



Hungarian Helsinki Committee

FLASH REPORT: WHAT HAPPENED IN THE LAST 48 HOURS IN HUNGARY AND HOW IT AFFECTS THE RULE OF LAW AND HUMAN RIGHTS

*Hungarian Helsinki Committee
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During the evening of 10 November 2020, millions of Hungarians were waiting for the Hungarian Government to issue its previously announced decrees involving restrictive measures to counter the spread of COVID-19; regulations that would fundamentally affect people's everyday lives. The Prime Minister announced the outlines of the envisaged measures in a Facebook video on 9 November, however there was much uncertainty about a number of aspects regarding implementation of the curfew. For example, what businesses could remain open and under what conditions? What are the exact rules of operation for university dorms? The decrees were to be adopted under the framework of the state of danger, declared¹ by the Government on 3 November, and with a view to a law adopted by Parliament on 10 November, providing authorisation 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 their lives to the new rules as of the next morning.

Hungarian citizens woke up to some further surprises. **During the night of 10 November, the Government submitted three extensive bills to Parliament;** 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 badly hit by the second wave of COVID-19. 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 hasty bills submitted by the Government must certainly be connected with urgently defending the population against the pandemic. However, **the bills have nothing to do with** supporting the health care system in fighting the pandemic, ensuring that everyone 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 Parliament either; for example, by allowing for remote sessions. Instead, while Hungarians were waiting to get to know the governmental decrees that would shape their everyday lives, the Government was busy submitting bills which:

- build on recent anti-LGBTQI political statements and earlier legislative steps, and **humiliate and curtail the rights of the LGBTQI community;**
- **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 are untouchable** for future governments; and
- severely **shrink the possibilities of opposition parties** to coordinate their candidates when running in the parliamentary elections.

Even though public consultation is legally mandatory, the bills were submitted without any.² Nor are the bills included in the Government's legislative plan for the autumn of 2020 either.³

The Government's legislative steps follow a pattern similar to what happened in Hungary during the first wave of the pandemic. The Government first announced a state of danger on 30 March 2020, and,

¹ Government Decree 478/2020. (XI. 3.) on the Declaration of the State of Danger is available here in English: http://njt.hu/translated/doc/J2020R0478K_20201104_FIN.pdf.

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-9607-0c48-7271c511cccd?t=1592289343256

subsequently, it was provided through Act XII of 2020 on the Containment of the Coronavirus (hereafter: Authorisation Act) 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 Authorisation Act were in effect until 17 June 2020. According to the Authorisation Act's explanatory memorandum, granting excessive powers to the Government was necessary to ensure that the Government could adopt and extend the force of its special government decrees if Parliament could not convene for epidemiological reasons.⁵ However, Parliament not only remained operational, but was quite active in the spring and adopted a number of laws and decisions during the state of danger. Some of these pieces of legislation had no relationship whatsoever with the containment of COVID-19, but they did have a negative impact on human rights.⁶

The preamble of Act CIX of 2020 on the Containment of the Second Wave of the Coronavirus Pandemic (hereafter: Second Authorisation Act) argues that holding parliamentary sessions may be disrupted due to the pandemic, and that is why it is necessary to give a 90-day authorisation to the Government to rule by decree.⁷ 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 Parliament**, e.g. by amending laws to allow for remote sessions.

Furthermore, it must be kept in mind that the possibilities of publicly opposing these new legislative proposals 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 summarise the main concerns emerging with regard to the following three bills:

- Bill T/13647, the proposed 9th Amendment to the Fundamental Law, that contains 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 is 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 amending election rules.¹²

1. THE GOVERNMENT RECEIVED A *CARTE BLANCHE* AUTHORISATION TO ACT DURING THE STATE OF DANGER - AGAIN

A state of danger was declared in Hungary for the second time on 3 November 2020, and was followed by the adoption of the Second Authorisation Act by Parliament on 10 November. The Second Authorisation Act differs from the original Authorisation Act in that it does contain a sunset clause: it **authorises the Government to extend the force of governmental decrees** adopted during the

⁴ In more detail, see: Hungarian Helsinki Committee, *Background Note on Act XII of 2020 on the Containment of the Coronavirus*, 31 March 2020, https://www.helsinki.hu/wp-content/uploads/HHC_background_note_Authorization_Act_31032020.pdf.

⁵ Available in Hungarian at: <https://www.parlament.hu/irom41/09790/09790.pdf>.

