Act XX of 1949'. However, a valid legal norm cannot be derived from an invalid one, which does not mean that the Fundamental Law is invalid (since a norm that has been duly adopted is not invalidated by a faulty reference), but it is a very embarrassing error, especially in the case of a constitution.

The Fourth Amendment to the Fundamental Law incorporated into the constitutional text several previously existing legal provisions that had previously been annulled by the HCC for unconstitutionality, without ensuring the internal coherence of the Fundamental Law. Thus, the provisions with which the newcomers were in conflict have remained part of the constitutional text. The purpose of this modification was to override the decisions of the HCC, and several other amendments were intended to avoid a constitutional review.

In addition, the provisions referring to the historical constitution (or its achievements) have also effectively destroyed the logical unity of the Fundamental Law. In this respect, the source of indeterminacy is not only that they are too abstract (this is also the case with many traditional constitutional principles), but also that they open the door to the infiltration of norms from extra-constitutional sources. As a consequence, the HCC often refers to the achievements of the historical constitution without clarifying what they are and how their content can be determined.

[31] Based on the data from *Oxford Constitutions of the World*, https://bitly.ws/3bwjG.

Constitutional provisions require unconditional enforcement, which cannot be offset by the fact that some provisions are enforced 'in part' or 'in some sense', nor by the fact that while some constitutional provisions cannot be enforced, others, or even most of them, are really implemented.

However, judging the practical validity of a constitution is not a simple task: it would be obvious to apply the formal assessment criterion that it is for the constitutional court (or other higher courts exercising constitutional review) to enforce the constitution, at least where there is judicial protection of the constitution. This would mean, however, that the constitution is always and fully enforced (because if it were not, the court would have already acted), which would make the very questioning of the issue meaningless. However, by the prevalence of a constitution, we do not only mean that there are no unconstitutional legal norms in force, but we also take into account its effects on society, and the practical achievement of the objectives pursued by its provisions. Beyond this, the conclusions that can be drawn from constitutional or other supreme court practice are important for scientific assessment, but they are not compelling arguments, especially in a country where the rule of law or the quality of democracy is widely questioned and where the composition of the competent court is determined by the governing parties. Hungary is a good example of this, since, despite the fact that the HCC, which is the main guardian of the Constitution, has been functioning continuously also since the adoption of the new constitution, the Fundamental Law has a very poor record in this respect: many of its provisions are not enforced at all, i.e. it can be considered a 'sham constitution'.[32]

As I have already pointed out, the Fourth Amendment to the Fundamental Law, passed in 2013, was largely adopted precisely to enshrine in the constitutional text the essential content of a number of legal provisions that had previously been repealed as unconstitutional ones, thus giving effect to the will of the legislature—as opposed to the provisions of the Fundamental Law that had been, and still are, unchanged and contrary to it.[33] Then, the so-called quota referendum initiated by the government in 2016—which proved invalid—was a textbook example of an unconstitutional popular vote.[34] The debt-ceiling rules of the Fundamental Law had no real effect; at most they were formally enforced by budgetary and other tricks, while nobody took seriously the constitutional principle of a 'balanced, transparent and sustainable management of the budget':[35] the state budget of 2023, for example, was adopted in the knowledge that many of the data on which it was based were wrong or outdated. The rules of the Fundamental Law on special legal orders did not matter when the state of emergency was proclaimed in March 2020[36] or when the

[32] See on this, Law and Versteeg (2013).

[33] Vörös (2014).

[34] The Controversial Anti-Migrant Referendum in Hungary is Invalid, 11 October 2016, https://bitly.ws/3bwnc.

[35] Art. N para (1) of the Fundamental Law.

[36] Government Decree 40/2020. (III. 11.).

Parliament, in the first enabling law,[37] spectacularly abdicating its duty to control the emergency decrees as required by the Fundamental Law, gave unlimited authorisation for government by decree.[38] Examples of constitutional provisions that are not enforced could be further listed.

In many cases, the lack of enforcement of the Fundamental Law is not apparent simply because the constitution does not have the authority to be worth invoking in political debates, or because it contains too general, abstract principles. It is difficult, for example, to take seriously the constitutional guarantees which solemnly declare that 'Hungary shall protect the freedom of scientific research,'[39] when a well-established (foreign-founded), prestigious university (the Central European University) that had been operating well for more than 25 years was driven out of the country for political reasons, the research institutions were arbitrarily taken away from the Hungarian Academy of Sciences, and most public universities were put under political control (changing the way they are maintained and the status of their teachers), and when gender studies were banned, and so on. Then, in a country of oligarchs linked to the governing parties and free transfers of state property to private individuals, arguably the most corrupt member state of the EU,[40] the constitutional principle that Hungary 'shall ensure the conditions of fair economic competition, act against the abuse of a dominant economic position' has only scant credibility.[41]

Nor can it be overlooked that, according to some EU institutions, a number of other international organisations and domestic nongovernmental organizations (NGOs), some fundamental rights (such as freedom of expression, freedom of conscience and religion, non-discrimination, the right to property, the right to social security or the right to strike) are not fully respected in Hungary and are subject to restrictions that are (would be) incompatible with the relevant provisions of the Fundamental Law.

3.2 Limitation of Public Power and Guarantee of Fundamental Rights by the Fundamental Law

It is hardly an excessive requirement for a twenty-first century constitution to meet the substantive requirements of modern constitutionalism. Given that Hungary is located in the centre of Europe and is a member of European integration organisations (the EU and the Council of Europe), it is also obvious that in this respect it is a matter of asserting the values of European constitutionalism.

[37] Act XII of 2020 on the Containment of the Coronavirus.

[38] On this, see Szente (2020a); Győry and Weinberg (2020); this book's introductory chapter by Fruzsina Gárdos-Orosz and Nóra Bán-Forgács.

[39] Art. X para (1) of the Fundamental Law.

[40] Transparency International: Corruption Perceptions Index 2022, https://bitly.ws/zC2G.

[41] Art. M para (2) of the Fundamental Law.

Nevertheless, the 2011 Fundamental Law contains some provisions that are contrary to these values, or at least not in line with the direction of European development, and several amendments also introduced such elements. These include the provision already mentioned, which removed public finances from constitutional review, but reference should also be made here to the constitutional possibility of life imprisonment without parole.[42] The exclusionary notions of family and marriage[43] constitute a constitutional prohibition on the recognition of same-sex marriage, which is incompatible with the principle of non-discrimination on grounds of sexual orientation, even though this institution is not (yet) recognised in the legal systems of several other EU Member States.

Apart from this, the 2011 Fundamental Law is in fact very similar to the previous constitutional arrangements. If a reader unfamiliar with the Hungarian political and legal context were to compare the previous constitutional text with the new one that replaced it, he or she might be surprised that it was necessary to adopt a new constitution, since neither the system of separation of powers nor the content of fundamental rights and the way in which they can be restricted had changed to such a significant extent that, say, a constitutional revision would not have made it possible to implement the changes intended by the constitution-maker.

However, despite the fact that the 2011 Fundamental Law recognises a number of institutions whose function is to counterbalance or control other branches of power, in practice the restriction of executive power is almost non-existent: Hungary can no longer be considered a Western-style constitutional democracy, which was the unanimous goal of democratic parties and movements during the process of regime change at the turn of the 1980s and 1990s. This is reflected in the EU proceedings against Hungary for systemic threats to the rule of law,[44] comparative studies by

[42] Art. IV para (2) of the Fundamental Law.

[43] Art. L para (1) of the Fundamental Law.

[44] In September 2018, at the initiative of the European Parliament, the so-called Article 7 procedure was launched against Hungary to determine whether there is a systemic threat to the rule of law in the country. European Parliament, P8_TA-PROV(2018)0340, The Situation in Hungary. European Parliament resolution of 12 Sept. 2018 on a proposal calling on the Council to determine, pursuant to Art. 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL), https://bitly.ws/3bwon. On 22 April 2022, the European Commission initiated the so-called conditionality mechanism procedure, which sought to have the Council suspend part of the EU funds due to Hungary in order to protect the EU budget. As a result, on 16 December 2022, the Council decided to freeze €6.3 billion from the Cohesion Fund and the so-called Recovery and Resilience Fund (although formally for separate reasons, but essentially both for rule of law concerns). See Council Decision 2022/2506 of 15 December 2022, https://bitly.ws/3bwov.

independent international organisations,[45] as well as in the research findings of the domestic[46] and international[47] professional and academic community.

The separation of powers provided for in the 2011 Fundamental Law is only formally enforced, firstly because politically based organisations have no real autonomy and, consequently, they have no independent policy-making capacity, and secondly because non-politically based public authorities are not a counterweight to the executive, but serve it: the leadership of the HCC, the Curia, the National Office of Judiciary, the Public Prosecutor's Office, and the State Audit Office are filled with party soldiers or other people loyal to Fidesz, the major governing party; the National Election Commission, and the position of the Commissioner for Fundamental Rights are under political patronage; and the autonomous regulatory bodies also operate under direct political control.

The above-mentioned restrictions on the exercise of fundamental rights also show that the Fundamental Law is not capable of imposing limits on the government and its majority in Parliament, but the same is also shown by the special legal order that has been in place for almost 4 years (with the exception of a short period), as noted above.

Hungary has become a world-renowned example of a modern, twenty-first century autocracy[48]; just as it was a forerunner of the democratic transition in 1988–1989, it has been the pioneer of the authoritarian transition since 2010. And the Fundamental Law has not been able to prevent this—although the coalition

[45] According to Freedom House's time-series analysis, the level of democracy in Hungary has steadily deteriorated over the last 10 years, and the country is no longer a democracy, but a 'hybrid' regime, and all Balkan countries except Kosovo and Bosnia and Herzegovina are more democratic than Hungary (according to 2023 data), https://bitly.ws/3bwqt. The same trend is shown by the World Justice Project's Rule of Law Index, which ranks Hungary 72nd out of 142 countries in 2023, the lowest in its region, https://bitly.ws/3bwqh. Hungary is also the worst performer in the EU in terms of the rule of law, according to World Economics, https://bitly.ws/3bwqc. According to Reporters Without Borders, Hungary has the most restricted press freedom in the EU, ranking 72nd out of 180 countries in the World Press Freedom Index, see https://rsf.org/en/index. Hungary has received similar criticisms from other professional organisations, see for example Centre for Media Pluralism and Media Freedom and Robert Schuman Centre (EUI), Monitoring Media Pluralism in the Digital Era. European University Institute, San Domenico de Fiesole, 2022, https://bitly.ws/3bwpL; International Press Institute, Mission Report: Media Freedom in Hungary Ahead of 2022 Election, https://bitly.ws/3bwq6. According to Transparency International's latest Corruption Perceptions Index (CPI) 2022, Hungary is the most corrupt country in the European Union, ranking 77th out of 180 countries in a tie on the list of the least corrupt countries, https://bitly.ws/zC2G. The most recent report by Amnesty International Report 2022/23: The state of the world's human rights (https://bitly.ws/3bwKG) and the US State Department's 2022 Country Reports on Human Rights Practices: Hungary (https://bitly.ws/3apVL) have also made a number of criticisms of Hungary's record on fundamental rights.

[46] See, for example, Kovács and Tóth (2011), Tóth (2012), Chronowski and Varju (2015), Halmai (2018), Szente (2017), Szente (2022), Varju et al. (2019).

[47] Among the vast literature, see, for example, Landau (2013), Bogaards (2018), Castillo-Ortiz (2019), Bugarič (2019), Fournier (2019), Pinelli (2015), Drinóczi and Bień-Kacała (2019), Kelemen and Pech (2019).

[48] See, for example, Pichl (2019), Bozóki (2022), Rupnik (2023).

government of the Fidesz and the KDNP and its MPs probably did not intend it to play this role, as demonstrated by the unilateral constitution-making and its amendments that have been made to serve current political interests.

Since the 2011 Fundamental Law was adopted, it has not been a limit on public power, but a tool and legitimizer of its expropriation and abuse.

3.3 The Fundamental Law as an Expression of National Identity

As far as the symbolic function of representing and strengthening the common elements of national identity is concerned, the Fundamental Law started with a handicap that is difficult to remedy afterwards. The unilateral constitution-making process and the failure to adopt the new constitutional text by referendum (although a constitutional referendum could have compensated to some extent for the one-sided nature of the constitution-making process) meant that opposition parties and voters were not in any way involved in the constitutional moment, which would have been all the more important given that there was no consensus or even a palpable social demand for the need to replace the previous Constitution. As is often said, a weak start was followed by a sharp decline: successive amendments, without consultation, and always serving current political interests, showed that there was no intention to strengthen the common, national character of the Fundamental Law.[49]

Its highly ideological nature, which was only reinforced by the amendments, also precluded the Fundamental Law from having any identity-building function at the societal level, as the governing parties asserted their political interests and ideological values even on divisive ideological or moral issues such as Christianity, or the concepts of family and marriage. Moreover, the reality of many of these values or propositions is highly contested: for example, the written form of the Fundamental Law is, in itself and in many of its fundamental features, the antithesis of the historical constitution, the constitutional identity based on it is anachronistic, just as the making of the defence of Christian culture the duty of all state bodies (at the expense of the state's ideological neutrality) is particularly unjustified in a country where Christians are in the minority[50] (and would not be justified even if they were in the majority). And after the opposition parties often voiced constitutionally absurd ideas for the abolition of the Fundamental Law after a possible electoral success in the run-up to the 2022 parliamentary elections, it is hard to imagine that a political consensus on this constitution can emerge between the different sides of the party structure.

[49] Várnay (2022).

[50] Hungarian Central Statistical Office: Final data 2022—Main population characteristics (national and regional data), https://bitly.ws/3bwvG.

4 Conclusion

While it seems obvious that the performance of the 2011 Fundamental Law should be judged on the basis of how it has fulfilled its basic constitutional functions, there may obviously be other criteria for evaluation. The judgement of the success of a constitution also depends on whether it is an internal (measured against the intentions of the drafters) or external (of those affected by the constitution) evaluation[51] and the evaluators' own motivations are also relevant. There are, for example, interpretations of the history and achievements of the Fundamental Law that are quite different from the above,[52] which describe the period since its adoption as a success story. There is no doubt that the Fundamental Law can be considered a great success by those in government and their supporters, as it provides a stable framework for government that is able to implement its policies without hindrance.

However, this is not the stability of a constitutional system that operates on the basis of principles recognised in the Fundamental Law: based on the above analysis, the 2011 Fundamental Law is rather a sham constitution of a modern, twenty-first century autocracy, which maintains the appearance of democracy and the rule of law, but is unable to ensure their enforcement, just as it was unable to prevent the authoritarian transition of the Hungarian constitutional and political system. Therefore, it is very difficult to imagine that a Western-type constitutional democracy and the rule of law could be restored in Hungary on the basis of the Fundamental Law, or at least without its comprehensive revision.

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[51] Ginsburg and Huq (2016), pp. 6–10.

[52] Csink et al. (2012), Trócsányi (2016), Varga and Mázi (2022).

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‘Eliminating Conservation’? The Re-Regulation of Hungarian Administrative Procedure in the Act on General Administrative Procedure

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Abstract The chapter analyses the resilience of the general rules of administrative procedural law in Hungary. Traditional doctrinal analysis, historical comparison and the sociology of legislation are applied to show the extent to which legislative transformation reflects the challenges of the socioeconomic environment after 2010. The chapter argues that the objectives declared by the legislator are not reflected properly in the legislative text. In the case of most of the legislative changes, neither the jurisprudential nor the sociological analysis can identify the expected positive impact. Legislative declarations concerning elevated public access or simplifications of the administrative procedure are in sharp contrast with the fact that, due to the reform of administrative procedure, review is inaccessible to the majority of clients. While the reform-related arguments that are officially put forward advertise the advantage of judicial legal protection, access to this and other forms of review is minimal; the advantage is not supported by statistical data.

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1 Aim and Method of the Research

Resilience refers to the ability of an entity to survive in a changing environment.[1] While the application of the concept of resilience in the field of social sciences has been questioned,[2] it is a general concept that seems very popular today and is specifically applicable to the legal system.[3] On the one hand, a legal system must be predictable and relatively stable, but on the other hand, it must adapt to social (economic, cultural, etc.) changes. Otherwise, it will inevitably become inefficient. This is a significant challenge for the legal system.

Administrative law is the most voluminous—and extremely heterogeneous—branch of law and the one which is also the most subject to change among all branches of law. Moreover, in the 10 years under review, almost all areas of the former have undergone a degree of legislative change that in other countries might not have been witnessed in an entire century. Among the so-called sectoral areas, one may mention the complete restructuring and centralisation of the education and health sectors, the radical overhaul of the pension system at the beginning of the decade, etc. However, analysis of these areas would obviously require specific expertise, and, in any case, the generalisability of the results would be questionable. It was therefore obvious that a narrower field should be chosen for analysis: i.e., 'Administrative Law – General'. This can be divided into three broad areas: the law of organisations, the law of operation and procedure, and the law of personnel.[4] The changes in each of these areas are very significant. We can refer, for example, to the changes in the law on central administrative bodies, the different types of bodies, the restructuring of the internal structure of ministries, the creation of government agencies and the dual management of previously autonomous, decentralised bodies in the case of local bodies, or the restructuring of the local government system with a radical reduction in the powers of local government.

This chapter focuses on the changes to the general rules of the administrative procedure. The reason for this is that, among the areas covered as general parts of administrative law, the role of the former is dominant, and it is the only area in the international and comparative law literature covered in almost all volumes dealing with the subject.[5] Several studies and even volumes have been published on the subject in Hungarian that explicitly discuss the need for and feasibility of the planned legislative changes.[6]

Our analysis takes place on two levels. On the one hand, we provide a content-dogmatic analysis of the law in terms of its responsiveness, exploring, on the one

[1] Reid and Botteril (2013), pp. 32–34.

[2] Olsson et al. (2015), p. 2–4.

[3] Reid and Botteril (2013), pp. 33–34.

[4] Lőrincz (2010), pp. 27–35.

[5] Cane (2011), pp. 56–58; Seerden (2012), pp. 24–30; Rose-Ackerman and Lindseth (2010), pp. 5–7.

[6] F. Rozsnyai (2018), pp. 48–50; Kálmán (2023).

hand, to what extent changes in the law fit the internal logic of the legal order and, on the other, to what extent it can be considered an appropriate means of achieving the social objectives predefined by the legislator. Our methodology and reasoning at this level correspond to classical legal thinking, but we have complemented the latter with other methods. We have also briefly considered the impact of legislative changes on the application of the law. Our analysis is based on publicly available statistics on public authorities and administrative litigation. The second layer of analysis focuses on the legislative process. In this area, we have examined the extent to which the preparatory process has successfully sought to identify the societal changes that the legislative change is intended to 'react' to and the extent to which it has been able to develop adequate legislative responses.

2 Social Issues Underlying the Reform of Administrative Procedural Law After 2010

After the political transformation (the landslide victory of the Fidesz–KDNP party coalition in the general election) in 2010, a new, so-called neo-Weberian conception of state and public administration began to prevail that involved the implementation of recentralisation and organisational integration within the subsystems of Hungarian public administration. The procedures, the functioning and the staff of the administration have been affected by the different transformations and amendments.

The starting point was that, until the change of government in 2010, the late but all the more radical application of New Public Management (NPM)[7] caused a severe crisis. The first version of the Zoltán Magyary Programme for the Development of Public Administration (MP 11.0.),[8] presented on 17 June 2011 (which was one of the medium-term and complex programmes related to the European Union's [EU] co-financed operative programmes), were intended to remedy this situation after the change of government in 2010.[9] The implementation of the revised version

[7] The NPM advocated the primacy of market solutions; that the delivery of public administration should preferably follow a market approach. This trend was dominant from the 1980s until 2008. In continental Europe, however, this trend—which has essentially Anglo-Saxon roots—never became dominant. Reforms in this region have been less radically pro-market but have sought to retain Weberian traits and give greater scope to customer focus and efficiency. This trend is referred to as the neo-Weberian approach (p. 3) in the much-cited work of Pollitt and Bouckaert (2004). In Hungary, due to a controversial interpretation, the post-2010 governmental reforms have been categorized this way (G. Fodor and Stumpf 2008, pp. 17–19).

[8] Zoltán Magyary Public Administration Development Programme (MP 11.0.). Ministry of Public Administration and Justice, Budapest, 10 June 2011.

[9] Jakab et al. (2015), pp. 170–171.

adopted in 2012[10] was evaluated by the Organisation for Economic Co-operation and Development (OECD).[11]

One of the central elements of the Magyary Programme was the 'Good State concept and the Good State Index', one of the (+1) areas of intervention of which effective public administration is a component. Accordingly, there were serious attempts to define and develop a set of criteria for 'good public administration' and to regulate it in a normative way, both at the international and national level.[12]

These Magyary programmes, which tried to strike a balance between post-NPM trends and the emerging neo-Weberian trends with an emphasis on national administration, were replaced by a new concept by 2014. The 'Strategy for the Development of Public Administration and Public Services 2014–2020' is a much more concrete and pragmatic document than the Magyary programmes and was confirmed by government decision[13] and allocated financial means[14] for its implementation.

Reform efforts aimed at 'good government' and 'good administration' were brought together by the considerably empowered Commission for State Reform.[15] However, this did not mean the eclipse of the OECD-inspired and strongly post-NPM 'Good-State'-based approach and activities. The latter led to the Good State Reports,[16] demonstrating the usefulness of indicators developed to monitor the results of the reform and inform further decisions.

In the reforms linked to the 'Good State' and 'Good Governance' programmes, elements of the NPM and post-NPM paradigms have been even more prominent since 2015/2016. In contrast to the neo-Weberian approach, which prioritised and emphasised the guarantees of the rule of law, post-NPM approaches, which in particular focus on market competitiveness and reducing the cost of competition in administrative, procedural law, have reduced procedural guarantees as well as the number of redress forums available to clients.[17]

The expectations associated with these programmes, such as the reform of local government and territorial (regional) governance, were not supported by any social needs assessment, so the former were largely speculative and based on applied research material in professional workshops. No significant social or professional debate was commenced to identify real needs.

[10] MP 12.0., 31 August 2012.

[11] OECD (2015) Hungary: Towards a Strategic State Approach. Paris, https://bit.ly/3wIPYdr.

[12] Balázs (2021), pp. 22–23.

[13] Government Decision 1052/2015. (II. 16.) on the tasks related to the Public Administration and Public Service Development Strategy.

[14] Government Decision 1561/2015. (VIII. 12.) on the annual development framework for the year of the Operational Programme for the Development of Public Administration and Public Services.

[15] See Government Decision 1602/2014. (XI. 4.) on the annual development framework of the Public Administration and Public Service Development Operational Programme for 2015; State Reform Portal, https://bit.ly/39KXpaV.

[16] Good State Report 2016, https://bit.ly/3yXArry.

[17] F. Rozsnyai (2020), pp. 12–14; F. Rozsnyai et al. (2021), pp. 312–314.

3 The Regulatory Nodes of Administrative Law

The process of the transformation of Hungarian public administration from 2010 onwards encompassed all areas of public administration, including its organisation, operation, tasks, and staff. The major reform acts by which the transformation of the Hungarian administrative system was carried out were Act CLXXXIX of 2011 on Local Governments of Hungary; Act CXCIX of 2011 on Civil Service Officials; Act CL of 2016 on the Code of General Administrative Procedure (CGAP); Act I of 2017 on the Code of Administrative Court Procedure (CACP); Act CXXV of 2018 on Government Administration; and Act CXXX of 2018 on Administrative Courts (which was passed, but did not come into force).

In addition to the above-mentioned regulations, there has been very significant legal, organisational and financial transformation in virtually all major areas of sectoral administration. However, the available research capacity clearly cannot cover such a wide range of areas. The research will, therefore, focus on the regulation and re-regulation of administrative procedure. In this respect, there have been very significant and even radical changes, both in terms of form (new laws) and content.[18]

Prior to the current legislation in force, the provisions of Act CXL of 2004 on the General Rules of Administrative Procedure and Services (GRAP) were applicable in Hungary.

The GRAP underwent a comprehensive amendment in 2008. One source of international challenges is Recommendation 1615 (2003) of the Parliamentary Assembly of the Council of Europe. On 20 June 2007, the Committee of Ministers adopted its Recommendation CM/rec(2007)7 on Good Governance and its appendix, 'A Code of Good Governance' (Good Governance Code). The research covered in this chapter starts with this set of objectives associated with the concept envisaged by the government. It first examines how the specific legislation has responded to perceived or real causes, taking into account the specificities of administrative law.

4 The Research Hypothesis Framework

Our assumptions can be summarised as follows. Compared to the previous legislation, the CGAP is considerably shorter yet hardly less comprehensible or applicable. For example, new institutions, such as conditional decisions, have been very difficult to interpret, even for those who apply administrative law. The effectiveness of the amendments was also highly questionable. For example, the introduction of the

[18] For example, the Codification Committee, which prepared the concept and drafted the legislation, was also used to prepare the GRAP. A report on their work has been produced: https://bit.ly/3wQA3K7. It is another question to what extent the technical discussions within the committees, the documents of which have still not been made public, are reflected in this report.

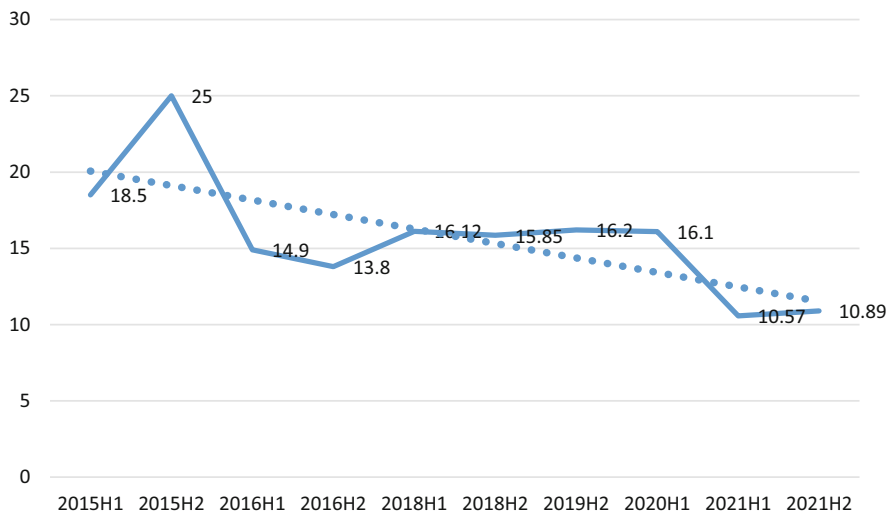

Fig. 1 Average duration of administrative procedures conducted by district offices (days) (from the first half of 2015-2015H1 to the second half of 2021-2021H2) (Authors' editing. Source of data: https://bit.ly/3sUUWRO. The dashed line in the figure is the trend line for the length of the procedure, indicating that, on average, procedures have accelerated as a result of the reforms)

conditional decision did indeed have a short-term accelerating effect, as shown in a previous study,[19] but this effect was subsequently reduced so that, overall, the impact of the legislative change can be considered moderate. In many cases, other procedural reforms more significantly impacted the system (see Fig. 1).

This ultimately led to the 'removal' of this conditional decision from the CGAP in 2020 through an amendment to the latter. Moreover, the legislation has a framework nature, leaving much room for sectoral additions even at the level of implementing decrees. Thus, if the CGAP and its implementing regulations are combined, the scope advantage over the previous legislation GRAP disappears.

Beyond the period examined by our chapter, the COVID-19 pandemic in Hungary in 2020 led to another change: the institution of so-called "controlled notification". This was first introduced in April 2020 as a temporary measure, then generally in the summer of 2020. The establishment of this institution resulted in a significant reduction in the time required for notification: in the second half of 2020, the average time required for filing at the district office was only 11.3 (!) days compared to 16.1 days in the first half of 2020.[20] In our view, an important factor in the significant reduction in the time taken to process cases is that controlled notification has removed from the authorities' remit a number of licensing-related cases requiring in-depth technical examination and involving multiple authorities (so these procedures, which generally take longer to process, no longer increase the average

[19] F. Rozsnyai and Hoffman (2020), pp. 121–124.

[20] Source: OSAP 1229 2020 and 2021 second-semester authority tables, https://bit.ly/3lCxhkV.

time taken to process cases).[21] The reaction to the polycrisis shows the resilience of the Hungarian administrative system: in 2021, the new wave of the COVID-19 pandemic impacted the duration of procedures only to a limited extent. It is clear that, over a longer period, the duration of procedures was not significantly influenced by the termination of the conditional decision.

The general nature of applicability is based on the fact that the CGAP also follows the model of so-called general procedural law, whereby, as a general rule, one act, the CGAP, is applicable to all administrative matters and all stages of a procedure. First, with regard to enforcement proceedings, the CGAP has unfortunately not changed the previous solution of applying Act LIII of 1994 on Judicial Enforcement in Civil Cases in the absence of a different provision, as it has not been able to institutionalise a separate administrative body for enforcement purposes. This is why the multi-level and complex legal regime has evolved wherein the Code on Civil Procedure (Chapter XI of CGAP) does such. This model was partially transformed, and a new provision was introduced: namely, that, as a general rule, enforcement is carried out by the general tax authority unless otherwise provided for by law, government decree, or local government regulation in a municipal (authority) case. However, in this case, Act CLIII of 2017 on the enforcement procedures to be carried out by the tax authority should be applied and not the CGAP.

If all this is appraised together, it becomes difficult to uphold the claim to the defining feature of general procedural codification, i.e. that it covers all stages of the procedure. Its general applicability is further undermined by exempted procedures, the largest group of which (to which the General Tax Code does not apply) are tax and customs procedures.[22] However, the latter may in themselves be more numerous[23] than those covered by the CGAP.

If this is true, then the 'general' nature of the CGAP is called into question. This, in practice, overrides one of the foundational points of the concept.[24]

5 Analysis: The Practice of the Authorities and the Judicial Review of Administrative Decisions

From the objectives and the legislation based on this concept, the intention to maintain a general code seems clear.

[21] Balázs and Hoffman (2020), pp. 48–52.

[22] Act CL of 2017 on the Rules of Taxation and Act CLI of 2017 on the Tax Administration Procedure apply to these.

[23] According to the OSAP official statistics, in the first half of 2018, 21,660,903 individual first-instance decisions were issued by NAV in tax cases alone. Meanwhile, 8,663,808 independent first-instance decisions on the merits were taken at the District Offices and 342,089 at government offices, while the number of first-instance decisions taken by local governments was 2,786,985. See the statistics on public authorities for the first half of 2018 (OSAP 1229), https://bit.ly/3lMywOL.

[24] Hajas (2017), pp. 294–297.

However, if the general rule is not applied to the majority of all public authority cases, the characteristics of the legislation will change. Here, 'preservation by abolition' is reversed: while the legislator's declared intention is to preserve the former's general character, the content of the regulation, in light of the above, essentially abolishes it.

The minimum social challenge for new regulation is that it should be better than the old one. In our case, the new one is indeed shorter and more transparent at first sight, but in contrast to its name, it does not cover the whole range of public authority cases, or even the majority of them, or all stages of the procedure. The question remains: what have the law enforcer and the justice-seeking public gained?

5.1 The Administrative Burden and How to Reduce It

The concept and legislation were not preceded by any credible surveys, empirical experience, or analysis of official statistics that could easily have been used for this purpose, so it was not possible to know which administrative burdens should have been reduced, and nor have such data have been made available since the application of the law.[25]

5.2 The Effectiveness of the Implementation of Administrative Decisions

Some administrative acts of public authorities impose substantive obligations on clients, which, in the absence of voluntary enforcement, the administration must implement through legitimate state coercion. The enforcement procedure and instruments serve this purpose.

A state cannot be a good state if the administration that carries out its actions is incapable of implementing the laws and carrying out the individual decisions it takes. And when society is faced with the fact that the law and lawful decisions taken based on it are not enforced, it is liable to lose confidence in both the state and the law.[26] It is, therefore, very important to enforce the law from the point of view of society as a whole, but also to safeguard the rights and legitimate interests of clients. However, since the state is coercive in this respect, it must be backed up by a system of guarantees that can detect and remedy abuses. The enforcement procedure must, therefore, be both swift and efficient while at the same time providing adequate

[25] Official statistics are also part of the National Statistical Data Collection Programme (Országos Statisztikai Adatgyűjtési Program, abbreviated 'OSAP' in Hungarian), but the system is not suitable for examining these aspects either. https://bit.ly/3Nu6NhG.

[26] Sajó (2008), pp. 692–694.

guarantees in the context of the rule of law. In this respect, the situation in Hungary has not been very good in recent decades.[27] The public administration did not have its own enforcement institutions, while the enforcement mechanism that the courts could use was seriously flawed and needed reform.[28]

It is therefore regrettable and surprising that the most difficult part of the new legislation to interpret is the enforcement procedure, to which, as indicated above, is not the enforcement procedure that should be applied, but the one on judicial enforcement, with appropriate derogations, and the rules on tax enforcement for the enforcement of its execution.

Although implementation is part of the official statistics (National Statistical Data Collection Programme, 'OSAP'),[29] the system is such that obtaining national and historical results is difficult. There is extensive literature on the effectiveness of public administration but no generally accepted methodology.[30] From this point of view, the OECD country reports and thematic papers are the most practical and important sources because the Hungarian government has used them for the reforms that have been underway since 2010.[31] Efficiency is also defined as a principle of administrative procedure, which is interpreted in a specific way by the CGAP. It should also be noted, however, that it would be wrong to draw far-reaching conclusions from the growing number of procedures[32] since it is arguable whether the efficiency of public administration can be determined solely based on the two aspects cited in the legislation. The international analyses make it clear that the administrative burden (the time spent by the customer on administration and, in the case of businesses, the financial costs of this in terms of wages, potentially lost profit, etc.) is at least as significant.

On the other hand, the annual OSAP official statistics are static, as they cannot follow the 'movement' of tasks and powers and the resulting administrative characteristics, such as the evolution of the proportion of each type of procedure (automatic, summary and full). Another problematic issue is the permanent transformation of the competences: after 2020, several important first-instance cases were transferred from the competence of district offices to county government offices, so the data before and after 2020 are hardly comparable.[33]

[27] Gajduschek (2008), pp. 78–91.

[28] See Act XIV of 2017 amending Act LIII of 1994 on Judicial Enforcement in Civil Cases.

[29] For data for 2018, see the official statistics and municipal database, https://bit.ly/39H89Xw.

[30] Bouckaert and Halligan (2007), pp. 72–77; Gajduschek (2014), pp. 101–104.

[31] Molnár and Varga (2017), pp. 6–8.

[32] OECD PUMA (1997) Jogi szabályozás hatásvizsgálata [Legislative Impact Assessment]. OECD–MeH–IM, Budapest.

[33] A further difficulty is the lack of publicly available annual summary data of the official statistics of OSAP, making it virtually impossible to process the data dynamically for different periods using appropriate statistical and scientific methods. In general, however, it should be noted that the declared aim of introducing summary and automatic procedures was precisely to radically reduce the time needed to complete administrative procedures.

5.3 Guarantees of the Enforcement of Client Rights and Remedies against Administrative Decisions

Several elements can be examined in this context. Still, the fact that CGAP (Arts. 111–119) has changed the more than half-a-century-old domestic system of administrative procedure in several respects stands out.

As a result of CGAP, different types of procedures were introduced and the general and ordinary appeal as a subjective means of legal protection within the administration was abolished. The latter can only occur in exceptional cases and within a narrower framework than before, being replaced by administrative court action with the general power of modification granted to the court. This fundamentally new element goes far beyond the rule-of-law requirement of eliminating unlawful administrative decisions and removes the power of the executive branch to decide, being replaced by judicial decision without the necessary administrative expertise.

The limited role of administrative court procedures (primarily administrative lawsuits since the entry into force of the CGAP) is also reflected in the statistics on public authorities and courts. In the first half of 2016, before the procedural reform, 0.21% of cases in district offices were challenged by legal remedy, but only 4.86% of second-instance decisions were subject to judicial review. Thus, the propensity for judicial challenge was not very great in two-instance procedures. This situation had changed only slightly by the first half of 2018, with the entry into force of CACP and CGAP. In 0.20% of the 13,589,251 first-instance district office cases, clients appealed, and 6.99% of the cases were followed by administrative lawsuits.[34]

In the first half of 2016, 0.33% of first-instance decisions of county government offices were appealed, and the courts decided 0.033% of all cases. In the first half of 2018, when appeals against decisions of the county government office were only possible if a specific law allowed it, the number of appeals increased significantly compared to the previous period. However, the proportion of appeals was still small compared to the total number of cases: 1.25% of first-instance decisions were appealed, and 0.72% were brought to court.

As regards the introduction of different types of procedures (automatic, summary, full), there are traces of 'deadline fetishism' based on client rights and the reduction of administrative burdens, which unfortunately also dominated the previous GRAP. Public policy expectations included as a priority that the authorities should deal with cases in the shortest possible time, and aspects of effectiveness, efficiency, professionalism, and legality took a back seat in the text of the legislation itself, even if they were explicitly emphasised in the declaration.[35]

[34] OSAP, https://bit.ly/3MVuEXC.

[35] This is confirmed by the justification on the impact assessment sheet of the proposal for Act CXLIII. of 2015 on public procurement, which states that '[t]he aim of the proposal is to ensure that the public administration acts within a high-quality, modern, efficient, transparent and predictable

In the interests of the public policy objectives indicated above, the new solution introduced by the CGAP makes significant compromises in this respect, 'juggling' with time limits in a system that is difficult to understand but undoubtedly logically interdependent, setting the latter at 24 h for automatic decisions, 8 days for summary proceedings and 60 days for full proceedings.[36] (If averaged, the result is eerily similar to the 20-day working day general time limit radically introduced by the GRAP, which later failed in practice.)

It is interesting to see the model calculation carried out to justify the generalisation of the summary procedure in the current legislation, which states that 'The possibility of successfully introducing the summary procedure is reinforced by the fact that, according to the available statistical data, in the current administrative procedural system, 30% of cases are dealt with in 3 days, 27% in 4–10 days, [and] 26% in 11–30 days. By fine-tuning the different time limits to be laid down in the General Administrative Regulation, it should be possible to open up the possibility of a fast-track procedure for a significant proportion of the cases that can currently be dealt with in 11–30 days.'[37]

However, a note to this statement also states that '[t]he Ministry of Justice's statistical data collection looked at first and second instance decisions taken by central public administrations in 2013. The Public Procurement Authority, the National Media and Infocommunications Authority, the Hungarian Energy and Public Utilities Regulatory Office, the National Authority for Data Protection and Freedom of Information and most of the central public administrations managed by ministers have complied with our data request, and we have data on 5,594,600 cases in 629 types of first instance cases.[38] Most of the questions are the same as those in the National Statistical Data Collection Programme, with the only additional question being on the length of time taken to process cases. The data did not cover cases handled by district offices, metropolitan and county government offices and municipalities.'

The data on which the decision-makers seem to rely are therefore not representative and are based on a sample that is not suitable for mathematical-statistical analysis, whereas OSAP data is public and general (being derived from a system that

framework of public procedural law in the administration of cases, in accordance with the Fundamental Law, guaranteeing the rights and legitimate interests of the customers, ensuring the speedy conclusion of procedures and timeliness. The fundamental requirement of the rule of law is that the rules of the legal system as such must be unconditionally respected, i.e. it is also a constitutional requirement that the procedural rules must be respected by the public authorities. By adopting a new approach to the law, the legislator draws on the experience of the 10 years of the Act's CXL of 2004 operation and also contributes to the creation of a genuine administrative adjudication system, which will also create a procedural law that will bring about real and positive changes for the client.' Source: https://bit.ly/3LO9usX.

[36] Art. 50(2) of the CGAP.

[37] Detailed report on the preparation of the concept for a general administrative regulation, https://bit.ly/3wT4EFC.

[38] This is equivalent to around 13 million decisions taken in regional government offices within 6 months.

covers all cases, the so-called 'whole population'). In fact, the data that are used appear to be rather inadequate and highly statistically skewed. On the one hand, they explicitly include a large number of atypical bodies operating only at the national level. On the other hand, the distorting effect of second-instance proceedings is also evident since, in this case, the potentially lengthy evidentiary procedure (hearing witnesses, on-the-spot inspections, and even trials, etc.) is unnecessary (although the extent of the distortion cannot be estimated without knowing the proportion of second-instance proceedings). The most significant bias, however, is the omission of data from the public law enforcement bodies with the highest case volumes (county and district government offices, municipal offices), which, according to OSAP data, are those where the bulk of first-instance proceedings take place, compared to which the Ministry of Justice of Hungary data collection process mentioned above covered what could be considered atypical, or at least specialised, proceedings. It should be added that the areas thus excluded are those where the ordinary citizen most often appears in the position of the client, i.e. this is precisely the area where a general procedural law can play the greatest role in informing the citizen, i.e. in providing practical assistance in understanding the procedure, in navigating the process and, not least, in clarifying the guarantees of the rule of law.

The statistical data on which such decisions are based seem rather inadequate for the very purpose of justifying the CGAP. In the absence of aggregated data, and also based on the arguments presented above concerning efficiency, it is not really possible to show clearly today how the number of administrative cases and the time taken to deal with them evolved before and after the entry into force of the GRAP, as the publication lists only provide data by sector.[39] This 'lack of processing' of official statistics (or, if they do exist in the Ministry of Public Administration, their secrecy) may call into question the soundness or effectiveness of the administrative procedure and even of its organisational and operational reform.

The abolition of the appeal as a general and ordinary remedy within the administration was therefore justified by the concept of the general administrative rules for several reasons. First, from the point of view of the organisation of the state, the new 'mega-organisations' created by the so-called 'internal and external' integration within the administration lack forums independent of the organisations which made the first-instance decisions. The second is that the risk of corruption that is inherent in administrative appeals is unknown and completely ignores the experience of administrative systems that have long used the appeal system. Nor does the situation correspond to the reality that judicial review is the new global trend, but instead, it can be justified as an argument for creating a special administrative court that runs in parallel with the latter concept. And it is certainly not an improvement on

[39] Until 2009, the ministry responsible for this was the Ministry of Interior or its successor bodies, which regularly published aggregated data on their websites. However, as the latter differed from that used in the OSAP system, it could not be considered official—but at least it provided information on the main trends.

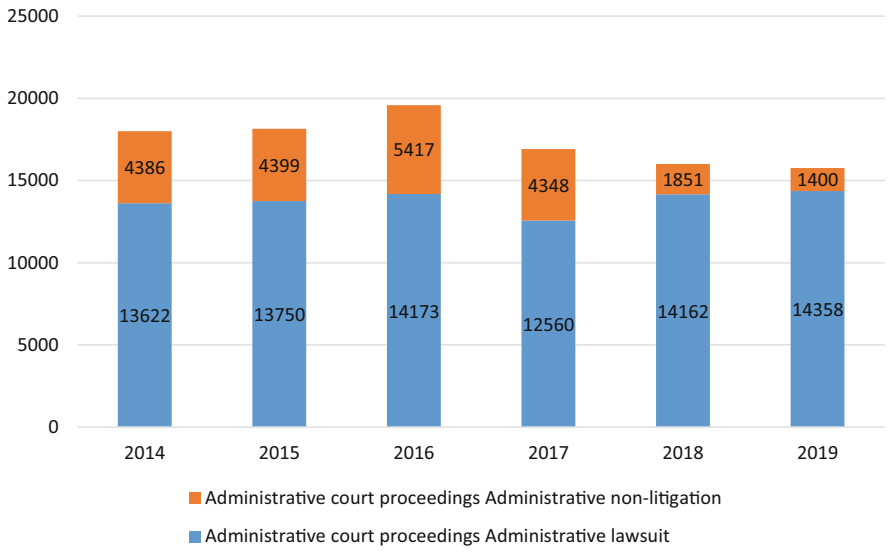

Fig. 2 Administrative court proceedings (number of cases brought before first-instance courts in administrative matters), 2014–2019 (Source: Court statistics, https://bit.ly/3MCgvhX)

the general and informal nature of appeals regarding client rights. The rigidity of the judicial procedure, its time delays, litigation constraints, costs, etc., tend to discourage clients from asserting their rights. This is also referred to in the concept as a challenge to be addressed. Appeals are significantly different from administrative court procedures. The entry into force of the CACP did not lead to a significant increase in the number of administrative court procedures, nor an overall decrease in their number (although there was a slight increase in the number of litigation proceedings, this was primarily because with the entry into force of the CACP most of the former non-litigation proceedings were classified as simplified litigation proceedings) (Fig. 2).[40]

The general reformatory power of the courts, which is supposed to balance timeliness, may be interpreted as a grave mistake because, on the one hand, it is not for the court to decide on behalf of the executive branch, and, on the other, the court does not understand public administration as a specialised (sectoral) form of administration. Even in systems where the judicial review of administrative decisions is organised within the executive branch, reforming administrative decisions could not be interpreted as a general remedy. And even with the introduction of a general power of reform (modification), the use of this possibility by the judiciary has been limited, as can be seen from the data based on the court statistics for the first half of 2019.

[40] F. Rozsnyai (2019), pp. 17–18.

Those decisions that modified the administrative authority's decision accounted only for 5.18% of all decisions (orders and judgments that close cases), i.e. their weight was not significant. Although the introduction of the **CACP** model has significantly increased the number of commutation decisions, given that the proportion of commutation decisions in cases which were typically still brought under the rules of the former Chapter XX of Act III of 1952 on the Code of Civil Procedure and closed in the first half of 2018 was only 1.70%, the new model, although significant, has not led to a breakthrough so that even within this framework we cannot speak of 'judicial governance'.

It was precisely for these reasons that the legislator abolished the general power of amendment in the spring of 2020 and returned to using cassation power as the primary power. Changes can now only be made under the provisions of a specific law and on a 'sanctioning' basis (if the authority has not taken into account the instructions of the court decision ordering the cassation).[41]

The problem is, of course, more complex than this, but it is only pointed out here that the priority of the administrative court with the power of modification does not support the rights of the client; the client's interest would instead be served by the existence of a special administrative court if one had been established. The priority given to administrative proceedings also indicates another trend: the legislator wanted to give preference to the judicial protection of the rights of the parties to the case, as indicated above, by means of administrative protection. This has been accompanied not only by a reduction in the number of appeals but also by a preference for administrative litigation. This shift towards administrative court procedures is also reflected in court statistics, as the number of court cases increased significantly in 2020 when appeal as a general remedy was terminated. Interestingly, after the significant increase in court procedures in 2020, the number of administrative court procedures decreased significantly.

Following the controlled notification, another major reorganisation of powers took place after 2017, essentially within 3 years. In 2017, the number of former district office decisions increased—in view of the general possibility of appeal provided by the CGAP—as a number of competences previously held by the county-level bodies of the county (metropolitan) government offices were transferred to the district offices of the county seat, but the first half of 2020 saw a countervailing movement. Since, as a general rule, appeal against decisions of district offices has been abolished, functions that are typically assigned to the district offices of the county capitals have again been carried out by the county (metropolitan) government offices since March 2020 onwards. The above-mentioned changes in competence are also reflected in the statistics on public authorities (Fig. 3).

At the same time, so-called horizontal procedural laws—such as Act CXXV of 2017 on Sanctions for Administrative Violations[42] and the articles on controlled notification of Act LVIII of 2020 on Transitional Rules Related to the Termination of

[41] F. Rozsnyai (2020), pp. 13–14.

[42] Nagy (2018), pp. 254–256.

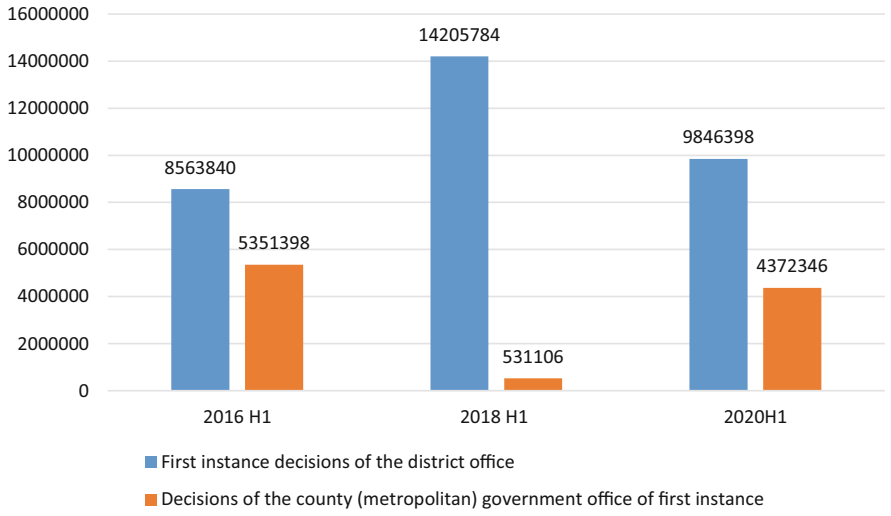

Fig. 3 Changes in powers and their impact on the number of administrative cases (H1 2016, H1 2018 and H1 2020) (Authors’ editing, data source: https://bit.ly/3GnPY5N)

State of Danger and Epidemiological Preparedness—were established, partly undermining the primacy of the CGAP and thus the rights of the client as set out therein. This is particularly the case for controlled notifications: with this new procedure, in the majority of cases, the opposing clients do not appear in the administrative procedure and can therefore not seek redress for any possible disadvantages they may suffer through administrative proceedings but must turn to civil (court) proceedings, which are generally more cumbersome.[43]

6 Conclusion

From the point of view of the responsiveness of the Hungarian legal system, the changes in the procedural law of public authorities within the period under review show a mixed picture. Prior to the current legal regulation, the provisions of the GRAP had to be applied in Hungary, and they changed very rapidly. The common denominator of the changes is the maintenance of the general character of the procedural code in relation to the specific or even exceptional procedural regulatory needs that regularly arise.

