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The politics of crises - The crisis of politics in Central and Eastern Europe

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The politics of crises - The crisis of politics in Central and Eastern Europe

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Editorial: The politics of crises—The crisis of politics in Central and Eastern Europe

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Central and Eastern Europe, crisis, comparative governance, political institutions, public policy

Editorial on the Research Topic
The politics of crises—The crisis of politics in Central and Eastern Europe

The history of politics can be assessed as a history of crises and over the past decade a series of "tectonic" changes that fall into the category of crises have been seen. The financial crisis of 2008 assessed as the starting point, followed by the migration crisis of 2014–2015, the COVID-19 pandemic of 2020–2021, and the escalation of the conflict between Russia and Ukraine in 2022, all have sharpened the conflicts among nation states, and have significantly transformed and reshaped the relations and the balance of power between political and constitutional institutions and actors.

The global financial and debt crisis has highlighted the vulnerability of the networked financial system built up since the 1980s, which has marginalized nation states, and the huge exposure resulting from the weakening of democratic control and state supervision of financial markets and their key players (Essers, 2013). Mitigating the effects of the financial crisis was primarily the responsibility of nation states, which intervened deeply in the economic process to an extent that went far beyond liberal, free market solutions. This has led to state solutions, including retroactive changes to individual contractual relations (see the example of Hungary) (Egedy, 2012). The economic crisis has also shaken up relations between the Member States of the monetary community, leading to rethink the division of powers between the European Union and the Member States. The most famous example was the PSPP-decision by the German Constitutional Court (Feichtner, 2020).

The migration crisis has posed a new type of challenge to European governments and modified their cooperation in the European Union. European countries were confronted with the impact of conflicts that had arisen in other regions (notably the Arab Spring and the Syrian civil war), and responded in sharply different ways, ranging from proclaiming the "Willkommenskultur" (Germany) to building border fences (Hungary).

No event since the Second World War has had such an impact as the outbreak of the COVID-19 pandemic as it triggered serious government action in terms of social distancing, vaccine procurement and immunization coverage, as well as in the measures aimed at mitigating the economic impacts of the epidemic (Schwab and Malleret, 2020). Some states tried to handle the epidemic and manage its consequences within the normal legal framework, while others (e.g., Hungary) introduced special legal order (e.g., state of emergency or its special types).

The most recent overall crisis was provoked by the Russian–Ukrainian war, again generating different responses from national governments. The majority of EU Member States have provided military assistance to Ukraine, but some Member States (like Hungary and Slovakia) have chosen a different path even in favor of peace with Ukraine. The

Russian–Ukrainian war can be defined as a crisis not only because of the danger of escalation and its' economic impact, but also due to the new cracks it caused in the "European project".

This broad overview of recent crises illustrates that both the frequency and depth/intensity of crises have increased. This is where the concept of multiple crises, forming a context of permacrisis (Papadakis et al., 2025) originates. At the level of public policies, permacrisis legacy indicates the importance of an organized, effective and inclusive nation state.

The papers of the Research Topic highlight this need and the challenges and dilemmas it poses. Crises that cause repercussions in political systems also force policymakers to question routines and previous beliefs. While these crises may increase the resilience of political systems, they may also generate counter-processes. For example, the centralization of power may strengthen populist aspirations.

Younger democracies, such as those in Central and Eastern Europe, are proving to be particularly sensitive to crisis stress tests. Thus, although their model value is more modest than that of the sample states, they may attract even more academic interest.

The Research Topic pays particular attention to all three dimensions (policy, polity and politics) as it analyses institutionalized policy-making, public policy responses to the challenges posed by crises, the institutional effects (changes in the functions of state political institutions, changes in the system of separation of powers, in particular with regard to parliaments, governments and constitutional courts and the recent changes of political parties and politics, especially changes in the phenomenon of presidentialization).

The 21 authors hail from almost every country in Central and Eastern Europe, including Hungary, Poland, Slovakia and Serbia. This means they can provide authentic insights into national crisis management issues and solutions.

Smuk's article provides a comprehensive framework for interpreting the constitutional-level rule changes in the Visegrad countries in response to crises. Garayová's article also focuses on the Visegrad countries, presenting the legal situation of migrant and refugee children in these countries. The article by Lukácset al. reflects on the effect of demographic challenges caused and/or exacerbated by crises, namely employment policy, examining the EU dimensions of the issue as well as the specifics of the CEE region.

Using a comparative methodology, Beretka and Osze examines constitutional interpretation in the Hungarian, Serbian and Croatian contexts. The article by Erdos et al. provides a unique comparison, reviewing the assessment of a national measure by various judicial bodies, including the Hungarian Constitutional Court, the Strasbourg Court and the Luxembourg Court. It highlights the differences in the constitutional, human rights and EU law constraints on the legislature. Tanács-Mandák describes the latest developments in presidentialization in Hungary, which have altered the balance of power between the executive and legislative branches. Kurunczi also examines a topic of interest to political science and public law in relation to the development of social participation in lawmaking during times of crisis. Two studies deal with local governments: a conceptual paper on the principle of subsidiarity and its implementation amid typically centralizing crisis management efforts (by Varga) and a case study on the practice of framing the theme of crisis by the Municipality of Budapest (by Pál). Two studies address public policies, namely criminal policy responses to the challenges posed by crises: Váczi presents the constitutional implications of a unique and new institution of Hungarian law, the reintegration detention, while Gellér examines the formative influence of EU law on the division of powers between the EU and its Member States through the institution of the European arrest warrant, which also has a fundamental impact on Member State sovereignty. Further public policy issues related to the latest technologies are discussed, including recent developments in EU space policy and opportunities for CEE (by Bartóki-Gönczy and Malinowska), and the evolution of digital sovereignty in response to crisis policy (by Hulkó et al.).

The studies in this Research Topic not only present the diversity of crisis phenomena, but also the wide range of state responses (crisis-management) to them, including policymaking, lawmaking, law enforcement, and their judicial and international control. It should be emphasized that most of the papers highlight the interdependence and mutual influence of politics and public law, which is a significant contribution to the literature on the politics of crises, as it may be of interest not only to political scientists and public law practitioners and academics, but also to researchers in new technologies (space technology and communications). In addition to its thematic focus, the geographical scope of this Research Topic is also noteworthy: democracies in Central and Eastern Europe are less stable than those in Western Europe, so crisis management in these countries involves a number of solutions, some of them unconventional (e.g., population policy, extensive price regulation), which make this region particularly interesting for comparative governance studies. Along with our gratitude to all the authors and reviewers, we should add our most sincere thanks to the prestigious, "Frontiers in Political Science" Journal and in particular the Publishing Manager, Dr. Gabriele Sak, as well as Luisa Moratelli and Adele King, for providing us the opportunity to develop and deliver this Research Topic to the public. We trust that the Research Topic and the studies it contains will contribute to stimulating academic discourse and drawing attention to the scientific analysis of crisis management in Central and Eastern Europe.

Author contributions

FT-M: Writing – original draft, Methodology, Writing – review & editing, Conceptualization. CE: Writing – review & editing, Methodology, Conceptualization, Writing – original draft.

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Crisis and constitutional politics in Central Europe

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This paper aims to examine the impact of significant crisis situations on the constitutional framework over the past decade, including financial crisis, migration, pandemics and war. The paper focuses on the Visegrad countries, especially Hungary, and analyses the constitutional amendments adopted and the relevant constitutional court decisions. By examining the justifications for the amendments and decisions, it is possible to observe the efforts of legislators and governing parties to overcome difficult governance situations in crisis management. The study aims to interpret the relationship between constitutional responses to social crises and crises of democratic political systems, and argues that the inherent feature of constitutional changes triggered by crises is that they remain part of the political system in the longer term. In turn, their impact determines not only the resilience of states and societies, but also the direction in which democratic systems evolve.

KEYWORDS

constitutional politics, crisis, COVID, migration, state debt, constitutional court, Hungary

1 Introduction—an era of crises

Numerous crises we have experienced in the 21st century have caused changes in public law that have had a significant impact on the constitutional playing field of government. Changes in constitutional law (constitutional texts, cardinal laws), in the functioning of public institutions and in the enjoyment of fundamental rights (fundamental rights adjudication) are traceable. This paper reflects on the specific features of the emergence of crises in constitutional law, the development of the regulation of various special legal order cases, and the reflections of the constitutional courts on these. As crises are perceived as "extraordinary situations," state policy actions were proclaimed as "adequate" "extraordinary responses."

Crises can be defined as situations in which the normal functioning of a system or organization is disrupted, serious problems arise and an urgent solution has to be found. The aim of crisis management is usually to stabilize the situation, protect those affected and return to normality. State crises can be political, economic or social in nature, where the performance of the constitutional functions of state bodies is threatened or where members of the political community (their rights, health, lives) are massively affected. In recent decades, there have been many "global" crises in Europe or the world that have affected the constitutional systems of countries; but developments that rise to the level of "crisis" can also be found in domestic events. In general, crises that spill over political borders are among the more serious ones, such as the global financial crisis of 2008; the effects of climate change; a large influx of migrants and refugees mainly since 2015; the Brexit in 2016 and its impact in EU institutional system; the terrorist attacks, including the Paris attacks in 2015 and the Brussels bombings in 2016; the pandemic COVID-19 which lead to closures, economic decline and high levels of mortality; the war in Ukraine that started in 2014 and escalated to new levels in 2022 with Russian aggression, has claimed hundreds of thousands of lives and displaced millions of

people and continues to affect the political-economic stability of the region.

This compilation of a series of crises in the 21st century shows that these socio-economic changes were triggered by various causes—not infrequently by the states themselves—and that states responded to them quite proactively, driven by mainstream governance philosophies. State responses have generally been aimed not only at mitigating the negative effects of crises, but also at creating resilience to respond to or prevent future challenges. The impact of crises on the legal system can be examined in two dimensions. On the one hand, what immediate, extraordinary (governmental) measures are taken to resolve a given crisis situation, and how the legal system gives space to these measures. On the other hand, the impact of the crisis on the legal system, i.e., how the application of certain legal institutions (jurisprudence, legal culture) or legal norms have changed in a lasting way, with a lasting legal and political impact on the post-crisis period (Coyne, 2010). We examine here the constitutional frames and consequences of crisis politics.

2 Methods—political-constitutional landscape of crises in Central Europe

I examine here the constitutional frames and consequences of crisis politics. In the series of crises mentioned above, European political systems have not only been challenged in their ability to protect their citizens, their societies and institutions, but also in social expectations and political attitudes. The electorate is turning to more radical solutions in the wake of greater and longer-lasting difficulties, with the weakening of traditional parties and party systems. The countries of Central Europe—in our study the Visegrad Four—have not only experienced government crises, but also the crisis management of ruling parties has been redefined in political competition and, in line with European trends, has led to a rise in populism (Havlík and Kluknavská, 2022). The success of crisis management is proof of the competence of political leaders, and this has been amplified by political communication. As well as the fact that in certain crises, citizens prefer to vote for incumbents in the hope of stability rather than for a change of government. It follows that the policy of crisis, but also the existence of crisis, becomes a political narrative.

In some cases, the different constitutional and political systems of the countries in Central Europe have reacted to the crisis in a very similar way. In Hungary, since 2010, the governing parties have had a supermajority that has allowed for constitutional change, while in less stable party systems, instead of consensus on crisis management, a series of government crises have emerged (Casal Bértoa and Weber, 2019). The EU membership of these states is a particular context, which, with its institutional and human rights standards, has also framed crisis politics and constitutional processes.

In this research I examine the impact of three crises on constitutional politics: the financial crisis, the migration wave and the COVID19 pandemic. Here, I explore the changes in constitutional texts and selected judicial-constitutional court decisions, with the aim of providing an interpretative framework on the constitutional background of political change. Comparative constitutional politics has been a popular topic in constitutional law and political science literature over a decade or more. For the Central European countries, valuable volumes have been published on the period since the change of regime and the development of democracy (Fruhstorfer and Hein, 2016; Halász, 2017), and on the empirical analysis of judicial review and constitutional interpretation (Pócza, 2018). I believe that new developments in the interrelation between crisis politics and constitutional law justify further research, to which the present paper intends to contribute.

One can argue that crisis does not provide a good time for constitution making and "a good setting for careful deliberation about what forms of institutional design will serve the nation's long-term interest. Participants in the process might focus on scandalous events that produced the crisis without linking those events to deeper processes" (Tushnet, 2023). Yet, the Fundamental Law of Hungary was born in 2011, in the heat of the economic crisis, it reserved the simple amendment rule of the previous constitution: two-third majority of all the members of (unicameral) Parliament is required and sufficient to amend the Fundamental Law of Hungary (Article S). As the governing majority gained such a supermajority after each election since 2010, it is not surprising that the Parliament adopted cca. 1 amendment per annum statistically. 14 amendments were made to it in the period of the subsequent crises (2012–2024).

In Poland and Czechia, qualified majority of three-fifth is required in both Houses of the Parliament, and in Poland, amendment to certain chapters shall be confirmed via national referendum (Halász, 2017). In these countries there were only few changes in the Constitutional text, all resulted by the accidental compromise of major political parties. In Slovakia, the unicameral legislation accepted more amendments, via "constitutional acts" (Ľalík, 2017). This landscape shows us that more rigid constitutional texts are durable even in crisis-periods, while a stable government like the Hungarian used the fundamental law as means for crisis-management and political narrative-building. And without constitutional amendments, crisis management measures were subject to constitutional court scrutiny that legislatures could only handle with difficulty.

3 Research and results—constitutional politics in crisis politics

3.1 The public finance chapter and responses to the financial crisis

The 2008 financial and subsequent sovereign debt crisis in Europe sent a political wave that also had consequences in terms of constitutional changes. In response to the sovereign debt crisis, some European countries, either individually or at the instigation of the European Union (Várnay, 2011), have amended their constitutions to include provisions on debt ceilings (on the German debt rule: Thiele, 2015). The Constitution of the Republic of Poland (Art 216.5) has stipulated that public debt cannot exceed 60% of GDP, already since 2004; in the Czech Republic the parliament has retained the power to authorize all government borrowing; while in Slovakia the 2012 Fiscal Responsibility Law imposes reporting mechanisms when the 60 percent debt to GDP ceiling is closing (Awadzi, 2015).

These provisions aim to limit the amount of debt that governments can take on and ensure the sustainability of public finances. These constitutional provisions aim to promote fiscal responsibility and prevent governments from accumulating excessive debt, which could

lead to a sovereign debt crisis. Awadzi notes that the debt rule provision included into the constitution could make the debt ceiling rule more permanent and not subject to arbitrary changes, however, result in rigidities in the face of challenging economic outturns (Awadzi, 2015). However, specific political-governmental considerations have nevertheless led to exceptions to the debt rules (see Germany in times of pandemic and Hungary in general in times of special legal order).

In Hungary, the Budget Council was set up in 2008 and legislation to eliminate public debt has been in place since 2009, but in 2011 it was also incorporated into the Fundamental Law by the new supermajority on government (In Slovakia, constitutional statute No. 493/2011 Coll. of Laws on budgetary responsibility created the Board for Budgetary Responsibility, see Ľalík, 2017). The explicit reason for this was that in previous years of crisis, the (previous) Constitution had failed to dissuade left wing governments from indebting future generations. The crisis-management, i.e., the exceptional nature of the provisions of the Fundamental Law aimed at sustainable public finances is not only reflected in the explanatory. It is peculiar that it is not the Constitutional Court, but the Budget Council that supervises compliance with the constitutional rules on public debt and the central budget (Smuk, 2013). Moreover, the Constitutional Court is subject to a—"temporary"—reduction in its powers: as long as public debt exceeds half of the total gross domestic product, the powers of the Court to supervise public finance laws are limited. From the wording of Article 37(4) of the Fundamental Law, it can be read that this is an exceptional situation, as the public debt should normally be below half of GDP. But, in practice, this economic emergency, as envisaged by the Constituent, has been institutionalized in the field of constitutional review for a long time. There is also an important exception to the constitutional provision on the debt ceiling. The Fundamental Law itself states that it may be derogated from "only during a special legal order," and "to the extent necessary to mitigate the consequences of the circumstances triggering the special legal order, or, in the event of an enduring and significant national economic recession, to the extent necessary to restore the balance of the national economy" (Article 36(6)). The reason for the qualified majority in Parliament to extend the special emergency law continuously in every 6 months—now because of the war in Ukraine—is also to give the government comfortable budgetary margin.

Managing the economic crisis has meant partly managing public spending and budget deficits, but also social benefits. To address the deficit, governments have sought measures such as tightening the conditions for certain entitlements or making room for some economic involvement of the state. In the health sector, the Hungarian and Czech governments introduced different fees, the former swept away by a referendum (2008) and the latter ruled unconstitutional by the Czech Constitutional Court (in its judgement Pl. ÚS 36/11 of 2nd July 2011, see Kudrna, 2017). The Czech and Hungarian governments made the payment of unemployment benefits conditional on participation in public work and community work programs after a certain period of time; the Czech Constitutional Court ruled this unconstitutional in its decision Pl. ÚS 1/12. The Czech Court argued that conditioning the constitutionally guaranteed right to unemployment benefits by completing public service (after 2 months of unemployment) is contrary with the prohibition of forced labor (Kudrna, 2017).

The Hungarian Constitutional Court's assessment of interference with private relations was peculiar when it accepted the restriction of property rights on grounds of public interest in connection with the restructuring of banks and the repayment of foreign currency loans. As it argues, "In the Constitutional Court's view … the state was forced to intervene rapidly with certain measures, including the law on final repayment, in the interests of the debtors, in order to avoid significant financial and social damage threatening the country, due to the development of circumstances which could not reasonably have been foreseen and which went beyond the risk of normal change, the weakening of the forint exchange rate, which it could only influence to a limited extent, and the related difficulties of a significant number of foreign currency debt holders, as well as the general foreign currency indebtedness of the country" (Dec. 3048/2013. Const. Court, 35). The restructuring of private pension funds partly entailed the nationalization of substantial sums of money (in 2010), but in this context the legal promise of future payment of savings was also accepted by the European Court of Human Rights (E.B. vs. Hungary case, 2013). The reform of the pension system, which removed certain preferential pension arrangements, can also be seen as a budgetary issue. In the context of the management of the economic crisis, the Hungarian Constitutional Court has accepted as a justification for the restriction of property rights in the public interest the creation of general stability in the credit institutions sector and the strong role of the State as an economic regulator (Dec. 20/2014 CC; Stumpf, 2017).

In 2011, the Hungarian Fundamental Law in its original text also brought about a change of paradigm with regard to fundamental rights, the public interest and individual responsibility. The previously more value-neutral constitutional text was replaced by one reflecting the values of the parties on the government side who drafted the new Constitution, and later on, provisions referring to Christian-conservative values continued to proliferate (Halász, 2017). It holds that individual freedom can only be complete in cooperation with others (preamble), everyone shall be responsible for him- or herself (Article O), and the nature and extent of social measures may be determined in an Act in accordance with the usefulness to the community of the beneficiary's activity (Article XIX (3)).

3.2 The migration crisis and the identity struggle in Europe

The Hungarian constitutional text also reflects the crisis situation envisaged by the Parliament, which was caused by the wave of immigration towards Europe, mainly as a result of the collapse of certain political regimes in the Middle East, but also from various crisis zones around the world. The year 2015 was a high point in this respect, when several hundred thousand people entered Hungary from Serbia, compared to a few thousand refugees a year before (Tálas, 2017). Here I would like to draw attention to the interconnections between the migration crisis and the EU debate, which has grown from the Hungarian political discourse to the European level. Before that, it is worth noting that the European security crisis was caused by terrorist acts at the time. Constitutional systems, including those in Central Europe, responded to this with various tightening measures. In Hungary, a new type of special legal order was introduced into the constitution (case of "terrorist emergency" by the sixth amendment to the Fundamental Law in

2015), and in Slovakia, according to the constitutional statute No. 427/2015 Coll. of Laws, in respect of terrorist acts, has extended the time-limit for a person to be brought before a judge from 48 h to 96 h or be released (Ľalík, 2017).

In István Stumpf's view, "the refugee crisis of 2015 and the challenges posed by the current pandemic situation have further reinforced the tendencies that have put the defense of national identity at the center of political struggles, and have further exacerbated the tension between countries defending national sovereignty and those calling for greater federalization." He argues that the Hungarian government's controversial ambition was to "depoliticize political issues and assert the mandate of the majority electorate. This ran counter to the mainstream of EU politics, the judicialization of political issues … The Fundamental Law and its amendments were clearly intended to replace the 'invisible constitution' that had been the yardstick of earlier constitutional activism and then increasingly to extend the powers of the executive (headed by the prime minister). The government's philosophy of crisis management and the limitation of fundamental rights in emergency situations was based on these considerations" (Stumpf, 2022).

We can place two amendments to the Fundamental Law within this interpretative framework. The first is the inclusion of the sovereignty (supreme authority) over population and migration (and resettlement) into the concept of constitutional identity; the second is the protection of the cultural motives of Hungarian society—as assumed by the constituent power—against "harmful" Western civilizational processes. The justification (Smuk, 2023) to the Seventh Amendment to the Fundamental Law dramatically describes the crisis situation as follows: "The mass immigration affecting Europe and the activities of pro-immigration forces threaten Hungary's national sovereignty. Brussels … threatens the security of our country and would forever change the population and culture of Hungary."

The amendment thus included a constitutional limit on the exercise of EU competence in Article E, and in response to the migratory pressure from both directions (the southern border and the EU's refugee quota proposal), it added in Article XIV that "No foreign population may be settled in Hungary" and "A non-Hungarian national shall not be entitled to asylum if he or she arrived in the territory of Hungary through any country where he or she was not persecuted or directly threatened with persecution." What is more, in the spirit of the protection of cultural identity, the new paragraph 4 of Article R made it the duty of all organs of the state to protect "the constitutional identity and Christian culture of Hungary." The Ninth Amendment takes this further, stating in its explanatory that "modern ideological trends in the Western world, which raise doubts about the gender identity of men and women, threaten the right of children to healthy development enshrined in the Fundamental Law," and thus Article XVI now provides that "Hungary shall protect the right of children to a self-identity corresponding to their sex at birth, and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country."

The identity "crisis" we are witnessing here can be seen as an element of the governing parties' narrative rather than a direct threat to society or the state (Bast and Orgad, 2017). Adding to Stumpf's point of view, while European forums approached the migration crisis and the plight of refugees from a human rights perspective, the Hungarian government explicitly wanted to keep it in the context of sovereignty, security and cultural identity. This has allowed identity protection laws to be used against NGOs (Mészáros, 2024b).

However, two of the Visegrad 4 countries, Hungary and Slovakia appealed to the CJEU against the European Council's decision (Council Decision (EU) 2015/1601 of 22 September 2015[1]) on the allocation of migrant persons, as they did not accept either its legal basis or its appropriateness and necessity; Poland intervened in the proceedings as a supporting party (Desmond, 2023). The CJEU rejected their application, finding both that the legal basis was correct and that the Council's assessment of the appropriateness and effectiveness of the measure was not manifestly unfounded (CJEU C-643/15 and C-647/15, Slovakia and Hungary v Council).[2] This decision was handed down in autumn 2017, at a time when the political importance of the migration issue had already risen well beyond the question of adequacy under EU law. In Hungary, a national referendum was held on the government's initiative on the issue—but invalid due to insufficient participation—in October 2016. This year, the Constitutional Court also ruled that it upholds the competence to decide on the applicability of EU law in order to protect the constitutional identity, affected by the population resettlement (Decision 22/2016 CC). This was followed by the above described Seventh Amendment to the Fundamental Law. By this time, in accordance with the Hungarian example, the reference to the migration crisis has become a central issue of the internal political debates in Central European countries and beyond (Androvičová, 2016; Etl, 2020; Fabbrini and Zgaga, 2024).

3.3 On the special legal order—the pandemic experience

Although the special legal order was "for some time before the coronavirus epidemic mostly known as a theoretical issue in university lectures and remote from the realities of everyday life" (Trócsányi, 2021), its constitutional regulation in Hungary has changed several times and has been the subject of a number of scholars (Mészáros, 2016; Csink, 2017; Kelemen, 2017; Till, 2019) since the system-change. Beside the academic discourse on the pandemic and constitutionalism (Drinóczi and Bień-Kacała, 2020; Florczak-Wator, 2021; Mészáros, 2024a), we summarize here the Hungarian experience.

The Hungarian constitutional text of 1990 recognized state of war, a state of national crisis and state of emergency, but the list of qualified periods was extended step by step later on. The sixth amendment in 2016 to the new Fundamental Law introduced the case of a terrorist emergency as the sixth, and the reform introduced by the tenth amendment (2022) simplified it: the three special legal regimes under Article 48 are the state of war, the state of emergency and the state of danger. Curiously, in addition to the changes in typology, the content of each special legal order has also changed, most recently, for example, as an explicit extension, the tenth amendment in Article

1 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece (OJ 2015 L 248, p. 80).

2 Judgment in Joined Cases C-643/15 and C-647/15 Slovakia and Hungary v Council.

51(1) allows for the declaration of a state of danger in the event of "armed conflict, war or humanitarian disaster in a neighboring country" (Ősze, 2021).

As the regime-changing political elites of the Central and Eastern European states had direct generational experience of the Polish martial law introduced in 1981 to contain the social crisis, democratic political thinking was fundamentally afraid of the possibility of emergency law. So, the question rightly arises: is a special legal order even necessary to deal with crises? Can effective "normal law" crisis management measures be taken within the framework of a sufficiently flexible legal system? There are threats to the state/society, however dramatic and unfortunate, which can never be eliminated in a modern society—and to which the special legal order is not the answer (CDL-PI(2020)005rev, 2020). The special legal order: ultima ratio—it can be applied when other, traditional measures are indeed no longer sufficient (Koja, 1993). The constitutional dilemmas of the special legal order can be summarised as follows (based on CDL-PI(2020)005rev, 2020), of which the concerns based on the constitutional text are addressed here.

The constitutional conception of the special legal order predates the sovereignty-based approach in virtually all modern constitutional systems. In the latter's view, one could argue that, on the one hand, the threat to the state/society and the means to avert it cannot be foreseen in advance, and, on the other hand, it is precisely the ordinary legal order that we are seeking to transcend: therefore, its regulation would not be viable. However, while the constitutional order is not suspended, so we expect a constitutional regulation of the special legal order; the approach of defining special legal order cases at the level of the law may be lacking constitutional guarantees. The Hungarian construction of "crisis situation caused by mass immigration" in Act LXXX of 2007 on the right of asylum (Chapter IX/A) can be considered as unconstitutional (Szente, 2020). Our natural aversion to unlimited sovereign power in the extraordinary legal order is still valid, and even growing.

With regard to the qualified periods in the Fundamental Law and the emergency declared due to the COVID pandemic, the reason for the declaration was subject to a scientific (i.e., not only political) criticism, namely whether the pandemic could be interpreted as a qualified case under the Fundamental Law. The state of danger was declared by the government because of a "human pandemic causing mass disease," but a "human pandemic" cannot be included in the definition of an elementary (natural) disaster (nor can it be interpreted as an industrial disaster). The option "given" by the Disaster Management Act was not appropriate for the reasons mentioned above (Szente, 2020; Horváth, 2020). The legal basis for the emergency response to the 2020 COVID epidemic was provided by the Government Decree 40/2020 (11 March 2020) on the introduction of the COVID epidemic, which, in addition to the Fundamental Law and the Disaster Protection Act, was extended by Act XII of 2020 on the protection against the coronavirus, and the legislative also ratified the government's emergency regulations.

To address this specific situation, the special legal order provides for instruments which have a particular impact on human rights and on the system of separation of powers due to the change of competences (CDL-PI(2020)005rev, 2020, p. 6). The Constitution only specifies the purpose for which special measures may be used in the case of an emergency (a state of danger may be declared by the Government, in accordance with Article 51 of the Fundamental Law of Hungary, in the event of "armed conflict, war or humanitarian disaster in a neighboring country, or a serious incident threatening the safety of life and property, in particular a natural disaster or industrial accident, and in order to avert the consequences thereof"). In general, the extraordinary powers granted to the executive by the rule of law are not unlimited, but are purpose-tied: a return to normality (CDL-PI(2020)005rev, 2020, p. 30). In addition to necessity, the proportionality test can also be applied to the assessment of individual measures. The Venice Commission has stated that "States may not resort to measures which would be manifestly disproportionate to the legitimate aim pursued (in terms of their seriousness or the geographical area covered by the emergency measures). If they have several measures to choose from, they should opt for the less radical ones" (CDL-PI(2020)005rev, 2020, p. 11). While it is a characteristic of resilient political systems that they are prepared for future challenges, we see this as being applicable primarily to decision-making mechanisms: in planning crisis management measures, it is perhaps precisely the novelty and unpredictability of the events that trigger crises that they should be counting on (Commissions Rec. 2023/C 56/01).[3] The position of the executive, which is empowered to take special measures, and its possibilities for action are defined by the Fundamental Law in terms of the legal source, with the Government being able to "suspend the application of certain laws, derogate from legal provisions and take other extraordinary measures." An explicit requirement of the scope of measures, in order to safeguard the political and constitutional control mechanisms, is that the Government is obliged to take all measures in a special legal order to ensure the continued functioning of Parliament and the Constitutional Court (Articles 52(4), 55(5)).

Emergency measures are justified in an emergency situation and it is in the vital interest of the community at risk that life returns to normal. Therefore, when the above-mentioned triggers cease to exist, or when the purpose of the measures applied has been achieved, or after a specified period of time, the special legal order must end. A guarantee solution is to renew the authorization for the exceptional measures periodically, even if the triggers persist (Szente, 2020). With regard to the constitutional arrangements for crisis management, the period of the special legal order and the (temporal) validity of the special legal order decrees issued during that period were also regulated. Under Article 51/A of the Fundamental Law, the Parliament could declare a state of emergency for a "specified period" at the initiative of the Government. More recent rules of the Fundamental Law provide that a state of emergency or state of danger may be declared for a period of 30 days (Articles 50 and 51) and that "the body authorized to declare a special legal order shall terminate it when the conditions for its declaration are no longer fulfilled" (Article 53(4)). In March 2020, there was a heated debate in the Hungarian Parliament over the Government's request for an indefinite emergency mandate on the grounds that the end of the pandemic cannot be predicted in advance (on the Act XII of 2020).

It is telling that Act IV of 2022 on the prevention and management of the consequences of armed conflict and humanitarian disasters in neighboring countries in Hungary—in its preamble and

3 2023/C 56/01—COMMISSION RECOMMENDATION of 8 February 2023 on Union disaster resilience goals.

explanatory—merely extends the validity of certain government decrees to ensure that "all necessary means are available to assist, support and accommodate people fleeing the conflict, to prevent the adverse economic effects of the consequences, to mitigate the consequences and to ensure that the country leaves the adverse consequences of the war behind as soon as possible…." This justification is mechanically repeated by the Parliament when extending the state of danger, in the Act XLII of 2022 and its following amendments (Mészáros, 2024a). The recent justification only adds that the armed conflict and humanitarian disaster in Ukraine and their consequences in Hungary, especially in the fields of refugees, economy and energy, have not changed in the recent period. That said, the possibility of political control of this justification in the parliamentary debate is given. The Constitutional Court's observation worth mentioning: "the economic and social impact of the (pandemic) emergency and the measures taken to protect against it go beyond the duration of the emergency, and the measures taken to counter its negative effects may therefore have a lasting or even definitive effect" (Dec. 8/2021 CC).

We note under this point that, at the time of the closure of this manuscript, a special legal order has been in force in Hungary continuously since March 2020, with the exception of a small period. The state of danger, which was lifted on 17 June 2020 on the grounds of the pandemic, was renewed in two phases from 4 November 2020 to 31 May 2022, and from 25 May 2022 it is maintained by the government on the grounds of the armed conflict in Ukraine—permanently in the crossfire of opposition criticism.

3.4 The impact of crises on institutional-power structures: the institutional conditions for political and constitutional control of the executive

In general, crises can have a significant impact on the division of powers between state bodies. In times of crisis, be it natural-industrial disasters, economic downturns or security threats, the executive may seek to gain greater power over decision-making and (public) policy-making. This could result in a shift of power away from the legislative and judicial powers, which would be responsible for controlling the executive. The government may take emergency measures such as imposing curfews, requiring masks and restricting gatherings in public places, which, although necessary to control the spread of the disease, may raise concerns about fundamental rights (especially civil liberties) and possible abuse of power (Ramraj, 2023). In such situations, the legislative and judicial branches of government may provide the guarantees to ensure that the government acts within the law and the constitution.

Political pressure from public opinion in times of crisis can be peculiar. Societies or vulnerable groups in society may demand quick and effective action and be less concerned about the separation of powers or constitutional limits on the executive. This can pose a challenge for democratically elected officials, who must balance public demands with upholding the rule of law. The expansion of the Government's powers and the change of control over its activities, through its political determination, is becoming the focus of political debates by default. This is particularly so if we consider that the success of the crisis management itself can be measured in terms of the popularity of the governing parties. Nearly a decade of critiques of the rule of law in relation to the Hungarian government's actions have provided a specific context for both the technique and the content of special legal powers (Stumpf, 2020, 2021; Mészáros, 2024a). Under this section, we will review the constitutional aspects of the system of separation of powers and the exercise of fundamental rights during crises.

3.4.1 The functioning of parliament

Parliamentary control of governance under the special legal order can be ensured by several factors. Firstly, as we have seen, the legislature has a role to play in the assessment of the crisis situation and the imposition of the special legal order, in so far as it can overrule the situation and the urgent measures ordered by the government. The review role of a parliament that sits and debates "more heavily" does not necessarily contradict the need for swift action: the regular presentation of emergency orders to the legislature can ensure that they can be approved or rejected by MPs. The Venice Commission also stresses that the criterion for meaningful scrutiny is that Parliament should not only be able to decide on these on an "all or nothing" basis, but also to do so in relation to parts of the regulations. This also implies that Parliament should be in session on a permanent basis (CDL-PI(2020)005rev, 2020, p. 71).

Accordingly, as mentioned above, the Fundamental Law of Hungary requires the Government to ensure the conditions for Parliament to sit continuously. It may be noted that in Hungary the Speaker may, under the authority of the Parliament Act (Art. 37), convene a sitting of Parliament in a special legal order at a place other than the Parliament Building. However, although not unprecedented (IPU.org, 2020; Petri, 2020), during the pandemic and quarantine period, the Hungarian Parliament did not meet on-line, even during the quarantine period of the first wave. The larger Upper House chamber in the Parliament Building allowed for distance sitting and the ParLex system allowed for virtually complete on-line management of documents (EKINT, 2020). In 2020, (the Empowerment) Act XII (§ 4) required the Government to provide regular information on the measures it had taken to avert the emergency, which it could do at the sitting of Parliament, in its absence to the President of Parliament and the leaders of the parliamentary groups. Thus, there were no institutional, infrastructural or external obstacles to the functioning of the Hungarian legislature and the provision of information during this period.