⁶ In more detail, see: Hungarian Helsinki Committee, *Information Note on Certain Rule of Law Developments in Hungary between May-July 2020*, 13 August 2020, https://www.helsinki.hu/wp-content/uploads/HHC_Rule_of_Law_update_May-July2020.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>.

state of danger for 90 days from its promulgation, that is, **until 8 February 2021**. However, three problems remain that are consistent with those first raised in relation to the Authorisation Act:

- According to the concept outlined in the Fundamental Law, special government decrees adopted during a state of danger can remain in effect after an initial period of 15 days only with Parliament's support given in full knowledge of the contents of the decrees. Just like the Authorisation Act, the Second Authorisation Act eliminates this substantive restriction when it authorises the Government to extend the force of future, not-yet-adopted special decrees - the content of which is of course unknown.
- In June 2020, Parliament adopted a law that profoundly altered the applicable provisions if a state of danger is declared. The Authorisation Act's stipulation 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 Act¹³ which details what the Government can do 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.¹⁴
- The Government is allowed to introduce decrees without any guarantee for the swift and effective constitutional review by the Constitutional Court.

It must be emphasised that declaring a state of danger or the Second Authorisation Act **do not in any way result in the suspension of the operation of the Hungarian Parliament**.

2. THE 9TH AMENDMENT TO THE FUNDAMENTAL LAW

The current governing majority has frequently amended both the old and the new constitutions, sometimes in a way that overrode Constitutional Court decisions. This demonstrates the governing majority's **"instrumental attitude" towards the Fundamental Law**.¹⁵ The proposal for the 9th Amendment to the Fundamental Law fits into this pattern, and shows once again that the ruling majority **treats the Fundamental Law as a political tool of the Government**.

Certain provisions of the 9th Amendment would restructure the framework of special legal orders (the state of danger being one of them). While analysing these modifications in detail is beyond the scope of this report, it is certainly warranted to take a fresh look at the framework of the special legal orders after the pandemic. However, the amendment foresees that any changes related to the special legal orders would only enter into force more than two years from now in July 2023. On the other hand, problematic provisions as those outlined below would enter into force the day after the promulgation of the 9th Amendment.

2.1. Humiliating the LGBTQ community and curtailing their rights

Recently, **the LGBTQI community has been the target of homophobic and transphobic political statements by governing party politicians**, including the Prime Minister.¹⁶ Moreover, a number of detrimental legislative moves against them have been made under cover of the COVID-19 response. The most recent examples include the following:

¹³ Act CXXVIII of 2011 on Disaster Management and Amending Certain Related Acts of Parliament

¹⁴ See in more detail: Hungarian Helsinki Committee, *Explanatory Note for Bills T/10747 and T/10748 as Adopted by the Hungarian Parliament*, 17 June 2020, https://www.helsinki.hu/wp-content/uploads/HHC_explanatory_note_Bills_T10747_and_T10748_after_adoption.pdf, pp. 1-4.

¹⁵ European Commission for Democracy through Law (Venice Commission), *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, CDL-AD(2013)012, 17 June 2013, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e), para. 136.

¹⁶ For a list of examples, see: *Stating the Obvious – Rebutting the Hungarian Government's Response to the Reasoned Proposal in the Article 7 Procedure against Hungary (A reaction paper by NGOs)*, 18 October 2019, https://www.helsinki.hu/wp-content/uploads/NGO_rebuttal_of_Article_7_Hun_gov_info_note_18102019.pdf, pp. 29-30.

- During the first wave of the pandemic in May 2020, Parliament **banned legal gender recognition**, violating the rights of transgender people as enshrined in international human rights standards;¹⁷
- 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**. Consequently, they can only adopt a child if no married couple in the whole country wants to adopt the said child;¹⁸ and
- In September 2020, *Wonderland Belongs to Everyone*, a children's book with fairy tales featuring members of various vulnerable groups (LGBTQI, Roma, persons with disabilities) was published. The publisher was quickly verbally attacked by various extreme right-wing decision-makers and public figures, 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: "*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 **9th Amendment to the Fundamental Law clearly tie into these attacks**, and **make the Fundamental Law the conveyor of the governing majority's homophobic and transphobic propaganda**.

Article 1 of the 9th Amendment would add the following to Article L) of the Fundamental Law: "**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 as follows:

"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 (T/13648) submitted during the evening of 10 November establishes that **only married couples will be allowed to adopt children**. Any exceptions can only be granted 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 9th 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 **stigmatise transgender people**. For example, it would make it difficult to hold LMBTQI sensitisation sessions in schools or, for that matter, to provide any kind of education that is not in line with "Christian culture" - a **severely problematic situation in a secular country**.²²

¹⁷ Hungarian Helsinki Committee, *Information Note on Certain Rule of Law Developments in Hungary between May-July 2020*, 13 August 2020, https://www.helsinki.hu/wp-content/uploads/HHC_Rule_of_Law_update_May-July2020.pdf, p. 8.

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

¹⁹ For the full interview in English, see: <http://www.miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-sunday-news/>.

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>.

2.2. Restricting the notion of public funds

At present, Article 39 of the Fundamental Law reads 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.