Another of these evergreen goals is increasing the service character of the procedure by expanding client rights and reducing administrative burdens. From the point of view of the responsiveness of the Hungarian legal system, we have

[43] Fazekas (2020), p. 194.

therefore focused on one topic, the regulation of administrative procedure, which is extremely extensive in terms of size, level, content and method of regulation but heterogeneous in terms of administrative law.

In sum, our analysis found the element of the legal system that we examined has a specific form of resilience, knowing that resilience is a specific challenge for the law in general. On the one hand, law must change in response to environmental changes and social needs. At the same time, there are a number of theoretical and practical factors which cannot be specified here that make it essential for law to be relatively stable and predictable.[44] This stability is certainly not apparent with regard to the domestic regulation of the administrative procedure. Our analysis describes the very large number and scope of changes in legislation and legal institutions, including a total overhaul of remedies and enforcement and radical changes to the basic procedure. Therefore, the law in this area has certainly changed over the last decade.

But to what extent and how can these changes be explained as reactions to the social environment? Based on our analysis, the answer seems to be little or perhaps not at all. We have come to this conclusion based on a detailed content analysis of the legislation and the legislative changes. The changes at the level of the relevant legal institutions analysed in detail above seem to confirm this conclusion.

First, the declared ambition of the procedure to provide a code-like regulation, apart from purely technical legal aspects, can also be justified by social needs. In such a case, the ordinary citizen can find information in one place on the rules to be followed in the various types of cases. However, our analysis shows that the trend is the opposite. The current legislation does not cover a significant part of public authority cases; the sections that were previously dealt with on a uniform basis (first instance procedure, remedies, and enforcement of the decisions) have been regulated separately, partly outside the scope of administrative law, etc.

Second, the redress procedure, based essentially on principled legal arguments, makes the judicial route the main means of redress, instead of the former relatively simple and thus accessible and quick appeal procedure, thus preferring a slower and more costly procedure with often more uncertain professional outcomes. The administrative and judicial statistics show that the emphasis on judicial remedies has also reduced the use of legal remedies: the number of appeals has not increased or even radically decreased with single-degree decisions, but the number of litigation and non-litigation procedures before administrative courts has not increased either. In addition, the horizontal procedural laws, in particular the rules on controlled notification introduced in 2020, have further reduced the enforceability of (opposing) client rights: the opposing client can enforce their rights not through the cheaper, more accessible administrative procedure, but via the more expensive, more difficult civil litigation (property law, typically neighbouring rights).

The transformation of the legal remedy system has also brought about an important change: although at the time of the adoption of the CACP, the formal generalisation of judicial (administrative) remedies at first only indicated that judicial

[44] Fuller (1964), pp. 32–34.

control over the public administration was expected to be strengthened, and even the strengthening of the judicial reformatory review power also posed the threat of a kind of 'judicial government', this was not the case with the CACP, at least on the one hand. On the other hand, the practice of the CACP did not justify this: although the rate of reversal of decisions increased, even then, there was no question of 'judicial government'. The amendments to the CGAP and the CACP in 2019/2020 created a specific situation: by radically reducing the possibility of appeal, they, in principle, strengthened judicial influence, but by removing the general power of reversal, they also excluded the possibility of 'judicial government'. These moves in the opposite direction have reduced the administrative options available to clients seeking redress and have clearly shifted the system towards private legal protection, a trend which was further reinforced by the changes at the end of the period under review, in particular, the institution of controlled notification referred to above.

Of course, our analysis also presents many other examples, but it is not only the analysis of the changes in the content of the legislation which suggests that the changes are not motivated by social circumstances nor any change in these circumstances. Instead, in many cases, they are motivated, for example, by the lack of staff at authorities and the latter's workload, i.e., in many cases, the Hungarian legislation on administrative procedure plays the hand that it is dealt. The process itself seems to confirm this. Changes to the general rules on administrative procedure have been relatively thorough compared to the case with many other laws. Expert working groups and codification committees have been set up, concepts have been discussed, etc. At the same time, the process does not reflect social trends[45] or even take into account the information that can be gathered from the practice of public authorities. The most important statistical data, which are supposed to be available, were not available to the legislative preparatory team. No professionally acceptable independent research has been carried out to identify the social or even administrative aspects relevant to the legislation. This may suggest there was no need to adapt the legislation to real and demonstrable social needs. It was certainly not possible to do so in the absence of such information.

In this case, the element of resilience retained is the formal maintenance of the general regulatory model with regard to administrative procedure. In contrast, the element of resilience adapted is the transformation of the content of procedural law into a different model that is tailored to the government's intention of supporting a changed or specific social, political and economic need in line with a different public policy priority. Indeed, the general administrative procedural model has *de facto* ceased to apply to all administrative matters, while the general scope of the CGAP has been formally preserved.

This conclusion is not a value judgment concerning whether the new legislation is good but merely a statement that its perception as a general model is at least questionable and a specific example of legal flexibility or adaptability in the sense discussed above.

[45] Hajas (2017), pp. 298–300.

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Minority Rights, Minority Protection, and Diaspora Policy in Hungary, 2010–2018

Lídia Balogh, Iván Halász, and András László Pap

Abstract This chapter offers a comprehensive overview of Hungary's evolving approach to three areas between 2010 and 2018. Firstly, it examines changes in minority rights, particularly through the recodified Minorities Act from 2011. Secondly, it delves into legislative measures aimed at protecting ethnic, racial, and national minorities, encompassing hate crime and hate speech legislation, media content regulation, and antidiscrimination law. Thirdly, the chapter explores Hungary's diaspora policy, emphasizing the 2010 amendment to the Citizenship Act from 1993. The analysis encompasses key legislative innovations and significant case law, providing insights into the political and societal challenges that drove these developments.

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1 Introduction

The chapter presents the most important changes in the fields of minority rights, minority protection, and diaspora policy in Hungary, i.e., in particular, the Minority Law, the anti-discrimination law, and the citizenship law, with reference to social challenges that can be identified behind the legal responses in the period 2010–2018.

The focus of the first part is on minority rights and the new (recodified) Minorities Act—the Act CLXXIX of 2011 on the Rights of National Minorities, as amended by Act XXVI of 2014 and Act CCI of 2017 (the Minorities Act of 2011). The second part focuses on the changes in the legal framework for civil, criminal, administrative, and media law protection of race, nationality, and ethnicity as protected characteristics, emphasizing the legal framework for hate speech and hate crime, and relevant media and anti-discrimination law changes. The third part presents Act LV of 1993 on Hungarian Citizenship (Citizenship Act) and the regulatory changes affecting diaspora policy: the relationship between the Hungarian state and Hungarian natural and legal persons living abroad.

2 Minority Rights

The most visible example of the change in minority rights law is the Minorities Act of 2011, although the new legislation has not fundamentally changed the concept, logic, or institutional system of its predecessor Act LXXVII of 1993 on the Rights of National and Ethnic Minorities (Minorities Act of 1993). The law breaks with the term 'national and ethnic minority' and introduces the single concept of 'nationality' in the definition of the legal subject matter (for reasons of clarity, we still prefer to use the term 'national minority' in English throughout the chapter). This is of particular significance in relation to the Roma, making it clear in principle that the legislator identifies the Roma as subjects of political and cultural rights in this context. The former term '*cigány*'—which holds similar connotation to the English term 'Gypsy', and is a common term also used for self-reference by numerous communities—is replaced by the term 'Roma', supposedly because it is considered more neutral or politically more correct. The basic philosophy, legal status and competences of the self-governments, which are called 'nationality self-governments' instead of 'minority self-governments', have not been changed in principle by the new Minorities Act. The preamble, in line with the spirit of the Minorities Act of 1993, speaks exclusively of the classic minority rights: the preservation of the specific culture of national minorities, the cultivation and development of their mother tongue, the free expression and preservation of their identity, collective participation in public life, the realisation of cultural autonomy, and the right of their real communities [sic!] to autonomy and self-government.

The definition of 'national minority affairs' includes 'the provision of specific public services to persons belonging to a national minority', and equal opportunities,

social inclusion and social welfare are included among the national minority rights. This is a significant departure from the Minorities Act of 1993, as the promotion of cultural autonomy and identity politics became conflated with social policy and social inclusion objectives—most visibly in the case of the Roma.

A further important element of the new legislation is that citizenship is not a prerequisite for national minority status (contrary to the logic of the Minorities Act of 1993).

Another significant innovation is the use of census data in national minority voting and in determining the volume of state subsidies. The operating budget subsidy for a settlement-level national minority self-government depends on the local number of persons belonging to that national minority, and in cases of regional national minority self-governments, on the number of national minority self-governments operating in the region. As the Fundamental Rights Ombudsman highlighted in a submission to the Hungarian Constitutional Court (HCC), which was subsequently rejected, it is troubling that at the time of the last census in 2011, it was not known yet whether there would be electoral consequences for declaring membership in a national minority. Although the number of citizens belonging to national and ethnic minorities increased from 313,832 to 555,507 between 2001 and 2011, according to census data,[1] and this represents more than 5% of the total population, given that 1.5 million people did not declare their nationality or ethnicity, it cannot be considered a definitive figure. According to estimates, the Roma minority may account for 5 to 10% of the total population.[2]

A key innovation of the new law concerns the representation and participation of nationalities in the Hungarian National Assembly (Parliament). In recent decades, a number of recommendations and reports by international organisations and the HCC have found constitutional violations by omission regarding the lack of representation of minorities in parliament. In the 199-seat Parliament, nationalities can secure seats on preferential terms from the 93 seats on the national list. When a nationality list secures a preferential seat, the number of seats available for party lists is reduced. National minority self-governments are the exclusive entities allowed to establish nationality lists, meaning that representation in Parliament is derived from municipal representation. Other actors, such as national minority associations or parties, cannot influence the composition of the list or propose candidates. Only one preferential mandate per nationality can be obtained, and nationality lists can compete for the remaining seats according to the general rules, subject to the 5% threshold. Under this model, voters have the option to vote either for party lists following general rules or, if they are on the nationality register, for their own nationality lists. According to the Act XXXVI of 2013 on Electoral Procedure, the rules for inclusion in the national minority register are no different from those for elections to the national

[1] Hungarian Central Statistical Office, Population Census 2011.

[2] The European Commission (EC) refers to the corresponding estimation (7.05%) of the Council of Europe (CoE). https://bitly.ws/3beW9.

minority self-government, i.e. the principle of free, unrestricted self-declaration essentially applies.

The solution chosen by the legislator also restricts the right to freely nominate candidates and lists. In addition to the clause on self-representation and the problematic restriction on multiple identities, the legislation also contains a problematic restriction on the right to vote. Moreover, the required number of votes without electoral abuses only applies to the Roma and German nationalities, since according to the 2011 census, only these groups are numerous enough: 315,583 Roma, 185,696 Germans, 6272 Bulgarians, 4642 Greeks, 26,774 Croats, 7001 Poles, 3571 Armenians, 35,641 Romanians, 3882 Rusyns, 10,038 Serbs, 35,208 Slovaks, 2820 Slovenes, and 7396 Ukrainians live in Hungary. However, the legislator has also devised a solution for the other 11 nationalities (apart from the Roma and Germans): according to Art. 18 of the Act CCIII of 2011 on the Election of Members of Parliament, 'a nationality that has submitted a nationality list but has not won a seat on it shall be represented in Parliament by a nationality spokesperson. The nationality spokesperson shall be the candidate who is ranked first on the nationality list.' In addition, the Parliament shall establish a committee representing nationalities, which shall initiate, make proposals, express opinions and participate in the monitoring of the work of the Government, for representatives of nationalities in their capacity as Members of Parliament and as national minority advocates. The spokesperson shall participate with voting rights only in the committee representing nationalities. In all other respects, his legal status is the same as that of other Members of Parliament—with regard to immunity, honoraria, reimbursement of expenses, etc.

An overall criticism of the regulation is that, on the one hand, it is unjustified from both a doctrinal and a practical point of view to restrict the right to become a candidate to individuals belonging to the nationality group and to restrict the right of multiple affiliation. On the other hand, there is still no guidance on the questions of when the 100 years of residence required for recognition as a nationality should be counted, and who should decide on this; many of the minorities listed currently do not meet this legal requirement.[3] At the same time, the regulations[4] on group membership and on the exercise of rights, which create opportunities for abuse, remain in place. The most serious problem with Hungarian minority law, known as 'ethnocorruption', arose not in relation to group-recognition, but in the lack of

[3] Pursuant to Art. 1 of the Minorities Act from 2011, a nationality is any ethnic group that has been resident on the territory of Hungary for at least one century, is a numerical minority among the population of the state, is distinguished from the rest of the population by its own language, culture, and traditions, and at the same time demonstrates a sense of belonging aimed at preserving all these, and at expressing and protecting the interests of the historically established community. Art. 148(3) of the Minorities Act from 2011 provides for the recognition procedure: one thousand signatures must be collected, then the Parliament, following consultation with the Hungarian Academy of Sciences, will verify the claim, and, if the conditions are met, will recognize the ethnic group as a nationality.

[4] Arts. 53(1), 54 of the Minorities Act from 2011.

regulation of the subjective conditions of minority affiliation. The phenomenon of ethnocorruption and the abuses experienced in domestic minority elections should also have warned against the introduction of the institution of a preferential parliamentary mandate, especially since neither minorities nor the majority of the political elite support a significant degree of regulation with regards to the freedom of identity-choice. There is a particular concern that majority politicians, by acting as representatives of recognized minorities, might abuse the framework of additional minority rights to gain access to parliament. In a 199-member parliament, an additional 13-member pseudo-minority faction could fundamentally redraw the electoral results.

A notable development is the abolition of the specialised position of parliamentary commissioner in charge of ethnic and national minority issues (Minority Ombudsman), which was considered an exportable 'Hungarian specialty'. The Fundamental Law[5] has introduced a curious hybrid system, breaking with the system of specialised ombudsmen: in the new arrangement, there is the general commissioner for fundamental rights (Fundamental Rights Ombudsman) and there are deputy commissioners,[6] including one for protecting the rights of national minorities living in Hungary (Minority Rights Deputy Ombudsman). The deputies are elected by the Parliament, while the Fundamental Rights Ombudsman is only nominated by the President of the Republic. The latter reports annually to Parliament and only MPs can put questions to him, i.e. the public responsibility is clearly linked to this status. It would follow from this constitutional logic that the Fundamental Rights Ombudsman is in all respects superior to his deputies, while the latter, as subordinate officials, have no independent powers. At the same time, however, by virtue of the election by a two-thirds majority in Parliament, the Fundamental Law equips the deputy institution with strong public and political legitimacy, which creates a specific contradiction. At the end of the day, however, the abolition of the independent minority ombudsman can be viewed a major step backwards in the protection of minority rights in Hungary.

3 Protection of National, Racial, and Ethnic Minorities

3.1 Hate Crimes

The recodification of the Act C of 2012 on the Criminal Code (Criminal Code) in 2012 included the following provisions: 'Any person who displays an apparently anti-social behaviour against others for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual

[5] The Fundamental Law of Hungary; i.e., Hungary's constitution.

[6] Cf. Forgács (2021).

orientation, of aiming to cause panic or to frighten others, is guilty of a felony punishable by imprisonment not exceeding three years';[7] 'Any person who assaults another person for being part, whether in fact or under presumption, of a national, ethnic, racial or religious group, or of a certain societal group, in particular on the grounds of disability, gender identity or sexual orientation, or compels him by force or by threat of force to do, not to do, or to endure something, is punishable by imprisonment between one to 5 years.'[8] In terms of application, the key question is whether these provisions extend to attacks against persons belonging to a majority group, or, by definition, only to attacks against persons belonging to a minority or at least not belonging to a majority.[9] In international practice, the majority nation, is generally not a protected subject in hate crime legislation. In Hungary, judicial practice in the field of hate crimes is rather inconsistent. According to Hungary's Supreme Court (Curia), 'The offence protects human dignity and; moreover, or involving [sic!], the various minorities; it prohibits, in particular, acts of violence against national, ethnic, racial, religious or other groups.'[10] However, one of the Curia's decisions in principle pointed out that '[the] victims of the crime of violence against a member of the community may also be persons belonging to the majority society'.[11]

Besides the problem of minority-majority vulnerability, there is the question of how to assess membership of social groups based on political views or subcultural identity. However, due to the open-ended list in the provision, essentially any member of a group can be considered a victim of a hate crime, even members of radical, far-right organisations. On the latter issue, the Curia already ruled in 2011 on an assault committed against members of the Hungarian Guard (an extremist paramilitary organization). According to the Curia's assessment, 'Members of an organisation which has been set up for the purpose of opposing a national, ethnic, racial, religious or other group of the population and which is manifestly contrary to the law—particularly if the organisation has already been dissolved by a final court decision [which was the case with the Hungarian Guard]—cannot, by definition, be afforded any greater protection under criminal law, since in this case the principle of the unity of the legal order is seriously undermined.'[12]

In 2015, the President of the Curia set up a working group to analyse the judicial practice regarding hate crimes; its concluding report highlighted the shortcomings of jurisprudence, in particular in the investigative phase, as well as problems with data collection.[13]

[7] Art. 216(1) of the Criminal Code.

[8] Art. 216(2) of the Criminal Code.

[9] Jovánovics and Pap (2013); Balogh et al. (2012).

[10] Bfv. II. 590/2012/18.

[11] Fkhar. II. 248/2014.

[12] Bfv. III. 87/2011/5.

[13] Available in Hungarian at: https://bitly.ws/3bfp8.

A report from 2018 by an independent expert initiative, the Working Group against Hate Crimes (Gyűlölet-bűncselekmények Elleni Munkacsoport, GYEM) points out that in Hungary the authorities tend to ignore the hate motivation, due to an inefficient training of officers involved; moreover, the need to achieve statistical objectives may discourage the authorities from dealing with more complex cases; consequently, the number of recorded hate crimes (violence against community members) is extremely low.[14] Notably, the Criminal Code includes a special offence to address paramilitary-vigilant actions by extremist groups;[15] however, in 2015, only one investigation was launched in connection with illegal patrols by extremist groups on Hungary's southern border during the European refugee crisis.

Several lower-level legal sources have also been adopted. In May 2019, the Prosecutor General's Office prepared a protocol,[16] and later, the National Police issued an instruction on police tasks relating to hate crimes.[17] The need for such a protocol has been continuously highlighted by human rights defenders since 2008–2009 (when a series of violent and fatal attacks were carried out against Roma in rural regions in Hungary) and several international organisations, such as the United Nation (UN) Committee on the Elimination of Racial Discrimination or the European Commission against Racism and Intolerance (ECRI), under the aegis of the Council of Europe, have expressed concerns about the lack of effective action.

In four cases, the European Court of Human Rights (ECtHR) condemned Hungary and ruled that the fundamental rights of Roma victims had been violated as a result of procedural errors by the investigating authorities. The ECtHR found in Balázs v. Hungary that the Hungarian authorities had failed to establish a prejudicial motive behind the attack against the Roma victim[18]; in R.B. v. Hungary, that the authorities failed to conduct an effective investigation and thus failed to protect the applicant from a racist threat in the context of a series of openly anti-Roma events;[19] in Király and Dömötör v. Hungary, that the applicants' right to physical and psychological protection was violated due to a series of errors in the criminal procedure; [20] and in M.F. v. Hungary, the state authorities failed to detect a possible racist motive behind a violent crime committed by police officers on duty against a Hungarian citizen of Roma origin.[21]

The data processing system has been also been improved: since July 2018, it is possible to indicate the bias motive in the statistical system for all offences and to indicate the group against which the offence was committed; this is in line with the

[14] GYEM: Shadow report to the sixth periodic report of Hungary to the International Covenant On Civil and Political Rights to the United Nations Human Rights Committee, February 2018.

[15] Art. 352 of the Criminal Code.

[16] Memorandum No. NF/1621/2015/3 of the Prosecutor General's Office.

[17] Instruction No. No. 30/2019 of the National Police.

[18] Balázs v. Hungary, Judgement of 20 October 2015, no. 15529/12.

[19] R.B. v. Hungary, Judgement of 12 April 2016, no. 64602/12.

[20] Király and Dömötör v. Hungary, Judgement of 17 January 2017, no. 10851/13.

[21] M.F. v. Hungary, Judgement of 31 October 2017, no. 45855/12.

Act XC of 2017 on Criminal Procedure which introduced the concept of a 'victim requiring special treatment' (who should be provided with the opportunity to be accompanied by a support person during interrogations), and strengthened the role of non-governmental organizations (NGO) representing victims. However, in the case of failures by the investigating authority, complaints can only be lodged in the framework of administrative proceedings, not in the framework of criminal justice, and NGOs are not allowed to act as victim representatives in crimes involving unidentifiable victims.

3.2 Hate Speech

The Fundamental Law places particular emphasis on the protection of the dignity of different communities, especially the majority community. This principle is codified in the Act V of 2011 on the Civil Code (new Civil Code) and the Criminal Code (both were adopted after the adoption of the Fundamental Law in 2011). Following many fruitless attempts to regulate hate speech in past decades, which failed numerous constitutional court reviews, the Parliament inserted a provision on the sanctioning of hate speech in Art. 2:54 of the new Civil Code: 'Any member of the community may enforce his personality rights within a thirty-day term of preclusion from the occurrence of a legal injury that was committed with great publicity in relation to some essential trait of his personality, his belonging to the Hungarian nation or some national, ethnic, racial or religious community, and is grossly offensive to the community or unduly insulting in its manner of expression. With the exception of relinquishing the material gain obtained through the violation of rights, any member of the community may enforce any sanctions of the violation of personality rights.' To dispel constitutional concerns raised, the governing party coalition, which has a two-thirds majority in the Parliament, inserted a provision allowing the sanctioning of hate speech into the Fundamental Law,[22] shortly after the adoption of the new Civil Code.

Notably, the new Civil Code allows for action in the event of harm to the community. However, under the general rules of civil law, the community is not a legal entity and therefore does not have personality and cannot be protected by civil law. A civil legal relationship is always (conceptually) a relationship between two individuals, so the concept of hate speech does not fit into civil law logic, neither in substantive nor procedural terms. Moreover, it is not in line with classical constitutional doctrine, since the right to human dignity[23] can only be understood in relation to human beings as individuals.

[22] See, for example, Koltay (2013), Gárdos-Orosz and Pap (2014), Hanák (2013).

[23] See, for example, McCrudden (2008), Mahlmann (2012), Dupre (2012), Jones (2012).

In relation to freedom of expression and community-based protection of dignity,[24] Art. IX (5) of the Fundamental Law provides that: 'The right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Persons belonging to such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity, as provided for by an Act.'

Following a peculiar codification logic, the hate speech provision of the Fundamental Law states, on the one hand, that the exercise of freedom of expression[25] may not be directed at violating the dignity of the Hungarian nation, and of the national, ethnic, racial or religious communities, while in the next sentence it seeks to allow the restriction of the right to freedom of expression, not in order to safeguard the dignity of communities as a value or state objective, but in order to safeguard the human dignity of individuals belonging to the community.

The main question regarding the applicability of the rules is therefore whether, in the case of 'harm to the community', it is possible to establish that an individual has suffered any harm at all. According to the doctrine of 'transference', which is known from German constitutional court (Bundesverfassungsgericht, BVerfG) practice, '[t]his can occur particularly in the case of statements relating to ethnic, racial, physical or mental characteristics, if the inferiority of a whole group of persons and of each individual member of that group can be inferred by the statement'.[26] In the case of belonging to the Hungarian nation, however, this theory will obviously not apply, since in the case of a hateful statement it is not realistic to conclude that the Hungarian nation is so vulnerable that the attack against the group could be transmitted to all the individual members.

Hate speech against minority and majority communities is also prohibited by criminal law. According to the Art. 332 of the Criminal Code, anyone who incites hatred in public against the Hungarian nation or against a national, ethnic, racial or religious group, or against certain groups of the population—in particular with regard to disability, gender identity or sexual orientation—commits the crime of incitement to hatred against the community.

3.3 Media Law

After the political change in 1989–1990, a comprehensive media law was a long time coming. Finally, the Act I of 1996 on Radio and Television Broadcasting (Media Act from 1996) was adopted in 1996 (which was in force until January 2011). The most relevant provisions of this legislation were as follows: 'Broadcasters shall respect the

[24] For an earlier version of the analysis (in Hungarian), see Pap (2015).

[25] Cf. Stajnko et al. (2023).

[26] BVerfGE 93, 266.

constitutional order of the Republic of Hungary. Their activities may not violate human rights and may not be suitable for inciting hatred against individuals, genders, peoples, nations, or national, ethnic, linguistic and other minorities, or any church or religious groups';[27] 'Broadcasting may not aim, openly or covertly, at insulting or excluding any minority or majority group, or at presenting and discriminating against such on the basis of racial considerations';[28] 'Public service broadcasters, and public broadcasters in particular, shall respect the dignity and essential interests of the nation and of national, ethnic, linguistic and other minorities, and may not offend the dignity of other nations.'[29]

The changes in the Hungarian legal system around 2010–2011, including the new 'media constitution'—Act CIV of 2010 on the Freedom of the Press and Fundamental Rules Governing Media Content (Act on Media Content) and Act CLXXXV of 2010 on Media Services and Mass Media (Act on Media Services)—have triggered heated debates both at domestic and international level. The conflict between media freedom and the protection of the 'dignity of communities' has been one of the most controversial issues from the outset.

The following parts of the Act on Media Content are of particular relevance: 'The media content may not incite hatred against any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group.'[30] 'The media content may not exclude any nation, community, national, ethnic, linguistic and other minority or any majority as well as any church or religious group.'[31] The original version of the latter provision also included the phrase 'overt or implicit insult', but this was soon removed by an amendment in the same year of entry into force.[32]

The above provisions of the Act on Media Content raise the same concern that has already been raised in relation to hate speech: whether the majority/dominant community is entitled to the same level of protection as minority/vulnerable communities. According to Judit Bayer's analysis published in 2011, 'the prohibition of hate speech against national-ethnic-religious minorities is commonplace in Europe, the prohibition of hate speech or exclusion against the 'majority' can obviously only be used against a minority'.[33]

Two of the relevant cases related to this media legislation received particular attention.

[27] Art. 3(2) of the Media Act from 1996.

[28] Art. 3(3) of the Media Act from 1996.

[29] Art. 23(1) of the Media Act from 1996.

[30] Art. 17(1) of the Act on Media Content.

[31] Art. 17(2) of the Act on Media Content.

[32] Art. 11(3) of Act XIX of 2011 on the amendment of Act CIV of 2010 on the freedom of the press and fundamental rules governing media content and the Act CLXXXV of 2010 on media services and mass media.

[33] Bayer (2011).

In the case of the documentary film entitled 'Gypsy-Hungarian coexistence',[34] broadcast by a public television channel in 2012, the Media Council (MC) decided not to initiate proceedings for violation of human rights, human dignity and the provisions on the prohibition of exclusion and incitement to hatred, as the programme did not present the Roma minority in Hungary as a homogeneous community with exclusively negative characteristics.[35]

The other case occurred in 2013 when the MC imposed[36] a fine on a daily newspaper for an article published, both in print an online, on 5 January 2013, by Zsolt Bayer.[37] (The reason the case was investigated by the MC—whose jurisdiction would not normally extend to the written/print press in similar cases—was that the newspaper in question was not a member of any co-regulatory organisation.) Bayer's article included the following statements: 'A significant part of the Gypsy [*cigány*] population is not fit to live among people. This part of the Gypsy community is an animal and behaves like an animal [...] Animals should not exist. Not in any way. This must be solved – immediately and by any means!'

3.4 Anti-Discrimination Law

Several attempts have been made to capture legally the phenomenon of 'ethnic profiling' with regard to the stop and search practices of the police in Hungary. In 2012, in a case involving the Hungarian Helsinki Committee (HHC) and the Nógrád County Police Headquarters, the court found that the cumulative effect of individual police measures, which were lawful and professional in themselves, could lead to disproportionality with regards to ethnicity. In 2016, the court approved a settlement between the HHC and the Budapest Police, according to which the latter party agreed to issue a circular on respecting the right to equal treatment of socially disadvantaged people and to emphasise that the 'generalised stop and search' measures against homeless or otherwise socially disadvantaged people are discriminatory.

In another lawsuit brought by the Hungarian Civil Liberties Union (HCLU), a violation of the right to equal treatment (in the form of harassment and direct discrimination) was established in 2011, in a case where the police in the town of Gyöngyöspata 'targeted' the local Roma community by control measures, while extremists raiding nearby were rarely stopped and even less frequently subjected to misdemeanour proceedings.

[34] See Pesty Fekete Doboz: A cigány–magyar együttélés [Gypsy–Hungarian Coexistence], 7 March 2012, https://bitly.ws/3bfrF.

[35] MC decision 925/2012. (V. 23.).

[36] MC decision 802/2013. (V. 8.).

[37] Bayer Zs: Ki ne legyen? [Who should not exist?] Magyar Hírlap, 5 January 2013.

In 2013, following a petition submitted by NGOs, the Fundamental Rights Ombudsman and the Minority Rights Deputy Ombudsman conducted a joint, comprehensive investigation into the Miskolc Municipal Police's control practices affecting Roma families. The report concluded that municipal bodies in Miskolc carried out raid-like, sometimes mass-scale inspections in segregated housing areas of the town, without any express legal authorisation to do so. This case was also investigated by the Organisation for Security and Cooperation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) contact point for Roma and Sinti issues by an on-site investigation that was followed by a report recommending that the authorities put an end to this practice of control.[38]

4 Diaspora Policy

This section outlines the amendment of the citizenship law and the changes affecting diaspora policy, the relationship between the Hungarian state and Hungarian natural and legal persons living/operating abroad. The naturalisation of ethnic Hungarians (i.e. providing them with Hungarian citizenship) who are non-residents of the country, was one of the few concrete issues mentioned in the election programme of the Fidesz—Hungarian Civic Alliance (Fidesz) and the Christian Democratic People's Party (KDNP) coalition that won in 2010. It is therefore not surprising that the amendment of the Citizenship Act was among the first steps taken by the new parliamentary majority. The 2010 amendment introduced the opportunity for so-called 'simplified naturalisation'. From then on, Hungarian-speaking applicants whose ancestors were Hungarian citizens could apply for naturalisation without having to reside in or move to Hungary. This was in a way a continuation of a trend, that had been evolving since the mid-2000s, of making it easier for Hungarians living abroad to become Hungarian citizens. However, as the pre-2010 legislation strictly insisted on the element of residence in Hungary, the amendment is rather to be considered a paradigm shift. Notably, this change is not unique in post-millennium Europe, as several states have relaxed their citizenship policies and allowed certain well-defined groups to acquire or regain citizenship without residence requirements.[39]

The amendment to the Hungarian citizenship law has caused some tensions in bilateral relations, especially with Slovakia: the latter made restrictive changes to its own citizenship legislation in response, intended to prevent large-scale naturalisation of ethnic Hungarians living in Slovakia. So far, very few ethnic Hungarians living in Slovakia have applied for Hungarian citizenship. The situation was less dramatic

[38] OSCE/ODIHR Contact Point for Roma and Sinti Issues: The Housing Rights of Roma in Miskolc. Report on the ODIHR Field Assessment Visit to Hungary, 29 June—1 July 2015. Warsaw, 27 April 2016.

[39] Croatia, Italy, Armenia, Romania, Serbia, and to some extent Spain.

regarding the relations with the other neighbouring countries, although Ukraine, for example, does not recognise multiple citizenship. Most of the newly naturalised Hungarians are from Romania, followed by Serbia and Ukraine. Acquiring Hungarian citizenship may be considered a major—one could say, humanitarian—form of assistance,[40] especially for Ukrainian citizens of Hungarian nationality, considering the country's situation since 2014.

By 2018, more than one million ethnic Hungarians, or individuals with Hungarian ancestors, had already applied for simplified naturalisation. The significance of this new feature is best illustrated by the figure that between 2011 and 2015 around 650,000 people obtained Hungarian citizenship under the simplified procedure and around 65,000 under the ordinary procedure. Of those naturalised under the simplified procedure, around 50,000 have also moved to Hungary; obviously, citizenship status always has a strong dimension of encouraging migration.

The above-mentioned paradigm shift in citizenship policy and the related complex paradigm shift in national policy affected several areas, including constitutional law (mainly through changes to electoral rules) and administrative law; and Act LXII of 2001 on Hungarians Living in Neighbouring Countries (Status Law) was also amended during the 2010s. The latter applied originally only to those living in any of the neighbouring countries, excluding Austria, who are not Hungarian citizens and who reside permanently in their country of citizenship; the objective of the Status Law used to be to promote the situation of ethnic Hungarians living in neighbouring countries. Then came the amendment of the Citizenship Act, with more complex and complicated objectives. Eventually, the legislator amended the provisions of the Status Law, and removed the stipulation that Hungarian citizens cannot be beneficiaries of the scheme governed by this act; however, they are supposed to maintain a permanent residence in one of the neighbouring countries, excluding Austria.

This paradigm shift affected the functioning of the Hungarian public administration, including the institutional framework of supporting ethnic Hungarians living beyond the border. In the first election cycle after 2010, the Ministry of Public Administration and Justice was charged with national policy making; later this task was transferred to the Prime Minister's Office. The State Secretariat for National Policy (SSNP) is supervised, however, by the Deputy Prime Minister, who represents national policy within the government. Since 2011, the Bethlen Gábor Fund (established by Act CCXXXII of 2010 on the Bethlen Gábor Fund) has disbursed a significant amount of financial support targeting ethnic Hungarians living abroad. Moreover, new entities have been established: the Research Institute for Hungarian Communities Abroad (established in 2011, subordinated to the SSNP) and the Research Institute for National Strategy (an autonomous budgetary body, established in 2012). As for foreign affairs administration, new consulates and consular offices have been opened in neighbouring countries (for example in Osijek, Croatia).

[40] Halász (2005), pp. 80–81.

In recent years, national policy has become a key component of public administration training. At the Ludovika University of Public Service, national policy as a mandatory subject is part of the curriculum for future civil servants, whether they are aiming for roles in national administration or careers in foreign affairs.

Several bodies have been established to coordinate national policy, including the Inter-Party Committee on National Policy, the Hungarian Standing Conference (resumed post-2010), and the Hungarian Diaspora Council, formed in 2011. The latter focuses not only on Hungarians in neighbouring countries but also on those scattered globally.

The revised national policy and citizenship regulation significantly impacted the boundaries of the Hungarian political community. Changes to electoral legislation in 2011 and 2014 allowed hundreds of thousands of newly naturalised citizens to participate in Hungary's political life. This move, however, sparked considerable public debates and political tensions. Three parliamentary elections (2014, 2018, 2022) in which Hungarian citizens living abroad without a Hungarian address were allowed to vote, revealed a relatively homogenous and clear voter preference. The ongoing discussions on rules for voting abroad, referred to the HCC, underscore the issue's continued importance and evolution.

5 Conclusion

As regards the field of minority rights, the Minorities Act in Hungary introduces several changes, such as altering terminology, or eliminating the citizenship criteria. However, the legislative developments have not remedied the most important shortcomings of the old legislation in connection with national minority elections, nor with regards to abuses of the system, including ethnocorruption, and have even extended the danger of such shortcomings with the new system of minority representation in Parliament, which is problematic from both a dogmatic and a practical point of view. While the cut-off date of the present analysis is 2018, the 2022 parliamentary elections should be mentioned, for the sake of follow-up. These elections somewhat confirmed concerns about the adequacy of the regulation of political representation for national minorities, as the largest national minority in Hungary, the Roma, did not gain any form of representation in the Parliament due to the failure to set up a nationality list.[41]

Regarding the protection of national, racial, and ethnic minorities, first, legal action against hate crimes was discussed, pointing out the problems of law enforcement and the role of the authorities. During the review of hate speech laws and relevant media regulations, a similar issue arose; namely, that the majority society theoretically receives similar levels of protection as ethnic (and other) minorities. As for the effectiveness of the anti-discrimination legal framework, an institutional

[41] Dobos (2024).

change needs to be mentioned as a follow-up: in 2021, the Equal Treatment Directorate of the Office of the Ombudsman for Fundamental Rights took over the tasks and competences of the Equal Treatment Authority (the former body charged with dealing with discrimination complaints). This change caused concerns from the Council of Europe's Venice Commission,[42] and others, regarding the adequacy of the financial, technical, and human resources of this new arrangement.

The main development in the field of diaspora policy was that the 2010 amendment of the Citizenship Act, allowing simplified naturalization for ethnic Hungarians abroad, has caused tensions with neighbouring countries. Nevertheless, as mentioned earlier, citizenship can also be relevant in the context of humanitarian assistance. As a follow-up, we can recall developments from 2022 when this theoretical opportunity became a reality after the Russian Federation's full-scale invasion of Ukraine. By that time, the majority of ethnic Hungarians in Ukraine, along with many Hungarian-speaking people of Slavic ethnicity, had acquired Hungarian citizenship, making it much easier for them to flee to Hungary and the European Union. However, this situation raised specific questions in Hungary regarding asylum policies, as it is uncommon that a country provides support to its own citizens fleeing from another country. This controversial situation was addressed by a government decree, providing that 'all benefits and advantages granted to asylum seekers who are permanent residents of Ukraine and arrive from Ukraine on or after 24 February 2022 shall be provided to Hungarian citizens if they do not enjoy more favourable treatment due to their Hungarian citizenship.'[43] The Ukrainian national minority self-government took a role in monitoring the humanitarian developments, and distributing asylum-related information in four languages on its website, including Russian, considering the many Russophone refugees.

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Changes in the Legal Status of 'Churches' in Hungary After 2010

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Abstract Between 2010 and 2018, there were significant changes in Hungary in the legislation on churches, religious associations and religious communities, in particular with regard to the provisions on the constitutional status, recognition and registration of religious communities. The main consequence was the deprivation of the previously acquired legal status of more than 300 religious communities. It is therefore reasonable to ask: what were the reasons and circumstances that justified and triggered such a profound and intense transformation? What social challenges did the law have to face that led to such serious consequences? In reviewing the changes in the legislative environment since 2010 in Hungary, the following aspects will be examined in this chapter: (1) the cause(s) of the change in the legislative environment; (2) the purpose(s) of the change in the legislative environment; (3) the result(s) of the change in the legislative environment; (4) the consequence(s) of the change in the legislative environment.

1 Introduction: Aim and Direction of the Research

Act IV of 1990 on the Right to Freedom of Conscience and Religion and on Churches—as one of the most stable laws of the period of the regime change in Hungary—is considered 'legislation under the rule of law by European standards'.[1] Act IV of 1990 built a 'high level of protection' of a fundamental constitutional right on the basis of constitutional provisions and international conventions, while at the same time establishing the principle of the ideological neutrality of the state, the

[1] See Kukorelli (2010), p. 71.

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separation of church and state and the principle of denominational equality. Among the innovations of the Act IV of 1990 was the establishment of conditions for the establishment of a church. Under these provisions, persons of the same faith may establish a church for the purpose of practising their religion. The government recognition that had prevailed before the regime change was replaced by registration by the county court or the Metropolitan Court, i.e. a neutral branch of government, subject to the following basic conditions: (a) the existence of at least 100 natural persons—founders, (b) the adoption of a constitution, and (c) the election of administrators and representative bodies. Art. 15(3) of the Act IV of 1990 also stipulated that churches had the same rights and obligations, which meant that the legislator considered churches to be equal. As regards financing, the law also provided, inter alia, that the State should grant to the ecclesiastical legal person's educational, social, health, sports, child and youth protection institutions, in accordance with the provisions of a separate law, a normatively determined budget subsidy for their operation, at the same level as that of similar public institutions. This measure created the possibility of sector-neutral funding.

Between 2010 and 2018, there were significant changes in the legislation on churches, religious associations and religious communities, in particular with regard to the provisions on the public status, recognition and registration of these communities. The main consequence of the legislative changes after 2011 was the deprivation of the previously acquired legal status of more than 300 religious communities.[2] It is therefore reasonable to ask: what were the reasons and circumstances that justified and triggered such a profound and intense transformation? What social challenges did the law have to face—if any—that led to such serious consequences?

In reviewing the changes in the legislative environment since 2010, the following aspects are examined: (1) the cause(s) of the change in the legislative environment; (2) the purpose(s) of the change in the legislative environment; (3) the result(s) of the change in the legislative environment; (4) the consequence(s) of the change in the legislative environment.

2 The Provisions of the Fundamental Law

Art. VII(2) of the Fundamental Law of Hungary (FL) adopted in 2011 emphasised the autonomy of churches and the separate functioning of the state and churches: 'The State and Churches shall operate separately. Churches shall be autonomous. The State shall cooperate with the Churches for community goals.' The term 'separate' replaced the earlier term 'separation', since Art. 60(3) of the Constitution of the Republic of Hungary stipulated that the Church shall function separately from the State. The legislator added to the reference to the separate operation of the FL the categorical statement that '[t]he State and religious communities may cooperate to

[2] Szente (2016), p. 230. skk.

achieve community goals'. As regards the principle of the separation of church and state, the explanatory memorandum of the FL underlined that it is considered a fundamental principle of the functioning of a 'secular state' and a guarantee of religious freedom.[3] Art. VII(3) of the FL provides that the detailed rules governing churches shall be laid down by a cardinal law, which requires the majority of two thirds of votes by the members of the Hungarian National Assembly (Parliament) present in the session.

This latter provision of the FL was clarified in Art. 21(1) of the transitional provisions to the FL: 'Parliament shall identify the recognised churches and shall determine the criteria for recognition of additional recognised churches. A cardinal Act may stipulate that in order to be recognised as a church the following shall be taken into consideration: operation for a certain length of time, a certain number of members, historical traditions and social support.' However, on the motion of the Commissioner for Fundamental Rights, Hungarian Constitutional Court (HCC) Decision 45/2012. (XII. 29.) annulled several provisions of the transitional provisions to the FL, including Art. 21, for invalidity under public law in the context of a posteriori review proceedings.[4]

The annulled provisions of the transitional provisions to the FL concerning churches were subsequently incorporated into the provisions of the Fourth Amendment to the FL. 'The detailed rules for Churches shall be determined by cardinal Act. As a requirement for the recognition of any organisation engaged in religious activities as a Church, the cardinal Act may prescribe an extended period of operation, social support and suitability for cooperation to promote community goals.' [Art. VII(2) of the FL].

The categorical wording on cooperation changed after the Fourth Amendment of the FL, to the extent that the constitutionalist emphasised the capacity of organisations carrying out religious activities to cooperate.

After the Fifth Amendment to the FL, the emphasis shifted from categorical cooperation to the possibility of cooperation: 'The State and religious communities may cooperate to achieve community goals. The State and religious communities may cooperate to achieve common goals. Religious communities participating in cooperation are established as churches. The State shall grant specific rights to established churches with regard to their participation in tasks aimed at achieving community objectives.' [Art. VII(4) of the FL].

If we look at the context of separation and cooperation together, it seems quite clear that the constitutional power prefers cooperation to separation, and the new terminology has been developed accordingly.

Following the Fifth Amendment of the FL, it also became clear that a religious community can only be transformed into a registered church with special rights by

[3] See the Explanatory Memorandum to Art. VI of Bill T/2627 on the Fundamental Law of Hungary, https://bit.ly/3c91u9U.

[4] See Szente (2013), pp. 11–21.

decision of the Parliament if—in addition to meeting the legal criteria—it expresses its willingness to cooperate with the state in the interest of community goals.

The Seventh Amendment to the FL added a new twist to Art. R) of the FL, stating that '[t]he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State.' [Art. R(4) of the FL] According to the Ninth Amandment of the FL '[H]ungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.' [Art. XVI(1) of the FL]. These provisions are also linked to the area under consideration, because of their departure from the principle of the neutrality of the State in religious and ideological terms.

3 The Adoption of 'Ecclesiastical' Laws

Two sub-periods of legislation can be distinguished: the first sub-period was the adoption of Act C of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities and Act CCVI of 2011 on National Higher Education, while the second period includes Act CXXXIII of 2013 on the Amendment of Certain Pieces of Legislation Related to the Status and Activity of Religious Communities in Relation to the Fourth Amendment to the Fundamental Law, and Act CXXXII of 2018 for amending Act CCVI of 2011 on the right to freedom of conscience and religion. The distinction between the two sub-periods is due to the fact that, at the time of the 'ecclesiastical' laws adopted in 2011, although the FL had already been adopted, the provisions of the Constitution were still in force, unlike the 'ecclesiastical' laws adopted after the entry into force of the FL, i.e. on 1 January 2012.

3.1 Act C of 2011 and Act CCVI of 2011

The issue of justifiability is an important consideration in the drafting of any law. The legislator must take into account and consider the circumstances that credibly support the need for the law. This was no different in the case of Act C of 2011 and Act CCVI of 2011.

Act C of 2011, which was originally tabled as an individual motion and then substantially modified by an amendment before the final vote, placed the criteria of justifiability in a specific context. The general explanatory memorandum—in addition to historical references—highlighted the following: 'Law IV of 1990 provided for a broad freedom of conscience and religion and the establishment of churches, but it subsequently became clear that the extremely generous conditions for the establishment of churches also provide opportunities for abuses of fundamental rights, both in terms of the unjustified use of state subsidies for churches and the

registration of organisations that do not actually carry out religious activities as churches.'[5]

At the same time, the abuses mentioned in the explanatory memorandum of Act C of 2011 concerned the so-called 'business churches', i.e. those religious communities that were never specifically named, which, according to the legislator, not only abused the generous conditions for church establishment laid down in the Act, but also made unauthorised use of state subsidies.[6]

It is the undisputed right and duty of the legislator and the law enforcer to detect and sanction abuse of the law. However, the provisions of the Act IV of 1990 also provided the opportunity for this, since the court could, on the basis of an action by the prosecutor, remove from the register a church or ecclesiastical legal entity whose activity is contrary to the constitution or the law, if it did not cease this activity despite a request to do so.[7] Act C of 2011 and its successor, Act CCVI of 2011, opted for the simpler but more worrying solution. It is simpler because, while classifying 14 religious communities as 'established churches' by law, it has removed the ecclesiastical status previously enjoyed by hundreds of religious communities, giving them the stigma of 'business churches'. After the adoption of the law, the need for the law was still justified by the high number of churches, saying that the fact that there are more than 360 associations claiming to be churches in Hungary is not normal and that some sort of order is needed.[8]

As regards the abuse of rights, the explanatory memorandum to the HCC Decision 6/2013. (III. 1.) pointed out that in the period 1990–2012, thirty-three complaints were received by the prosecution authorities concerning the activities of church legal entities, of which only three ended with the dissolution of the church organisation.[9] It would therefore appear that the phenomenon of 'religious business' is far from having reached social proportions, and that the institutionalisation of mass disenfranchisement cannot be legitimised by invoking it.

On the basis of the provisions of Act C of 2011 and Act CCVI of 2011, adopted due to its invalidity under public law,[10] the legislator deprived hundreds of religious communities of their previously acquired public status, or forced them to continue their activities in the framework of associations, or to apply to the Parliament for the

[5] See the General Explanatory Memorandum to Bill T/3503 on the right to freedom of conscience and religion and on the legal status of churches, religious denominations and religious communities, https://bit.ly/3ca0aDU.

[6] For the pillars of the church financing system see Schanda (2003), pp. 206–256.

[7] See Szathmáry (2014), pp. 1–2.

[8] Zsolt Semjén, László Szászfalvi and Péter Harrach on the new church law, https://bit.ly/3c9ZOwK.

[9] HCC Decision 6/2013. (III. 1.), Reasoning [178]. See also Hegyi (2016).

[10] The public law invalidity of Act C of 2011 was established by HCC Decision 164/2011. (XII. 20.).

restoration of a legal status that practically corresponds to the previous status, under the changed conditions, if they comply with them.[11]

The conditions for recognition as a church are set out in Act CCVI of 2011 as follows: the recognition of a church with a religious activity as its basic purpose may be initiated by the person entitled to represent the association by signing a petition signed by at least 1,000 people, applying the rules on popular initiative. An association with a specific profile may be recognised as a church if (a) it carries out religious activity as its basic purpose, (b) it has a creed and a rite containing the essence of its doctrine, (c) it has been operating internationally for at least one hundred years or has been operating in an organised form as an association in Hungary for at least twenty years, which twenty-year period includes the period of time prior to the entry into force of this Act, when the Association was established in accordance with the provisions of the Act IV of 1990 registered as a church under the Act, (d) has adopted its statutes, articles of association and internal church rules, (e) has elected or appointed its administrative and representative bodies, (f) its representatives declare that the activities of the organisation they have established do not conflict with the FL, the rights and freedoms of others, (g) the association has not been found to pose a risk to national security in the course of its activities, and (h) its doctrines and activities do not infringe on the right to physical and mental health, or the protection of life and human dignity. However, there was no automaticity attached to the fulfilment of these conditions, since it was at the discretion of the Parliament whether or not to accept the application for recognition as a church.[12]

According to the Annex to Act CCVI of 2011, the Parliament recognised *ex lege* 14 religious communities as established churches, religious denominations, or religious communities[13]—i.e. established churches–, while the religious communities registered under the Act IV of 1990 could, in principle, continue their activities on the forced association path offered by the legislator as an option as of 1 January 2012. It is true that these religious communities were able to apply for recognition by the Parliament under the changed—significantly tightened—legal conditions. More recently, the Annex to Act VII of 2012 added 13 religious organizations to the list of churches, religious denominations and religious communities—i.e. established

[11] For the impact of Act C of 2011 and Act CCVI of 2011 on the 'small churches', see the following case study D. Nagy (2015), pp. 28–43.

[12] This can also be confirmed by the years-long stagnation of the Hungarian Evangelical Brotherhood, founded in 1981, since the Parliament did not grant this community the established church status, even after the conditions changed in 2011.