In Poland, the Presidium of the Sejm allowed holding online sessions and remote voting—with identification –, while the Senate hold hybrid sessions. The Slovak legislative body held its sessions with personal attendance, although without media presence and applying fast track procedures; while the Czech parliament's sessions were suspended in 2020 (The emergency practices were monitored by European bodies, see Venice Commission, 2020). Countering the executive's emergency measures, the Polish Supreme Court has ruled that fines for breaching restrictions on personal movement introduced by government decrees in March 2020 are unlawful, as the restrictions were not laid down by a parliamentary act but by secondary legislation (Jaraczewski, 2021).

As proof of the continuity of the Hungarian legislative functioning, its performance is outstanding: in the spring of 2020 (from 17 February to 15 June), it held 37 meeting days, compared to 19 in the same period in 2019 and 31 in 2021. In 2020, between the first wave

of legislation to combat the coronavirus and the first wave of legislation to end the crisis, Parliament passed 46 laws, compared with 33 in the same period in 2019. Looking at the remainder of the 2018–2022 term in terms of the scrutiny function of the National Assembly, we see those four initiatives to set up a committee of inquiry on pandemic crisis management have been tabled, but none of the items were supported by the Committee on Justice (Parliamentary Information Portal data).[4] The number of interpellations and questions raised has been higher, although the quality of the questions and answers (like "The government's emergency press conference provided regular information on the data in the written question.") does not necessarily support our expectations as to the viability of a substantive control function.

On the one hand, these indicators disproved that the government had technically shut down Parliament during the emergency, and on the other hand, they raised the question of whether the crisis management legislation—not always of daily urgency—could have been passed under normal law. What is more, the laws adopted in spring 2020 include some politically sensitive and unrelated to the management of the virus situation, such as those on foundations of new model universities and their endowment. In the same time, the Government had issued decrees actively, not only in numbers but also in merits (Mészáros, 2024a).

3.4.2 On the functioning of the constitutional court

The operation of the Hungarian Constitutional Court cannot be restricted during a special legal order, and the Government is obliged to take measures to ensure its continued operation (Fundamental Law, Art 52 par. 4). In contrast to the National Assembly, the Constitutional Court was allowed to meet online, first in Act XII of 2020, and then, after the first wave of the emergency was lifted, the new Article 48/A was inserted into the Constitutional Court Act. According to the latter rule, which is not limited to a special legal order, "the plenary session of the Constitutional Court and the session of the Council may be held by electronic means of communication, as decided by the President." With the amendment of the Constitutional Court Act, the emergency measure has thus become part of the normal legal order.

The strict sentence that the Constitutional Court's functioning cannot be restricted in a special legal order also raised a question of interpretation of its powers. It was argued that some of the limits on the jurisdiction of the Constitutional Court, as enshrined in the Fundamental Law (in other places, e.g., Article 37) and in the Constitutional Court Act, would also cease to apply under the special legal order. However, the view prevailed that "the Constitutional Court may not extend its jurisdiction beyond the limits of the normal legal order, even in the special legal order" (Erdős, 2022). All this said, the functioning of the Constitutional Court in the period of crisis can be considered to be substantial and continuous (Németh, 2021), although its interpretation was legislation-friendly (see below).

In Poland, the period of migration and pandemic crises was intersected by the constitutional-political debate on the reform of the judicial system and the membership of the Constitutional Tribunal. This has also attracted particular attention at EU level and has risked a general dismantling of judicial review and rule of law guarantees against the executive (hence not limited to crisis issues). Without further elaboration here, it should be noted that these efforts are seen by many scholars as a chapter in the "illiberal" or "populist" turn of the Central European states (Drinóczi and Bień-Kacała, 2019). It is worth noting that the weakening of these control mechanisms is a particular risk in other periods of crisis. The abovementioned limitation of the powers of the Hungarian Constitutional Court in relation to the financial crisis, which exists since 2011, has, by comparison, already been removed from the agenda of constitutional debates.

3.4.3 Other counterbalances to the executive

In terms of the system of separation of powers, the Fundamental Law of Hungary does not explicitly provide for institutional guarantees of the functioning of the other counterbalances of the executive, as is the case with the National Assembly and the Constitutional Court. Although the prohibition of the suspension of the Fundamental Law (Article 52(1)) implies that the rules of organization and competence described therein continue to apply, unless otherwise provided, for example in the case of the courts, the Public Prosecutor's Office or the Commissioner for Fundamental Rights, the laws governing the procedure and organization of these bodies do not enjoy the same protection as in the case of the Constitutional Court. On the merits of the reviews, the Hungarian Ombudsman's annual reports show that it was not in 2020, but rather only in 2021, that the fundamental rights protection issues of pandemic-related inquiries were deepened. With regard to the judiciary, an important reservation is that the criminal law guarantees contained in Article XXVIII (2)–(6) cannot be limited in relation to the normal legal order (Article 52(2)). In a case concerning criminal law guarantees, the Polish Constitutional Tribunal found the legislative measure on suspension of the limitation period for punishability of an act unconstitutional (case P 12/22).[5] It found that "In principle, the legislator has the ability to freely shape the institution of the limitation period, however, the lack of specifying the maximum period of suspension due to the state of epidemic threat or epidemic state meant that the suspension of the limitation period could last for an indefinite period."

Nevertheless, as regards the organs of the judiciary and their procedures, the special legal order rules have introduced a number of modifications. Adapting to the pandemic period has required considerable efforts not only from citizens seeking justice but also from those working in the organization of the judiciary (Chronowski et al., 2024). Thus, in addition to the possibility of suspending proceedings, we must remember the restrictions on the oral hearing of requests from clients without a lawyer, the personal availability of the offices of the administration, the restrictions on home office work and the mandatory vaccination of those working in an administrative environment.

4 www.parlament.hu

5 P 12/22 – Constitutional Tribunal decision on 12 December 2023 (Suspending the limitation period for imposing penalties for prohibited acts and the limitation period for enforcing penalties in cases concerning criminal offences and fiscal offences). Available at: https://trybunal.gov.pl/s/p-12-22.

3.5 Further constitutional concerns on crisis policy measures

A detailed analysis of the specific legal crisis management measures cannot be undertaken within the scope of this study. Instead, three cross-sectional aspects will be mentioned, firstly, the substantive reasons for the introduction of the special legal order, secondly, the legislative conditions of the rule of law for crisis management measures and, finally, the question of the enforcement of fundamental rights.

As we have seen above, the wording of the reasons for special legal order cases (crisis situations) can be less detailed and concrete. This is an acceptable position because of the unforeseeable novelty of crisis situations, but it certainly implies a decision as to whether the crisis situation experienced really fits into the situation offered by the Fundamental Law. As such, it is a decision on the application of the Fundamental Law, which must be subject to review by the Constitutional Court: to avoid abuse of the special legal order, but also to protect the Fundamental Law. According to the Venice Commission, it is acceptable that the Constitutional Court's control over the introduction of the special legal order is limited to the procedural aspects of the decision, but this should not restrict the substantive examination of the emergency measures (CDL-PI(2020)005rev, 2020, p. 86, while Vyhnánek et al., 2024, argue to apply a semi-procedural approach).

The invocation of the reasons for the declaration of a state of danger and the relationship (expediency) of certain government measures to crisis management are dealt with rather narrowly by the Hungarian Constitutional Court. It argues in its Decision 23/2021 that "it is for the legislature to decide whether the conditions for imposing a special legal order exist and, at the same time, whether and to what extent a restriction of fundamental rights is justified under such a legal order." While the "appropriateness of the exceptional measures cannot be challenged by the Constitutional Court, it is a question of constitutionality whether the restriction of rights remains within the limits of the Fundamental Law. … The primary question is that of the appropriateness of the measures necessary to combat the coronavirus epidemic. The Constitutional Court has neither the power nor the means to review such measures. It is the Government's power and responsibility to take the necessary emergency measures, which are directly authorised by the Constitution in times of emergency, taking into account the health, social and economic risks. However, the Government's power to take emergency measures is not unlimited. … In its examination of the constitutionality of a measure, the Constitutional Court may not examine the appropriateness of the restrictions, but it may examine whether the rule restricting a fundamental right is justified in the interests of protection against an exceptional situation." However, "[i]n general, it can be stated that the fight against the coronavirus epidemic, including the reduction of its health, social and economic effects and the mitigation of the damage, are objectives which constitutionally justify the restriction of fundamental rights, including the restriction of freedom of assembly. The restriction of a fundamental right therefore has a constitutionally justified, legitimate aim." In adopting this approach, one element of the fundamental rights limitation test was in fact initially waived by the Court when examining specific restrictions on fundamental rights [Erdős (2022) analyzes also the further development of the fundamental rights tests].

Similarly, the Hungarian Court has been cautious in its approach to the preparation period for the introduction of crisis measures (Dec. 8/2021 CC). It argues that "[i]n an emergency situation, immediate measures are necessary, which cannot be prepared for in advance. It is therefore not possible to provide sufficient preparation time for voluntary compliance with the provisions contained therein." It adds from its pre-pandemic precedents that "the determination and provision of sufficient time to prepare for the application of the law is a matter for the legislature's discretion and judgment. The assessment of how much time is necessary to prepare for the application of a particular piece of legislation is a matter of discretion requiring consideration of economic policy, organizational, technical and other aspects, and is therefore not a constitutional issue." In the even earlier practice of the Constitutional Court, we can find decisions where the Court took a more specific position on the length of the preparation period (i.e., Decisions 43/1995 or 51/2010 CC).

This position in favor of emergency legislation was taken at a time of pandemic, quarantine, social and psychological stress. It was not just about the application of legislation full of technical rules that tested legal experts too, but about the hour-to-hour rules imposed on ordinary people, controlled by the authorities or risking infection. In this context, government communication is of paramount importance, using various channels to keep the public informed of specific measures. One of the characteristics of the COVID period was that, in addition to reliable news sources, additional sources competed for the attention of members of society, not infrequently not to amplify official information but to disturb it with fake news or other "noise" (Koltay, 2021). Sketchy announcements by government leaders on social media preceded the promulgation of the final and detailed regulations. Against this background, the Constitutional Court intended to remain balanced when referring to the predictability of certain measures.

During the Hungarian crisis legislation, the executive branch made use of legal restrictions in large numbers, and it is obviously not possible to give an exhaustive list of these, but we consider it necessary to take a small inventory to show the nature of exceptional measures. In the wake of the migration crisis, border police measures have been accompanied by legal restrictions in the asylum procedure, including the possibility of "escorting" or "returning," introduced in 2017, which also restricts access to asylum: in a crisis situation caused by mass immigration, a police officer may detain an illegal alien on the territory of Hungary and escort him/her to the nearest gate of the Schengen external border. We can add to Section 5 (1b) of Article 5 of Act LXXXIX of 2007 on State Borders the rule contained in Article XIV (4) of the Fundamental Law (with the seventh amendment), according to which a non-Hungarian citizen who has entered the territory of Hungary through a country where he or she has not been subjected to persecution or the imminent threat of persecution is not entitled to asylum.

The specific legal restrictions were actually experienced by Hungarian society on a massive scale during the COVID-19 pandemic. These restrictions affected a diverse range of fundamental rights. These included restrictions on freedom of movement, on the opening of shops and "events", on giving the minister access to personal health data for protection purposes, on the wearing of masks, on the switch to digital working hours in universities and schools, on the requirement to have a immunity certificate (see Decision 3133/2022 of the Const. Court), compulsory vaccination for certain groups of the population (Dec. 3088/2022 of CC), restrictions on the right of assembly (Dec. 23/2021 of CC) (including fines for car rallies, see Dec. 3048/2022 of CC), the

introduction of the offence of scaremongering (Dec. 15/2020 of CC), changes to the deadlines for requesting data of public interest or the non-disclosure of data of public interest, and cuts in local government revenue and property (Dec. 92/2020 and 3234/2020 of CC). In the leading cases, the Hungarian Constitutional Court found only few constitutional problems with government measures (Erdős and Tanács-Mandák, 2023).

4 Discussion—crisis politics and democratic accountability

During the years of crises, perhaps not directly as a result of the crises, we can also observe issues with the functioning of representative democracy—these have also appeared at the constitutional level. In 2012, the Czech Republic switched to direct election of the head of state, while in the Czech and Slovak parliaments, the immunity of representatives was reduced (Kudrna, 2017; Ľalík, 2017). In Hungary, there was a flurry of referendum initiatives in 2007, including one that was held on budgetary issues in 2008. In 2009, also as an effect of a referendum initiative, the parts of the previous constitution relating to the reimbursement of MPs' expenses were amended with surprising cross-party consensus.

Europe's democratic systems are also under threat from hybrid foreign influence. This latest challenge is defined in several legislative bodies as a crisis situation. In Hungary, foreign (in this case, Western) influence has led to an amendment of the constitution and the creation of a new body to protect sovereignty, which is trying to fight "foreign agents" by investigating NGO finances (12th amendment of the Fundamental Law, Art. R par.(4); Act LXXXVIII of 2023; Dec. 20/2024 CC). The CJEU (CJEU Case C-78/18 Commission v Hungary), the ECtHR (Ecodefence and Others v. Russia, 2022) and the Venice Commission (CDL-AD(2024)001) have already expressed the dangers of Russian, Hungarian and Georgian "foreign agent legislation" for fundamental rights (Smuk, 2024). The real dangers of foreign influence may only be experienced in the future, and one of the omens of this may be the decision of the Romanian Constitutional Court to annul the result of the presidential elections at the end of 2024, referring to the unacceptable level of foreign influence (Selejan-Gutan, 2024).

A complex application of the principle of democracy could help to conclude the review of the constitutional implications of crises, and to this end we propose two aspects. One of the problems is the emergence of a tension between expert knowledge and legitimacy in crisis legislation and adjudication. Another equally serious impact of the crises on democratic process relates to the holding of elections and referendums. Both issues are related to political accountability and democratic legitimacy.

We have to recognize that, in the context of technological progress and the complexity of crises, specialized expertise is often necessary to develop effective responses to crises, as experts can provide insights into the technical, scientific aspects of the crisis and help identify the most effective solutions. On the other hand, democratic legitimacy is essential to ensure that public policy decisions and actions taken in response to a crisis reflect the values and priorities of the wider population. While expert knowledge can be critical to developing effective crisis responses, it is important to ensure that policies and measures are subject to democratic scrutiny and accountability. Past crises have highlighted the fact that in many respects, elected government officials, functioning with democratic legitimacy and accountability, are no longer in the position to make decisions on the basis of their democratic responsibility (or popular representation) on a number of important issues. Such situations of conflict between democratic legitimacy and scientific expertise have been well spawned by the economic crisis, climate change and, of course, the pandemic. During the COVID-19 pandemic, almost all Hungarian disease control measures were based on the justification offered by medical science—even if alternative or rather pseudo-scientific opinions were also published, and later on, national economic and welfare considerations were becoming increasingly strong (for a comprehensive presentation and analysis of political communication see Szabó, 2022). A particular risk may be that the government has administrative power to choose between, or even to influence, expert positions (Post, 2012).

While the government administration had access to expert knowledge by default, the constitutional courts had to apply the fundamental rights tests of necessity and proportionality in its absence. When the Hungarian Constitutional Court was required to base its position on scientific knowledge, it could already refer back to its previous case law to determine the method: the Court, acting in the light of the "prevailing scientific world view" at the time (which was the WHO's position), accepted the adequacy of vaccines to combat the coronavirus epidemic (Dec. 3537/2021. CC.; Erdős, 2022).

Regarding the holding of elections and referendums in crises periods, we draw attention to the fact that these direct democratic occasions would be organized in a special legal order, in a more turbulent social-psychological state of public opinion and society, and even at a time of increased government power, restrictions on political freedoms and freedom of movement (Nagy, 2021). These circumstances would leave strong doubts as to whether they were a reflection of the real will of the people. Would there be more serious consequences if the elections and referendums were postponed until after the crisis? (Lee, 2024).

In Visegrad countries, several elections have been postponed during and because of pandemic. Slovakia postponed the local elections of April 2020, Poland the presidential election of 10 May 2020 to June/July, and the Czech Republic a by-election to the Senate also in 2020 (Gál, 2022). Around the most important event (presidential election in Poland) the political and constitutional debate took into account probably almost all alternatives and justifications. Voter turnout on the planned day would have been limited due to the extraordinary measures; the pandemic broke out in March 2020, by which time it was too late to change the electoral procedure; the Court would not have accepted a purely postal vote as regular; the opposition rejected the postponement of the election and also party motions to extend the mandate of the incumbent president for another 2 years (ODIHR, 2020). Voter turnout in postponed elections has increased in Poland, Slovakia and Czechia, and not decreased compared to the average trend in other countries (Gál, 2022).

The Hungarian Fundamental Law, in its position of protecting the functioning of the National Assembly, rather provides for the exclusion of elections in times of war and state of emergency (Article 55), but does not mention this in the event of a state of danger. Act I of 2021 prohibited or postponed by-elections and referendums until the end of the state of danger, although it was reauthorized by Government Decree 103/2022 (10.3.2022). The 2022 parliamentary elections were held under a special legal regime, which imposed fewer restrictions on the electoral process but defined the broader legal context of the

campaign period. Among the relevant restrictions the limited access to information of public interest is mentioned by OSCE (2022).

The Venice Commission underlines that the solutions available under the legal order should be used as far as possible in the event of an election held during a crisis situation. If a state decides to hold elections, it should consider that the democratic legitimacy of the elected legislature may be undermined by lower turnout (for example, due to restrictions on freedom of movement or epidemic fears), public confusion, and the negative influence of restrictions on fundamental rights (CDL-PI(2020)005rev, 2020, pp. 101–120; Landman and Splendore, 2020, construct a risk matrix on the issue). This, in turn, could have the most significant, long-term impact on constitutional law because of the spill-over effect of crises on popular representation, democratic control and the legitimacy of constitutional institutions.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

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The limits of restrictions on free competition in the state of emergency—the Hungarian fuel and food retail price maximisation in the light of the Hungarian constitutional court's, the Strasbourg court's and the Luxembourg court's jurisprudence

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Since March 2020, Hungary has almost continuously been under a type of special legal order, the state of emergency, which was first introduced to better protect against the COVID-19 epidemic and then in May 2022—following the amendment of the Fundamental Law—due to the Russian-Ukrainian war. Both the crises caused by the epidemic and the armed conflict in the neighbouring country were de facto limited not only to the health and migration-humanitarian fields, but the Government made use of the exceptional legislative powers of the special legal order in almost all areas of life. Economic regulation was no exception: in 2021, the Government capped the retail price of fuel, and from February 2022 onwards, the retail price of several basic foodstuffs (including flour, sugar, milk, chicken breast and other meats, and later eggs and potatoes). The aim of this paper is to show the limits of one of the most powerful state interventions in the economy: the price maximisation. This can basically be determined on the basis of the relevant case law of three fora of legal protection—the Hungarian Constitutional Court, the European Court of Human Rights in Strasbourg and the Court of Justice of the European Union. A comparison of the case law of the above-mentioned three courts also shows which legal protection mechanism is most effective against legislation restricting the free competition—at least in a period of special legal order.

KEYWORDS

state of emergency, Hungary, price maximisation, fundamental rights, SPAR-case

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1 Introduction

The state of emergency as a type of special legal order[1] was declared in Hungary on the 11th March 2020[2] and has been in place almost continuous since then.[3] It was first introduced to better protect against the crisis caused by the COVID-19 epidemic[4] and then in May 2022—following the amendment of the Fundamental Law—due to the Russian-Ukrainian war. Both the epidemic and the armed conflict in the neighbouring country were de facto limited not only to the health and migration-humanitarian fields, but the Government made use of the exceptional legislative powers of the special legal order in almost all areas of life. Economic regulation was no exception: among the economic policy measures, public and professional interest mainly focused on the various types of price regulation by public authorities. One group of such measures was the introduction of retail price ceilings for some basic foodstuffs—including flour, sugar, milk, chicken breast and other meats, and later eggs and potatoes—(hereinafter referred to as food price caps). The other group of official price-fixing measures consisted of the retail price ceilings for certain types of fuel (hereinafter referred to as fuel price caps).

1 It should be stressed that the state of emergency is considered as a legal order, even if it is an exceptional state, and is treated as such by the Hungarian legal system. Contrary to the theory of Carl Schmitt, who interpreted the decision on the exceptional status as the supreme expression of the sovereign, it is not a matter of law but of politics. It reveals to whom that power is vested and who is the true sovereign in a given state. For more on the political-philosophical foundations of the state of emergency (see Schmitt, 1922).

2 Government Decree 40/2020 (III. 11) on the declaration of an emergency.

3 For the first time, the state of alert was "suspended" between 16 June 2020 and 4 November 2020—replaced by an epidemiological alert. See: Government Decree 282/2020 (17.VI.2020) on the lifting of the state of emergency declared on 11 March 2020, Government Decree 283/2020 (17.VI.2020) on the introduction of an epidemiological alert and Government Decree 478/2020 (3.XI.2020) on the declaration of a state of emergency. On 8 February 2021, the state of emergency declared on 3 November 2020 was lifted by Government Decree 26/2021 (I. 29.), but with the same effect, a new state of emergency was declared by Government Decree 27/2021 (I. 29). *De facto,* the Government has also maintained the state of emergency continuously. As of 1 June 2022, Government Decree 181/2022 (VII. 24) lifted the state of emergency of 2021. However, in view of the armed conflict and humanitarian disaster on the territory of Ukraine and in order to avert the consequences of these in Hungary, Government Decree 180/2022 (II. 24) on the declaration of a state of emergency and certain emergency rules reintroduced the "new" state of emergency. In the same way, *a de facto* state of emergency remained in place on 1 November 2022. Following the Ninth and Tenth Amendments to the Fundamental Law, it became necessary to lift the state of emergency declared on 1 June 2022, which was abolished by the Government Decree 423/2022 Decree 424/2022 (X. 28.) on the declaration of an emergency situation and certain emergency rules to avert and manage the consequences of armed conflict and humanitarian disasters in Ukraine and their consequences in Hungary, which is still in force.

4 For further details on the diversity and impact of different governments' measures to reduce public health risks (see Abayomi, 2024; Capati et al., 2023; Andersson et al., 2022).

2 Materials and methods

The aim of this paper is to show the legal limits of one of the most powerful state interventions in the economy: the price control by its maximisation (price ceilings). This can basically be determined on the basis of the relevant case law of three fora of legal protection—the Hungarian Constitutional Court (hereinafter: HCC), the European Court of Human Rights in Strasbourg (hereinafter: ECtHR) and the Court of Justice of the European Union (hereinafter: CJEU). A comparison of the case law of the above-mentioned three courts also shows which legal protection mechanism is most effective against legislation aimed at protecting the economy—at least in a period of special legal order. This is also the main question of the research.

The research applies the classical jurisprudential methodology: the interpretation and critical analysis of norms and individual decisions. It will also use these to draw conclusions about the future, hypothetical decisions of the forums analysed. On the basis of the past practice and hypothetical decisions of the HCC, the ECtHR and the JCEU, it attempts to identify the most effective forum for price maximisation mechanisms. It also provides an answer to the question of which gives the national legislator the greatest freedom of discretion, i.e., policy-making leeway.

To this end, the paper outlines the legal basis for state intervention in the economy and then describes the institution of special legal order price regulation in Hungary. It will then analyse the legal protection provided by the HCC, then the ECtHR and finally the CJEU in order to establish the answer to the main research question.

The fact that both the HCC and the CJEU have taken substantive decisions only on the food price cap makes comparisons difficult. Nevertheless, we attempt to outline, based on the jurisprudence on the food price cap, what decisions these fora may take on fuel price maximisation. In the case of the ECtHR, where there is no explicit jurisprudence on price ceilings, we will build our conclusions on its decisions on the right to property.

3 General considerations on market economy and price regulation—from a legal perspective

One of the pillars of Western-style democracies is the market economy, which has its roots in Roman law. The 'sanctity' of property, the freedom of contract that ensures its dynamism—and the free determination of prices, which is one of its most important elements—were fundamental institutions of Roman law and remain so to this day.[5]

With the emergence of the charter constitutions, a new level of property protection emerged: that of fundamental rights. In addition, a number of constitutions, including the Hungarian Fundamental Law, enshrine the market economy and freedom of contract as

5 According to Peter Temin the early Roman Empire was primarily a market economy. Although the parts of this economy located far from each other, but they still functioned as part of a comprehensive Mediterranean market (Temin, 2001; Temin, 2006).

constitutional values. Accordingly, a complex system of constitutional property protection is also functioning at the national level, guarded by the constitutional adjudicating body, the HCC in Hungary.

Property protection at the national level has been complemented by supranational legal protection regimes. From the point of view of a state, which is a member both the Council of Europe and the EU, the two most important fora are the ECtHR in the field of international law and the CJEU in the field of sui generis EU law.

In spite of the historical developmental arc outlined above and the fact that the democratic rule of law is unthinkable without a market economy—and its safeguards like right to property, freedom of contract—price regulation is not unknown. In addition to the Roman legal roots of property, price regulation can also be found: Diocletian's edict of 301 regulated in detail the maximum price of goods. The reason for issuing the edict at the time was high inflation (Prantl, 2011). The fight against inflation has remained a legitimate purpose of intervention in the economy in modern times—often, but not exclusively, in wartime.[6] One of the most famous of these regulations is the US General Ceiling Price Regulation (GCPR) of 1951, which introduced the "general freeze" after the Korean war broke out. This regulation "froze" prices at the highest prices charged by individual sellers during the period between December 19, 1950, and January 25, 1951 (Ginsburg, 1952; Durham, 1952).

The examples given show that price maximisation has its place, at least exceptionally, even in the most liberal market economy. Such strong state intervention can be justified primarily in times of financial-inflationary crises, which are often underpinned by other types of crises, such as war. Also in 2021, the runaway inflation and the resulting financial and economic crisis were the basis for the Hungarian government's decision to introduce a price cap on fuel from 2021 and on certain basic foodstuffs from 2022.[7] As in the case of the Edict of Diocletian and the GCPR, there were also 'underlying crises' which, in the government's view, triggered inflation: the COVID-19 pandemic in 2020, and the Russian-Ukrainian conflict, which erupted in 2022 and escalated rapidly into a war.

4 Overview on the relevant regulation

4.1 Regulation of fuel price maximisation

The price cap on certain fuels was in force in Hungary between 15 November 2021 and 31 December 2022. During its little more than 1 year of operation, the legislation was subject to a number of technical and substantive amendments. Below we review the most important changes to the regulation in this narrow area of law.

The Government imposed the fuel price cap by exercising its emergency legislative powers under Article 53(2) of the then-effective Fundamental Law, through the adoption of two emergency government decrees. Government Decree 624/2021 (XI. 11.) on the different application of Act LXXXVII of 1990 on the determination of prices during an emergency set the maximum retail gross price of 95 octane petrol and diesel at HUF 480 per litre.[8] Government Decree 626/2021 (XI. 13.) on the detailed rules for the distribution of fuels at the official price entered into force at the same time as Government Decree 624/2021 (XI. 11.) and laid down a number of provisions to ensure effective distribution. For example, it stipulated that service stations may not operate shorter opening hours than normal and may only announce a closure of their service stations in the cases specified in the Regulation.[9]

The regulatory environment for fuel retailers improved from February 2022. Government Decree 57/2022 (II. 28.) on certain measures related to the official fuel price capped the wholesale price of fuel types with official retail price at HUF 480 and created a contractual obligation for wholesalers, and stated that no other costs or fees may be charged when selling to retailers. The regulation exempted fuels subject to price regulation from the member contribution to the Hungarian Hydrocarbon Stockpiling Association for the months of March, April, and May 2022 and granting a reduction in the excise duty on fuels.[10] In March 2022, the Government launched a programme[11] to support small petrol stations,[12] under which small petrol stations could receive a pro-rata subsidy for the fuel they sell that is subject to a price freeze. The aid was paid by online application for a period of 7 months from March to September 2022.[13]

The group of consumers eligible to purchase fuel at capped prices was narrowed in two stages starting on March 10, 2022. The amended

6 For example, Cochoy and colleagues examine price ceilings in the inflationary environment of the postwar era (Cochoy et al., 2023).

7 Fuel price regulation in recent years has not been without precedent in the Central and Eastern European region. The Slovenian government decided to cap the retail price of certain fuels in response to the turmoil in the oil market and non-seasonal price fluctuations. In February 2022, the Croatian government justified the restriction of retail fuel prices by the sudden change in global oil prices and oil derivatives, and the imbalance between supply and demand. In addition to maximising fuel prices, the Croatian government decided to introduce a retail price cap. For Croatian legislation see: Decree NN 17/2022 (7 February 2022) on the determination of the maximum retail price of petroleum products; Decree NN 86/2022 (25 July 2022), amending the Decree fixing the maximum retail selling price of petroleum products; Decree NN 78/2024 (1 July 2024) on determining the highest retail prices of petroleum products; NN 107/2023 (September 15, 2023), Decision on direct price control measures for certain products in retail trade For further information on the petroleum product price structure in Slovenia, see: https://www.gov.si/en/topics/petroleum-product-prices/.

8 The Price Regulations have been repealed by the legislator as of 1 January 2022, but the price freeze remains in place. The provisions of Act CXXX of 2021 on Certain Regulatory Issues Related to Emergency Situations, which entered into force on 1 January 2022, maintained the price cap for the two fuel types.

9 Section 3 of the Government Decree 626/2021 (XI. 13.) assigned the responsibility for overseeing the price cap to the National Tax and Customs Administration.

10 Government Decree 162/2022 (IV. 28.) amending certain government decrees on price regulation extended the period of the exemption from the membership contribution payable to the Hungarian Hydrocarbon Stockpiling Association until 30 April 2022.

11 Government Decision 1117/2022 (III. 5.) on the support of small petrol stations to guarantee security of supply in rural areas.

12 An undertaking operating up to 50 service stations with a turnover from fuel sales not exceeding HUF 50 billion in 2021.

13 See https://kisbenzinkutak.mgfu.hu/.

regulation initially excluded non-Hungarian-registered vehicles from eligibility for fuel purchases at capped prices.[14] Subsequently, from July 30, 2022, the discount was no longer available for „company cars."[15] Government Decree 190/2022 (V. 26.) on the entry into force of certain government decrees issued during the emergency declared to avert the consequences of the coronavirus pandemic and on emergency measures reintroduced the rules on price maximisation on 1 June 2022. However, the Decree expired on 1 November 2022 due to the amendment of the special legal order chapter of the Fundamental Law. Despite this, the institution of the official fuel price cap continued to exist, as the Government issued Government Decree 425/2022 (X. 28.) on the entry into force of government decrees issued during an emergency and on emergency measures, which entered into force again on 1 November 2022.

The end of the fuel price freeze was marked by the adoption of Government Decree 494/2022 (XII. 6.) on certain provisions related to fuel prices. The Decree repealed the part of the regulation relating to the price freeze and the distribution obligation and their duration, consequently the fuel price freeze ended on 31 December 2022.

4.2 Regulation on food price maximisation

Below, we provide an outline of the regulatory concept, along with a presentation of the most significant substantive changes.

The Government also ordered the retail price cap using its emergency legislative power under Article 53(2) of the Fundamental Law in force at the time. In order to prevent the adverse effects of market disruptions related to the COVID-19 pandemic, the Hungarian government issued a Government Decree[16] at the beginning of 2022 regulating the marketing of eight basic foodstuffs (certain types of sugar, wheat flour, sunflower oil, pigmeat, poultrymeat and milk).[17] The Government Decree entered into force on 1 February 2022 for an initial period of 3 months and due to successive extensions, it remained in force until 31 July 2023. The Government Decree obligated retailers, in regard to the aforementioned food products, to sell the items distributed on October 15, 2021, and to offer at least the average daily quantity sold on the corresponding day of the week in 2021. For these products, the gross retail selling price charged by traders of everyday consumer goods could not exceed the gross retail selling price applied on 15 October 2021. The Government Decree provided for sanctions in cases of non-compliance with the prescribed obligations.[18] The legislation was subject to a number of technical and substantive amendments.

As a result of the war in Ukraine, the Hungarian Government amended the Government Decree[19] such that with effect from 10 November 2022, the reference quantity to be considered was no longer the average daily quantity offered for sale in 2021, but rather the average daily quantity of stock available to the trader on the corresponding day of the week during that year. The amendment also entailed extending price regulation to two additional product categories, namely eggs and potatoes. In the case of these products, the Government Decree set the maximum price and the distribution obligation based on the reference date of September 30, 2022.

The end of food price maximisation was marked by the adoption of Government Decree 347/2023 (VII. 27.), which amended the Government Emergency Regulations. The Decree repealed the provisions related to price maximisation, the marketing obligation, and their duration, thereby ending the food price maximisation on 1 August 2023.[20]

Although the study focuses on the limits of price maximisation, one of the most powerful forms of state intervention in the economy, the reference to the institution of compulsory action imposed on retailers should not be overlooked in the context of presenting the rules on price maximisation. In May 2023, the Hungarian Government, exercising its extraordinary legislative powers under Article 53(1) of the Basic Fundamental Law, issued Government Decree 162/2023 (V. 5.) on measures necessary to control wartime food price inflation, deciding to introduce mandatory promotions to replace the price maximisation rules. The regulation defined the categories of products subject to the promotions and obliged the covered trader to reduce the price of one free choice product from

14 Vehicles with non-Hungarian registration plates were excluded from eligibility to purchase fuel at capped prices by Government Decree 94/2022 (III. 10.) on the divergent application of Act CXXX of 2021 concerning certain regulatory issues related to extraordinary situations. This exclusion did not apply to vehicles registered in countries that provided fuel at capped prices for refuelling Hungarian vehicles.

15 Government Decree 278/2022 (XII. 30.), amending certain government decrees on the official fuel price, excluded motor vehicles operated by non-natural persons ("company cars") from the group entitled to purchase fuel at the capped price. This exclusion did not apply to vehicles providing a taxi service.

16 Government Decree 6/2022 (I. 14.) on the different application of Act LXXXVII of 1990 on the fixing of prices during an emergency.

17 The product categories of food items subject to price regulation are listed in the first annex of the decree. Between February 1, 2022, and May 1, 2022, the food items included in the scope of regulated prices were: granulated sugar (white sugar), wheat flour type BL 55, refined sunflower cooking oil, pork leg (including bone-in, skin-on, filleted, diced, sliced, or ground forms, whether pre-packaged or not, sold fresh, chilled, or frozen), chicken breast, chicken back—including back, tail, and wing tip (in whole or separate, in bone-in, skin-on, filleted, diced, sliced, or ground forms, whether pre-packaged or not, sold fresh, chilled, or frozen), and ultra-high-temperature (UHT) treated cow's milk with 2.8% fat content.

18 According to Article 3 of the Government Decree, if the authority responsible for consumer protection identified a breach of the obligations specified in the Government Decree, it could impose fines ranging from HUF 50,000 to HUF 3,000,000. In the case of repeated violations, the authority could temporarily prohibit the trader from continuing their activities, with the duration of the prohibition ranging from a minimum of 1 day to a maximum of 6 months.