(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 aims to insert the following provision into this section 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. Their defence was 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 involved the foundations of Hungary's central bank, 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. The bank refused to disclose any financial information about the foundations' operations on the grounds 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 National Bank are public funds, and all assets acquired by the National 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 Parliament that would have given MNB the right to classify documents pertaining to enterprises and foundations owned by the National Bank.²⁴ The law was sent for 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 on the basis – among others – 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 Hungarian sports clubs (and until recently also to theatres) 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 the data related to the TAO programme public. The respondents argued that TAO funds could not be regarded as public funding. The Kúria concluded that should companies not offer the concerned amounts for the purposes identified in the law for the TAO programme, those would become tax revenues for the central budget, and therefore, they must be regarded public funds.

Those laws that the different courts relied upon for their rulings on the above-mentioned 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. 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 since **the justification 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

²³ <https://budapestbeacon.com/court-rules-national-bank-of-hungary-must-account-for-use-of-public-funds/>

²⁴ <https://budapestbeacon.com/emergency-bill-to-exempt-mnb-owned-enterprises-foundations-from-public-disclosure/>

²⁵ <https://budapestbeacon.com/hungarys-constitutional-court-takes-one-step-forward-two-steps-back/>

²⁶ <https://budapestbeacon.com/curia-tao-constitutes-public-money/>

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 aims to insert an additional 6th paragraph into Article 38 of the Fundamental Law, stipulating that *“the establishment, operation and termination of public trust funds performing a public task as well as the performance 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 majority of the MP’s who are present during the vote).

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, public trust funds are often established 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). MCC is a talent management foundation whose Chairman of the Board Balázs Orbán is also State Secretary of the Prime Minister’s Office. By the power of Act CVI of 2020, five pieces of real estate were handed over to MCC; among them a marina with an abandoned hotel by Lake Balaton. When the law prescribing the transfer of real estate to MCC was discussed in the Parliament’s Committee for Justice Affairs, the Government was represented by Balázs 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 and 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 by arguing the important tasks public trust funds perform and the need to guarantee the stability of their operation.

However, critics of the proposed amendment are afraid 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 qualified 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 underwent reform in 2011. Currently, a one-round system applies in which 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 party lists (using a proportional formula). Therefore, voters cast two ballots: one for a specific candidate in their constituency, and one for a party list. The ballots cast for 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 votes 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

²⁷ <https://444.hu/2020/10/19/orban-balazs-ket-sapkam-van>

²⁸ <https://www.reuters.com/article/hungary-protests-students-idINKBN2782DC>

²⁹ For a more detailed description of the election system, see e.g.: http://www.valasztasirendszer.hu/wp-content/uploads/PC_ElectoralSystem_120106.pdf.

During the said reform, electoral **rules** were **amended in favour of the governing party**: gerrymandering³⁰ and introducing a system of “winner compensation” (which brought extra mandates for the governing party in the general elections)³¹ resulted in the **election system becoming extremely disproportionate**.³² On top of that, Hungary’s **distorted media landscape and deficient campaigning rules undermines the fairness of elections**. For example, with regard to the 2018 general elections, the OSCE/ODIHR Limited Election Observation Mission concluded 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.”³³

Bill T/13679 amends the election rules against the above landscape. Most notably, it almost doubles the number of single-member constituencies where parties must field candidates in order to be eligible for a party list: **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.³⁴

According to the explanatory memorandum of the bill, the new rules aim at purging sham parties from the elections.³⁵ 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 **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 15% in the case of the lists of three or more parties.³⁶ 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 **further shrink the options and possibilities of opposition parties, and is capable of undercutting the opposition’s chances** in the elections.

³⁰ For more information, see: Political Capital – Friedrich Ebert Stiftung, *Halfway into the Hungarian electoral reform*, 19 April 2012, http://www.valasztasirendszer.hu/wp-content/uploads/PC-FES_ConferencePaper_HalfwayIntoTheHungarianElectoralReform_120417.pdf.

³¹ For more details, see: Political Capital, *Flash Report: The Winner Takes it All*, 18 February 2014, http://www.valasztasirendszer.hu/wp-content/uploads/pc_flash_report_20140218_TheWinnerTakesItAll.pdf.

³² See e.g.: <https://budapestbeacon.com/electoral-rules-rig-results-of-hungarian-elections-warns-princetons-kim-lane-scheppele/>.

³³ <https://www.osce.org/files/f/documents/0/0/377410.pdf>

³⁴ Bill T/13679, Article 3

³⁵ For more on the phenomena of “sham parties”, see: Political Capital – Transparency International Hungary, *Sham Parties Could Drain Billions of Forints from Public Money*, 18 November 2013, <https://transparency.hu/en/news/ujabb-visszaelesi-lehetoseg-a-kampanyfinansirozasban/>.

³⁶ Act CCIII of 2011 on the Election of Members of Parliament, Article 14(2)