[13] Churches recognised by Act CCVI of 2011: 1. Catholic Church in Hungary; 2. Reformed Church in Hungary; 3. Evangelical-Lutheran Church in Hungary; 4–6. Jewish denominations: Federation of Jewish Communities in Hungary, United Hungarian Jewish Community (status quo ante), Autonomous Orthodox Jewish Religious Community in Hungary; 7–11. Orthodox Church: Buda Diocese of the Serbian Orthodox Church, Ecumenical Patriarchate of Constantinople the Orthodox Exarchate in Hungary, The Bulgarian Orthodox Church in Hungary, Romanian Orthodox Diocese in Hungary, Hungarian Diocese of the Russian Orthodox Church—Moscow Patriarchate; 12. Unitarian Church in Hungary; 13. Baptist Union of Hungary; 14. Faith Church, Hungary.

churches—recognised by Parliament,[14] while Hungarian National Assambley Resolution 8/2012. (II. 29.) rejected without any justification the request for recognition by Parliament of 66 religious communities previously subject to the Act IV of 1990.

Unlike the pre-2010 legislation, the legislator also sought to define religious activity at the level of the law. Pursuant to Section 6(1) of Act C of 2011, for the purposes of this Act, religious activity is defined as 'an activity related to a world view which is supernatural, has systemic beliefs, is oriented towards the totality of reality and embraces the whole of human personality by means of specific conduct requirements which do not offend morality and human dignity'. While the explanatory memorandum to the bill stressed that 'the State cannot decide on theological questions', it also referred to the fact that the State may determine the conditions under which it recognises the ecclesiastical status conferred by specific powers.[15] It is unfortunate that it is the legislature that defines religious activity, since the definition of religious activity, which is necessarily transcendent, goes beyond the competence of the legislature and limits and delimits the possible scope of religious activity. Defining religious activity by law not only pushes the limits of the separation of church and state, but also of the state's ideological neutrality.

3.2 Act CXXXIII of 2013

Following the annulment of several provisions of Act CCVI of 2011 for being contrary to the FL by HCC Decision 6/2013. (III. 1.),[16] the legislator was forced to take a new step. According to the HCC, the State must ensure the acquisition of ecclesiastical status by religious groups, which allows them to operate independently, on the basis of objective and reasonable conditions, in accordance with the right to freedom of religion, in a fair procedure and with the possibility of legal remedy. Furthermore, the HCC also pointed out that 'the transfer of the power to decide on the recognition of churches to the National Assembly is particularly worrying from the point of view of consistency with the Fundamental Law,

[14] Churches recognised by Act VII of 2012: 15. United Methodist Church of Hungary; 16. Hungarian Pentecostal Church; 17. St. Margaret's Anglican/Episcopal Church; 18. Transylvanian Congregation; 19. Seventh-day Adventist Church; 20. Coptic Orthodox Church of Hungary; 21. Hungarian Islam Community; 22. Apostolic Christian Church (Nazarene); 23. Hungarian Society for Krishna Consciousness; 24. Free Church of the Salvation Army – Hungary; 25. Church of Jesus Christ of Latter-day Saints; 26. Hungarian Church of Jehovah's Witnesses; 27. Buddhist religious communities.

[15] See the Explanatory Memorandum to Art. 6 of Bill T/3503 on the right of conscience and freedom of religion and the legal status of churches, religious denominations and religious communities.

[16] The HCC annulled the provisions of Act CCVI of 2011 which regulated the procedure for registration as a church and which abolished the legal status of the former churches. See Szente (2016), p. 219.

including the right to freedom of religion and the rule that the State and the churches operate separately'.[17]

Act CCVI of 2011, as amended by Act CXXXIII of 2013, in the light of the Fourth Amendment to the FL, designated two types of religious communities: an organisation carrying out religious activities[18] and a church recognised by Parliament, which is called an established church, as an old-new name. While a religious organisation operating as an association is registered by the Metropolitan Court, the Parliament recognises an established church by adopting a law.

The necessary conditions for recognition by Parliament as an established church are laid down in the Act CXXXIII of 2013, as follows: 'The National Assembly shall recognise an organisation carrying out religious activities as a church if it (a) primarily carries out religious activities, (b) has a creed and a rite containing the essence of its doctrine, (c) has at least ca) one hundred years of international operation or cb) has been organised for twenty years, operates as a religious community in Hungary and has a membership of 0.1 per cent of the population of Hungary, (d) has adopted by-laws, (e) has elected or appointed its administrative and representative bodies, f) its representatives declare that the activities they wish to pursue are not contrary to the provisions of Arts. 6. § (4) and (5), (g) its doctrines and activities do not violate the right to physical and mental health, the protection of life and human dignity, (h) the organisation carrying out religious activities has not been exposed to any risk to national security in the course of its activities and (i) its willingness to cooperate in the interests of community objectives and its ability to maintain this in the long term are demonstrated in particular by its statutes, the number of its members prior to the initiative, and Art. 9 (1) the accessibility of such activities to a larger section of the population.'

These general conditions must be met by religious communities which have lost their previous legal personality with effect from 1 January 2012 if they apply for recognition as established churches.

At the same time, Art. 4 of Act CXXXIII of 2013 redefined the concept of religious activity by, among other things, removing the reference to morality and human dignity from the elements of the previous definition.

Some of the churches deprived of their status under the 2011 legislation have appealed to the European Court of Human Rights (ECtHR). In its judgment of 8 April 2014 in the case of the Magyar Keresztény Mennonita Egyház [Hungarian Christian Mennonite Church] and Others v. Hungary, the ECtHR ruled that the measures taken by the Hungarian authorities following the adoption of the FL did not meet the requirements of overriding social need, impartiality and neutrality.[19] While Strasbourg considered the filtering out of 'business churches' to be a legitimate aim, it considered the method used by the Hungarian legislator to be an

[17] HCC Decision 6/2013. (III. 1.), Reasoning [203].

[18] For a characterisation of an organisation carrying out religious activities, see Ádám (2015), pp. 378–379.

[19] See Drinóczi (2014), p. 54.

unjustifiably severe and disproportionate measure.[20] The court also pointed out that the Hungarian state had failed to provide any compelling reason which, in a democratic society, could have justified the legislative measures complained of by religious communities which had applied to Strasbourg, having been deprived of their ecclesiastical status and forced to follow an associative course against their will. By 'depriving the applicants of their ecclesiastical status instead of resorting to less restrictive measures, by introducing a politically influenced re-registration procedure whose justification is itself open to doubt and, finally, by treating the applicants differently from established churches, not only in terms of cooperation but also in terms of benefits for the purpose of faith life, the authorities have failed to meet the requirement of neutrality with regard to the applicant communities'.[21] The ECtHR also pointed out, in cases concerning the legal status of religious communities, that Member States party to the European Convention on Human Rights must grant legal status to religious communities within a reasonable time and in a non-discriminatory procedure.

3.3 Act CXXXII of 2018

The status of religious communities was last regulated by Act CXXXII of 2018.[22] During the debate on the bill, the justification for the previous legislation, the reference to 'business churches', was reiterated; however it is still not clear—although seven years have passed since the Act CCVI of 2011 was enacted—which religious communities were removed from the register for abuse of rights, while many other religious communities operating legally have lost their status.

A religious community is defined by the legislator as a community of natural persons, irrespective of their organisational form, legal personality or denomination, formed for the purpose of practising religion and carrying out primarily religious activities. A religious community may operate without legal personality or in the form of an organisation with legal personality.

Act CXXXII of 2018 divided religious communities with legal personality into four categories according to their legal status and legal powers: (1) religious association (vallási egyesület), (2) listed church ('nyilvántartásba vett egyház'), (3) registered church ('bejegyzett egyház'), and (4) established church ('bevett egyház'). The legislator justified the introduction of this four-tier system by stating that 'not all religious communities have the same level of social support, and it is not enough to look at the current level of support in itself, but the durability of this support must

[20] Mink (2014), pp. 85–99.

[21] Magyar Keresztény Mennonita Egyház [Hungarian Christian Mennonite Church] and Others v. Hungary, nos. 70945/11, 23611/12, 26998/12, 41150/12, 41155/12, 41463/12, 41553/12, 54977/12 and 56581/12.

[22] For a description of the bill, see Uitz (2018).

also be taken into account when crossing categories to broaden or narrow the legal powers of organisations'.[23] According to the drafters, the bill not only responds to critical comments at home and abroad, but also provides a predictable, objective and clear set of criteria for religious communities.

Concerns might be raised about the legal categorisation of religious communities. In the period of the liberal extension of the law, after the adoption of Act XLII of 1895 on the free exercise of religion, there were three categories of religious communities: the established church, the recognised church and the so-called 'tolerated denomination', which in practice operated in an associative framework. This legislation, apart from the plight of the so-called 'tolerated denominations', seemed at the time to be an improvement in many respects. At the beginning of the 21st century, however, the classification of religious communities into different categories of public law is an undeniable step backwards. Below we look at each category.

ad 1) Religious association. According to the provisions, natural persons professing the same religious beliefs may form a religious association for the purpose of practising their religion and carrying out religious activities. The State may enter into an agreement with the religious association for a maximum period of five years for the performance of certain public benefit activities and for the promotion of religious activities. The religious association is entitled to the part of the personal income tax paid by individuals, which is donated and determined in accordance with a special law.

ad 2) Listed church. A religious association shall be registered as a registered church following an application for registration if it has received, on average over the three years preceding the submission of the application for registration, at least 1,000 individual contributions of personal income tax paid, as determined by a special law, and has been operating as a religious association for at least five years or has 100 years of independent international operation in an organised form. The State may conclude an agreement with a registered church for a maximum period of ten years for the performance of a public service activity or for the promotion of religious activity.

ad 3) Registered church. A religious association shall be registered as a registered church upon application for registration if (a) it has been offered a portion of the personal income tax paid by at least 4,000 individuals, as determined by special law, on average over the five years preceding the submission of the application for registration, and (b) it has been operating as a religious association for at least 20 years or has been operating as an independent international association for 100 years. However, a registered church shall be registered upon application if it has received an average of 4,000 individual contributions of personal income tax paid, as defined by special law, over the five years preceding the application for registration, and has been operating as a registered church for at least 15 years or has been operating as an independent internationally organised church for 100 years. The State may conclude an agreement with a registered church for a maximum

[23] Uitz (2018).

period of 15 years for the performance of a public service activity or for the promotion of religious activities.

ad 4) Established church. An established church is a registered church with which the state has entered into a comprehensive agreement to cooperate for community purposes. When concluding or amending the comprehensive agreement, the Minister responsible for coordinating relations with churches acts on behalf of the State. An application for the conclusion of a comprehensive agreement may be submitted to the competent minister by the registered church or by an established church which does not have such an agreement. With a view to cooperating in the interests of the Community, the registered church shall be entitled to tax or other equivalent benefits and to budgetary aid. The registered church shall be entitled to the part of the personal income tax paid by individuals which is offered and determined in accordance with a special law and to the State supplement thereto or to the allowance replacing it.

While the recognition of the established church remains the responsibility of the National Assembly—so the decision on recognition remains political—the other three categories of religious communities will be registered by the Metropolitan Court. This is also worth highlighting because the explanatory memorandum of the bill stressed that the legislator ensures the neutrality of the state for all religious communities.[24] However, this neutrality can only apply, by definition, to religious communities registered by the court. The further direction of the changes was indicated by the fact that while under the Act IV of 1990 churches registered uniformly by the county courts and the Metropolitan Court were entitled to the same rights and were subject to the same obligations—i.e. the Act IV of 1990 was based on the principle of equality of churches—Act CXXXII of 2018 distinguished between four different legal statuses of religious communities.[25] The retrogression is therefore also in force in this area.

According to the current legislation, 32 established churches,[26] 12 listed churches,[27] and 239 religious associations operate in Hungary, according to the government's register.[28]

[24] Bill T/3618 on the Right to Freedom of Conscience and Religion and on the Amendment of Act CCVI of 2011 on the Legal Status of Churches, Religious Associations and Religious Communities, https://bit.ly/3uIQ7vZ. The same argument was also made by the deputy minister Balázs Orbán, who presented the bill, during the general debate of the bill before the Parliament on 28 November 2018.

[25] For a detailed characterisation of religious communities by the provisions of Act CXXXII of 2018, see Köbel (2019), p. 158.

[26] Register of established churches pursuant to Art. 16/A of Act CCVI of 2011, https://bit.ly/3Rq44IZ.

[27] Listed churches (23 July 2022), https://bit.ly/3ywocjQ.

[28] Religious associations (28 Juny 2022), https://bit.ly/3z1alDu.

4 Conclusion

The legislative changes that occurred between 2010 and 2018 have placed the constitutional relationship between the state and churches, religious denominations and religious communities on a completely new footing, as the emphasis has shifted from separation to separation and cooperation with the adoption of the FL. For the religious communities involved in cooperation—above all the established churches—the legislator not only created a specific legal status, but also granted them additional powers.

On the basis of the provisions of Act CCVI of 2011 the legislator deprived hundreds of religious communities of their previously acquired public status, and forced them to continue their activities in the framework of associations, or to apply to the Parliament for the restoration of their status, which essentially corresponds to their previous status, under the changed conditions, if they meet them.

In contrast to the one-tier regulation introduced by the Act on the Law on the Establishment of Religious Communities (which provided a uniform status for church denominations and religious communities), Act CCVI of 2011 introduced two levels of religious communities (church and association performing religious activities), Act CXXXIII of 2013 introduced two levels of religious communities (church recognised by Parliament—i.e. established church and organisation performing religious activities), and finally Act CXXXIII of 2018 introduced two levels of religious communities (i.e. recognised by Parliament—i.e. established church and organisation performing religious activities). The trend is quite clear: the multi-level classification of religious communities has removed the public law equality of religious communities provided by the Act IV of 1990.

The legislator has also laid down the concept of religious activity, which implicitly includes a definition of religion in the public law sense, although the legislator 'cannot have the task or the purpose of defining religion or religious activity'.[29]

While the explanatory memorandum of the FL referred to the secularised state, and the preamble of Act CCVI of 2011 referred to the ideological neutrality of the state and 'the striving for peaceful coexistence between religions', the meaning of religious neutrality in Hungary has changed significantly, especially with regard to the religiously and ideologically committed turns, slogans and provisions of the FL concerning Christianity and the protection of Christian culture by state bodies.[30] The concept of neutrality during the period of regime change has been replaced by the idea of a state that is gradually becoming more religiously and ideologically committed. Paradoxically, the concept of neutrality of the HCC has remained unchanged, since according to the HCC Decision 27/2014. (VII. 23.), the religiously neutral state is still defined in the HCC Decision 4/1993. (II. 12.) can be characterised on the basis of the criteria set out in the HCC Decision: (a) the state cannot be institutionally linked to religious communities or to any religious community, (b) the state does not

[29] Wildmann (2014), p. 2.

[30] Schweitzer (2019), pp. 107–120.

identify itself with the teachings of any religious community, (c) the state does not interfere in the internal affairs of religious communities, (d) the state cannot take a position on matters of religious truths, (e) the state must treat religious communities as equals.[31]

It is peculiar, however, that the phenomenon of the 'church business' or religious business, which has been cited as the main basis of reference for the post-2010 legislative changes, has not been credibly proven. Apart from isolated cases, there was no evidence of the systemic presence of church business. The legislator was not, therefore, reacting to a neuralgic phenomenon of social proportions, but was essentially seeking to redefine the status of churches and religious communities and to establish a hierarchy of public law. As a result, there was a necessary shift in the role of religious communities in society in Hungary, primarily in favour of the established churches (especially the Christian ones).

With regard to the legal status, categorisation and public hierarchy of religious communities, the legislator, in the spirit of regression, succeeded in creating a public law construction, inherently developed at the end of the 19th century and adapted to the circumstances of the 21st century, by creating Act CXXXII of 2018.

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Part II
Criminal Law, Private Law, Regulation and Resilience

Reflections on the Responsiveness of the Legal System in Hungary: From a Criminal Law Perspective

Mihály Tóth

Abstract In this chapter, which deals mainly with criminal law responses to the social and economic changes after 2010 in Hungary, I address three questions. After outlining the general situation of the Hungarian legal system and the role that criminal law should play, I will first examine the actual responses of criminal *legislation in substantive provisions of the law* to the criminal phenomena of the last decade; in the second part, I will look at the legislative responses in the *field of procedural law*; and finally, I will make some comments on a related issue, the relationship between the criminal law *framework* and *responsiveness. I argue that* criminal law has, in recent years, completely lost its rightly perceived *ultima ratio* character and has become an almost primary, but at the same time rather arbitrary, regulatory instrument in many areas.

1 Responsiveness of Substantive Law, Current Responses

1.1 The Creation of Act C of 2012 (Criminal Code) and Its Ten-Year History

Regardless of the priorities of 'criminal law' or the 'criminal law of the perpetrator', the relationship between criminal law and its social context has always been a matter of intense concern to social scientists. It has always been seen as a natural requirement that the Criminal Code should adapt to new forms of crime that may not have been anticipated. It needs to follow changes and react to them because we know that anything new that makes our lives easier immediately benefits criminals as well.

Criminal law has, therefore, inevitably come a long way over the centuries, from messages on tablets of stone to the challenges of artificial intelligence. The

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expansion of punishable offences and the modernisation of their regulation were inevitable, so claims that stability is more important than flexibility are misplaced.

The question is, however, whether this fundamentally correct principle is not being abused today by over-zealous legislators or those who are easily swayed by external pressure.

The current governing party, Fidesz—Hungarian Civic Alliance, while still in opposition in February 2009, even then expressed its belief in the need for tougher criminal law. The explanatory memorandum of the proposal, submitted under number T/8875 (which was not discussed in substance), began with the following sentence: 'The dramatic increase in the number of serious violent crimes in another area has made it clear that the Government has failed and that public safety cannot be restored in Hungary without its early departure'.[1]

Apart from the fact that this was not a party platform but a justification for a bill intended for professionals, the wording was not only highly unusual but also wrong on the merits. The total volume of known crimes had not changed significantly for some time, with the number of offences detected by the authorities varying from year to year by a few per cent between 400,000 and 430,000. The number of intentional homicides had fallen steadily (from 131 to 78 in 10 years), and the number of other violent crimes, such as robberies (in the order of 3000 per year), had tended to stagnate or fall.

Those areas where there has been a (partly continuous) increase in crime were not and still are not part of the violent crime that is to be dealt with more strictly (for example, drug abuse or corruption offences). Nevertheless, the new Criminal Code still includes the same repressive approach in its general justification, which defines the whole concept of the law, and defines as one of the fundamental tasks of the Code the elimination of the 'offenders' paradise. The primary means of achieving this are said to be 'the stringency of the law, the increase in sentences, [. . .] multiple life sentences and the protection of victims'.[2]

However, the protection of victims, for example, can hardly be seen as a preventive, 'tightening' rule. But this is not the only inconsistency in the justification. It goes on to say that 'one of the most important requirements of the new Criminal Code is stringency, which does not necessarily mean an increase in the threshold, but rather a more pronounced emphasis on the proportional approach to criminal law'. This is 'primarily reflected in the provisions on repeat offenders'. Criminologists—who, for good reason, treat recidivism as a category that characterises not the offence but the offender (i.e. as a manifestation of danger to personal society)—may lose the thread of their thinking here.

The law itself was, on the whole, already stricter than its predecessor when it was drafted, even if this stringency may have fallen slightly short of the threatening messages associated with the general grounds. Here are some of the detailed

[1] Explanatory Memorandum to Bill T/8875. The proposal (as it had no follow-up) has since been removed from the Hungarian National Assembly website.

[2] See point 2.3. of the Ministerial Explanatory Memorandum to Act C of 2012.

provisions from the General Part of the Criminal Code that justify this claim: the minimum age of criminal responsibility was selectively lowered; the rules on limitation periods were tightened; a custodial sentence was added to the system of penalties; the maximum term of imprisonment was extended; and driving disqualifications were made mandatory as a general rule in certain cases; the rules on confiscation of property were tightened; involuntary treatment in a mental institution once again became an indefinite measure; the possibility of the partial suspension of imprisonment was abolished; the rules on cumulative sentences and the inclusion of offenders in a collective sentence were tightened; the consequences of the main forms of recidivism were made more serious. The list, which could perhaps be extended, is impressive, even if, as I will explain, some of the provisions are part of 'law enforcement marketing' rather than promising concrete, tangible changes that would affect many people.

Sometimes, the possibility of imposing *alternative sanctions* (suitable as a substitute for the deprivation of liberty), which can be applied relatively widely, is raised to counter claims about the severity of the new Criminal Code [Art. 33(4) and (5) of the Criminal Code]. However, the previous, more lenient Criminal Code already provided for this possibility to a large extent, and the possibility of applying less severe sanctions is almost obvious in the case of imprisonment (as the least severe legal disadvantage *mentioned* in the Special Section).

The new rules on *parole* are also often cited as adding nuance to the severity of the former, as they seem to be more lenient than the previous ones since the four-fifths discount is of the past and the requirement of release after completing two-thirds of the sentence or, in the case of repeat offenders, three-quarters of the sentence, depends on the previous conviction. However, this provision cannot be considered dogmatically more lenient than the previous rules of the Criminal Code, as the application of the apparently more lenient rules depends on conduct during imprisonment. In any case, as will be discussed later, the rules on the *conditions of* conditional release have recently been considerably tightened.

The more important provisions on the specific crimes also generally justify the claim of a moderate tightening.

Over the last 10 years, criminal policy has been characterised by a steadily rising wave of modifications that have become almost impossible to follow and generally increased the repressive nature of the law.

For example, the rules on the age of majority, limitation periods, conditional leave, disqualification from employment, reparation work, expulsion, confiscation, cumulative sentences, discharge of or other provisions associated with soldiers have been changed in the General Part of the Criminal Code. In addition to a number of new offences, violence in relationships, illicit influence on sporting results and espionage against the institutions of the European Union (I will come back to some other offences later), while the offence has been amended three times in 2 years, and the rules on designer drugs and prohibitions on association and assembly have been significantly amended too.

The process has accelerated even more recently: worrisome, even if we only look at the changes that have come into force in the last year and a half. Amendments to

the Criminal Code on quackery and naturopathy,[3] on the new regulation of human trafficking and forced labour,[4] the restructuring of money laundering,[5] the elimination and prevention of violence in schools,[6] the pursuit of payola,[7] criminal protection of national data assets,[8] imposing the exclusion of parole for homicide offenders,[9] prosecuting paedophile offenders more vigorously,[10] and the data acquisition by drones.[11] The list is not exhaustive and may be supplemented with less significant changes, such as the clarification of the imputation of disqualification from driving (Act XXXI of 2020) and the addition of the definition of a firearm (Act XLIX of 2020).

This essentially amounts to 11 amendments in just over a year. We are hardly surprised that a few months ago, after almost 80 years, a new offence was once again established by decree instead of by law.[12] Government Decree 220/2021. (V. 01.), in the spirit of stricter action against the misuse of immunity certificates, treats as an offence of the same gravity as involuntary manslaughter (punishable by up to 5 years' imprisonment), for example, the making of false private documents relating to a certificate (even the making of a false medical certificate), although *the making of* other false private documents is not in itself a criminal offence. This is not simply a transitional rule born of the epidemic situation, but there seems to be an insistence that this offence should be included in the permanent text of the Criminal Code.

Since its entry into force, the new Criminal Code, which has been in force for less than 10 years, has already been amended by some 50 laws and several Hungarian Constitutional Court (HCC) Decisions, affecting hundreds of legal provisions and more than a third of the text. Since 2013, our current Criminal Code has been amended on average every two months, with five or six provisions being changed every now and then. This is double the legislative activity that authoritative analysts had already assessed as a serious undermining of legal certainty when the previous code entered into force. Some of the changes in the new law were undoubtedly formal corrections or clarifications following changes in definitions, but most of them concerned issues of substance, often involving dozens of sections.

[3] Act CXI of 2019 (in force from February 1, 2020). The HCC found the regulation unsatisfactory [HCC Decision 24/2021. (VII. 21.)].

[4] Act V of 2020 (July 1, 2020).

[5] Act XLIII of 2020 (January 1, 2021).

[6] Act LXXIV of 2020 (September 6, 2020).

[7] Act C of 2020 (January 1, 2021).

[8] Act LXXXI of 2020 (January 1, 2021).

[9] Act CVIII of 2020 (November 5, 2020).

[10] Act LXXIX of 2021 (July 1, 2021).

[11] Act CLXXIX of 2020 (January 1, 2021); Mezei (2020), pp. 137–138.

[12] The last time in Hungary that the then Provisional National Government regulated criminal offenses by government decree (e.g., Prime Minister's Office Decree 820/1945. on certain public service offenses) was in 1945, in the immediate aftermath of World War II.

It is to be feared that criminal law has, in recent years, completely lost its rightly perceived *ultima ratio* character and has become an almost primary, but at the same time rather arbitrary, regulatory instrument in many areas.

1.2 Individual Precedent-Based Legislation

It is not a new phenomenon that politicians (often embracing the simplistic demands of an emotionally determined and under-informed or even manipulated public opinion in their own interests) immediately want to amend the Criminal Code when a specific case arises—usually, of course, with undoubtedly serious and tragic consequences. There are almost any number of examples when, in response to a specific and individual case that has not been repeated and may be considered exceptional, there has been a 'strong impulse' to create or amend a criminal provision, and in most cases, this did not only involve a cry for change. Let us look at some examples.

In the autumn of 2013, video footage of an election campaign was made public, which was later proven to be fake. In less than a month, an amendment to the Criminal Code was adopted prohibiting the Production of Sound or Video Recording of a Defamatory Nature and a separate provision prohibiting the publication of such recordings (§ 226/A, § 226/B). This was necessary, as the explanatory memorandum to the amending law states, 'to protect our democratic institutions'. Thus, in addition to libel and slander, which are prosecuted on private grounds and, in addition to private prosecution, a purposeful form of these offences was introduced, limiting the scope of the act to the making or disclosure of a false audio or visual recording. In this case, the aim is defamation, which had traditionally been indifferent to this type of offence.

Of course, the titles of the new offences do not refer to the purpose but only to the suitability, which is irrelevant to the interpretation of the facts, but it is an issue of substance that while defamation and libel are prosecuted in private law litigation, the two new offences of purpose are prosecuted through *public, criminal law procedure* (with the assistance of the prosecutor). In such cases, an investigation must be ordered, and the public prosecutor must prove that the intention of the publisher was defamatory when making or publishing a montage. If this is successful, a new offence may be established, but if not, we are in the same situation as in the case of defamation, which has been a criminal offence in the Criminal Code for almost a hundred and fifty years, where the same or *even a more severe penalty* can be imposed for defamation in the absence of intent, associated *with the same range of offences.* What is this, if not yet again the grossly unnecessary multiplication of facts produced by precedent law? And, of course, it has also been proven that legislative products of a similar nature are highly seasonal: since the case that gave rise to the legislation (i.e., during almost 10 years), statistics record only three denunciations of false audio recordings, when no prosecutions were brought.

The chapter of the Criminal Code regulating traffic offences—despite the extremely rapid process of motorisation—has been composed of the same seven offences for the last 40 years, with little change in their content. In the past, at least in this area, the former legislator recognised that these few offences could cover the most dangerous behaviour, justifying criminal action. A few years ago, however, the offence of Driving an Illegally Converted Vehicle for the Carriage of Passengers (§ 239/A) was added to the chapter, which also covers driving a converted *school bus* as a specific qualifying offence.

Contrary to the title of the offence, the *conversion* itself is a privileged offence punishable only by imprisonment. The explanatory memorandum itself states that the reason for the modification was the tragic bus accident in Verona.[13] However, it is not (or should not have been) the legislature that provides an adequate response to this through legislation. It is clear that according to our multi-stage liability system, a 'modification'—as a potential, possible, remote source of danger—is, in the correct view, purely a question of law enforcement. (In the specific case in question, it was not established that the previous modification of the bus was the real cause of the accident.) Nevertheless, similar unauthorised modifications may justify administrative measures and may also merit sanctions but do not *in themselves* require criminal action.

If, on the other hand, it can be established that the tampering with the original structure poses a concrete danger to the passengers of the vehicle actually in circulation (i.e. even in the absence of a result), both the modifier and the driver, if they are aware of it, would be liable for the offence of *professional endangerment.* The creation of a new offence with the same penalty was, therefore, clearly unnecessary. If, however, it was considered important to make it a criminal offence to drive a modified vehicle, why was it considered that only passenger vehicles could pose a danger to road users? Were they thinking only of the vehicle's occupants? Does this mean that driving a lorry or tractor-trailer without a licence cannot pose a danger to the occupants of a road vehicle, whether this be a school bus or a 'road vehicle for the transport of persons with special needs, in particular those with reduced mobility, the elderly or the infirm'?

It was, therefore, a wrong and unnecessary step to change the traditionally coherent system of traffic offences.[14] In the other chapters of the Criminal Code, similar amendments are many.[15]

[13] On the night of January 20, 2017, on the motorway between Verona and Venice, a bus carrying Hungarian students and teachers ran off the road, hit a bridge pillar and caught fire. The accident killed 18 people.

[14] Or should we also be glad that the offence introduced into the Criminal Code was not adopted with the title and content 'Driving at night an illegally converted school bus on an irregularly constructed section of motorway to or from Verona'?

[15] In the wake of the daily events that occur in our harassed world, similar criminal law provisions have been introduced: in the case of an otherwise harmless 'sending of a letter', the offence of harassment was supplemented by the 'creation of the appearance of a threatening event' [§ 222(2)(b)]; a riot at a championship final by fans running onto the pitch gave rise to the turn of disorderly

In general, we should not allow individual ambitions, sensitivities, particular group interests, even those perceived as legitimate, or political aspirations that substitute a sense of mission for well-founded impact assessments to play a dominant role in the shaping of criminal norms, especially when in most cases the more general and elaborate frameworks already in place are suitable for establishing responsibility, applying the appropriate legal remedies, and ensuring the effective enforcement of certain institutions. Replacing professionalism with populism[16] will cause serious and difficult-to-repair damage to the stability, credibility and legal certainty of the law. In the legislative process, careful preparation and consultation are needed to assess potential impact and provide a dogmatic, scientific basis for justified bans. In other words, to ensure that criminal law is once again the 'keystone' of the legal system[17] and not increasingly the 'cornerstone' of it.

conduct 'unauthorised entry into the area of the sports event of the facility, which is closed to spectators' [§ 340(2)]; in 2008, the offence of assault was added to the offence of egg throwing (then in the new Criminal Code § 340(2)]; in the case of egg throwing, the offence of assault was added to the offence of 'hooliganism' [§ 340(2)]. Already overburdened qualifying cases of theft were also gradually multiplied, again in connection with specific cases which have generally given rise to disapproval (e.g. precious metals, artefacts, archaeological finds, anti-theft devices in shops, wood from the forest, etc.). My fellow professors abroad smile at the fact that the legislator has managed to chisel theft—this time formulated at the level of the Ten Commandments—in such a way that the law, including no less than six value thresholds, has forced more than 20 cases into the mouth of the law enforcer. Another spectacular example of the loss of confidence in the courts is the fact that today, the legal definition of theft in the Criminal Code looks like a coffee machine in a shop, where you just have to press the right button and the (centrally expected) sentence is delivered. It can also be considered a 'Hungaricum' that, in the spirit of the determined fight against graffiti, the concept of the 'felt-tip pen' has been introduced into the Criminal Code.

[16] The general concept of populism is obviously much more complex than the simple meaning of the word (indicating the will of the majority of the people, or the winning of this will by an elite) would suggest. For understandable reasons, the phenomenon itself is primarily studied in political science, sociology and social psychology rather than in law. However, the phenomenon can also have a strong impact on the field of criminal law. According to Katalin Gönczöl: 'We can speak of criminal populism when the ruling political elite, under pressure from public opinion, reacts to complex social phenomena—especially crime and other self-destructive and public deviant behaviour—in a way that is constantly simplistic, spectacular and promis[es] quick success. Rather than addressing serious social conflicts in a meaningful way, this elite is resorting to extending social control as a power grab for votes rather than as a substantive solution to alleviate them. It breaks with the use of criminal intervention as a last resort and with the constitutional principle of necessary and proportionate punishment.' See Gönczöl (2014), p. 542. Populism has two clearly discernible sides: one is the often very simplistic, momentary or short-term thought and demand system of 'public opinion', shaped by perceived or real interests, and the other is the techniques of those in power (or those who seek to be in power) to exploit or even reinforce it.

[17] The phrase, which has since become a classic, comes from András Szabó, who used it in his dissenting opinion to HCC Decision 89/B/1990. on the abolition of the death penalty.

1.3 Amendments of a More General Nature

The offences described above which have been introduced into the Criminal Code or amended have not been exhaustive. Therefore, it can be said that these modifications have not reached the 'general' level. They are not to be welcomed, but given their ad hoc, one-off nature, they may not cause significant damage in practice.

Politicians—usually also in the wake of certain serious cases—however, increasingly resort to the General Part of the Code, invoking the indignation and legitimate demands of 'public opinion', the 'Hungarian people',[18] tightening the broader legal framework and reducing the scope for law enforcement. As this also ignores professional arguments and imposes *general rules for each individual case*, it can have dangerous consequences.[19]

The following are, therefore, three examples of the responsiveness of legislation over the last 10 years that have been introduced into the Criminal Code. I would like to deal in more detail with a number of amendments affecting the General Part of the Criminal Code. Two of them concern the issue of the age of offenders, which has implications for 'future potential offenders', and the third concerns the parole of convicted offenders.

The justification for short prison sentences, or rather their necessity—because the absolute supporters of the latter have always remained a strong minority—has been debated for centuries.[20] Since the second half of the last century, however, there has

[18] At this point, I believe it is necessary to stress that neither in the process of codification nor in the everyday application of the law should we *completely ignore* the 'needs' of 'public opinion'. The law, including criminal law, has a duty to find ways of bringing public opinion and legal judgments closer together when this is justified. It has never been disputed that although criminal law regulation or adjudication is a complex set of complex professional issues, it is unfortunate if there is a significant (possibly growing) difference between public and professional opinion concerning, for example, what deserves punishment or what type and severity of punishment is considered a fair response to a crime. However, in addition to understanding and possibly taking into account the views of the public, it is essential that the profession should also identify misconceptions, exaggerated or erroneous claims of the public and seek to dispel them, rather than serving them, and to develop a more realistic and accurate picture. Nor should the politicians of the day seek to gain popularity easily by embracing the often uninformed, one-sided, emotionally determined, irrational and even prejudiced expressions of public opinion. Even if this can win votes. As Pál Angyal put it almost a hundred years ago, 'It is not cold deliberation, objective assessment, insight into the psyche of the actor, and thus dispassionate, calm and unemotional scrutiny, that characterises those who judge in the forum of public opinion, but passion, momentary anger, and the will to harm [. . .] that surface, and these feelings do not lead the shapers and bearers of public opinion towards an impartial and just reaction.' Angyal (1933), p. 106.

[19] Ferenc Nagy sees these legislative products as institutions of 'symbolic criminal law', part of a system of instruments that 'leads to a significant deficit in the exercise of effective subject-matter protection, without the legislator taking note of this deficit in its implementation. In political terms, however, the legislator demonstrates and communicates its capacity to decide and act, despite its failure to perform the actual task of protecting the subject-matter of the right.' Nagy (2013), p. 129.

[20] As Paul Heilborn wrote early last century, the only advantage of a short-lived abolition, if it exists, is that it is short. Heilborn (1908).

been almost unanimous agreement that the deprivation of liberty of children, especially for a few weeks or more, cannot be justified on reasonable preventive grounds and that it clearly has no social protection function.[21]

Despite this, the legislator saw the time was right in the third millennium to introduce the extension of detention to juveniles. In this almost condensed form lies its entire conception of criminal law: just a 'taste of prison', as the responsible Secretary of State put it, can have a salutary effect.[22]

The Commissioner for Fundamental Rights turned to the Minister of the Interior, who had initiated the amendment, and was told that without detention, enforcement would be 'ineffective against juvenile offenders'. The legal system must, therefore, 'react'. It was added that 'dealing with minor offences with the appropriate force [i.e. deprivation of liberty] also contributes to the positive shaping of young people's personalities'.[23] I myself could not find any research evidence to support this, even in the materials produced by the Scientific Council of the Ministry of the Interior, nor was there any explanation for the contradiction that the educational effect of community service can only be relied upon for minors over the age of 16, whereas detention can be used for children as young as 14.

However, in the explanatory memorandum of the draft Criminal Code, which was submitted for a short public consultation, it was reiterated that 'detention is a custodial sentence that can effectively serve [the purposes of] special prevention, especially for juvenile and first-time offenders'.[24] This is a serious error, however, the latter being a pro-political perpetuation of the 'punitive-educational' pedagogical concept of punishment, which is (was?) considered a century out of date. It is quite obvious that the imprisonment for lesser offences of an immature personality may involve more risks and negative consequences than benefits. The stigma inevitably attached to such children makes them more susceptible to sinking even deeper into the mire of crime. They are educated not by imprisonment but by the examples of more experienced fellow prisoners, and obviously not for the good but for the bad. Imprisonment does not teach young people to resist the school of sin but may turn many of them into its students and then, under the pressure of circumstances, perhaps even diligent ones.

The fallacy of the reasons (but only the reasons) was later acknowledged, and the ominous sentence was removed from the final version of the ministerial explanatory memorandum to the law, but the sanction itself remained. Fortunately, case law has

[21] For more recent literature on the subject, see e.g. Schaeferdiek (1997); Janssen (2002), p. 16; Dünkel and Snacken (2001), p. 195.

[22] KIM: Szigorú az új Btk. a visszaeső bűnözőkkel [Ministry of Culture and Innovation: The new Penal Code is tough on repeat offenders]. Mandiner, 24 June 2013. https://bit.ly/3yHjzoK.

[23] Report of the Parliamentary Commissioner for Civil Rights in case AJB-5980/2010.

[24] See the explanatory memorandum to Art. 50 of the February 2012 version of the Criminal Code.

Table 1 Rate of custodial arrest of juvenile offenders

		Custodial sentence to be served	Custodial arrest
2013	5598	360	0
2014	5955	357	9
2015	5130	330	14
2016	4598	251	25
2017	3886	194	40
2018	3505	176	29
2019	3077	148	26
2020	2542	86	14
Total over 8 years	34,291	1902 (5.5%)	157 (0.4%)

never been very receptive to such arguments. Such case law is illustrated in the following Table 1.[25]

It can be seen that since the entry into force of the Criminal Code in July 2013 until the end of 2020, in only 157 cases had juvenile offenders been detained. This represents less than half of one percent of all juveniles with a disqualification, which means that, on average, only one in two hundred and twenty juveniles with a disqualification has been prevented from alleged 'lack of means' and their 'responsiveness' improved. Nevertheless, if we were to ask the legislator whether it is worth maintaining this misguided institution in these circumstances, we would certainly receive the same answer since, among other things, it can be used to demonstrate desperate rigour, regardless of actual application.

The minimum age of criminal responsibility of 12 was also set in the spirit of responsiveness following a few isolated cases.[26]

There has also been a long-standing debate about the lower limit of criminal liability. For a long time, the plan was to lower the age limit in general, but later, when the issue of 'child-friendly justice' was raised in the context of our international legal obligations to amend our criminal legislation, the decision was taken to keep the age limit at 14. It would have been difficult to argue in favour of lowering the minimum age of criminal responsibility at a time when the *upper age of criminal responsibility* was unanimously set at 18 in international instruments. Clearly, the fact that someone is considered a 'child' on the basis of international experience is far from only a matter of terminology.

[25] Prosecution Service of Hungary: Key data on Activity Before the Criminal Court. II. Juvenile Defendants, 2021, https://bit.ly/3FOzvHa.

[26] In January 2008, a 12-year-old Roma child from Gheorgheni (Romania) named István G. stabbed a young man during a robbery in Budapest. A similar case did not come to light for years afterwards (some other young people who had committed serious violent crimes were aged 17–18 at the time), but the former became a reference point for the position that 'violent advocacy is becoming more and more common among children aged 12–14, and therefore the age of criminal responsibility needs to be changed'. See Ministerial Explanatory Memorandum to Art. 16 of the Criminal Code.

The age of criminal responsibility in Europe is very mixed: 10 in England but 16 in Belgium, Spain and Portugal. In any case, there are many more European countries where 14 years of age or above is the benchmark. There is less mention of the fact that in most countries with a 'stricter age limit', even 'young adults' (up to the age of 21 or even 25) may be subject to special, less strict rules.[27]

The provision finally adopted in the Criminal Code is the result of a specific compromise. As we know, children between the ages of 12 and 14 were made punishable for certain serious offences. Even after the latter came into force, I myself was inclined to describe this measure as 'window dressing' (i.e. a particular 'populist product'), which sought to satisfy certain particularistic punitive demands, hoping and assuming that it would have no real effect, but only send a bad professional message. Based on the number of children of legal age and the number of juvenile offenders involved, it could be assumed in advance that only about 50 cases per year would involve children under the age of 12 (which does not at all mean that they would be criminally liable, as this would have to be carefully examined on an individual basis, as is mandatory in this context). In the light of these figures, and as the failure of the institution of criminal law has become increasingly clear, official data have become increasingly difficult to obtain.[28]

However, some data, which has become scarcer over the years, does emerge from the annual parliamentary reports of the Attorney General.[29] In the second half of 2013 (the first half of the year after the new Criminal Code came into force), 19 cases were brought against suspects aged between 12 and 14 in 18 cases, and in 2014, 61 cases were brought against suspects aged between 12 and 14 in 53 cases. Apart from one robbery and one assault causing bodily harm, the other offences were robberies, often committed with older peers. Only 17 children were convicted, and only three children under 14 were sentenced during a year and a half.

After 2016, the reports no longer provide detailed statistics in this area, mentioning only the 'close monitoring' and 'focus on' such cases.

The accessible data can hardly realistically sustain the need for specialized police officers, prosecutors and judges instead of trained and competent child protection professionals and teachers. The new trend is also in open defiance of international standards, which call for the minimisation, if not the abandonment, of administrative procedures against children.

The legislator has not yet come to this conclusion but has considered it necessary to extend the possible liability of perpetrators over the age of 12 to include crimes

[27] In the German-speaking countries, 'young adults' are treated as a separate category not only in criminological but also in legal terms (in Germany and Austria as 18–21-year-olds, in Switzerland as 18–25-year-olds) and are subject to rules that are partly substantive, partly procedural or penal, and partly less stringent than those for adults. Csuri (2008).

[28] Special publications on child and juvenile delinquency have not been published since 2012, and the annual information sheets on the prosecution of under-18 s do not include a breakdown by age group of under-14s.

[29] Most recent: B/16954 Report of the Prosecutor General to Hungarian National Assembly on the activities of the Prosecution Service of Hungary in 2020. https://bit.ly/3MwuK85.

against persons who are considered to be terrorists (!) and then, due to the 'escalation of violence in schools', crimes against teachers and public officials (school guards).

According to the general provisions of criminal law, unless there are no grounds for exclusion, persons serving a sentence of imprisonment may be released earlier than the full sentence if they behave properly (Arts. 38 and 43 of the Criminal Code). This possibility does not depend on the gravity and nature of the offence committed, but on the conduct of the person during the execution of the sentence.[30]

In contrast to international trends aimed at expanding the use of this institution, the legislator also changed the rules on conditional release in response to a single tragic case, essentially ignoring the rational principles of the previous regulation.[31] The grave tragedy was a cause for public concern, but the response to it (the general exclusion of parole for *all* convicted persons who have committed *intentional homicide*)[32] was again a manifestly formal and inadequate response.

The *general exclusion of* parole for those who have committed intentional homicide suggests a false guarantee that the remaining one-third of the sentence would deter the offender from re-offending. This ill-considered generalisation also undermines a consistent system that has encouraged cooperative behaviour by providing a potential discount.

The purely demonstrative nature of the amendment to the institution becomes all the more striking when knowing that, after barely a year, the possibility of parole was again restricted, this time for more serious sexual offences against persons under 18 years of age.[33]

It is, therefore, highly doubtful, and almost impossible that additional months of indiscriminate incarceration behind bars can have a deterrent effect on future crime, but it is certain that the lack of motivation to cooperate due to the prospect of early release during the prison term may have harmful consequences. Although an attempt was made to reduce the indiscriminate severity of the modification when it was finalised, it did not make any significant difference to what could be considered a fundamentally flawed regulation.

[30] This is also called for in international documents, such as the Recommendation CM/Rec(2010)1 of the Committee of Ministers to member states on the Council of Europe Probation Rules. To this, the European Parliament resolution of 15 December 2011 called on 'Member States to honour the commitments made in international and European fora to making greater use of probation measures and sanctions which offer an alternative to imprisonment' (European Parliament Resolution of 15 December 2011 on detention conditions in the EU (2011/2897(RSP)).

[31] In 2016, H.G. attempted to commit a jealousy manslaughter against his sleeping wife and was sentenced to 5 years in prison for this crime, taking into account his limited mental capacity. However, he only had to serve two-thirds of his sentence and was released in September 2019. He was deprived of custody of his children, but his contact was not restricted. In December 2019, he killed his two children at the first visitation and then killed himself.

[32] Act CVIII of 2020 amending the Criminal Code.

[33] Act LXXIX of 2021 amending the Criminal Code.

Table 2 Historical overview of codes of procedure

	Act XXXIII of 1896	Act III of 1951	Act 8 of 1962	Act I. of 1973	Act XIX of 1998	Act of XC 2017
In force	1900–1952 (52 years)	1952–1962 (12 years)	1962–1973 (12 years)	1973–2003 (30 years)	2003–2018 (15 years)	2018-
Number of Arts. (§)	592	246	363	407	608	879
Number of amendments	42 Acts					
24 decrees	6	2	52	89 Acts		
15 HCC decisions	12					

2 The Responsiveness of Criminal Procedural Law

The misinterpretation of responsiveness may become a factor jeopardising legal certainty not only with consequences extending beyond substantive law, so it is appropriate to briefly discuss the regulation of the criminal procedure.

The need for 'quick', 'timely' answers (often not even realistically justified) can lead (indeed, perhaps has already led) to a dumping of legislation in the area of criminal procedure regulation, which makes it considerably more difficult to understand and properly apply the standards, with serious implications.

Let us first examine a brief—and perhaps instructive—summary of the scope of the laws and the number of amendments from our first written and adopted code to the present day (Table 2).

The number of sections in the five post-World War II laws increased steadily, but for the last three laws (i.e. about a third of the total period), the growth represented a jump of almost 50% in both cases compared to the previous code.

Although the first Criminal Code survived two wars and a few regime changes, it was amended fewer times in 52 years than our previous law, which has been in force for 15 years. In the decades after World War II, modifications were negligible, but from the mid-1980s onwards, their frequency became worrying. The average in the decade following the democratic transition was still around two per year (which is not low), but the previous law had already experienced an average of six modifications per year.

Unfortunately, this process has not come to an end since the entry into force of Act XC of 2017: it seems to be continuing with unchanged intensity, and this can only be partly attributed to the pandemic. The new law was already significantly amended between its adoption and entry into force, and it was soon announced that a further, more detailed amendment was needed. However, in the run-up to this, in March 2020, a pandemic struck the world, and this urgently required a revision of the entire legal system, including the criminal justice system.

Government Decree 74/2020. (III. 31.) on certain procedural measures during the emergency primarily focused on replacing procedural acts with personal

participation (the extensive elimination of mandatory personal participation) and on strengthening electronic communication, but also on relaxing its strict requirements. Temporary restrictions were imposed on certain rights that are not always restrictive in substance and can be offset by other provisions, such as the possibility of excluding the public from hearings but allowing recording of what happens, and certain time limits were made more flexible. The institution of a single judge at first instance became general, the rules on special treatment were extended to persons over 65 years of age, and the admission of previously recorded testimony or the use of audio and video recordings of other procedural acts was made possible. This can still 'fit' into the proof of responsiveness.

However, from April 2020, the rules of criminal procedure were also affected by Act CXXVII of 2019, which was created in the spirit of the new principles of the judiciary, the strengthening of the unity of law and the introduction of 'limited precedent law'. Act XLIII of 2020, which was originally planned to contain a comprehensive amendment, was adopted on 19 May 2020. In addition to the Criminal Procedure Act, the amendment also amended and adapted a number of other related laws to the changed needs. Furthermore, in 2020, two other minor amendments and a decision of the HCC substantially amending the law were adopted.

This was followed by two more Acts and an HCC Decision in 2021. In total, 12 acts, HCC decisions, and government decrees have affected the Code of Procedure in the 2 years since its entry into force. The main modifications are summarised in the Table 3.

Again, part of the reason for the rapid prescriptions has been the escalation of the virus-related situation. At the same time, however, there have also been ongoing amendments that have responded to specific cases in this area without waiting for and discussing more thoughtful summary proposals.

In this context, and without going into the issue in depth, I think it appropriate to make a few additional comments on the reform of the conceptual management of the judiciary. Act CXXVII of 2019 has thus openly opted for the introduction of 'limited precedent' in the judiciary, giving published curia decisions a practically binding force and, ultimately, creating the possibility of constitutional complaint in this area, making the HCC the final arbiter of decisions that violate the rules of precedent.

I also consider it wrong and incompatible with the continental legal tradition if the law of precedent, which is already prevalent in legislation, becomes a fundamental principle in the application of the law. This could result in the further marginalisation of the possibility of judicial individualisation, which is often already impossible because of the incontestable, binding provisions and irrebuttable presumptions[34] that are constantly being enacted into law.

Moreover, it does not reflect well on the Curia itself if the mandatory system of case-law decisions, which contains more general lessons and mainly concerns

[34] See, in relation to the institution of legitimate defence, so-called 'situational legitimate defence' [Art. 21(2) of the Criminal Code].