19 Government Decree 451/2022 (XI. 9.) amending Government Decree 6/2022 (I. 14.) on the different application of Act LXXXVII of 1990 on the fixing of prices during an emergency.

20 According to the currently applicable Section 7 of the Government Decree, however, the provisions that have been repealed shall still apply as substantive legal rules in proceedings initiated on the basis of previous breaches of obligations, in accordance with the legal framework in force at the time the breach occurred.

each of the designated product categories per promotion period.[21] The mandatory promotion for certain food products was in force in Hungary from 1 June 2023 until 1 July 2024.[22]

5 Retail price maximisation in the light of the fundamental law

5.1 Constitutional framework of market economy

This paper examines the institution of retail price maximisation from the perspective of the right to conduct a business, freedom of contract and the right to property. These are not only constitutional safeguards of the market economy and economic competition, but are also closely interrelated. As the HCC has pointed out since the beginning of its work, "[competition] is the basic raison d'être of the market economy. The vital value of a social and economic order based on a market economy is the development and protection of economic competition."[23] The HCC has further stated that "[t]he freedom of contract is an indispensable condition for the operation of the market economy and thus for the freedom of enterprise and competition protected by Article M of the Fundamental Law, and as a consequence it also enjoys the protection of the Fundamental Law."[24] "Economic autonomy, i.e., the autonomy of the decision to dispose of property, rights and claims, can be determined primarily from the right to property and, in a subsidiary way, from the right to enterprise."[25]—confirmed the previous practice of the HCC, based on the Constitution, after the entry into force of the Fundamental Law.

5.2 Freedom to conduct a business and fair economic competition

Fair economic competition as a constitutional value is declared in Article M(2) of the Fundamental Law, while freedom of enterprise is declared in Article M(1) of the Fundamental Law. Article XII(1) of the Fundamental Law also refers to freedom to conduct a business as a "genuine" fundamental right. According to this, "everyone has the right, guaranteed by the Fundamental Law, to engage in business, i.e., to carry on a business activity. However, the right of entrepreneurship means the right to be granted the opportunity to enter into a certain set of economic conditions created by the State for enterprises, or, in other words, the opportunity to become an entrepreneur, sometimes subject to conditions, sometimes limited, motivated by professional considerations."[26] In the context of fuel price maximisation, it is important to note that the freedom to conduct a business also means protecting businesses that are already operating, i.e., it also protects the continuation of entrepreneurial activity: 'The scope of protection of the right to conduct a business as a fundamental right thus extends both to entry into the market (the free "choice" of a given business activity, becoming an entrepreneur and starting an activity) and to the continuation of an activity that has already started, while stressing that the fundamental right in question does not guarantee the immutability of the legal environment. The difference between subjective and objective barriers, which are more stringent, but in both cases subject to the necessity/proportionality test,[27] is that subjective conditions can in principle be met by anyone, whereas objective barriers are understood to be requirements that are independent of the person wishing to set up a business."[28]

In the context of the retail price freeze, the HCC has dealt in detail with the test for a restriction on the freedom to conduct a business in a special legal order. The reason for this is that in a special legal order, the Fundamental Law provides for the application of less stringent rules for the restriction of fundamental rights than in the normal legal order and even allows for the complete suspension of fundamental rights, with some exceptions. [29] In this respect, the HCC has significantly modified the proportionality element of the fundamental rights test. Therefore, instead of comparing the advantages and disadvantages of a restriction of rights, the HCC examined whether the legislator periodically reviewed the maintenance of the restrictive measure (Erdős and Tanács-Mandák, 2023).

The determination of the applicable test was further complicated by the fact that the chapter of the Fundamental Law regulating the special legal order was completely restructured on 1 November 2022, following the Ninth and Tenth Amendments to the Fundamental Law. Under the current rules of the Fundamental Law, the restriction on the freedom to conduct a business was assessed 'on the basis of a set of criteria developed in the light of Article I(3), Article 51(2) and Article 52(1) and (2) of the Fundamental Law:

- whether the fundamental right in question has been interfered with,
- whether the restriction of fundamental rights had a legitimate aim,
- whether the restriction is appropriate to achieve the legitimate aim,

21 The benchmark for the promotional price applied by the trader was the lowest gross retail price of the product in the 30 days preceding the price reduction, compared to which the trader was required to apply a gross retail price at least 10% lower.

22 During its little more than 1 year of operation, the legislation was subject to a number of technical and substantive amendments. Government Decree 279/2023 (VI. 29.) on the measures related to the introduction of the food price freeze changed the price reduction to 15% and included products with previously capped prices in the range of products subject to price reduction. The extension of the applicability of the compulsory action was provided for in Government Decree 440/2023 (IX. 25.) and Government Decree 516/2023 (XI. 22.).

23 Decision 19/1991 (IV. 23.) AB, cited in Decision 3192/2012 (VII. 26.) AB, Reasoning [20].

24 Decision 3192/2012 (26. VII.) AB, Reasoning [21].

25 Decision 20/2014 (VII. 3.) AB, Reasoning [291].

26 Decision 3/2020 (I. 3.) AB, Reasoning [35].

27 Article I (3) of the Fundamental Law: '(3) The rules on fundamental rights and obligations shall be laid down by law. A fundamental right may be restricted to the extent strictly necessary for the exercise of another fundamental right or for the protection of a constitutional value, in proportion to the aim pursued and with due regard for the essential content of the fundamental right."

28 Decision 3/2020 (I. 3.) AB, Reasoning [36].

29 Decision 3128/2022 (IV. 1.) AB, Reasoning [163].

- whether the disadvantages caused by the restriction of a fundamental right outweigh the advantages of achieving a legitimate aim (proportionality)."[30]

In the case of the test, it is worth highlighting that the HCC has significantly tightened the test of limitation of fundamental rights, as amended in view of the special legal order, by reintroducing the traditional interpretation of proportionality. The other development is that, as a result of the tightening, the general test for the protection of fundamental rights applicable to the special legal order differs from that applicable in the normal legal order in only one element. It does not require necessity, i.e., that the legislator should choose the least intrusive measure that is likely to achieve a legitimate aim.

With regard to the constitutionality of the retail price cap, the HCC held that the introduction of the ceiling did not constitute an interference with the freedom of business, as it did not hinder market entry nor impose subjective conditions on the pursuit of economic activities. The HCC based its finding on the fact that the price regulation applied to only a narrow segment of retail activity, affecting just eight product groups out of the thousands typically found in stores.[31]

Applying the above test to fuel price maximisation, we can conclude the following.

The first element of the test is answered in the affirmative, and interference with the right to conduct a business is established. In its decisions on the retail price freeze, the HCC reached a different conclusion, but also pointed out that the price freeze applied to only eight product groups out of a typical range of several thousand products in shops. In contrast, the fuel price cap concerned the two most typical products of service stations, i.e., the core of their activity, since the other products and services offered by service stations (motor oil sales, shop, car wash, etc.) are typically complementary.

The legitimate aim of the restriction of fundamental rights is twofold. On the one hand, to ensure that the public has access to fuel at a realistic price and, on the other hand, to mitigate the effects of inflation. The latter is primarily a constitutional value, the former is also of fundamental rights relevance, as the HCC's case law interprets the freedom to travel by vehicle in the context of Article XXVII(1) of the Fundamental Law, which guarantees freedom of movement.[32]

The third, 'aptitude' element of the test may cause some uncertainty in the assessment. It is not clear on which spectrum/in which sense the suitability is to be tested. If it is only focused on whether the fuel price maximisation ensures that the legitimate objective can be achieved, then suitability can be established beyond doubt. However, by broadening the concept, suitability may also be called into question. To this end, we refer to the supply difficulties that occurred under fuel price controls: stockpiling by the public caused an increase in demand, and the supply constraints were exacerbated by the refinery capacity constraints. Dealers have introduced volume restrictions (litres/day/vehicle/service station) partly to reduce supply constraints and partly to reduce their losses from fuel price maximisation. The availability of the types of fuel affected by fuel price maximisation has therefore not always changed in a positive direction. The appropriateness of achieving a legitimate objective can only be established on the basis of a more thorough analysis, supported by economic analyses, which is a question of economic policy and expediency, on which the HCC usually refrains from ruling.

In the context of proportionality, it cannot be ignored that in February 2022 the scope of the regulation changed and capped the wholesale price of retail authority-priced fuel types at HUF 480. In March 2022, the Government launched a programme[33] to support small petrol stations.[34] The range of consumers eligible to buy fuel at the official price was narrowed. First vehicles with non-Hungarian registration plates, then "company cars," with the exception of taxis, were excluded from the eligible group.

The above legislative steps are in favour of proportionality. However, the fact that the period of price maximisation has been extended several times and has lasted for a longer period of time can be seen as a countervailing circumstance. On the whole, however, it is clear that after 4 months the burden on retailers of the fuel price cap has been significantly reduced, so that the time for meaningful intervention was limited. The differentiated regulation based on the size of the businesses concerned—and their resulting capacity to cope with the burden—and the entitlement to the 20 HUF per litre subsidy, shows the legislator's desire to spread the burden of fuel price maximisation in a proportionate way.

5.3 Right to property: article XIII of the fundamental law

The infringement of the right to property typically arises in three aspects in relation to the fuel price maximisation imposed in connection with the marketing obligation. The first is the loss of profit in the absence of free pricing, the second is the restriction of the right to dispose of the sale and price determination, which is part of the right to property, and the third is the restriction of the right of use, which is also part of the right to property, by the obligation to use the infrastructure used for sale. With regard to the loss of profit, the HCC has consistently held that: 'The fundamental right to property protects property already acquired and, in exceptional cases, property expectations […]. However, the HCC has consistently held that the mere hope of future profit from economic or regular income-generating activities, from entrepreneurial activity, cannot be regarded as a property expectation recognised and protected by the constitutional right to property, i.e., it is not protected by Article XIII of the Fundamental Law.'[35] In the light of the practice of the HCC, such a petition would therefore most probably be inadmissible on the merits.

According to the practice of the HCC, partial rights to property are constitutionally protected: "[a] necessary restriction on property must, however, also be proportionate, which imposes on the legislator the obligation to ensure compensation proportionate to the restriction

30 Decision 3004/2024 (I. 12.) AB, Reasoning [57].

31 Decision 3323/2024 (VII. 29.) AB, Reasoning [144].

32 Decision 3215/2013 (XII. 2.) AB, Reasoning [35].

33 Government Decision 1117/2022 (III. 5.) on the support of small petrol stations to guarantee security of supply in rural areas.

34 An undertaking operating up to 50 service stations with a turnover from fuel sales not exceeding HUF 50 billion in 2021.

35 Most recently, see Decision 3192/2024 (V. 31.) AB, Reasoning [50].

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in the case of expropriation and other restrictions similar in their actual effects to expropriation, in particular in the case of legal restrictions on certain partial rights to civil property (possession, use and enjoyment, disposal). In the case of expropriation or other cases involving substantial restrictions on the exercise of partial civil property rights, the guarantee of security of tenure is therefore replaced by a guarantee of value."[36] The HCC therefore applies the public interest test to assess the compatibility with the Fundamental Law of restrictions on the right of disposal and use.

From the above, it could follow that the obligation to sell a product at a maximum price also constitutes a violation of the right to dispose of property, which is part of the right to property. However, in the case of the exchange of foreign currency loans, and later also in relation to retail price caps, the HCC took a different position, and assessed this aspect in the context of freedom of contract: "Freedom of contract […] is also closely linked to the right to property protected by the Fundamental Law. Article XIII(1) of the Fundamental Law also guarantees the freedom of property and the protection of the private autonomy of owners. One of the partial rights of property is the freedom of "disposal" of property, of which freedom of contract is a necessary substantive element."[37]

The approach has two consequences. On the one hand, it establishes conformity with the Fundamental Law on the basis of a different standard from the level of protection of the right to property, the public interest test. This standard is more lenient than the public interest test. It is noted that if the petitioner also invokes a violation of Article XII(1), which guarantees the freedom to conduct a business, the general fundamental rights test for the assessment of the restriction, or its version adapted to the specific legal order, is stricter than the public interest test. On the other hand, by interpreting the right to dispose in the context of freedom of contract, the HCC is making a *de facto* distinction in the level of constitutional protection based on the objects of property.

The function of the "general" category of property is to provide the material framework for individual self-fulfilment (e.g., a home, a car, consumer goods) or the functioning of a business (e.g., machinery, premises, etc.), while in the case of another special category, the acquisition of property is inherently for the purpose of resale (and the profit to be derived from it). While the public interest test applies to the restriction of ownership of objects in the first category, the reasonableness test for freedom of contract or the necessity-proportionality test for freedom to conduct a business applies to those in the second category.[38] While the distinction may be justified, it may be difficult in practice to determine which group an object (or group of objects) falls into.

The third theoretical aspect of the restriction of the right to property that was raised was the use of traders' licences and shop infrastructure for a specific purpose. In this context, however, the HCC pointed out that the infrastructure and the licences are used for profitable entrepreneurial activities, but that the expectation of profit is not protected as property.[39] Thus, the HCC did not deal with the restriction of the right of use as part of the right to property.

5.4 Freedom of contract as a constitutional value

As a consequence of the previous point, contractual freedom is of particular importance in relation to forms of retail price freeze, and it is therefore important to clarify the criteria to be applied to limit it. As with the freedom to conduct a business, a distinction must be drawn between the standards applicable to the normal and the special legal regime.

The HCC has consistently held that freedom of contract is protected under Article M of the Fundamental Law.[40] In this context, it has explained that "Article I(3) on the restriction of fundamental rights does not apply to it either, i.e., even the essential content of contractual freedom may be restricted" and that "the level of protection of contractual freedom as an independent constitutional right is different, […] a restriction of contractual freedom may be unconstitutional if there is no justification for the restriction and the restriction is not unreasonable."[41] As stated in the previous point, freedom of contract is also closely linked to the freedom of disposal which is part of the right to property protected by the Fundamental Law. "To sum up: freedom of contract follows from Article M and Article XIII(1) of the Fundamental Law, and is therefore not a fundamental right, but it enjoys the protection of the Fundamental Law as an independent constitutional right and is a right guaranteed by the Fundamental Law, the violation of which is a ground for a constitutional complaint under the Abtv. However, the constitutionality of the restriction is not to be assessed on the basis of Article I(3) of the Fundamental Law, but—taking into account the public interest—by applying the test of reasonableness."[42]

The HCC laid down the specific legal standards for the restriction of freedom of contract in Decision 3004/2024 (I. 12.) AB. It was based on the premise that freedom of contract is not a fundamental right guaranteed by the Fundamental Law and that "it also follows that

36 Decision 23/2017 (X. 10.) AB, Reasoning [16]; similarly, Decision 25/2021 (VIII. 11.) AB, Reasoning [100].

37 Decision 3004/2024 (I. 12.) AB, Reasoning [35]; Decision 33/2015 (XII. 3.) AB, Reasoning [25].

38 In relation to the limits of the right to property of enterprises, a similar argument was formulated by Béla Pokol in paragraph [41] of his parallel reasoning to Decision 3194/2014 (VII.15.) AB: 'In my opinion, the reasoning of the decision should have stated in principle that if the profit-oriented operation of property arises, then this can no longer be included in the framework of the protection of property under the Basic Law, but the right to enterprise and the constitutional value of the freedom of enterprise to strengthen this right are there. With this declaration of principle, we could avoid in the future that the complainants would also focus on and argue their grievance in the course of profit-oriented property operation as a grievance of property, whereas the Fundamental Law has regulated this activity - with a content largely different from the previous Constitution - in a different context." András Bragyova, also in a dissenting opinion on this decision, argues that the right to property in the context of the protection of the property of undertakings only extends to the name and *goodwill* of the business introduced as an asset, while other aspects are more appropriately assessed in the context of the freedom of enterprise {Decision 3194/2014 (VII.15.) AB, Reasoning [66]}.

39 Decision 3323/2024 (VII.29.) AB, Reasoning [100].

40 Decision 22/2018 (XI. 20.) AB, Reasoning [34].

41 Decision 3298/2014 (XI. 11.) AB, Reasoning [29].

42 Decision 33/2015 (XII. 3.) AB, Reasoning [26] In the citation Abtv. refers to Act LX of 2011 on the Constitutional Court.

Article 52(2) of the Fundamental Law[43] […] does not apply to freedom of contract. At the same time, the concept reflected in Article 52(2) of the Fundamental Law, according to which the legislative leeway of the Government is greater than in a normal legal order, for the reason that it can take the measures necessary to avert the danger threatening society and the state and to mitigate its consequences with the greatest possible effectiveness, cannot be ignored when determining the standards for the restrict ability of the freedom of contract as a right under the Fundamental Law. On the basis of the foregoing, the HCC, taking into account the so-called reasonableness test […], has separated the following steps in its examination of the permissibility of the restriction of contractual freedom:

- whether there has been an interference with contractual freedom;
- whether the interference had a reasonable justification based on an objective assessment, in particular the public interest, or was arbitrary;
- whether the intervention was suitable to achieve the objective for which it was intended."[44]

The HCC applied the above test to the rules on retail price maximisation in the following manner. According to the practice of the HCC, all forms of public pricing, including the relevant rules on retail pricing, constitute a restriction of contractual freedom, as they prevent traders from setting the retail price of the products they sell based on market conditions, such as prevailing supply and demand.[45] Turning to the second element of the applicable test, namely the justification for the interference, the HCC noted that the legislative objective of institutionalising the legislation was, in addition to preventing the harmful effects of market disturbances, to ensure public access to basic foodstuffs at affordable prices and in sufficient quantities. In doing so the legislator has promoted the right of access to healthy food, as guaranteed by Article XX(2) of the Fundamental Law, and through this the right to physical and mental health, as declared in Article XX(1) of the Fundamental Law, and the right to life, as guaranteed by Article II(1) of the Fundamental Law, as well as the right to the proper physical development of children, as guaranteed by Article XVI(1) of the Fundamental Law. Under the third element of the test, the HCC assessed that access to food cannot be understood without considering its quantitative and economic aspects. Therefore, the maximisation of retail prices, in conjunction with compulsory distribution and the quantitative requirement, is, in principle, suitable to ensure that the population has access to these foods at prices not subject to inflationary effects.[46] The HCC has held, with regard to retail price maximisation, that the fixing of prices for certain basic foodstuffs to ensure public access to essential goods at affordable prices and in sufficient quantities does not constitute an unconstitutional restriction of contractual freedom.

Applying the above test to the fuel price maximisation, we can conclude the following.

The fact of interference with the freedom of contract is unquestionable, since the freedom to set prices and raise prices is removed by the interference.[47]

As regards the public interest as a reasonable, objective justification to counterbalance the disadvantages of the interference and the suitability of achieving it, we are of the opinion that the conclusion drawn in the context of freedom to conduct a business may be the relevant one.

6 Assessing retail price maximisation in the light of ECtHR practice

6.1 The Strasbourg framework of market economy

While the constitutionality of retail price maximisation has been assessed in the context of the right to conduct a business, freedom of contract and the right to property, the following discussion will assess the regulation in the light of the right to property as enshrined in the First Additional Protocol to the European Convention on Human Rights (hereinafter: ECHR). The reason for this is that the scope of the declarations of the ECHR that can be examined is narrower than the scope of the relevant provisions of the Hungarian Fundamental Law. The ECHR does not provide for the right to conduct a business and freedom of contract. The ECtHR, applying the Convention, therefore interprets the questions relating to the right to conduct a business and freedom of contract in the context of the right to the peaceful enjoyment of goods, i.e., the right to property.

In its previous practice, the ECtHR has not examined the issue of retail price maximisation in substance, therefore the methodology of the examination is based on the general case law of the ECtHR on property rights. The application of the general case law of the ECtHR on property rights is also justified by the fact that Hungary has not notified any specific derogation.[48]

6.2 Right to property and restrictions

The ECHR did not originally provide for the right to property, but the First Additional Protocol, annexed in 1952, declared:"[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions."[49] According to Article 1 of the First Additional Protocol, property may be deprived in the public interest, under conditions laid down by law and in accordance with the general principles of

43 "with the exception of the fundamental rights laid down in Articles II and III and Article XXVIII(2) to (6), the exercise of fundamental rights may be suspended or restricted in a particular legal order beyond the limits provided for in Article I(3)."

44 Decision 3004/2024 (I. 12.) AB, Reasoning [39]–[40].

45 Decision 3004/2024. (I. 12.) AB, Reasoning [42]; Decision 3323/2024 (VII. 29.) AB, Reasoning [150].

46 Decision 3323/2024 (VII. 29.) AB, Reasoning [115]–[155].

47 See with the same conclusion in relation to the retail price freeze: "All types of official pricing [...] constitute a restriction of freedom of contract. This is because the trader cannot exercise the possibility—which also derives from the right of disposal, which is considered an essential element of the right to property enshrined in Article XIII(1) of the Fundamental Law—to determine the retail price of the product(s) he sells in the light of market conditions, including the prevailing supply and demand situation. On that basis, the HCC held that the legislature had interfered with the freedom of contract by enacting the provisions of the LR at issue." Decision 3004/2024 (I. 12.) AB, Reasoning [42].

48 On specific issues of derogation (see in detail Higgins, 1978; Gross, 1998; Cowell, 2013).

49 For a detailed analysis of the development of human rights protection of property (see Ristik, 2015).

international law. The provision also allows the restriction of property in the public interest and for the payment of taxes, other public charges and fines.[50] The text does not provide for an obligation to compensate for the deprivation of property, which follows from the ECtHR's practice and law-enforcement work (James and Others v. the United Kingdom, 1986) (Lithgow and Others v. the United Kingdom, 1986).

As can be seen from the above, the text of the First Additional Protocol to the ECHR does not contain explicit provisions on price regulation or on the obligation to distribute and sell. It does, however, address aspects of restrictions on the right to property (Coban, 2004; Pejchal Grünwald, 2022). A restriction on property rights in accordance with the First Additional Protocol to the ECHR requires that the use of goods in the public interest be regulated by law by the states parties. Although the Additional Protocol does not mention it among the criteria of restriction, the ECtHR's practice (Vékony v. Hungary, 2015) (Könyv-tár Kft. and others v. Hungary, 2018) has highlighted the importance of proportionality of the interference, i.e., the balance between the public interest justifying the interference and the private interest affected by the interference. In conclusion, therefore, an interference with the right to property is compatible with Article 1 of the First Additional Protocol to the ECHR if it is (1) based on law, (2) in the public interest and (3) proportionate. In the following, the paper will examine how the institution of retail price regulation is compatible with the right to property enshrined in the ECHR's First Additional Protocol and the ECtHR's case law.

First and foremost, however, the question of whether the retail price maximisation imposed in conjunction with the marketing obligation constitutes an interference with the right to property under the First Additional Protocol to the ECHR must be addressed. The expected future profits from a business activity cannot be included in the concept of 'goods' within the meaning of Article 1 of the First Additional Protocol to the ECHR. The broad concept of "property" can be understood to include the prejudice to the customer base as understood in the context of corporate goodwill (Könyv-tár Kft. and others v. Hungary, 2018). In the case of the food price freeze, the harm to customers did not arise in the present case because the scope of the regulation extended to all traders. The same applies to fuel price regulation, too. The statutory restriction of contractual freedom is to be interpreted not only according to the HCC, but also according to the ECtHR's practice in the field of the right of disposal (Mellacher and others v. Austria, 1989). Contrary to the practice of the HCC as explained in section 3.3,[51] interference with the right to dispose may constitute interference with the right to property under the ECtHR (Marckx v. Belgium, 1979).

6.2.1 Provided by law

According to Article 1 of the First Additional Protocol to the ECHR, property may be taken only under conditions laid down by law. The expression "provided by law" requires, in the first case, that the contested measure must have a legal basis in national law. In the other case, it also refers to the quality of the right in question, which must be accessible to the person concerned and predictable in its effects (VgT Verein gegen Tierfabriken v. Switzerland, 2001) (Rotaru v. Romania, 2000) (Maestri v. Italy, 2004). According to the ECtHR's practice, the domestic legal provisions which provide for intervention must be sufficiently accessible, precise and predictable.

Compliance with this requirement is demonstrated in the cases of the retail price freeze regulations by the legislative form, the publication in the Hungarian Official Gazette, the time period between publication and entry into force. Another aspect to be assessed under this condition is that the legislations have been subject to a number of technical and substantive amendments. On several occasions, the legislator extended the period of application of the price freeze and—in the case of fuel prices—narrowed the eligibility criteria for consumers to purchase fuel at the official price. This is not, however, incompatible with the substantive requirement of a legal basis, as all amendments were made by legislation published in the Hungarian Gazette and the substantive amendments did not create a new, different and unknown obligation for the addressees.

6.2.2 Public interest

The next element of the test is that interference with property rights must be in the public interest. According to ECtHR practice, the concept of "public interest" is to be interpreted broadly. This is because the ECtHR respects the legislature's judgment as to what "serves the public interest"—unless it is manifestly unfounded (James and Others v. The United Kingdom, 1986). The legislative purpose of the introduction of the retail price freeze was twofold. On the one hand, to ensure that the public has access to food and fuel at a realistic price and, on the other hand, to mitigate the effects of inflation. These legislative objectives also undoubtedly justify the existence of a public interest justifying the intervention.

6.2.3 Proportionality

On the basis of the above, it can be concluded that the retail price freeze constitutes an interference with the right to property which meets the requirement of being defined by law and is in the public interest. The proportionality of the interference is therefore examined below.

When assessing the proportionality of an intervention, the ECtHR takes into account a number of criteria and gives States Parties a very wide margin of discretion/appreciation. It should be stressed that in the present cases, the legislator has limited the right to dispose of property, which is part of the right to property, and has not deprived the trader of his property. Therefore, the case law on compensation for deprivation of property is not directly relevant (J.A. Pye (Oxford) Ltd. v. The United Kingdom, 2005).

The ECtHR's rulings on freedom of contract and/or legislative price maximisation in breach of convention have been in cases where the whole of the activity in question was prevented by the State Party.[52] Out

50 For more on the discretionary power granted to the state (see Schwelb, 1964).

51 The HCC also pointed out in Decision 3323/2024 (VII. 29.) AB that "freedom of contract [...] is also closely related to the right to property protected by the Fundamental Law. Article XIII(1) of the Fundamental Law also guarantees the freedom of property and the protection of the private autonomy of owners. One of the partial rights of property is the freedom of "disposal" of property, of which freedom of contract is a necessary substantive element."

52 For example, in the case of renting a flat (Hutten-Czapska v. Poland, 2006) or textbook distribution (Könyv-tár Kft. and others v. Hungary, 2018).

of the thousands of products on offer in shops, the food price cap only affected a few types of products, while the others were subject to free pricing. This included the possibility of offsetting losses on products with price caps against profits on other products. The fuel price maximisation concerned the two most typical products of service stations, the core part of the activity. Other products and services (motor oil sales, shop, car wash, etc.) sold at service stations are typically complementary.

However, the unfavourable proportionality of the subject matter of the legislation has been counterbalanced by a number of other measures. The temporary nature of the price ceiling can be interpreted in this way. The legislative context shows that the legislator has examined the need for price capping on several occasions and has subsequently decided to maintain it. The legal price capping of certain fuels was therefore part of the Hungarian legal system for a limited period of time: in the case of fuel between 15 November 2021 and 31 December 2022. It cannot be ignored that from February 2022 the regulatory environment concerning fuel changed in favour of retailers. The loss of retailers was reduced by the Government Decree 57/2022 (II. 28.) on certain measures related to the official fuel price by capping the wholesale price of fuel types with official retail price at HUF 480 and creating a contractual obligation for wholesalers. It also stipulated that no other costs or fees could be charged for sales to retailers. It also provided for an exemption from the membership contribution to the Hungarian Hydrocarbon Stockholders Association and a reduction in the excise duty on fuels. The narrowing of the range of consumers eligible to purchase fuel at the official price is also a measure that can be assessed in the context of proportionality for all retailers. In addition, from March 2023, small petrol retailers could also receive a subsidy of HUF 20 per litre for the distribution of fuels covered by the price freeze.

Overall, retail price maximisation has served the interests of consumers and has placed the burden on certain market players, initially only retailers. However, in the case of the food price cap, the fact that it applied to only a few products from the huge range of products available in shops could justify proportionality. In the case of the fuel price cap, the following arguments in favour of the proportionality of the intervention can be made out: the temporary nature of the price cap and the favourable development of the regulation for retailers (wholesale price cap, reduction in the number of eligible retailers, public compensation scheme for small retailers), it did not lead to the disappearance of these operators and their exclusion from the market.

Consequently, it can be concluded that, on the basis of the ECtHR's previous practice, it is likely that the retail price caps did not infringe the right to property guaranteed by Article 1 of the First Additional Protocol to the ECHR, given the uncertainty inherent in the proportionality test.

7 Price maximisation before the Luxembourg court

7.1 The EU legal framework concerning price regulation

Despite the fact that the EU's primary sources of law include the Charter of Fundamental Rights—including the freedom to conduct a business (Article 16) and the right to property (Article 17), the CJEU's practice on price regulation is based on a more competence-based logic, and is founded on aim to ensure the functioning of the internal market.[53] The basis for this is the framework provided by the Treaty on the Functioning of the European Union (hereinafter: TFEU). These include Article 4 TFEU lists internal market as shared competences between EU and its Member States covering the free movement of goods as one the fundamental freedoms (in specific Articles 26 and 28–37 TFEU). The Common organisation of the markets (hereinafter: CMO) regulation,[54] which fleshes out Articles 38–44 TFEU on agricultural and agricultural policy, is particularly prominent in the case C-557/23 (hereinafter: SPAR-case).

7.2 The SPAR-case

In the SPAR-case CJEU has ruled on the compatibility of the food price ceiling with EU law in a preliminary ruling procedure. The member state court asked the CJEU for a ruling on how the food price ceiling could be applied in the light of CMO regulation 83(5) and 90a(3).

Although the CJEU concluded that the provisions of the CMO regulation relied on by the national court were not relevant, it dealt with the food price dispute in a broader context, including the CMO regulation as a whole and the principle of free movement of goods. To this end, it first of all stated that the Common Agricultural Policy and the CMO regulation fall within the shared competence between the EU and the Member States. In the exercise of this shared competence, Member States are obliged to refrain from any measure which would derogate from the CMO regulation or which would hinder its proper functioning. In the absence of a pricing mechanism, the free formation of selling prices on the basis of fair competition is a component of the CMO regulation and constitutes the expression of the principle of free movement of goods in conditions of effective competition. However, the establishment of a CMO does not prevent the Member States from applying national rules intended to attain an objective relating to the general interest other than those covered by that CMO, even if those rules are likely to have an effect on the functioning of the common market in the sector concerned, provided that those rules are appropriate for securing attainment of the objective pursued and do not go beyond what is necessary for attaining that objective. The CJEU therefore examined the following aspects:

- whether there was an interference with the freedom of competition
- whether the interference had a public interest objective
- whether the interference was suitable to achieve the public interest objective

53 For further details on internal market aspects of price regulation (see Lovas and Pelle, 2023).

54 Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013L 347, p. 671, and corrigendum OJ 2016 L 130, p. 9), as amended by Regulation (EU) 2021/2117 of the European Parliament and of the Council of 2 December 2021 (OJ 2021 L 435, p. 262).

- whether the interference was proportionate (does not go beyond what is necessary to achieve the objective).

The CJEU has assessed public pricing and the obligation to sell in sufficient quantities as interference with the freedom of competition. The Court accepted as a public interest objective of the interference the fight against inflation and the protection of disadvantaged consumers under Articles 219 and 221 of the CMO.[55] The CJEU did not take a definitive position on the question of suitability, but assumed that it existed. This was not justified because it failed the proportionality element of the test: "the undermining of free access by traders to the market in conditions of effective competition, free access ensured by the CMO Regulation, and, consequently, the disturbance of the entire supply chain caused by the regulated prices imposed on those traders and the obligation imposed on them to offer for sale the quantities required of the products concerned go beyond what is necessary to attain the objectives pursued by that decree."[56]

7.3 Fuel price maximisation in the light of EU law

Since the CJEU has not ruled on the fuel price cap, we can only draw conclusions from its similar practice as to how it would take a position on its compatibility with EU law. In this respect, we can rely on the SPAR case only to limited extent, as it is based primarily on the TFEU provisions on agricultural policy and the CMO regulation, also in this area. However, we can state that fuel is a commodity to which the rules of the internal market apply. It follows, on the one hand, that the test applied in the SPAR case may also similarly apply to fuel. Concerning the free movement of goods, EU law prohibits quantitative restrictions and measures having equivalent effects (Articles 34–35 TFEU), but allows Member States to rely on limitations based on Article 36 TFEU (public policy, public security, etc.). Besides, in case of non-discriminatory national restrictions, EU law recognises the so-called mandatory requirements as obstacles to movement resulting from disparities between the national laws in absence of common rules relating to the production and marketing, including those relating to, e.g., the fairness of commercial transactions and the defense of the consumer (Case C-120/78, paragraph 8.).[57] Since all service stations were subject to the fuel price cap, it cannot be considered as a discriminatory measure, therefore it might constitute such a mandatory requirement, but for this purpose, the relevant rules must meet a four-part test:

- must be applied in a nondiscriminatory manner;
- must be justified by imperative requirements in the general interest;
- must be suitable for securing the attainment of the objective which they pursue; and
- must not go beyond what is necessary in order to attain it (Case C-55/94, paragraph 37.).

Based on the SPAR case, public pricing might be considered as a measure of consumer protection, so the fuel price cap can be justified by general interest. However, as in the mentioned case, even assuming suitability, necessity is questionable. One reason for this is that the fuel price cap applies to the dominant products of petrol stations, so the intervention in that market is much more significant than it is in the food market. Another indication of the absence of necessity is that not only those state rules are prohibited that hinder the fundamental freedom in question, but also those that "make it less attractive." (Case C-55/94, paragraph 37.) Price-fixing makes not only the free movement of goods less attractive, but also to exercise other fundamental freedoms, since it may deter new potential actors from entering this market.

The part of the fuel price cap which, with few exceptions, granted access to fuel with a price cap only to vehicles with Hungarian registration plates, raises a breach of the prohibition of indirect discrimination on grounds of nationality laid down in Article 18 TFEU.

8 Conclusion

Above, we have reviewed the most important elements of retail price cap regulation and the relevant case law of the HCC, ECtHR and CJEU. The research question—which of the three fora provides the most effective legal protection and constrains government—can be answered in clear terms. As the ECtHR has no relevant case law, we could only conclude whether the retail cap would stand the test. The main uncertainty here is proportionality, so we cannot give a definitive answer. However, the HCC has judged the institution of a food price cap on its merits, stating that it does not generally violate the Fundamental Law, only the sanction of a temporary ban on trading was found to be unconstitutional. On the basis of this case law, although not decided on the merits, it is reasonable to conclude that the fuel price cap would also stand the test of the HCC. In the food price cap case, the CJEU held the core of the institution to be incompatible with EU law, and it is only with low uncertainty that we can conclude that the fuel price cap would not pass this test either.

