

Introduction



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

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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 decisive 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 populism³ 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 Sente and Fruzsina Gárdos-Orosz. Sente (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

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

⁶Scheppele (2018), pp. 545–584.

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

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

⁹Landau (2013).

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

¹¹Blokker (2019).

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

¹³Anselmi (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.

¹⁴Corrias (2016), Müller (2016).

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

¹⁶Gárdos-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

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

¹⁸Teubner (1989), pp. 727–758.

¹⁹Luhmann (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 Sente 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

²⁰In 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.

²¹Sajó (1999), pp. 69, 73.

²²See 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](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 constitution, 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 judges³²—

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 discretionary 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](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

⁴⁰The 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.

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

⁴²The 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).

⁴³Szente (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 press⁶⁰ 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), Vármay (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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