Table 3 Amendments to the new Code of Procedure

Act/Decision/Decree	Entry into force	Scope, subject matter, essence
Government Decree 74/2020. (III. 31.)	March 21, 2020	Transitional rules for emergency situations
Act CXXVII of 2019 (on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices)	April 1, 2020	'Limited precedents'
Act LVIII of 2020 (on the temporary measures applicable to the termination of the state of emergency and the preparedness for pandemics)	June 16, 2020	Extension of transitional rules + some final changes
Act LXXIV of 2020 (on certain legislative amendments necessary to eliminate and prevent violence in schools)	September 6, 2020	Criminal costs (by a juvenile relative)
Act XLIII of 2020 (amending the Criminal Procedure Act and other related acts)	January 1, 2021	Comprehensive amendment
Act CLII of 2020 (Legal Status of the Staff of the National Tax and Customs Administration)	January 1, 2021	Updating certain concepts in the regulation
Act CL of 2020 (on the Code of General Administrative Procedure)	January 1, 2021	New rules on civil (damage) claims by victims
HCC Decision 6/2020. (III. 3.)	March 3, 2020	Transitional provisions of the act (validity of appeals at third instance before July 1, 2018)
Act CIII of 2021 (on rules to promote the competitive operation of higher education institutions and amending certain laws on property management, government administration and criminal law)	September 30, 2021	Private prosecution clarification
HCC decision 10/2021. (IV. 7.)	September 30, 2021	Constitutionality of the time limit for arrest
HCC decision 19/2021. (V. 27.)	By omission constitutional violation	Relative weight of procedural infringements
Act CXXXIV of 2021 (amending other laws on criminal law and related matters)	March 1, 2022	Simplified telecommunication link; links between liquidation and criminal proceedings

questions of principle (although increasingly diluted in this respect), has proved ineffective and will continue to do so. This is not really the case, of course, but rather that another institution, made difficult to circumvent, was intended to help centrally preferred intentions prevail, providing a kind of guide to desirable, 'expected' decisions. The only guarantee of the rule of law concerning legal unity in the right sense is certainly not uniformity of this kind, but only the right judicial decisions endowed with the appropriate scope for manoeuvre and the capability of properly perceiving and assessing the necessary particularities of individual cases. For, as László Szalay put it almost two hundred years ago, judgement imposed on us from

the centre is ‘abstract, rigid, inflexible, apparently equal for all, but unjust in reality’.[35]

3 Conclusion

This chapter, as I have indicated in the introduction, could not fully examine the complex system of responsiveness of criminal law and focused mainly on legislative issues.[36] In doing so, I have tried to show that the reactions of domestic criminal legislation in recent decades have generally not been characterised by a research-based, far-sighted approach, complexity and moderation. Traditional dogmatics in the field of substantive criminal law and procedural law have gradually developed on a case-by-case basis. Criminal policy, increasingly lacking in professionalism, has moved in the direction of providing an immediate, concrete, and as visible a criminal-law response to certain negative or perceived negative phenomena as possible. While a rapid and rigorous but purely symptomatic response to certain criminal phenomena—usually involving the introduction of repressive institutions and new offences, sometimes restricting certain criminal law benefits or limiting judicial discretion—may give the appearance of being responsive and be widely popular and well-communicated, it is inevitably ineffective in the long term. After all, centuries of experience have shown that criminal law instruments which only address the surface of crime, which only consider retaliation and ‘wrong for wrong’ as the solution, cannot replace a properly conceived system of instruments which address the real causes, which are sufficiently differentiated and which provide a wide margin for manoeuvre.

However, the role of criminal law should not be overestimated. Tibor Király concluded the reflections quoted at the beginning of my paper by saying: ‘When a society is full of tensions, it is easy to imagine that punitive power can be used as a general remedy, but it is only an auxiliary tool. Nowhere in the world has this power ever cured a society, for while it can punish certain crimes, it can put people away, it

[35] Szalay (1847), p. 78.

[36] A further issue to be examined could be the responsiveness of *law enforcement*: how law enforcement decisions follow the steps of legalisation, necessarily with a certain lag. It may be of interest to note that while the proportion of defendants sentenced to imprisonment among all convicted persons has remained practically unchanged over the last 10 years, the proportion of persons actually serving a prison sentence has increased steadily, albeit slightly. This suggests that the increase in the number of persons sentenced to imprisonment may be linked not to the increased use of deprivation of liberty by the courts but to its increasing duration (the length of time spent in prison). This is certainly primarily the result of the judicial response to the ‘average’ sentence and may also raise questions about the responsiveness of the prison service and the appropriateness of the response to overcrowding. The frequent disregard of the European Court of Human Rights’ judgments on criminal law (e.g. on the de facto life sentence or the legal context of the use of disguised instruments) could also be examined in the context of responsiveness. There is, therefore, much more to analyse.

is too weak to repair public morals and to neutralize social customs.'[37] It may, in some cases, be a mistake not to respond with criminal law. But no less a mistake is made by those who resort to unwarranted criminal law instruments or use them to address real problems in an inappropriate, misguided, purely demonstrative and unhelpful way.

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[37] Király (1988), p. 742. Recent research also confirms that the recognition of the limits of criminal law helps to effectively apply the appropriate legal and extra-legal instruments—see e.g. Dyson and Vogel (2018).

Adaptation Mechanisms in Private Law

Ákos Szalai and Attila Menyhárd

Abstract Contracts are risk allocation mechanisms and, as with legal relationships generally, are social relationships. If circumstances change, the content of such relationships also changes. Adjusting such relationships to changed circumstances may be done either using a bottom-up approach, via courts, or in an top-to-bottom approach by the legislator. Implied terms, frustration of purpose, impossibility, judicial amendment of contract and the adaptive application of the rules concerning breach of contract are the tools of judicial adaptation. Intervention via legislation may be more efficient if there are a large number of cases. While legislative or administrative rule-making is determined by political decisions, judge-made rules are influenced by the constrained options of judges. That is, the latter cannot impose a standard of conduct on non-litigants, and the courts cannot handle all legal problems—many of which are not brought to court or end in settlement.

1 Introduction

The expectations that the law creates for social and economic actors have a specific relationship to changes in society and the economy because they not only enforce but shape the latter at the same time. Until the beginning of the twentieth century, changes in private law were characterised by natural, harmonious adaptation. Even if the changes were as profound as the dismantling of feudal property systems and the emergence of modern private property or the development of business companies and commercial law, they were the result of processes that were well adapted to the

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rhythm of social and economic development and therefore partly fitted into the framework of legal thought. And if the framework needed to be adjusted, it could be done in such a way as to preserve the logical order of the law.

The typical method of adaptation in civil law is *bottom-up* development: courts decide on the disputes that come before them, and the principles that emerge from the decisions define a body of law, which, if the legislator sees fit, can be translated into written civil law rules. The written regulations thus created are typically defined at a high level of abstraction to be sufficiently flexible and applicable in cases similar in substance to the earlier rules but different in fact and certain details.

The reverse, *top-to-bottom* direction of rule-making comes to the fore when the legislator wants to correct existing law. This is usually done either because the legislator intends to override judicial practice or because the bottom-up, socially and economically embedded responses to judicial practice take time to develop, and the legislator sees more risk in sustained uncertainty than in the adverse effects of direct intervention. These adverse effects are primarily manifested in a poorly defined scope of application in terms of social appreciation and demand, regulatory loopholes leading to uncertainty, and gaps in the legal system, leading to uncertainty.

The economic analysis of law analyses these problems as the difference between standards and rules.[1] These models distinguish between the latter on the basis of how precise the law is and how much room it leaves for judicial discretion. Standards are less precise; they leave more room for judicial balancing. The main question here, however, is different. This analysis assumes that the same accuracy can be achieved through legislative and judicial rule-making. For example, even if standards (general clauses) exist in private law, judicial practice can produce rules as accurate as legislative or regulatory acts. But the process of rule-making is different. The first part of the analysis concentrates on the rule-making process—why the scope, costs, timing, and expected lifetime of rules are different in the case of legislation (or regulation) and judicial rule-making. The second part focuses on the circumstances when the two methods result in different rules. This section will present the typical differences between the rules made by courts and by legislators (or administrative branches).

2 Contracts as Risk Allocation Vehicles

Contract law protects trust in the promise of another party. This trust corresponds to the moral norm that promises must be kept. Contracts are, however, social relations,[2] and it seems obvious that if social and economic circumstances change, contracts must adapt to these changes. This requirement appears to be incompatible with the principle of the binding force of contracts. Because of the high costs of contracting

[1] For an overview of the relevant literature, see, for instance, Luppi and Parisi (2011), pp. 43–53.

[2] MacNeil (1974), pp. 691, 715; Kohler (1921).

and information gathering, contracts are never complete: they are never able to fully and perfectly spread the risks of unforeseen future changes. Thus, social and economic changes make it necessary to adapt contracts by law or through the courts. However, such intervention is often considered undesirable because of interference with the private autonomy of the parties.

Since contracts are necessarily incomplete, it is the task of private law to offer solutions for the redistribution of risks when unforeseen and unforeseeable circumstances make performance much more difficult for the obligor than they expected when they concluded the contract. This is supported by the idea that social justice in contractual relations should be promoted. The gaps in incomplete contracts can be filled by implied terms or by specifying general clauses such as the requirement of good faith and fair dealing. Both the general rules of private law and doctrines, such as *hardship*, impossibility, *frustration of purpose*, *loss of the basis of the transaction*, *imprévision* or *clausula rebus sic stantibus* and specific rules about contracts can deal with such cases. The legislator may also intervene using ad hoc legislation if the change of circumstances affects a wide range of contracts and is a social problem.

Doctrines pointing in this direction are the building blocks of the arguments made by the courts. A judgment is, in fact, the result of weighing up the interacting values relevant to the case. With regard to the binding force of contracts, the autonomy of the parties, their responsibility for themselves, the (objective) value of the exchange as established by an external party and the trust in the promise of the other party are the relevant values, which may vary in strength depending on the facts. In the flexible system of private law, a court's judgment on the binding force of a contract is the result of weighing up these relevant values according to their strength in the circumstances. In other words, the more informed and uncoerced the consent, the less relevant the (objective) value of the exchange as determined by an external party. However, a lack of information about unforeseen circumstances may undermine the value initially attributed to the exchange, and this may also open the door to the need to correct a contract according to the social evaluation.

3 Judicial Risk Allocation: The Doctrinal and Regulatory Framework of Contract Law

3.1 Implied Terms

Legal systems involve a wide range of doctrines and rules that deal with the redistribution of the risk of circumstances unforeseeable to parties at the time of the conclusion of a contract. These solutions are designed to ensure that the contract conforms to society's general values and requirements. The conditions implied by any of the relevant doctrines are part of the basis of contracts and primarily relate to the existence or non-existence of facts which are so obvious and so unlikely to fail that the parties did not think it worthwhile to stipulate them expressly.

Regarding the addition of the general clause of good faith and fair dealing, traditional Hungarian private law doctrines followed the German model before the Second World War.[3] The requirement of good faith and fair dealing is part of Hungarian private law along the lines of the German *Treu und Glauben*[4] and its function. Since § 1:3 of Act V of 2013 of the Hungarian Civil Code, it has been an integral part of all private legal relationships, including contracts. The contracting parties are bound by this obligation even if it has never been concluded or negotiated. To promote the relevant social values, the courts must give concrete form to the general clauses on a case-by-case basis, taking account of the specific facts. In other words, the courts may derive from the requirements of good faith and fair dealing specific rights and obligations in the relationship between the contracting parties, even if they have never negotiated or imposed such rights and obligations. This also applies to Hungarian private law in force, although it is not reflected in current court practice. This option is available to the courts if they consider it fair and reasonable in the circumstances of the case or if the application of the otherwise applicable rules does not lead to a socially satisfactory result.

3.2 Impossibility and Frustration of Purpose

After a contract is concluded, circumstances may change, resulting in the contract becoming unenforceable. If performance becomes impossible due to a change in circumstances after the conclusion of the contract, this will result in the termination of the contract, or the obligation to perform in kind will be converted into an obligation to pay damages. Hungarian contract law treats the impossibility of performance as a form of breach of contract. It follows that if the defendant is responsible for the impossibility of performance, they may be liable for damages under the rules of liability for breach of contract. The performance of the contract may be rendered impossible by physical circumstances (e.g. the subject matter of the contract has been destroyed) or because the contract has lost its purpose. This is the case, for example, when a shareholder agreement becomes impossible to perform because the court has rejected the application for the registration of the company.[5] Alternatively, a lease contract would be considered to have lost its purpose and to have been terminated because it was impossible to conclude if the tenant entered into it with the intention of establishing an industrial estate, but the industrial estate was not ultimately established for reasons for which neither party is responsible.[6]

[3] Kelemen (1937), p. 88.
[4] Földi (2001), p. 105.
[5] EBH 2006. 1428.
[6] BH 2007. 370.

A contract also terminates for impossibility if performance would be so difficult for the obligor that it cannot be reasonably expected.[7] This would be the case, for example, if the parties had contracted to exchange accommodation, but one of them fell ill after the conclusion of the contract and medical treatment was only available to them at their original place of residence.[8] Impossibility may also occur because of a change in the legal environment. This is the case when an obligation to provide a service that was legal at the time the contract was concluded becomes illegal due to a change in the law after the contract was concluded.[9] A supplementary interpretation of the contract or the presumption of *implied terms* also means that the rights and obligations laid down in the contract are subject to certain conditions (purpose), even if these are not fixed by the parties. Once this basis for the contract has ceased to exist, the enforceability of the contract ceases. This statement is also valid in Hungarian private law.

Legal impossibility may provide a response to the direct consequences of legal restrictions, while impossibility due to the frustration of an objective may provide an answer to the consequences of changes in social behaviour. With respect to the sharing of the risk of legislative action in relation to the COVID-19 pandemic, the question is whether the performance of the rights and obligations contracted by the parties depends on the absence of such limitations or difficulties. The answer does not follow from the internal logic of private law. It is a question of policy to be decided by the court and may require a different approach with commercial and non-commercial contracts. In our view, a finding of impossibility due to frustration of purpose should be subject to much stricter requirements in commercial relationships than in non-commercial relationships. This view seems to be supported by the approach followed by the courts in international commercial disputes.

An important feature and limitation of impossibility is that it provides a 'black or white' answer as to the binding force of the contract. This is very much in line with the market paradigm in that it does not give a new contract to the parties but leaves it to them to decide whether they want to renegotiate the contractual relationship. However, this may impose a significant social cost if the termination of the contract affects third parties or entails excessive transaction costs and is not an optimal solution. This is particularly the case with long-term contracts, as parties invest in performance with a predictable return in the longer term. Therefore, terminating a long-term relationship would entail high costs. This may not only be less efficient but also unfair.

[7] BH 1986. 489.
[8] BH 1985. 101.
[9] BH 2002. 235.

3.3 Clausula Rebus Sic Stantibus

In long-term contractual relationships, the parties are particularly exposed to risks arising from changes in circumstances. Transaction costs can be reduced by adapting contracts to changed circumstances while maintaining the original balance of rights and obligations and conforming to social values rather than by applying the law's doctrine of impossibility, which would sever the socio-economic link between the parties. Adapting a contract to changed circumstances by judicial modification is achieved by applying *clausula rebus sic stantibus,* which is a general rule, particularly the requirement of good faith and fair dealing, or specific rules at different levels of abstraction of private law. Contract modification is reasonable in long-term relationships. With such contracts, there is a high probability that risks will arise that the parties do not allocate because of the high costs involved. Impracticability makes the contract unenforceable. Therefore, the parties must renegotiate their contract if they want to maintain their legal relationship. In contrast, the *clausula rebus sic stantibus* and *hardship* doctrines open the way to a review of the contract. However, as a consequence, one party may find itself in a contract that it might never have entered into.

As far as long-term contracts are concerned, the Hungarian Civil Code provides for a special rule on the amendment of contracts by a court. Either party may claim a judicial amendment of the contract if, as a result of a circumstance arising in the long-term legal relationship between the parties after the conclusion of the contract, performance of the contract under unchanged conditions would be prejudicial to their substantial legal interest, and the possibility of a change in circumstances was not foreseeable at the time of the conclusion of the contract; the change in circumstances was not caused by them; and the change in circumstances does not fall under the scope of the normal business risk [Art. 6:192 (1) of the Civil Code]. There is a strong argument that the court is not entirely free to formulate a modification of the contract but can only modify the contract by applying the dispositive rules of the Civil Code.

3.4 Application of the Rules on Breach of Contract

The rules of the Civil Code, similar to the solutions of the various unification products, allow a party to be exempted from liability for breach of contract if it can prove that the breach of contract occurred for a reason beyond its control ('irresistible'). The concept of *beyond control* is a completely open concept that can be used by the court to spread the risk. Thus, in the context of the exemption from liability for breach of contract, the court may also allocate risks unforeseen by the parties at the time the contract was concluded.

4 Re-Allocating Risks Through Legislation

In crises affecting the whole economy, the judicial route is often complemented by the legislative or regulatory route: at the government's initiative, such instruments are used to revise the original contracts and modify the rights and obligations of the parties—in other words, to distribute losses between them. The present analysis is concerned with when this takes place and when it is left to classical contract law (and the courts) to deal with the situation.

The Hungarian economy has been hit by several major shocks in recent decades. Without claiming to be exhaustive, the significant economic downturn following the change of regime, with the associated fall in income and inflation, was a major shock; contracts signed in the second half of the 1980s were particularly hard hit; following the economic crisis of 2008, the significant depreciation of the forint caused particular problems with the repayment of loans to households and municipalities (and companies), many of which were in francs and euros (loans denominated in foreign currency); the closures caused by the COVID-19 epidemic paralysed a significant part of the economy, leading to a significant loss of income for debtors, but also for tenants of businesses, for example.

5 Differences in Rules

In the previous section, we assumed that the decisions made by the court and the regulators (government, bureaucracy) are the same. We focused on the differences in timing, accuracy, and the costs of rule-making. In this part, we look at why the content of the rules created in the two diverging ways can be different.

When rules are enacted by legislative acts or regulations, we are faced with political decisions. The motivations behind these decisions can be understood with the help of public choice theory models. However, due to a lack of space, our analysis and model will be a bit one-sided. The focus will be on judicial lawmaking. We assume that the main findings of public choice models are well-known, and we concentrate on the areas where judicial decision-making differs from political-bureaucratic decisions. In this regard, three main elements might be identified: different opportunities, different objectives, and different incentives.

5.1 Different Opportunities

It is worth starting with the fact that due to the structure of the legal system, courts have different options from those of legislators and regulators. Courts can decide only on the issues that are brought before them. Courts can only confer rights on the parties concerned and impose new obligations on them. For example, in a credit

crunch, the courts can only redistribute rights and obligations between creditors (banks) and debtors, while governmental-political regulators can impose costs directly on third parties in the resolution of the problem. For example, during the Hungarian foreign currency crisis, the regulation allowed debtors to get out of debt by paying a third of the debt while the government itself took on a third of the debt. (The third part had to be covered by the banks.)

5.2 *Different Individual Objectives and Preferences*

As an argument in favour of governmental-political regulation, it is sometimes made expressis verbis that court decisions pursue different goals than the government. Such divergence is often explained by the various preferences of rule-makers. Perhaps the best-known model related to the preferences of judges is that of Richard A. Posner. However, other goals are also specified in the literature.

Utilitarianism and Welfare Maximisation Richard A. Posner's original (very strong) claim was that judges typically follow utilitarian principles—more precisely, because the utility or (subjective, non-monetary) benefits on which utilitarian logic is based are difficult to measure, they are welfare-maximizers.[10] A (weaker) version of this claim argues that utilitarian principles are the easiest to follow—and therefore, judges often relegate other preferences to the background. For example, if they try to promote the fair distribution of wealth, they must first engage in a political-philosophical debate about distributional justice. Only after defining the meaning of justice or fairness can they consider what decision this definition requires in the given case for particular parties. This political-philosophical debate can be avoided by seeking efficient rather than fair or just decisions.[11]

Coherence Models Many argue that the underlying principle behind judicial decisions is that the legal system's coherence should be preserved.[12] Perhaps one of the best-known such arguments arises in the context of credit: judges are overly committed to the principle of pacta sunt servanda and, thus, to creditor protection. They attempt to enforce the original terms in the credit contract even when legislators or bureaucrats attempt to protect debtors and ease the burden of credit.[13]

[10] Posner (1979), Cserne (2015), pp. 188–189; Zywicki and Stringham (2011), p. 108.

[11] Zywicki and Stringham (2011), p. 109.

[12] See, e.g., Hayek (1978), Rizzo (1980).

[13] See, e.g. *Study on means to protect consumers in financial difficulty* (2012), p. 12.

5.3 Evolutionary Models

An alternative to preference-based explanations is the so-called evolutionary model.[14] Most of these models assume that judges have the same preferences as other social actors—for example, those working in government: they crave the recognition of their colleagues, promotion, higher pay, etc.[15] However, because incentives in the judicial system are different to those in political-bureaucratic institutions, they may serve to satisfy the same demands.[16] The other key building block of evolutionary models is the incentive for the litigants and other parties. First, this leads to a so-called selection effect, i.e., jurisprudence does not encounter all possible types of cases—problems that result in judicial decisions have well-defined characteristics. Problems that are not referred to court (do not start or end in a settlement) have no chance of improving case law.[17] Litigants (potential litigants) determine what cases the court encounters and (partly) what kind of arguments and information it is confronted with in a given case. In this respect, parties are involved in a game (in economic terms), and to win this game, they decide how much and what resources to use. The amount of resources that are used can affect the chances of a favourable decision being made. Models typically conclude that the expected result of this game is inefficient—a barrier to efficient decision-making.[18] (Or, in a weaker version, they at least assume that an efficient result is harder or slower to achieve.)[19]

The Role of the Parties in Influencing Decisions In the process of judicial decision-making, the judge does not have all the information.[20] They rely heavily (although not exclusively) on the evidence and arguments provided by the parties. One of the best-known models assumes that litigants who mobilise more resources to persuade the court are more likely to prevail.[21] Therefore, case law is primarily determined by those who can mobilise more resources to win a case.

Several elements can influence the amount of resources deployed to persuade a court. One of the most common explanations is that the amount of such resources

[14] Rubin (1977), p. 56.

[15] Pritchard and Zywicki (1999), pp. 409–521.

[16] Zywicki (2003a), p. 1551–1633.

[17] Hadfield (1992), pp. 583–616; Fon and Parisi (2003), pp. 419–433; De Mot (2011), p. 134; Depoorter and Rubin (2017), p. 132.

[18] For such a model in the case of judicial decisions, Tullock (1997).

[19] There are theories, such as Gary S. Becker's, which stress that in certain circumstances, the presence of interest groups can explicitly steer policymakers towards effective decisions. Becker (1983).

[20] Aranson (1982), pp. 289–319; Rizzo (1980).

[21] Galanter (1974), pp. 95–160; Hirshleifer (1982); Rubin (1977), pp. 51–63; Zywicki and Stringham (2011), p. 110; Depoorter and Rubin (2017), pp. 134.

depends on the size of the subjective stakes of the particular lawsuit.[22] On the one hand, this depends on the amount of money or rights, etc., that can be won or lost in the given lawsuit. Not only that, it is possible that one of the parties is a "repeat player" who will face several similar cases. For them, the stakes of the case are raised by the fact that the decision can be used as a reference in other lawsuits. If one of the parties is a repeat player, they are more likely to win. Consequently, judge-made rules tend to favour them precisely because of the correlation between the stakes and the use of resources.[23]

Repeat players may not only be defendants or plaintiffs. They may include a lawyer who will represent others in similar cases. But the former may also be a socioeconomic group whose members recognise that the decision in a particular case will affect their positions. They may also be interested in providing resources to support one of the litigants. However, for such groups, resource mobilisation is more difficult. On the one hand, they may not know about the case. On the other hand, even if they are aware of it, they may be held back by what is known as the collective action problem: they may try to free-ride and wait for others.[24] Therefore, case law is expected to be more favourable to lawyers and socioeconomic groups that are in a better position to obtain information and overcome collective action problems.

Accepting or Challenging Precedents: The Chance of Overruling *Ceteris paribus,* filing a case is more likely if the plaintiff perceives higher stakes.[25] This leads to the so-called selection effect[26]: Judges will only be able to decide on cases based on plaintiffs' decisions.[27]

However, case law is influenced not only by decisions about filing but also by decisions about appeals. As appeals are also more likely when the stakes are high for the losing party, there is less chance of overruling previous case law concerning legal problems when the stakes are low. In these cases, few lawsuits are filed, and few appeals are likely.

The Place of Litigation Litigants can sometimes choose the place of litigation and thus the court as well—or even the judge, if applicable. Two cases should be distinguished here: (1) when the choice of the forum is decided unilaterally by the applicant, and (2) when parties decide together (for example, when they agree on the place and form of dispute resolution ex-ante in a contract). If the plaintiff is able to make a unilateral decision on the forum, cases are typically brought before judges and courts that are likely to rule in favour of the plaintiff. That is, it shifts this

[22] Zywicki and Stringham (2011), p. 111.

[23] Rubin (2011), Zywicki and Stringham (2011), pp. 110–111.

[24] For analysis of the collective action problem see Olson (1971).

[25] Priest and Klein (1984), Depoorter and Rubin (2017), p. 130.

[26] Fon and Parisi (2003), pp. 419–433; De Mot (2011), pp. 134–135.

[27] Landes and Posner (1979), pp. 235–284; Rubin (2011), pp. 96.

jurisprudence in the direction of precedents that are more favourable to the plaintiff.[28]

Joint decisions, however, are typically made on the basis of at which court the parties expect to maximise their joint benefits and minimise transaction costs. As these courts are more likely to be chosen, the law will evolve towards decisions that maximise the former's joint economic benefits. (These decisions are not always efficient because the costs and benefits of external stakeholders may not be taken into account by the parties and the court.)[29]

Settlement The chances of changing judicial practice are affected not only by the fact that not all cases have the same chance of going to trial but also by the fact that some cases end without a judgment: the parties reach a settlement between themselves. The importance of the selection effect based on settlement was first articulated by Paul H. Rubin in an article from 1977.[30] The argument, which often appears later in the literature, is that settlement is more likely in a case when the case law favours the party with the higher stakes. So, this selection effect based on such settlements also predicts that precedents—the 'established jurisprudence' that favours the party that gains less than the opposing party—have a greater chance of being overridden.

This claim is complemented by the model of Keith N. Hylton,[31] who claims that the plaintiff's knowledge, in addition to the size of the stakes, affects the chance of bringing suits. Hylton shows that cases come before the courts when the more informed party has a better chance of prevailing. In contrast, the party that has more information but is more likely to lose will not take the case to judgment. Therefore, publicly available court judgments will be assembled into a jurisprudence which is more favourable to the more informed party.[32]

Hylton's model is based on George L. Priest and Benjamin Klein's observation that more cases reach the point of court rulings when jurisprudence is more unpredictable.[33] This is an additional, separate selection effect: courts mainly encounter cases with less clear rules. Therefore, jurisprudence moves toward eliminating uncertainty. It is worth noting that settlements can effectively act as indirect

[28] Fon et al. (2005), Klerman (2007), pp. 1179–1226; Zywicki (2006), pp. 1141–1195; Depoorter and Rubin (2017), p. 135.

[29] Stringham and Zywicki (2011), pp. 497–524. Of course, this choice of forum is only really an effective factor if (i) the case is new or of doubtful classification not yet covered by established case law [Fon and Parisi (2003), pp. 419–433] and (ii) it is known to the parties before which judge they can expect a decision. For example, if judgments are handed down in chambers and it is, therefore, more difficult to identify the preferences of individual judges, this type of forum selection is less attractive [De Mot (2011), pp. 135–136; Depoorter and Rubin (2017), p. 135.]

[30] Rubin (1977).

[31] Hylton (2006), pp. 33–61.

[32] De Mot (2011), pp. 139–140; Depoorter and Rubin (2017), pp. 135–136.

[33] Priest and Klein (1984), pp. 1–56.

forum choices. In places where the chances of a decision unfavourable to the decision-maker are high, cases tend to end in settlements.[34]

The models discussed in the previous section focused on the decisions of the litigants, their lawyers, and external socioeconomic groups; evolution was explained by their choices. Another group of evolutionary models concentrates on judges. These models usually predict path dependence: they claim that judges, when faced with a problem, basically follow previously established practices. They do so even if they are not obliged to by a precedent or established jurisprudence.[35]

Appeal, Promotion Some explain the evolution of the legal system in reference to the rules on the promotion of judges. The career progression of judges is often crucially influenced by whether the higher court will overturn their judgments on appeal. If this is the case, the decisions of judges who want to be promoted can largely be explained by their reluctance to deviate from established case law at the higher instance; at the lower instance, they are reluctant to innovate. This is why established practice is maintained.[36]

Reputation Erin O'Hara's model[37] goes one step further and examines why judges follow the decisions of other judges even when there is no precedent or established case law—i.e., they would not be obliged to do so. Of course, this could be explained by the previous goal (desire for promotion), but O'Hara offers another explanation. He points out that judges may be concerned about their reputation. Judges are players in a repeated game: if their decisions differ from those of other judges in one case, they may expect that their decisions in other cases will be negated by these colleagues in the form of 'sanctioning'.[38]

However, as Timur Kuran emphasises, there is an opposite effect as well[39]: Judges who deviate from precedents or established jurisprudents and change the rules can also gain a reputation. Of course, thiIs is only if the majority of judges find the new rule acceptable and follow it. However, making such decisions—even in the light of high potential reputational gains—is highly risky.

Judges and Forum Choice *The possibility of direct and indirect forum choice impacts* the decisions of judges who want to attract (or eventually discourage) cases.[40] Judges who want to attract cases are more likely to make decisions that are more favourable to plaintiffs (or to those deciding where to bring a case).

[34] Stearn and Zywicki (2009).

[35] Kornhauser (1992a), pp. 169–185; Kornhauser (1992b), pp. 441–470; Roe (1996), pp. 641–668; Hathaway (2001), pp. 601–665; Zywicki and Stringham (2011), p. 113; Wangenheim (1993), pp. 381–411.

[36] Posner (1994), pp. 1–41.

[37] O'Hara (1993), pp. 736–778.

[38] Whitman (2000), pp. 753–781; Depoorter and Rubin (2017), p. 133.

[39] Kuran (1990), pp. 1–26.

[40] Fon et al. (2005), pp. 43–56.

Lobbying at Courts According to rent-seeking models, winners and losers of a rule are willing to devote resources to influence rule-making. This influence may be formal or informal, legal or illegal. However, the effects of lobbying differ in terms of the two types of rule-making. It is generally accepted that government decisions might play a more important role in this respect. As Thomas C. Merrill points out, a dollar or euro spent on lobbying has a greater influence on the content of future laws or regulations than if the same amount of money were spent on influencing a court ruling.[41]

But there are also counter-arguments. Some models suggest that in some cases, the impact of decisions made by judges can be more substantial—and therefore, the stakes (the gains or losses) are higher in the case of judge-made rules. For example, the two types of rule also have different life expectancies. Legislative acts are able to override both the former government-driven rules and judicial decisions. (In contrast, courts are not able to override legislative acts or regulations.) However, the political costs of changing the two types of rules are different. In the case of overriding judge-made rules, legislators and politicians must accept the risk—greater or lesser—that their action will be interpreted as a deprivation of the rights of independent courts, possibly with political consequences.

Similarly, the stakes for influencing judges are higher when the scope of their rules is broader.[42] While statutory and regulatory rules typically try to define precisely the range of cases in which they can be applied, they can also be relied upon in the broader context (in all 'similar' situations). For example, legislation may specify who can or must apply specific legislation to loans made by whom and when. Or, eventually, the dates from which rules apply to leases of premises and until when they apply. On the other hand, if such specific rules come from a judicial decision, the latter may be cited as a precedent in many 'similar' cases.

6 Conclusion

This chapter has demonstrated why the two types of rule-making can result in different rules. While legislative or administrative rule-making is determined by political decisions, judge-made rules are influenced by the constrained options of judges (they are not able to impose a standard of conduct on non-litigants), by selection effects (courts cannot address all legal problems—many of them are not brought to the court or end in settlement). As presented, court-made rules are likely to be favourable to parties who (i) are able to mobilise more resources to win, (ii) have higher stakes (e.g. because they are repeat players), (iii) are associated with socioeconomic groups with more resources, more information and more capability

[41] Merill (1997), pp. 219–230.

[42] Zywicki (2003b), pp. 1–26; Stringham and Zywicki (2011), pp. 121–123.

to cope with collective action problems, and (iv) are able to choose the place of litigation. Judge-made rules are less likely to change frequently and dramatically than legislation as there is a strong tendency to path-dependence in court decisions: judges are motivated to follow previously established practices.

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Economic and Social Crises, Model Change and the Responsiveness of the Legal System: Special Tax Measures and Their Regulation in Hungary

Márton Varju

Abstract Responding to various social, economic and policy crises, Hungary has introduced and has since maintained a broad range of special taxes, imposing additional taxation on certain corporate taxpayers. These measures enabled the state to secure necessary tax revenues and make strategic adjustments to the domestic tax structure. Through the special taxes and their regulation, the Hungarian legal system was able to respond to significant changes and challenges in its social and economic environment. However, their introduction came with significant consequences for the legal system at large. As demonstrated by the case of the turnover-based progressive taxes introduced, the responsiveness of law may come at a cost of legal regulation that does not guarantee that the declared objectives and the actual effects of legal measures coincide. Such legal changes thus enable—as concealed by the words of the legislation—discriminatory, or even abusive application of the law.

1 Introduction

The special taxes imposed on corporate taxpayers operating in specific sectors of the national economy have now become regular components of the Hungarian fiscal and legal system. These direct taxes, the main objective of which is to increase public revenues, have frequently been introduced as tools of crisis management in response to exceptional socio-economic situations. Their introduction was also connected to the objective of enabling and later maintaining strategic changes in the structure of the tax system driven by sovereign economic and tax policy considerations. Thus, they can be considered as particular manifestations of the responsiveness of the legal system in Hungary to changes and challenges in its social and economic environment. However, when examined more closely, the continued application of special taxes raises fundamental questions about the consequences of their introduction for

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the legal system at large. The special taxes enable a controversial exercise of taxation powers by the state. Their application may not correspond with their declared objectives, which may be imprecisely determined, thus leading to discriminatory, or even abusive taxation.

In this chapter, we investigate the question of whether and how the special corporate taxes introduced in Hungary represent the responsiveness of its legal system, as interpreted in this volume. We will first examine the socio-economic context of the special tax measures, with particular reference to the socio-economic pressures that led to their introduction. We will also explore the specific objectives of domestic tax policy that made the additional taxation of certain corporate taxpayers necessary. In the second part, we will provide an overview of the Hungarian special taxes and their regulation, highlighting the declared objectives of taxation. We then continue by determining the main characteristics of the special taxes, as revealed by their regulation and the relevant domestic and international tax policy frameworks. We will close the chapter with an assessment of these characteristics and what they mean for the impact of these taxes on the Hungarian legal and tax system.

2 Tax Policy and Socio-Economic Pressures in Hungary

From a broader perspective, the introduction of special taxes and the consolidation of their position within the Hungarian tax system cannot be separated from the state of the economy and society, and the crises and crisis phenomena impacting them. Put simply, the special taxes, some of which were introduced in response to a specific crisis situation, and were declared to be crisis taxes, were the reactions of the Hungarian state and law to the relevant changes in economic and social conditions that came in waves after the turn of the millennium. The imposition of a tax burden on corporate taxpayers additional to their regular taxation obligations could usually be associated with a period during which the national economy and its development were undermined—recurrently—by crises.

The 2000s were characterised in Hungary by subdued economic growth, followed by a slowdown during the 2008 crisis, which was followed by a partly similar period in the 2010s with a more significant slowdown around 2012, and then a new crisis from 2020 onwards due to the impact of the corona virus pandemic.[1] The main indicators of the state of public finances show these changes relatively accurately, also indicating the challenges faced by the fiscal system over the past two decades. The data on the government deficit (Table 1) show the periods of increased financing needs for the government, as well as periods when the government's financing needs have been addressed, for example through increased tax revenues (Table 3). The level of government debt (Table 2) allows similar conclusions to be drawn about the government's financing needs.

[1] HCSO: Main macroeconomic data. https://bit.ly/3NuovBG.

Table 1 Evolution of the general government deficit (% of GDP)[a]

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
3.0	−3.7	−8.2	−7.2	−6.5	−7.8	−9.2	−5.0	−3.7	−4.5
2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
−4.5	−5.4	−2.4	−2.6	−2.6	−1.9	−1.6	−2.2	−2.2	−2.1	−8.0

[a]General government deficit (–) and surplus (+) (2007–2018) in millions of euros and as a percentage of GDP. https://bit.ly/3NL2m2f; HCSO: Report on the balance and debt of the general government sector (EDP Report 2021 II.). https://bit.ly/3wzxhZp

Table 2 Evolution of government debt (% of GDP)[a]

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
54.8	51.4	54.6	57.1	58.0	60.0	64.1	65.0	71.0	77.2
2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
79.7	79.9	77.6	76.0	75.2	74.7	73.9	73.6	70.8	66.3	80.1

[a]General government debt (1995–2016). Consolidated gross debt of general government as a percentage of GDP and in millions of euros. https://bit.ly/3NriR2Z; HCSO: Report on general government sector balance and debt (EDP II Report 2021). https://bit.ly/3G7AS46

According to the official government assessment of tax policy, which was published retrospectively, Hungarian tax policy in the 2010s had to address two major socio-economic problems. The first problem area concerned the so-called 'inherited disadvantages'—the socio-economic problems dating back to the 2000s. These were the high public deficit, external indebtedness and low labour market activity.[2] The document treated these as interrelated problems. Low labour market activity was associated with a high redistribution rate, which in turn led to high levels of taxation and a large deficit, which latter the state tried to finance by increasing external debt.[3] The second set of problems, which according to the official explanation could only be addressed after at least a partial resolution of the previously mentioned problem areas, was the stagnation or recurrent slowdown of economic growth and investment.[4]

In addition, the report observed that there was an almost constant need for minor or major adjustments to the budget, which necessitated the introduction of a number of new public charges.[5] Another important problem that had to be addressed in tax policy during this period was that Hungary, as an importer of capital, was forced to take steps in international taxation to maintain its ability to attract foreign investment, without risking the undertaxation of economic activity carried out in its territory (of value actually generated domestically) and thus the violation of the principle of proportionate taxation.[6] The COVID-crisis starting in 2020 was

[2] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 19.
[3] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 19.
[4] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 19.
[5] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), pp. 23, 53.
[6] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), pp. 47–48.

Table 3 Revenue from taxes and social contributions (billion HUF)[a]

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
5228.5	5861.1	6531.6	7134.9	7788.8	8248.4	8865.9	10,120.3	10,726.2	10,296.7

2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
10,118.7	10,380.6	11,298.3	11,691.6	12,608.3	13,548.7	14,171.6	14,893.5	16,007.5	17,310.2	17,425.4

[a]HCSO: Revenue from taxes and social contributions - Government + Institutions of the European Union (current prices, HUF million). https://bit.ly/3MRzsgR

associated with both short- and long-term challenges.[7] Short-term challenges included job losses and a stagnation and partial collapse of the economy. The lack and the postponement of investment were identified as the long-term challenges.

Hungarian tax policy responded to these challenges primarily by strategically redesigning the tax structure.[8] Revenues come from different sources: taxes on private taxpayers, taxes linked to consumption (also including the public health tax, the insurance tax, the financial transactions levy and the telecommunications tax), and corporate taxation (also including the levy on credit institutions, the income tax of energy suppliers, the advertising tax, the special tax on financial institutions, the so-called special tax on certain economic sectors and the utilities tax). According to data from the Ministry of Finance, the special taxes provided the following revenues (as a share of the total GDP): below 0.5% in 2007–2009, slightly above 1.5% in 2010–2012, around 2.5% in 2013, around 2% in 2014-2015 and around 1.5% in 2016–2020.[9]

The design of the tax structure including the special taxes, and the deliberate model change of the Hungarian tax system after 2010 were based on complex economic and tax policy considerations. According to the official government policy position, the transformation of the Hungarian tax system followed one central strategic objective: to improve its competitiveness.[10] As an additional operational objective, the reform aimed to overcome the 'inherited disadvantages' mentioned above. The realisation of the latter aim was reported to have taken place in the first half of the 2010s, and it included actions such as the consolidation of the central budget, the reduction of the accumulated external debt, and the increase in labour market activity.[11] The second operational objective of the model change, the realisation of which had to wait until the implementation of the consolidation measures mentioned above, was the increase in labour productivity, and, in parallel, the stimulation of economic investment.[12] Its main instruments included tax cuts to stimulate investment and productivity, and a restructuring of the tax structure to the same end.[13]

Government policy identified five priority areas for the restructuring of the tax system. These included: maintaining and, later, when possible, reducing the overall level of taxation, shifting taxation from capital and personal income to the taxation of consumption and harmful activities (externalities), restructuring the taxation of labour, which would follow specific objectives of population (family) policy, with the purpose of stimulating employment, reducing and restructuring corporate

[7] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 25.

[8] See the data available at Hungarian State Treasury: Budgetary balance of the central subsystem. https://bit.ly/3a8xXvX.

[9] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 53.

[10] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 6.

[11] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 7.

[12] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 7.

[13] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 19.

taxation to stimulate investment especially in the small and medium-sized enterprise sector and in the essential export-oriented sectors of the national economy, and improving tax collection and, in parallel, 'whitening' the economy.[14] The aim of developing a tax system which is based on a broad range of taxpayers and tax bases, and which uses low, preferably differentiated tax rates where possible emerged as a general government and tax policy preference.[15]

The introduction of the special taxes did indeed take place in a complex economic and tax policy environment. After 2010, aiming primarily to increase the competitiveness of the national economy, the government wanted to decrease the general level of taxation, and to change the centre of gravity of the tax structure. In parallel, it also sought to secure the policy—the actual taxation—leeway necessary for the realisation of its narrower and broader objectives. The official government and policy position linked the introduction of the special taxes to the actual state of the central budget; however, it regarded as their main purpose—as declared explicitly—additional taxation, following the principle of proportionate taxation[16] of the substantial financial resources which were generated in the domestically oriented sectors of the services economy dominated by large enterprises, in part as a result of the oligopolistic nature of these markets.[17]

In their design, when determining the object of taxation, or when regulating the rate of taxation and the applicable tax exemptions, the policy-maker—gradually, having regard to the financing needs of the central budget—took into account the objective that these tax burdens must not significantly impede investment and growth in the Hungarian economy.[18] Furthermore, having regard to the economic and industrial policy priorities, the small- and medium-sized enterprises sector, and the export-oriented manufacturing sectors were intentionally excluded from this form of taxation, for example by means of regulating (steeply) progressive tax rates, or the restriction of the tax to specific sectors of the national economy.[19]

[14] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), pp. 8–9. In 2010, personal income tax was made single-rate, at a rate of 16% (Art. 4 of Act CXXIII of 2010). The declared legislative objective was to create conditions for financial stability and economic growth, to restore the competitiveness of the economy and to reduce the administrative burden. The tax rate was reduced to 15% in 2015 (Art. 2 of Act LXXXI of 2015). The corporate tax rate was reduced to 9% in 2016 (Art. 11 of Act CLXXXII of 2016).

[15] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 1.

[16] Art. XXX(1) of the Fundamental Law: Everyone shall contribute to covering common needs according to his or her capabilities and to his or her participation in the economy.

[17] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 53.

[18] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 53.

[19] *Restoring the competitiveness of the Hungarian tax system in the 2010s* (2021), p. 53.

3 Special Taxes in Hungary and Their Regulation

The special taxes collected from different taxpayers under different legal titles can now be considered as forming a normal part of the Hungarian tax system.[20] They include taxes on consumption, for example the consumption of a service, taxes imposed in addition to regular taxes on corporate income and other corporate financial resources, and, as a special form of the latter, taxes levied in addition to corporate income tax on the turnover of undertakings.[21] As will be demonstrated shortly, the Hungarian legislator relied explicitly on reasons for their introduction which correspond with the tax policy considerations described above, such as securing the revenues necessary for the functioning of the State, particularly in times of a crisis or in connection with a specific emergency, and/or ensuring a supposedly more proportionate, fair and equitable distribution of the tax burden among taxpayers with different financial resources and, as a result, different taxability. The differentiated taxation introduced for the latter objective also has the effect in a given structure of taxation of providing the central government budget with additional, overall higher tax revenues. The scope, the preferred nature and the regulation of the special taxes have been modified several times in the recent period, most likely having regard to the tax policy needs, as well as the revenue needs of the central budget, as explained above.

3.1 Special Taxes in the Financial Sector

The legislation introducing the special taxes in the financial sector, which has been amended several times over the last fifteen years, introducing and abolishing specific taxes, was adopted in 2006, before the outbreak of the financial and economic crisis amidst a deteriorating state of public finances. The declared objective of Act LIX of 2006 on the special tax and levy imposed to improve the balance of public finances was to raise additional tax revenues for the state by imposing an extra tax burden on those taxpayers—having regard to their duty of solidarity—that are able to bear public charges in addition to their general tax obligations. Originally, the act introduced the tax on savings interest only, as the first special tax. The savings interest tax is payable by the credit institution concerned, at a rate of 5% on its interest and interest-related income.

The levy on credit institutions was introduced by Act CXXIII of 2010 and was subsequently phased out from 2017 by Act LXVI of 2016. The levy was payable

[20] For an overview, see Deák (2014), pp. 339–368.

[21] The tax on energy products was introduced in 2003 (Act LXXXVIII of 2003) on the basis of EU harmonisation obligations (Directive 2003/96/EC, the Energy Tax Directive). As a necessary technical amendment, the energy tax has been included in the scope of excise duties and is now provided for in the Excise Duty Act (Act LXVIII of 2016).

quarterly in advance at an annual rate of 5% based on the adjusted value of the credit portfolio held by the taxpayer credit institution. Financial institutions were required to pay a separate levy, quarterly in advance, on the reimbursement received under Act LXXV of 2011 on the fixing of the repayment rate of foreign currency loans and on the regulation of the forced sale of residential property. The reimbursement received by financial institutions from the state as a guarantee for their non-performing foreign currency loans was taxed at a rate of 50%.

The special tax on financial institutions was introduced by Act XC of 2010, which was incorporated into the 2006 general legislation. The tax needs to be established by the taxpayer by March of the tax year and is payable in four equal quarterly instalments. The tax is based on the taxpayer's balance sheet total for the second tax year preceding the tax year. For certain financial institutions, the tax base is the profit or adjusted net turnover for the same tax year. For credit institutions, the tax rate is 0.15% for the part of the tax base not exceeding HUF 50 billion and 0.2% for the part of the tax base exceeding HUF 50 billion. For other financial institutions, the tax rate varied between 5.6% and 6.5% depending on the nature of the financial institution. Credit institutions were allowed to deduct the tax payable under the special tax on credit institutions. The special tax on credit institutions was introduced in 2010 by Act CXXIII of 2010 and was repealed in 2019 by Act XLI of 2018. The tax was based on the taxpayer's profit for the tax year, to which the costs of the special tax on financial institutions had to be added. The tax rate was 30%. In 2014, for a single year, a special tax was levied on the transfer by credit institutions from their general risk provision to their profit and loss reserve as a one-off payment under the corporate income tax.[22]

The special tax on investment service providers was introduced in 2015 by Act LXXIV of 2014. The tax is based on the value of the investment securities held by the taxpayer or the value of the investment fund managed by the taxpayer. The tax is payable quarterly at a rate of 0.05%. The special tax on insurance companies was introduced in 2012. The underlying Act CII of 2012 declared as its objective the simplification of taxes on insurance and the provision of tax revenue for common social expenditure. The tax was based on the premiums paid, with a rate between 10% and 23%, depending on the type of insurance. For voluntary motor insurers, home and business insurers and accident insurers with a total tax base of less than HUF 8 billion, the act set the tax at progressive rates. The financial transaction levy was introduced by Act CXIV of 2012. It is payable by the service provider based on the amount of the financial transaction in question. The rate varies between 0.3% and 0.6% per transaction, depending on the transaction, with a maximum levy limit per transaction.

[22] Act CC of 2013.

3.2 The (Additional) Income Tax of Energy Suppliers and Public Service Providers

The special income tax for energy supply companies and public service providers was introduced in 2008, the first year of the economic and financial crisis, by Act LXVII of 2008 on increasing the competitiveness of the district heating sector. The tax, which is payable to the central budget, is based on the adjusted pre-tax profit of energy suppliers and public service providers for the tax year. The rate is 31% of the positive tax base. Taxable persons include: mining companies engaged in hydrocarbon extraction activities, petroleum product producers, wholesalers of petroleum products holding an excise licence, natural gas trading licence holders, electricity trading licence holders, production licence holders under the Electricity Act, universal service providers under the Electricity Act, distribution licence holders under the Electricity Act, universal service providers under the Natural Gas Supply Act and distribution licence holders under the Natural Gas Supply Act. As public service providers, taxable persons include: water utility providers, public service providers authorised to collect non-publicly collected domestic waste water, and providers of the waste management public service.

3.3 Sectoral Special Taxes Introduced in 2010 and Abolished in 2013 (the So-Called Sectoral Special Tax)

According to its text, Act XCIV of 2010 introducing the special tax on certain sectors, adopted in the autumn (18 October) following the 2010 elections, was generally aimed at improving the balance of public finances, which had been disrupted by the financial and economic crisis and the actions of previous governments. It sought to achieve this objective declaredly by means of imposing in specific sectors of the national economy an extra tax burden on taxpayers that are able to bear public charges in addition to their general tax obligations. In principle, the tax was a crisis tax. The additional tax obligation was introduced by the legislator only for the necessary period (tax years 2010, 2011 and 2012) and the act itself provided for its repeal after 3 years.[23]

The act established the additional tax obligation for three economic activities (sectors). These are commercial retail trade activities, telecommunications activities and the business activities of energy suppliers. The taxable amount was the taxpayer's annual net turnover. The tax rate was set progressively in several bands adjusted to the tax base. Therefore, the tax, in accordance with the legislator's intention, subjected taxpayers of different size and different economic relevance to

[23] Art. 10(2) of Act XCIV of 2010.

what was in principle objectively differentiated taxation. Energy suppliers, as one group of targeted taxpayers, were taxed at a single rate of 1.05%.