Overall, it can be concluded that EU law imposes much stricter requirements on interference in the economy than the Hungarian Fundamental Law—at least in a special legal order.[58] It also follows, however, that the CJEU's rather economic integration focused logic

55 See also the TFEU's Article 39(1) (d) and (e) points.

56 Competition (law) aspects of price regulation are analysed by Dunne (2018).

57 On relevance of mandatory requirements in case of public pricing (see Nagy, 2014).

58 In emergency situations, the political space and legislative power of the executive branch are expanded to respond to new and rapidly evolving challenges that cannot be addressed within the framework of existing laws. The Hungarian Fundamental Law provides greater leeway for the government to act in such situations. The government's room for maneuver is constrained by the actions of the Constitutional Court, which is reflected in the special tests applied when assessing restrictions on fundamental rights during a state of emergency. Moreover, the proportionality element of the standard test can provide a framework for assessing the legitimacy of emergency measures. Some argue—see for example Csink (2017)—that specific tests are therefore unnecessary, because the framework of the general test can also take into account the actual elements of social reality (whether a viral situation, an economic crisis or a war).

provides a higher level of legal protection against economic interference by the state than the fundamental rights standards.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

CE: Conceptualization, Funding acquisition, Methodology, Supervision, Writing – original draft. VV: Funding acquisition, Writing – review & editing. LK: Writing – review & editing.

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The politics of digital sovereignty and the European Union's legislation: navigating crises

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In recent years, the resistance of member states to the strengthening of the European Union and its ambition to extend the powers of nation states has become a dominant political element, especially in the countries of the Central and Eastern European region. At the same time, both nation states and the EU are facing a number of global challenges, one of the most significant of which, alongside climate change, is digitalization. At the dawn of the digital age, technological innovation and the free flow of information promised unprecedented opportunities. However, as digital technologies have increasingly permeated all aspects of economic, social and political life, they have created new crises and challenges, particularly with regard to digital sovereignty. This research explores the complex and interdisciplinary nature of digital sovereignty, with a particular focus on the crises that digitalization has triggered and caused. These crises manifest themselves in various forms, including cybersecurity threats, privacy issues and the economic dominance of global technology companies. The European Union's legislative initiatives, including the Digital Services (DSA), Digital Markets (DMA) and European Media Freedom (EMFA) regulations, as well as the efforts to regulate artificial intelligence, are designed to address the crises inherent in the digital age, while at the same time posing new challenges to the sovereignty and perception of sovereignty of individual states. The research examines the EU's legislative efforts in navigating the politics of digital crises. It sheds light on the interplay between national self-determination and the EU's overall regulatory framework, highlighting the ongoing struggle to balance control and cooperation in a rapidly changing digital environment. The analysis will provide a deeper understanding of how digital sovereignty is shaped by and responds to crisis policy, and insights into the future of digital governance in an increasingly interconnected world. It also seeks to assess the extent to which recently introduced EU legislation can be harmonized with the policy objective of strengthening the autonomy of nation states. This is particularly important in the context of the legislation and practices observed in countries with relatively small populations, such as Hungary, Slovakia and the Czech Republic.

KEYWORDS

state intervention, digital markets, digital sovereignty, innovation, crisis

1 Introduction

At the dawn of the digital age, technological innovation and the free flow of information promised opportunities that were previously unimaginable. The acceleration of global communications, the democratization of information, access to information and the emergence of new digital technologies have given hope that we are entering a new era of human development through digitalization. However, as digital technologies have become more deeply integrated into all aspects of economic, social and political life, a number of new crises and challenges have emerged that threaten the transparency, security and fairness of the digital world.

The rise of digitalization has been accompanied by the emergence of a new form of sovereignty, digital sovereignty. The concept of digital sovereignty refers to the ability of a state or region to manage and regulate its own digital infrastructure, data management and technological development, while protecting the rights and interests of its citizens in the global digital ecosystem. This concept is particularly important for the European Union, which has made digital sovereignty a priority in the areas of data protection, cybersecurity and technological innovation.

One of the biggest challenges of the digital age is crisis management, the ability of states to make and implement decisions that can lead to rapid and strategic intervention. These crises take different forms. Attacks by state and non-state actors that threaten the digital infrastructure of states and companies. Inappropriate handling of personal data and lack of privacy that undermine citizens' trust in digital technologies. The dominance of global technology companies such as Google, Amazon, Facebook, Apple and Microsoft (collectively referred to as GAFAM), which distort competition and limit the opportunities for smaller players.

The European Union finds itself in a particularly complex situation in the implementation of digital sovereignty. On the one hand, one of the EU's main objectives is to strengthen its own strategic autonomy in the digital world, especially in the face of the influence of global technology companies. On the other hand, there are significant differences between EU Member States in the way digital sovereignty is understood and implemented, especially in the Central and Eastern European region.

Countries in Central and Eastern Europe, such as Hungary, Slovakia and the Czech Republic, are paying particular attention to preserving nation-state sovereignty, while at the same time facing global digital challenges. These countries are particularly sensitive to issues of technological innovation and regulatory autonomy due to their smaller populations and limited economic resources. EU legislative initiatives, including regulations on digital services, digital markets and media freedom in Europe, as well as efforts to regulate artificial intelligence, are crucial to addressing digital challenges, but could also create new conflicts over the autonomy of nation states.

This study examines the EU's legislative approach to navigating the crises inherent in the digital ecosystem. It focuses on key regulations, including the General Data Protection Regulation (hereinafter GDPR),[1] the Digital Services Act (hereinafter DSA),[2] the Digital Markets Act (hereinafter DMA),[3] and the European Media Freedom Act (hereinafter EMFA),[4] as well as emerging initiatives like the Artificial Intelligence Act (hereinafter AI Act).[5] These legislative efforts aim to address the multifaceted challenges of the digital age while grappling with tensions between national sovereignty and supranational governance.

The research also delves into the perspectives of Central and Eastern European countries, where the preservation of national sovereignty remains a critical political concern. The study evaluates the extent to which EU-wide digital policies align with the unique priorities of smaller member states, such as Hungary, Slovakia, and the Czech Republic. By analyzing the interplay between EU legislation and national autonomy, the research offers insights into the evolving landscape of digital governance within the Union.

Briefly this research aims to analyze the evolving concept of digital sovereignty in the EU, with a focus on the legislative efforts addressing digital crises and their implications for Central and Eastern European countries.

2 Materials and methods

The research employs a qualitative and interdisciplinary methodology, focusing on the intersection of legal, political, and technological dimensions of digital sovereignty. The study integrates a comprehensive analysis of key legislative frameworks within the European Union, including the GDPR, DSA, DMA, EMFA, and the proposed AI Act. It also examines secondary sources, such as policy documents, academic articles, and case studies from Central and Eastern Europe.

The study is rooted in a qualitative research design that integrates legislative analysis, comparative case studies, and thematic content analysis. This approach ensures a nuanced understanding of the legal and political dimensions of digital sovereignty within the EU.

The research focuses on critical legislative instruments, including GDPR, DSA, DMA, EMFA, and the AI Act. The research also includes case studies of Hungary, Slovakia, and the Czech Republic to highlight regional variations in the implementation and reception of EU digital policies. These countries were selected for their distinct political and economic contexts, offering a representative perspective on the challenges and opportunities of aligning national and EU-level digital sovereignty goals. Policy documents, academic articles, and government reports were systematically analyzed to identify recurring themes and patterns in the discourse surrounding digital sovereignty.

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (hereinafter GDPR), OJ L 119, 4.5.2016, p. 1–88.

2 Regulation (EU) No 2022/2065 of the European Parliament and of the Council of 19 October 2022 on the Digital Single Market and amending Directive 2000/31/EC (the Digital Services Regulation) (hereinafter the DSA Regulation), OJ L 277, 27.10.2022, p. 1–102.

3 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on competitive and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (hereinafter the DMA Regulation), OJ L 265, 12.10.2022, p. 1–66.

4 Regulation (EU) No 2024/1083 of the European Parliament and of the Council of 11 April 2024 establishing a common framework for media services in the internal market and amending Directive 2010/13/EU (the European Media Freedom Regulation) (hereinafter the EMFA Regulation), OJ L, 2024/1083, 17.4.2024.

5 Regulation (EU) No 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonized rules for artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) No 2018/858, (EU) No 2018/1139, (EU) No 2019/2144 and Directives 2014/90/EU, (EU) No 2016/797 and (EU) No 2020/1828 (the AI Regulation) (hereinafter the AI Act), OJ L, 2024/1689, 12.7.2024.

The study's methodology can be replicated by adopting a similar legislative analysis framework across different EU member states or expanding the case studies to include Southern European nations facing parallel sovereignty concerns.

3 Results

3.1 The concept and elements of digital sovereignty

Digital sovereignty is closely related to the traditional notion of state sovereignty, which refers to the right and ability of states to manage their domestic and foreign affairs autonomously (Lansing, 1914, 61; Philpott, 1995, 355; Steinbach, 2024, 51). However, in the digital age, state sovereignty faces new challenges as global technological companies and the borderless internet pose new threats (Falkner et al., 2024, 2,100). Digital sovereignty requires states to be able to regulate and control digital services and infrastructures, ensuring that the rights of their citizens are protected and their national interests are safeguarded (Suzor, 2018).

Digital sovereignty is a complex and dynamic concept that encompasses several different elements (Couture and Toupin, 2019; Mueller, 2020; Pohle and Thiel, 2020; Roberts et al., 2021; Schmitz et al., 2023). Digital sovereignty is broadly defined as the ability of a country or region to exercise control over its own digital infrastructure, data use and technological developments, independent of external influence (Chander and Sun, 2021; Floridi, 2020; Sheikh, 2022). Digital sovereignty therefore necessarily includes the ability to make strategic decisions, develop legislation and enforce law in the digital space.

Digital sovereignty includes data sovereignty, technological sovereignty, cybersecurity sovereignty and legislative sovereignty. Data sovereignty is the ability of a country or region to exercise full control over the data collected and processed on its own territory. Data sovereignty also extends to the definition of legal and regulatory frameworks for data protection and data management, as well as the development of a national data economy (Hummel et al., 2021). Technological sovereignty already refers to the ability of a country or region to independently develop and control its own technological infrastructure and assets, including hardware, software and network systems. Technological sovereignty is particularly important for national security and innovation (Roumate, 2024). Cybersecurity sovereignty ensures that a country or region can protect its own digital infrastructure and systems from cyber threats. Cybersecurity sovereignty includes the implementation of cybersecurity standards and certifications, and the establishment of mechanisms to manage cybersecurity incidents (Farrand and Carrapico, 2022). Finally, legal sovereignty refers to the ability of a country or region to create and enforce its own legal rules in the digital space. This includes the regulation of online services, digital platforms and e-commerce (Novikov, 2024).

It is important to emphasize that the concept of digital sovereignty and its elements are still evolving, with different countries and regions interpreting and applying it differently. The European Union places a strong emphasis on citizens' data protection and technological independence. The EU aims to become independent from non-EU technology companies and to ensure the privacy and security of its citizens' data. The US approach focuses on promoting technological innovation and free market competition rather than digital sovereignty (Metakides, 2022). The US tech giants (GAFAM), with their global dominance, make the US less focused on digital sovereignty (Liman and Weber, 2023). In contrast, China is strongly pushing to ensure its digital sovereignty, with strict internet regulations and state control over its technological infrastructure. China aims to independently develop and manage its own digital technologies and to minimize external influence in the digital space (Kokas, 2023).

The concepts of digital sovereignty and state sovereignty are closely intertwined in the digital age and pose new challenges for states. The traditional notion of state sovereignty is complemented by a digital dimension that requires new types of regulatory and policy approaches. At the same time, the concept of digital sovereignty is dynamic and constantly evolving as technological developments and the global political environment change. While there is no complete consensus on the exact definition of the concept, digital sovereignty is increasingly becoming a central issue in national and international policy discourse. The example of the EU shows that digital sovereignty is not only a technological or economic issue, but is also essential for national security, citizens' rights and political autonomy.

3.2 The crisis and crisis management

The term "crisis" refers to critical situations that require immediate and strategic responses and in which there is a risk of disruption or collapse of the normal order of operations (Eastham et al., 1970). Crises typically require uncertainty, unpredictability and urgent solutions. In political science, crisis situations are tests of the capacity of power, resources and institutions to function, in which states and organizations are forced to make rapid decisions and adapt flexibly (Hay, 2013).

The digital age has added a new dimension to crises: the speed of technological development and the decentralized nature of the global digital ecosystem mean that crises can occur at both local and global levels. Crises in the digital space are different from traditional political or economic crises because they are more complex from a technological, privacy and cybersecurity perspective, happen faster and often involve invisible or difficult to identify actors.

Crisis management or the politics of crisis is a theoretical framework that describes how sovereign states and international organizations deal with crisis situations (Boin, 2008; McConnell, 2020). This theoretical approach is based on three main dimensions. The first step in crisis policy is to identify the situation quickly and accurately. This involves assessing threats and risks, and assessing the potential consequences. In the digital age, this is particularly difficult as crises are often hidden, for example in the form of cyber-attacks or data security incidents. The second dimension of crisis policy is the development and implementation of responses. This involves taking government action, putting in place regulatory or legal frameworks and mobilizing relevant institutions and actors. Addressing digital crises often requires a multidisciplinary approach involving public authorities, technology companies and civil society. Finally, the third stage of crisis policy is to draw lessons and adapt the policy, legal or institutional framework to better manage future crises. This is particularly important in the digital space, where technology is constantly evolving and previous solutions can quickly become obsolete.

Digital crises have specific characteristics that distinguish them from traditional crises (Lapsánszky, 2021, 140). Cyber attacks, ransomware attacks and other cyber security incidents threaten the functioning of states and companies, as well as the data and privacy of citizens. Personal data breaches, data theft and data security incidents undermine citizens' digital rights and trust. The dominance of global technology companies distorts digital markets and limits the regulatory space of national governments. Digital crises are often global in nature, as technology infrastructures and data flows know no borders. This makes it difficult for individual states to manage crises independently (Saka et al., 2024).

Crisis management plays a central role in achieving digital sovereignty, as crisis management and prevention fundamentally affect the ability of states to manage their digital spaces. Suffice it to say in this regard that managing data security incidents requires that states are able to exercise control over data, including its storage, processing and sharing. The procedures and measures used during cyber security crises directly affect the technological independence and defense capabilities of states.

At the same time, it is worth pointing out here that action against global players dominating digital markets, such as the Digital Markets Act (DMA) introduced by the EU, can be seen as part of the acquisition of crisis management capacity (Rojszczak, 2023). Cooperation between states is essential to tackle digital crises, especially at EU level, where common regulatory frameworks and strategies strengthen collective resilience.

Crisis and crisis management is at the heart of digital sovereignty, as states need to be able to effectively manage crises in the digital space, which in turn fundamentally affects their sovereignty. The example of the European Union illustrates that the crises of the digital age require a new approach to public policy and regulation because of their global, decentralized and rapidly changing nature. Crisis-related public policy is not only about crisis management, but also about how states and international organizations can anticipate, adapt and learn from these situations, while protecting their citizens and interests in the digital space.

3.3 Historical overview and the current issues-the evolution of digital policies in the European Union

Digital policies in the European Union have evolved significantly over the past decades. Initially focused on promoting the internal market and economic integration, the EU has increasingly focused on digital infrastructure, data protection and cybersecurity as technology has developed and digitalization has advanced. The EU's digital strategies aim to develop a digital economy and society and to create a Digital Single Market. Throughout the development of the EU's digital policies, a number of key milestones and decisions have been taken that have fundamentally shaped the pursuit of digital sovereignty (Floridi, 2020).

The starting point for EU digital policy is the Data Protection Directive,[6] which was the first major piece of data protection legislation in the European Union. The Data Protection Directive set out the principles and rules for data protection. This Directive ensured the protection of EU citizens' personal data and paved the way for the introduction of subsequent regulations, such as the GDPR. The next key standard was the ecommerce Directive,[7] which created the legal framework for e-commerce and facilitated the development of online services and commerce in the EU. The Directive aimed to promote the growth of the digital economy while ensuring the protection of consumer rights in the online space.

Building on the Directive, the European Union adopted the Digital Agenda in 2010,[8] which was the EU's overarching digital strategy. The EU set the goal of developing a digital economy and society. The Agenda stressed the importance of creating a single digital market based on high-speed, superfast internet and interoperable applications to deliver sustainable economic and social benefits. Under the Digital Agenda, the EU has introduced a range of measures to develop digital infrastructure and stimulate innovation.[9]

Finally, it is necessary to highlight the GDPR, a landmark piece of legislation in the field of data protection. The GDPR introduced strict data protection rules in the EU to ensure the foundations of digital sovereignty. It aims to protect the personal data of individuals and to increase the responsibility of data controllers. The impact of the GDPR goes beyond EU Member States, as many non-EU companies have also adapted to the rules to continue providing services to EU citizens and businesses in the internal market. In addition to the GDPR, the EU Cybersecurity Act[10] has strengthened the EU's cybersecurity capabilities and introduced EU-wide cybersecurity certification for information and communication technology (ICT) products and services. The Cybersecurity Act aims to enhance the security and protection of the EU's digital infrastructure against cyber threats and to increase trust in digital products and services. In addition to the above, the so-called NIS 2 Directive[11] obliges Member States to report cybersecurity incidents and to cooperate in the management of cybersecurity incidents.

Following the emergence and evolution of the European Union's digital policies, the Commission has set out its vision for the period up to 2030 in its Communication "Digital Agenda 2030: A European

6 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.

7 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.

8 COM (2010)245 the Digital Agenda for Europe.

9 Such measures have included support for infrastructure development related to broadband internet access, or the introduction of e-government services, the development of e-health systems, and increasing the availability of digital public services.

10 Regulation (EU) No 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Cybersecurity Agency) and the certification of information and communication technologies for cybersecurity and repealing Regulation (EU) No 526/2013, OJ L 151, 7.6.2019, p. 15–69.

11 Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures to ensure a high uniform level of cybersecurity throughout the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972 and repealing Directive (EU) 2016/1148, OJ L 333, 27.12.2022, p. 80–152.

way to deliver the Digital Decade"[12] to empower citizens and businesses through digital transformation. Building on this, the Digital Decade 2030 policy agenda[13] established a monitoring and cooperation mechanism to achieve the common objectives and targets of Europe's digital transformation. And in the Declaration on Digital Rights and Principles, the EU has set out principles for the enforcement of European values underpinning digital sovereignty.[14]

As a first step in the policy programme, the European Commission has defined key performance indicators (KPIs) in an implementing act.[15] The KPIs are based on the existing DESI exercise, which measures the state of Europe's digital transformation every year. Subsequently, the European Commission, in cooperation with the Member States, published EU-wide trajectory indicators to assess whether the progress made against each target is sufficient to reach the 2030 targets.[16] Each year, the European Commission publishes a Digital Decade Progress Report, which assesses and evaluates progress towards the EU-level trajectories and the final Digital Decade targets, and proposes further actions and efforts where necessary. The first Digital Decade Progress Report was published in 2023.[17]

Each Member State sets its own national agenda to achieve common EU agendas and targets. The national roadmaps will be set out in the first national roadmaps, which Member States were required to submit to the Commission in autumn 2023.[18] Member States will review and revise their national roadmaps every 2 years to inform the actions, measures and investments planned to achieve the objectives and targets.

With the advance of the digital age, the European Union has recognized that technological developments are creating new types of challenges to sovereignty and citizens' rights. The dominance of global technology companies, data protection issues, cybersecurity threats and the need to maintain media freedom and pluralism raise complex issues that require a comprehensive regulatory approach. The EU has launched a number of regulatory initiatives to respond to these challenges and to create stability and security in the digital age. Prominent among these initiatives are the attempts to regulate digital services,[19] digital markets,[20] media,[21] and artificial intelligence[22] as essential tools for achieving digital sovereignty (Eifert et al., 2021; Chiarella, 2023; Edelson et al., 2023).

The DSA is one of the EU's most important pieces of legislation aimed at creating a safer and more transparent digital environment. It regulates the operation of digital services, in particular online platforms such as social media and e-commerce sites. The DSA makes these platforms responsible for moderating content, preventing the spread of false information and protecting users. In addition, the law obliges large platforms to operate transparently, disclose the operation of their algorithms and ensure that advertising practices are regulated (Tóth, 2023; Keserű, 2024).

The DSA is a major step forward for digital sovereignty, as it increases Member States' control over online platforms. However, it also creates new challenges, as global technology companies often find it difficult to adapt to the different legal and cultural frameworks in different Member States. This is particularly true in smaller countries such as Hungary and Slovakia, where the capacity of local regulators to control large platforms may be limited.

The DMA is another key EU regulation to ensure fair competition in digital markets. The DMA Regulation aims to limit the monopolistic practices of global technology giants, in particular GAFAM. The law defines the "gatekeeper" players, the large companies that have a dominant position in the online market, and sets rules for them to prevent distortions of competition in the market.

For example, the DMA requires that gatekeeper operators must not favor their own products or services over those of other operators and must not restrict smaller firms' access to essential platforms. This regulation directly contributes to strengthening the EU's digital sovereignty by reducing the economic dominance of global companies and creating opportunities for European businesses to compete in the market. However, the implementation of the DMA also poses challenges, as strong and well-coordinated EU and national institutions are needed to ensure strict enforcement.

The EMFA is the EU's response to the challenges to media freedom and pluralism. The aim of the EMFA is to ensure the independence and transparency of editorial boards and to prevent government and economic interference in media content. It requires transparency in media ownership and financing and introduces rules to protect the decision-making independence of journalists and editors.

The EMFA is particularly important in the digital age, where the role of media is not only in traditional forms but also on digital platforms. The EMFA is directly linked to digital sovereignty, as it ensures that EU citizens have access to reliable and independent information, while reducing the control of global technology companies over media content. However, the implementation of the EMFA may give rise to controversy, especially in Member States where government actors have a significant influence on the media.

12 COM (2021) 118 Digital Agenda 2030: A European way to deliver the Digital Decade.

13 Decision (EU) 2022/2481 of the European Parliament and of the Council of 14 December 2022 establishing the Digital Decade 2030 policy programme.

14 European Declaration on Digital Rights and Principles for the Digital Decade 2023/C 23/01. The declaration sets out to put people at the centre of the digital transition; to promote solidarity and inclusion through: connectivity, digital education, training and skills, fair and equitable working conditions and access to digital public services; to reaffirm freedom of choice and the importance of a fair digital environment; to promote participation in the digital public space; to increase safety, security and empowerment in the digital environment, especially among young people; and to promote sustainability.

15 Commission Implementing Decision (EU) 2023/1353 of 30 June 2023 establishing the key performance indicators to measure progress towards the digital targets set out in Article 4(1) of Decision (EU) 2022/2481 of the European Parliament and of the Council.

16 C (2023) 7,500 Setting out planned delivery pathways for digital at EU level.

17 See https://digital-strategy.ec.europa.eu/en/library/2023-report-state-digital-decade (07-11-2024).

18 See Hungary's National Strategic Reference Framework for the Digital Decade 2030 Policy Agenda 2030, as set out in Decision 2022/2481 of the European Parliament and of the Council (EU) of 14 December 2022. Available at: https://digital-strategy.ec.europa.eu/hu/policies/national-strategic-roadmaps (07-11-2024).

19 See DSA.

20 See DMA.

21 See EMFA.

22 See the AI Act.

The EU regulation on Artificial Intelligence (AI), the so-called AI Act, is the first comprehensive piece of legislation aimed at regulating artificial intelligence systems with the intention of ensuring technological progress, the protection of citizens' fundamental rights and the ethical use of AI. The AI Act aims to make the European Union a pioneer in the global regulation of AI, while strengthening its own digital sovereignty.

The AI Act is based on a risk-based approach, whereby AI systems are categorized according to their level of risk. This approach allows for targeted regulation, focusing on the most critical systems.[23] In particular, the AI Act emphasizes data quality, transparency, and compliance assessment to ensure that AI systems operate fairly, reliably, and safely.

The AI Act is a key element of the EU's digital sovereignty strategy in several respects. On the one hand, the AI Act allows the EU to govern the development and application of AI in its territory according to its own rules. This regulatory autonomy is particularly important for taking action against global technology companies, which tend to operate in a transnational framework. On the other hand, the AI Act ensures that AI systems used in the EU comply with EU values and legislation, in particular in the areas of privacy, security and transparency. This move confirms the EU's commitment to protecting the rights of its citizens. Third, the AI Act will support European AI development and innovation, creating opportunities for European businesses to remain competitive in the global market. This will reduce the EU's dependence on non-EU tech firms. Finally, the AI Act includes strict standards for data management, ensuring that the data used by AI systems is secure and reliable. This will directly contribute to strengthening the EU's data sovereignty.[24]

Together, the DSA, DMA and EMFA and the AI Act are the cornerstones of the EU's digital sovereignty strategy.[25] These regulations not only increase the transparency and security of digital markets and services, but also contribute to the EU's technological and economic independence. However, their implementation and effectiveness depend to a large extent on cooperation at EU and Member State level and on the resources available to enforce the rules. These measures will significantly shape the future of the digital space in the EU, while reflecting the different needs and priorities of Member States. The rules aim to strike a balance between national self-determination and cooperation at EU level, and ensure that the EU is able to maintain its sovereignty in the face of global digital challenges. This is particularly important for smaller Member States such as Hungary, Slovakia and the Czech Republic, for whom EU rules provide protection and opportunities to thrive in the digital space.

3.4 Digital sovereignty from the perspective of central and eastern European countries

The issue of digital sovereignty is of general concern within the European Union, but is particularly acute in the countries of Central and Eastern Europe. These countries, such as Hungary, the Slovak Republic, the Czech Republic and Poland, have different approaches to digital sovereignty issues due to their unique political, economic and cultural characteristics.[26] For the states in this region, nation-state sovereignty is particularly emphasized for historical reasons, while global technological challenges and the EU's common regulatory framework create a complex situation that requires a specific approach (Benyusz and Hulkó, 2021; Farkas, 2022).

The historical past of the countries of the Central and Eastern European region has a significant impact on their perception of sovereignty and their relationship with the EU. Their belonging to and subsequent liberation from the Soviet bloc has left a political legacy in which the emphasis on national sovereignty is central. These countries have long been under the rule of external powers, and the restoration and preservation of national self-determination is particularly important for them. Their accession to the EU was often accompanied by ambivalent feelings, while they sought economic and political integration, they also feared that some of their national sovereignty would again be restricted.

This historical legacy is particularly acute in the area of digital sovereignty, where the EU's common regulatory framework and the influence of global technology companies create a situation where the autonomy of nation states often comes into conflict with transnational interests. For the countries of Central and Eastern Europe (CEECs), digital sovereignty is not only a technological or economic issue, but also a means of preserving national identity and political self-determination. The economic structure and technological

23 Unacceptable risk schemes are schemes that violate basic human rights (e.g., social scoring schemes) are completely prohibited. High-risk systems are AI systems that may have a significant impact on the lives or safety of individuals (e.g., systems used in health, education or critical infrastructure), must meet strict compliance requirements. Medium-risk systems are systems (such as chatbots for consumers) that must meet transparency requirements. Low-risk systems are those applications that carry minimal risk (e.g., entertainment AI) and are therefore subject to less stringent regulation.

24 The importance of the AI Act goes beyond AI, as the EU is presenting a regulatory approach that focuses on promoting technological progress, protecting human rights and maintaining economic competitiveness. In this way, the AI Act will play a key role in shaping the EU's future digital ecosystem and strengthening its position in the global digital space.

25 In addition to the regulatory framework, it is important to mention the EU's Gaia-X project. The EU's Gaia-X project is an integral part of the historical development of the European Union's digital sovereignty, as it is an initiative specifically aimed at strengthening Europe's digital infrastructure and achieving technological independence. Gaia-X aims to create an interoperable and secure cloud services ecosystem that operates in accordance with European standards and values. The importance of Gaia-X lies in the fact that it offers an alternative to non-EU based cloud services, while supporting European innovation and local entrepreneurship. In this way, the project not only serves to strengthen digital sovereignty, but also reinforces the foundations of the EU's technological and economic independence, complementing regulatory actions such as the DSA and the DMA (Braud et al., 2021; Tardieu, 2022).

26 The research data of the chapter is based on National Digital Decade strategic roadmaps of Hungary, Slovakia, the Czech Republic and Poland. See Hungary: Magyarország Nemzeti Stratégiai Ütemterve; Slovakia: National Digital Decade Strategic Roadmap of the Slovak Republic; the Czech Republic: The Path to Europe's Digital Decade: The Strategic Plan for the Digitalization of Czechia by 2030; and Poland: Krajowy plan działania do programu polityki "Droga ku cyfrowej dekadzie" do 2030. Available at: https://digital-strategy.ec.europa.eu/en/policies/national-strategic-roadmaps (08-12-2024).

development of CEECs differ significantly from Western European countries, creating both challenges and opportunities for the realization of digital sovereignty. Countries in this region tend to have smaller economies with limited resources to develop digital infrastructure and support technological innovation. This is particularly the case in Hungary and Slovakia, where the digital switchover is mainly driven by EU funds and foreign investment.

The dominance of global technology companies in this region is particularly sensitive to the economy, as these companies often exploit their dominant market position and distort local markets. However, common EU regulatory initiatives such as the DSA and the DMA create opportunities for the region to reduce dependence on global firms and support local businesses. The EU's technological and economic support is key for CEECs, especially in developing digital infrastructure and strengthening cybersecurity capabilities.

The issue of cybersecurity and data protection is of particular importance for the countries of Central and Eastern Europe, which are often exposed to the threat of cyber-attacks and information warfare due to their geopolitical position. Countries in the region face a number of cybersecurity challenges, including attacks on critical infrastructure and the protection of citizens' personal data. The EU's common cybersecurity strategy and regulatory frameworks, such as the Cybersecurity Act, provide significant help in addressing these threats, while national governments also have an important role to play in building local defenses.

From a data protection perspective, the introduction of the GDPR has been an important step forward for Central and Eastern European countries, ensuring the protection of citizens' data and transparency in digital services. However, implementation of the regulation is often challenging for smaller countries with limited resources to enforce legal and technological requirements.

The freedom and pluralism of digital media is also a key issue in Central and Eastern European countries, particularly in view of the political and economic pressures that often threaten independent media. The EMFA can be an important tool for the region to preserve media independence, but its implementation often creates conflicts between national governments and the EU. In the case of Hungary, for example, the EU blames the government for the limited independence of the media and the strong influence of the government. The provisions of the EMFA could run counter to these practices, leading to further disputes between the EU and the Hungarian government. Other countries, such as the Czech Republic and Slovakia, also face challenges in maintaining transparency and pluralism in digital media.

The issue of digital sovereignty in Central and Eastern European countries is particularly complex, as these countries seek to both preserve nation-state sovereignty and integrate into the EU's common regulatory framework. This dichotomy often leads to tensions between EU institutions and national governments, especially in areas such as media freedom, data protection and cybersecurity.

4 Discussion

The European Union's ambition for digital sovereignty has evolved gradually over the past decades, responding to the pressures of global technological developments and transnational digital challenges. The importance of digital sovereignty lies not only in strengthening EU institutions and promoting cooperation between Member States, but also in strengthening the EU's position as a global regulatory actor. Initiatives such as the GDPR, the DSA, the DMA, the EMFA, the AI Act and the Gaia-X project form a comprehensive strategy that seeks to protect citizens' rights, maintain economic competitiveness and promote EU values at a global level.

The European Union's legislative framework, encompassing the DSA, the DMA and the AI Act, has significantly altered the operational landscape for major technology companies such as Google, Amazon, and Meta. These regulations aim to create a more equitable digital ecosystem by curbing monopolistic practices, enhancing user protection, and ensuring transparency in digital services. While these measures align with the EU's broader ambition to assert digital sovereignty, they also impose considerable compliance burdens on large tech firms, reshaping their strategies and business models within the Union.

One of the most direct impacts has stemmed from the DMA's effort to regulate the behavior of gatekeeper platforms, large tech companies that control significant portions of the online market. The DMA specifically targets practices such as self-preferencing, where companies prioritize their own products or services over those of competitors on their platforms.[27] Failure to comply with these provisions carries severe financial penalties. Under the DMA, non-compliant gatekeepers can face fines of up to 10% of their global annual turnover, with repeat offenses potentially leading to fines of up to 20%. In extreme cases, the European Commission can mandate the structural separation of business divisions, demonstrating the substantial leverage the EU wields over even the largest technology firms.

The DSA introduces stringent requirements for content moderation, user privacy, and transparency in advertising. Large platforms, including Meta's Facebook and Instagram, are obligated to proactively identify and remove illegal content, such as hate speech and misinformation, or risk fines amounting to 6% of their global turnover. Additionally, the DSA mandates algorithmic transparency, forcing companies to disclose how content is ranked and recommended to users.[28] The compliance costs associated with the DSA have led to significant operational adjustments for tech companies. These include hiring local legal and regulatory teams, redesigning user interfaces to ensure transparency, and investing heavily in AI-driven moderation tools. Smaller platforms may face challenges in meeting these requirements, but the largest corporations, such as Google and Amazon, have the resources to pivot strategically to align with EU expectations.

The AI Act marks the first comprehensive attempt to regulate artificial intelligence globally. Its risk-based classification imposes

27 For instance, Google has been compelled to adjust its search algorithms and product display methods to ensure equal visibility for third-party services in online search results. Similarly, Amazon is now required to avoid favoring its in-house brands over external retailers in its marketplace, fostering a fairer competitive environment.

28 A notable example involves Meta, which has restructured parts of its advertising ecosystem to comply with EU demands for greater transparency in targeted ads and algorithmic fairness. Similarly, Twitter (now X) faced scrutiny and compliance pressures under the DSA, resulting in increased investments in content moderation teams within the EU.

strict obligations on AI systems that could potentially endanger fundamental rights or safety. This has placed pressure on companies like Amazon and Google, whose AI-driven services and products (e.g., facial recognition tools, automated hiring systems) are categorized under high-risk applications. To comply, these companies must ensure robust data governance, algorithmic explain ability, and human oversight in AI systems deployed within the EU. The AI Act's requirement for data transparency and the prohibition of certain AI applications (such as social scoring systems) further restricts tech giants' operational flexibility, prompting preemptive adjustments to their product roadmaps and AI strategies.

A defining feature of these regulations, including the GDPR, DMA, and AI Act, is their extraterritorial scope. These laws apply not only to EU-based companies but also to foreign service providers that target or process data of EU citizens. This has necessitated compliance by companies worldwide, regardless of their geographical headquarters.[29] The extraterritorial reach of the DMA compels gatekeepers to apply fair market practices across all EU member states, even if the services are managed from non-EU jurisdictions. This mechanism underscores the EU's ambition to set global standards for digital governance, effectively exporting its regulatory model to influence tech policy beyond its borders.

