**FLASH REPORT:**

**WHAT HAPPENED IN THE LAST 48 HOURS IN HUNGARY AND HOW DOES IT AFFECT THE RULE OF LAW AND HUMAN RIGHTS?**

*Hungarian Helsinki Committee*

*12 November 2020*

During the evening of 10 November 2020, millions of Hungarians were waiting for the Hungarian Government to issue its previously announced decrees on ordering a series of restrictive measures to counter the spread of the coronavirus, fundamentally affecting people’s everyday lives. The Prime Minister announced the outlines of the envisaged measures in a Facebook video on 9 November, but there was a lot of uncertainty around the detailed rules of the modalities of the curfew, what businesses can remain open and under what conditions, what the exact rules of operation for university dorms are, and so forth. The government decrees were to be adopted under the framework of the “state of danger”, declared by the Government on 3 November,¹ and with a view to a law adopted by the Parliament on 10 November, providing authorization to the Government to extend the force of any of its emergency decrees until 8 February 2021. The government decrees on the new restrictions were finally issued and put online a few minutes before 11 p.m. on 10 November, and entered into force at midnight, leaving very little time for people to adapt to their lives to the new rules as of the next morning.

Hungarian citizens were up to some further surprises as well: during the night of 10 November, the Government submitted to the Parliament three extensive Bills, one of them being a proposal for the 9th Amendment to the Fundamental Law (the new constitution of Hungary, adopted in 2011). Hungary has been hit badly by the second wave of the coronavirus: for example, on 11 November, almost 4,000 new infections were recorded in the country of 10 million, and close to 19% of the tests carried out were positive. One might think that in this grave situation, the Bills submitted by the Government must be somehow connected to defending the population of Hungary against the pandemic, and the hasty legislation has certainly to do with the urgency of the COVID-19 situation. However, this is not the case. The Bills have nothing to do with helping the health care system in fighting the epidemic, ensuring that everybody has access to timely testing, or any other aspect of defending people's health and lives from COVID-19. They have nothing to do with ensuring the continued operation of the Parliament either, for example by allowing for remote sessions. Instead, while Hungarians were waiting to get to know the governmental decrees that will shape their everyday lives, the Government was busy submitting Bills which

- **humiliate and curtail the rights of the LGBTQI community**, building on recent anti-LGBTQI political statements and earlier legislative steps;
- **restrict the notion of public funds**, undermining the state’s transparency and the freedom of information;
- **ensure that public funds channelled into public trust funds is untouchable** for future governments; and
- **severely shrink the possibilities of opposition parties** to coordinate their candidates when running in the parliamentary elections.

The Bills were submitted without any public consultation, even though that would have been mandatory for governmental Bills under the law.² They are not included in the legislative plan³ of the Government for the autumn of 2020 either.

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² Act CXXXI of 2010 on Public Participation in Preparing Laws, Articles 1 and 8(1)-(2)

³ [https://www.parlament.hu/documents/10181/721095/Tvalk_program_2020_%c5%91sz.pdf/bea220f0-55fa-9607-0c48-7271c511cced?t=1592289343256](https://www.parlament.hu/documents/10181/721095/Tvalk_program_2020_%c5%91sz.pdf/bea220f0-55fa-9607-0c48-7271c511cced?t=1592289343256)


The Government’ legislative steps follow a pattern similar to what happened in Hungary during the first wave of the coronavirus. The Government announced a state of danger for the first time on 30 March 2020, and, subsequently, it was provided through Act XII of 2020 on the Containment of the Coronavirus (hereafter: Authorization Act) with a carte blanche mandate without any sunset clause to suspend the application of Acts of Parliament, derogate from the provisions of Acts, and take other extraordinary measures.4 (The first state of danger and the Authorization Act were in effect until 17 June 2020.) According to the Authorization Act’s explanatory memorandum,5 granting excessive powers to the Government was necessary to ensure that the Government can adopt and extend the force of its special government decrees also if the Parliament will not be able to convene for epidemiological reasons. However, the Parliament not only remained operational, but was quite active in the spring, and adopted a number of laws and decisions in the period of the state of danger. Some of these had no relationship whatsoever with the containment of COVID-19, but in turn had a negative effect on human rights.6

The preamble of Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic7 (hereafter: Second Authorization Act) argues as well that holding parliamentary sessions may be disrupted due to the pandemic, and that is why it is necessary to give a 90-day authorization to the Government to rule by decree. It is of course a valid concern that some MPs may get infected, but it is quite telling that the Government has not taken any steps to facilitate the continuous operation of the Parliament, e.g. by amending laws to allow for remote sessions.