The tax rate for commercial retail was 0% for the part of the tax base not exceeding HUF 500 million; 0.1% for the part of the tax base exceeding HUF 500 million but not exceeding HUF 30 billion; 0.4% for the part of the tax base exceeding HUF 30 billion but not exceeding HUF 100 billion; and 2.5% for the part of the tax base exceeding HUF 100 billion. For telecommunications activities, the tax rate was 0% for the part of the tax base not exceeding HUF 100 million; 2.5% for the part of the tax base exceeding HUF 100 million but not exceeding HUF 5 billion; and 6.5% for the part of the tax base exceeding HUF 5 billion.

3.4 The Utilities Tax

Act CLXVIII of 2012, declaredly pursuing the principle of proportionate taxation, introduced a special tax on utility pipelines and cables. The tax is payable by the owner of the utility pipeline or cable. If the pipeline or the cable is owned by the state or local government, the tax is payable by the operator. The tax is levied on the actual utility pipelines or cable, not on their use or construction. In order to ensure adequate taxation revenues, the act defined the notion of utility pipelines or cables broadly, as covering water supply, sewage disposal, storm water drainage, natural gas supply and heat supply pipelines, and electricity supply and communication cables, which enable the satisfaction of intermittent and continuous consumer needs.[24] In the case of establishing a new public utility pipeline or cable, the tax obligation arises only in the sixth year following the year in which the pipeline or cable is put into service. The tax remains payable when the use of the pipeline or the cable is discontinued. The tax obligation ceases to apply only when the utility pipeline or cable ceases to exist or is dismantled.[25]

The act defined the basis of the tax as the length in metres of the utility pipeline or cable. Several pipelines or cables of a taxpayer on the same route and capable of providing the same service are considered as one utility pipeline or cable. The rate of tax is HUF 125 per meter per year for each meter. The state and local governments are exempt from the tax.

The act departs from the general tax objective of proportionate taxation by providing for a tax reduction regulated in bands for telecommunications lines, aiming to encourage infrastructure investment and development. Following a similar purpose, the act provided a further tax reduction possibility. Where an upgrade of an

[24] The part of the line located in, under or over public land and the part of the line located in, under or over a parcel of land not classified as public land, excluding a line located in public land or in a parcel of land not classified as public land which is used solely to serve the needs of the user of the parcel of land registered under the parcel number in question for the use of the parcel of land.

[25] The exact date of cessation of tax liability is the last day of the year concerned.

existing telecommunications network is carried out to allow data connection access at a speed of at least 100 Mbps on the subscriber section of the network, the tax base may be reduced for a period of five years by the length in metres of the section of the network affected by the upgrade.

3.5 The Special Tax on Telecommunications

2012 saw the introduction of another special tax. Act LVI of 2012 introduced the special tax on telecommunications with the declared objective of contributing to the 'common social expenses'. The tax is charged to the provider of telecommunications services. Telecommunication services are defined as publicly available telephone services within the meaning of the Electronic Communications Act provided on an electronic communications network within the territory of Hungary, including services enabling the sending of messages.

The tax is calculated on the basis of the duration of calls made from the number associated with a subscriber or, in the absence of a subscription, with the operator, and the number of messages sent. The act regulated the rate of the tax differentially. In the case of telephone calls made from a private phone number, the tax is HUF 2 per minute per call made. The tax is HUF 3 per minute per call when the call is made from a commercial phone number or a number associated with the operator. Messages are taxed at 2 HUF/item for private messages and at 3 HUF/item for commercial messages or messages from the operator. The act capped the tax at HUF 700/month/phone number for private subscribers and at HUF 5000/month/phone number for non-private subscribers and the operator. In the public interest, tax exemptions were granted for emergency calls, calls to a fundraising number and messages sent to a fundraising line. The first ten minutes per month of calls made from a private phone number are also exempt from the tax.

3.6 The Special Taxes Introduced in 2014

After the repeal of the 2010 turnover-based sectoral special taxes in 2013, the Hungarian state decided to introduce a new batch of similar taxes. This time, the insufficient state of public finances as caused by external and internal circumstances was not mentioned among the declared objectives of the tax measures. The advertising tax was introduced by Act XXII of 2014. It justified the taxation of income from the publication of advertising for consideration with reference to the need to impose more proportionate taxation on taxpayers. Act CXIV of 2014 introducing the so-called health contribution of tobacco undertakings (for 2015)[26] pursued several

[26]The Act entered into force on 1 February 2015 and expired on 31 December 2015.

declared objectives. These included, for example, the elimination of the harmful effects of tobacco consumption on health, the improvement of the quality of health care in Hungary and the provision of the necessary financial resources to achieve this aim, and finally, the specific objective of obliging tobacco companies to cover the significant increase in health expenditure resulting from the harmful effects of their products. By introducing the contribution, the Hungarian state also wanted tobacco undertakings to contribute to public expenditure in proportion to their economic strength (taxability). In Art. 1(2), the act expressly provided that the revenues from the health contribution can be used exclusively to finance the health subsystems of the central budget.

The advertising tax was originally levied in six progressive bands on the net turnover from the publication of advertising for the tax year.[27] The rate of the tax was set in Art. 5 as follows: 0% on the part of the tax base not exceeding HUF 0.5 billion; 1% on the part of the tax base exceeding HUF 0.5 billion but not exceeding HUF 5 billion; 10% on the part of the tax base exceeding HUF 5 billion but not exceeding HUF 10 billion; 20% on the part of the tax base exceeding HUF 10 billion but not exceeding HUF 15 billion; 30% on the part of the tax base exceeding HUF 15 billion but not exceeding HUF 20 billion; 40% on the part of the tax base exceeding HUF 20 billion. At the time of its entry into force, the act allowed for a reduction of the tax base for the 2014 tax year by 50% of the carry-forward losses of previous years, if the taxpayer's pre-tax profit was zero or negative in 2013 (Art. 10).

The original tax bands were abolished by Act LXII of 2015. The new provisions introduced two tax bands adjusted to the net turnover: 0% for the part of the tax base not exceeding HUF 100 million, and 5.3% for the part of the tax base exceeding HUF 100 million. When the taxable person is the undertaking commissioning the publication of the advertisement, the tax base was the costs directly incurred in connection with the advertisement's publication. In such cases, the tax rate was 5% of the tax base. Hungary introduced these changes autonomously in its own competences following the state aid investigation launched by the European Commission in 2015. When the taxable person is the advertising service provider (the service provider who undertook the publication of the advertisement), the new 2015 rules allowed (Art. 4) the taxable person to choose whether to apply the newly introduced tax bands from the date of entry into force of the original 2014 Act, or to be taxed at the previous tax bands in the tax year not covered by the new Act.

In 2017, following the closure of the Commission's state aid investigation, the rules on the advertising tax changed again. Act XLVII of 2017 provided that, where the tax is levied on media content providers or other persons with advertising space, the tax rate would temporarily (between 1 January 2017 and 30 June 2017) be 0%. It reinstated the tax burden on 1 July 2017, from which date the tax was imposed at a tax rate of 7.5% on the net turnover of the taxable persons concerned. For

[27] Art. 4 provides for two types of taxable amount: the net turnover from the taxable activity for the tax year (1) and, in the case of commissioning advertising services, the costs directly incurred in connection with the publication of the advertisement (2).

undertakings commissioning the publication of the advertisement, the new legislation did not introduce a similar a suspension period. The tax rate was fixed at 5%, with the proviso that the taxable amount is the part of the aggregate monthly income from the publication of advertising exceeding HUF 2.5 million. According to the 2017 provisions (Art. 5(3)), media content providers (or other persons with advertising space) are exempt from tax on HUF 100 million of their net turnover. This tax exemption was classified by the act as *de minimis* state aid, and it provided that it may only be claimed if the conditions of Commission Regulation (EU) No 1407/2013 on *de minimis aid* are met.

Art. 5/A of Act LXXIII of 2019 set the tax rate at 0% for the period from 1 July 2019 to 31 December 2022. The act also suspended the application of the relevant tax procedure provisions for this period. For media content providers, the act introduced a retroactive 0% tax rate for the period from 1 January 2017 to 30 June 2017. It also provided that the tax declared and paid for the tax years ending on 30 June 2017 shall be considered as an overpayment under the Act on the Rules of Taxation, the refund of which shall be subject to the tax refund rules of the same act. In addition, it held that tax declared but not paid for the tax years ending on 30 June 2017 does not have to be paid.

The health contribution of tobacco undertakings was imposed on legal persons engaged in the manufacture and sale of tobacco products in Hungary, or who carried out such activities in 2014. This was a fairly broad category of taxpayers. Its scope was clarified by the act specifying that only those undertakings were liable to pay the contribution whose net turnover from the manufacture and trade of tobacco products in 2014 was equal to or exceeded 50% of their total net turnover. The contribution payable in 2015 was based on the net turnover in the 2014 tax year. The rate was set in bands: 0.2% on the part of the tax base exceeding HUF 30 million but not exceeding HUF 30 billion; 2.5% on the part of the tax base exceeding HUF 30 billion but not exceeding HUF 60 billion; 4.5% on the part of the tax base exceeding HUF 60 billion. The act allowed specifically that the tax payable could be reduced by the amount of the investment expenditure incurred in 2014 (30% of the amount accounted for as investment in 2014 minus the amount of state or EU aid received for the investment), up to a maximum of 80% of the amount. The health contribution was extended to the 2015 tax year (and after) by Act LXXXI of 2015. It was finally repealed by Act CXXXV of 2016. Under the latter legislation, contributions already paid were refundable at the request of the taxpayer. This coincided with the closure of the state aid investigation by the European Commission with a negative decision.

The third turnover-based special tax introduced in 2014 was the modification of the food chain supervision fee introduced originally by Act CLXVI of 2011. Act LXXIV of 2014 modified the general legislation set out in Act XLVI of 2008 on the Food Chain and Official Supervision by regulating progressive bands for the fee. The legislator did not attach any explicitly stated specific policy or regulatory objective to the amendment. According to the amended provisions, the fee payable by retail units selling daily consumer goods (as defined in the Commercial Code) was: 0% on the part of the annual net turnover not exceeding HUF 500 million (approximately EUR 1.6 million); 0.1% on the part of the annual net turnover

exceeding HUF 500 million but not exceeding HUF 50 billion; and 1% on the part of the annual net turnover exceeding HUF 50 billion but not exceeding HUF 100 billion; 2% for the part of the annual net turnover exceeding HUF 100 billion but not exceeding HUF 150 billion; 3% for the part of the annual net turnover exceeding HUF 150 billion but not exceeding HUF 200 billion; 4% for the part of the annual net turnover exceeding HUF 200 billion but not exceeding HUF 250 billion; 5% for the part of the annual net turnover exceeding HUF 250 billion but not exceeding HUF 300 billion; and 6% for the part of the annual net turnover exceeding HUF 300 billion. Following the Commission's negative state aid decision on the fee, the progressive band structure of the fee was repealed by Act CLXXXII of 2015. According to the new provisions, the rate of the fee is 0.1% of the net turnover from sales in the previous year. This corresponds to the regulation of the fee prior to its 2014 amendment.

3.7 The 2020 COVID-Crisis Special Taxes

The introduction of new special taxes in 2020 was justified by the Hungarian legislator with reference to the economic downturn caused by the COVID-19 pandemic and the concomitant challenges to public finances. The special tax on credit institutions linked to the epidemic situation was not in fact a separate tax. It was a modification of the special tax on financial institutions for the 2020 tax year, which increased the tax rate to 0.19% for the top tax bracket, i.e. the part of the tax base exceeding HUF 50 billion. As a parallel crisis tax measure, the government reintroduced the commercial retail tax phased out earlier in 2013. The emergency decrees 108/2020 on the special tax on credit institutions in the context of the epidemic situation and 109/2020 on the commercial retail tax were adopted under emergency powers to implement the so-called Economic Protection Action Plan, and within that objective to secure financial resources for the so-called Epidemic Fund. The former government decree was subsequently replaced by Act XLVI of 2020 and the latter by Act XLV of 2020. Under a third government decree,[28] which was also adopted under emergency powers, the remaining part of the motor vehicle tax (40%) was transferred from the budgets of local authorities to the central budget.

The base of the special tax on credit institutions was the balance sheet total of the second tax year preceding the 2020 tax year. The tax was payable in three instalments during 2020. The tax, which was incorporated into the provisions of Act LIX of 2006 regulating the special taxes of the financial sector, could be deducted from the special tax on credit institutions payable in subsequent tax years at the rate of 20% per year. The revised commercial retail tax covers both traditional and electronic retail, in particular the retail activities in Hungary of taxable persons established abroad. The tax is based on the net annual turnover from retail activities,

[28] Government Decree 90/2020.

plus the turnover of the supplier of the goods acquired for retail sale from the supply of services in connection with the sale of the goods acquired, plus the amount of the discount granted to the taxable person by the supplier of the goods acquired for retail sale. The tax rate is set in four progressive bands, copying the bands of the previous commercial retail tax: 0% for the part of the tax base not exceeding HUF 500 million; 0.1% for the part of the tax base exceeding HUF 500 million but not exceeding HUF 30 billion; 0.4% for the part of the tax base exceeding HUF 30 billion but not exceeding HUF 100 billion; 2.5% for the part of the tax base exceeding HUF 100 billion. In the top band, Act CLI of 2021 increased the tax rate to 2.7%.

Contrary to the original government decree, Act XLV of 2020 on the commercial retail tax does not include the pandemic and its effects among its objectives of taxation. Its declared objectives include general tax policy objectives, such as strengthening the role of consumption and sales taxes within the national tax system, reducing income taxes and the taxation of employment without undermining the balance of public finances, and applying taxation that is proportionate to the actual taxability of taxpayers. The tax was also justified with reference to the negative environmental impacts of retail activities. In contrast to the provisions of Act XLV of 2020, Act XLVI of 2020 on the credit institutions' special tax specifically identified as its objective the mitigation of the economic impact of the COVID-19 pandemic.

4 Responsiveness, Tax Policy and the Nature of the Hungarian Special Tax Measures

In light of the previous overview, the Hungarian special tax measures were introduced with the primary purpose of responding to the various challenges faced by domestic public finances. Their longer-term purpose was to enable a national tax policy that is responsive to the needs of its broader economic and social environment, as shaped especially by crises or specific crisis phenomena. In particular, the special taxes played an instrumental role in the restructuring of the tax system, aiming to enhance its competitiveness. Their introduction enabled the reduction of the overall tax burden and a crucial modification of the tax structure. Taxes on income, which discourage investment and labour market activity, could be reduced, and taxes on consumption could be increased, especially on consumption with negative externalities. As declared by the legislator, the special taxes were expected to implement the constitutional principle of proportionate public taxation. By targeting specific taxpayers (specific economic sectors), they can achieve their taxation objectives without undermining parallel economic and fiscal policy objectives, such as the fair taxation of small- and medium-sized enterprises or avoiding the overtaxation of the export sector. These sectors play a crucial role in maintaining the competitiveness and the resilience of the Hungarian economy.

From the perspective of the legal system, the response expected was fairly straightforward. Legislation had to be adopted to introduce new taxes in addition

to the general tax burden. Legislation also had to ensure that the taxes are targeted and are therefore in line with the relevant fiscal and economic policy priorities. In modern Western tax systems, the introduction of taxes that increase tax revenues and that correspond with the priorities of the broader national policy framework, which aim to respond to economic and social changes and pressures, is considered to be an orthodox development. Western tax systems, which provide the basis and the main solutions of the European and global taxation and tax policy mainstream,[29] have been developed to increase tax revenues.[30] They abandoned formerly commonly used taxes, which generally undermined fiscal and economic policy objectives,[31] and introduced tax solutions[32] that are based on a sufficiently broad tax base and therefore make the collection of revenues particularly effective.[33]

In principle, the taxation favoured by the Western model is efficient, simple and neutral in its economic effects; it involves taxes that increase revenues without unnecessarily distorting market processes and without imposing intolerable administrative and other burdens.[34] Parallel considerations, such as the fairness or the equity of the tax burden for the individual or for society as a whole, enjoy lesser priority, and they are matters for the expenditure and not for the revenue side of the public finances.[35] However, there are local variants of the Western model that depart from the mainstream, for example to achieve objectives of local industrial or economic policy.[36] States are usually forced to introduce such taxation solutions as they compete with other states, often with their immediate neighbours to secure tax revenues or to realise crucial growth-oriented economic policy objectives, such as stimulating investment or labour market activity.[37]

In this light, the special taxes introduced by Hungary can be assessed as particular tax solutions that allow the state to increase its revenues while pursuing and supporting parallel tax and economic policy objectives. This assessment is affected neither by the perceived exceptional nature of the special taxes, nor by the fact that they aim to add a further burden to the general tax burden of taxpayers. Their characterisation as tax instruments that pursue what is essentially a mainstream Western taxation objective is unaffected by the disagreement surrounding the

[29] See, in particular, OECD Model Tax Convention on Income and Capital. https://bit.ly/3PCqXaS. On the general issue see Kaldor (1963), pp. 410–419.

[30] Genschel and Seelkopf (2016), pp. 316–344, 318, and the literature cited therein. See also Seelkopf et al. (2016), pp. 208–231.

[31] In particular, taxes on international trade.

[32] Such as personal income tax, the taxation of corporate income and value added tax.

[33] Genschel and Seelkopf (2016), p. 318.

[34] Genschel and Seelkopf (2016), p. 318.

[35] Genschel and Seelkopf (2016), p. 317.

[36] Genschel and Seelkopf (2016), p. 340.

[37] See Swank (2016), pp. 185–207.

additional taxation of corporate taxpayers within the Western model. The additional taxation of corporate taxpayers is usually defended by states the tax system of which suffers from a socially, economically and/or politically unacceptable undertaxation of these taxpayers. In other words, they are usually introduced when and where the national tax system fails to tax corporate income as expected.

Some Western jurisdictions responded to the problem of unacceptable and indefensible undertaxation by the introduction of so-called 'Robin Hood' or compensatory additional taxes.[38] These taxes, which are supposed to distribute the tax burden more fairly among taxpayers, aim to tax economic activities carried out in the national territory by residents and by foreign taxpayers, which latter are supposedly undertaxed, and equalise their respective tax burdens.[39] In the context of the OECD/G20 BEPS (Base Erosion and Profit Shifting) process,[40] which has confirmed the increasing of revenues as a central taxation objective,[41] it was accepted that in specific areas significantly affected by unfair undertaxation—for example in the digital economy—the introduction of such special taxes may be a legitimate response.[42] The relevant OECD preparatory material recognised the need for a digital special tax to equalise the tax burden, at least on a temporary basis.[43] However, lacking a global consensus the BEPS process did not officially endorse this form of taxation.[44] Digital equalisation special taxes were introduced only sporadically in individual countries.[45]

As presented earlier, official tax policy in Hungary has recognised the problem of unfair corporate undertaxation. However, it took notice of the problem only in the context of international taxation challenges. The special taxes have never been associated with an objective of equalizing respective corporate tax burdens. The legal measures regulating special taxes mentioned—in addition to the core objective of increasing revenues as necessitated by a crisis or similar situation—the objective of taxation that corresponds with the taxability of the taxpayer[46] targeted. This latter objective is clearly different from an objective of equalising the tax burdens of unjustifiably undertaxed corporate taxpayers. The Hungarian objective refers merely to the possibility that some taxpayers may have financial resources that could be subject to additional taxation having regard to the revenue needs of the state. The introduction of the special taxes is not based on an established case of unacceptable

[38] See Ismer and Jescheck (2017), pp. 382–390.

[39] See Kofler and Sinnig (2019), pp. 112–113.

[40] See OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting, https://bit.ly/3tckFpd.

[41] See Christians (2010), pp. 19–40.

[42] Kofler and Sinnig (2019), p. 114.

[43] See 2015 OECD BEPS Action 1 Report. https://bit.ly/3wzzvIf.

[44] See Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy. https://bit.ly/3GmeCnn.

[45] Kofler and Sinnig (2019), p. 106.

[46] Its assumed objective financial capacity to pay the tax.

undertaxation,[47] but rather on an assumption of extra taxability, i.e. that more can be taken away from them than from other taxpayers.

From a legal perspective, corporate equalisation taxes, which most often amount to an additional compensatory taxation of internationally mobile taxpayers not established in the national territory, may raise controversies, especially when their application is considered. It has been suggested that there is a significant risk that such tax measures may be used in a discriminatory and abusive manner by the state exercising its taxing powers.[48] The same risks may also be present in the application of the Hungarian special taxes. In fact, the risk of discriminatory or abusive use may even be higher considering that they were not introduced to address established cases of unfair and unacceptable undertaxation. The Hungarian special taxes aim to implement an unspecified principle of proportionate taxation by targeting more successful corporate taxpayers with higher tax burdens based on an assumption that they can pay more taxes than others, including their competitors in the national market. The application of the Hungarian taxes is not based on a precisely established actual taxability of taxpayers, therefore, when levied, they may function as mere fiscal penalties imposed on corporate size and a presumed corporate success.

5 Conclusion

The Hungarian special taxes were introduced during a period when there was a clear need to increase tax revenues. The economic and the social environment of the fiscal system had faced several crises, public finances were in deficit, and public debt remained high and increased again after occasional decreases. In this period, the clear objective of tax policy was to respond to these challenges and to changes in the economy and society and in public finances through taxation and the redesigning of the tax structure. From this perspective, the special taxes provide evidence of the responsiveness of the Hungarian tax system. They secured additional, permanent or temporary revenues for the central budget, and these revenues allowed the government to respond to the challenges of the time that had arisen from economic and social crises and other pressures. In general, the introduction of special taxes did not cause major complications for the Hungarian legal system. Tensions only arose with the introduction of the turnover-based progressive taxes. Their regulation does not guarantee that their actual tax effects coincide with their declared tax objectives. Therefore, it cannot be ruled out that their application—as concealed by the legislation—will not be discriminatory and abusive.

[47] Although the special taxes imposed on digital economy operators, such as the advertising tax or the new commercial retail special tax, may implicitly be justified by a case of undertaxation.

[48] See Stevanato (2019), pp. 538–546.

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Risks and Resilience in the European Union's Regulation of Online Platforms and Artificial Intelligence: Hungary in Digital Europe

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Abstract The European Union is taking ambitious steps to strengthen regulation in the digital space as part of the Digital Agenda for Europe. As part of this, the digital services regulatory package (Digital Services Act and Digital Markets Act) has been adopted to define the responsibilities of digital platforms, control online content, protect users' fundamental rights and promote competitiveness in the online space. In addition, an EU regulatory framework for artificial intelligence has been developed (AI Act), which supports a risk-based approach to regulate the technology. One common intersection of these regulations is to maintain transparency. The Digital Services Act aims to fight against filter bubbles and disinformation in social media, where online platforms also use algorithms to provide services. A new challenge in adapting to the accelerating technological development has been the COVID-19 pandemic, which has further increased the penetration of online service providers through mandatory distance and opened up a whole new platform for spreading fake news. The application of the new Digital Europe Regulations raises several questions. Still, these are complemented by application-specific areas for Hungary, such as how Hungarian authorities will act as national authorities or interpret 'illegal content' under the European legislation.

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1 Introduction: Digital Europe, Hungary in Digital Europe

Technological progress, giant companies in the digital world and artificial intelligence (AI) are part of our everyday lives; regulating them requires a complex solution from legislators. Digital markets are very different from traditional markets, and so are the regulatory and competition solutions that can be applied to them. Social media service platforms have become the most prominent players of mass communication in expressing opinion. Furthermore, new technologies are emerging, using AI and developing increasingly sophisticated tools and hardware. The EU is responding to the challenges of technology and the digital world by adopting harmonised rules in the areas concerned in the context of the Digital Europe[1] regulatory plan. Given that the European Union (EU) has a dedicated objective of uniform regulation, this directly affects Hungary. As will be presented in detail in this study, EU legislators have opted for proactive regulation in digitalisation and technology. Therefore, these regulations are key parts of the Hungarian regulation and directly apply to the issues they cover which will transform the Hungarian legal system.

The concept of regulation puts European values and people at the centre (human-centred approach). One phase has already taken place between 2010 and 2020. The Decision (EU) 2022/2481 of the European Parliament and of the Council establishing the Digital Decade 2030 Policy Programme (Decision 2022/2481/EU) for the current decade states that the EU should 'address strategic weaknesses and high-risk dependencies that could lead to supply shortages or cybersecurity risks and promote digital transformation'.[2] In addition, the resolution also highlights data sharing issues and the protection of personal data in relation to new technologies.[3]

Specifically on the implementation of the governments, Decision 2022/2481/EU states that 'Harmonious, inclusive and steady progress towards the digital transformation and towards the achievement of the digital targets in the Union requires a comprehensive, robust, reliable, flexible and transparent form of governance, on the basis of close cooperation and coordination between the European Parliament, the Council, the Commission and the Member States.'[4]

In addition, Decision 2022/2481/EU states that '[t]o that end, the Commission should cooperate closely with stakeholders including civil society and private and public actors, such as bodies governed by public laws of the education and training or health sectors, and should consult them about measures to accelerate the digital transformation at Union level'.[5]

[1] European Council: A digital future for Europe, https://bitly.ws/3cARX; Digital Agenda for Europe, https://bitly.ws/3cASe.

[2] Decision 2022/2481/EU, preamble (5).

[3] Decision 2022/2481/EU, preamble (16).

[4] Decision 2022/2481/EU, preamble (22).

[5] Decision 2022/2481/EU, preamble (39).

Among the objectives more narrowly related to digital ecosystems, Art. 3 of Decision 2022/2481/EU highlights general objectives which include human-centredness, safety and the use of sustainable ecosystems.[6]

While regulation is usually the first thing we think of in the digital world, it is important to note that Digital Europe does not aim to stifle innovation. It explicitly aims to make businesses use cloud computing, big data, and AI. It just wants to make these technologies more transparent and secure through regulation.

Moreover, the EU has already shown its ability to influence global dynamics, an approach that experts call the *Brussels effect*; it refers to the EU's unilateral power to regulate global matters.[7] The EU is increasingly aware of its ability to influence policy on digital technologies in other parts of the world, since most new technology and digital services companies are based in the United States or China.[8]

In the Digital Single Market Strategy context, the Commission has issued a Communication stressing the need to ensure that online platforms 'protect core values' and increase 'transparency and fairness to maintain user confidence and protect innovation'. This is due to the role of online platforms in providing social access to information and content and their consequent impact on users' fundamental rights. The Commission stressed that this role comes with wider responsibilities.

It is beyond the scope of this paper to review all the regulations that have been or are being adopted in the framework of the Digital Europe Regulatory Plan. Thus, we will specifically examine regulations which are the most relevant in Hungary's social life and democracy, related to the operational characteristics of digital ecosystems and platforms, with a particular focus on the phenomenon of their increased importance in our daily lives during and after the COVID-19 pandemic, becoming more dominant in the orientation of Hungarian society, in information gathering or even in trapping us in an 'opinion bubble'.[9]

2 Characteristics of Digital Ecosystems and Online Platforms

Digital markets and social networking sites have evolved enormously over the last 20 years, growing from almost nothing to becoming today's dominant players. In commerce, eBay started to take off in the early 2000s, when online shopping was still a speciality. An example of a social media service is Facebook, which was launched in 2004, initially mainly for the leisure activities of the younger generation. From the 2010s onwards, the platforms began to take off and became part of our

[6] Decision 2022/2481/EU, preamble Art. 4(1)(3)(a) and (c).

[7] See Bradford (2020).

[8] De Gregorio (2022a).

[9] Challenges in freedom of information see Bán-Forgács and Szatmári (2023); Bán-Forgács (2023a).

everyday lives.[10] Since then, they have become one of the leading platforms for accessing information. They have proved to be a tool for influencing public opinion, including specific events such as elections.[11] The 2020 coronavirus pandemic compounded the rise of online services, as people turned to them more and more. The pandemic created a specific economic situation which benefited some firms and industries, including those dealing in technology, while adversely affecting others. In the final year of the crisis, people and businesses showed an even greater demand for what the tech giants had to offer. Moreover, with the end of the epidemic and the end of restrictions, people recognised the convenience of online services.[12] In addition, there has been no let-up in the spread of misinformation and conspiracy theories, as other events (e.g., Russia's invasion of Ukraine) and issues have been highlighted, and social media has played a significant role in spreading information.[13]

Digital marketplaces have also become dominant as an advertising platform, with a significant number of users visiting these sites continuously. Moreover, their operating model can pre-order or target ads according to users' previous activity. In addition, online platforms have created new professions and occupations, such as influencers, content producers, and even employees managing social media for their explicit employer.[14]

With a large number of users and the content they share and upload on online platforms, they can gain a market advantage by processing, exploiting and even selling the vast amount of data[15] that is changing quickly and widely. In addition to the areas already described, the development and use of AI has also accelerated significantly in the 2020s, and its application is also present in digital markets, both in content moderation and in the use of recommendation systems and data analysis.

3 Digital Ecosystems

Firms and state institutions that choose a digital ecosystem-based operating model seek to maximise the benefits of the digital space and digital markets described in the previous paragraph. There is currently no single definition of a digital ecosystem, however, which makes it difficult to define. The term can be traced back to the concept of an ecosystem, as used in biology, which describes the coordinated, interdependent functioning of a system involving all participants. In these areas, the digital ecosystem differs from traditional business models. The digital ecosystem

[10] Ződi (2022), p. 66.

[11] For more on this, see Miró-Llinares and Aguerri (2021); Grinberg et al. (2019).

[12] Affinito et al. (2020), p. 2; Revati Devaki and Dinesh Babu (2021).

[13] Hou et al. (2023), p. 22.

[14] For more, see Goanta and Ranchordas (2020).

[15] Favaretto et al. (2020), p. 2.

takes advantage of this interaction and builds on the large number of actors and assets involved simultaneously, taking advantage of the network-like structure of this system.[16]

The benefits of digital ecosystem-based operations are also demonstrated by the fact that many prominent players in the global economy (e.g., Amazon and Meta-Facebook) have chosen and are currently using this operating model. The operation of these companies and their increasing penetration of digital markets has prompted the EU to develop an effective regulatory model to reduce the vulnerability of users and consumers, mitigate the risks they face and maintain the competitive opportunities of smaller companies. Regulation (EU) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA), and Regulation (EU) No 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Market Act, DMA) are the objective of the Regulations.

Issues related to the Internet, technological innovations and, in particular, the vast networks of the digital ecosystem are almost always transnational. To this end, the EU is laying the foundations for regulation, with a view to a uniform approach in its own territory. In our view, the adoption of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and the repeal of Regulation (EC) No. 95/46/EC (General Data Protection Regulation, GDPR),[17] which is still in force, are already linked to the regulatory background of this problem, which was also based on the realisation that, in particular, companies operating on the international Internet platform process the personal data of vast numbers of users in a way that is difficult to monitor, and also that they can make significant profits of different kinds—which can even have policy-related relevance—in the digital markets by exploiting them directly or indirectly.

4 Key EU Rules Affecting the Operation of Digital Ecosystems and Online Platforms

However, with the rapid development of technology and the increasing use of new technologies, other areas of regulation have come to the fore where the EU has opted for uniform regulation. One step in this direction has been the adoption of the DSA-DMA Regulations, which are currently in the process of entering into force

[16] Barykin et al. (2020), p. 1.

[17] For GDPR challenges in COVID-19 see Bán-Forgács and Mezei (2023); Bán-Forgács (2023b).

and starting to be applied.[18] In our view, the regulation of AI (AI Act), which also seeks to keep pace with the latest technological changes, can also be linked to this,[19] as companies regularly use AI-based systems in the exploitation of the digital ecosystem and the use of large amounts of data, in the categorisation of individual data.

Although at first glance, one might say that we are talking about different areas of regulation, if you are operating in the online marketplace or using—or planning to use—a digital ecosystem-based operation, all of the above regulations will almost certainly set the framework for your legitimate operations. With this in mind, it is necessary to look at these regulations in context, particularly the regulatory solutions they seek to implement for these service providers.

This approach is supported by the fact that it has already been identified that digital markets have specificities that are difficult to address in a single legal field and that the EU has finally moved towards a coordinated regulatory approach in several areas.[20]

We can identify a number of similarities in the wording and regulatory solutions of the regulations, which clearly show that they target the same market players and opt for similar measures:

In addition to the provisions focusing on the specificities of the sub-area, each of the regulations clearly responds to the specific nature of digital markets, i.e. each regulation approaches the scope in a way that extends it to all service providers providing services in the EU[21] and does not link it to the location of the company, thus ensuring that operators outside the EU are obliged to comply with the provisions and that regulations cannot be circumvented by those established in third countries (extraterritorial scope).

Another element common to the regulations' regulatory approach is that they are largely adapted to the size and economic role of the market operator. In some cases, the regulation itself is explicitly based on the role of the market, such as the classification as a gatekeeper[22] or the categorisation of service providers in the

[18] The DMA entered into force on 1 November 2022 and applied from 2 May 2023. The DSA entered into force on 16 November 2022 and was directly applicable in the EU until 17 February 2024.

[19] The AI Act (Regulation of the European Parliament and of the Council—Laying down harmonised rules on artificial intelligence—Artificial Intelligence Act) and amending certain union legislative acts Brussels, 21.4.2021 COM(2021) 206 final 2021/0106(COD) came into effect on August 1, 2024. EU member states must designate the relevant national authorities responsible for overseeing AI systems and conducting market supervision by August 2, 2025. Most of the regulation's provisions will apply starting August 2, 2026. However, bans on AI systems deemed to pose unacceptable risks will be enforced after six months, and provisions related to general-purpose AI models will become applicable 12 months after the regulation's entry into force.

[20] Pünkösty (2022), p. 175.

[21] DSA Art. 2(1), DMA Art. 2(2), GDPR Art. 3(1), AI Act Art. 2(1).

[22] DMA Art. 3.

DSA,[23] but an absolutely common element in the regulations is that the fines are not set at a fixed amount, but are based on the turnover of the infringer.

Risk reduction is also one of the reasons for adopting the regulations and is reflected in the specific rules. In the AI Act, we find an explicitly risk-based approach to the rules to be followed in the application and development of AI.[24]

Closely related to the foregoing, the regulations aim to protect users and consumers, to reduce the vulnerability of users to giant companies and possibly the lack of information (information asymmetry) and to ensure adequate data protection in this context.[25] Although it could be seen as a measure to reduce consumer vulnerability, all regulations pay great attention to the need for operators in the digital market to operate as transparently as possible, to have documented activities and thus to be verifiable.

5 Risk-Based Regulation

A '*risk society*',[26] as the term is used today, is a society in which risk as a factor plays a dominant role in legal regulation. In the context of technology, this means that the law responds only to the extent necessary to reduce the risks associated with technology and ultimately creates a framework that seeks to strike an appropriate and proportionate balance between different scenarios. Risk in this context means the combination of the probability that a particular harm will occur due to the use of a particular technology and the severity of that harm.

The COVID-19 pandemic has also highlighted the barriers that regulation can pose to response needs if it is inconsistent with a risk-based approach and the regulatory framework is not flexible enough.

Risk-based regulation in Europe was originally developed in response to the risks posed by new technologies and industries to the environment, human health, and safety, and only later extended to other sectors. Since launching the Digital Single Market Strategy, the EU has increasingly relied on this legislative approach to manage digital technologies and has taken a more prominent role in regulating digital markets and society. This is particularly evident in recent legislative efforts in the areas of data, online content and AI.

In examining these regulations, the DSA is also taking a risk-based approach, particularly in the new rules on content moderation practices. In particular, the DSA

[23] DSA Art. 33. The Digital Services Act—Ensuring a safe and accountable online environment, https://bitly.ws/3cASW.

[24] Titles 2–3 of the AI Act.

[25] In the recitals of the regulations referred to, we find recurrent provisions aimed at protecting users, ensuring the protection of fundamental rights, transparency and risk reduction. See also van de Waerdt (2020); Helberger et al. (2021).

[26] Beck (1992).

defines several categories of service providers according to their role in the digital ecosystem (hosting providers; intermediary service providers and online platforms; and very large online platforms and very large online search engines). Each category is subject to different due diligence obligations in ascending order. The DSA is based on the following simple yet important assumption: the larger an online platform, the greater its impact and, therefore, the greater the risk it poses to users and society. By taking an *asymmetric by-design* approach to ensure a transparent and safe online environment, DSA can be easily identified as a risk-based regulation.[27] It is worth noting that the DSA has adopted a size-based criterion instead of an explicit risk-based model, as is the case with the AI Act. In this respect, although the size of the platform may impact the level of risk exposure, it has less influence on other relevant variables in the risk assessment, i.e. the likelihood and severity of adverse consequences. However, the specificities and common characteristics of platforms may justify this size-based approach. This is because platform size is a proxy for risk levels in a network impact-focused context, which may not be true in other domains, such as AI, where AI systems can be applied in various ways.[28]

However, in contrast to the GDPR, which, following a bottom-up approach, places the onus of risk assessment and mitigation entirely on the controller and/or processor, the DSA significantly reduces the discretion of the recipients of the regulation (in this case, the intermediary service provider) by defining four general risk layers. The DSA does not provide a generic definition of systemic risk, a term best known in regulating financial markets and financial institutions, but instead introduces a novel contextual application of systemic risk primarily by listing three specific systemic risks. These are the dissemination of illegal content, negative impacts on certain fundamental rights (privacy, freedom of expression, non-discrimination and children's rights) and the deliberate manipulation of services. These measures may include the application of content moderation and advertising display schemes or require them to operate under codes of conduct and crisis management protocols. The last few years have provided a number of concrete examples, such as the Facebook-Cambridge Analytica scandal or the use of social media to spread COVID-19-related fake news.[29]

In the context of risks, it is also necessary to mention the new regulation on AI, which does not set compliance requirements specifically for online platforms but for AI systems in general and their developers.[30] At the heart of this regulation is the risk-based approach referred to above, which means that each AI system will be classified into more or less stringent compliance groups according to the risk it poses to users and their fundamental rights, as perceived by the legislator. The shift from a bottom-up to a top-down model in the AI Act is even more evident. As with the DSA, the AI Act sets out four categories of risk that apply to AI systems. The AI Act

[27] Efroni (2021).

[28] Mantelero (2022).

[29] Efroni (2021); Barata et al. (2021).

[30] Art. 2(1) of the AI Act.

addresses systemic risks, though its definition is not identical with the DSA, despite similarities. According to Article 3, point 65 of the AI Act, systemic risk refers to the risks associated with the high-impact capabilities of general-purpose AI models. These risks, due to the widespread use of the models or their potential negative impact on public health, safety, public security, fundamental rights, or society as a whole, could significantly affect the EU market and spread extensively across the value chain.Models are considered to have "high-impact capabilities" if the cumulative computational power used to train them exceeds 10^{25} floating-point operations. However, the AI Act only specifies that high-impact capabilities are those that meet or exceed those found in the most advanced general-purpose AI models. This encompasses most models currently available on the market, including OpenAI's GPT-4 and possibly Google's Gemini, which may be regarded as models with systemic risk. Additionally, the AI Act clarifies that AI systems embedded in very large online platforms or search engines fall under the DSA's risk management framework. If AI models meet the DSA's systemic risk obligations, it is presumed that they also comply with the AI Act, unless significant systemic risks arise that the DSA does not cover.

Despite their differences, both pieces of legislation have common features. Together, they mark a new phase in the EU's digital policy history. In particular, these laws illustrate the EU's evolving approach to *digital constitutionalism.*[31] Both Regulations are based on the organisational principle of risk and seek to balance the economic focus on innovation and the creation of an internationally competitive digital single market with an interest in protecting democratic values, including individual rights and freedoms. Balancing different interests and values through the risk strategy is inherently constitutional. It reflects a shift in the approach of the EU institutions (from the Court of Justice onwards) to digital technologies.[32] Furthermore, both the AI Act and the DSA algorithm impose auditing obligations to ensure compliance and transparency. In addition, both pieces of legislation pay particular attention to the risks arising from the design, operation and use of digital services or AI systems, taking into account their adverse effects on fundamental rights, and adopt an ex-ante strategy based on risk assessment, following a common approach to the protection of human rights. The AI Act requires a separate human rights impact assessment to be carried out for high-risk AI systems and should be an integral part of the impact assessment for DSA too.[33]

[31] See De Gregorio (2022b).

[32] De Gregorio and Dunn (2023).

[33] Nagy (2023).

6 Digital Ecosystems and the Use of AI and Algorithms

It is worth mentioning the challenges of applying AI on platforms, as this technology is being integrated into the operation of more and more services, among which the first are the recommendation systems and content management algorithms of the platforms mentioned above. Another key area where platforms use algorithms at a systemic level is in the area of content moderation.[34] In the case of moderation, the service provider acts with some means to restrict users' fundamental rights (e.g. freedom of expression) or even their dignity (e.g. suspension of a content provider's account, exclusion of monetisation of their content). In Art. 20(6), the DSA refers to the internal complaints handling system, stating that this activity cannot be carried out solely by algorithms but requires the supervision of a qualified person. Apart from this, there is no specific provision for algorithms for content moderation and complaint handling; the regulation refers to referral systems.

In addition, one specific area of application of online platforms and algorithms that has recently received much attention is the problem of fake news. A detailed analysis of the concept and approaches to fake news is beyond the scope of this paper, but in summary, fake news can be referred to as 'a type of online disinformation (1) that (2) consists of misleading and/or false claims that may or may not be related to real events, (3) deliberately intended to mislead and/or manipulate the public (4) specific or imagined, (5) through its appearance, with an opportunistic structure (title, image, content) news format to attract the attention of the reader, to attract more clicks and shares and thereby to attract more advertising revenue and/or ideological gain'.[35]

With the outbreak of the COVID-19 pandemic, a number of factors have also emerged that have helped to increase the interest in misinformation and fake news and, as a result, to cause more damage. The circumstances surrounding the outbreak itself have also given rise to the spread of dubious news.[36]

The newly created term *infodemic* (information and pandemic) reflects the significant impact of new information technologies on contemporary health communication. Political scientist David Rothkopf first used the term during the severe acute respiratory syndrome (SARS) pandemic of 2003 to describe how 'some facts, amplified by modern information technologies and rapidly transmitted worldwide, mixed with fear, speculation and rumour, have had an impact on national and international economies, politics and even security that has been totally out of proportion to the underlying realities'.[37] The impact cited is that of the COVID-19 pandemic, exacerbated by the fact that by 2020, online media had become much more sophisticated, and the widespread use of smartphones meant that misinformation and theories were spreading at an untraceable speed.

[34] Ződi (2022), p. 67.

[35] Baptista and Gradim (2022), p. 633.

[36] Tomes (2020); WHO Infodemic Summary. https://bitly.ws/3cB86_1.

[37] Tomes (2020).

Determining the reality basis of information and news is further complicated by the *filter bubble effect*, in which the algorithms used by social media play a prominent role. The role of these algorithms is to prioritise content in a user's news feed that is likely to fit their interests.[38] However, the algorithm does not only favour similar content for purchases and hobbies, but for all information. As a result, users can be completely 'bubbled', and on a social networking site, they can almost completely avoid reviews and content that are different from what they have read before or that criticise them. Moreover, the users can further reinforce this lock-in by being able to block users and pages that express opinions he or she does not like.

Social media have become an essential platform for political expression and access to information. In most cases, people are now getting their information there, even to the exclusion of traditional media providers. In addition, political and public actors are trying to maximise this access. We only have to think of the scandals of former US President Donald Trump's use of the Twitter platform (now X).[39] Still, a Hungarian example is when election-related advertisements appeared on all the platforms popular in Hungary before the elections, with advertising costs of several hundred million forints.[40] Furthermore, in Hungary there are several organisations (e.g., Megafon) that, in fact, present messages and topics to users that fit well into government communication and may even create fake user accounts or 'troll profiles' to support their messages.[41]

These circumstances, combined with the filter bubble effect of social media sites' algorithms, mean that users, and ultimately voters, are easily cut off from other information (critical information that is contrary to government communication) and thus remain outside the bubble, ultimately preventing access to a wide range of information on public issues.

Moderation and content filtering in Hungary can be hampered by the fact that content (including illegal, hateful content and fake news) is published in Hungarian. In the more minor, less known languages, the algorithms also find it more difficult to filter; making a mistake about a joke, an irony, or an opinion is easier.[42] This in itself can cause problems even in the proper filtering and moderation of public content.

DSA generally tries to manage the information, news and advertisements that appear on the platforms. While we are still waiting for practices to emerge on its application in general, one of the issues that arises is the problem of over-constraint. There is concern that fearing heavy fines, operators may prefer to remove all dubious content, disproportionately restricting freedom of expression. In Hungary (and Poland), due to the specificities of the political systems in place, there is also concern

[38] Holone (2016).

[39] Wells et al. (2020), p. 663.

[40] Bene and Farkas (2022), p. 154.

[41] Hidden Agendas: Fake Profiles on Facebook ahead of Hungary's Upcoming Elections. https://bitly.ws/3cB9C.

[42] Duarte et al. (2017), p. 14.

that national authorities will use their powers to exercise their monitoring obligations, even abusively, and effectively censor content they do not want.[43]

The European Commission's Code of Practice on Disinformation (CoP) which has been in force since 2018, aims to improve the credibility of information and content moderation practices, for example by closing fake accounts, removing bots, investing in technologies that help users to be informed, and voluntarily joining.

It was in 2021, in the wake of the epidemic of fake news and infodemics, that the EU decided to strengthen the CoP,[44] clarifying its obligations, including the reduction of disinformation linked to advertisements, increased moderation obligations, visibility of information of public interest, the possibility to customise algorithms and the marking of warnings and presumed false information.[45] This Code already foreshadowed that, with the entry into force of the DSA, which was still in its draft phase, it intended to co-regulate and further harmonise the provisions on moderation, transparency and algorithms, as is currently the case in the process of achieving compliance with the DSA, thus responding to the technological challenges of legal regulation.

7 Implementation Issues Related to Hungary: Conclusion

A common feature of new technologies and online platforms is that they entail significant risks, both in terms of consumer protection and the protection of human rights. This raises the question of how active market players are in adopting codes of conduct and to what extent their content will be able to mitigate the risks identified in the regulations. This leaves a number of additional questions open: in principle, the largest ecosystem users (at least for one of their activities) will be, at the same time, data controllers, gatekeepers, very popular online search engines, intermediary service providers, or users of AI systems, and service providers,[46] and could therefore be subject to all ther Regulations. As a result, they will have a huge 'self-regulatory burden', as all the impact assessments required by the regulation must be carried out and documentation produced.

The way digital ecosystems work, as described in this study, means that these areas are not as sharply separated as the obligation in the various regulations. This raises the question of whether separate regulations should be formally drawn up for each regulatory area or whether it should be sufficient for the content to comply with the requirements of all the regulations, aligning codes and systems with regulations,

[43] Mchangama et al. (2022), p. 18.

[44] Burri (2022), p. 17.

[45] European Commission, Guidance on Strengthening the Code of Practice on Disinformation Brussels, COM(2021) 262 final, 26 May 2021.

[46] Each of the categories identified is a category defined by one of the Regulations to which a Regulation applies and requires compliance obligations [DSA Arts. 2(1) and 33, DMA Art. 2(2), GDPR Art. 3(1), AI Act Art. 2(1)].

as in many cases regulations have very broad objectives, such as protecting human rights,[47] or the fight against illegal content.[48] All of the provisions referred to have relatively general objectives, and it is likely to be difficult to determine whether, in a specific platform policy or a specific case, the person subject to the regulation(s) has acted properly and fully implemented the obligations imposed by the regulation.

These issues are also important because all the regulations provide for heavy fines in case of non-compliance. In relation to fines, there are also uncertainties as to the relationship between infringements of the rules of each regulation and the extent to which the prohibition of double jeopardy applies. As shown above, it is our view that the scope of the regulations in practice, in fact, regulates the same activity of the service provider in several aspects. It also follows that one behaviour (inadequate internal rules or IT systems) may violate several regulations.[49] However, it is unclear from the current rules whether a penalty for a breach of one of the rules precludes a penalty for the same activity under another regulation.

In recent years, the technological and digital world has been evolving at an accelerating pace, and new challenges and risks have had to be addressed. The EU is taking a complex approach to the issue, seeking to limit the digital ecosystem in several ways, reduce users' vulnerability and improve competition in online markets. However, there are also a number of questions about how the objectives of the regulations will be achieved, which will be answered in practice.

It is important to underline that the EU is thinking of a regulatory model for online platforms and AI, which is a uniform regulatory model across the EU. This desire for uniformity is so decisive that it is expressed in the DSA, the DMA and the AI Act. However, regulations in terms of their legal source are no longer titled 'regulation' but 'act', so the EU legislator aims to achieve complete uniformity. On the one hand, this is a perfectly logical approach, as the platforms and other service providers primarily affected by the regulations provide an international, essentially borderless, global service. They can, therefore, be effectively tackled uniformly across the EU.

However, there are also difficulties with fully harmonised regulation; while regulatory and reporting issues for service providers and their stakeholders can be addressed uniformly, there are several factors (language, cultural differences) that arise when using the platforms which can ultimately lead to different problems across Member States. A regulation, as opposed to a directive, leaves the Member States with little scope for individual solutions. The content of regulations directly applies to national law, and their provisions do not need to be—or should not be—repeated. As stated in the preamble (9) of the DSA, 'Member States should not adopt or maintain additional national requirements relating to the matters falling within the scope of this Regulation, unless explicitly provided for in this Regulation, since this would affect the direct and uniform application of the fully harmonised rules

[47] AI Act preamble, paragraph (13) and (28).