But the EU's digital sovereignty ambitions are not without internal contradictions and challenges. The different interests and capabilities of Member States often make it difficult to develop a coherent regulatory framework. These contrasts are particularly acute in the Central and Eastern European region, where the emphasis on nation-state sovereignty and scepticism towards the EU are dominant political factors. Nevertheless, the EU's digital regulatory initiatives represent a significant step towards an orderly and sustainable transnational digital space.

There are a number of challenges in implementing the EU's digital sovereignty strategy. Large technology companies (GAFAM) wield considerable power in the global digital space. The EU's regulatory initiatives aim to reduce this dominance, but enforcing these regulations requires significant resources and comes under considerable political and economic pressure. EU Member States have different levels of economic development, political priorities and regulatory capacity. This is particularly pronounced in smaller Member States such as Hungary, Slovakia and the Czech Republic, where the development of digital infrastructure and regulatory capacity often depends on EU funding. The decentralized nature of the digital space and cross-border cyber threats make the work of nation-state regulators more difficult and require joint EU action. However, this joint action often requires political compromises that can slow down the regulatory process. A key objective of the EU's Digital Sovereignty Strategy is to support innovation and technological development in Europe. However, the EU often struggles to compete in the global marketplace against technology giants from the US and Asia.

In light of these challenges, a number of proposals can be made to further strengthen the EU's digital sovereignty strategy.

The EU needs to step up cooperation at national and EU level, in particular to strengthen regulatory capacity and allocate resources more efficiently. This is particularly important for smaller and less developed Member States, which often face challenges in implementing common EU rules. The EU should further increase its investment in digital infrastructure, in particular through initiatives such as the Gaia-X project. Developing a European cloud infrastructure not only strengthens technological independence, but also gives European businesses a competitive advantage. The EU must continue to strengthen cybersecurity and data protection regulations to protect its citizens and economy from threats in the digital space. The examples of the Cybersecurity Act and the GDPR show that these measures not only provide internal security, but also create global standards. The EU needs to increase its R&D investment in artificial intelligence, blockchain and other emerging technologies. The AI Act not only provides a regulatory framework, but can also act as a stimulus for innovation, if properly combined with funding programmes such as Horizon Europe. The EU needs to place greater emphasis on raising awareness of citizens' digital rights and opportunities. Digital sovereignty is not only an institutional issue, but also a societal process that requires the active participation and support of citizens.

The EU Digital Sovereignty Strategy is an important and timely response to global technological challenges. Achievements to date, such as the GDPR, DSA, DMA, EMFA and the AI Act, provide a strong foundation for a sustainable and ethical digital space. At the same time, the strategy must continuously adapt to the changing technological environment and the different needs of Member States.

The EU needs to find a balance between nation-state sovereignty and EU-wide cooperation to ensure the stability and security of the digital space, while supporting the rights and interests of European citizens. In doing so, the EU can not only strengthen its internal cohesion, but also become a global leader in digital regulation and governance. This strategy will not only ensure the EU's economic and technological competitiveness, but will also contribute to a more ethical and transparent digital ecosystem that can serve as a model for other regions of the world.

This paper achieved its objective by evaluating the legislative measures and their impact on digital sovereignty, highlighting the specific challenges faced by smaller member states in the process.

Data availability statement

The raw data supporting the conclusions of this article will be made available by the authors, without undue reservation.

Author contributions

GH: Writing – original draft, Writing – review & editing. JK: Writing – original draft, Writing – review & editing. AL: Writing – original draft, Writing – review & editing.

29 For instance, U.S.-based firms such as Microsoft and Apple must align their services with EU digital laws to continue offering products within the Single Market. GDPR's heavy fines (up to 4% of global turnover) have already led to cases where Meta was fined €1.2 billion for improper data transfers to the U.S. Similarly, Amazon faced €746 million in GDPR fines for alleged privacy violations.

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Constitutional court attitudes and the COVID-19 pandemic—case studies of Hungary, Serbia, and Croatia

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The paper analyses the practice of the constitutional courts of Hungary, Serbia and Croatia, in terms of the constitutionality and legality of the normative responses to the COVID-19 pandemic in the countries examined. The goal is to critically present the arguments along which the constitutional courts ensured (or attempted to achieve) the balance between the protection of fundamental rights and the preservation of the public interest and public health in their decisions related to the COVID-19 pandemic; and to deduce whether any similarities can be discovered in the reasoning of the courts or they have adopted a completely different approach from each other. According to the results of the legislative research, regional experience of the examined neighbouring countries with similar legal and political traditions, constitutional court structures, and political leadership styles shows that even in circumstances of a global, uniform health crisis, distinct national reactions might be expected. However, on the other side, the case law research gave a completely different conclusion, supporting the highly similar reasoning of the constitutional courts that almost without exception have given priority to public interest in combating the epidemic over fundamental rights.

KEYWORDS

COVID-19, constitutional court, Hungary, Serbia, Croatia, protection of fundamental rights

1 Introduction

Due to COVID-19, basic research and judicial practice related to state of emergency and accompanying derogations of human rights have taken on a new dimension. The appearance of a previously unknown epidemic on a global scale raised questions for which most countries did not have prefabricated, adequate answers: neither in legal, economic, medical, nor in political sense (Landman and Smallman-Raynor, 2023) and required a much more systematic integrated approach to solving problems than any crisis experienced up to that point. While it was a global difficulty to find a balance between the public interest, i.e., the preservation of public health, and the necessary derogations of fundamental rights, it was neither possible to reach a unified position regarding whether the medical threat was serious enough to declare a state of emergency, or it could be handled in an ordinary legal order. Not to mention that not all national constitutions contain a clause on state of emergency or not all national clauses on state of emergency may apply to health emergencies (Diaz Crego and Kotanidis, 2020, p. 5). The states often hid behind the need for an urgent reaction and the unfamiliarity of the situation when they dispensed with the basic values of the rule of law, such as prohibition of arbitrariness, legality and legal certainty, separation of powers together with independence of the

judiciary, respect for human rights, hierarchy of norms and equality before the law (Venice Commission, 2010, p. 9), when adopting a restrictive measure. The courts also faced a challenge as to how much they could or should deviate from their already established practices in cases related to infectious diseases, if there was such a national practice at all, and to what extent the standards developed for classic crisis situations, such as natural disasters, wars or humanitarian emergencies could be applied to a pandemic (Ćorić and Knežević Bojović, 2021, p. 381–382).

National constitutional courts have shown varying degrees of tolerance towards the crisis management of the national authorities. Given the incomplete regulations experienced in the national legal systems, especially regarding the legal categorisation of an epidemic as the basis for the introduction of state of emergency, the constitutional courts had relatively wide latitude when examining the constitutionality and legality of restrictive measures. However, they had to be careful "not to make arbitrary decisions themselves, not to create their own value standards, not to make activist decisions or look for formal reasons in order to avoid making a meritorious decision" (Korpič-Horvat, 2015, p. 84). The paper examines the practice of the constitutional courts of three neighbouring countries in Central-Eastern Europe, Hungary, Serbia and Croatia, in connection with their COVID-19 decisions, with particular regard to the above requirements. Namely, what attitude did the constitutional courts show with respect to derogations of fundamental rights: how consistent they were; whether they applied the typical tests for the cases of human rights derogations (like the test of necessity and proportionality) or evolved new standards for the COVID cases.

The choice of the countries is not accidental. Hungary, Serbia and Croatia as post-socialist unitary countries have gone through mainly similar stages in their legal-political development—regardless of the fact that Hungary and Croatia are already EU members, and Serbia is still in the negotiation process. Their legal systems are based on similar principles; the constitutional courts exercise similar powers; each constitution contains a clause on state of emergency (under different names and categorisations) without explicitly mentioning health emergencies. Despite all these similarities, they differed in their crisis management (e.g., extent and intensity of closures, involvement of the military, introduction of COVID-19 certificates). The main research question of the paper is whether the practice of the constitutional court of Hungary, Serbia and Croatia also differed in decisions related to COVID-19. Given the relevant case law, the answer is clearly negative. Almost without exception, the constitutional courts gave priority to the public interest over the elementary preservation of fundamental rights or did not make a substantive decision.

In the first part of the discussion, after a short theoretical summary on state of emergency, the authors examine the relationship between the emergency clauses and COVID-19 in the light of national constitutions and constitutional court decisions—where this is relevant, given that the legal categorisation of COVID-19 largely determines the outcome of all court decisions related to the pandemic. While in the second part, the focus is on the protection of fundamental rights, i.e., what tests did the constitutional courts apply to preserve human rights against the restrictive measures of the authorities, and whether they were successful.

2 Materials and methods

The paper applies classic methods of legal research, relying both on primary and secondary legal sources in the countries examined. Primary legal sources, such as laws, by-laws, administrative regulations and constitutional court practice related to COVID-19 in Hungary, Serbia and Croatia are available online, through official databases, and although there are mostly no English translations, the authors were able to analyse the relevant sources in original, national languages without any difficulties. Given that the study deals with the legal solutions and constitutional court case law of three countries, the legislative, regulatory and case law research primarily relies on comparative legal methods.

As for secondary sources, in recent years a large number of articles have been published as a result of scientific research, not only in English. Not neglecting international journal articles in English, the paper principally interprets the primary legal sources with the help of articles and academic commentaries published in national legal journals and reviews in Hungarian, Serbian and Croatian, supplementing them with the authors' own insights.

Considering that the examined three countries have adopted different terminology and legal institutions when it comes to state of exception, the following concepts used in this paper have the meanings below:

State of emergency is a situation that cannot be handled within the normal operation of the state, and therefore requires faster and more serious intervention in the life of the individual and society. The Serbian Constitution contains separate mechanisms handling state of emergency when fundamental rights might be derogated by the parliament or common action of the executive to the extent necessary. In Croatia derogation of fundamental rights is possible by similar channels, but even without "official" declaration of state of emergency. Moreover, this term is not even used literally in the Croatian Constitution, but rather describes the situations in which it is possible to deviate from the normal functioning of the country.

In contrast to these two states, the Fundamental Law of Hungary (before 2012, the Hungarian legal system used the terminology of the "Constitution") imposes much more detailed rules in this regard, and uses different terminology, as well. Instead of a state of emergency, in Hungary *special legal order* should be introduced as a set of institutions, procedures and periods that are established to avert and manage a crisis situation. Also, the Fundamental Law contains provisions on *period that is qualified as a state of exception* which covers a crisis situation that falls within the scope of a state of emergency and which may be declared or applied under conditions laid down by the legislator.

3 Discussion

3.1 The theory of state of exception

It is worth starting the theoretical examination with Carl Schmitt's findings. Perhaps the author's most famous quote is: Sovereign is he who decides on the exceptional case. The ordinary legal order means the validity and enforcement of the legal order, the exceptional case means the suspension of the legal order. The

main feature of the state of exception is the unlimited authorization, i.e., the suspension of the entire existing order, where the state has survived even when the right has disappeared. Thus, in an exceptional situation, the state has the upper hand over the validity of legal norms. The decision is freed from all normative ties and becomes absolute in the true sense of the word. The exceptional case is the clearest illustration of the essence of state authority: it is when the decision is divorced from the legal norm, when no law is necessary for the authority to create the law (Schmitt, 1992, p. 1, 16).

In Schmitt's conception of sovereignty, it can become a virtually unlimited political power in a state of exception. It is important to emphasise, however, that in his book *Political theology* this unlimited political power can in no way be seen as an end, aimed solely at building up his sovereign dictatorial power (Mészáros, 2017, p. 34–35).

Sooner or later, in every society, crises arise to which both the legislative and the executive branch, and the members of society must react in a different way from the ordinary legal order. The general characteristic of these crises is that the normal functioning of the state and the security of life and property of the population are threatened by some social and/or natural danger (Mógor and Horváth, 2009, p. 37), and which cannot be dealt with by the normal, customary means of state action (Csink, 2017, p. 8). Another important characteristic of crisis situations is that they can be defined in time, but it is extremely difficult to determine when they will end (Mészáros, 2017, p. 32). Consider that a crisis situation has not yet occurred but is already threatening society. For example, in a pandemic period, how many infected persons could justify the introduction of a special legal regime?

Therefore, the essence of a state of emergency is based on the fact that society is fundamentally vulnerable, and the state cannot provide maximum protection for the population (Kondás, 2015, p. 303). We could say that the rules of the state of emergency form a separate legal order within the constitution. In crisis situations threatening the existence of the state, these rules override or modify the framework of constitutional rules which prevent or make it difficult to safeguard the existence of the state (Kelemen, 2017, p. 39).

Taking into account historical experience, the above crisis situations can be grouped in several ways. Oren Gross has put forward the following typology:

a) grave political crises, which include
 i) international armed conflicts,
 ii) terrorist attacks,
 iii) riots, and rebellions,

b) economic crisis;
c) natural disasters and force majeure events (Gross, 2003, p. 1025).

Alongside Oren Gross, Pasquale Pasquino and John Ferejohn set up the following system of crisis situations:

a) emergencies that flow from an intentional threat to the political order (for example: wars, terrorism);
b) emergencies that are the result of human action, but not of human design (for example: economic emergencies);
c) emergencies caused by natural (as opposed to man-made) disasters (for example: epidemics and floods) (Elster, 2004, p. 240–241).

Comparing the above classifications of crisis situations, it can be concluded that while Gross typifies crisis situations according to their nature, Ferejohn and Pasquino focus on the factors that trigger them (Ősze, 2018, p. 34).

A recurring dilemma in relation to a state of emergency regulation is the possibility of abuse of power. It should be stressed that this dilemma can only be understood in a constitutional democracy, where the principles of constitutionality prevail, namely: separation of powers, popular sovereignty, rule of law, recognition and protection of fundamental rights, equality before the law (Kukorelli, 2014, p. 23).

A detailed examination of the literature on state of emergency tends to highlight as a problematic point the impairment of the principle of separation of powers (concentration of power) and the limitation of human rights to a greater extent than the standard developed in the ordinary legal order. Separation of power can be defined as one of the foundations of constitutional democracy. The sharing of public power is not an end, but a guarantee: an organisational guarantee that the exerciser or exercisers of the rights deriving from sovereignty do not abuse the opportunities arising from this privileged role (Erdős, 2019, p. 61). So, on the one hand, the separation of powers is a fundamental condition for the interpretability of a state of emergency. This criterion is specific to the rule of law, which makes public decision-making more complex and time-consuming (Farkas, 2017, p. 21).

Under a state of emergency, the executive—or a special body set up for this purpose—is usually empowered to govern by decree, but this must not be in breach of the principle of separation of powers. On the other hand, it is also necessary to ensure the dynamism of legislation, implementation and other measures, as this is a fundamental condition to avert a crisis. It is worth mentioning here the reassurance function of the empowered organ under a state of emergency. The short way to put it is "calm down, we are in control of the situation." In such cases, the empowered organ must act transparently and effectively, but also quickly. Indeed, it is usually the reassurance function that links the exceptional situation to the state of exception. This is likely to mean that the law needs a solution which, on the one hand, allows the state to take immediate action and, on the other, guarantees constitutionality once a state of emergency has expired, thus reassuring society (Mészáros, 2016, p. 191–192).

Another concern about the application of a state of emergency is the unnecessary and disproportionate violation of fundamental rights. The specific definition of fundamental rights and the rules for their limitation are laid down at constitutional level. Most of the fundamental rights can be restricted, and different tests must be applied to justify this restriction. A state of emergency can be interpreted as a special test, where on one side of the balance is the crisis (or its prevention) and on the other side is the fundamental right (or its restriction). The possibility of abuse lies in the reference to a crisis and the possibility of more concentrated action.

3.2 Legal regulation of state of emergency

3.2.1 Hungary

At the time of the change of regime in 1989 (the collapse of the Soviet Union and the democratisation of Hungary), the Constitution

of Hungary covered states of national crisis, state of emergency and state of danger. The list of crisis periods was extended in 1993 to include the unexpected attack and in 2004 to include the state of preventive defence. The next milestone is the entry into force of the Fundamental Law of Hungary in 2012, and its sixth amendment. From 2013, the security environment started to change noticeably. The Arab Spring, the crisis in Ukraine, the activities of the Islamic State terrorist organisation, the wave of terrorism in Europe, these developments have brought a clear and radical change to the security situation. In response to this, the constitution-maker increased the number of crisis periods to six by introducing the state of terrorist threat into the Fundamental Law. In parallel, new security challenges have emerged in the last few years, which have created a need for modern and applicable legislation (Kádár, 2020, p. 10–16). Because of this, and the conclusions drawn from the declaration and application of the state of danger (see later), the Parliament made comprehensive amendments to the special legal order rules in Hungary (Farkas, 2020, p. 14–15). It is worth stressing that the reform came after COVID. At the time of COVID, there were six periods that are qualified as a state of exception, currently there are free: the state of war, the state of emergency and the state of danger (Ősze, 2021, p. 9–19).

The National Assembly may declare a state of war

a) in the event of the declaration of a war situation or in the event of danger of war;
b) in the event of external armed attack, an act with an impact equivalent to an external armed attack, or imminent danger thereof;
c) or in the event of the fulfilment of an alliance commitment regarding collective defence (Art. 49, Para. 1)

For the declaration of state of war, the votes of two thirds of the MPs shall be required (Art. 49, Para. 2).

The National Assembly may declare a state of emergency

a) in the event of an act aimed at overthrowing or subverting the constitutional order or at exclusively acquiring power, or
b) in the event of a serious unlawful act massively endangering life and property (Art. 50, Para. 1).

For the declaration of state of emergency, the votes of two thirds of the MPs shall be required (Art. 50, Para. 2).

The Government may declare a state of danger in the event of an armed conflict, war situation or humanitarian catastrophe in a neighbouring country, or a serious incident endangering life and property, in particular a natural disaster or industrial accident, and in order to eliminate the consequences thereof (Art. 51, Para. 1).

In all three crisis periods, the Government has exceptional powers. As part of this, during the period of special legal order, the Government may adopt decrees by means of which it may, as provided for by a cardinal act (a cardinal act is an act, which requires the votes of two thirds of the MPs present); suspend the application of certain laws, derogate from the provisions of laws and take other extraordinary measures (Art. 53, Para. 1). Guaranteed rule, during the period of special legal order, the application of the Fundamental Law shall not be suspended (Art. 51, Para. 1); the operation of the Constitutional Court (hereinafter: "CC") shall not be restricted; and the Government shall be obliged to take every measure to guarantee the continuous operation of the CC and the National Assembly (Art. 51, Para. 3–4).

Due to the outbreak of the COVID in 2019, the Government declared a state of danger on 11 March 2020 with nationwide effect. And shortly after the COVID, the state of danger was reintroduced because of the Russian-Ukrainian war (Art. 51, Para. 1), which is still in force today. It should be stressed that no special legal order has ever been applied at national level, so there was no relevant practice after the change of regime in 1989.

The declaration of the state of danger has divided public opinion, including the scientific community, sometimes debating and sometimes justifying its constitutionality. It should be pointed out that when the state of danger was declared on 11 March 2020, the condition for declaring the state of danger was a natural disaster or industrial accident endangering life and property. And a state of emergency has been declared due to a "human pandemic causing mass disease." In the Hungarian constitutional system, however, a human pandemic cannot be interpreted as a natural or an industrial disaster. Thus, according to many authors, the declaration of the state of danger at the time was unconstitutional (Szente, 2020, p. 132).

According to Gábor Mészáros, the extraordinary measures could have been ordered without the risk of a significant limitation of fundamental rights under the ordinary legal order, which was made possible by the health crisis under the Act CLIV of 1997 on Health (Mészáros, 2019, p. 66). Others argue that the codification of the relevant provisions of the Act CLIV of 1997 on Health was hardly a global epidemic that would paralyse the whole country for months or years. It would be considered unrealistic and contrary to the principle of the Act for a specialised administrative authority under the Government to decide on the closure of all educational institutions, which would last for months and affect a significant part of society. On the other hand, it should also be pointed out that the Chief Medical Officer, who is not a legislator, could not have ordered the restrictive and prohibitive provisions by law. In the absence of a law, there remains the individual decision and the normative instruction, but neither could have been a legal solution (Horváth, 2021, p. 155).

As regards the constitutionality of the decree declaring the state of danger, the CC stressed that it is up to the legislator to decide whether the conditions for the declaration of a special legal order are met, whether the limitation of fundamental rights is justified and to what extent the limitation of fundamental rights is justified [Decision 23/2021 (VII. 13) of the CC, Reasoning (28)]. These are questions of expediency, and therefore the court has neither the competence nor the jurisdiction to examine the constitutionality of the decrees under a special legal order. Consequently, the CC did not examine the constitutionality of the government decree declaring the state of danger.

3.2.2 Serbia

In Serbia, "when a public danger threatens the survival of the state or citizens, the National Assembly declares state of emergency," (Constitution of the Republic of Serbia, 2006, Art. 200, Para. 1) by majority of the total number of MPs. The decision is valid for a maximum of 90 days, and after the expiration of this period, the decision's effect can be extended by another 90 days. Despite this clear jurisdiction of the parliament, on 15 March 2020, the state of emergency due to the COVID-19 crisis was declared by co-signature of the President of the National Assembly, the Prime

Minister and the President of Serbia (Sl. glasnik RS, No. 29/20). The Constitution of Serbia only allows for such joint decision-making, as an exception, "if the National Assembly cannot meet." Reasons for this are not defined in any law, nor are they specified in the Constitution itself. In fact, it is up to the President of the National Assembly to determine whether it is possible to convene the parliament, or not. The Rules of Procedure of the National Assembly do not contain provisions on electronic meetings, MPs vote publicly and in person. Therefore, any limitation on the physical assembly of people in one place—which was an essential tool to protect against COVID-19, especially in the early days—also affected the functioning of the parliament. Actually, this is how the President of the National Assembly subsequently explained why the National Assembly could not meet properly and declare state of emergency in the ordinary course of proceedings; notwithstanding that the official ministerial order on the ban on public gatherings in indoor places entered into force only on 21 March 2020 (Sl. glasnik RS, No. 39/20), 6 days after the declaration of the state of emergency, "bypassing" the legislator.

According to some views, "the mentioned constitutional provision refers to the factual impossibility of gathering of MPs. And no act of the Government or any executive body may be an obstacle to holding a session of the highest legislative body" (Glušac, 2021, p. 152). On the other hand, most MPs, except for a few opposition members, remained silent on the lack of parliament's substantive involvement in the process (Tepavac and Branković, 2020, p. 28). Self-marginalisation of the National Assembly in favour of the executive branch is a permanent feature of Serbian parliamentarism, "so it could not be expected that it would be different during the state of emergency" (Simović, 2020, p. 13). Moreover, according to the CC of Serbia, favouring efficiency over representation is just in the spirit of the Constitution, and not contrary to it, because "waiting" for the conditions to be met for a parliamentary session can have unpredictably harmful consequences (CC of Serbia, No. IUo-42/2020). However, pursuant to another view, maybe the National Assembly could not factually meet, but there was no legal obstacle to this. The constitutional right of the National Assembly to meet is stronger than any decision of the Government, and any other interpretation that legitimises the government's ability to limit or even ban parliamentary sessions, is equal to the institutionalisation of a *coup dětat* (Marinković, 2021, p. 131–132).

On 21 May 2020 the CC refused to start the examination of the constitutionality and legality of the declaration of the state of emergency which was challenged because of the procedure itself and the lack of material reasons. Concerning the way how the decision was adopted, like in Hungary, the CC accepted that it is a discretionary decision of the deputies how and according to which constitutional provision they act under conditions of rapid spread of an infectious disease. Organisational capabilities of the National Assembly to meet without delays is a factual, and not a legal issue that the CC cannot assess. As regards the material part of the introduction of the state of emergency, the CC emphasised "that it cannot be concluded that the constitutional basis for declaring a state of emergency did not exist" (No. IUo-42/2020). Based on the premise that *two negatives make a positive*, it can be concluded—even by a twisted logic—that the concrete case could threaten the survival of the country and its citizens, but the court was not competent to estimate to which extent (Beretka, 2023, p. 135).

According to the initiatives, successful management of the crisis in Serbia, caused by COVID-19 could have been resolved under the conditions of the so-called emergency situation (*vanredna situacija*). Unlike state of emergency, which must be introduced for the entire country directly on the basis of the Constitution, in the procedure described above, in order to preserve the survival of the state, an emergency situation arises in security cases that are unpleasant, vicious and dangerous, like a virus epidemic, but does not threaten the survival of the state and people in toto (Šabić, 2020). It has several degrees, depending on whether the risks and threats or the resulting consequences for the population, the environment and material and cultural assets occur scattered (only in certain regions or municipalities) or actually affect the whole country. In the latter case the risks and threats are of such scope and intensity that their occurrence or consequences cannot be prevented or eliminated by the regular action of the competent authorities, and the Government must declare an emergency situation for the entire country, based on the proposal of the Republic Headquarters for Emergency Situations. Although it is almost impossible to accurately define the border line between these legal categories (state of emergency and emergency situation in the entire country), there is no doubt that "the legal 'capacity' of an emergency situation does not guarantee such an effective response" (No. IUo-42/2020) as a state of emergency. Serbia's decision to introduce a state of emergency instead of declaration of an emergency situation can probably be justified by the postponement of the already called parliamentary elections; because derogation of voting rights was permissible only in a state of emergency. Otherwise, the health crisis caused by COVID-19 in Serbia could have been successfully handled by authorities within ordinary legal order, based on the laws regulating emergency situations (Marinković, 2021, p. 128–129).

As the relevant constitutional provision states, "when the decision on the state of emergency has not been made by the National Assembly, the National Assembly confirms it within 48 h of its adoption, i.e., as soon as it is able to meet" (Art. 200, Para. 8) This took place on 28 April 2020, after all security preparations had been made for a face-to-face meeting of representatives (protective gear and barriers to enable the respect of physical distancing). Finally, the state of emergency in Serbia was lifted on 6 May 2020, by decision of the National Assembly.

3.2.3 Croatia

"Unlike many other national constitutions, the Croatian Constitution does not necessitate a parliamentary declaration of the 'state of emergency' or provide the Government with any emergency powers exceeding its regular mandate for as long as the Parliament is capable of assembling" (Bačić Selanec, 2020). Instead, it only stipulates that in times of war, immediate threats to the independence and unity of the state, or major natural disasters the Croatian Parliament decides by two-thirds majority on the derogation of fundamental rights. Ergo, "state of emergency" exists as a matter of fact, not requiring an official legal declaration. It therefore logically arose whether or not COVID-19 counts as a natural disaster. Terminologically different terms referring to emergencies usually do not imply substantial differences and are generally reduced to large-scale natural disasters or other threats (Karovska Andonovska, 2022, p. 39). However, while the constitutions of North Macedonia and Republic of Srpska specifically mention the epidemic as the basis for the introduction of a state of emergency, in

the case of Croatia classification of COVID-19 as a natural disaster generated a constitutional legal debate. Namely, if the COVID-19 is a natural disaster, the Parliament can only suspend fundamental rights with a qualified majority. Otherwise, Article 16 of the Constitution shall be applied, which refers to the limitation of rights in "peacetime," within ordinary legal order. Article 16 does not require qualified majority or any special circumstances to restrict fundamental rights; the only condition is that the restriction should be prescribed by law, and it must be proportionate to the goal to be achieved. However, the CC of Croatia did not consider this issue to be so complex. According to the court decision, it is up to the parliamentary representatives to decide which constitutional provision to refer to when restricting a fundamental right. In the particular case, the Croatian Parliament did not find that COVID-19 represents such a threat that could be equated with a major natural disaster. Although every epidemic is also a natural disaster, COVID-19 was not a "sufficiently strong reason" for the activation of Article 17 of the Constitution.

To avoid any confusion, the Citizens' Initiative "Let us decide together!" (*Odlučujmo zajedno*) submitted a proposal for calling a referendum to amend the relevant constitutional provision by adding the words "epidemic, i.e., pandemic." As stated in the explanation "only amendment of Article 17 can guarantee that in the future, in a state of epidemic, i.e., pandemic, the Croatian Parliament must decide on the derogations of freedoms and rights by the highest qualified majority recognised by the Constitution of the Republic of Croatia." This proposal also corresponds to an academic standpoint: measures related to the fundamental values of every society must be decided upon in crisis situations only by the highest level of agreement. There is no room for political games because only "the broadest social consensus contains the idea of finding the best quality measures, acceptable to as many people as possible" (Gardašević, 2020).

Although from a formal and legal point of view the referendum question met the requirements of constitutionality, the CC of Croatia has found that it was not in accordance with the Constitution: looking at the Constitution as a whole, the referendum question did not meet "the requirement of reasonable purpose and effectiveness of the referendum, which are inherent to the rule of law as one of the highest constitutional values" (No. U-VIIR-2180/2022). The court decision was widely criticised, considering that the CC, by exceeding its authority, limited direct democracy of citizens, and supported the Parliament's unlawful luxury of choosing among the powers guaranteed by the Constitution in Article 16 and 17, with almost no restrictions.

"In Croatia the government tried to find alternatives to gain the necessary legal base for emergency management without declaring a state of emergency" (Jashari et al., 2021, p. 823). Unlike in Hungary and Serbia, where in addition to declaring a state of emergency, the executive branch took over all decision-making powers from the parliament, in Croatia the representatives chose a more controversial solution. Although the Croatian constitution also contains a provision in case the Parliament is prevented from doing its work (then the President of the Republic issues decrees with force of law at the proposal of the Government and co-signed by the Prime Minister) (Art. 101, Para. 2), the Croatian Parliament decided to maintain the ordinary legal order and by an "ordinary law"—passed by simple majority, in urgent legislative procedure—established the authority of the Crisis Headquarters that's got almost total authorization to impose restrictions on human rights due to COVID-19. The Crisis Headquarters as a "professional, operational and coordinating body for the implementation of civil protection measures and activities in major accidents and disasters" under the direct supervision of the Government, ordered security measures to prevent the spread of the virus, in collaboration with the Minister of Health (No. U-I-1372/2020). The fact that the Crisis Headquarters could limit fundamental rights based on amendments to a law and not on the basis of the Constitution and took over the role of the Parliament was not a concern for the CC. Like the Serbian CC, the CC of Croatia accepted that the parliament's self-restraint is the sovereign right of the MPs, even if it means assigning quasi-legislative powers in "peacetime" on a body that is not under direct parliamentary control. The Croatian Parliament can only through the Government control its bodies, including the Crisis Headquarters, request special reports on their work and, in case of dissatisfaction, initiate a vote of no confidence in the Government (Gardašević, 2021, p. 115). For the CC, this is acceptable as long as the CC's follow-up control is ensured.

3.3 Derogation of fundamental rights in constitutional court practice

3.3.1 Hungary

According to the Fundamental Law, during the period of special legal order, the exercise of fundamental rights—with the exception the right to life and human dignity, the prohibition of torture, inhuman treatment or slavery, and the guarantees of criminal procedure and the right to a legal remedy—may be suspended or may be restricted beyond what is required by the necessity-proportionality test (Art. 52, Para. 2). The necessity-proportionality test applies under an ordinary legal order, which is defined in the Fundamental Law as follows: A fundamental right may only be restricted to allow the effective use of another fundamental right or to protect a constitutional value, to the extent absolutely necessary, proportionate to the objective pursued and with full respect for the essential content of that fundamental right (Art. I. Para. 3). The three basic elements of the necessity-proportionality test are: legitimate goal, necessity and proportionality. Of these, the proportionality aspect often receives more attention in the analysis. According to Zoltán Pozsár-Szentmiklósy, a conceptual order can also be identified in the analysis criteria: Only the means capable of achieving the legitimate aim can be considered necessary, and only the necessary means can be subject to the proportionality. As suitability is often examined in the context of necessity, it is also possible that only proportionality is examined in the procedure. However, it is important to note that this is a risky practice. Some elements of the examination criteria require objective answers, and only in the final phase of the examination is subjective judicial discretion possible (Pozsár-Szentmiklósy, 2014, p. 30).

And the state of danger caused by the coronavirus pandemic has significantly changed the CC's practice on the limitation of fundamental rights. The first stage of the change is the decision of the CC 15/2021 (V.13). The petitioners invoked a violation of the right to access data of public interest, as the Government extended the deadline for the submission of a request for data of public interest due to the effectiveness of the fight against the COVID-19. According to the petitioners, the Government violated the right to access data of public interest by extending the deadline for complying with the data request. The Government cited the successful defence against the

coronavirus. The petition was rejected. According to the CC, the necessity-proportionality test must be applied in the case of limitation of a fundamental right under a special legal order, but the circumstances in which the state of danger was declared must be considered. Accordingly, it examined the triad of legitimate goal, necessity and proportionality in relation to the disputed legislation. The epidemic situation as a circumstance justifying the declaring of a special legal order appeared in all three aspects, although rather concisely: the legitimate goal is to combat the epidemic, the disclosure of data of public interest hinders the fight against the epidemic, so the extension of the deadline for the execution of the request is justified, necessary and not disproportionate. A similar argument could be conceivable under any ordinary legal situation (Erdős and Tanács-Mandák, 2023, p. 562).

The next step in defining the type of test to be applied was the decision of the CC 23/2021 (VII.13). This decision follows a complete ban on the right to assembly and according to the CC, the decree did not violate the freedom of assembly. In this decision, it was no longer a requirement that the legislator must choose the most moderate intervention, it is sufficient that the measure applied is suitable for the containment, eradication or mitigation of the consequences of the epidemic situation. In the context of proportionality, the decision drew attention to the importance of temporality (Erdős and Tanács-Mandák, 2023, p. 563–564). The longer the period of suspension of a fundamental right is, the stronger the justification needed to maintain the limitation is. The legislator must recurrently consider—as it does in other cases—the collision between the exercise of the fundamental right and the achievement of the epidemiological goals and, where the epidemiological goals permit, allow at least partial exercise of the fundamental rights [Decision of the CC 23/2021 (VII.13), Reasoning (34)].

The third step in the definition of the test of limitation of the fundamental right under a special legal order is the decision of the CC 27/2021 (XI.5). The Government has decreed that from 1 May 2021, certain activities (e.g.: attending sporting events, participating in cultural events, restricting visits to restaurants and accommodation) can only be used if people can prove that they are protected against the coronavirus. The petitioners claimed that the decision was discriminatory. According to the CC, the decision did not violate any fundamental rights, since those who are protected do not form a homogeneous group with those who have not received the vaccination or have not been infected. In this decision, the CC stressed that it cannot decide on questions of scientific truth, cannot evaluate scientific research, and referred to the results of national and international scientific forums [decision of the CC 27/2021 (XI.5), Reasoning (82)–(94)]. And the Court has already examined Article 53 (3) of the FL instead of the proportionality test for establishing the requirements of periodic review (Erdős and Tanács-Mandák, 2023, p. 565).