Furthermore, it must be kept in mind that the possibilities of opposing these new Bills publicly are rather limited: as of 11 November, the Government introduced a blanket ban on demonstrations,8 irrespective of the modalities of the demonstration and whether it would be compatible with social distancing and curfew rules.9

Below, we outline what declaring a state of danger means for the Government’s legislative powers, and summarize the main concerns emerging with regard to the following three Bills:

- Bill T/13647, the proposed 9th Amendment to the Fundamental Law, containing rules such as “the mother is female, the father is male”, and that children have a right to their identity in line with their sex by birth; rules on the notion of public funds; and rules on public trust funds;10
- Bill T/13648, an extensive omnibus Bill that covers a range of areas, from organisational issues pertaining to the judiciary to the rules of adoption;11 and
- Bill T/13679, a Bill amending election rules.12

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1. The Government got a carte blanche in the state of danger — again

The state of danger was declared in Hungary for the second time on 3 November 2020, and was followed by the adoption of the Second Authorization Act by the Parliament on 10 November. The Second Authorization Act differs from the Authorization Act in that it has a sunset clause: it authorizes the Government to extend the force of governmental decrees adopted in the state of danger for 90 days from its promulgation, that is, until 8 February 2021. However, three problems remain that are the same as the ones raised in relation to the Authorization Act:

5 Available in Hungarian at: https://www.parlament.hu/irom41/09790/09790.pdf.
7 Available in Hungarian at: http://njt.hu/cgi_bin/njt_doc.cgi?docid=222620.391193.
8 Government Decree 484/2020. (XI. 10.), Articles 4(1) and 5(1)-(2).
9 During the first wave, demonstrators in Hungary used novel methods to demonstrate against governmental measures in a way that respects social distancing rules, e.g. they were driving around in the centre of Budapest honking.
10 Available in Hungarian at: https://www.parlament.hu/irom41/13647/13647.pdf.
11 Available in Hungarian at: https://www.parlament.hu/irom41/13648/13648.pdf.
12 Available in Hungarian at: https://www.parlament.hu/irom41/13679/13679.pdf.
According to the concept outlined by the Fundamental Law, the special government decrees adopted in the state of danger would remain in effect after an initial period of 15 days only with the Parliament’s support given in full knowledge of their contents. Just as the Authorization Act, the Second Authorization Act eliminates this substantive restriction when it authorizes the Government to extend the effect of future, not-yet-adopted special decrees, the content of which is of course unknown.

In June 2020, the Parliament adopted a law that fundamentally altered the provisions applicable if a state of danger is declared. As a part of that, the provision of the Authorization Act that provided a carte blanche mandate to the Government by excessively widening the scope of the decrees the Government may issue during the state of danger was copied practically verbatim into the Disaster Management Act’s rules applicable in a state of danger. Thus, this new provision of the Disaster Management Act became automatically applicable when the Government declared the new state of danger.

The Government is allowed to introduce restrictions without any guarantee for the swift and effective constitutional review of the respective government decrees by the Constitutional Court.

It has to be emphasized that declaring a state of danger or the Second Authorization Act do not result in the suspension of the operation of the Hungarian Parliament in any way.

2. THE 9TH AMENDMENT TO THE FUNDAMENTAL LAW

The current governing majority has amended both the old and the new constitutions frequently, sometimes in a way that overrode Constitutional Court decisions, demonstrating the governing majority’s "instrumental attitude" towards the constitution. The proposal for the 9th Amendment to the Fundamental Law fits into this pattern, and shows once again that the governing majority treats the constitution as a political tool of the Government.