[48] DSA preamble, paragraph (9).

[49] The simplest example is when personal data is used to train an AI system in a non-transparent way. In this case, how will it be assessed whether there has been a breach of the GDPR provisions on personal data processing or the impact assessments under the AI Act? Or will a breach of both regulations be established?

applicable to providers of intermediary services in accordance with the objectives of this Regulation.'

In a conflict with national law, EU law also takes precedence. On this basis, the regulations referred to will apply in precisely the same way in all Member States. However, this statement does not stand on its own. An example of this is Art. 3(h) of the DSA, which defines 'unlawful content' as any information which, in itself or about an activity, including the sale of products or the provision of services, does not conform with EU law or the law of any Member State which conforms with EU law, irrespective of the precise subject matter or nature of that law.

As can be seen from the quoted text of the DSA, unlawful content may, therefore, not only be content contrary to EU law but also unlawful under Member State law. This is likely to result in differences in each Member State, with differences in what is considered illegal content under the law of a particular State.[50]

However, examining the DSA's unlawful content under national law, specifically in Hungary, leads to some exciting situations. For example, in Hungary, extremely restrictive content—especially content that is accessible to minors—concerning LMBTQ people is considered illegal.[51] As a result, the assessment of whether content is illegal under EU law and Hungarian law may be markedly different under the DSA. Most social networking sites, such as Facebook, are officially available to users over 13.[52] Suppose we assume that the child is using the site legally and is indeed at least 13 years old when registering (in the case of social networking sites, this alone is difficult to verify reliably). In that case, he or she is a minor under Hungarian law,[53] and thus, content posted on the platform—which is on the LMBTQ topic—may be illegal in Hungary. Still, where this is not the case under EU law, restricting the content under Hungarian law may be considered discriminatory.[54]

Furthermore, in many cases, the DSA also entrusts the competent authorities of the Member State[55] with the task of dealing with the case, which in itself opens up the possibility of differences between procedures, but—concerning the discussion on fake news—in the case of Hungary, the specificities of the political system raise further concerns about the national process.

Therefore, a seemingly uniform regulatory regime will unlikely result in a perfectly consistent regime. There are also several questions to be answered about the application and effectiveness of the legislation in the EU as a whole.[56] However, even beyond this, Hungary may still have further questions of application, partly

[50] The Digital Services Act (DSA) and combating disinformation—10 key takeaways. https://bitly.ws/3cB9h.

[51] Act LXXIX of 2021 on tougher action against paedophile offenders and amending certain laws to protect children.

[52] Facebook Legal Terms 3.1. https://www.facebook.com/legal/terms.

[53] Act V of 2013 on the Civil Code, Book two, Section 2:10 (1).

[54] Mchangama et al. (2022), p. 9.

[55] DSA preamble, paragraph (109).

[56] Husovec (2022).

because content moderation is more difficult to carry out in a minor language less familiar to algorithms and moderators. On the other hand, there may be differences in the Hungarian legal system and official procedures, which may cause difficulties beyond the general application uncertainties.

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Part III
Courts and Resilience

The Resilience of the Hungarian Court System Between 2012 and 2020

Mátyás Bencze

Abstract In this chapter, I will first outline the political challenges the Hungarian court system has faced since 2010 and also present the characteristics of the organizational setting of the administration of justice, which has been a decisive factor in the response to those challenges. I will then turn to a discussion of how the relationship between the political system and the courts has changed since 2010. Using statistical methods and content analysis, I will prove the hypothesis that sporadic governmental expressions of opinion on certain judicial decisions before 2010 have been replaced by the systematic assertion of the interests of political power in public communication to the courts since the change of government in 2010. I will then describe the reactions of the domestic judicial leadership and use content analysis to identify the extent and nature of the reactions and how the strength of the resistance has changed over time. Finally, I draw conclusions about the factors that influence the preservation of the resilience of the judiciary.

1 Introduction

What may be novel about the conclusion of this chapter is that while the relationship between courts and politics is examined in legal and political sciences, both for democracies[1] and in authoritarian regimes,[2] little attention has been paid to the role

[1] Waldron (2006), p. 107.

[2] Among the classics of legal theory, see Radbruch (2006), pp. 1–11; more recently, Graver (2015), pp. 205–301; Ginsburg and Moustafa (2012), pp. 102–131.

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of courts in the transition from democracy to authoritarian rule.[3] In this context, the most relevant questions are under what conditions is effective judicial resistance likely to occur and what circumstances might lead the judiciary to 'offer deference'.[4]

First, I briefly describe the political environment in contemporary Hungary and the most important developments of recent years. Then, I argue that, following the institutional settings of the Hungarian court system, the reactions of court leaders to external attacks are crucial in defending the independence of individual judges. After this, I examine the government's communication toward the courts after 2012, focusing on the issue of whether that communication can be interpreted as exercising systematic political pressure on the latter. Finally, I analyze the frequency and the content of responses of the court leaders and draw conclusions about the factors which influence the effectiveness of the preservation of judicial independence.

2 Changes in the Hungarian Political Regime After 2010

In Hungary, until 2010, democratic and rule-of-law institutions were seemingly solid, and opposition parties had a realistic chance of winning political power in free and fair elections. After 2010, when the right-wing Fidesz–Hungarian Civic Alliance (Fidesz party) defeated the then-governing Hungarian Socialist Party (MSZP) in the general election and took political power, the situation changed surprisingly fast.

According to Freedom House's latest list, Hungary is the only EU Member State not classified as a democracy but as a 'Transitional or Hybrid Regime'.[5] Hungary has also gradually slipped down the 'Rule of Law' world rankings, placing last among EU countries on the World Justice Project index regarding the conditions for the rule of law in 2021. It is currently 69th on the global list with an overall score of 0.52 out of 1 (compared to 33rd in 2014, with an overall score of 0.61).[6]

Many legal and political scholars have sought to describe the essence of the political system in Hungary after 2010.[7] Tóth argues that new authoritarianisms (such as in Hungary) represent a *sui generis* political system located between the opposite poles of democracy and autocracy, and one of the main characteristics of those systems is the pretence of democracy.[8] Halmai writes on Hungarian 'illiberal

[3] An exception is a research project entitled *Judges under Stress* led by Hans Petter Graver. Graver (2018).

[4] The questions are taken from Graver and his co-author. Graver and Čuroš (2022), pp. 1147–1158.

[5] Freedom House (a). See the detailed country report on the condition of governance, civil society, media independence, elections etc., at Freedom House (b).

[6] World Justice Project: Rule of Law Index 2021, https://rb.gy/tj1vqk; World Justice Project: Rule of Law Index 2014, https://rb.gy/kiadmj.

[7] A more comprehensive account can be read in this book's introductory chapter by Fruzsina Gárdos-Orosz and Nóra Bán-Forgács.

[8] Tóth (2019), pp. 37–61.

democracy',[9] while Pap characterizes the phenomenon as 'new populism', which 'is hollow in the sense that there are no positive, alternative grand narrative constructions. Playing on the criticism and rejection of the current discourses, political and policy regimes seem to suffice. This shallowness and emptiness are the unique and engaging features of the (potentially exportable) Hungarian model of illiberal democracy and, as I argue, of new populism.'[10]

Finally, Guriev and Treisman describe some modern forms of politically oppressive regimes (including that of Viktor Orbán, Prime Minister of Hungary) as 'informational autocracies'. In these systems, the rulers are keen to monopolize power, like traditional dictators, but they do it with a new strategy: 'Rather than intimidating the public, they manipulate information—buying the elite's silence, censoring private media, and broadcasting propaganda—in order to boost their popularity and eliminate threats.'[11]

The above-outlined model of governance (a pretence of democracy and rule of law, dominance over and manipulation of the media, populist public policy and communication) is reflected in the government's measures and communication toward the Hungarian justice system. In the following step, I present the Hungarian judicial structure, which is essential for understanding the response of the court system to challenges deriving from the political sphere.

3 Hungarian Judicial Structure

In the construction of a modern court system, Hungary followed the so-called Prussian model. According to this, the judge is a well-educated, competent and disciplined bureaucrat, a legal specialist whose primary duty is the unbiased and impersonal application of the law.[12] This model can also be characterized as a 'Weberian' one.[13]

Another feature of the bureaucratic Hungarian judiciary has been that—from the beginning of the modern era—the judge has been a part of a hierarchical organization[14] in which their activities outside of adjudication have been controlled by other, higher-ranked judges. At the time of the transition from a feudalistic judicial system to a liberal one in the late nineteenth century, having strict, bureaucratic control over judges was very reasonable. Accordingly, the understanding of members of the judiciary was that they were subordinate officials.

[9] Halmai (2021), pp. 51–74.
[10] Pap (2018), pp. 2–3.
[11] Guriev and Treisman (2019), pp. 100–127.
[12] Máthé (1982), pp. 17–26.
[13] Weber (1978) pp. 809 and 853.
[14] Damaška (1975), p. 481.

During the socialist era, the bureaucratic character of judicial work became stronger. In the 1950s, the government had the right to remove judges from their positions or transfer them to another court without their consent.[15] From the mid-1960s onwards, during the age of the 'soft dictatorship',[16] direct political influence on courts gradually disappeared; however, the bureaucratic mentality of judges was further strengthened. Judges were generally conceived of as technocrats and apolitical civil servants.[17]

In the process of the post-1989 political transition, ideas of reforming the judicial system received surprisingly little attention from the designers of the new constitutional setup. The latter focused only on the formal constitutional guarantees of judicial independence, while changes in the internal court structure were not on the agenda.[18] This can be explained by the fact that judges were generally conceived of as neutral bureaucrats in the late socialist period, not as servants of the communist regime; thus, their individual independence was somehow taken for granted. As a result of this, while organizational independence was guaranteed, the individual autonomy of judges remained limited to their freedom of decision-making.

That is why, after the political transition, the control of judges' administrative activity by their superiors remained at the same level. This means that serious administrative decisions such as case assignments, individual assessments of judges, promotions, the initiation of disciplinary procedures, and—to a certain extent—salary increases have remained within the court leaders' competence.[19] There are only a few vague criteria in the relevant laws concerning the exercise of these powers.

Therefore, judges in lower courts are generally encouraged to align their judicial activity predominantly with the viewpoints of the reviewing second instance panel and its judicial style, regardless of any opposing professional convictions.[20] Accordingly, within a bureaucratic judicial system, the successful preservation of judicial independence in decision-making is highly dependent on the behaviour of court leaders.

In the following, I will show what governmental communication was directed towards the courts between 2012 and 2020 and why the hypothesis that the latter should be understood as pressure and not just as criticism (which is natural in a democratic public domain) is justified.

[15] Horváth (2017), p. 128.

[16] From 1963 until 1989 in Hungary, the authoritarian political leadership gradually abandoned open aggression and threats toward citizens and tried to acquire legitimacy by creating social and financial security for people. Besides this, it introduced some civil liberties in limited forms. Gitelman (1981), pp. 187–210; Nyyssönen (2006), pp. 153–172.

[17] Fleck (2001), p. 105.

[18] Révész (2017), p. 122.

[19] Ravasz (2015).

[20] The Hungarian situation in this regard is very similar to that of the German courts. Lautmann (2011), pp. 116–119.

4 Governmental Communication Concerning the Courts in Two Different Political Eras

In this subsection, I look at governmental communication from 2012 to 2020. The endpoints are chosen because these years were almost entirely determined by the work of two judicial leaders—the President of the Supreme Court of Hungary (Curia) and the President of the National Office for the Judiciary—who were elected by the Fidesz-led parliament, and whose decisions and statements fundamentally shaped the activity of the court system and the external image of the courts.

In 2021, when András Varga Zs. was appointed President of the Curia, a new story began. He, as opposed to the previous president, Péter Darák, had not served as a judge before his appointment. In his scholarly work, he has openly represented the government's viewpoint on the rule of law, labelling it an 'idol'.[21] His personnel policy, especially the reorganisation of the structure of the adjudicative panels in the Curia, is also accused of being in Fidesz's interests.[22]

In order to show how challenging government pressure has been in the Fidesz era, it is necessary to compare this period with the one before it. From a methodological point of view, it seems optimal to compare the period 2012–2020 with 2002–2010. On the one hand, they both cover a relatively long period of homogeneous governmental politics: between 2002 and 2010, a left-wing (socialist and liberal democrat), and between 2010 and 2020, a right-wing (Fidesz-led) parliamentary majority and government were in power. On the other hand, news about the relationship between the government and the courts can be reliably traced back to around 2002 on internet news portals, greatly facilitating the research work.

For a better overview, I have included in two tables specific statements addressing the work of the courts. These include the information necessary to identify the politicians and the cases, the exact wording of the criticism/expectation or its essence, and whether there was any reaction from the courts. If there was a protesting reaction, this is indicated with 'Yes', and if the representative of the judicial organization did not substantively react, I have indicated this with 'No'. The other two options were: Agreed with criticism ('Agree') and declined to give a substantive response ('Avert'). I have not written about the context of the statements; however, relevant references are included.

In 2002–2010, the following criticisms and expectations were made toward the courts by the government (Table 1).

Since 2012, many more government-aligned politicians have sharply criticized the courts' actions when they thought they had decided wrongly or made strong demands about the 'right' direction of judicial practice. For methodological reasons, I have not included in the table criticisms published by journalists who are perceived to be government loyalists since, although it is very likely, it is not possible to prove

[21] Varga Zs. (2019).

[22] Kovács (2023).

Table 1 Government expectations/criticisms of Hungarian courts (2002–2010)

Number	Name of politician	Political function	(Essence of) criticism/ expectation	Year	Reaction
1.	Péter Medgyessy	Prime minister	'There is no democracy if anyone [a judge in a verdict] can call for exclusion [or] call their fellow human beings primitive.'[a]	2003	Yes
2.	László Kovács	President of the MSZP, Minister of Foreign Affairs	He was 'dismayed' to learn of the judgment of a court.[b]	2003	Yes
3.	József Petrétei	Minister of Justice and Law Enforcement	Court procedures should be as made efficient and timely as possible using managerial tools.[c]	2006	Yes

[a]Lomnici a primitívezés ellenzőitől félti a jogállamiságot [Lomnici fears the rule of law from opponents of primitivism]. https://bit.ly/3ttiayU
[b]Árpád Szakács: Kormányzati támadás [Government attack]. Magyar Nemzet 9 November 2003. https://bit.ly/3ttieyE
[c]MTI: Petrétei elfogott levelét lobogtatja a Fidesz [Petrétei's intercepted letter is waved around by Fidesz]. https://bit.ly/3OdBl7t

that the negative statements and derogatory expressions were 'commissioned' by the government (nor have I included the statements of journalists who belonged to the political left in the period 2002–2010). Statements from government-aligned politicians are summarized in the following table (Table 2).

The communications of the Fidesz government are similar to each other in that they avoid any legal/professional arguments, while most of them appeal directly to the sense of justice of 'ordinary people' using the rhetoric of populism. It is also not difficult to notice that some criticisms contain a thinly veiled threat or make specific demands about pending cases.

It can be said that while before 2010, we can speak of sporadic criticisms of court decisions that were not based on the presumed or real indignation of public opinion, after 2012, criticisms cannot be examined in isolation, independently of each other; they 'reach a level' both in terms of quantity and content. As such, they can be interpreted not as simple criticism but as systematic pressure.

5 The Response to Pressure

Although the focus of my previous research has been on what judges do (how they decide) rather than what they say (how they speak), in this paper, I take stock of how court leaders have responded to criticisms and attacks on judges' work. This is because it is not only direct pressure that can influence judges' decisions but also the extent to which they are supported by the court leadership and the extent to which they perceive that the leadership of the organization does not leave them alone.

Table 2 Government expectations/criticisms of Hungarian courts (2012–2020)

Number	Name of politician	Political function	The (essence of) the criticism/ expectation	Year	Reaction
1.	Tibor Navracsics	Minister of Justice	In one case, he said that sentencing practice was too lenient and asked the President of the Curia to investigate.[a]	2013	Yes
2.	Antal Rogán	Fidesz parliamentary group leader	The Minister of Justice should investigate why someone was released from pre-trial detention to house arrest in a particular case.[b]	2013	Yes
3.	Antal Rogán	Fidesz parliamentary group leader	The Curia sided with the banks in the case of foreign currency mortgages.[c]	2013	Yes
4.	Viktor Orbán	Prime minister	'I find the court's decision today to allow the anti-Zionist demonstration on Saturday unacceptable.'[d]	2013	No
5.	Viktor Orbán	Prime minister	'It is scandalous that the Curia has decided in favour of the public service providers.'[e]	2013	Yes
6.	Gergely Gulyás	Vice-President of the Parliament	'The judiciary lacks not only the will but also the competence to restore moral order.'[f]	2015	Yes
7.	Szilárd Németh	Vice President of Fidesz	As the so-called Hagyó case and the red sludge disaster verdicts outraged the majority of people, the courts must be held accountable.[g]	2016	Yes
8.	Fidesz (press release)		The penalty imposed on the former chief of the Metropolitan Police and his fellows is outrageously light.[h]	2017	No
9.	Fidesz (press release)		'The verdict in the case of socialist politician Dezső Hiszékeny is outrageous.'[i]	2017	No
10.	János Lázár	Minister for the Prime Minister's Office	'A certain justice of the Curia, András Baka, is very angry with Hungary and because of some 'mysterious coincidence' all company tax related cases are allocated to him.'[j]	2017	Avert
11.	László Kövér	President of the Hungarian Parliament	'[George Soros's organizations] have people in the judiciary.'[k]	2017	No
12.	Viktor Orbán	Prime minister	'The Curia has clearly and grossly interfered in the elections. Studying the ruling of the Constitutional Court, it is evident that the Curia has not risen to the challenge of its task intellectually.'[l]	2018	Yes (partly 'Avert')

(continued)

Table 2 (continued)

Number	Name of politician	Political function	The (essence of) the criticism/ expectation	Year	Reaction
13.	László Trócsányi	Minister of Justice	'[I]t is common nowadays for the judge to reinterpret the law or to give an extensive meaning of the interpreted legal concept that is contrary to the legislator's intention. In this case, the judge takes over from the legislator, and we are faced with judicial governance.'[m]	2018	No
14.	István Hollik	Spokesman of the Fidesz–KDNP[n] parliamentary group	'[The] Helsinki Committee holds pro-immigration sensitization training with the clear aim of sensitizing court staff from the migrants' perspective, representing their interests.' '[...] there is also a risk that in a particular case, an attorney paid by Soros to represent migrants could have a court hearing with a judge in a particular case whom he has sensitized. This clearly puts the independence of the judiciary at risk.'[o]	2018	Curia-Avert; NOJ[p]-Agree
15.	János Halász	Fidesz deputy parliamentary group leader	'[I]t is shocking and very worrying that the Soros network has already set foot in Hungarian courts'; 'Fidesz is requesting data of public interest to the courts about the influence of the Soros network, they would like to know who exactly, what organizations, when, where and for whom such pro-migrant sensitization training has been held for Hungarian court employees.'[q]	2018	
16.	László Kövér	President of the Hungarian Parliament	'The lawyers and politicians of our time must decide for themselves which values they will defend and on whose side they will stand: those who defend and build the state, or those who attack and destroy it.'[r]	2019	No

(continued)

Table 2 (continued)

Number	Name of politician	Political function	The (essence of) the criticism/ expectation	Year	Reaction
17.	Viktor Orbán	Prime Minister	He criticized a court's decision to award compensation to the families of Roma children who had suffered segregation and another court's decision to grant parole to a convict for a crime against life.[s]	2020	No[t]

[a]Prime Minister Viktor Orbán said in Parliament that in a 'private' conversation he would also find the sentence too lenient. https://bit.ly/39fNfz9

[b]Babett Oroszi: Rogán bepöccent Rezesova luxusbörtöne miatt [Rogán pissed off about Rezesova's luxury prison]. 24.hu 3 December 2013. https://bit.ly/3NJZByw

[c]Rogán: a Kúria a bankok oldalára állt [Rogán: the Curia sided with the banks]. HVG 16 December 2013. https://bit.ly/3MRWSlq

[d]Prime Minister's statement, 3 May 2013. https://bit.ly/3aRfWTw

[e]Orbán harcba hív az energiaszolgáltatók ellen – percről percre [Orbán calls for a fight against energy suppliers – minute by minute]. HVG 11 March 2013. https://bit.ly/3Hephkm

[f]Tolmácsot ajánlok! [I recommend a translator!]. Népszava 26 Juny 2015. https://bit.ly/3NS5mdC

[g]Az igazság bajnokai [Champions of justice]. 168 óra 16 February 2016. https://bit.ly/3HeWpIF

[h]MTI: Fidesz: Felháborítóan enyhe a Gergényi-ítélet [Fidesz: The Gergényi verdict is outrageously mild]. Magyar Idők 13 February 2017. https://bit.ly/3HknhqS

[i]Nem tetszik nekik a jogerős ítélet, máris fenyegetőzik a Fidesz [They do not like the final judgment, Fidesz is already threatening]. Magyar Narancs 30 January 2017. https://bit.ly/3xFIZST

[j]Péter Urfi: A Kúria reagált Lázár János szavaira, aki szerint direkt olyan bíróhoz kerülnek a tao-ügyek, aki 'haragszik Magyarországra' [The Curia reacted to the words of János Lázár, who said that the corporate tax cases will be directly assigned to a judge who is 'angry with Hungary']. 444.hu 16 November 2017. https://bit.ly/3Qhh6I4

[k]Judit Windisch: Kövér átjavította a nemzeti konzultáció egy pontját – videón pár erős mondása [Kövér reworked a point of the national consultation – video of some of his strong statements]. HVG 6 October 2017. https://bit.ly/3tyo161

[l]MTI: Curia has grossly interfered in elections. 7 May 2018. https://rb.gy/ttodn1

[m]A bírói kormányzás antidemokratikus [Judicial governance is anti-democratic]. 26 May 2018. https://rb.gy/rgcojf

[n]KDNP – Christian Democratic People's Party

[o]A Fidesz szerint Soros György befolyásolja a magyar igazságszolgáltatást [Fidesz says George Soros is influencing the Hungarian judiciary]. 168 óra 26 May 2018. https://bit.ly/3xSC1dv

[p]NOJ – National Office for the Judiciary

[q]Újabb fokozatba kapcsolt a Fidesz támadása a bíróságok ellen [Fidesz's attack on the courts has entered a new gear]. HVG 27 May 2018. https://bit.ly/39p4huG

[r]A természet rendjét tagadó liberális veszély miatt a bíráknak el kell dönteniük, hogy az államot építők vagy rombolók oldalára állnak [The liberal threat to the natural order means judges must decide whether to side with the builders or the destroyers of the state]. 444.hu 24 April 2019. https://bit.ly/3NPiQH0

[s]Orbán szerint a gyöngyöspatai cigány diákok szegregációs kárpótlása mindenféle munka nélkül kapott pénzt [Orbán Orbán says gypsy students in Gyöngyöspata received segregation compensation without doing any work.]. Index 9 January 2020. https://bit.ly/3xKNco8

[t]Following the Prime Minister's statement, the panel of the Curia, which was hearing the case of compensation for segregation, stated that 'according to Hungary's Fundamental Law, judges are independent and subject only to the law, and cannot be instructed in their judicial decision-making'. https://bit.ly/3zuXiuQ

Between 2002 and 2010, the statements of Péter Medgyessy and László Kovács were clearly and firmly condemned by the then President of the Supreme Court, Zoltán Lomnici.[23] In the latter case, the president of the court that handed down the judgment also called the statement of László Kovács 'unprecedented'. The President of the National Council of Administration of Justice, after hearing the presidents of the courts, replied to József Petrétei's letter that they would continue to act as they had done until then, in accordance with the law.[24]

In contrast to this unanimity, the picture is much more mixed when looking at reactions after 2012. For the sake of clarity, these are presented separately for the actors concerned. In brackets, I also indicate the case to which a particular reaction relates using the ordinal numbers in Table 2.

5.1 The Curia

In Hungary, the Curia functions as a supreme court. Although there is no precedent system in the country (only a weak form of it was introduced in 2021), because of the wide range of ordinary and extraordinary remedies channelled to the Curia and because of its duties in the field of the unification of judicial practice, it is a judicial organ which plays a crucial role in the court system. This is why it is a justified expectation that its president should react to criticism addressed to a particular judgment or adjudicative practice.

The former President of the Curia, Péter Darák (between 2012 and 2020), responded to Tibor Navracsics' letter criticizing the excessive leniency of sentencing practice in a statement in which he stressed the importance of the independence of the courts, while he 'welcome[d] and underst[ood] the attention and concern of a Minister of Justice for the Curia's responsibilities in guiding the judicial practice' (1).[25] He also stood up for the Curia's 'foreign currency debtors' decision, and while he recognized the importance of the social problem caused by the foreign currency debts, he said that treatment of the crisis was not primarily a task for the courts but for politics (3).[26] In the Rezesova case, he stressed that 'any statement that could be used to create the appearance of influencing proceedings must be opposed' (2).[27]

[23] Lomnici a primitívezés ellenzőitől félti a jogállamiságot [Lomnici Fears the Rule of Law from Opponents of Primitivism]. https://bit.ly/3ttiayU.

[24] Minutes of the meeting of the Parliamentary Committee on Constitutional Affairs, Justice and Administration held on 28 November 2006. https://bit.ly/3xL1Ufb.

[25] A Kúria mindent megtesz az egységes ítélkezési gyakorlatért, de a Cosma-ügyben jelenleg nincs tennivalója [The Curia is doing its utmost to ensure uniform case law, but there is currently nothing to do at the moment]. 17 May 2012. https://bit.ly/3aQdkoJ.

[26] Devizahitelek – Darák Péter: a Kúria nem tehetett többet (1.) [Foreign currency loans – Péter Darák: the Curia could do no more (1.)]. 18 December 2013. https://bit.ly/3zwJ3We.

[27] Zsuzsanna Wirth: Edzett bírák akadtak ki Rogán üzenetén [Trained judges upset by Rogán's message]. Origo 5 December 2013. https://bit.ly/3xoJtLJ.

The President also defended the judicial decision about the 'consumers vs public service providers' case on the basis of the Fundamental Law, stating that 'public confidence in the courts can only be preserved if the opinions expressed on their work are objective, professional and based on accurate knowledge of the facts. Reactions and opinions outside the procedural framework do not influence judgements' (5).[28]

On the day after the statement of Szilárd Németh, Darák responded strongly in defence of the independence of the judges, but in a general way, without referring to specific cases and without mentioning the critic's name (7).[29]

In comparison, in response to a journalist's question concerning the criticism by János Lázár, who personally attacked a judge of the Curia for his decisions and criticized the case allocation system, the Curia answered that 'they do not respond to political statements of public figures' (10).[30] The Curia expressed an almost identical reaction to press inquiries about the government's response to the government party's accusation that 'Soros organizations' were gaining ground in the courts (14–15).[31]

Regarding one of the most direct and clearly slanderous criticisms (the electoral case), the President of the Curia considered it important to say that anyone has the right to criticize the decisions of the courts, including the Prime Minister but also explained that 'judges make their own professional decisions, and what the press brings up to justify [the] political motivation [of the court] is open to question' (12).[32]

It must be noted that it was also Péter Darák who, at the end of his presidential term, emphasized in an interview that judges must not adjudicate for the public mood.[33] In my view, this can be seen as making a stand against pressure from the government because the government attacks were rhetorically made 'in the name of the people' instead of emphasizing any public policy considerations.[34]

[28] Darák visszaszólt Orbánnak: 'a bírák függetlenek, nem utasíthatóak' [Darák hit back at Orbán: 'Judges are independent, they cannot be ordered about']. HVG 13 March 2013. https://bit.ly/3mJ80Gx.

[29] Communication from the President of the Curia, 1 February 2016. https://bit.ly/3mIbaue.

[30] Péter Urfi: A Kúria reagált Lázár János szavaira, aki szerint direkt olyan bíróhoz kerülnek a tao-ügyek, aki 'haragszik Magyarországra' [The Curia has reacted to János Lázár's words that the Tao cases will be handed directly to a judge who is 'angry with Hungary']. 444.hu 16 November 2017. https://bit.ly/3mGKiKR.

[31] Judit Windisch: Behódolt a Fidesznek az Országos Bírói Hivatal [The National Office for the Judiciary has given in to Fidesz]. HVG 28 May 2018. https://bit.ly/3aY8Nkf.

[32] Tamás Németh: Elmagyarázta a Kúria elnöke a levélszavazatos döntésüket [The President of the Curia explained their decision to vote by letter]. Index 7 May 2018. https://bit.ly/3mLov4E.

[33] András Sereg: Nem a közhangulatnak kell ítélkezni – Darák Péter az Indexnek [Not to be judged by public sentiment – Péter Darák for Index]. Index 2 November 2020. https://bit.ly/3tuISH6.

[34] Bencze (2020), pp. 83–96.

5.2 The NOJ

The National Office for the Judiciary (NOJ) has been much more restrained in its reactions to criticism of the courts. The reason for this may be the different conceptions of the role of the two presidents, but this may also be because the criticisms have mainly concerned judicial activity and less concerned the organizational and personnel issues that fall under the competence of the president of the NOJ.

The president reacted to Szilárd Németh's aforementioned opinion in a statement a day later, in which she 'asked' the 'representatives of the other branches of government to respect the independence of the judiciary and to trust in the responsibility of the judiciary'. During the same press conference, there was also a reference to the responsibility of the presidents of the courts: 'As long as judges are not influenced by different opinions, the courts, [and] the presidents of the courts, must pay close attention to these voices' (7).[35]

The response of the president to Gergely Gulyás' statement criticizing the work of the courts is also a telling one. In it, in addition to stating that 'the presidents of the courts must take more decisive action against attacks on judges', she considered the most important task to be fighting against 'delaying' cases and wanted to see the legislation changed so that annulments and orders to repeat the whole trial court procedure could only take place in the case of serious procedural errors (6).[36] The intention to avoid confrontation is even more apparent in the statement responding to the accusation of 'Soros organizations' gaining ground in the courts. The reaction was not that there was no evidence of any illegitimate influence (which is the case in reality), but that '[t]he general experience of recent years has shown that the activities of individuals or organizations, including education, may be aimed at imposing their preferred worldview and interpretation of the law on judges. What we believe to be benevolent knowledge sharing may in fact be an attempt to influence' (14–15).[37]

[35] Függetlenség és felelősség [Independence and responsibility]. https://bit.ly/3mGADUE.

[36] Handó Tündének elege lett a bírákat ért támadásokból [Tünde Handó fed up with attacks on judges]. HVG 23 Juny 2015. https://bit.ly/3tvw57v.

[37] Oktatásnak vagy kutatásnak álcázott befolyásolási kísérletek [Attempts to influence disguised as education or research]. https://bit.ly/3tgEjze.

6 Conclusion

Looking at the reactions of the leaders and representatives of the domestic judiciary described above, several observations can be made. The first is that, over time, leaders elected by parliament have responded to criticisms of the government with less and less frequency. Until 2017, every negative government utterance but one was met with a judicial response. Thereafter, there was either no response or, if there was, it averted or accepted the criticism (and often only in answer to press inquiries). It is also important to note that several of the court leaders' statements emphasized the government's right to criticize, an element which was completely absent from the statements of leaders before 2010.

Second, the tone and the language in which court leaders communicated have become much softer and more diplomatic than before 2010; they speak now in general terms, not even mentioning the names of the politicians who attacked them or the specific cases they reacted to.

Finally, it also appears that the president of the NOJ was much less firm in her opposition to government criticism than the president of the Curia, who was responsible for the unity of judicial practice, and that agreements with criticisms came largely from her.

In light of all this, it is perhaps not premature to conclude that the constant pressure, year after year, case after case, has had its effect and that the court leaders, after a while, stopped engaging in open confrontation and became defensive. There is, therefore, no well-defined specific case to which the turnaround can be linked. Rather, reaching the 'breaking point' can be understood in terms of the analogy of the mathematical 'catastrophe theory'. The essence of this theory is that contrary to our intuition, continuously and linearly changing circumstances may not only have gradually changing effects but also cause sudden, significant transformations. For example, the N+1th straw on the back of a camel breaks the camel's back, but this straw is no different from the previous N straws ('quantity turns into quality').[38]

Similarly, 2017 did not witness anything new compared to the previous government's behaviour, but only a continuation of the constant pressure that may have led to the weariness of the judicial leaders. The consistency of the pressure has made the government's behaviour (even a fraction of which had caused huge uproar before 2010) increasingly 'normal'. Besides this, at that time, it was becoming more evident that Fidesz would win the following general election to be held in 2018, which is why, considering the interest of the judiciary, it would not have been a good strategy to antagonize the government.

The fact that constant criticism has created a 'catch-22' situation for these leaders has contributed to this situation. If they take little or no action, they may radically reduce confidence in the courts, as the perception will be that the judiciary has given up its independence and succumbed to pressure from the government. If, on the other hand, they firmly reject and condemn slanderous government criticism at every turn,

[38] Stewart (1992), pp. 208–221.

they may unwittingly compromise the appearance of neutrality and be accused of 'doing politics'.[39]

What also makes resistance more difficult is that the government does not usually criticize the courts on the grounds of its own political aims but emphasizes that the judges' decisions are contrary to the opinion and sentiment of the average citizen. In a climate where there is growing demand for courts and their representatives to come down from their 'ivory towers', it is difficult for them to resist the demand to take into account the views of 'ordinary people'.[40]

In addition, it cannot be ignored that the changes in the organization of the judiciary and other of the government's activities concerning the courts, which have been negatively assessed by domestic[41] and international organizations,[42] have been *in strictu sensu* legal (even if there were legislative changes that were later found to be unconstitutional). For a legal community essentially socialized on legalism, this is also a circumstance that takes the wind out of the sails of effective resistance since it is precisely the institutional system set up to enforce the law that should be opposing government regulations that are legally flawless.

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[39] Shapiro (2012), p. 334.

[40] For more on this, see Bencze (2022), pp. 50–54.

[41] Amnesty International (2020); Hungarian Helsinki Committee (2018).

[42] European Commission: Opinion 663/2012 (CDL-AD(2012)001), https://bit.ly/3Hidlhn; European Commission: Opinion 683/2012 (CDL-AD(2012)020), https://bit.ly/3MJ5Tgr; European Commission: Opinion 943/2018 (CDL-AD(2019)004), https://bit.ly/3MI1Ukb; European Commission: Opinion 1050/2021 (CDL-AD(2021)036), https://bit.ly/3MJKxzq; European Parliament: Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012 (2012/2130(INI)), https://rb.gy/9sgpcz; European Parliament: Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), https://rb.gy/yhzdn5; ENSZ-szakértő: veszélyben a magyar bíróságok függetlensége [UN expert: independence of Hungarian courts at risk]. HVG 8 April 2019. https://bit.ly/3HdC8TT.

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‘The Past Is Unforgettable’: Civil Procedural Law’s Response to the Challenges of Pseudo-Modern Society and Economy in Hungary After 2010

Balázs Timár

Abstract In this chapter I want to look at civil procedural law from a legal history perspective. My aim is to present one of the flagships of the post-2010 procedural reform, the Code of Civil Procedure, in a legal-historical context. In this context, I will describe the characteristics of pseudo-conservative legislation, with a focus on the merging of substantive and procedural law, and on dogmatic anomalies that not only theory but also practice have to face. In my view, knowledge of legal history can also bring us closer to understanding the presumed intentions of the legislator and to interpreting the resulting legislation. In this context, I will examine the process of what I call procedural law reform, after reviewing the legal and taxonomic antecedents. In the context of the latter, I will present the problems of pseudo-conservative legislation and the contradictions of legal historicism through the fundamental provisions of the Code. Also in this chapter, I intend to illustrate the consequences of centralisation and the abolition of special courts through the way in which labour courts were abolished. The chapter will conclude with a comparative and introspective evaluation of the new law.

1 Introduction: Traditions and Problems with Civil Procedure

The traditions and problems of civil procedure are complex. Civil procedure is one of the most conservative areas of law. Despite their many inflexibilities and socio-economic relations, which by their very nature change rapidly and apparently without specific reason, litigation systems respond slowly, only after significant delay. However, this also creates an advantage since it is precisely this so-called conservatism which, even a century later, allows principles, characteristics and

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traditions to emerge, resulting in some sort of stability. It is also necessary that the changes and needs justifying the regulation reach the critical mass that forces reform.

The roots of civil litigation stretch back millennia and its practice has evolved slowly, often over decades, but certain basic principles have remained unchanged since Roman law.

The conservatism of civil procedural law gives rise to its inevitably organic nature. When the Hungarian legislator needed to create a new code of civil procedure, there were two reasons for this. The first was Act IV of 1869, which separated the judiciary from public administration, including at the lower levels, and the second was Dualism itself. Since half of the Austro-Hungarian Monarchy's exports went to Germany, and this had a direct impact on the Hungarian economy,[1] it is no exaggeration to say that the nature of civil law relations in this way justified the creation of a code that would allow disputes to be settled in a Western way in Hungary. Even if the effect was indirect, the resulting change in commercial attitudes certainly justified the reform, and this was not in contradiction with the fact that the rules of civil litigation are fundamentally slower to respond to external stimuli than other areas of law.

As the application of the law evolves, so does judicial practice, which is sometimes stricter but sometimes more permissive towards the behaviour of litigants. By virtue of their position, legislators can only give the practitioner the means to comply with principles that are still so relevant today, such as the requirement to bring proceedings to a conclusion within a reasonable time. However, it should not be overlooked that the requirements of speed, professionalism, and fairness in litigation are a triad that can only be achieved at each other's expense.

A century after the last comprehensive and substantive reform, the legislature felt that the time had come to create a new code for the area of law that handles the bulk of disputes before the public judiciary. The conceptualization of Act CXXX of 2016 on the Code of Civil Procedure (CCP) identified a dozen objectives and principles that must be kept in mind during the codification process. These included, for example, the systemic achievement of efficiency in litigation; the formulation of new principles in the service of efficiency, including the emphasis on the principle of the concentration of litigation and the creation of different rules; the establishment of procedural rules that promote the separation of litigation and conciliation between the parties; and the introduction of a split structure, i.e. the division of the litigation procedure into a pre-trial phase and a trial phase.

It can be said that the legislator has identified the problems that have emerged in the civil justice system since 1989 and has had all the means to provide adequate responses to them. More than a century of domestic developments involving tried and tested principles and legal institutions were available and referred to by the legislator.[2] Given that this is the case, it is worth reviewing the solutions adopted in Act I of 1911 on the Code of Civil Procedure (CPC I) so that the yardstick defined by

[1] Katus (2012), p. 464.

[2] Wopera (2019), p. 3.

the Code of Civil Procedure applied to itself is one of the guiding principles for the analysis.

Accordingly, the present paper aims to outline the development of civil procedural law from 1868 to 1911, then from 1952 onwards, and finally (1c) in the decades after the regime change. It then examines the problems of pseudo-conservative legislation as a cornerstone of procedural reform and the problem of historicism through the lens of principles, in particular, the duty of truthfulness, verbosity and perception, and the counter-productivity of regulatory rigidities. In a striking example of taxonomic anomalies, and following the necessity of proof, it seeks to assess the success of Act CXXX of 2016 (CPC III) compared to CPC I on the one hand and as a stand-alone code on the other.

2 Outline of the Development of Modern Hungarian Civil Procedural Law

2.1 The First Steps of Professionalisation: Hungarian Regulation in the Dualist Era

Given that the Dualist era between 1867 and 1918 had, in practice, ended by the time CPC I came into force, it is worthwhile moving away from the period of public history in terms of the history of procedural law.

After Reunification in 1867 when Hungary gained almost full independence, two measures in the field of civil justice once again became urgent for Hungary. The first was establishing a system of judicial organisation and separating the judiciary from the public administration at the lower level, which was achieved by Act IV of 1869. The second was the creation of rules of civil procedure adapted to the new system.[3]

The Hungarian legislature had already regulated civil litigation in Act LIV of 1868, but this was based on the assumption that the regulation would only be temporary, and it was also clear that this Code was only able to meet the needs of the time to a limited extent. In the West, both French and German civil procedural law moved in the direction of the oral procedure. In contrast, our own procedural law was modelled on the Austrian Code of Civil Procedure. It is no coincidence, therefore, that the lower house of Parliament, even before the adoption of Act LIX of 1881, which was designed to remedy initial shortcomings, passed a resolution to prepare a code of civil procedure based on the principles of orality, immediacy and publicity. As a result, two drafts were prepared on behalf of the Minister of Justice, Tivadar Pauler. The proposal drafted by Kornél Emmer, Member of Parliament, covered the procedure before the courts, rules of evidence and the emergency procedure, while the one prepared by Professor Sándor Plósz covered the entire

[3] Fabinyi (1931), p. 1.

civil procedure except for the rules of evidence.[4] The thus-commissioned drafts were ready by 1893, with Kornél Emmer taking French civil procedure law as the basis for his, and Sándor Plósz German civil procedure law.[5] It was already clear then that there were fundamental differences between the two sets of rules of procedure, making it impossible to combine them.

2.2 *The Idea and Its Shadow: Socialist Procedural Law in Hungary*

Of course, the later legislation of the twentieth century was not free from the application of foreign models, but this time, the legislator's attention was turned more to the East. The process of codification was still being carried out and could be undertaken by legal scholars whose legal 'education' had been influenced by CPC I of the early twentieth century.[6] Since 1923, socialist trials had been characterised by the fact that the court had to take action on the motion to obtain evidence where appropriate since it was legally obliged to establish the 'material' truth.[7]

The tasks which the courts of a people's democracy in Hungary were called upon to perform could, in the opinion of the legislature, only be successfully accomplished if the procedural rules of our judicial system gave citizens full guarantees for the enforcement of their personal and property rights in civil law if they allowed the direct participation of a wide range of workers in the judiciary of labour courts, and if they made substantive justice the basis for litigation decisions. In the view of the legislator at the time, these requirements made it necessary to replace CPC I with a new, 'democratic' Code that fully implemented the guarantees of procedural law.[8] In this context, it should be noted that the need for attempts to ascertain the substantive truth, which Artúr Meszlényi had previously advocated, was—rightly—omitted from the previous legislation[9] but was now included here, only to be removed again in due course. It is true that, after 1957, the novel 'objective' interpretation of truth that had developed in legal literature gained ground—even though the law did not contain any references to the notion of truth..[10]

[4] General Explanation of Article I of Act I of 1911 on the Code of Civil Procedure.

[5] Kengyel (1989), p. 48.

[6] This is supported, among other things, by the fact that a special hybrid version of the obligation to serve process may have developed, i.e., Hungarian civil procedural law was free from the principle of investigation as such even in the 1950s, despite the fact that several socialist procedural institutions were incorporated into the new code, including the protest of legality, the reduction of the need for lawyers, and the institution of people's assessors. See Kengyel (2012), p. 62.

[7] Kengyel (1989), p. 57.

[8] General explanatory memorandum to the original text of Act III of 1952 on the Code of Civil Procedure.

[9] Kengyel (1989), p. 49.

[10] Kengyel (1989), p. 33.

2.3 The Market Economy and Litigation: Responses to the Social Challenges of Regime Change

After 1989, Hungary faced a task that was a particular challenge even for experienced states. The strengthening of private property and the diversification of civil law relations posed a number of challenges to the legislator, and the most far-reaching amendments to the RPC became necessary. The most important of these was Act LXVIII of 1992 on the establishment of a review procedure in Act III of 1952 on the Code of Civil Procedure (CPC II) and related legislation, which, although it was adopted because of the unconstitutionality of the prosecutor's challenge to the legality of the law, nevertheless contained the necessary innovations required for the change of economic system.[11]

Subsequently, the Supreme Court, and later the Curia, guided the development of civil procedural law in Hungary with several decisions and rulings.

3 The Cornerstone of Procedural Reforms After 2010

3.1 The Problems of Pseudo-Conservative Legislation

The Fundamental Law of Hungary professes faith in tradition and respect for past generations. Considering the place of the Fundamental Law in the hierarchy of legislation, it can be concluded that this respect for tradition, this classical conservative ideal, has permeated all legislation since its adoption and entry into force, especially the classical codes.

Since about two decades after 1989, a situation was restored whereby legislation became possible without compromise, and this is reflected more than ever in the Fundamental Law and the codes of procedural law reform.

This is a fortunate situation, as the process of drafting Act CXXX of 2016 on Civil Procedure Code (CPC III) is clearly traceable through government decisions and study volumes. The legislative revision aimed to produce a modern code of civil procedure, in line with international (presumably good) practice, which ensures the effective enforcement of substantive rights and, drawing on the results, or rather the acquis, of jurisprudence and legal practice, regulates litigation clearly and coherently, taking account of the latest technological developments, thus making life easier for clients and the related professions.

According to the general justification of the Civil Procedure Code, its regulatory solutions are based on the regulatory solutions of traditional European codes of procedural law, which can be considered models, in particular, the German Code of Civil Procedure of 1877 and the Austrian Code of Civil Procedure of 1895, as well as

[11] General Explanatory Memorandum to Act LXVIII of 1992 establishing the review procedure in Act III of 1952 on the Code of Civil Procedure and related legislation.

the provisions of the Swiss Federal Code of Civil Procedure, which was codified in 2008. It also takes into account the solutions provided by the codes of civil procedure of the Central and Eastern European countries that have been recodified in recent decades, such as the Slovenian Code of Civil Procedure and the Croatian Code of Civil Procedure.[12]

In principle, CPC III sought further to develop the existing traditions of Hungarian procedural law, preserving the split trial system introduced in Article I of CPC I, the definition of the tribunal as a court of general jurisdiction, the uniform procedure modelled on the tribunal, and the mandatory extension of legal representation to all tribunal cases. The question rightly arises to what extent such selection was necessary, i.e. to what extent was it fortunate to extract specific provisions from the coherent, unified approach and solutions, and also from the provisions of CPC I—thereby disrupting its uniformity—and to insert alongside them, even if only in principle, the rules of other nations whose legal development was nominally independent of Hungary's.

CPC III sought to achieve the main legislative objective of the Act by introducing a number of innovations, reviving legal institutions with a long tradition in Hungarian procedural law and, where necessary, adapting them to the requirements of the time: ensuring the efficiency of litigation at the systemic level. The realisation of this objective required systemic changes, in-depth reform or an outright break with pre-existing procedural solutions.[13] This may give rise to criticism in some quarters of the legal community that the legislator has sought to ignore the progress made by judicial practice and jurisprudence in the field of civil procedure over the last half-century or so. It should be noted here that the main objective of efficiency in litigation would have been achieved under the rules previously in force if the 'burden of disregard'[14] had been genuinely hanging over the heads of litigants in the practice of the courts, usually of second instance.

From the above, it is clear that the lens into the past, into an idealised era that never existed—is blurred—it was an era in which the problems of procedural law were similar. The period in the history of ideas that served as a model and is reflected in the above-quoted part of the Fundamental Law refers to an era that was only a shadow of an even earlier, even more idealised one.

While a century ago, after the lost war and two revolutions there was still concern about the unsustainability of authority[15] and the old establishment's place, this is no longer the case. Although the period of Plósz's practice of litigation has handed down to posterity a number of experiences, reference to these can be regarded as biblical[16] rather than real, since the legislation only held the words and gave away the meaning. As will be illustrated later in this study, the reference to the past, to

[12] General Explanation of Act CXXX of 2016 on the Code of Civil Procedure.

[13] General Explanation of Act CXXX of 2016 on the Code of Civil Procedure.

[14] Sections 3 (3) and 8 of Act III of 1952 on the Code of Civil Procedure.

[15] Szekfű (1989), p. 412.

[16] Gen 3, 7.

roots, has remained in most cases at the level of mere words, making the CPC III. An example of historicist legislation, a tradition without substance, which was drafted with the same possibilities as in the period it was intended to revive.

3.2 Legal Historicism in Principles and Courts

Of course, Article I of CPC I was not without its novel amendments, but these were typically the result of public history rather than due to the whims of the legislator. Royal power could not be asserted to the full given the privileges of the order, and there was also a lack of the declaration of the principle of due process of law, the immovability of judges, the independence of proceedings and the proper organisation of the courts.[17] The legislature had remedied some of these issues before the turn of the century, but the procedural principles were still to be found in the rules of civil procedure.

The obligation of the parties to provide truthful information is one such principle, despite the question of whether the parties have a duty to provide truthful information in civil proceedings, which is a recurring controversy. CPC I provided (in substance, in line with the current legislation) that a party or representative who, against their better knowledge, asserts a fact in a case which is manifestly untrue, denies a fact in a case which is manifestly true or relies on evidence which is manifestly unfounded, shall be fined by the court.[18] It is noticeable that while the turn-of-the-century legislation imposed an explicit obligation regarding all facts, the new legislation maintains it only regards 'material' facts, leaving it to the courts to decide what is material in a civil action. In particular, the obligation to tell the truth no longer derives from the requirement of good faith but from the parties' obligation to support the proceedings and has been codified accordingly.

In addition to doctrinal clarity, the social costs of a civil action justify the emphasis on the responsibility of the party with respect to the veracity of the facts and statements made by them. The duty of truthfulness applies, as in CPC I, to the representative and the intervener when they make statements of fact. Since other participants in the proceedings—in particular, witnesses and experts considered to be providers of evidence—make statements of fact which are, from a doctrinal point of view, different from those of the party, the special rules and legal consequences that apply to them are applicable.

Throughout legal history, civil litigation has gradually shifted from the written to the oral form.[19] Article 5(1) of CPC II was clear when it said that the court shall decide disputes in open court. In my view, it follows that what is said orally has

[17] Magyary (1939), p. 27.
[18] Act I of 1911, § 222.
[19] Magyary (1939), p. 27.

significance, albeit not to the same extent as in criminal proceedings. However, the fact is that the oral statement had much greater significance in the system of CPC II.