Finally, decision of the CC 3128/2022 (IV.1) summarised the results of the development of the special legal order test. In the case, the CC had to decide on the constitutionality of the compulsory use of the coronavirus vaccination by employees of state institutions, but the measure did not violate fundamental rights (for example: human dignity; prohibition of torture; right to freedom of thought, conscience and religion; right to work). Describing its steps of evolution in relation to the general test other than the special (public interest, reasonableness) test as follows: based on the test on the restriction of fundamental rights under a special legal order, it is to be examined whether:

a) There has been an intervention to the fundamental right in question,
b) The restriction of fundamental right has a legitimate goal,
c) The restriction of fundamental right is suitable for achieving the legitimate goal, and, subject to Article 53 (3) of the Fundamental Law, whether.
d) The legislature has periodically ascertained whether the maintenance or extension of the restriction is justified [Decision of the CC 3128/2022 (IV.1), Reasoning (168)].

By not giving the legislator a blank mandate for emptying fundamental rights referring to the possibility of their suspension, the CC has preserved its role as a constitutional guardian and has given meaning to the provision of the Fundamental Law that prohibits restrictions on its operation even in a special legal order. The CC strengthened this approach further by using the special legal order test only for those legal acts adopted in a special legal order which were concretely related to epidemic control. By gradually modifying the test to apply under a special legal order, the CC has developed a slightly less rigorous test but one which ensures that the legislator cannot use the special legal order legislation for a purpose unrelated to the elimination of the circumstance giving rise to its imposition and to reducing its consequences, or for undertaking a task which requires expertise that the Government does not possess, or one that withdraws the chance of rapid intervention by the rapid intervention by the Government (Erdős, 2022, p. 118–119).

Although the paper focuses on the practice of restriction of fundamental rights during the coronavirus epidemic, it is worth briefly mentioning that the Hungarian Government also declared a state of danger because of the Russian-Ukrainian war. In this context, the Court pointed out that an armed conflict poses a completely different challenge than a pandemic. Consequently, the role of the Government in the constitutional system is also different in the two crises. This is evidenced by the abolition of the limited duration of government decrees in emergency situations. In the decision of the CC 3004/2024 (I.12), the Court was dealing with an infringement of the freedom of enterprise and created a new test. In the case it is to be examined whether:

a) There has been an intervention to the fundamental right in question.
b) The restriction of fundamental right has a legitimate goal.
c) The restriction of fundamental right is suitable for achieving the legitimate goal.
d) The disadvantages caused by the restriction of a fundamental right outweigh the advantages of achieving a legitimate aim (proportionality) [Decision of CC 3004/2024 (I.12), Reasoning (56)–(57)].

A necessary element of the special legal order is that the Government can act quickly and effectively to avert a crisis, which necessarily entails a reduction in the control function of other state organs. This can be seen with the reformulation of the necessity-proportionality test of the CC. It is worth pointing out, however, that the reduction in the control function of the CC is not due to the

provisions of the Fundamental Law, as the body appointed its own position, which was not an easy task due to its lack of competence in special legal order. The starting point for finding this position was that the CC refused to examine the constitutionality of the decree declaring the state of danger. On the other hand, the reduction of the control function can be explained mainly by the increased importance of the legislative discretion of the state of danger in the decision-making process of the Court. As an excellent example, in the decision on a request for access data of public interest, the Court simply stated that an extension of the deadline for responding would not infringe the right to access data of public interest if it was indeed necessary to avert the epidemic [Decision of CC 15/2021 (V.13), Reasoning (43)]. And whether this is really necessary is for the legislator to decide, it cannot be examined from a constitutional point of view.

The CC also stressed that it is up to the Government to decide what measures are appropriate to avert the crisis. If justified, it may decide to maintain restrictions on certain fundamental rights. It is true that the Court formulates it as a requirement that it is a question of constitutionality whether the legislature applies the fundamental rights test when adopting rules. If this is not done, the restriction of the fundamental right is disproportionate, leading to the annulment of the rule. The legislator must constantly monitor whether the general suspension of a fundamental right is indeed an indispensable measure to achieve the goals pursued by the special legal order. It is not the declaration of a state of emergency, but the specific circumstance giving rise to the declaration of a state of danger that justifies the restriction of fundamental rights. Only a state of danger does not justify the total exclusion of a fundamental right, but it is necessary to decide on an ongoing basis whether the circumstances justify the suspension of a fundamental right [Decision of CC 23/2021 (VII.13), Reasoning (35)]. From this decision, we can also conclude that the CC practically leaves the discretion of the proportionality of the restriction of fundamental rights to the discretion of the legislator and the measure of this is temporality.

3.3.2 Serbia

During the state of emergency, when examining the constitutionality of the restrictive measures, the Serbian CC should primarily check whether the degree of deviation from fundamental rights did exceed the necessary level—as stated in the Constitution (Art. 202, Para. 1). And this necessary level, according to the Court, was the preservation of public interest, i.e., the citizens' health.

There are authors who by deviation from fundamental rights mean their temporary, but complete abolition (Simović and Petrov, 2018, p. 133–134; Rajić, 2011, p. 711), but it seems that the Constitution allows "a dosed narrowing of the scope of exercising rights" (Đurić and Marković, 2021, p. 40). This is proven by the attitude of the CC regarding the acceptable limitation of the external element of the freedom of religion, but the simultaneous preservation of its internal aspect. Namely, most petitions to the CC were based on Serbia's very strict restrictive measures regarding freedom of movement. Although the country continuously reviewed the conditions of the ban on leaving the residence, the protection of fundamental rights was seriously questioned in several cases (see Petrović and Pokuševski, 2021). One of the bans on leaving the residence at the weekend also extended to the time of the Orthodox Easter holiday, due to which violation of freedom of religion was also considered by the court. However, it found that in this specific case, it is not about a measure derogating from freedom of religion, but about a measure derogating from freedom of movement during a religious holiday. The freedom to manifest religion by performing religious ceremonies or attending a religious service can be limited by law even in a regular situation if it is necessary in a democratic society. However, this does not mean that one cannot practise the religion of his own choice in a home environment (No. IUo-45/2020). Some of the restrictive measures also extended to churches and gatherings there, which raised the issue of the secular character of the state according to the Constitution. On the other hand, the CC has already taken a position that in the case of Serbia separation of state and church is based on cooperative foundations (No. IUz-455/2011), i.e., a relationship in which the state and the church legislation and activities intertwine and complement each other (Avramović, 2011, p. 296). Anyway, returning to the basic question itself, the coherence of the text of the Constitution dictates that "if it is possible to limit the freedom of religion on regular occasions for certain reasons (life and health of people, morals of a democratic society, freedom and rights of citizens, prevention of causing or inciting religious, national or racial hatred, etc.) which represent a superior value (or goal) in relation to freedom of religion, then it is all the more possible in a state of emergency that was declared precisely for the purpose of protecting that superior value" (Milošević, 2020, p. 190).

According to the court the strict rules on leaving residence did not mean deprivation of liberty neither according to its purpose, nor according to its content. The purpose of those measures was to protect especially vulnerable persons additionally and effectively from a dangerous infectious disease, while the content of those measures essentially came down to creating the necessary conditions for this protection. On the other side, the centres for social protection, hospitals, retirement homes did not allow visitors, neither did the ombudsman, who highlighted in a 2020 report that he was unable to fulfil his function in field of prevention of torture in these institutions as he was not allowed to enter (Zaštitnik građana, 2021, p. 16–17).

Although a few petitions highlighted that some of the restrictive measures particularly discriminated against older persons (e.g., citizens over the age of 65 were not allowed to leave their homes except once a week, when they could go shopping in the early hours of the morning, or those who were still actively working could not work compared to younger people), the court did not deal with this issue in more detail. During a state of emergency, the Serbian Constitution treats the equal rights policy differently than in "peacetime" and does not prohibit "'any form of discrimination' which would allow any form of discrimination to be included in the interpretation of this constitutional provision" (Pajvančić, 2009, p. 266) but enumerates prohibited grounds severally. According to the Art. 200, Para. 2, in a state of emergency, only those measures are not permitted that make difference between people because of their race, gender, language, religion, nationality, and social origin. The age is not specifically mentioned. On the other side, after the end of the state of emergency (but still during the fight against the spread of the virus) a Government decree that permitted longer working hours for catering facilities and night clubs in the territory of the city of Belgrade compared to other municipalities in Serbia, was challenged before the court due to alleged discrimination based on residence and seats, but the CC did not accept that as a constitutionally relevant reason (No. IUo-100/2020).

Measures restricting movement had practical consequences, but most of the relevant violations did not reach the CC, with a few exceptions. For example, the court established the violation of the right to trial within a reasonable time in several cases, in which closures due to COVID-19 indirectly contributed to the prolongation of the procedures but did not decisively influence their length (see, CC of the Republic of Serbia, No. Už-10648/2020, Už-1572/2019, Už-6390/2020). On the other side, in another case, the court found a violation of the right to a fair trial because the High Commercial Court "did not take into account the specific social circumstances of that period, and the factors that made it difficult to comply with compulsory legal deadlines" (No. Už-1061/2021).

The only case that reached the tolerance threshold of the CC concerned the possibility of double punishment and the violation of the *ne bis in idem* principle. Namely, during the state of emergency for certain misdemeanours due to non-compliance with the movement ban, misdemeanour proceedings could be initiated and completed, even if a criminal proceeding had been already initiated or was ongoing against the perpetrator of the act that included the features of that misdemeanour—regardless of the constitutional category of *ne bis in idem* (Sl. glasnik RS, No. 39/20). The court applied the *Engel* criteria from the practice of the ECHR which primarily refers to the assessment of whether the two procedures (in the concrete case a misdemeanour proceeding and a criminal proceeding) are sufficiently closely related in terms of content and time (see, Engel and Others v. The Netherlands). Based on the test carried out, the court established that even though conducting two procedures, which concern different subjects, arising from the same life event, and from which two sanctions can also arise, is not absolutely excluded—if certain conditions are met (taking into account the type of those different procedures, the appropriate connection in terms of time and space, the character of different sanctions), in the examined case the challenged regulation did not reach "a fair balance between the interests and rights of the individual protected by the principle of *ne bis in idem* and the public interest which mandates/enables the conduct of two procedures in a specific case" (No. IUo-45/2020). The CC retroactively determined that these provisions related to potential double-sentencing and double-punishment of a misdemeanour due to violation of the prohibition of movement in a certain period, and a crime of not complying with health regulations during the COVID-19 pandemic—with regard to the same act—were not in accordance with the Constitution during their validity. Not to mention that during a state of emergency no derogation from legal certainty in criminal law is allowed, an integral part of which, otherwise, is the principle of *ne bis in idem* (Škulić, 2022, p. 82).

3.3.3 Croatia

In Croatia, the Crisis Headquarters had a central role in the adoption of restrictive measures, which regulated all issues in separate decisions. Instead of limiting freedom of movement, freedom of assembly, or work-related rights in a general act, it created separate rules for all social areas, e.g., for visiting playgrounds, funerals, working hours of commercial establishments, marriages, border crossing, public transport, and other public gatherings. According to the statement of the CC of Croatia, with appropriate amendments to the Law on the Protection of the Population against Infectious Diseases and Law on the Civil Protection System, the Crisis Headquarters was authorised to regulate all these issues that otherwise fall within the competence of the Croatian Parliament, including the limitation of fundamental rights. The fact that the challenged Law was not adopted on the basis of Article 17 of the Constitution (by two third majority applicable during crisis situations), did not by itself make this act unconstitutional (No. U-I-1372/2020). And the assumption of constitutionality also applies to all restrictive measures adopted by the Crisis Headquarters on the basis of the disputed law, at least in terms of the existence of a valid legal basis (Ljubanović and Đanić Čeko, 2022, p. 505). Although some of the justices criticised the decision—because such an attitude supported the activity of a "parallel legislator, headed by the Minister of Police, who did not have to be burdened by constitutional restrictions or legislative procedures" (dissenting opinion in No. U-I-1372/2020), this did not have any particular practical consequences in the end.

After the epidemic subsided, the Croatian parliament tried to retroactively enact the restrictive measures of the Crisis Headquarters by amending the above-mentioned laws. Although the CC indicated the faults of the Parliament because of incomplete justification, it finally rejected the petitions that challenged the amendments' constitutionality: "In connection with the ongoing COVID-19 pandemic, the CC expects the legislator to provide a justification for the (mandatory) measures to be taken in the future, on the basis of which the addressees of the measure and the public can find out for what reason each measure was taken, and which shows that the constitutional principle of proportionality was respected" (No. U-I-5781/2021).

The CC—otherwise being too lenient with the Crisis Headquarters (Blagojević and Antunović, 2023, p. 133)—remained consistent concerning the outcome of constitutional reviews in COVID cases: it either rejected or did not accept proposals to initiate proceedings to assess the constitutionality and legality of restrictive measures, except in three cases.

First, the court found (acting *ex officio*) that the ban on the operation of commercial establishments on Sundays was not in accordance with the Constitution because when determining a non-working day during the week, the Crisis Headquarters did not act in accordance with the principle of proportionality. The court could not *prima facie* rule out the constitutionality of this measure, or that there were actually objectively and rationally justified epidemiological reasons for its adoption. Therefore, it examined whether the ban on the operation of commercial objects on Sunday was proportionate to the goal to be achieved. According to the Government's justification, the highest traffic usually occurred on Fridays, and Sunday was classified as a moderately risky day from an epidemiological point of view. So, it was considered an optimal choice in the sense of the maximum reduction of the epidemic risk, but it minimally damaged the lives of citizens and the normal conduct of commercial activities. However, the court did not find this explanation convincing (Kokić-Hinović, 2022, p. 176). Although the decision was quite short, it was followed by lengthy dissenting opinions. According to Justice Šumanović the court did not determine which fundamental right was violated by the measure; it did not establish the extent and intensity of the interference with this right, or its consequences, and it was also how to determine the proportionality between the positive effects of the measure in question and the negative consequences of the restriction of the given right. "Since it is an emergency measure, the duration of which is limited, the court must not take over the role of the legislator, in this case the role of the Crisis Headquarters, just

because, in its opinion, another measure would have been better in terms of its effectiveness or adequacy. That is why it can only examine whether the measure was apparently illegal or unacceptable, or whether an obviously inappropriate measure was chosen" (No. U-II-2379/2020). That is another question is "how precisely Sunday trade is detrimental to the epidemiological situation in the country whereas mass gatherings in places of worship, coffee shops and hairdressing salons are no" (Horvat Vuković and Kuzelj, 2020, p. 62). Namely, not all economic activities were limited or prohibited on Sundays, only certain ones. But the court did not consider this to be discriminatory, or that the state favoured certain economic sectors (No. U-II-1373/2020).

Second, the court did not accept that the autonomy of universities extended to the authority of the university management to decide on the exclusion of students from the implementation of the Decision on mandatory testing for the SARS-CoV-2 virus and mandatory presentation of evidence of testing, vaccination or passing this infectious disease in order to enter public premises. According to the challenged decision (Narodne novine, No. 121/21. and 10/22), public employees or anyone who worked in a state-owned and managed institution might not enter the public premises if they could not prove their vaccination status, or that they had been infected, or tested. This also applied to customers. The decision did not apply only to university students who were in university halls, unless the university management had decided differently. The decision was annulled only in this part because in this specific case, the deviation from the exception (exemption for students from testing, presenting vaccination status etc.) which was tried to be explained with university autonomy, was not justified by the COVID-19 pandemic and the related epidemiological and other objective and verifiable data; so it was not in line with the announced legitimate goal. The CC accepted the reasons why the decision did not apply to students during their stay in higher education institutions. However, it is considered constitutionally unacceptable that a higher education institution could decide otherwise because it falls outside the framework of the university autonomy (see no. U-1902/1999). As for the rest of the decision, according to the court, the aim of the measure—the orderly and continuous provision of state, local and general public affairs—was legitimate (no. U-II-7149/2021). Since the costs of testing were borne by the state in the case of employees, the question of discrimination against clients, who paid for it themselves, arose. But according to the CC these two categories of citizens are not comparable, and the cost of testing does not represent an excessive burden on the citizens, who do not necessarily visit these institutions every day.

In addition to the previously mentioned public administration workers, social and health workers were also required to obtain a COVID certificate if they wanted to work. The CC accepted the Government's explanation that by refusing such an employee to enter the business premises, the employer protected the life and health of others, which is/was also an obligation according to the labour protection law. To what extent the right to work is violated in specific cases, the CC should decide separately in each individual case in the procedure initiated with a constitutional complaint (No. U-II-5417/2021). On the other hand, there were no sanctions for workers in the disputed decisions, but it only instructed the employer that a worker without COVID certificate cannot start work. Therefore, in this context, "there is a legal gap that allows extensive interpretations by employers, based on which the labour law status of workers may be threatened, without there being any legal basis for such behaviour" (Bilić, 2022, p. 536).

In the third exception the CC did not find a reasonable and objective justification for the technical restrictions that significantly limited the active participation of the deputies at the sessions of the Parliament, in the conditions of the pandemic (No. U-I-4208/2020). Namely, each parliamentary group had the right to designate at least one member who could attend the session of the Parliament, the time for comments was shortened, the possibility of audiovisual and electronic voting was introduced. In view of the latter, according to the court, there were the means for all elected representatives to participate in the work of the Parliament, not just the selected ones.

Given that the ordinary legal order was maintained in Croatia during the pandemic, the CC primarily applied the classic proportionality test when examining the potential violations of fundamental rights related to restrictive measures. And according to the court, the disputed measures could only be considered proportionate if they were necessary to protect against the spread of the virus, and based on available scientific data they had no alternative, and there was no less drastic legal solution that would achieve the same goal with a lesser degree of violation of fundamental rights (test of the least restrictive or the less onerous measure) (No. U-I-5781/2021). On the other side, a parallel opinion of Justice Mlinarić and Justice Šeparović highlighted that the test of strict necessity could not be applied in the period when the epidemic was still "alive" because actually the same epidemiological measures were used from the beginning, and they differed only in their scope, intensity and duration (obviously there was no other effective measure, or the profession did not know about it). An example of this is the mandatory wearing of masks as one of the most basic and lasting protective measures almost all over the world. In Croatia it was constitutionally acceptable in general, but the CC examined separately how much this measure violated the dignity or other rights of the individuals in individual cases. Due to the strong public interest, the mandatory wearing of masks was a social necessity, especially considering the Article 69 of the Croatian Constitution (everyone is obliged to contribute personally to health protection). Ergo, wearing a mask is not a matter of personal choice, as this choice can potentially endanger others (No. U-II-3170/2020). A treatment violates human dignity if it has at least minimal weight that always depends on the specific case, how long it lasted, what were the physical and mental consequences, in some cases the gender, age and health status of the victim may also be relevant (No. U-III-6559/2010, No. U-IIIBi-268/2020). The court, for example, upheld the constitutional complaint in which a citizen suffering from asthma was punished for not wearing a mask in a shop. According to the assessment of the CC, it does not matter whether the specific case is about short-term or long-term wearing of a protective mask, as explained by the lower courts. Although not having specialist medical knowledge, the lower court put itself in the position of a medical expert and drew its own conclusions about how long the patient could or could not wear a protective mask without endangering his health (No. U-III-4208/2022).

4 Concluding remarks

Many studies have been published on the effects of the COVID-19 pandemic on human rights. The present paper is one of

those that seeks to compare the reactions of states otherwise facing the same danger, and more precisely, the position of the constitutional courts regarding human rights derogations in the fight against the virus.

Comparing the practice of Hungary, Serbia and Croatia, it reveals several similarities and differences. As for the differences, all three countries regulate the state of exception in different ways and have also activated different constitutional provisions due to COVID-19. While the state of emergency and the so-called special legal order was introduced in Serbia and Hungary, ordinary legal order was maintained in Croatia; but regardless of this, the executive power took over control of the epidemic management in all three cases. As stated by the ECHR, it is up to each contracting state, within its own responsibility for the survival of the nation, to determine whether survival is threatened by a public danger and, if so, how far it is necessary to go to avoid that danger (case of Aksoy v. Turkey). Therefore, not introducing a state of emergency is not necessarily contrary to the protection of fundamental human rights as long as the purpose of the decision is legitimate. And this is also true in reverse: the goal of the declaration of state of emergency is legitimate as long as "it is not aimed at introducing a dictatorship or violating human rights, but at removing serious dangers and quickly returning the country to normal functioning" (Nastić, 2020, p. 73). Considering that the state of exception in Hungary has lasted for several years and still exists today, serious questions are raised about the constant dominance of the executive power over the parliament, as well as the almost limitless possibility of measures that can restrict fundamental rights. Currently, there is a special legal order in Hungary because of the Russian-Ukrainian war. It seems that the CC has adapted to the situation, as it has developed a new test for the restriction of fundamental rights, giving the green light to government measures.

Although the constitutionality of the declaration of state of danger in Hungary has been questioned by several authors, the CC has not examined the declaration decree, arguing that it is for the Government to decide whether the conditions for this are met. Similarly, the Serbian and Croatian CC found that the sovereign right of the MPs to decide who introduces, or does not introduce, the state of exception, and in which procedure. The constitutional courts also did not investigate in depth whether the pandemic was a natural disaster or not, while this raised a constitutionally relevant question in Hungary and Croatia as well. In Serbia, the question was whether it was necessary to declare a state of emergency across the entire country, or whether it would have been possible to successfully manage the crisis through the so-called emergency situation. But as we have already mentioned, despite the different legal frameworks, the constitutional courts did not examine the merits of the legality of the solutions; and in this way the legal basis of the restrictive measures was not questioned either from a constitutional point of view.

However, what turned out to be a much more complex problem was the extent to which it is necessary to limit fundamental rights due to COVID-19, especially considering "that basically the whole humankind has been and will remain subjected to some compulsory measure, irrespective of whether a concrete individual is infected or not" (Sándor, 2020, p. 389). In the case of previous epidemics, the restrictions and bans primarily affected sick persons. However, due to the nature of COVID-19, many people without symptoms were classified as a source of danger, which required a new medical and also legal approach. As a result, the discriminatory nature of the entire system also came to the fore, although no constitutional court has ruled this in the examined cases.

In Serbia, most of the measures restricting fundamental rights were adopted by amendments to the Government Decree on the Measures during the State of Emergency (Sl. glasnik RS, No. 31/2020, 36/2020, 38/2020, 39/2020… 60/2020) which was no longer in force during its constitutional review. Other Government decrees passed with the co-signature of the Head of State in the examined period mostly related to technical and organisational issues, financial support, and fiscal measures, and only some of them were subject to constitutional review. The CC of Serbia also decided on far fewer cases than the constitutional courts in Hungary and Croatia, where restrictive measures were usually included in a large number of separate decrees. As a result, a much richer constitutional court practice has developed in these two countries in the field of the relationship between fundamental rights restrictions and the COVID-19, than in Serbia.

In the Hungarian constitutional system, the general test for the restriction of fundamental rights is the necessity-proportionality test. This was applied by the CC during the state of danger, as well. However, the test was modified favorasing the public interest almost without exception, and the court accepted the restriction of fundamental rights as a legitimate tool in the fight against the virus, putting special emphasis on the legislative discretion as much more relevant. Although most of the COVID decisions in Croatia were affected by a whole series of dissenting opinions, pointing out the limitations of the necessity test during a still ongoing crisis, the consistency of the CC can be seen in action here as well, without exception giving priority to the "we-health" over the "me-health." A similar conclusion can be made in Serbia, although the proportionality test was applied less strictly in the case of restrictive measures adopted during the state of emergency.

In global terms, the most questionable situation was mandatory vaccination that was introduced only in Hungary in certain public institutions, among the examined countries. The CC did not consider it unconstitutional, justifying this decision by scientific results. Although mandatory immunisation against COVID-19 was not introduced in Serbia and Croatia, in both countries, a precedent immunisation doctrine already existed, which, according to some authors, could also be applied to the COVID-19 vaccinations (with very similar outcome than in Hungary). Namely, during the constitutional review of the Law on Medical Protection against Infectious Diseases, the Serbian CC adopted the following, related position: "the constitutional right to protect an individual's health is correlated, on the one hand, with the state's obligation to take appropriate protective measures, including preventive protective measures aimed at the entire population, and on the other hand, with the obligation of each individual to undergo certain measures which purpose is to realise others' right to health" (No. IUz-48/2016). So, the aforementioned obligation logically indicates the infeasibility of refusing vaccination, according to the court. Eliminating certain diseases from the entire population is a legitimate goal, and at the same time an obligation of the state. As it is a professional issue, the CC cannot get involved in examining the justification of the mandatory vaccination from a medical point of view; but as far as the legislator prescribes such health protective measures that have been determined by acknowledged medical experts to achieve the most favourable results in preventing the spread of infectious diseases,

individuals cannot call for the protection of their right to physical integrity against the protection of public health. Also, according to the Croatian CC "in the case of vaccination, it is an obligation to provide and accept health services of standardised quality and equal content for all persons … it is not a question of experimental treatment or examination, in such a way that a person is the object of scientific research without his consent or the consent of her parents but about the duty/obligation to vaccinate against certain infectious diseases" (No. U-III-7725/2014). Although the COVID vaccines do not fall within the scope of routine vaccination against diseases well known in med-science, in general, it is probable that deciding in such cases the national constitutional courts, but also the ECHR will accept "the flexible application of the test of necessity in a democratic society with the horizontal test of proportionality as well as the wide field of discretion recognised for the states" (Marochini Zrinski, 2022, p. 34).

Such flexibility, wide margin of discretion and emphasising the public interest and public health above all else generally characterised the examined constitutional court practices, proving that despite the very different crisis management and legal background, the constitutional courts were similarly lenient with the country's "excesses" in the case of derogations from fundamental rights—mainly due to the uncertainty, unpredictability and uniqueness of the situation. But as life goes on, and the more similar health challenges humanity faces, it will soon become clear how this attitude pays off against the preservation of centuries-old traditions of the rule of law and fundamental rights doctrine.

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The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

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Decision of the CC 23/2021 (VII.13.)
Decision of the CC 27/2021 (XI.5.)
Decision of the CC 3128/2022 (IV.1.)
Decision of the CC 3004/2024 (I.12.)

Serbia

Constitution of the Republic of Serbia, Sl. glasnik RS, No. 98/2006 and 115/2021.

Decision on declaring state of emergency (Odluka o proglašenju vanrednog stanja), Sl. glasnik RS, No. 29/20.

Decree on measures during the state of emergency (Uredba o merama za vreme vanrednog stanja), Sl. glasnik RS, No. 31/2020, 36/2020, 38/2020, 39/2020, 43/2020, 47/2020, 49/2020, 53/2020, 56/2020, 57/2020, 58/2020 and 60/2020.

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No. Už-1572/2019, July 13, 2023.
No. Už-6390/2020, April 27, 2023.
No. Už-10648/2020, December 21, 2023.

Croatia

Constitution of the Republic of Croatia, Narodne novine, No. 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14.

Decision on the introduction of a special security measure of mandatory testing for the SARS-CoV-2 virus and a special security measure of mandatory presentation of evidence of testing, vaccination or recovery from the infectious disease COVID-19 in order to enter the premises of public bodies (Odluka o uvođenju posebne sigurnosne mjere obveznog testiranja na virus SARS-CoV-2 te posebne sigurnosne mjere obveznog predočenja dokaza o testiranju, cijepljenju ili preboljenju zarazne bolesti COVID-19 radi ulaska u prostore javnopravnih tijela), Narodne novine, No. 121/21. and 10/22.

Decision on the necessary measure of mandatory use of face masks or medical masks for the duration of the declared epidemic COVID-19 (Odluka o nužnoj mjeri obveznog korištenja maski za lice ili medicinskih maski za vrijeme trajanja proglašene epidemije bolesti COVID-19), Narodne novine, No. 80/20. and 81/20.

Decisions of the CC of Croatia:

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The Hungarian governments in the decade of crises (2015–2024)

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The prime minister, and thus indirectly the government, had a strong position in the Hungarian chancellor-type parliamentary system established at the time of the transition to democracy. Since the 1990s, as a result of the *de facto* presidentialisation, this initially stronger position has been continuously and systematically strengthened. Since the balance of power between the legislature and the executive has shifted significantly in favour of the later. All these developments make it particularly interesting to describe the extraordinary measures taken in recent years and to assess their impact on the already modified system of separation of powers. Based on the relevant legislation, statistics and practice, the manuscript discusses and analyses how the congestion of legally and politically overlapping periods of emergency and special legal order has affected the already changed balance of power between the government and parliament, to what extent and how it has influenced the instruments used by the government for decision-making, and the dynamics of parliamentary work.

KEYWORDS

presidentialisation, Hungary, state of danger, special legal order, government, parliament

1 Introduction

There is a consensus in both Hungarian and foreign academic literature that the power available to the Prime Minister (PM) has been steadily increasing, and that the PM's room for manoeuvre in the legal and political dimensions has been expanding in Hungary over the past decades.

This research examines how, and to what extent, the prolonged state of emergency since 2015 has contributed to this trend.

During a state of emergency, the executive is expected to play a more central role vis-à-vis parliament and other political institutions. A state of emergency requires a massive delegation of power to the executive, as it is the only branch of power that has sufficient information to make the necessary decisions in the shortest possible time (Ginsburg and Versteeg, 2021, p. 1499).

The study examines what happens in a significantly prolonged state of emergency such as the one in Hungary, taking into account the fact that both the position of the government and that of the PM were explicitly strengthened in Hungary long before the first state of emergency was introduced.

The hypothesis of the study is that the degree of the government's strengthening (including the PM) in relation to parliament, resulting from the continuous and successive periods of states of emergency and special legal orders introduced in the last decade due to a series of crises (migration crisis, health crisis, economic crisis, war crisis), is caused by the level of dominance of the executive (including the PM) prior to the crises. The *de facto* presidentialisation of the Hungarian political system, which has been observed and developed since the beginning of the 1990s (Körösényi, 2001; Mandák, 2014), has mainly determined the

further strengthening of the position of the Hungarian government and the PM in the last decade (Kosztrihán, 2024; Mandák, 2015; Musella, 2019; Stumpf, 2015, 2020; Stumpf and Kis, 2023; Tóth, 2017, 2018, 2022).

The article is structured as follows: first, the conceptual and theoretical framework describing *de facto* presidentialisation is discussed, then the methods are presented, explaining the studied indicators, followed by the analysis and the results. The article ends with concluding remarks.

2 Materials and methods

2.1 Conceptual framework—de facto presidentialization

The theoretical framework of the research is *de facto* presidentialisation. The majority of studies analysing the strengthening of the government and the PM as a result of the state of emergency or the special legal order introduced along the lines of COVID-19 use the concept of executive aggrandisement (Bromo et al., 2024; Bolleyer and Salát, 2021; Edgar, 2024; Farrell et al., 2024; Guasti and Bustikova, 2022). According to Bermeo (2016), executive aggrandisement is a temporary reduction in the influence and oversight capacity of formal institutions vis-à-vis the executive. In my opinion, the concept of executive aggrandisement would not be the most appropriate theoretical framework for the case of Hungary, because this concept is used only to describe temporary changes, the longest time frame studied by executive aggrandisement was 4–5 years (Khaitan, 2019; Khaitan, 2020), while executive empowerment is a decades-long phenomenon in the Hungarian political system, as this research will explain.

Presidentialisation of politics means that some parliamentary democracies have become more presidential in their political attitudes without changing their formal institutional structure (Poguntke, 2000; Poguntke and Webb, 2005). *De facto* presidentialisation makes the operating logic of the political system more presidential without formally changing the institutional system and the constitution (Elia, 2006). The *de facto* presidentialisation of politics appears in three areas: the executive, the party and the electoral arena. The paper analyses the changes in the Hungarian executive arena with a special focus on the decade of crises and its impact on the presidentialisation of Hungarian politics.

The Hungarian political science literature started to deal with the phenomenon of presidentialisation and its signs in the Hungarian government in 2001, when András Körösényi (2001) published the first article on the subject. Körösényi identified presidentialisation with the rearrangement of power within the executive, the change in the style of politics, the nature of political competition and the operating logic of the entire political system. At the same time, he emphasised that the concept of presidentialisation should not be interpreted strictly in constitutional terms, but should be used as an analogy and metaphor. The publication triggered a major academic debate at the time (Ilonszki, 2002; Csizmadia, 2001; Tőkés, 2001; Körösényi, 2003; Enyedi, 2001), but shortly afterwards the issue lost its centrality until 2014. After the reforms of the second Orbán government concerning the organisation and functioning of the government, the issue returned to the centre of political science literature (Kosztrihán, 2024; Mandák, 2015; Musella, 2019; Stumpf, 2020; Stumpf and Kis, 2023; Tóth, 2017, 2018, 2022).

In my understanding, presidentialisation is the concentration of formal and informal power in the hands of the PM and the government he or she controls, which consists of an increase in the number of rights, powers and instruments. This kind of centralisation, as we will see in later sections, has been fundamentally brought about by changes in the decision-making processes of international politics, the growth and complexity of the role of the state, and the erosion of social fault lines.

At the level of the executive, the presidentialisation of politics means a weakening of the collective character of government and a strengthening of the power of the PM. *De facto* presidentialisation increases the resources available to the PM, as well as his autonomy within his party and the entire political executive, and develops the personalisation of electoral processes.

The PM's increased power derives from two things: an increase in the number of areas he or she controls and an increase in his or her ability to successfully confront political actors who hold different views from his or her own. In the executive, the PM's power is based on a combination of two factors: the total number of areas in which he can make decisions independently, and the extent to which he can fend off opposition to his initiative in other areas where he does not have unlimited decision-making potential. According to this logic, the PM's power can be strengthened by increasing the number of policy areas in which he can decide independently and by increasing his ability to counter opposition from other political actors. This latter capacity is based on the following resources: his formal power; his staff; the extent of his financial resources; his ability to set and shape the agenda; the extent of his control over communication; and his increasing ability to participate in international negotiations and decision-making since most decisions taken in such fora can no longer be renegotiated at the national level, but only ratified (Poguntke and Webb, 2005).

The increase of areas in which the head of the executive has individual decision-making power may result from an increase in the formal power granted to the PM or from a more frequent use of the personal power of the head of the executive. The institutional position of the head of the executive in the nation state is fundamentally determined by two types of relationship: the balance of power between the executive and the legislature, and the balance of power within the executive, i.e., the relationship between the PM, ministers and specific members of the government (Mandák, 2014, p. 43–44).

2.2 Methodology

The research relies on a number of different indicators to measure the degree of *de facto* presidentialisation at the executive level, focusing on the strengthening of the PM within the government and the strengthening of the government vis-à-vis parliament.

The presidentialisation of politics can be seen through numerous changes at the level of the PM, the cabinet and in the relationship between parliament and government. The conceptualisation of these phenomena is crucial because these conceptual criteria will be used to examine the events in the country study later in this paper. The changes do not have the same weight in all cases (Mandák, 2015); and it is important to

note that, due to the limitations of this article, we focus only on those criteria that could be influenced by the decisions and changes made by the state of emergency and the special legal order, both in the case of strengthening the government vis-à-vis the parliament and in the case of changing the relations between the PM and the government.

I have prioritised the following list of criteria, dividing them into two main categories: the first examines the strengthening of the government vis-à-vis parliament, while the second includes the indicators measuring the increase in the PM's powers and degree of autonomy within the government. All dimensions of these two categories are examined through qualitative analysis (Tables 1–3).