Certain provisions of the 9th Amendment re-regulate the framework of “special legal orders” (the “state of danger” being one of them). Analysing these modifications in detail is beyond the scope of the present flash report, but it could be justified to have a fresh look at the framework of the special legal orders after the experiences of the pandemic. However, the Bill envisages that any amendments related to the special legal orders would only enter into force in July 2023, in more than two years. On the other hand, problematic provisions as outlined below will enter into force the day after the promulgation of the 9th Amendment.

2.1. Humiliating and curtailing the rights of the LGBTQ community

Recently, the LGBTQI community has been the target of homophobic and transphobic political statements by governing party politicians, including the Prime Minister, and of detrimental legislative steps. The most recent examples include the following:

- During the first wave of the coronavirus, in May 2020, the Parliament banned legal gender recognition, violating the rights of transgender people as enshrined in international human rights standards.17

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13 Act CXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament
In October 2020, a ministerial decree made it excessively hard for single persons or non-married same-sex or opposite-sex couples to adopt children: currently, they can adopt a child only if no married couple in the whole country wants to adopt them.\(^{18}\)

In September 2020, a children's book with fairy tales featuring members of various vulnerable groups (LGBTQI, Roma, persons with disabilities) was published. The publisher was soon attacked verbally by various extreme right-wing actors, and an extreme right-wing MP shredded a copy of the book at a press conference. Soon, the governing party followed course, heavily contributing to the homophobic hate campaign against the book. On 4 October, the Prime Minister made a distinction between “Hungarians” and “homosexuals” in a radio interview, and stated the following: "as regards homosexuality, Hungary is a patient, tolerant country. But there is a red line that must not be crossed, and this is how I would sum up my opinion: 'Leave our children alone.'"\(^{19}\)

Articles 1 and 3 of the proposed 9\(^{th}\) Amendment to the Fundamental Law clearly tie into these attacks, and make the Fundamental Law the conveyer of the governing majority's homophobic and transphobic propaganda.

Article 1 of the 9\(^{th}\) Amendment would add to Article L) of the Fundamental Law the following: "The mother is female, the father is male." If the amendment is adopted, Article L) (1), which already excludes the marriage of same-sex couples and restricts the notion of family, will read like this:

"Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. The mother is female, the father is male."

In itself, this new declaration would have little legal consequence. However, one of the other Bills submitted during the night of 10 November, Bill T/13648, sets out that only married couples will be allowed to adopt children, and exceptions to that can be granted only on a case-by-case basis by the Minister responsible for family policies.\(^{20}\) Thus, the new rules would exclude same-sex couples, single persons and non-married opposite-sex couples from adoption.

Article 3 of the 9\(^{th}\) Amendment would add the following to Article XVI (1) of the Fundamental Law:\(^{21}\)

"Hungary shall protect the right of children to their identity in line with their sex by birth, and shall ensure an upbringing in accordance with the values based on our homeland's constitutional identity and Christian culture."

This new provision would further stigmatize transgender people, and would make it hard for example to hold LMBTQI sensitisation sessions in schools\(^ {22}\) – or, for that matter, to provide any kind of education that is not in line with “Christian culture”, which is severely problematic in a secular country.

2.2. Restricting the notion of public funds

At present, Article 39 of the Fundamental Law runs as follows:

"(1) Support or contractual payments from the central budget may only be granted to organisations whose ownership structure, organisation and activities aimed at using the support are transparent.

\(^{18}\) Decree 35/2020. (X. 5.) EMMI of the Minister of Human Capacities, Article 4(5)


\(^{20}\) Articles 99-103 of Bill T/13648

\(^{21}\) Currently, Article XVI (1) sets out the following: “Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. “

\(^{22}\) See also: [https://hatter.hu/hirek/jarvanykezeles-helyett-hadjarat-az-lmbtqi-emberek-ellen](https://hatter.hu/hirek/jarvanykezeles-helyett-hadjarat-az-lmbtqi-emberek-ellen)
(2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and corruption-free public life. Data relating to public funds and national assets are data of public interest.”

Article 8 of the proposed 9th Amendment envisages to insert into this section the following provision as Article 39(3): “Public funds are the revenues, expenditures and receivables of the State.”