The principle of verbality is even specifically mentioned in CPC I. Both the law's text and its explanatory memorandum specifically refer to it. The preparatory nature of the writ as a document to be cited is rooted in the nature of oral proceedings and is also rooted in our current law. The nature and purpose of the oral procedure required that the application, as the basis and subject matter of the proceedings, be capable of being presented at the oral hearing. Without the presentation of the claim, the oral hearing would have been a mere argument without direction, which would have been incomprehensible in itself and, in the legislature's view at the time, would not have been able to inform the court sufficiently of the state of the case. Therefore, if the action was to be brought at the oral hearing in any event, there was no reason why the court should consider the prior notice of the action, rather than the oral presentation, to be the operative part of the proceedings. The primacy of oral pleading was also supported by the fact that the plaintiff could amend the statement of claim on the day of the hearing, which they could do under Article 68 of Act LIV of 1868.[20]

CPC II regulated this issue so that the plaintiff was entitled to withdraw from the action as long as the defendant had not presented a counterclaim at the first hearing and was not restricted by the fact that a preparatory document was created after the receipt of the statement of claim.[21]

CPC III, on the other hand, actually takes a major step towards literacy by referring to the split structure. Declarations of *lis pendens*, which are recorded at the end of the proceedings, may be changed only in the cases and under the conditions laid down by law, and it has become a general rule that declarations of lis pendens may be made only on the summons of a court.[22] The only exception to this rule is the amendment of the statement of claim and statement of defence, which may be made without a specific invitation.[23] In connection with this, the legislator refers to practical experience in the application of the law, which has been identified as a frequent and significant cause of delays in litigation and a shortcoming of the current legislation, which does not or only partially restricts the right to amend the statement of claim, the defendant's right to change the defence at first instance being virtually unlimited and the parties being able to present their evidence and motions at almost any time.

The legislator, guided by the interest of ensuring the concentration of the litigation, bases the limitation of the amendment of the action on the fact that the defendant and the court may reasonably expect the plaintiff to prepare their action properly and, beyond a certain point, to consider the framework of the dispute as closed, without having to follow the plaintiff's new factual submissions, legal positions, arguments and requests. A related novelty is that it extends this limitation

[20] Explanation of Article 129 of Act I of 1911.

[21] BH 1998. 133.

[22] CPC III. Article 203 para. (1).

[23] CPC III. Article 202 para. (2).

to the amendment of the statement of defence. The law also limits the submission of motions and evidence in the statements of defence so that the closure of the statement of defence essentially fixes the scope of the evidence.[24]

Compared with the system of CPC I and the current legislation, this can be considered a step backwards, even if the objective to be achieved is otherwise desirable and in line with the requirement of a fair trial within a reasonable time. It is worth remembering that CPC I was clear that '[t]he plaintiff's presentation of his claim is not bound by the content of the statement of claim served with the summons'.[25] In comparison, Article 183 of CPC III already introduces substantial limitations, e.g., it threatens to impose a fine in certain cases,[26] but even more explicit limitations are contained in CPC III Therefore, CPC I cannot be considered a model since its essence—verbality—disappeared with the entry into force of CPC III.

At the turn of the century, a particularly relevant and important innovation was the declaration of the judiciary as a state prerogative, with judgments being made in the name of the Holy Crown.[27] Until recently, the designation of the origin of the right to judge was an integral part of the Hungarian judiciary. However, with the entry into force of the Fundamental Law, the reference to the depository of sovereignty has been dropped.

CPC I provided that the Tribunal shall have jurisdiction over all suits not referred to the jurisdiction of the District Court.[28] CPC I, in regulating the jurisdiction of the district courts, was based on the premise that it should cover primarily cases defined according to the value of the subject matter of the action and those cases whose subject matter, irrespective of value, fitted the profile of the individual court, either because of its simplicity or because of the need for a speedier procedure. Given that only a very limited number of cases were assigned to the district court, which acted as a single court, it can be said that the model of the first instance court had already been introduced, with the addition that, in the absence of separate administrative and labour courts as we understand them today, the law also divided the cases falling under their jurisdiction between the courts of the time.

CPC III, on the other hand, clearly drew on the first instance jurisdiction of the court when it reformed the rules of recourse to the court while excluding trainee lawyers from the training required during their compulsory internship (effectively eliminating the internship required for the bar exam) by making legal representation compulsory,[29] also a major step towards addressing the overstaffing of the legal market.

[24] Explanation of § 214 of Act CXXX of 2016.

[25] CPC I. Article 178.

[26] CPC III Article 183(5).

[27] Fabinyi (1931), p. 8.

[28] Act I of 1911, § 2.

[29] Act CXXX of 2016, § 75 (3).

CPC III models the unified civil procedure as a professional procedural system and defines the tribunal as the court of first instance with general jurisdiction on the basis of the corresponding theoretical and doctrinal foundations. The codification of civil procedural law is based on the four-tier court organisation that was re-established at the turn of the millennium. Its task is to ensure the optimal allocation of groups of cases within this structure, with a division of labour in terms of content in accordance with the function of each level of court, using the rules governing jurisdiction and competence. The model of the single trial and the general jurisdiction of the tribunals expresses the essence of the four-tier court system in a clear and principled way: the courts of first instance, which have a general jurisdiction, are the counterpart of the courts of appeal, which have a purely appellate function. The legislator has rightly stated that the transfer of general jurisdiction to a tribunal is not alien to Hungarian procedural law and is mainly in line with procedural law traditions, although the four-tier system of organisation and the primary existence of a tribunal of first instance would not necessarily follow from each other but could nevertheless be given substance in practice.[30]

Another glaring difference in jurisdiction where the legislator did not want to return to the previous system is the system of special courts. CPC I provided for several other forums apart from ordinary courts. As an alternative to the state justice system, CPC I specifically mentioned the proceedings of two bodies.

Title XVII of Article I of CPC I contained all the rules applicable to arbitral tribunals, but there were also scattered rules in Article 2 (jurisdiction of the tribunal of first instance), Article 59 (disqualification) and Article 180 (objections to prevent litigation). Unlike the law in force, the rules of CPC I were subsidiary in nature, but their application by analogy required the agreement of the parties.[31] The principle of bilateral hearings was established as a basic principle, and the arbitral tribunal complied with this requirement, providing that and allowed the parties to have their trials by these rules.[32] The principle of negotiation did not prevail; the parties could present their case at their expense in the manner determined by the arbitral tribunal, and, of course, could be represented by a lawyer.[33] There was somewhat greater dependence on the state courts than at present; for example, the ordinary court could, at the request of either party, set a reasonable time limit for the delivery of the judgment at the unsuccessful expiry of which the arbitration agreement would be void in the proceedings.[34]

The only provision that seems specific is that the administrative and labour court has jurisdiction over labour cases within the scope of CPC III, except for the recent legislative period on administrative adjudication. Of course, recentralisation has also prevailed over time in relation to special courts, so under Act CXXVII of 2019, as of

[30] Explanatory memorandum to Article 20 of Act CXXX of 2016.

[31] Fabinyi (1926), p. 172.

[32] Fabinyi (1926), p. 174.

[33] Fabinyi (1926), p. 177.

[34] Act I of 1911, § 780.

1 April 2020, the tribunal will act as a labour court under Article 20(2) of the Labour Code.

The consequence of this provision is not only the abolition of the autonomous administrative and labour courts but also the fact that the courts of appeal in labour cases, which had previously played no role in labour adjudication, are now empowered to hear appeals from labour cases. However, it is also a fact that, due to legislative changes in recent years, the jurisdiction of labour courts has been steadily eroded, and an increasing number of disputes that would otherwise arise from employment relationships have been transferred to other judicial forums.

3.3 Systemic Anomaly: A Substantive Legal Provision in CPC III

One of the important innovations of CPC III is the new legal institution known as the necessity of proof, which has its roots in medical malpractice cases. According to the explanatory memorandum to CPC III, 'if the exact cause of the victim's injury cannot be established, all the possible causes connected with the hospital's activities must be examined. If the hospital cannot prove that it acted with due care in relation to a possible cause, its liability for damages may be established'.[35] The explanatory memorandum refers to several curia decisions, all of which have in common that they were taken by the same council, and raises the question of how a legal instrument creating a substantive hybrid of general and special rules of liability for damage in dangerous establishments could have been introduced into a procedural code. The starting point is to be found in the rules on general liability and the rules on liability for dangerous industrial accidents in Act V of 2013 on the Civil Code (CC). In principle, tort is prohibited by law,[36] and the tortfeasor is liable to pay compensation for the damage caused unless they can prove that their conduct was not attributable to their fault.[37] The exception, as previously drafted, was when the tortfeasor acted as could normally be expected in the circumstances.[38] In contrast, a person who carries out an activity involving an increased risk is liable to pay compensation for the resulting damage unless they prove that the damage was caused by an unavoidable cause outside the scope of the activity involving the increased risk.[39] A further substantive difference between the two forms of liability is that the former is subject to a limitation period of five years and the latter to three.

However, the specificity of the legal institution incorporated into CPC III is that it explicitly applies the rules of general liability for damages in terms of the limitation

[35] Explanation of paragraph (3) of Article 265 of the Civil Code.

[36] CC Article 6:518.

[37] CC Article 6:519.

[38] Act IV of 1959, § 339.

[39] CC Article 6:535(1).

period and also makes the tort of wrongful act, the occurrence of the damage and the causality between the two the basis of liability for damages, thus practically replacing the obligation to excuse the fault (previously generally expected) with a move towards excluding the scope of activity. In concrete terms, the problem is that by introducing adequate causality into CPC III, the legislator has created a hybrid form of liability that reduces the possibility of exculpation for healthcare providers to zero.

Perhaps the most far-reaching 'innovation' appeared in a decision of a higher court that described the resulting obligation as an atypical contract between a woman giving birth and a healthcare institution, thus treating the harm to the newborn baby during birth as a breach of contract but giving the defendant the opportunity to prove that it was not at fault.[40] Here, the reasoning of the judgment underlines that it was sufficient for the plaintiffs to prove that the damage to health occurred during childbirth and that beyond that, the burden of proof was limited to the hospital's duty to discharge. The medical documentation is of particular importance in the proof, which, if incomplete, must be assessed against the hospital's argument the context of examining the imputability. The decision here shifts to an argument based on liability for damages caused by a breach of contract; in practice, incomplete documentation made it impossible to discharge this kind of legal responsibility. Here, the argumentation was introduced following the heightened standard of care inherent to the medical activity.

The court went even further, stating that '[i]f the exact cause of the injured party's injury cannot be established, all possible causes relating to the hospital's activities must be examined, and if the hospital cannot prove that it acted with due care, its liability for damages may be established'.[41] In this context, it should be stressed that, on the basis of the facts established, the experts appointed could not establish a causal link between the birth and the injury. Although they highlighted the shortcomings in the documentation, no evidence of a breach of the rules was found. It is interesting to note that in this context, the court sets the minimum level of liability at the level of what is normally expected. Although the judgment also stated, on the basis of an expert opinion, that the related malformation could have had a genetic and congenital cause, the High Court held that if the exact cause could not be determined, all those linked to the hospital's activities must be examined. This means that if there could have been more than one cause for the development of the impairment, the lower courts could not declare—despite expert opinion—that no cause could be established. And if this were the case, then if 'a cause related to the medical activity is possible and cannot be excluded, the defendant's excuse will prevail, i.e. he must prove that he acted with care as to the possible causes or that the injury could have occurred even if he had acted with care'.

The problem with this is not that CPC III imposes a burden of proof on healthcare providers that is impossible to meet in practice but that it goes against the very

[40] BDT 2010.2355.

[41] EBH 2009.1956.

essence of CPC III. According to the preamble of the legislation, CPC III is designed to ensure the fair resolution of private law disputes and the effective enforcement of substantive rights, and liability rules are rarely concerned with procedural law rather than substantive law.

4 Evaluation: The Value of CPC III. Compared to the System of CPC I

In its regulation, CPC III followed the so-called conservative principle of regulating and centralising everything, in contrast to CPC I, which laid down rules that were cogent yet kept in mind the rights and interests of the parties. Due to the nature of the rules of CPC III, the uncertainties of its initial application caused frustration in many areas of practical law. It is precisely because of the spirit of CPC III that the application of the law can sometimes go to such extremes, as when the court pointed out that '[a] defendant acting through legal representation may not be entitled to challenge a written counterclaim under CPC III (3)(b) of Article 199(3) of the Brussels Convention, the court did not indicate the place of the plaintiff's seat, despite the court's request to the plaintiff to do so, which included a time limit and legal consequences. The court, as a body administering the law, cannot disregard the fact that the written statement of defence does not comply with all the mandatory procedural rules in force despite the court's detailed notice of deficiencies, and the court may, therefore, impose the legal consequence of that failure—in this case, the legal consequence of the failure to comply with the provisions of the Article 115(1) of CPC III—must be applied'.[42]

Sometimes, even a seemingly isolated decision shows that the rigid application of the law makes it impossible to achieve the primary objective of the application of the law, namely the swift and lawful resolution of a dispute between parties. This is the result of the centralised pseudo-baroque interior built up behind the walls of the former institutions with which CPC III has sought to evoke the innovation of the code that was considered its great predecessor. In this context, moreover, it is not only CPC I that has veto power, but also—once again—the forgotten achievements of legal history, since it dates back a thousand years to the *scire leges non hoc est, verba earum tenere, sed vim ac potestatem*,[43] although it is doubtful whether the cited case law would be of any help to us if we were to consider the law as a whole.[44]

The misunderstanding of this split personality and the narrowing of the scope of facts that can be orally presented hardly support the criterion of bringing a speedy conclusion to litigation. Given that CPC III has ignored the case law of almost half a century in this area, it has inflicted a wound in the application of the law from which

[42] Pest Central District Court, 18.G.303.408/2020.

[43] Földi and Hamza (2009), p. 72.

[44] Brósz and Pólay (1986), p. 65.

recovery is doubtful. In its present form, the so-called 'split' system is a solution which can only be regarded with goodwill as a step forward, given that it has lost its original meaning and has not even re-established the original function of the writ of summons.

It can be stated, however, that CPC III, among its many innovations, has typically fulfilled the task of changing the meaning of concepts. However, the nominal use of specific terms is a far cry from reintroducing or even confirming the legal concepts. We must also appreciate the fact that the new Code was drafted after a lengthy legislative process and that the solutions and instruments of judicial practice have been replaced by a need to prepare not only for changes in the legal environment but also for the fundamental changes in the body of legal knowledge that has become routine over decades.

5 Conclusion

The value of CPC III as a stand-alone code is not measurable. It would be a mistake, however, to judge CPC III only by the standard it sets for itself since it exists as an independent code and has its own value. There is no doubt that it has sought internal coherence and has consistently stood by its controversial dogmatic structural decisions. Its suitability for achieving the legislative objectives to be pursued may be demonstrated by the passage of time since, after only a few years of application (and one amendment), it cannot be said with certainty that procedures are completed more quickly, not only statistically but also in reality.

The shortcoming of CPC III is also noticeable in the fact that it intends to refer to both the German Code of Civil Procedure of 1877 and the Austrian Code of Civil Procedure of 1895 as precedents, omitting the fact that the latter was the result of the shortcomings of the former since its social conception requires a fundamentally different approach to the liberal civil procedure.[45] One of the most eclectic qualities of CPC III was that it was that it did not last half a decade, as soon after its entry into force, comprehensive reform became necessary, involving changes to a number of basic institutions that were justified precisely by the progressive, modern spirit.[46]

Therefore, it cannot be stated with absolute certainty that either CPC II or CPC I is more suitable for the concentrated, quick and professional resolution of cases, but it must also be seen that the creation of a single code cannot override the practice of several decades of law enforcement.[47] The legislator correctly identified the problem

[45] Kengyel (1989), p. 54. sk.

[46] Act CXIX of 2020 amending Act CXXX of 2016 on the Code of Civil Procedure, the explanatory memorandum of which states that 'the experience of the enactment of the Code of Civil Procedure, the decisions of the Constitutional Court and the feedback of law enforcement bodies justify the refinement of the regulation of certain provisions of the Act, the simplification and flexibilisation of the procedural rules'.

[47] Osztovits (2023).

arising from confusion associated with CPC II, but in many cases, the response to it was more the ‘granite’ of pseudo-conservative ideology than a solution to actual problems. And the value of recalling the past lies in the fact that this does not remain at the level of words.

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Part IV
Different Theoretical Approaches to Resilience

Change of Law: Backgrounds and Limits, Expectations and Realizations

Csaba Varga

> *Th[e] search for static security—in the law and elsewhere—is misguided. The fact is that security can only be achieved through constant change [Douglas (1949), p. 7].*
> *Thinking of law as a complex adaptive system reveals the importance of laws and lawyers as integral parts of law's fitness landscape, but just as surely reveals the importance of humility. We will never get the legal system 'just right', at least not for long, but if we are mindful of its properties and the need for continuous work at living within its stable disequilibrium, we can hope to keep it fit indefinitely [Ruhl (2008), p. 911].*

Abstract In this chapter, law as an object of change is seen in regard to the historically generalizable trinity of (1) the establishment and (2) the enforcement of the law by the state, as well as (3) the exercise of whatever is regarded as 'law' in society. Then law and its changes are treated in parallel according to the respective legislative and judicial paths. The essence of law serving as a 'patterned pattern' is mediation, which, especially in recent times, the judiciary has constantly tried to weaken. This movement now—when the immense overdevelopment and predominance of formal rationality itself has become irrational—involves the rejection of the radicalism with which the formal rationality of regulatory systems was once fought for. The overview of this will show that the process is ultimately able to destroy the very distinctness of law. As finally concluded, legal change is not an end in itself but a means of maintaining an organic functional relationship between law and its social medium. This relationship is not a mechanical one but a series of further socio-legal mediations expressed through complex interactions. All in all, the road from legal change to the prospect of actual change is long, complicated, and not without risk.

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1 Law as an Object of Change

From the very first moment of academic reflection on law, it has been almost a truism that law, in its socio-historical generality, is not something given from above or from without but an integral part of the existence and life of the people who live it;[1] indeed, all that we see today as the great edifices of continental and Anglo-Saxon law themselves developed from nothing more than the daily practice of rustic communities in the manner of the tribal rights discovered by legal anthropologists.[2] It is an equally commonplace truth today to deduce that, since '[h]istory, in the objective meaning of the word, is the process of change',[3] the constant change of the conditions of existence and circumstances also implies a constant change of law; and that any such change must take place on the grounds of an inner unity between people and law, that is, of *self-identity* and *organicity.*

It was around the same time, a century or so ago, that the former rector of the university in the Austrian-administered capital of Bukovina, founded just a few decades previously, set up an institute for the study of *'living law'* to examine the legal culture of the province, making it the other pole of law to positive law in his pioneering sociology of law,[4] and that, also out of a sociological interest in law, a law professor from Nebraska conceptually separated the law as written *in books* from the law as manifested *in action.*[5] At the same time, of course, the difference between them is obvious: the former was a realization of a normative culture which had been functioning and developing practically independently of what had hitherto been exclusively acknowledged and recognized as official, albeit for ages in its quasi-immediate environment, while the latter was more the professorial declaration of a professional claim to acknowledge and analyze the findings of the court, a branch of power independent of the legislature, as to what the law is—a sui generis manifestation of the law. They were united, however, in treating what had hitherto been seen as the sole source of law, now constantly threatened by the self-assertive competition of other factor(s) in their own domains, as merely one of the forces making law.

Myself, I attempted to depict the difference between positivist and sociological conceptions of law nearly half a century ago in the form of a set of *circles* operating in a largely shared space, partly overlapping but, in principle, in constant

[1] '[L]aw is life itself' – quoting F. S. C. Northrop. See Northrop ([1959]), p. 3.

[2] E.g. van Niekerk (1970), pp. 244 and 245.

[3] Toynbee (1992), p. 19.

[4] Eugen Ehrlich first announced the founding of his institute and the pre-eminence of its research profile in the Vienna weekly *Juristische Blätter*. 'Ein Institut für lebendes Recht', and then extended his research in 'Das lebende Recht der Völker der Bukowina' Fragebogen für das Seminar für lebendes Recht mit Einleitung vom Seminarleiter – laying the foundations for his classic basic work on the sociology of law. See Ehrlich (1911a), pp. 229–231; Ehrlich (1911b), pp. 241–244; Ehrlich (1913).

[5] Pound (1910), pp. 12–36.

competition.[6] But I was also inspired by the idea of *living law* when I tried to interpret the possible practical and theoretical implications of the legal knowledge of a practice that had been informally requested and of the concept of law itself as a concrete pretext for the discovery of domestic legal custom[7] and, on the other hand, as a pretext for the attempt to make tips and gratuities subject to some form of legal regulation out of the grey silence that had hitherto prevailed. It was then necessary to add a third circle to the diagram of possible legal elements.[8] However, this trinity—that is, the domains of (1) *the establishment of law by the state*, (2) *its enforcement by the state*, and (3) the *exercise of 'law' in society*—expresses a historically generalizable reality whose simultaneity has not changed since then. Inherent in this formula was the fact that the activation of either side (including its timing, mode and degree) depends on historical contingencies. Any given state obviously has a definite legal policy with its own official preference for one of these, which it tries to enforce openly through the various instruments of its entire institutional system. However, the complexity of social movements never precludes the possibility that one of them may make its presence felt, even if it ignores or even obstructs the other two and even if it achieves temporary or long-term predominance, even in certain areas. For it can be assumed, so to speak, that in almost every single legal system, there will be at least some latent competition, albeit perhaps only in certain critical regulatory areas or fields. Moreover, in principle, either side can create a dominant position, which results in the other two sides being marginalized or temporarily excluded from the sphere of factors which actually have an impact or are even in an acute struggle for a dominant presence in the law as a whole, which can lead to real conflict, and which, to the contemporary observer, can almost be seen as a vision of anarchy.

Nevertheless, the above pictorial representation already assumes that law is a complex phenomenon resulting from the simultaneous and contradictory operation of several components, which can be deduced from its respective outcomes and may be concealed by formalized appearances, but behind which is a never-ending tension of opposites and contradictions. It follows from this that (a) our question of law is always a question of *'law, but in what sense?'*, that is, involves a choice between three possible components in one or another combination. It also follows that (b) these three circles will obviously coincide only partially in most cases, i.e. we may find a valuable coincidence between only two circles, or a certain range of legal rules may be the exclusive content of only one circle. For this reason alone, therefore, we cannot give a simple answer to the question 'What is law?' which might otherwise seem self-evident since interpreted as a totality, it could at most indicate the area that can be marked by the complete intersection of all three domains. At the same time, we can only ask a more precise question in the knowledge that some parts of the whole domain of law will be *'more' or 'less'* law. Finally, it also follows—since the formula of the competing circles is itself

[6] Varga (1973), pp. 21–78.

[7] For a theoretical-legal interpretation of Tárkány Szűcs (1981), see Varga (1985), pp. 39–48.

[8] Varga (1988), pp. 265–285.

nothing other than a symbol of the eternal (open or hidden) dynamism of law, of the competition between the three sides which in principle never ceases—that (c) a lasting final result or final state is never really arrived at. It is only the successive *states of permanent processes of change and metamorphosis* (i.e. at most time segments) that we may encounter at a given moment. For some parts are entering the domain of law, while others may be leaving it. So, any question we ask about law can, at most, be answered in concrete terms for a given temporal state.

Thus, regardless of the official image that the law may have of itself and regardless of the eventuality of the fact that the system of sources of law may also be fixed by the law itself, both the law (i.e. the law issued by the legislator in a specific procedure with specific formalities) and the law created in the judicial decision-making process (i.e. the law enforced in the interpretation, actualization and concretization of its relevant norms in application) are fundamental forms of the objectification of law.[9]

The *objectified form* of law is already only a mediation, or more precisely, a signal (set of signals) transmitting a mediation in human communication for *human understanding*. It is this human understanding through which we activate the law and with whose content we then enforce our decision. In short, it is the realm of the *hermeneutics* of law. Once argued forcibly within the official Marxism of socialism, I could only approach this idea wrapped up in the then slowly recognized duality of positivism and sociologism in law. According to this, (a) 'Law is a historical continuum in an unbroken process of formation'; (b) moreover, 'law is an open system [that] can only be treated as closed for the sake of its historical reconstruction', in which (c) its 'social existence [. . .] is to be seen as an irreversibly progressing process', the root of this being that (d) 'if law as a working system is composed of formal enactment and its social contexts that make it interpretable and set it in function, and if a change of any of its components may cause a change in the law as a working whole, there is offered a perspective for an *alternative strategy*. I mean thereby that a struggle for the law can be fought through a struggle to confirm/reform/revoke its *formal enactment* and a struggle to strengthen/reshape/loosen its *social contexts* as well, and that any of these alternatives can eventually lead to the same goal as set.'[10]

2 The Law and Its Changes

Change of law is the basic form of its life. Amongst the two forms of the objectification of law, legislative and judicial, this obviously takes place occasionally, step by step, with an infinite series of invisible changes in the meaning of the daily practice of each actualization, and a hermeneutic sense, too, with each legal action.

[9] Cf. Varga (2011).

[10] Varga (1984), pp. 181–182, lightly edited for clarity here.

Given its intellectual presuppositions and its context, the very fact that we rely on law and work to shape it continuously as dictated by circumstances presupposes *trust* in law—on the part of society, of the individual actors in the social complex, not least the legal profession. It is perhaps no coincidence that the classic twentieth-century comparativist in private law was at pains to remind us that 'a magical belief in the efficacy of the law in shaping human conduct and social relations [. . .] is a superstition which is itself a fact of political importance, but it is a superstition all the same'.[11]

Whether this is true or not, in any case, over the last half-century, from legal anthropology to the sociology of law, from empirical social sciences to social theory generalizations, there has been a huge investigation into the themes of 'law and society' and 'law and social change' and the like, to derive a more accurate picture of the dynamics of social movement and the interactions at work in it. Classical Greece, for example, was already aware that law and society had to change together for the *politeia* to maintain its capacity to evolve. But they warned against going beyond what was strictly necessary. For any *change* in the law (i.e. shift or progress) can upset the delicate balance that has just been struck and is therefore inevitably *disintegrative* from the point of view of the political equilibrium.[12] But today's literature goes beyond this and would prefer to make legal change permanent, capturing it in its very existence, as it were, in its mobilization. 'Change of law', it is argued, has an inherent double meaning: it implies the modification of a legal proposition and the need to adapt to the *constantly* changing circumstances of the time. Consequently, modernity today suggests that it must strive, even demand, that the law's uninterrupted change shall be a feature, an actual property, of the very continuity of law.[13]

Such a complex approach within social theorization is both natural and necessary since societal existence itself is a process, and since everything takes place in the complexity of social being, any moment or step is not only the product and result of interactions but also the consequence, source and resolution of tensions. This is in contrast, for example, to the vision of anthropology, where any change is clear from the replacement of the medium of sociality itself since the 'cultural pattern' that defines self-identity is for it the starting and end point of any investigation; consequently, any change is also a loss of identity and the birth of a new identity. In law, on the other hand, and thus in the jurisprudential vision as well, the situation is the reverse: the idea of change is inherent in the very idea of law. And there is a further difference here, namely that while 'The discipline of anthropology considers change in terms of rupture, [. . .] law must treat change as categorical redefinition.'[14]

There are a number of general statements about the change of law. For example, the precondition of the validity of a legal act, whatever the circumstances, is not only

[11] Kahn-Freund (1969), pp. 301–316.

[12] See e.g. Poddighe (2019), p. 184ff.

[13] Minow (1993), p. 179.

[14] Malagrino (2014), p. 118.

that it be *legitimate* and *legal*[15] but also, in principle, that its creation and content meet the requirements of *legal certainty.*[16] Such and similar expectations are mostly normative requirements, also laid down in legal policy, intended to be enforced within the law. However, they owe their strength above all to the fact that they are not based on an arbitrary determination of will or an excess of desire; they are dictated by the *reconstructible logic of the normative phenomenon* itself.[17] This is dictated by the very nature of the normative phenomenon, and it also determines its autopoietic description as the most succinct response: 'no social movement [i.e. external force, and in a direct way] [. . .] can change the law. Change is not possible except through the legal system itself'.[18]

Only 'through the legal system itself'? This seems to be a clear statement, yet it seems to contain several elements pointing in different directions. Legal change can be seen as the shaping of the textuality of law in both legislative and judicial lawmaking. Moreover, in both areas of the *textuality* of the law, on the user's side, understanding also appears as the formative element of meaning. As for the first possibility, the terrain of textuality, while we usually look for and perceive, or even plan, legal change in terms of formal rules, there are often principles behind the rules that are laid down and fixed in a particular way, and behind them, final and mostly latent, tacit meta-principles that activate our cultural roots by giving the community its identity.[19] However, they do not remain rigid and intact either, since they themselves are enriched (for example, by the superimposition of shifts of emphasis) with each concretizing step in the process of *reflective equilibrium*. The complexity of the law and its functional unity mean that *changes in the law are* never reduced to a single element; at most, their visibility and formal identifiability *in the chain of further action* is sharply reduced. Hence, in this complexity (in its source and in the way it exerts its effect—i.e. in its manifestation in the legal reference justifying a given legal statement and in its ontological existence as well), attempts to separate the different components of law as layers of a stratified complex (which is itself infinitely complex), what we usually call legal change is directly perceptible, so to speak, only in its most superficial component; in its propositional elements. Rarely, and of course, mainly through the intermediary of these, does it come to some further development within the hermeneutics of understanding and the general principles underlying it. And it is only in the vast intervals that may mark a change of era that

[15] 'Legitimacy is not an all-or-nothing affair.' Beetham (1991), p. 19ff.

[16] This is treated as a human rights obligation, for example, in Tryzna (2020), pp. 234–249.

[17] Cf. e.g. Varga (1994), pp. 3–27.

[18] Luhmann (2004), p. 119.

[19] In his last work, Dworkin, the recently deceased American classic scholar of our time, stated: '[L]aw includes not only the specific rules enacted in accordance with the community's accepted practices, but also the principles that provide the best moral justification for those enacted rules. The law then also includes the rules that follow from those justifying principles, even though those further rules were never enacted.' Dworkin (2011), p. 402.

the cultural embeddedness of law itself, i.e. the actual legal culture,[20] even undergoes some change and becomes perceptible.

The professional literature tends to refer, as *drivers/inhibitors of legal change*, to needs made aware, needs explicitly calling for generalized regulation, the political and legal professional force supporting re-regulation, and, in the background, the willingness of the society and legal profession concerned to innovate, learn, and even adopt foreign examples.[21]

And when we approach the issue not prospectively, from the point of view of the planned progress, but retrospectively, looking back on the results already achieved, the difference between the two main functions, already divided by the classical Greek predecessors[22] and the two corresponding sources of law, will become even more striking:[23]

Legislative type, law made by the legislator	Resulting from a judicial decision possibly becoming a precedent
will apply in the future	retroactive
of general application	case specific
striving for systematicity as conscious legislative policy product	is due to the accidental nature of the lawsuit
arises from a purposeful determination	can be made if and in a case where there is a party who wishes and can afford to sue
systematic in itself	asystematic
enables the development of the legal system	incapable of serving the development of the legal system
also helps to develop the underlying legal principles	precludes the development of legal principles
is based on the use of accumulated experience	has little, if any, relevant experience behind it
theoretically founded	taken without broad professional preparation
can be safely clear	the identification of the *ratio decidendi* will always remain debatable
free from casual emotions	may be influenced by the moral, social (etc.) motives involved in the case
suitable for immediate implementation of the change	with an impact indirect, slow, and random
can also lead to a leap in the development of law, a change of direction	its effect on the law's development is of minor importance and, at most, has indirect consequences
can be replaced with any repetition and/or speed	can only be modified under rare and limited conditions

[20] Varga (2021), pp. 191–219.

[21] Watson (1978b), pp. 313–336.

[22] Poddighe, especially, already distinguishes between formal legal change and informal adaptation to a given situation by popular decision or judicial review. Poddighe (2019), pp. 192–196.

[23] Described without tabular summary in Watson (1978b), pp. 323–324.

As for the possible effects of one or the other, it is a theoretical—ontological—truth that there is a long way from enacting any law to the triggering of any result thanks to the former act since there is no direct—causal or quasi-causal—mechanism of implementation in human society, only possible *chains of motives and effects* used. Hence, social beings can be produced or shaped in a way that teleological projections put causal lines in motion, which then, following their own laws, usually pass beyond the original project: in the final analysis, they give rise to phenomena more or less similar or dissimilar to the original intent.[24] In addition, and on the other hand, all this is flanked or even intersected by a mass of *coincidences.* And it is an old adage that the role of chance occurs not only in the form and success of the change of law but also in the result which it contributes to, even as a multiplicative *side-effect,* even as a multiplicative *spill-over effect*—naturally, completely independently of what was initially intended, but also of what was foreseeable even with the greatest care. In a certain sense, however, this kind of collateral, ex-post, indirect effect makes possible or even brings about most of the most significant changes in world history.

3 Understanding the Change of Law

Law is used as a regulatory force. Or, law is used to regulate something or change a previous regulation when the functionality of its social environment requires it, and requires it with such force that it needs recourse to law itself as a general and national-level regulation.

The change that takes place here is always a change of something—one or more components, but always *only a part*—on the grounds of the (at least momentary) immutability of the other elements of the environment, of the remaining whole.

3.1 Judicial Attempts to Loosen Mediation by Law

Already today, foresight suggests to several theorists that present law must be replaced by adaptive law in the future. This may be characterised by the following features: '(1) multiplicity of articulated goals; (2) polycentric, multimodal, and integrationist structure; (3) adaptive methods based on standards, flexibility, discretion, and regard for context; and (4) iterative legal-pluralist processes with feedback loops, learning, and accountability.'[25]

We do not yet have any data on the future of the reality of all this, so we can only resort to mapping the intellectual environment that is helping to develop it, safely

[24] Based on Lukács (1984–1986). See Varga (2012b), p. 218.

[25] Arnold and Gunderson (2013), pp. 10426–10443.

stepping backwards, seeking and interpreting its antecedents. Dating back centuries or even millennia,[26] there were already some thoughts *concerning resolving the mediation* inherent in legal mediation.[27]

My first personal recollection of their contemporary occurrence was

- an American theoretical proposal, enthusiastically received at the time, that would have pushed the framework of the justifiability of decision to a broader one, from the legal to the *directly social,* as much as sixty years ago;[28] then
- a decade later, a Swedish proceduralist would have gone somewhat further to broaden the normative debate into simple *open debate*.[29] But—I tried to clarify the basic position even then—since the law was born, its theoretical possibilities in this direction have remained unchanged: either I accept the *norm-structured patterning* of the processes of judgement and decision-making, or I reject this—and with it the instrument of law itself, i.e. the very meaning of its prevalence as a law, its core, its specific potential, its criteriality. I can do this, but in this case, precisely by withdrawing this very criteriality, I am inevitably withdrawing from law as a specific toolkit;[30]
- a few years later, Watson, the Scottish-American comparative legal historian came up with a reform idea specifically for the legislature, a proposal for a *two-tier legislature.* His idea was based on the fact that continental codification-oriented lawmaking builds a long, abstract system based on technical terminology far removed from everyday life, which, for lack of clarity, can only be applied in law while at the same time resisting any change by its abstract systemic generality. Therefore, the *first layer* of legislation should be a text that is short and accessible in everyday terms, with cross-references to the subject matter rather than the systemic focus. This would be complemented by a *second layer*, which would provide a systematic legal terminology for the first, by a committee (for example, set up within the Supreme Court) empowered by the legislator during his term of office to comment, clarify and adapt to social changes, and which would republish this work every year, with any changes it made in the meantime. And if there were a direct conflict between the two, the law (as *lex generalis*) would obviously prevail, except for the possibility of a second layer of detailed regulation, when the latter, as *lex specialis,* would prevail;[31]
- another few years passed, and two leading legal sociologists from the West Coast of America articulated the need for a so-called post-bureaucratic society and the

[26] Varga (1978), pp. 21–38.

[27] It is worth recalling that in the late social ontology of György Lukács, socialisation [*Sozialisierung/Vergesellschaftlichung*] is, so to speak, synonymous with social mediation [*Vermittlung*]: from this he derives the possible perspective of the growth of human formations into alienated powers that now may threaten man himself.

[28] Varga (1967), p. 197.

[29] Bolding (1969), pp. 59–71; Varga (1970), pp. 80–82.

[30] Varga (1981), pp. 45–76; Varga (2012a).

[31] Watson (1978a), pp. 552–575; Varga (1979), pp. 5–10.

corresponding need for a so-called *responsive law*—one that is sensitive in responding to changes in the environment, flexible, open, active, and based on broad participation.[32] It was a noteworthy step in intellectual development and in the increasingly acceptable assumption of the idea of a 'leap back' that what had previously been regarded as almost utopian was now explicitly taken into account as a desirable subject for *social planning;*

- another decade, and in Canada, the same began to be presented as the *socio-positivisme juridique* movement, inspired by post-modernist ideology;[33] and finally
- soon, almost in parallel, some positive legal facts were added; first of all, the new civil code of the French province of Canada, Quebec, was issued in 1991. Its basic philosophy is that, as a code of law, it is *binding* in principle in its entirety, while—as is its declared intention—it is constantly *being further developed* by judicial interpretation and application in everyday practice. And while this may appear to be a one-sided solution and may be seen as doing no more than taking up what was the inevitable fate of the once pioneering French *Code civil* (1804),[34] it nevertheless breaks with an old tradition, one that characterizes continental law, in that it has from the outset intended its rules not to pre-determine the decision in the process of applying the law, but merely to *mark out a course for responsible judicial creativity.*[35]

3.2 Lessons to Learn for the Future

In today's rage of legalism it is not exceptional to make such exaggerated generalizations and visions of the future, even as wish-driven projections onto the present, as 'the law is open *and* closed, formal *and* informal, *both* a unity *and* a disunity, *both* pluralistic *and* monocentric'.[36]

[32] Nonet and Selznick (1978); Varga (1980), pp. 670–680.

[33] Cf. Varga (2003), pp. 21–44.

[34] Varga (2011), pp. 120–121. Meanwhile 'from being master of establishing the law, the code became degraded primarily to a *conceptual-referential framework* of the everyday practice of shaping the law. It is no longer the embodiment, but rather a mere *reference-basis* of the living law.' Nevertheless, '[t]he code remains the Bible of bourgeois society, an *organizing centre of law*, despite being socially antiquated. It has remained the framework for legal movements as their formal initiating and precipitation point'. However, at the same time, '[i]nstead of providing a pattern for decision, its task is merely to indicate the *direction of finding* the solution, and to define its *conceptual-referential* place. Points, which were earlier the final outcomes of legal control by the force of the wording of the code, now appear to be the points of initiation.'

[35] Cf. Varga (2006).

[36] Gustafsson and Vinthagen (2013), p. 37.

In any case, while law is subject to influence from all sides in one way or another, its own influence can obviously multiply in a chain reaction and thus may go far beyond the directly perceptible terrain of concrete legal change.

Presumably, equally realistic content can be gleaned from the indications in the adaptive law idea just presented. In any case, its root should presumably be sought first of all in the awareness of increasing complexity and second in the *self-defeat of the formalisms* that have been constantly developed. For the *archetypes* of both versions in terms of the theory of organization clearly show the developmental arcs and their utopian slowness. For example, in the second variant—what its relevant literature calls complex adaptive systems, i.e. those 'in which large networks of components with no central control and simple rules of operation give rise to complex collective behaviour, sophisticated information processing, and adaptation via learning or evolution'[37]—the characterization is at once ambiguous and meaningless—but precisely because it reflects counter-radicalism. In other words, it is a rejection of the radicalism with which the formal rationality of regulatory systems has been fought for. But now that *formal rationality itself has become irrational* with the immense (over) development and predominance of this formal rationality, its overthrow, the elimination of the kernel of formalism, and thus its *material replacement,* is becoming the new fashionable rule.[38]

4 Legal and Socio-Legal Change: Conclusion

Legal change is not an end in itself but a means of maintaining an organic functional relationship between law and its social medium. In principle, legal change creates the possibility either of establishing this link or of promoting or accelerating the development of the social environment, which is recognized as desirable, but it is neither in itself a *sine qua non-prerequisite* for this nor a guarantee of such a link or development. For the relationship between society and law is not a mechanical one[39] but a series of different mediations expressed in complex interactions that activate human awareness, interest, and willingness to act,[40] which, 'as intervening in the complex of other activities, and as itself a social process, [are] not something that can be said to be done or to happen at a certain date.'[41]

The possibilities of law are limited because, in metaphorical terms, 'It is beyond the law to prevent ravages of time, weather and human apathy. All law can do is

[37] Mitchell (2009), p. 13.

[38] Cf. e.g. Varga (2011), ch. X para 1.

[39] Ringelheim (2013), pp. 157–163.

[40] Which was already Rudolf von Jhering's appeal-like message in his 'Der Kampf um's Recht'. von Jhering (1872).

[41] Dewey (2008), p. 117.

help, not cure [. . .]. A simple legislative solution is not available'.[42] And, of course, any change is in itself contrary to the basic function of law, which is to protect the status quo, i.e. to stabilize the system.[43] All in all, the road from legal change to the prospect of actual socio-legal change is long, complicated, bumpy, and not without risk.

And if we confront the two sides with each other, i.e. if we (also) seek the help of law to bring about a change that is progressive and interdependent in society, but at the same time firmly embedded in society—a programmatic version of which was the modernization programme[44] that was a Western parallel to the socialist reforms of the past–, then we can come to new conclusions, which, of course, were first formulated in macro-level studies of the sociology of law, largely as a result of earlier observations and experiences,[45] but which are now clear enough to serve as a counterweight to the commitments that see law in the ethos of permanent legal change. For according to them, (1) whatever we do in law, we must first and foremost, as the most important and most difficult instrumental value, build and safeguard the *prestige of law*; (2) we must be aware that social reforms are to be fought for by means of a *reform movement* consistently won from society, not by shortening the circle to the shortest element by means of a word of power and a simple legal doctrine from above; and, finally, (3) law is stronger the less we rely on it and the less we use it—that is, the more we consider it applicable only as an *ultima ratio* and in cases, even when considering its use.

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[45] Cf. Varga (1986), pp. 197–215.

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Resilience Thinking: Emergence, Conceptualisations, and Applicability in Social Systems and Law

Erik Goto and Viktor Olivér Lőrincz

Abstract This chapter delves into the origin of 'resilience thinking' and how it evolved from ecology to be used in social sciences. While widely used, resilience lacks a unified definition, manifesting differently within disciplines. Resilience theory has evolved into a tool for analysing complex interactions in socio-ecological systems, and such an interdisciplinary approach calls for complex systems thinking. However, its application in social sciences faces challenges due to conceptual ambiguities, normative assumptions, and difficulties defining system boundaries. Despite these challenges, the paper suggests that resilience thinking could serve as a bridging concept, fostering interdisciplinary research and prompting critical reflections on societal dynamics. We also discuss the applicability of resilience theory and resilience models to the law as a complex system, presenting its notable limitations, analysing the possible advantages of the use of resilience as a scientific research programme, and emphasising the dangers of using it as a metaphor. Using the transfer of property as an example, we propose an alternative model of system response by the law in relation to external stimuli based on Jean Piaget's theory of adaptation.

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1 Introduction

If one were to ask ten researchers to define resilience, one might be surprised to receive ten different yet slightly related meanings of the term. The term 'resilience' has been employed within several disciplines: ecology, psychology, business, sociology, engineering, disaster planning, international development, and the list goes on. However, the shared use of the term 'resilience' does not imply a unified concept or a common theoretical foundation. In fact, as the word resilience is used in a range of sciences, it has become a loose concept that signifies the capacity to withstand shocks and recover from difficulties. The ten researchers, depending on their respective disciplines, would probably grasp different aspects of the concept: one might emphasise the 'design' that makes something resilient, while another might focus on the 'stress' that enables something to be resilient. One might consider resilience in terms of systems and functions; another focus on the adaptability of systems, and so on.

Interdisciplinary research on phenomena that are broader than the scope of individual natural or social sciences often requires system thinking and the application of a bridging concept to unveil their complexity. Scrolling through the news in recent years, one may read about the need to build a 'resilient society' that withstands health, economic, or political crises. Moreover, the discourse on the nature of a 'resilient future' has intensified in the face of climate and environmental change. As such, complex systems thinking and resilience theory have emerged as the analytical and descriptive study of complex interactions and the potential of dynamic systems to absorb disturbances without inducing structural changes.[1] In essence, resilience theory deals with a system with an infinite number of variables in which causality cannot be assessed with certainty, or the outcome of interventions can only be predicted and expressed using statistical means. Resilience theory was first discussed in the context of ecosystem studies, wherein the natural environment on Earth is conceptualised as a complex dynamic system—a system in which an unmeasurable number of disordered but interacting actors create equilibrium despite the seeming disorder.[2]

However, the adaptation of complexity thinking and resilience theory from mathematical to natural and then social sciences and its popularisation in different fields of study raise epistemological and ontological questions about the concept itself. If resilience theory is used without conceptual clarity, there is a risk of it being used as a 'buzzword' to incorporate everything yet mean nothing. Despite some doubts about the general applicability of the concept, some researchers believe in the capacity of resilience theory to function as a boundary object and a descriptive concept that could bridge interdisciplinary boundaries.[3] However, when the concept

[1] Holling and Gunderson (2002), pp. 31–32.

[2] Ladyman et al. (2013), p. 35.

[3] Brand and Jax (2007).

is applied without critical observations, there is a risk of creating a false and misleading understanding of how social systems function.[4]

Taking a step back from the use of resilience theory in Hungarian legal studies, this section aims at giving an overview of how complex system thinking and resilience theory emerged in ecosystem studies. The growing scientific evidence for human-induced environmental change transformed the conceptualisation of the human-nature relationship in the twentieth century. This transformation was paired with empirical research on dynamic interactions and equilibrium conditions, leading to a 'new ecology' in which resilience, adaptability and transformation were vital elements. Second, the paper will briefly discuss the epistemology and ontology of resilience and the normative assumptions associated with resilience when used in social systems. The positivist approach of resilience research might hinder and hide the causes and consequences of societal processes, disregarding power, agency, and discourse in the creation of complex social systems. Third, the difficulties of applying resilience theory as a stand-alone formal theoretical framework will be discussed.

In the last part of the chapter, we discuss the use of resilience in law. Using the transfer of property as an example, we propose a simplified model of external stimuli and system response.

2 The Emergence of Resilience Theory

The emergence of resilience theory is strongly tied to the realisation that humanity has had an ever-growing influence on the natural environment since the onset of the Industrial Revolution. The relationship between humans and nature, at least in Western philosophy, has changed over the centuries, from nature being seen as a static entity that provides humanity with resources, beauty, and awe.[5] As the conceptualisation of nature changed along with human's place within it, ecosystem studies emerged to provide a theoretical framework within which the complex relationship between living and non-living systems could be better understood.[6] Ecosystem studies departed from the dominant perception of nature as a static and independent entity, an object without agency governed by humans and formed to our ideals, to understanding nature as a complex interaction of living and non-living entities. Early theoretical and empirical studies by ecologists such as G.E. Hutchinson (1903–1991) and R.H. MacArthur (1930–1972) transformed ecology and ecosystem studies into a structured quantitative and theoretical science using profound empirical research.[7] The empirical research described in *Paradox*

[4] Davidson et al. (2016); Olsson et al. (2015).

[5] Purdy (2015).

[6] Hall (2004).

[7] Hall (2004).

of the Plankton by Hutchinson (1961) challenged and ultimately debuted the idea of single-state equilibrium in a natural system and described natural communities as being in a dynamic state of constant flux.

Silent Spring by Rachel Carson (1962) was among the first influential scientific works to describe the impact of pesticides on the food system. The increased use of DDT by the agricultural sector eventually degraded local and regional biospheres; humankind had thus 'acquired significant power to alter the nature of his world.'[8] The following decades brought about widespread environmental movements in Western societies and a turn to 'new ecology', which proposed that an ecosystem should be conceptualised as a dynamic system with multiple stable states instead of the idea of a 'balance of nature' that can be managed and engineered by humankind.[9] In the conventional human-environment analysis, nature management focused on the command and control of disturbances and shocks and aimed at returning to an initial state where yields are maximised to satisfy human needs. In the new ecology, the focus shifts to the role of the adaptive capacity of the system, with emphasis on the importance of change and unpredictability, allowing changes to happen rather than controlling or entirely avoiding them.

2.1 The Evolution of Ecological Perspectives

For resilience theory to be popularised in ecosystem studies, the physical environment had to be seen as a system rather than a static entity: the conventional nature-human dichotomy does not allow for a holistic and systemic understanding of the environment. Resilience in ecosystem studies is understood as the system's ability to absorb change and disturbance without inducing 'system changes in its structure by changing the variables and processes that control behavior'.[10] Emphasis is thus not on a single point equilibrium but a dynamic state of constant flux in the system, which is continued and maintained under and within a particular domain of attraction. In a simple linear system with a single attractor—for instance, a wooden stick and the force that bends it—the outcome is reasonably predictable: if the perturbation breaches the resilience threshold (in this case, the elastic limit), the wood bends or breaks, and the likelihood of a return to its previous state declines. However, when several attractors are present and influence a complex non-linear system, unpredictable shifts can occur in response to disturbances.

To give a heuristic illustration of resilience theory, imagine one small marble placed in a saucer and one in a vase, both placed on a table. These represent two different systems, with the marble being in equilibrium at rest and staying still at the bottom of the containers. When the table is jolted, the marbles roll around but behave

[8] Carson (1962), p. 23.

[9] Cote and Nightingale (2012), p. 476.