The criteria of presidentialisation with regard to the change in the relationship between the PM and the government are organised in two dimensions, the first being the institutional body(ies) directly led and controlled by the PM and their position in political decision-making, while the second dimension refers to the possible counterweights within the cabinet (Mandák, 2015).

In order to analyse the extent to which the above-mentioned changes can be observed in Hungary, I examine the constitutions, the rules of procedure and the regulations on governments, the rules on states of emergency and special legal orders, and the practical functioning of everyday politics through parliamentary statistics.

It is beyond the scope of the research to examine all the indicators. Of the political institutions that can act as a counterweight to the government and the PM, I will focus only on the parliament. This decision is justified by the limitations of the scope of the study and by the fact that it is responsible for ex ante and ex post control of the executive, i.e., it can act as a veto player and supervisor of legislative outcomes. For further analysis of the other counterweight institutions (see Gárdos-Orosz, 2024; Paczolay, 2015; Steuer, 2024; Szente, 2015).

3 The context of the Hungarian political system

This section briefly describes the main elements of the political system established at the time of and after the democratic transition

TABLE 1 Dimensions for the two analysed categories (author's own elaboration).

Categories	Strengthening of the government vis-à-vis parliament	PM's empowerment within the government
First dimension	Democratic and efficient parliamentary functioning	The institutional body/bodies led and controlled directly by the PM
Second dimension	Parliament's participation in law-making	The PM's potential counterweights inside the cabinet
Third dimension	Parliamentary control	

TABLE 2 Indicators of the dimensions of the strengthening of the government vis-à-vis parliament (author's own elaboration).

Dimensions	Indicators
1. Democratic and efficient parliamentary functioning	Frequency, regularity and length of debates
	Committee work
	Average law adoption time
	Activity of the opposition
2. Parliament's participation in law-making	Legislative procedures (number of stages)
	Division of submitters of bills
	No. of laws versus no. of government decrees
	Fast-track procedures
3. Parliamentary control	Control instruments and their use

TABLE 3 Indicators of the dimensions of the PM's empowerment within the government (author's own elaboration).

Dimensions	Indicators
4. The institutional body/bodies led and controlled directly by the PM	Powers of the PM
	Centralisation and coordination of political processes at the centre of government
	Regular restructuring of government bodies
	Level of control exercised by the Prime Minister's Office over policy-making processes
	Number of the PM's personal advisers and advisory bodies
5. The PM's potential counterweights inside the cabinet	Turnover of ministers
	Number of technocrats and politicians without party affiliation.

in 1989–1990, as well as the state of emergency and special legal order as of 2015.

In the new democratic political system that emerged from the transition to democracy, the PM had a particularly strong position when the chancellor-type parliamentary system was introduced in 1990. The main framework of the system has remained essentially unchanged over the past decades, but the actors, institutions and rules of the political system have changed significantly.

The main features of the parliamentary form of government introduced in 1989–1990, which aimed to create a consensual democracy as defined by Lijphart (1999), included a unicameral parliament, a government responsible to parliament, a basically monist executive headed by the government and the PM, an independent government from parliament and vice versa,[1] a relatively high number of two-thirds laws (for more than 30 subjects), and the indirect election of the President of the Republic (Körösényi et al., 2003; Körösényi, 2006; Smuk, 2011; Jakab, 2009; Küpper and Térey, 2009; Szente, 2008).

Unlike in other parliamentary systems, the President of the Republic played a relatively minor role in the formation of the government and had limited power to dissolve the National Assembly, but his constitutional and political veto power allowed him to act as a counterweight to the government.

Other important features include the broad powers of the Constitutional Court, the institution of ombudsmen (Körösényi et al., 2003, p. 360) and the independence of the Public Prosecutor's Office from the government (Körösényi, 2006, p. 10–11).

In terms of government relations, an important pillar of the system was the strong position of the PM, the formal equality of ministers within the cabinet, the institution of ministerial responsibility and a model of state governance based on the principle of separation of politics and administration (Müller, 2011, p. 21–22).

The strengthened position of the PM, based on his constitutional rights were to determine the government programme, to choose his deputy, to form the government and to chair cabinet meetings.[2] The PM was given a policy-making role, but the system based on the principle of separation of powers also introduced a number of checks and balances that made the PM's power controllable (Tölgyessy, 2006, p. 114–116). Overall, the PM had a government rather than the government having a leader (Paczolay, 2007; Romsics, 2010).

Although a number of counterbalancing institutions were added to the political system in the early 1990s, they saw a gradual and steady decline in their potential in the first two decades, while at the same time the PM continued to be strengthened.

It is also important to briefly outline the political context of the last 15 years, which confirms and in some cases reinforces the effects of presidentialisation in the case of several indicators.

With the exception of a 3-year period, Fidesz has had a two-thirds majority for the last 15 years,[3] and a predominant party system has emerged, which represents a significant power potential that further increases the impact of the phenomenon of presidentialisation.

Since 2010, there has been no need to form a coalition after election,[4] so in practice Fidesz and its leader, Viktor Orbán, have been able to decide alone on the structure and composition of the government. The executive role of the governing party group(s) has informally shifted the balance of power between the legislature and the executive towards the executive and its leader. In this situation, Hungary entered the so-called decade of crises, initiated by the declaration of a state of emergency due to the migration crisis in 2015 (Gellén, 2024).[5]

Then, on 11 March 2020, the Hungarian government declared a state of emergency due to the COVID-19 pandemic, referring to the emergency chapter of the Fundamental Law (FL), and approved an authorisation act[6] granting the government broad powers to manage the situation. It was the first national emergency since the democratic transition.

It soon became clear that the special legal regime would not last for a short period of time, measurable in weeks or months—at the time of writing it has been in force for 4 years, albeit with interruptions—although from 25 May 2022 the reason for the declaration of a state of emergency has been the armed conflict and humanitarian disaster on the territory of Ukraine (Szente and Gárdos-Orosz, 2022).

The FL and its amendments, especially the 6th, 9th, and 10th amendments, significantly changed the previous special legal order, and by November 2022, the solution of blurring the boundaries between the branches of power was abolished and the government became the sole crisis manager.

The ninth amendment formally increased the role of the government in the special legal order, stating as a general rule that the government may issue decrees in all situations of the special legal order, thus abolishing the former Council of Defence and removing the right of the President of the Republic to issue decrees (Horváth, 2021).[7]

The tenth amendment, adopted on 24 May 2022,[8] was due to the state of emergency in response to the war in Ukraine; it redefined the rules of the state of emergency by adding a humanitarian catastrophe or war in a neighbouring country as a prerequisite for a state of emergency. Following this declaration, the Hungarian parliament again gave the government blanket approval to rule by emergency decree until 1 November 2022. The declaration of a state of emergency in response to a humanitarian crisis abroad is unique in modern constitutional democracies (Erdős and Tanács-Mandák, 2023, p. 557–559). In this context, it is noteworthy that after the declaration of a new state of emergency, the government issued several emergency decrees that had nothing to do with the humanitarian situation. Instead of addressing other issues, these decrees were implemented to

1 The mutual independence of the two institutions was established by limiting the right of the government to dissolve parliament, the introduction of the constructive motion of non confidence and the missing motions of no confidence for ministers.

2 Law No. XX of 1949, Art. 33. and 37.

3 Between February 2015 and April 2018.

4 In political science terms, we do not consider Fidesz-KDNP governments as coalition governments (Ványi and Ilonszki, 2024).

5 A state of emergency was introduced at local level from 15 September 2015 and then at national level from 9 March 2016, with extensions until 7 September 2022.

6 Law No. XII of 2020.

7 FL, Art. 48. and 51.

8 FL, Art. 3.

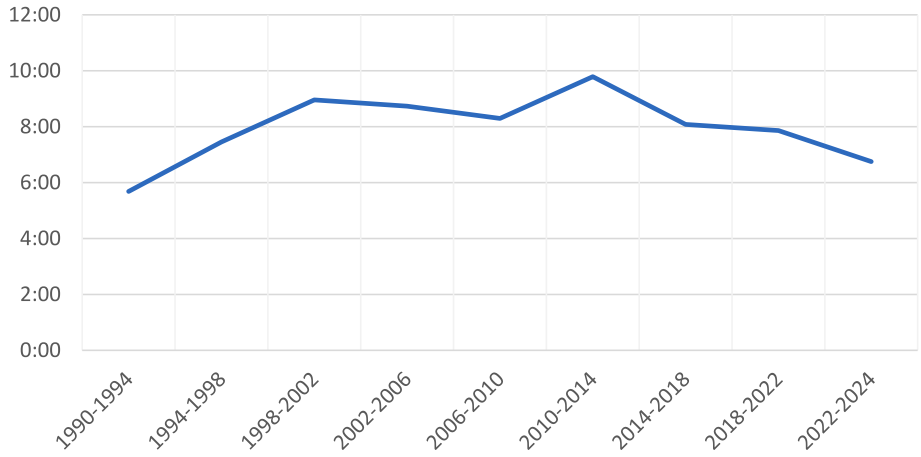

FIGURE 1
Average time for sittings (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

deal with a growing economic and financial crisis, in total the government issued almost 200 emergency decrees. The aim of the emergency decrees was not to deal with a real crisis, but to circumvent parliamentary control by maintaining a model of rule by decree (Mészáros, 2024, p. 306).

4 Presidentialisation in Hungary between 1990 and 2023

4.1 The changing relationship between parliament and government

Over the past 30 years, the Hungarian Parliament has maintained its place in the state structure as the main representative body of the people, although significant changes have occurred in parliamentary practice. In examining the relationship between parliament and government, the paper focuses on three dimensions, analysing the evolution of the rules of procedure and longitudinal parliamentary statistics.

4.1.1 First dimension: democratic parliamentary functioning

The first dimension examines the democratic functioning of the Hungarian National Assembly: the frequency, regularity and length of debates; the efficiency of decision-making: the average time taken to pass legislation, the existence and characteristics of fast-track procedures, the number of laws amended per year and the activity of the opposition in practice.

Basic indicators of democratic functioning are the predetermined regularity of sittings, the predetermined distribution of time slots for political groups and the frequency of committee work.[9] The Standing Orders of 1994 introduced *cloture*, guaranting equal speaking time for both government and opposition groups.[10]

Weekly sittings were used until 1998, when three-week plenary sittings were introduced for the third parliamentary term.[11] However, the new left-wing coalition reintroduced weekly sessions in the next legislature.

The FL, and later the Parliament Act,[12] stated that sittings should be convened in such a way as to ensure that, during ordinary sessions, sittings are held within a reasonable period of time.[13] Therefore does not guarantee weekly sessions and, as we see in the next legislatures (both in the 2014–2018 and 2018–2022 legislatures), the Parliament had fortnightly sessions, reducing the possibility and space for democratic debates and strengthening the government vis-à-vis the Parliament.

Parliamentary statistics show that both the number of sitting days and the average duration of debates per sitting day decreased between 1990 and 2023.[14] During the emergency periods, all indicators—the number of parliamentary sessions (17%), the number of session days (16%) and the total duration of sessions (19%)—decreased only slightly compared to the periods before the crisis decade (Tanács-Mandák, 2024, p. 266–269). So, overall, we cannot say that the indicators related to the democratic functioning of the parliament have decreased significantly during the period of the special legal order (Figure 1).

9 A properly proportional electoral system is also necessary for the democratic functioning of parliament. The detailed analysis of the Hungarian electoral system is beyond the scope of this research, but it is important to note that the electoral reform adopted in 2011 shifted the electoral system towards majority rule (53.26% of mandates were allocated by majority rule compared to the previous 45.59%), reduced the number of MPs and modified the previous proportional channel, all of which have led to a more disproportionate representation in parliament.

10 The only exceptions were the budget, the final accounts and the motion of censure. See: Parliamentary Resolution No. 46 of 1994, Art. 53.

11 The first Orbán government justified the reform by the need to increase the efficiency of parliamentary work, but parliamentary statistics have not proved that the reform has made legislative work more efficient.

12 Law No. XXXVI of 2012.

13 Law No. XXXVI of 2012, Art. 34.

14 Although the last two legislatures had fortnightly sessions, the number of sessions and session days were almost the same or slightly less than in the 1998–2002 legislatures, when there were three weekly sessions.

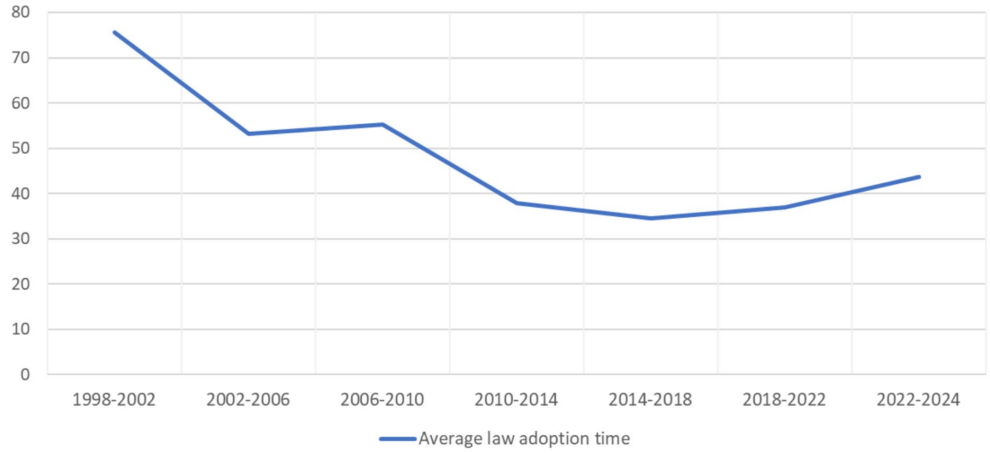

FIGURE 2
Average law adoption time (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

4.1.1.1 Efficient functioning

One of the key factors in measuring efficiency is the average time taken by parliamentary legislation. The Standing Orders reforms of the second legislature were intended to develop efficiency by curbing the obstructionist activities of the first legislature.

Later, the Standing Orders reforms of the 2010–2014 term had the explicit primary objective of ensuring reasonable timeframes and increasing efficiency in order to normalise the over-accelerated law-making. An analysis of the available parliamentary statistics[15] suggests that there has been a general acceleration of lawmaking over time, but the real turning point came in the 2010–2014 term, when the average time fell by 20 days and the 37-day average achieved in that term has been maintained since (Tanács-Mandák, 2024).[16] There is also a significant number of bills that were adopted in 7 days or less, and some that were adopted in 1 day (Figures 2, 3). In the 2022–2024 legislation term, there were 5 laws (Law No. LII of 2022, Law No. LXIX of 2023, Law No. XIV of 2023, Law No. XXV of 2023 and Law No. XXXII of 2024) that the President of the Republic either sent back to Parliament or sent to the Constitutional Court. Their adoption time was much longer than the average (161, 217, 84, 189, and 371 days), for this reason they were excluded from the calculation to prevent the distortion.

When analysing parliamentary efficiency, we must also include the number of committee meetings and their average duration, highlighting another parallel trend: the duration of committee meetings has been steadily decreasing, and since 2014 the average number of committee meetings has also been decreasing.[17] This explicitly indicates that the more detailed policy debates are decreasing and/or no longer taking place in Parliament (Figure 4).[18]

4.1.1.2 Parliamentary activity of the opposition

A parliament can only be effective with the active participation of the opposition, while respecting the majority principle. The research examines the tools provided by parliamentary law for the opposition and the extent to which the opposition (is able to) use them, in particular in the case of officers and committee memberships and in the legislative process, especially by tabling bills.

4.1.1.3 Officers and committee memberships

The position of Deputy Speaker is particularly noteworthy from the opposition point of view, as Deputy Speakers play an important role in the work of Parliament through their role as presiding officers. Until 2010, there were always an equal number of government and opposition deputy speakers alongside the government speaker. From 2010, the balance tipped in favour of pro-government deputy speakers. In 2014, a new type of deputy speaker, the deputy speaker for legislation, was introduced, but in all cases he was pro-government, and in the last two terms 4 out of 6 deputy speakers were pro-government.

Since 1990, Parliament's committee system has been based on political agreements made by the party groups at the beginning of each parliamentary term.[19] The 1994 Standing Orders stated that each standing committee must include at least one member from each party group and that the number of members of standing committees must be proportional to the number of members of each party group.[20] But the new rules of 2014,

15 Data only available from 1998 onwards.

16 The time taken to legislate is calculated by taking the time between the date of submission of the bills and the date of the final vote. The calculation does not take into account rejected bills that did not pass the final vote.

17 The average number of meetings per standing committee was between 120 and 140 in all legislative terms until 2014, the only exception being the first Orbán government, when the introduced three-weekly meeting system significantly reduced this indicator to 86. Since the 2014 parliamentary elections, a clear downward trend can be observed: in the 2014–2018 term, an average of 83 and in the 2018–2022 term, an average of 66 meetings of standing committees were held in the four-year legislative period.

18 The fact that detailed public policy debates have moved to a new arena could also be confirmed by analysing the number and length of cabinet meetings and the change in the number of proposals discussed at the meeting. Data on this, however, are only available for the period 1994–2013. The author has received a negative reply to a request for public data for the subsequent period [Reply to data demand for public interest Prime Minister's Cabinet Office MK_JF_közadat/66/2 (2024)].

19 So far, the only time Parliament has deviated from this practice was in 2010, when opposition groups failed to agree on the distribution of committee seats.

20 Parity of representation is compulsory for the Immunity Committee. It is also stated that the chairperson of the Committee on National Security must

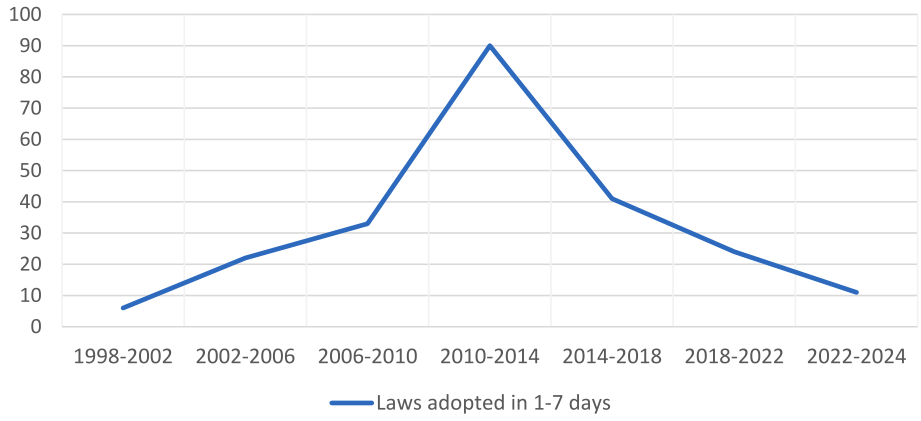

FIGURE 3
Bills adopted in 1–7 days (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

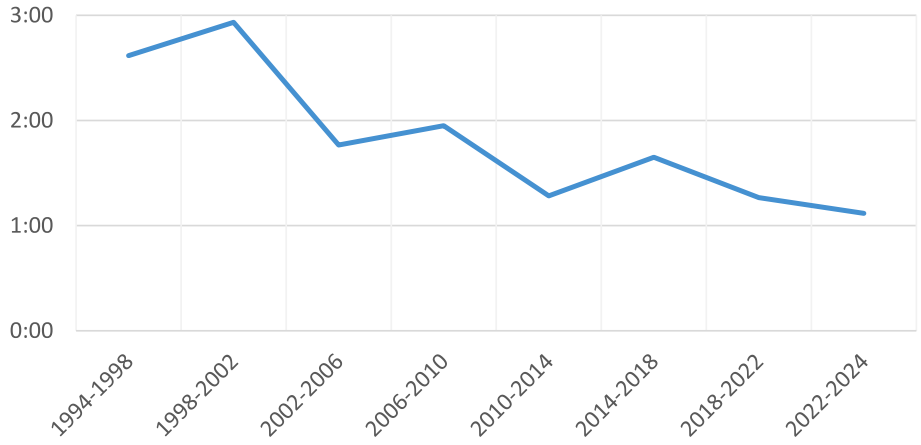

FIGURE 4
Average duration of committee meetings (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

no longer require each party group to be represented in all committees, but still give party groups the right to participate in all committees. If they do not have a member, they can only participate in the debate of the committee, but they do not have the right to vote (Tanács-Mandák, 2024).[21]

4.1.1.4 Participation in law-making

In addition to scrutinising the executive, the opposition's other important function is providing alternatives. The first significant reform of the Rules of Procedure concerning the participation of the opposition in the legislative process, both in tabling its own motions and in participating in the legislative process in the case of laws requiring special majorities, appeared in the 2010–2014 legislature. On the one hand, the FL increased the number of qualified majority votes requested by the subjects and the number of decisions on persons that also require a two-thirds majority, thus strengthening the opposition's ability to participate in decision-making.

On the other hand, the reform of the Rules of Procedure introduced the extraordinary urgency procedure and reduced the number of MPs required to initiate the extraordinary procedure from four-fifths to two-thirds; both changes explicitly reduced the opposition's ability to participate actively in the legislative process.

Assessing the ambition and will of the opposition at all times, we can assume that while in the first term only 23% of bills were submitted by opposition MPs, in the 2018–2022 term there was a significant increase, with the opposition submitting 40.82% of all presented bills. However, while the number of bills submitted by opposition MPs was increasing, their success rate was incredibly low, ranging from 0.14 to 4.16 percent, and it did not reached 1 percent in any legislative term since 2010 (see Figure 5).

4.1.2 Second dimension: the parliament in law-making

4.1.2.1 Legislative procedures

According to the preamble of Act XI of 1987, laws in the Hungarian legal system should play a decisive role in regulating fundamental social relations.

always be an opposition MP, and since 1990 the Budget Committee has also been chaired by an opposition MP.

21 Law No. of XXXVI of 2012, Art. 40 (1) and (2).

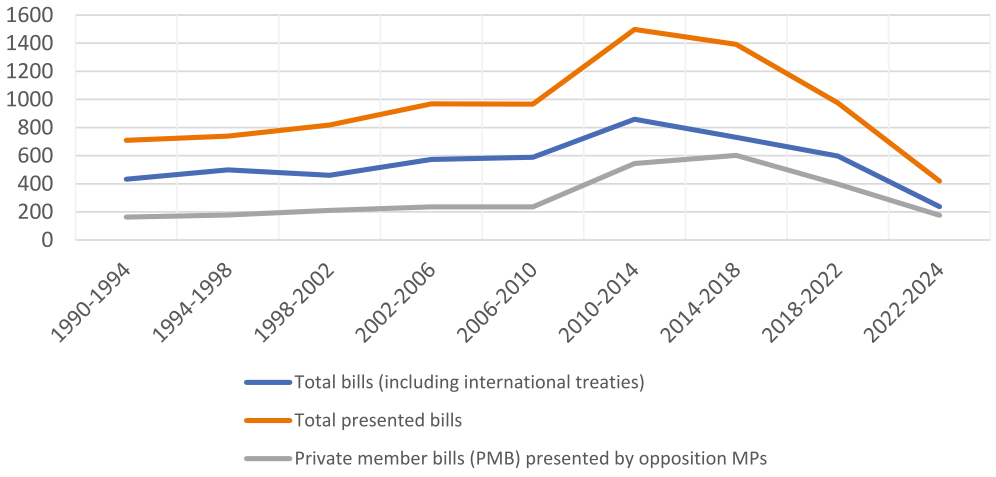

FIGURE 5
Bills submitted by the opposition (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

The ordinary legislative procedure was first significantly reformed by the second Orbán government, which replaced the two-stage reading (plenary and committee stage) with a new system in which the general debate takes place in plenary and the committees, including the new Legislation Committee. A single set of amendments concluding the detailed debate and a committee report is prepared and sent to the Committee on Legislation (TAB), which incorporates the amendments it supports. In the final stage, the plenary discuss only the TAB proposal and decides by a single block vote (Tanács-Mandák, 2024).[22]

If we look at the proportion of laws passed by the proposers, we can see that the government has played an increasingly dominant role in the legislation over the past decades. When analysing the initiators of bills, we see that 39–64% of bills were initiated by the government in each legislative period, but the government's share of approved bills is much higher 66–88%. The reason for the decrease in the share of bills submitted by the government compared to the total proposals between 2014 and 2018 is that this was the most active period for the opposition in terms of presenting alternative proposals (43.24%). However, there is a discrepancy when looking at the rate of bills passed, as only one of the 602 bills submitted was passed during this period.

If we also look at the emergency period, we see a large number of government decrees. In terms of subsequent legislation, in parallel with the increase in the number of laws, we can see the reorganisation of legislation, resulting in more and more government decrees each year. The number of government decrees per year shows a steady upward trend, but an explicit significant growth can be observed from 2003 (106), while the peak was of course reached in the years of COVID-19 (832 government decrees in 2021), and in the last 2 years we might detect a decreasing tendency, which is significant especially in 2024. But it is important to note that before COVID-19 there were also several years with government decrees approaching or exceeding 500 per year (2013, 2015, 2016, 2017) (Figure 6).

Thus, the executive has assumed a dominant role in lawmaking and the Hungarian National Assembly has been marginalised.

4.1.2.2 Instruments for speeding up the general legislative procedure

In order to speed up the general legislative procedure, the Rules of Procedure provide a number of special instruments, such as derogations from the Rules of Procedure, the urgent procedure and the exceptional procedure.[23]

The Rules of Procedure of 1994 introduced the exceptional procedure[24] and the derogation from the rules of the Rules of Procedure, which, although amended, is still in force today. Parliamentary statistics show that this instrument was used extensively between 2002 and 2014, with 140–190 motions adopted per legislature, but has almost disappeared since 2014.

In order to slow down the already accelerated legislative process, the parliamentary reforms of the 2010–2014 legislature introduced quantitative (maximum 6 motions per term, minimum 6 days between submission and final vote) and qualitative limits (the urgent procedure requires the support of 2/3 of the MPs present).

4.1.3 Third dimension: parliamentary instruments of control

Parallel to the continuous strengthening of the government at the expense of the parliament, the role and importance of the parliamentary opposition has become more decisive. Although Morgenstern et al. (2008) have noted that a strong government does

22 A party group and the submitter of the motion may request a detailed vote.

23 In the 2010–2014 legislature, there was a fourth instrument, the exceptional urgency procedure [Articles 128/A-128/D of Parliamentary Resolution 98/2011 (31.12)]: it allowed the final vote to take place the day after the decree was issued. This clearly strengthened the hand of the government in the legislature. The emergency procedure was abolished in 2014.

24 The exceptional procedure is allowed for debates on bills that do not require a two-thirds majority, mainly of a technical nature, and is conducted in committee, with only a summary of the debate and a final vote in plenary.

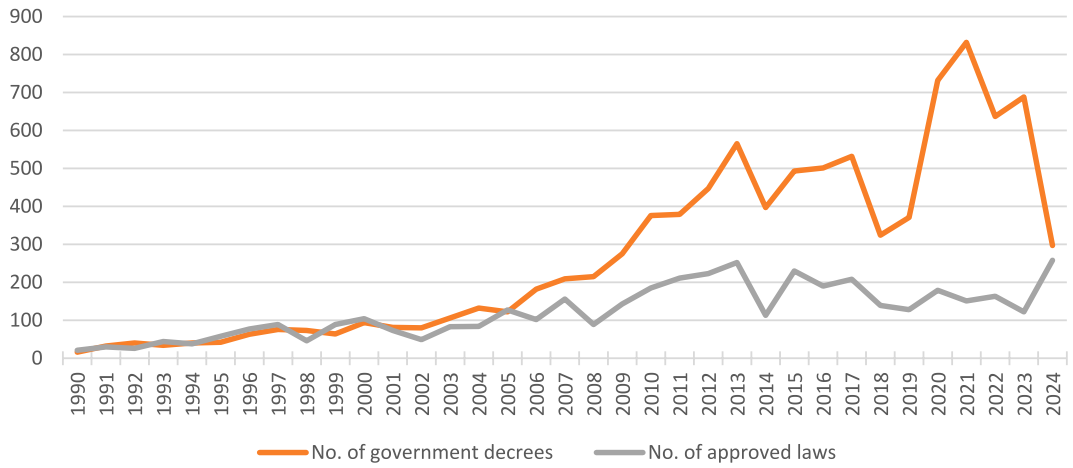

FIGURE 6
Comparing government decrees and approved laws (National Assembly Office and author's calculations). For the year 2024 the data is available only till 15 October 2024.

not necessarily imply a weak opposition, this point explains why this is not the case in Hungary.

Looking at the parliamentary control instruments of all terms, it can be assumed that opposition parties have regularly exercised some form of control. The FL and the Standing Orders have clarified the rules in many respects compared to the previous regulations. The main instruments of control are the interpellation, the question, the immediate question, while the secondary instruments are the committees of inquiry and the political debates (Magyar, 2018; Tanács-Mandák, 2024).

The first major reform to improve the opposition's tools of control was the 1994 Standing Orders, which introduced the Prompt Question Hour, political debate and increased the time allowed for interpellations from 60 to 90 min per week, a timeframe that remains in force today. The opposition actively used almost all these powers, spending on average about 12–15% of the debate time on interpellations, questions and prompt questions (Mandák, 2014, p. 70–80).[25]

It is worth mentioning a peculiar Hungarian phenomenon, the practice of "self-interpellation" and "self-questioning" by the governing party, which was introduced in 1998 and continues to this day, and which has had a negative impact on the institutions that essentially provided the means for the parliamentary opposition to exercise its control functions.

Overall, the number of interpellations submitted to Parliament shows a steady increase since the first democratic legislature and a significant downward trend since the introduction of the two-week session in 2014.

The Committee of Inquiry has been one of the most common means of oversight of the executive, but here too there has been unusual government activity. However, changes to the Committee of Inquiry in 2014 have reduced and weakened the opposition's options. The 2014 reform no longer requires committees to be initiated by 1/5 of MPs, and states that each standing committee will set up subcommittees to conduct inquiries. The previous parity of committees of inquiry has thus been abolished. The inquiry sub-committees will now operate with a government majority, as the government has a majority on the standing committees. Furthermore the Standing Orders have extensively regulated the subjects on which a committee of inquiry can be set up, stating that a committee of inquiry cannot be set up on matters that can be investigated by interpellation. The consequences of these changes are clearly visible in the parliamentary statistics: no committees of inquiry were set up in the last two terms.

The number of oral questions tabled in the 2018–2022 term was lower than in the previous terms. For most of this term, the use of immediate questions as the sole means of scrutiny has been adopted jointly by the majority and opposition groups as the practice for plenary sessions. Neither interpellations nor oral questions were requested by political groups in plenary. Overall, the use of scrutiny instruments has steadily decreased compared to previous legislatures for the reasons described above, but has shifted towards opposition MPs in terms of the proportion of submitters due to the increase in the number of political groups, in particular opposition groups, and the number of independent MPs.

Overall, the reforms of the Rules of Procedure in recent years have institutionalised some tendencies of presidentialisation, but at the same time, government practices that are not institutionalised at the Rules of Procedure, but applied in practice aiming to strengthen the government vis-à-vis the parliament, were equally important in the everyday work of the parliament.

The reforms of parliamentary rules and practice during the period under study have changed the relationship between government and parliament: decision-making processes have become faster, the PM and the government have become stronger in parliamentary work (expansion and simplification of the circle of special procedures, high number of "mixed laws"), while the opposition's room for manoeuvre has been reduced. The latter was not only the result of the limitations of the equipment, but also the result of the government's practice of "self-questioning" and "self-interpellation." It can be said that some of the presidential tendencies and intentions have been institutionalised

25 There have only been two terms when this rate fell below 12%, between 1998 and 2002 (due to the three-week sessions) and 2010–2014.

in the reforms of the Rules of Procedure, but in everyday parliamentary work the tricks used by the government still strengthen the executive.

4.2 The empowerment of the PM

The system of government established by Law XXXI of 1989 and Law XL of 1990 was consolidated during the first 20 years of democracy, despite the lack of political consensus, and its basic principles remained the same until the FL of 2011.

4.2.1 First dimension: the institutional body/bodies led and controlled directly by the PM

Since 1996, the Prime Minister's Office (PMO) has played a more important role in preparing decisions and in harmonising the government's parliamentary work.[26]

From 1998, the PMO developed into a central institution headed by a minister. The charter of the PMO stated that it would lead and harmonise the strategic activities of the government.[27] Furthermore, the reforms introduced the reference units, which were different policy units and departments of the PMO. Their role was to monitor and coordinate the work of the ministries and to develop independent technical proposals, limiting the freedom of the ministries. Thus began the transformation of the PMO into a chancellor office, the entire decision-making process was in the hands of the chancellor (Müller, 2011, p. 123). From then on, the PMO not only had administrative functions but also became a political body, dealing with the strategic leadership of the government.[28]

The Medgyessy government (2002–2004) continued these efforts, strengthening the structure of the PMO and giving it new powers. In the autumn of 2004, Ferenc Gyurcsány became the new PM, and by 2005 he had succeeded in developing an autocracy for himself. The party was transformed into a one-man party (Körösényi, 2006, p. 144–146), the number of PMO staff was increased and the legal equipment of the PM's power[29] was developed.[30]

The reform had a formal impact in three areas: the role of the PM, the decision-making process and the authority of the minister in charge of the office. It is important to mention the introduction of professional-political agreements, which limited the authority of individual ministers and strengthened the PM much more than the system of reference units, as this new system controlled and influenced the work of the portfolios. These meetings examined the political, professional, legal and financial sufficiency of the changes (Müller, 2011, p. 134).

In addition to the formal changes, there were also visible informal changes in the PMO's working mode, such as the increasing number of cabinet meetings chaired by the PM and the decreasing of the length of government meetings (Rákosi and Sándor, 2006, p. 346). At this legislation term the PMO was transformed into a governmental centre directly headed by the PM.

One of the main aims of the first measures taken by the second Gyurcsány government was to present only legally and professionally agreed proposals to the meetings of state secretaries and the cabinet. To this end, a three-stage consultation system was introduced, starting with the political consultation in the PMO. At the first stage of this so-called pre-screening, it was checked whether the proposal was in line with the government programme; the second stage was to consult the relevant ministries and social partners; and the third stage was the political debate at the meeting of state secretaries.

The second Orbán government left the 1990 model of government essentially unchanged, although it introduced a number of changes to the structure, functioning and character of the government. The constitutional amendments adopted in 2011 changed the previous provisions on the tasks and the scope of the government's authority,[31] stating that the government is the general of the executive and the main body of the administration. It declared that the scope of the Government's powers is everything that, according to the Constitution or any law, does not belong to any other body.[32]

The constitution differentiated the government from the other branches and strengthened its opposition to them. The possibility of review by the Constitutional Court was reduced in the case of economic and financial laws. It also limited the cases in which the Constitutional Court could be invoked.[33]

As a compulsory element of the structural changes, the PMO was abolished and the Prime Ministry was established. The tasks of the former Prime Minister's Cabinet, such as the political coordination of the government, were taken over by the Prime Ministry, while professional and administrative tasks were assigned to the Ministry of Public Administration and Justice and its minister. The Prime Ministry was headed by the PM and operated by a Secretary of State.[34] The tasks of the former government coordination centre were divided

26 The PMO prepared an expert report on the proposals and bills under discussion, which was not only a constitutional and legal assessment, but also an economic and political one. Law No. LXXIX of 1997, Art. 39.