Most probably, this is a reaction to a series of cases in which different entities using funds originating from the state budget attempted to refuse freedom of information (FOI) requests regarding how the funds had been spent on the basis that those funds “had lost their public nature”, however, the Hungarian courts repeatedly rejected this argument and obliged them to disclose the requested information.

One such case was that of the foundations of the Hungarian National Bank (MNB). MNB spent over HUF 250 billion (EUR 695 million) endowing a number of foundations. An MP submitted an FOI request to MNB on how the funds had been used, but the bank refused to disclose any financial information about the foundations’ operations on the ground that the funds were not public funds but rather central bank “profits”. In the subsequent lawsuit, a final and binding ruling was handed down concluding that all funds held and managed by the central bank are public funds, and all assets acquired by the central bank are national assets. In February 2016, the court ordered MNB to release the requested information.23

Within weeks a Bill was submitted to and passed by the Parliament that would have given MNB the right to classify documents pertaining to enterprises and foundations owned by the central bank.24 The law was sent to constitutional review by the President of the Republic, and in its decision 8/2016. (IV. 6.) AB, the Constitutional Court quashed the law as unconstitutional – among others – on the basis that the funds in question are public funds despite being bequeathed to a private foundation.25

In a similar case, the Kúria (Hungary’s Supreme Court) ruled that so-called TAO contributions, which can be given by companies to sports clubs (and until recently also to theatres) in Hungary in lieu of corporate tax, constitute public funds.26 In this case, Transparency International Hungary filed a lawsuit against the Ministry of Human Capacities and the Ministry for National Economy to make public the data related to the TAO program. The respondents argued that TAO moneys could not be regarded as public funds, however, the Hungarian courts repeatedly rejected this argument and obliged them to disclose the requested information.

While those laws that the different courts relied on in the above described and several other cases (such as Act CXCVI on National Assets or Act CXII of 2011 on the freedom of information) have not been amended yet, and therefore, it needs to be seen whether (i) the constitutional amendment might change the jurisprudence, and/or (ii) the constitutional amendment will serve as a basis for amending these lower ranking norms, the proposed amendment must be assessed with suspicion, especially because the explanation offered for it in the Bill’s explanatory memorandum is false. The memorandum claims that the need for the amendment stems from the diverging case law of “constitutional bodies” and it is aimed at unifying the jurisprudence. However, as substantiated by the above examples, the jurisprudence has been sufficiently consistent in not allowing the meaning of the term “public fund” to be narrowed down.

2.3. The proposed rules on public trust funds

Article 7 of the proposed 9th Amendment envisages to insert an additional 6th paragraph into Article 38 of the Fundamental Law, stipulating that "the establishing, operation and termination of public trust

**funds performing a public task as well as the performing of such public tasks by the public trust fund shall be regulated in a cardinal law**” (i.e. an act of Parliament that can only be passed or amended by two-thirds of the MP’s who are present at the voting).

**Public trust funds** are a relatively new institution in Hungarian law. Since their introduction in 2019, several have been established and endowed by the Government, according to critics often with the purpose of **channelling public assets into private hands**. One of the most recent examples of endowing a public trust fund close to the Government with significant assets was the transfer of valuable real estates to the Mathias Corvinus Collegium (MCC), a talent management foundation, where the Chairman of the Board is Balázs Orbán, who is also State Secretary of the Prime Minister’s Office. By the power of Act CVI of 2020, five real estates were handed over to MCC, among them a marina with an abandoned hotel by the Lake Balaton. When the law prescribing the transfer of real estates to MCC was discussed in the Parliament’s Committee for Justice Affairs, the Government was represented by Mr Orbán himself. Although he acknowledged that “he appeared with both hats on”, he responded to the criticism of the opposition MP’s by saying that it is not uncommon in the West to have politicians on the boards of public trust funds.27

Public trust funds have also been **used as the institutional framework for recasting the management of universities**. Several universities have been transferred to such foundations in the past couple of months, enabling the Government to appoint boards with loyal members, thus decreasing the independence of institutions of higher education. One of the concerned universities is the **University of Theatre and Film Arts**, the reorganisation of which triggered significant protest from the students and a two-month occupation of the university building.28

Until now, the Acts of Parliament on public trust funds have been passed and amended by a simple majority. The explanatory memorandum attached to the Bill justifies the amendment with the important tasks public trust funds perform and the need to guarantee the stability of their operation.