[10] Holling and Gunderson (2002), p. 28.

differently within these two constrained limits. In the narrow and tall vase, the marble stays near the bottom and quickly recovers its original state, whereas in the shallow and wide saucer, the marble moves around more robustly, reaching the rim and tipping out.[11] Resilience theory, thus, is a conceptualisation of disturbances to systems and their reactions to exogenous and endogenous processes, resulting in three possible outcomes: resilience, adaptation, or transformation. The marble and bowls may resist the exogenous effects and return to their initial state (resilience). Alternatively, a saucer could be modified or replaced with a more desirable bowl with a higher rim that can withstand perturbations to decrease the possibility of spillover by learning from past events and adjusting the responses (adaptation). On the other hand, the marble might fall out of the saucer into another bowl, placing it in a different regime with altered thresholds and behaviour (transformation). Different disturbances can produce different results from the two bowls, as a strong wind might knock over the vase but not the saucer, while an earthquake might bounce the marble out of the saucer but not the tall vase.[12]

2.2 Socio-Ecological Systems and Resilience Theory

The synthesis of theories about the interlinking nature of human and biophysical systems led to the concept of a socio-ecological system (SES).[13] Essentially, SES recognises that social and ecological realms are not separate and isolated systems but instead emphasises the feedback mechanism between them, wherein the human system is a part of and alters the ecological system and vice versa. Along with the emphasis on feedback mechanisms, another critical aspect of resilience theory is the role of adaptive capacity in human-nature systems. 'Panarchy', a term coined by Gunderson and Holling,[14] expanded the original concept of resilience to include adaptive cycles as part of the multiscalar system framework. It is argued that 'ecological systems feature multiple, semi-autonomous scales formed from the interactions among variables that operate at similar speeds. Each level experiences its own change cycle, but slower and larger scales set conditions for faster, smaller ones, whereas the faster, smaller ones are the sites of variation that can generate functional shifts at higher scales. This dynamic interaction feeds evolution: As long as there is interaction across scales, a crisis or adaptive variation on one level can trigger dynamism in smaller and larger scales.'[15]

In resilience thinking, the concept of feedback mechanisms, adaptive cycles, and self-organisation within the system dynamics are key components that distinguish

[11] Ruhl (2011), p. 1377.
[12] Ruhl (2011).
[13] Cote and Nightingale (2012), p. 475.
[14] Gunderson and Holling (2002).
[15] Davidson (2010), p. 1138.

the theory from other concepts aimed at describing the state of stability in life sciences. While, for instance, homeostasis is defined as a steady internal state in life sciences, Gunderson and Holling's *Panarchy* aims to rationalise the interplay between change and persistence and between the predictable and unpredictable by accounting for adaptive cycles, wherein human and natural systems are interlinked in cycles of growth, accumulation, restructuring and renewal.[16]

Resilience theory is seen as a promising new way of conceptualising and analysing contemporary processes. It uses complex system thinking to quantify, qualify, and normatively order exogenous and endogenous shocks and instabilities, increasing understanding of how to best cope with them. Resilience theory is a counter-narrative to the conventional human-environment analysis as it emphasises unpredictability, change, and complexity across different scales. It also shifts the focus away from the quantitative availability of specific resources to the scope of available response options.[17] However, using resilience as a stand-alone theoretical framework for analysis can be difficult because of its ambiguity and the incommensurability between ecological and social sciences.[18] Core conceptual and ontological differences in natural and social systems create theoretical tensions and methodological barriers to using resilience for the purpose of constructive knowledge integration between disciplines.[19]

3 Challenges and Considerations in Applying Resilience Theory to Social Systems

3.1 Navigating Ambiguities, Normative Questions, and Boundary Dilemmas

The asymmetry of the use of resilience within natural and social systems results in ambiguity. Hence, simply importing resilience as it was originally understood in ecology to social sciences risks ignoring characteristics specific to each system. While the structural complexities of both natural and social systems can be perceived in similar terms, the internal feedback processes are incomparable, and many system-specific features are not present in ecological systems.[20] As social resilience has economic, spatial, and social dimensions, its analysis and evaluation require an interdisciplinary understanding of scales. Furthermore, because of the institutional context of social systems, analysis regarding social resilience must recognise the scale of communities and individuals to acknowledge agency, power, and

[16] Gunderson and Holling (2002).

[17] Cote and Nightingale (2012), p. 478.

[18] Folke et al. (2010); Adger (2000), p. 348.

[19] Olsson et al. (2015), p. 4.

[20] Davidson (2010), p. 1139.

knowledge, which are crucial factors in conceptualising resilience but absent in ecological systems.[21] Applying the resilience framework to social science thus requires an improved and thorough appreciation and understanding of complex interdependent relationships without being deterministic and assuming pre-existing power hierarchies.

Resilience research, in general, is heavily influenced by positivist epistemology, as it assumes that phenomena can be objectively defined, measured, and understood. Resilience might be desirable but may hinder and hide normative questions such as 'the resilience of what?' and 'resilience for whom?'. Without asking these questions, there is a risk of conceptualising society as a homogenous mass, masking agency, power, and the dialectic development of societal phenomena. The idea of desirable condition present in ecological resilience is thus not transferrable to resilience in social systems, as this would eventually function as a boundary condition that anchors social change in a socially constructed optimum.[22] Resilience in social systems assumes a possibility of transformation to a new system viewed as more desirable, with boundaries defining alternate system states.[23] However, defining thresholds in social systems often involves normative value judgement and is not necessarily a question of science *per se*.

Furthermore, the concepts of 'system ontology' and 'system boundary' also create difficulties with using resilience theory in the realm of the social. In ecological science, the constructed system of analysis is not intended to give a complete account of ecosystems—while the notion of a system is necessary for resilience, system boundaries need to be specified to examine and explain a specific phenomenon. For instance, in the *Paradox of the Plankton* by Hutchinson (1961), the scope of analysis consisted of relatively large bodies of fresh water. The paradox deals with the unexpectedly wide range of plankton species in lake systems, which seems to flout the principle of competitive exclusion. As species compete for a single resource, planktonic species should be driven to extinction except for one top predator. However, a single equilibrium state in which one species of plankton is favoured will not occur as other environmental and ecological factors are considered, such as commercialism, symbiosis, or chaotic fluid motion.[24]

Another example is the functioning and resilience of the Atlantic Meridional Overturning Circulation (AMOC), an essential component of Earth's climate system. Understanding AMOC requires a thorough knowledge of ocean-atmosphere dynamics, thermohaline circulation, and the seasonal and long-term changes in the cryosphere. Geological records and palaeoceanographic reconstructions suggest that the AMOC has multiple equilibrium states, and the decline and collapse of the AMOC may result in a rapid and widescale change in Earth's climate system.[25]

[21] Adger (2000); Davidson (2010).

[22] Olsson et al. (2015).

[23] Miller et al. (2010).

[24] Hutchinson (1961); Károlyi et al. (2000).

[25] Boers (2021).

However, most systems in natural sciences do not have sharp boundaries as systems are generally understood as entities of a given phenomenon that researchers want to explain, describe, or interact with.[26] As with both lake ecosystem and ocean circulation, pragmatic considerations concerning what aspects of the subject of study are to be included in the system framework imply some degree of normative construction.

Thus, defining boundaries is an essential prerequisite for system ontology. Downplaying the conceptual requirements of a system and system boundaries to make resilience applicable may result in blurring the concept of resilience itself. At first glance, a lake ecosystem differs from the surrounding terrestrial ecosystem, yet some plants are partially submerged in the lake, rooted in the earth; amphibians move across the lake's shoreline; nearby trees drop leaves into the lake. The AMOC can be analysed as the surface and deep-water currents in the Atlantic Ocean, but its palaeoceanographic analysis requires an understanding of freshwater input, change in solar insolation due to orbital cycles, and the consideration of other factors that can also be perceived as part of the system. In both cases, delineation problems arise when describing system boundaries. These boundaries can be defined reasonably well in environmental science as system boundaries rely on the assumption that a given set of entities is universally recognised across disciplines. Hence, the reflexivity of researchers in recognising that system boundaries are constructed is crucial. Still, a given set of entities may be more accepted in the natural sciences than the social sciences, and resilience thinking can be applied to analyse the system's limits and potential for adaptation or transformation.

3.2 Analytical Use, Ontological Disparities, and the Shadow of Structural Functionalism

Research involving social phenomena is reluctant to use systems as an ontological description of society.[27] Instead, a system might be used analytically to study a specific aspect of society, polity, or the economy, such as the political, legal, or tax systems. Furthermore, the bowl analogy is problematic because of competing explanations and paradigms regarding the shape and surface of the 'social system'. While in ecological resilience, the surface and shape of the bowl reflect the current state-of-the-art understanding in science, there might not be consensus about the shape in social science.[28] Moreover, feedback mechanisms in natural and social systems differ widely: the cybernetics of positive feedback that causes exponential change and negative feedback that stabilises the system (homeostasis) is too simplistic to apply to social systems. Social entities interpret and reinterpret

[26] Olsson et al. (2015), p. 4.
[27] Olsson et al. (2015), p. 3.
[28] Olsson et al. (2015).

communication and interact in a way that may or may not affect the behaviour of its participants; thus, feedback mechanisms in social systems are primarily determined by structured agency rather than structural forces.[29]

The emphasis on a systematic view of society according to resilience theory is reminiscent of the structural-functionalist conceptualisation of society that gained theoretical prominence in the mid-twentieth century.[30] In *Panarchy*, the definition of the social system is adapted from the work of Émile Durkheim (1858–1917) and Talcott Parsons (1902–1979).[31] Society is conceptualised as a system with prerequisites that need to be fulfilled for its persistence, and its various institutions exist to fulfil these needs and maintain its stability. There are similarities between resilience thinking and Parsons' AGIL paradigm: adaptation (A)—a system needs to adapt to endo- and exogenous factors as well as to adapt the environment to its needs; goal attainment (G)—a system must define and function to achieve its primary goal; integration (I)—harmonisation within a system, coordination of its interrelationships that strives for cohesion, and; latency (L)—latent pattern maintenance: the system and its components must maintain and renew themselves to perform their roles.[32]

The functionalist approach to resilience theory can be seen as one of the most fundamental obstacles to applying the theory in social sciences. Resilience scholars in social sciences reify society, assuming it to be embedded in shared norms and values. Hence, resilience corresponds to harmony and good norms that bring stability to society.[33] Thus, social resilience thinking, strongly relying on functionalism, has adopted a view of society that assumes nondynamic consensus and mechanical equilibrium, a view similar to what ecological resilience theory initially rejected when theorising ecosystems.

3.3 *Social systems and Resilience Thinking: A Bridging Concept?*

It must be recognised that social systems do not operate in a void and are not separate from the social context in which they exist. There are multiple theories about how systems may be envisioned in the realm of the social, including those by Niklas Luhmann (1927–1998), Talcott Parsons, and Immanuel Wallerstein (1930–2019). Applying the original concept of resilience used in ecology to these systems might be problematic. However, using 'resilience thinking' not as a formal theoretical framework but as an ideal—a bridging concept between interdisciplinary research

[29] Davidson (2010), p. 1142.

[30] Hatt (2013), p. 35.

[31] Gunderson and Holling (2002); Olsson et al. (2015); Hatt (2013).

[32] Ritzer and Stepnisky (2017), p. 240; Parsons (1951).

[33] Olsson et al. (2015).

areas—may indeed be useful.[34] In such a way, the normative assumptions underlying the resilience of and for social systems could be recognised with consideration of the positionality of researchers and the context of knowledge production that resilience research often overlooks and assumes is homogeneous. Social resilience, thus, should not be 'seen from nowhere' but as situated in time and space in its unique context in relation to which the ontological boundary of the system is drawn.[35]

As such, resilience thinking directs our attention to cycles of change and the interactions of agents, helping us realise how our current institutional structures might respond to disturbance and how to prepare for such outcomes.[36] Analytical studies of institutional networks and the proposed system's characteristics can help develop a system-specific understanding of resilience. For instance, when analysing law and resilience, distinctions should be made between (1) the resilience of legal systems, (2) the resilience of the law they produce, and (3) the resilience of other social and natural realms the law addresses.[37]

4 Legal System and Resilience

4.1 Law as a Complex System

Resilience theory, as we have seen, is suitable for describing complex systems, and there is no doubt that law is such a system.[38] It involves numerous actors at numerous levels, and its development is also influenced by numerous variables: economic, political, and social. Empirical research also shows that the legal system exhibits characteristics that can also be observed in other complex systems. For example, in a previous study,[39] we looked at citations in ordinary court decisions of constitutional court judgments and, similar to other judgment citation studies,[40] we found that they may follow a so-called power law distribution that is also characteristic of the scale-free networks of complex systems. This distribution was popularised by the work of Albert-László Barabási[41] and although in the former research, we only examined a rather limited network, the processes involved in the formation of the distribution are much more complex than the analysed network itself.

[34] Cote and Nightingale (2012).
[35] Haraway (1991).
[36] Davidson (2010); Brand and Jax (2007).
[37] Ruhl (2011).
[38] Ruhl (2008).
[39] Ződi and Lőrincz (2020).
[40] Fowler et al. (2007).
[41] Barabási (2009).

In the research presented in this volume, the primary question was not whether law can be considered a complex system but whether it can be distinguished from other social subsystems in the analysis. Indeed, if the aim is to examine how the law responds to external changes, we must find the means to describe these changes. One would assume that social demands, changes and possible shocks would influence debates in parliament. These would be reflected in the form of bills or at least some kind of parliamentary speeches or petitions. However, the current system does not really allow for meaningful parliamentary debate, especially regarding opposition proposals, as the supermajority tends to cut short these proposals and exclude them from debate. Moreover, the political interests of the ruling party may also magnify less pressing problems in society in parliamentary discourse, as has happened, for example, in the case of migration. This makes quantitative analysis particularly difficult.

However, it is also possible that a new social phenomenon does not arise at the level of legislation but in the practice of law and is dealt with by the legal system without new legislation being created. The relationship between legislation and practice is not clear either: the major waves of codification are not necessarily triggered by the emergence of pressing social needs but are often symbolic acts. We have seen this in the case of the new constitution of Hungary, the 'Fundamental Law', after democratic institutions had operated for two decades formally on the basis of the 'Stalinist' Constitution of 1949 (Act XX of 1949). While the content of this Constitution was completely altered after 1989, the Fundamental Law was adopted only two decades later, in 2011. Also, the capitalist transformation was followed only decades later by the recodification of the Civil Code.[42] Codification, as a profound and far-reaching legislative act, can, therefore, by no means be seen as an immediate response to profound and far-reaching social change. However, the question must be left open here as to the extent to which the political changes that led to the wave of codification after 2010 had a social background, i.e., whether they can be seen as a response to the 2008 global economic crisis.

A particularly interesting issue is the extraordinary legislative response to various shocks and the perpetuation of the extraordinary legal order, which we have analysed in the framework of the research project *Epidemiology and Law, a* precursor of this research project.[43]

The authors of this volume have thus used several different methods to identify the external challenges to the law. A further problem, however, is that other subsystems may even use legal categories to describe social problems. This legal pre-qualification also means the pre-selection of information by these other

[42] The old Civil Code (Act IV of 1959), applicable from 1960, was also heavily amended after 1989, but the new one (Act V of 2013) came into effect only in 2014.

[43] The results were published in the Jogi Diagnózisok [Legal Diagnoses] series in 2020, 2022 and 2023 (editors: Fruzsina Gárdos-Orosz and Olivér Viktor Lőrincz; published by Institute for Legal Studies of the Centre for Social Sciences and L'Harmattan Publisher in Budapest).

subsystems; therefore, it is not easy to find 'pure' external stimuli isolated from the legal system.

4.2 Models and Metaphors

Concerning the application of the model of ecological resilience to law, the use of natural scientific models and metaphors is not unknown in law, even if law and legal science (if law can be considered a science) are far from being natural sciences.

For example, Gyula Eörsi, who also played an important role as the chair of the committee that drafted The United Nations Convention on Contracts for the International Sale of Goods (CISG), in one of his early works on the transfer of property[44] describes issues associated with the transfer of goods using different physical models: a thing is transferred from one person's gravitational field to another's. Goods can have different states of matter: rights are gases, movables are liquids and inventoried goods like real estate and ships are solids. This is not, of course, a question of the laws of physics being applied within the legal system. Eörsi refers to these physical laws as a kind of metaphor, but this leads to a number of problems. A metaphor as a transfer of a semantic field[45] leaves open the question of which elements of the model taken from physics are applicable to the transfer of property and which are not. We can imagine owners as bodies with their own gravitational field, where property is transferred from one sphere of attraction to another, but it is unlikely to be meaningful to calculate the trajectory of the object of property. It is conceivable to classify goods into three groups based on the three states of matter known by Eörsi at the time, but it is unlikely that we would be able to apply further quantitative features of physics to law, such as the (measurement of the) specific heat, melting or boiling point of goods. New discoveries that increase the number of states of matter are also unlikely to impact the classification of goods.

Likewise, we can use the marble-bowl model to describe the legal system, assuming that each branch of law or national legal system has a different shape, which affects its capacity to absorb social shocks (and this capacity can be examined separately from general social resilience). Or one can assume that there is a threshold beyond which the legal system will swing into another irreversible state, but it is precisely the description and quantification of the underlying processes that quantify and predict these changes in resilience models that is problematic. To use a simple example: what could we consider to be the populations in the legal system, in the Hollingian sense, whose competition and interaction would determine the equilibrium states of the system and whose change would predict an irreversible change in a given equilibrium, an upheaval of the previous system?

[44] Eörsi (1947).

[45] See Kittay (1987).

Ultimately, the danger with such metaphorical approaches is that we are, in fact, only transferring the basic logical schemas—category divisions, sub-divisions—built up in one domain to another, but beyond these rudimentary schemas, the original models do not really add anything to the knowledge of the other domain.

4.3 Normativity, Legal Positivism and Descriptive Law

The application of scientific models to law, in addition to the limitations described above in relation to the social sciences, is also limited by the normative nature of law and the legal positivism that gives it prominence. If, for example, we wanted to apply the theory of resilience as a scientific research programme[46] on law, the limitations of this application would become apparent quite quickly because of the absence of quantitative evidence.

In an earlier paper[47] we tried to reinterpret the problem addressed in Eörsi's study mentioned above—the different transfer regimes of movable property—within continental law. For this purpose, we used Jean Piaget's theory[48] of the emergence of object constancy and permanence in children. In the course of cognitive development, a mental image of the physical object is formed in the mind, and the child understands that even if they do not see the physical object for a while, this does not mean that it ceases to exist, and they can perform mental operations on the image of the object; for example, move it in the imagination without moving the physical object. In that paper, we built on this to describe the two major legal systems, the *traditio*-based German and the *solo consensu* French systems. We assumed as a basic principle that the good and its image (the property right) cannot be separated indefinitely and that in all legal systems, a mechanism links the two in some way. In German law, the transfer of property requires, in addition to a contract, a legal transaction called *Dingliches Rechtsgeschäft*, practically a transfer of possession, so that the possession of the good (which is, of course, also not a purely physical relation but a social construct) and the property right on the good are never too far apart.

In the French system, although an unlimited number of contracts can be concluded, property is transferred through these chains of transfer even without the transfer of possession. Ultimately, however, the legal institution known as *prescription acquisitive instantannée* (immediate acquisitive prescription) applies, thus if the possession of the thing takes a completely different path, the last holder of the thing acquires, under certain conditions, the right of ownership over the good, so that the thing (its physical possession) and its 'mental representation', its image (i.e. the property right) come together again. Thus, even if we consider the property right

[46] See Lakatos (1978).

[47] Lőrincz (2009).

[48] Piaget and Inhelder (1992), pp. 14–16 and 54–66.

(*Sachenrecht, droit des biens*) to be normative, no legal system allows the multiplication of the legal image of the thing. Accordingly, property law is, to a certain extent, bound and determined by the physical properties of the object, primarily by the uniqueness of the object, unlike the law of obligations, where, in principle, an unlimited claim can be made against the same property. According to the law of property, the thing must typically be assigned to a single claimant; common property is avoided in most cases.

Thus, for law to be able to perform 'mental' normative operations on the image of a given thing, it is necessary that it be at least partially descriptive and that it represent the physical properties of the thing in its own system.

To describe the process of representation, we have also invoked Piaget,[49] whereby new experiences are incorporated into the existing system through adaptation. There are two types of such a process: assimilation, which involves the incorporation of the new phenomenon into one of the existing categories, and accommodation, which requires a change in the system. Thus, for example, the model of the transfer of property created for corporeal objects can be applied to other phenomena or resources, such as electricity (in the same way that the rules on theft of property can be applied to electricity, which is not a physical object in the common sense), thereby assimilating electricity into the category of physical objects—but, for example, a legal system can also adapt by creating a separate form of transfer for the transfer of rights, rather than applying the rules used for the transfer of property. The regulation of money and securities in physical form can be extended to money held in a bank account and dematerialised securities but not to cryptocurrencies. This basic model of adaptation, the description by the law as a system of the external world—responding to external stimuli—served as a starting point for the research in this volume.

5 Conclusion

In the first half of this chapter, we reviewed the ecological origins of the concept of resilience its relation to complex systems, and the limitations of this model as applied to the social sciences. We then turned to its legal application and its limitations in the second part. In the volume, we give examples of the application of the resilience model, but we also propose an alternative, rather simple cognitive model, which points out that the normative character of law and the regulation of social processes requires that the outside world be represented in some form within the legal system and that the legal system can perform normative-mental operations with this representation. In law, the acquisition of this tacit knowledge, which represents the outside world, including newly experienced social phenomena, is described using Piaget's model of adaptation, and some of the authors of this volume have embedded

[49] Piaget and Inhelder (1992), p. 9. ff.

this schema in their research. The analysis could be extended in several directions in the future. On the one hand, more emphasis can be placed on the self-movement of law as a system, on changes that are not the result of external influence but, for example, of some internal dogmatic-regulatory need. On the other hand, much more sophisticated models of categorisation may exist, some of them based on statistics. In a future research step, we would also like to apply these to law.

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A Pluralistic Model of the Responsiveness of Law: The Case of Hungary

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Abstract The present chapter seeks to show that the application of traditional doctrinal legal methodology is not sufficient to understand the responsiveness of law. Indeed, it is necessary to draw on the methodological tools of socio-legal studies to accurately model how the law responds to social change (legal responsiveness). We attempt to outline a pluralistic theoretical framework to dislodge the commonplace notion that law merely mirrors society. This would enable jurisprudence to move beyond debates about the concept of law and take account of both external and internal legal culture, as well as the omnipresent phenomenon of legal pluralism, which we believe is essential for describing the responsiveness of law. To demonstrate the value of such an approach, we describe multiple areas, including technology and artificial intelligence regulation, which are increasingly focal topics for legal studies.

1 Introduction

The present chapter seeks to show that the application of traditional doctrinal legal methodology is not sufficient for understanding the responsiveness of law. Indeed, it is necessary to draw on the methodological tools of socio-legal studies to model the responsiveness of law accurately. In this paper, we attempt to outline a pluralistic theoretical framework to dislodge the commonplace notion that law merely mirrors society. This would enable jurisprudence to move beyond the currently jejune debates associated with the concept of law and take account of both external and internal legal culture, as well as the omnipresent phenomenon of legal pluralism, which we believe is essential for describing the responsiveness of law.

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Although it might not always be glaringly obvious, contemporary legal studies is permeated by numerous serious methodological debates. This is true both of jurisprudence[1] and, even more so, of the so-called doctrinal study of law.[2] While a refreshing debate on doctrinal legal research has emerged in recent years both in Hungary[3] and internationally, especially in the United Kingdom and the Netherlands,[4] this has done little to dispel questions about the methodology of such research. Thus, the methodological underpinnings of contemporary legal research—although mostly surrounded by eerie silence—remain an open question that needs to be answered.[5]

This is not to say, of course, that doctrinal research is not the dominant strand within legal studies, both in the United States and Europe.[6] However, there is a growing demand for legal research to use, at least in part, empirical methods.[7] Of course, dealing with law as a social phenomenon (from a social sciences perspective) is nothing new. Sociology of law, legal anthropology, and criminology have centuries-old traditions.[8] Moreover, they have long been an integral part of Hungarian jurisprudence, and there is also a wealth of Hungarian literature dealing with the social aspects of law.[9] Typically, however, as recent literature highlights, such social science perspectives are often relegated to the status of 'auxiliary science' in Hungarian legal studies. This classical disciplinary demarcation seems to have been loosening recently, a phenomenon to which jurisprudence must necessarily react.

Thus, alongside the predominance of doctrinal jurisprudence, socio-legal research is becoming increasingly important, partly because of changes in the academic field and partly due to the methodological uncertainties mentioned above.[10] Some authors are more pessimistic about the future of doctrinal jurisprudence, arguing that it should increasingly be replaced by a kind of social jurisprudence.[11] Others, such as Mátyás Bódig, take the view that doctrinal jurisprudence has an 'indestructible epistemological core' that cannot be replaced but can only be

[1] Cotterrell (2014), pp. 41–55; Leiter and Matthew (2017).

[2] Bódig (2016).

[3] Szabó (1999), Bódig and Ződi (2016), Jakab and Menyhárd (2015).

[4] Bódig (2016).

[5] van Hoecke (2011), Smits (2017), pp. 207–228; Bódig (2021).

[6] Gestel et al. (2017), pp. 1–28.

[7] Diamond and Mueller (2010), pp. 581–599; Langbroek et al. (2017); Tyler (2017), pp. 130–141; Jakab and Sebők (2020).

[8] Jakab and Sebők (2020), p. 14.

[9] For an overview, Jakab and Sebők (2020), pp. 14 and 17.

[10] Jakab and Sebők (2020), pp. 14–16.

[11] As Oliver Wendell Holmes famously pointed out in 1897: 'For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.' Holmes (1897), p. 469.

supplemented by social science methods.[12] However well-founded the doubts about doctrinal jurisprudence may be, there is perhaps no doubt about the need to clarify the methodology and the criteria for answering the research questions associated with jurisprudence.

This is particularly so when we ask questions—as the authors in this volume do—about the capacity of the legal system to respond to the social reality that surrounds it. Such research questions stress both the need to understand the social processes that form the background of the legal system's normative rules and how these may be evaluated.[13] We can, therefore, distinguish between a descriptive question (why and how does the law respond to social reality?) and a normative question (how may we evaluate such changes?). To answer these questions, it is necessary for doctrinal jurisprudence to complement its 'inside' view of law with social science methods. Without this, we may observe the reactions of the legal system, but it is difficult, if not impossible, to evaluate their justification or aptness. It is therefore necessary to describe the relationship between law and social change, which is thus also relevant to doctrinal jurisprudence.

2 Law and Social Reality

One of the quintessential theoretical frameworks for describing how law and social reality relate to each other is the metaphor of 'mirroring': law reflects social reality, or a specific part of it, in some way. Brian Z. Tamanaha has pointed out that much of modern legal theory can be fitted into this theoretical framework.[14] For example, authors in the natural law tradition interpret law as a reflection of morality or reason.[15] Similarly, authors in the legal positivist tradition base their concept of law on a reflection of commands or social conventions.[16] Thus, for example, H.L.A. Hart derived his concept of law from the conventions (secondary rules) of (at least a certain part of) society.[17] In his analysis, Tamanaha goes into even more detail on the relationship between the two major competing traditions of legal philosophy and the metaphor of mirroring, which also creates a basis for his case against it.[18] It should be stressed, however, that Tamanaha does not claim that law *never* mirrors social reality. He merely argues that this is *not necessarily* the case: one can imagine several degrees of mirroring, which can best be judged using

[12] Bódig (2021), pp. 157–171.
[13] Bódig (2021), pp. 197–215; van der Burg (2018).
[14] Tamanaha (2001), pp. 11–76.
[15] Tamanaha (2001), pp. 16–22.
[16] Tamanaha (2001), pp. 2–27.
[17] Tamanaha (2017), pp. 71–77.
[18] Twining (2003), pp. 207–209.

qualitative empirical means.[19] It follows that there is good reason to consider how law interacts with the underlying social reality, especially when it responds to changes in the latter.

One would be right to interject that this framing of legal philosophy does not take account of 'third-way' theories that seek to go beyond legal positivism and natural law and which are typically subsumed under the umbrella of socio-legal research. However, as Tamanaha points out in several pieces of work, theories that focus on law as a social phenomenon have played a significant role in legal theory since the nineteenth century.[20] Such theories are necessary if only because: '(1) theories of law are themselves subject to surrounding social-legal influences, and (2) theories of law are involved in the social construction of law.'[21] It is, therefore, necessary to incorporate the insights associated with theories that approach law from a social science (or theory) perspective when discussing the adequacy of the metaphor of mirroring.

Even when jurisprudence reflects on the relationship between law and society, it often does so in a one-sided way. Drawing on Brian Tamanaha, we have shown that major authors in the Hungarian legal theoretical tradition, like the international literature, often rely implicitly or explicitly on the metaphor of reflection.[22] In what follows, we will argue that this metaphor is inadequate and that we should provide a different description of the relationship between law and society. Only on the basis of this description can we formulate a theory of the responsiveness of law.

3 The 'Folk Concept' of Law as a Means of Moving on from the Mirroring Thesis

As we have alluded to in the introduction, to make the responsiveness of law researchable, one cannot simply apply a well-worn doctrinal methodology firmly embedded in internal legal culture. Indeed, the doctrinal methodology takes for granted an analytical concept of law, which, according to Tamanaha, approaches law from a functionalist or a formalist point of view.[23] Tamanaha starts from the so-called 'folk concept' of law, which includes all social phenomena perceived as law by a social group.[24] In his view, there is no single valid definition of law, and, therefore, a theory of law based on social reality can provide valid answers to the

[19] Tamanaha (2001), pp. 230–231.

[20] Tamanaha (2017) ch. 1; Tamanaha (2015).

[21] Tamanaha (2017), pp. 32–33.

[22] Fábián and Matyasovszky-Németh (2022), pp. 67–72.

[23] Tamanaha (2017), p. 48.

[24] According to Tamanaha's *labelling theory*, whatever different social groups label law is law. Tamanaha (2017), p. 117.

functioning of law primarily on the basis of this diverse, plural concept of law.[25] Tamanaha argues that 'Form-and-function-based analytical concepts of law inevitably clash with folk concepts because how people perceive law cannot be captured by functional analysis [. . .].'[26] According to Tamanaha, 'People and groups have conventionally identified and constructed multiple forms of law [. . .], and each of these forms of law comes in a range of variations. These forms of law arise and change over time in connection with social, cultural, economic, political, ecological, and technological factors.'[27]

Recognizing and researching the 'folk concept' of law should not, of course, mean a complete rejection of the analytical concept of law. To clarify, we are not questioning the merits of doctrinal jurisprudence but merely wish to emphasize that in order to describe the responsiveness of law, the traditional tools of doctrinal jurisprudence need to be supplemented. For this, socio-legal research should inevitably free itself from the constraints of the analytical concept of law and use the freedom offered by the 'folk concept' to describe the functioning of modern law that is in correlation with socio-political reality.

Of course, the visceral doubts of practicing lawyers, doctrinal legal scholars, and legal philosophers of positivist (or even natural law) inclinations regarding the 'folk concept' of law are understandable. Their hitherto used concept of law is at odds with this approach. One need only open the textbooks used in legal education today to see that law students acquire, even in the first semester of their legal studies, the idea that law is essentially and primarily positive state law. However, one would be remiss to deny that law should no longer be understood exclusively as state law—that is, how the vast majority of jurists have understood it since the nineteenth century—thanks to the rise of positivism.[28] Based neither on internal nor external legal culture can one claim that, in their everyday life and work, they think only of state law, and maybe of international and European law, when they think of law. If this were the case, how would one account for rules created by various international organizations, health experts, and the non-binding rules of the Operational Task Force set up during the state of emergency in Hungary at the time of the COVID-19 pandemic? And what would one make of wearing masks on public transport before the mask mandates were imposed simply because others were also wearing them?[29] Of course, it is conceivable that some proportion of people made a sharp distinction between positive law, morality, and other norms, but the majority of society (and the legal profession), at least in Hungary, did not.[30]

[25] Tamanaha (2017), p. 76.

[26] Tamanaha (2017), p. 48.

[27] Tamanaha (2017), p. 80.

[28] Michaels (2017), p. 91.

[29] Fekete (2020).

[30] Roth (2021), pp. 159–160. Roth cites cases related to the legal concept during the COVID-19 epidemic as examples. One such case is when fundamentalist Protestant communities in the

4 Legal Pluralism and the Responsiveness of Law

If in researching the responsiveness of the legal system we use the folk concept of law instead of an analytical concept, we must necessarily reject the mirroring thesis and should base our account on legal pluralism instead. Thus, it would be insufficient simply to provide a doctrinal analysis of specific legislative or jurisprudential changes to account for the responsiveness of law to social changes.

Although theories of legal pluralism, like theories built on the mirroring thesis, are diverse, we can identify some basic features that widely characterize legal pluralism. According to Ralf Michaels, legal pluralism rests on the following three pillars: '1. Not all law is state law: some law does not emerge, directly or indirectly, from the state. Put differently, some non-state normative orders deserve to be called law. 2. There is necessarily a plurality of laws: law is not one, but many. 3. These different laws interact; there are overlaps and conflicts between laws that cannot be resolved through appeals to either hierarchy or objective delimitation.'[31] John Griffiths' *What is Legal Pluralism?*[32] is widely considered to be the cornerstone of contemporary theories of legal pluralism.[33] Griffiths attempted to summarise what might be meant by legal pluralism. He argued that applying an approach based on legal pluralism can combat the 'ideology of legal centralism [which] has not only frustrated the development of general theory, it has also been the major hindrance to accurate observation.'[34] Griffiths' conception of legal pluralism is perhaps overly radical, but it illustrates the tendency in legal theory that led to the general acceptance of Bodin's, Hobbes', and others' monistic conceptions of law while ignoring social phenomena. On the contrary, as rightly emphasized by Ehrlich, law is a much more colourful *social* phenomenon than the totality of state law.[35]

Griffiths' article proved to be programmatic and revolutionary in its time because it made a radical break with how legal pluralism had been used in previous decades—that is, to describe the law of colonial societies.[36] He achieved this by using Sally Falk Moore's concept of a semi-autonomous social field to describe legal pluralism as a system of norms that parallel state law.[37] This neutralized the frequent criticism of legal pluralism as having over-extended the concept of law and recognized as law all normative systems outside state law.[38] So, Griffiths let the genie of legal pluralism out of the bottle. Indeed, the evolution of the conceptions of legal

Bijbelgordel, the Netherlands, followed religious rules as opposed to legislation and guidance because they did not recognize the legal validity of the epidemiological restrictions.

[31] Michaels (2017), p. 92.

[32] Griffiths (1986).

[33] Dupret (2007), pp. 297–300; Tamanaha (2021), pp. 169–209.

[34] Griffiths (1986), p. 4.

[35] Tamanaha (2021), pp. 8–9.

[36] Tamanaha (2021), p. 171.

[37] Szilágyi (2000), p. 27.

[38] Tamanaha (2021), p. 187.

pluralism after Griffiths shows that the meaning of the pluralist conception of law varies from one author to another, but certain commonalities can be found.[39]

In what follows, we attempt to outline the diverse theories of legal pluralism and the debates that have arisen in relation to it. It is also worth noting at this point that a multitude of approaches to describing how the law responds to social change may emerge from the dual foundations of the folk concept of law and legal pluralism. For example, according to Masaji Chiba, most of the conflicts between theorists of legal pluralism are caused by the distinction between state law and 'minor law'.[40] Chiba explains that both concepts have undergone significant changes, but it is now accepted that minor law can take many forms that are almost impossible to catalogue. He also points out that minor law includes legal systems other than state law, which, like local or regional systems of norms, substantially determine and transform them in some cases (e.g., European Union law or human rights law).[41] Another common feature of these theories is the extension and modification of the concept of legal pluralism, which, according to Chiba, necessarily goes hand in hand with the phenomenon of legal pluralism—a dynamic phenomenon in constant flux.[42] Chiba points out that while almost all studies on legal pluralism may generate new debates, it is this multiplicity of uses that brings us closer to the complex social reality of law.[43]

5 Global Legal Pluralism

The systematization of legal pluralism is by no means an easy task, and many approaches have been proposed since Griffiths' study in 1988. Paul Schiff Berman's classification, modeled on Cotterrell's, is one of the most well-known because it is easy to operationalize for both doctrinal jurisprudence and socio-legal studies.[44] Berman distinguishes between substantive and procedural legal pluralism. According to Berman, substantive legal pluralism can be linked to multiculturalism, which aims to justify the coexistence of different normative systems in a given field. On the other hand, procedural legal pluralism does not set a priori goals but merely seeks to describe the interaction of different mechanisms, institutions, and discourses.[45] According to Cotterrell, these can take place at different levels: intranational, transnational, and supranational. Berman argues that this division makes it easier to deal with the phenomenon of global legal pluralism, which moves away

[39] Chiba (1998).
[40] Chiba (1998), p. 229.
[41] Chiba (1998), pp. 233–234.
[42] Chiba (1998), p. 240.
[43] Chiba (1998), p. 242.
[44] Berman (2014), p. 257.
[45] Berman (2014), p. 256.

from the nation-state level and takes account of transnational socio-legal processes.[46] The introduction of the notion of global legal pluralism may be very useful for research on the responsiveness of law, as it poses a number of challenges for anyone wishing to understand the responsiveness of law, ranging from social media platforms to epidemiological rules to the internal law of transnational organizations.

An exciting discussion of the phenomenon of global legal pluralism is provided in Boaventura de Sousa Santos' seminal work *Toward a New Legal Common Sense*.[47] Santos argues that the theory of legal pluralism has historically been represented as a counter-hegemony to the established social order and legal structures.[48] He also points out that the theory of pluralism had already manifested at the end of the nineteenth century in reaction to the legal positivism present in both common law and continental traditions, the main objective of which was the codification of state law and the rejection of law outside the state, guided by the idea of creating a civil state based on legal certainty.[49] It is perhaps no coincidence that legal pluralism became a popular research topic in socio-legal studies in the context of the turbulent social changes of the 1960s.[50] The importance of the theory of pluralism was later reasserted when it offered an alternative to the cosmopolitan global legal order in the 1990s and again in the 2010s.[51] Sousa Santos believes that legal pluralism is important because it can bring underrepresented 'practices' of legal discourse—typically the Global South's narratives of law—into the dominant legal epistemological space.[52]

A less critical reading of global legal pluralism is given by Günther Teubner in *Global Bukowina: Legal Pluralism in the World-Society*,[53] where he argues that only legal pluralism can provide an adequate theoretical framework for the study of global law by focusing on the discourses that occur therein. Teubner argues that living law, as described by Ehrlich, has also developed globally, primarily with the emergence of the new *lex mercatoria*.[54] Teubner argues that global law is a distinct legal order that cannot be understood from the perspective of state law, as it has widely divergent characteristics and is closely coupled to different economic and social contexts.[55] Teubner's idea mirrors theories of legal pluralism, which describe the concept of law as a complex phenomenon determined by social and cultural contexts. Both reject the idea of the universality of Western law and treat it as a

[46] Berman (2014), pp. 268–269.
[47] de Sousa Santos (2020).
[48] de Sousa Santos (2020), p. 99.
[49] de Sousa Santos (2020), p. 101.
[50] de Sousa Santos (2020), p. 102.
[51] de Sousa Santos (2020).
[52] de Sousa Santos (2020), pp. 112–113.
[53] Teubner (1997).
[54] Teubner (1997), p. 1.
[55] Teubner (1997), pp. 1–3.

normative system with limited scope.[56] Teubner's theory of global legal pluralism is also unique in that it describes the functioning of a 'global Bukowina' based on Luhmann's systems theory. Thus, Teubner, following Luhmann, argued that global free law is also a self-reproducing system with its own mode of communication and ability to determine whether a situation is legal or illegal under global law.[57]

On the other hand, the concept of global legal pluralism has been criticized in recent years.[58] One of the foremost critics of Santos' and Teubner's theories, William Twining, argues that the notion of legal pluralism as a system of coexisting norms in constant competition or struggle is flawed, as the relationship between these systems is generally much more complex.[59] Twining argues that the '[...] terminological uncertainties [associated with global legal pluralism] can be viewed as symptomatic of a discipline trying to face up to a new and rapidly changing scene. [...] However, the many extensions and applications of the idea of legal pluralism to new phenomena and situations are so many and varied that it is difficult to construct a coherent answer to the question: what is the relevance of classical studies of legal pluralism to the emerging field of "global legal pluralism?"'[60]

In his recent theoretical work on legal pluralism,[61] Tamanaha also criticizes the theory of global legal pluralism because, in his view, '[a]fter telling us to center on coexisting public and private and hybrid regulatory bodies and their interaction, they have little to say beyond paying attention to the complexity and interaction, or advocating flexibility, negotiation, and other general advice with thin content.'[62] Instead, Tamanaha proposes a systematic discussion of the role of legal pluralism in history, as well as a history of the idea of legal pluralism. However, he does not merely collect and file the writings of authors on legal pluralism. Going beyond mere systematization, he develops a unique theory on this basis, in which he further elaborates his thesis of the folk concept of law developed in his earlier works, applying it to the plural conception of law.[63]

Tamanaha distinguishes between two conceptions of legal pluralism: abstract and folk legal pluralism.[64] According to Tamanaha, social scientists' and legal philosophers' conceptions of abstract legal pluralism are always based on an artificially distilled analytical concept of law.[65] These theories of abstract legal pluralism may start with the view that law is a kind of 'normative ordering within social groups' or

[56] Teubner (1997), pp. 14–16.
[57] Teubner (1997), p. 10.
[58] Tamanaha (2021), pp. 157–161; Twining (2009), p. 277; Twining (2010), pp. 511–514.
[59] Twining (2009), p. 277.
[60] Twining (2010), pp. 512–513.
[61] Tamanaha (2021).
[62] Tamanaha (2021), p. 168.
[63] Tamanaha (2021), p. 12.
[64] Tamanaha (2021), pp. 10–15 and 169–209.
[65] Tamanaha (2021), p. 11.

that law is 'institutionalised norm enforcement'.[66] Tamanaha argues that theories of abstract legal pluralism cannot adequately describe legal pluralism because they all start from an abstract, artificial notion of law and end up with the conclusion that legal pluralism is nothing more than the 'multiplicity of a single form of law'.[67] For this reason, abstract theories always work with either a concept of law that is too broad or too narrow and fails to represent socio-legal practice adequately. Tamanaha summarises this problem as follows: 'These theories share three essentialist assumptions: (1) law is a singular phenomenon with (2) a particular set of defining or essential features that provides the basis for (3) an objective or universal science or theory of law.'[68] Abstract legal pluralism, then, cannot describe multiple sets of norms existing simultaneously as valid law in a social space, but rather how the analytic concept of law created by the author operates in an artificially delineated space.

Folk legal pluralism, based on the folk concept of law, thus frees scholars committed to socio-legal research from producing analytic concepts of law detached from social reality and from spending their time defending the merits of these concepts of law.[69] This also enables research into the responsiveness of law to be freed from several artificial presuppositions at once: first, one does not have to insist that law mirrors society; second, one does not have to defend the view that state law is the only normative system in society; and, finally, one is not forced to explain every socio-legal phenomenon one encounters in the course of their research using an artificial legal concept. Folk legal pluralism thus offers the possibility of observing and describing the normative systems that prevail in different communities as they operate in everyday life. Again, it should be stressed that this latter view does not dismiss the methodology of doctrinal jurisprudence and its usefulness; it merely seeks to shed light on another neglected slice of socio-legal reality. For, when examining the responsiveness of law, it is just as important to look at how the state legislature reacts to a social phenomenon as it is to look at how external legal culture shapes our everyday lives.

Cotterrell, partly in agreement with Tamanaha, believes that legal pluralism offers lawyers an opportunity to avoid having to engage in systematic theorizing, which is less relevant for practice, and instead provides them with a way to approach the complex reality of law and respond to different changes in the law.[70] According to Cotterrell, legal studies could facilitate this rapprochement by becoming more closely linked to the social sciences without losing its specific methodology.[71] Although Cotterrell does not provide a detailed guide that would fully convince every lawyer of the importance of legal pluralism, he does draw attention to an

[66] Tamanaha (2021), p. 11.
[67] Tamanaha (2021), p. 11.
[68] Tamanaha (2021), p. 174.
[69] Tamanaha (2021), p. 206.
[70] Cotterrell (2017), p. 30.
[71] Cotterrell (2017), p. 39.

important point when he urges an ever-closer relationship between legal practice, jurisprudence, and the social sciences. We agree with Cotterrell that legal pluralism may make the legal profession aware that, in addition to what they are taught at university, there is a complex and diverse world of law, which is very often not the same as state law, but which nevertheless contributes a great deal to the everyday functioning of different communities.[72]

To provide some examples of the potential benefits of research based on global legal pluralism, let us briefly highlight some areas of increasing importance to practitioners where such an approach might lead to relevant results. One of these is global *lex mercatoria*, i.e., the law of international economic relations mentioned above.[73] This heightened interest is apparent from the growing number of authors who apply an interdisciplinary methodology to describe *lex mercatoria* as a socio-legal phenomenon.[74] On the other hand, there is also a growing social science scholarship on related issues, such as the role of international organizations[75] or international arbitration[76] in shaping *lex mercatoria.* Thus, as *lex mercatoria* becomes more and more plural, the role of jurisprudence based on the folk concept of law becomes increasingly important since the analysis of state law can provide a less and less accurate account of the law of international economic relations.

Another critical area where jurisprudence needs to build strongly on the folk concept of law is issues related to information society.[77] One of the characteristics of information society is the emergence of ever-larger platforms that typically provide services across borders.[78] This phenomenon is predominantly encapsulated by various social media platforms. These entities and their day-to-day functioning are difficult to understand solely through a lens of the doctrinal jurisprudence of state law. Research that takes legal pluralism into account can better capture the quasi-legal systems that these platforms create for their users.[79] In addition, we seek to answer the question of how state law can respond to technological advancement, without which the response of the legal system can be disintegrative rather than effective.[80] A recent issue that highlights how pluralistic approaches are necessary for understanding the legal response to technological change is the newly emerging

[72] Cotterrell (2017), p. 39.
[73] Toth (2017).
[74] Calliess and Zumbansen (2010).
[75] Block-Lieb and Halliday (2017).
[76] Ali (2020).
[77] Ződi (2018), ch. 6.
[78] Lobel (2016), p. 87; Cohen (2017), p. 133.
[79] Land (2020).
[80] Parker and Braithwaite (2005).

field of artificial intelligence (AI) regulation.[81] Onur Barkiner, for example, highlighted that the European Union's AI Act is built on a plurality of understandings of the dangers and benefits of AI.[82] Thus, the legal response to emerging information technology phenomena must also build on socio-legal insights.

These are just a few examples of areas of law whose changes are best understood through legal pluralism. But the list is far from exhaustive. Even in areas of law where legal scholarship has traditionally focused on state actors and the law they make (such as public international law or constitutional law), we can find very promising pluralist research.[83] Legal pluralism should thus no longer be seen as the playground of a few legal anthropologists, sociologists of law, or researchers in atypical fields of law. A shift of emphasis is taking place that is permeating legal scholarship at large.

6 Conclusion

Before concluding, let us briefly allude to the state of legal studies in Hungary. Although the influence of theories of legal pluralism and the application of the folk concept of law is not prevalent in the Hungarian jurisprudential tradition, we can find authors who have worked to explore facets of socio-legal reality that transcend doctrinal jurisprudence, as well as legal sociological research based on the mirroring thesis. One such pioneer was Ernő Tárkány Szücs, who, in the last chapter of his book on Hungarian legal folk customs, looked at the existence of such folk customs in the late 1970s.[84] Tárkány Szücs found that layers of 'up' and 'down' existed in legal culture, or as he calls them, 'legal folk customs', even under the socialism of his time. This was mainly due to the fact that '[t]he old traditions are no longer known, and the new laws are not yet known [...]. Although the social and economic transformation has been followed by the laws, they have not been mastered and understood by the broad masses of our people [...]'.[85] Thus, contrary to the mainstream academic opinion of his time, the post-war political and economic transformation did not result in a 'socialised legal consciousness', but rather increased the division between internal and external legal culture and cemented the existence of legal pluralism.[86]

In recent years, however, we have witnessed significant advances in research on legal consciousness with the revival of research on legal consciousness and legal culture. In 2018, two monographs on Hungarian legal consciousness were

[81] Smuha (2021).
[82] Barkiner (2023).
[83] Mégret (2020); Teubner (2012).
[84] Tárkány Szücs (1981), p. 813–833.
[85] Kulcsár (1981), p. 822–823; Tárkány Szücs (1981), p. 830.
[86] Tárkány Szücs (1981), p. 820.

published.[87] Both works also sought to identify why the regime change's legal and institutional shocks were not absorbed and why the new legal discourse did not adapt to legal consciousness and legal culture. Notably, the two independent research projects used different methodologies: the first relied on a primarily quantitative methodology, and the second relied on a qualitative, narrative methodology. The two works may have influenced the academic acceptance of legal pluralism and the folk concept of law, even though neither piece of research explicitly considered this as its aim.

From the point of view of how the law responds to social change, however, we think it is time to revisit the research project that has been repeatedly brought to the surface by Hungarian legal anthropologists, both in legal theory and in empirical research on legal culture. The most important task would be to get legal scholars to accept that the theoretical findings of socio-legal research do not challenge doctrinal jurisprudence but are merely aimed at creating a body of knowledge about law that reflects the diversity of socio-legal reality. We believe that research based on this premise, which we strongly recommend, can complement and enhance jurisprudence. Only this approach can reveal indispensable factors without which we cannot obtain a complete picture of how the legal system responds to the constant shifts in today's dynamically changing world.

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[87] Fleck (2018); Fekete and Szilágyi (2018), pp. 19–63; Fekete (2021).

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