Critics of the proposed amendment are afraid however, that the amendment simply serves the purpose of **making sure that in the case of an electoral victory for the opposition that falls short of gaining a constitutional majority, the transferred assets cannot be reclaimed and the reorganisation of the management of universities cannot be reversed.**

3. **SHRINKING ELECTION SPACE FOR OPPOSITION PARTIES**

Hungary’s general election system has undergone a reform in 2011. Currently, a one-round system applies, where 106 Members of Parliament out of the 199 MPs are elected in single-member constituencies (where a first-past-the-post system applies and the candidate getting the most votes wins the seat), while the other 93 seats are filled from the party lists (using a proportional formula). Therefore, voters cast two ballots: one to a candidate in their constituency, and one to a party list. The ballots cast to a party list will benefit the party only if the party list receives 5% of all the ballots cast on party lists nationally (otherwise, the ballots cast on the party list are lost). Parties can have a party list only if they have candidates in at least 27 single-member constituencies across at least 9 counties and the capital.29

During the said reform, electoral **rules** were **amended in favour of the governing party**: gerrymandering30 and introducing the system of “winner compensation” (which brought extra mandates for the governing party in the general elections)31 resulted that the election system has become...

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27 [https://444.hu/2020/10/19/orban-balazs-ket-sapkam-van](https://444.hu/2020/10/19/orban-balazs-ket-sapkam-van)
28 [https://www.reuters.com/article/hungary-protests-students-idINKBN2782DC](https://www.reuters.com/article/hungary-protests-students-idINKBN2782DC)
extremely disproportionate.\textsuperscript{32} On top of that, Hungary’s \textit{distorted media landscape and deficient campaigning rules undermined the fairness of the elections}. For example, with regard to the 2018 general elections, the OSCE/ODIHR Limited Election Observation Mission concluded\textsuperscript{33} that the “elections were characterized by a pervasive overlap between state and ruling party resources, undermining contestants’ ability to compete on an equal basis. Voters had a wide range of political options but intimidating and xenophobic rhetoric, media bias and opaque campaign financing constricted the space for genuine political debate, hindering voters’ ability to make a fully-informed choice.”

Bill T/13679 amends the rules of elections against the above landscape. Most notably, it almost doubles the number of single-member constituencies where parties must have candidates in order to be eligible for a party list: \textit{If the Bill is adopted, parties could have a party list only if they have candidates in at least 50 single-member constituencies} across at least 9 counties and the capital.\textsuperscript{34}

According to the explanatory memorandum of the Bill, the new rules aim at purging sham parties from the elections. However, what the new rules mean in reality is that if the opposition parties do not want to compete against each other in the constituencies in order to avoid splitting the opposition votes, all of the opposition parties can have only two national joint party lists. Thus, the new rule \textit{would push opposition parties to have almost exclusively joint candidates and joint party lists} in the 2022 general elections. This requires an extended level of cooperation: for example, instead of agreeing which one of them runs a candidate against the governing party in a given constituency and “only” having to give up certain constituencies for other opposition parties, parties will have to actively support joint candidates. Furthermore, in the case of joint party lists, the threshold is not 5\% of all the ballots cast for party lists nationally, but much higher: it is 10\% in the case of two-party lists, and it is 15\% in the case of the lists of three or more parties.\textsuperscript{35} Joint candidates and joint lists also have detrimental financial implications for political parties, e.g. in terms of the sum of the campaign support from the state budget. Accordingly, Bill T/13679 would \textit{further shrink the options and possibilities of opposition parties, and is capable of undercutting the opposition’s chances} in the elections.

\textsuperscript{32} See e.g.: https://budapestbeacon.com/electoral-rules-rig-results-of-hungarian-elections-warns-princetons-kim-lane-scheppel.

\textsuperscript{33} https://www.osce.org/files/f/documents/0/0/377410.pdf

\textsuperscript{34} Bill T/13679, Article 3

\textsuperscript{35} Act CCIII of 2011 on the Election of Members of Parliament, Article 14(2)