27 Government Decree No. 137 of 1998.

28 It is important to note that this term has also seen an expansion of informal institutions and decision-making mechanisms. The most significant change compared to previous terms was the establishment of the so-called "carriage of six," which strengthened the PM's power both vis-à-vis parliament and within the government. This group coordinated the work of the government, Fidesz and the parliamentary group as a special steering body. Its members were the most prominent members of the party (Wiener, 2010).

29 The basis for the changes was Law No. LVII of 2006. In addition to the content of the reform, its preparation, drafting and approval were also important, as this so-called government law was developed without the apparatus of external experts (Müller, 2011, p. 27).

30 In order to increase the number of Gyurcsány supporters, he significantly increased the staff of the PMO, making it the most important institution of political patronage. He set up parallel apparatuses, formed informal advisory syndicates, increased the number of government commissioners and created the informal post of Prime Minister's Commissioner.

31 Law No. XX of 1949 Art. 35, [a]-[m].

32 Law No. XX of 1949 Art. 15.

33 While the Law No. XX of 1949 said that anyone can start a procedure at the Constitutional Court (Constitution of 1949, Art. 32/A para 3), according to the Constitution now, this can only be done by the government, one fourth of the representatives and the Commissioner for Fundamental Rights [Fundamental Law of Hungary, Art. 24 para 2, (e)].

34 Law No. XLIII of 2010. Art. 36.

between two bodies, creating a kind of parallelism and a "competition" between the two institutions (Franczel, 2014).[35]

As a result of the 2010 reforms, the government agreements on the amendments are no longer decided by the professional political agreements of the second Gyurcsány government, but by the state secretary of the Ministry of Public Administration and Justice,[36] so the government's administrative centre decided whether the ministries' initiatives could start the process.

The second Orbán government strengthened the PM's role within the government at the constitutional level by several innovations such as declaring that the PM determines the general policy of the government,[37] removing from the Constitution the reference on government meetings[38] and ensuring the right to the PM to assign tasks to ministers.[39]

The ministers became increasingly dependent on the decisions of the PM because, according to the FL, the ministers run their ministries within the framework of the general government policy set by the PM.[40] The PM selects the ministers and permanent secretaries and chooses his or her deputy(s), so his or her authority fully encompasses the work of all members of the government. While it used to be a constitutional duty to present the government's programme to parliament and have it approved,[41] the FL does not refer to this issue, thus increasing the PM's freedom. The regulations of the second Orbán government also allowed the PM to issue a government decree or resolution on his own between government meetings and to present it later to the government as a whole.[42]

In 2014, political and administrative coordination were integrated again, and the Prime Ministery became a "superministry," encompassing several key portfolios such as agricultural and rural development, EU funds, national financial services and postal services, territorial administration (Tóth, 2017, p. 57–61). In 2015, the independent Cabinet Office of the PM was created, and in summer 2016, two cabinets (strategic and economic) were organised[43] to speed up and make government decision-making more efficient (Stumpf, 2021).

The 2018 elections[44] also marked a turning point as the fourth Orbán government aimed more at a one-person, quasi-presidential government.

In the government decree on the duties and powers of the members of the government,[45] the centre of government followed immediately after the PM. The Government Centre consisted of three institutions: the Prime Minister's Government Office (Miniszterelnöki Kormányiroda) (PMGO), which reported to the PM; the Prime Minister's Cabinet Office (Miniszterelnöki Kabinetiroda), which was responsible for policy coordination and communication; and the Prime Minister's Office (Miniszterelnökség), which is responsible for administrative coordination and strategy formulation (as well as for certain specialised areas assigned to it).

The newly created PMGO co-ordinated the work of the ministries from an administrative point of view. It was chaired by the PM himself and headed by a Secretary of State. It also included the Minister without Portfolio for State Property—an indication that state property and other sectors in the asset management portfolio (e.g., gambling, postal services) play such a strategic role that they will be led directly by the PM. This also indicates a further strengthening of the role of the PM. In addition, the Prime Minister's Office has been given a strategic, policy-making role by integrating the National Information Office into it (Tóth, 2018, p. 13). The main task of the Prime Minister's Office has been to prepare the government strategy from a whole-of-government perspective.

The role of the cabinet system established in the summer of 2016 has been maintained and even strengthened, the four cabinets essentially cover the whole spectrum of government in order to facilitate the preparation and implementation of decisions at the government level, thus potentially relieving the PM and the bodies responsible for government coordination.

An overview of government coordination shows that the centralisation of responsibilities in several centres, the division of tasks and the creation of a political[46] middle level within the government (between the PM and the ministers, the deputy prime ministers and the two coordinating ministers) indicate a centralised and hierarchical government.

Changes in the organisational structure and competences of the institutions responsible for government coordination are a typical feature of the Orbán cabinets, always after parliamentary elections,

35 In my opinion, minor disagreements between the PM and the Minister of Public Administration and Justice made it a little difficult to implement the PM's ideas, but in the long run the Minister could not weaken the PM because he was also dependent on him.

36 Government Decision No. 1144 of 2010, Art. 24.

37 FL, Art. 18 (1). For more details see Stumpf and Kis, 2023, p. 107–110.

38 The collegial nature of the government takes the form of a cabinet meeting. The position of PM, strengthened by the second Orbán government, did not in itself reduce or eliminate the collegial nature of government. As a result of the reforms affecting the government, the collegial nature of the government has been reduced, both in terms of its public law basis and its practical functioning. While the Constitution in force previously had provided for the decision-making forum of the government [Act XX of 1949, § 37 (1)], the FL no longer included the concept of a government meeting, nor did it make any indirect reference to the form of government as a body. In addition, the Act on the Functioning of the Government [Government Decision 1144/2010 (7.7.2010)] stated that the functions and powers of the Government as a body, and that it meets regularly [Government Decision 1144/2010 (7.7.2010), points 1–2]. However, it is important to emphasise that the term "body" has 'slipped' from the constitutional level to the level of a government decision.

39 FL, Art. 18 (2).

40 FL, Art. 18. (2).

41 Law No. XX of 1949, Art. 33 para 3.

42 Government Decision No. 1144 of 2010, Art. 77.

43 Government Decree No. 215 of 2016, Government Decree No. 1399 of 2016.

44 It is important to underline that there was a high turnout, which gave more support to the winning political force.

45 Government Decree No. 94 of 2018.

46 This level does not appear as an administrative level within the government, but its political relevance is obvious. The structure of the statute—the PM is followed by the three entities known as the Government Centre (PMGO, COPM and the Prime Minister's Office), then the Deputy Prime Minister General, then the ministries of the Deputy Prime Minister, who also heads the two ministries, and only then the other ministries and ministers without portfolio—indicates the prominent, central position of these actors or institutions.

but often also during the legislative period. It can also be assumed, especially from the experience of the post-2010 period, that the institutions of government coordination play a key role in setting the policy direction of the government.

All three institutions introduced in 2018 were retained when the government was formed after the 2022 general elections, but both their relationship to each other and the scope of their portfolios changed significantly. Both the Cabinet Office of the Prime Minister (COPM)[47] and the PMGO were developed by transferring several other portfolios to them.[48] The PMGO, which had previously operated as a separate body, was essentially integrated into the COPM. From then on, the PMGO is specifically responsible for administrative coordination.[49]

In a sense, the Prime Minister's Policy Director is an existing actor, but new in his current position and powers. His main role is to advise the PM on a range of general and policy issues, and he may deputise the PM when answering immediate questions in Parliament.

In addition to the cabinets, the role of bodies set up to deal with specific issues has grown, especially since the fourth Orbán government. This is linked to the challenges facing the country, which are usually of global origin (migration crisis, coronavirus pandemic, economic consequences of the pandemic, Russian-Ukrainian war, war inflation, energy crisis, drought). The increasing number and role of the established bodies focusing on specialised areas (e.g., Defence Council, Operational Group, etc.) contributes to the complexity of the government structure and also reinforces the presidentialisation due to the overlapping of responsibilities as a result of the potentially formed competition among the actors (Tóth, 2022, p. 4–9).

Since 2010, it has been common practice to have large, integrated ministries, the so-called superministries. The year 2022 also brought a reform in this respect.[50] The governments installed after 2010 have a large number of state secretaries, but in the current fifth Orbán government their number even reached a record high with a total of 57 state secretaries.

Assessing the institutional (internal) structure of the last four governments, it is clear that they were designed to promote centralisation and presidentialisation. The resources at the disposal of the government are undoubtedly in the hands of the PM through the strengthening of his own office. The PM has clear control over the decision-making process, as evidenced by the institutional strengthening of the so-called Government Centre. The creation of the independent post of Political Director also demonstrates the PM's increased political control.

4.2.2 The second dimension: the potential counterweights inside the cabinet

The second Orbán government significantly reduced the number of ministries with the development of the aforementioned "superministry" system. The structural reorganisation of the government—the general number of ministries was reduced from 13, in the previous period 11, to eight—not only simplified the structure of the government and enabled a more solid government policy, but also centralised the decision-making process. A significant concentration of tasks and scope of authority was achieved by merging different departments (Vadál, 2011, p. 43). Another change in the government structure was that the PM could appoint a commissioner to deal with the tasks that fell within his remit.[51]

In the original Poguntke-Webb model of presidentialisation, the small number of government members implies a weaker PM and stronger ministers. In the Hungarian case, however, superministries since the second Orbán government have actually strengthened the role of government centralisation. The obvious purpose of creating superministries was the need for more coherent government policy-making. The number of ministerial posts only increase from 2017 onwards.

Looking at the turnover rate and the possible parallel parliamentary mandate of government members as an indicator of presidentialisation, it can be seen that while there is little turnover at ministerial level, state secretaries are subject to frequent changes. Looking at the statistics of post-2010 governments, in general about two-thirds of government members also hold a parliamentary mandate. In the post-2010 Orbán governments, it has been an unwritten rule that members of the government, with the exception of the PM and his first deputy, cannot become members of the party leadership, thus avoiding the possibility of any politician gaining too much power and potentially jeopardising the PM's position and power.

Since 2010, frequent ministerial changes have not been common, but the frequent changes of state secretaries and the continuous reorganisation of the institutional system of government coordination (and communication) have had a similar impact on the functioning of the government.

In the fourth Orbán government—similar to the first, coalition Orbán government—the proportion of ministers without a party (and/or parliamentary) background has increased. This in itself shows the role of the head of government as the sole determinant of the strategic direction of policy.

While between 2014 and 2018 in particular the majority of state secretaries held parallel parliamentary mandates, in the fifth Orbán government the proportion of outsiders has increased: only three of the 23 new cabinet members are MPs. The replacement of half of the cabinet members is in itself an expression of the personal will of the head of government.

It is clear from the above that the fifth Orbán government is a presidential government in a parliamentary system.

47 The official English translation of the institution changed from the Prime Minister's Cabinet Office to the Cabinet Office of the Prime Minister, but the institution remained the same.

48 The most important change was to take control of the secret services.

49 Law No. IV of 2022, Art. 188.

50 On the one hand, the new cabinet is dominated by ministries and economic ministers; on the other hand, the boundaries of responsibilities between ministries, ministers and state secretaries are not clear and there may be some overlap between portfolios.

51 Law No. XLIII. of 2010, Art. 32.

5 Conclusion

Since the democratic transition, Hungary's chancellor-type parliamentary system has presupposed a strong head of government. In the political system established at the time of the democratic transition, a tendency towards centralisation of power began in the late 1990s, which became even more pronounced from 2006 onwards, and since 2010 there have also been tendencies towards explicit concentration of power in government reforms.

It is therefore clear that both the dominance of the government over Parliament and the prominence of the PM within the government are, by law, fundamental features of the Hungarian political institutional system. Since 2010, the position of PM has been held by a person whose authority within the ruling party is unquestioned, and the government structure has been designed to further strengthen the PM's dominance.

Since the periods of extraordinary legal order were introduced in a significantly modified system of separation of powers, they further reduced the powers of the already weakened parliament, and it is reasonable to assume that the executive has not only governed against the parliament, but has even ignored it. For example, the introduction and expansion of extraordinary procedures strengthened the government, as the very short negotiation period and the very tight deadlines for amendments hindered and reduced the possibility of active parliamentary participation in the legislative process. In addition to the institutionalised strengthening of the government vis-à-vis Parliament and the emphasis on the PM, the non-institutionalised governmental practices used by all political forces are of equal importance, as they strengthened the executive power in everyday parliamentary work.

In the last term, the institutions known collectively as the Government Centre were also strengthened compared to previous terms, with the aim of centralising the functioning of the government and ensuring the most effective enforcement of the interests of the government as a whole, on the one hand, and ensuring political control—i.e. control by the PM—on the other. This tendency is reinforced by the creation of competing ministerial portfolios, the large and seriously restructured system of permanent secretaries, and the restructuring of the weight of the ministries.

Since 2015, the Orbán cabinets have been in a constant state of crisis—at least from the point of view of political communication—(the pandemic and war situation and the economic crisis partly resulting from both are real and serious challenges), which generally requires a strengthening and centralisation of the government. The structure and functioning of the Hungarian cabinet, which already has the foundations of centralisation, clearly shows a move in this direction.

In the case of Hungary, the trends show that presidentialisation was established and consolidated long before the decade of crises, and therefore it is not the rules and practices adopted during the crisis that contribute to its survival, although they are clearly part of this trend, but the tools and established practices introduced before 2015, and that is why it is expected to continue after the crisis.

Data availability statement

Publicly available datasets were analysed in this study. This data can be found at: https://www.parlament.hu/en/web/house-of-the-national-assembly.

Author contributions

FT-M: Conceptualization, Data curation, Formal analysis, Funding acquisition, Investigation, Methodology, Project administration, Resources, Software, Supervision, Validation, Visualization, Writing—original draft, Writing—review & editing.

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The effect of crisis on demography and employment in CEE countries

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Europe faces the most challenging long-term demographic forecasts globally. Over the centuries, demographers have conducted extensive studies to uncover the drivers behind population trends, relying on theories such as demographic transitions and economic models. Europe is currently experiencing a pronounced migration trend coupled with declining birth rates and total fertility rates. Crises usually generate negative effects, as demonstrated by the greater than average decrease in birth rates and employment rates during the COVID period in Europe. Declining population trends have, and will continue to have, adverse effects on the labor market. To mitigate these detrimental impacts, the EU adopted important measures since 2009. Although the decline in the employment rate recovered quickly in the EU, demographic trends have not. In 2022, the European Commission also shifted its focus and introduced several initiatives aimed at improving demographic outcomes at EU level. Moreover, demography has emerged as an independent policy area, recognized as a key element of the triple transition and competitiveness. By contrast, Central and Eastern European (CEE) countries implemented active demographic policies much earlier, particularly after the 2008 economic crisis with registered success. However, in relative terms, crises have had a more significant impact on both demographics and the labor market in the CEE region. Labor market flexibility in the region does not sufficiently support demographic policies. This paper examines these trends and argues that a combined approach of enhancing labor market flexibility and supporting families is essential for alleviating the adverse demographic trends affecting Europe. It further argues that for CEE countries, due to their increased vulnerability, it is crucial to continue prioritizing demographic measures that support families and strengthen the labor market.

KEYWORDS

Central and Eastern Europe, demography, supporting families, labor market, competitiveness, employment

1 Introduction

In European public thinking, migration has been predominantly seen as the solution to mitigate labor shortages over the past decades, while the idea of supporting demographic renewal by encouraging higher birth rates has not been emphasized (Pári et al., 2024, p. 4). The 2015 migration crisis and the Ukrainian war led to millions of migrants arriving in Europe, with some being absorbed into the labor market, but the demographic crisis persisted, and the two most pressing demographic challenges in EU Member States are considered to

be population aging (42%) and a shrinking working-age population and labor shortages (40%) (European Commission, 2023, p. 3).

In response, at European level, the 2019/1158/EU directive on work-life balance[1] was adopted aimed at making the labor market more flexible (D'Andrea, 2022, p. 14), and in 2022, the European Commission adopted a demographic report,[2] and developed a toolkit to support parents, aiming to increase labor market participation. Therefore, 2022 can be seen as a turning point, but it depends on EU Member States to take action, as European institutions have limited powers. In comparison, CEE countries started active demographic policies much earlier, following the 2008 crisis, to support parents and families (Barzó, 2024, p. 760), and these efforts have been continuous and are in the spotlight ever since. These policies have exerted positive effects on the labor market participation of parents (Gellérné Lukács and Mészáros, 2024, p. 14–19), although the long-term impact remains uncertain. However, the labor market has not been properly adjusted to family needs, with full-time jobs still being predominant and flexible working conditions fading after their uphill during and after the COVID (Molnár et al., 2024, p. 572).

2 Materials and methods

The central theme of the article is the impact of crisis on Europe's demography, especially CEE countries and Hungary with a special focus on the labor market. The article elaborates on these issues and argues that only the combined and supported implementation of both policies can lead to results that will alleviate the demographic decline.

This research aims to explore how the demographic situation in the EU can be improved and how adequate labor force availability can be ensured amidst these demographic challenges. The first section provides a mapping of the current situation, setting the scene by outlining the room for maneuver available to EU Member States in addressing demographic challenges, the policies they have implemented so far, their impacts, and potential directions for further action. Among demographic factors, special attention is given to birth rates, fertility rates, migration, and the effects of crises on these aspects. Subsequently, the labor market situation is examined, with a particular focus on the impact of crises on the labor markets of the EU and CEE countries. This is followed by a discussion assessing the challenges of demographic transition and the potential implications of a declining labor force on the EU labor market and competitiveness.

The research primarily adopts a desk-based methodology, relying on literature reviews and legal analysis, complemented by extensive statistical data analysis. This includes the use of self-generated graphs. The approach combines description and synthesis, incorporating a comparative perspective both temporally (contrasting periods affected and unaffected by crises) and geographically (comparing EU Member States with CEE countries).

3 Setting the scene: demography and labor market situation in the EU

3.1 Population and demographics

World population reached 1 billion in 1800, which has risen to 8 billion in the past two centuries (Pison, 2022). According to forecasts based on different scenarios, the UN estimates a 95% probability that world population is expected to continue growing for another half or more than half century, reaching a peak of around 10.3 billion people in the mid-2080s, up from 8.2 billion in 2024. After peaking, it is projected to start declining, gradually falling to 10.2 billion by the end of the century (United Nations Department of Economic and Social Affairs, Population Division, 2024). Figure 1 illustrates this change based on low, medium and high fertility variants.

On average, a woman today bears one child fewer, than they did three decades—approximately a generation—ago. Currently, the global fertility rate stands at 2.25 live births per woman. This rate was 3.31 in 1990. More than half of all countries globally have fertility below 2.1 births per woman (e.g., Europe, North America and part of Asia and Southern America), which is the level required for a population to maintain a constant size in the long run without migration. The world population by countries—based on the UN average annual rate of population change between 2015 and 2020—increased in most regions, but decreased in Eastern and Central Europe and Southern Europe—except for Spain—and in Georgia, Venezuela, Japan and Syria.[3] It is important, that "*globally, the number of women in the reproductive age range (roughly, between 15 and 49 years) is projected to grow through the late 2050s, when it will likely peak at around 2.2 billion, up from nearly 2.0 billion in 2024. Growth in the number of women of reproductive age is conducive to continuing population increase even when the number of births per woman falls below the replacement level.*" (United Nations Department of Economic and Social Affairs, Population Division, 2024, p. 3.)

Research on population trends in Europe is widespread and focus on various aspects of demographic change, including fertility rates, migration patterns, and socio-economic implications. Notably, the work of Matthijs et al. provides a comprehensive overview of population changes across Europe, the Middle East, and North Africa, emphasizing the demographic divide and its implications for policy and planning (Matthijs et al., 2016). Their analysis is crucial as it encapsulates a broad temporal scope, covering significant demographic shifts over the century. Another significant contribution comes from Lesthaeghe, who explores the demographic and cultural transformations in Western Europe, highlighting the underlying dimensions that have shaped these changes over the past century (Lesthaeghe, 1983). This work is particularly relevant as it situates demographic trends within a broader socio-cultural context, allowing for a nuanced understanding of how population dynamics are influenced by cultural factors.

The population of the European continent in 2022 was 745 million, representing 10% of the total world population. Seven decades earlier, this number was 550 million (22% of the world population) and there

1 Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, OJ L 188, 12.7.2019, p. 79–93.

2 EUROPEAN COMMISSION, Communication, Demographic change in Europe: a toolbox for action COM(2023) 577 final.

3 Due to the population growth rate data from the United Nations, DESA/Population Division https://population.un.org/wpp/ (Accessed: 07/01/2025).

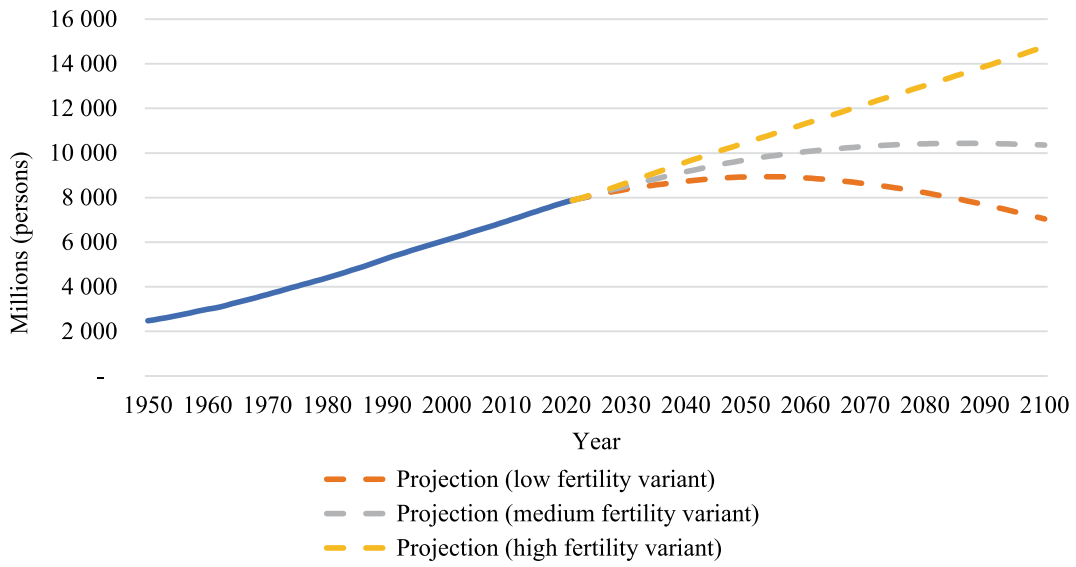

FIGURE 1
Total Population, as of 1 January (millions) and projections, 1950–2,100 Source: UN, Population Projections Database; graph edited by the authors.

was an increase of only 35%. This was the smallest increase among all the continents. By 2,100, Europe's population is projected to fall to 586 million people, reducing the continent's share of the world population from 10% to less than 6% (United Nations Department of Economic and Social Affairs, Population Division, 2024). Consequently, we face an aging and declining population in the "old continent." The EU27 population is projected to increase from 446.7 million in 2022 and peak at 453.3 million in 2026 (+1.5%), then gradually decrease to 447.9 million in 2050 and to 419.5 million in 2100.[4] In addition, the birth rate and fertility rate, which determine population growth, in the EU are well below the population replacement level. Countries with low fertility rates often rely on immigration to maintain population levels, but this solution is not universally applicable and can lead to social tensions and integration challenges (Parr, 2022). Europe's fertility rate fell from 2.77 in 1950 to 1.53 in 2021, and none of the EU Member States currently reaches the 2.1 level that is needed for population reproduction. As Figure 2 illustrates, on a baseline scenario, population trends will show a continued downward trajectory in the long term. However, the EU's population is still rising and is predicted to continue to do so for decades to come, despite the continuing decline in fertility. The increase in the next decades in population is not a result of organic domestic growth but of additional population inflow from international migration.

The countries of origin of immigrants arriving to Europe are diverse, and migration trends are constantly changing due to political, economic and social factors. The increase in the number of migrants arriving from African and Middle Eastern countries has been particularly notable in the last decade. For example, Italy has already seen a significant number of irregular border crossings since 2014, mainly from North Africa, especially Libya. This trend was further intensified during the migration crisis of 2015, when the number of refugees increased dramatically, and the situation has continued to challenge the Italian government and European policy since then. Conflicts in the Middle East, such as the Syrian civil war, have also generated significant migration flows, leading to many people seeking refuge in Europe. Many of these refugees arrive via Turkey (Bridges and Mateut, 2014; Kalas, 2021).

Central and Eastern European countries, such as Hungary, are also affected by immigration processes, as many migrants pass through these countries to reach Western Europe. Migration policies and border protection are also central issues here, and local political discourse often revolves around national identity and security (Pogonyi, 2019).

3.2 Life expectancy and aging population

In 2021, life expectancy at birth in the EU was 82.9 years for women and 77.2 years for men.[5] Crude death rates fell to 9.9 per 1,000 deaths per person in 2001, 9.7 in 2004, and 11.9 in 2021.[6] The mortality rates were highest in Bulgaria (21.7 deaths per 1,000 population), Latvia (18.4), Romania (17.5), and Lithuania (17.0), and the lowest in Ireland (6.8), Luxembourg (7.0), and Cyprus and Malta (8.0) in 2021.

The total fertility rate does not reach the 2.1 value required for reproduction in any EU Member State.[7] In 2010, the value of the indicator in Ireland, France and Sweden approached or exceeded the

4 EUROSTAT (2023). Demography of Europe—2023 edition. Publications Office. ISBN 978–92–76-99580-7. https://data.europa.eu/doi/10.2785/083.

5 Eurostat (2024) Mortality and life expectancy statistics, March 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Mortality_and_life_expectancy_statistics.

6 Eurostat (2023) Key figures on the EU in the world—2023 edition, Publications Office of the European Union, 2023, 19. https://data.europa.eu/doi/10.2785/515035.

7 Source: Eurostat. https://ec.europa.eu/eurostat/databrowser/view/TPS00199/default/table?lang=en.

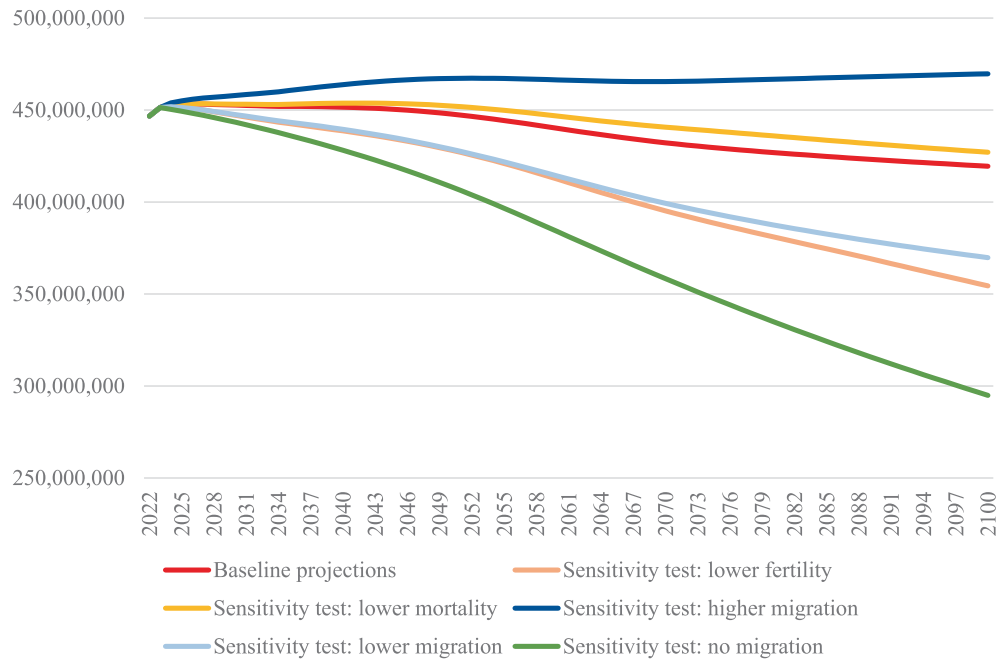

FIGURE 2
Population projections in EU27 until 2100 (estimated) Source: Eurostat, Demographic balances and indicators by type of projection [proj_23ndbi__custom_13481723].

value of 2, but after that it started to decrease: in Sweden, by 16%, in Ireland, by 13%, and in France, the fertility rate decreased by almost 10 percent compared to 2010, which is now 1.7–1.8. If we look at the propensity to have children of the native and immigrant population, we can find significant differences, because in France women with a migrant background are twice as willing to have children as native French women: in the case of the former, the total fertility rate per woman is on average 3.4, while for the latter it is 1.7.

Recent data indicate that birth rates across Europe have shown significant regional variability. The research of Campisi et al. investigated whether the deviation of the values characteristic of NUTS 3 regions differs from the national TFR (Campisi et al., 2020). A strong correlation was found indicating that deviations in fertility patterns are more influenced by spatial structure than by differences between neighboring regions. This suggests that regional effects on fertility are more significant than country borders, with macro-regional cohesion often playing a larger role. For instance, Brandenburg's NUTS 3 regions in eastern Germany have above-average fertility, while neighboring Lubuskie Voivodeship in western Poland has below-average fertility, despite the similar TFR levels of Germany and Poland. Thus, territorial factors, alongside economic and sociocultural influences, play a crucial role in fertility. Figure 3 illustrates the projections for the population pyramid for the EU27 for 2,100.

3.3 Immigration and internal mobility

The motivations for migration are multifaceted. Economic factors remain a primary driver, as individuals seek better job prospects and living conditions. Research highlights that migrants often choose destinations based on perceived accessibility and historical ties, with many opting for countries where they have established networks or prior connections (Christensen et al., 2016). This is particularly evident in the case of Central and Eastern European migrants who have increasingly moved to Western European nations, contributing to the labor market and addressing skill shortages (Strockmeijer et al., 2019). The emergence of new migration routes and destinations reflects changing global dynamics, as individuals explore opportunities beyond traditional migration corridors (Chatzipanagiotidou, 2018).

Migration also influences the dynamics of population change, emerging as a primary factor, particularly in the context of stabilizing fertility and mortality rates. Europe's population is shrinking, in consequence the labor age population is also decreasing. One of the primary ways migration contributes to sustainable population growth is through its compensatory effect on fertility rates in low-fertility areas. For instance, in European countries such as Sweden and Luxembourg, net migration has been shown to sustain long-term population growth even when fertility rates drop to very low levels (Parr, 2023).

Due to the impact of the pandemic, immigration to Europe could not offset the natural population decline during 2020 and 2021 on EU average. In the individual Member States, however, we get a very different picture[8]. In the majority of countries (Belgium, Czech Republic, Denmark, Germany, Estonia, Spain, Latvia, Lithuania, Netherlands, Austria, Portugal, Romania, Slovenia and Finland) the growing population can be attributed to migration, so

8 Eurostat (2023) Key figures on the EU in the world—2023 edition, Publications Office of the European Commission.

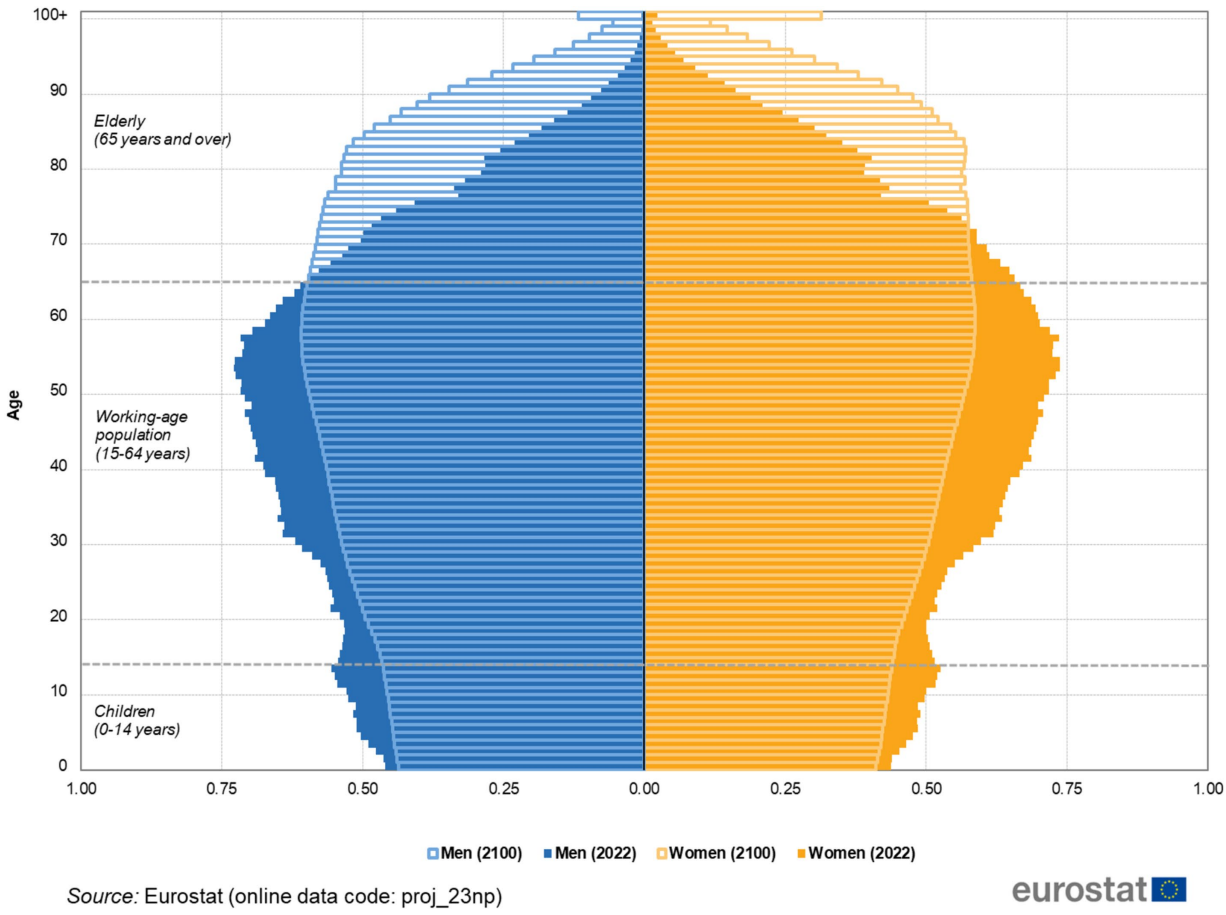

FIGURE 3
Population pyramid of the EU27 in 2022 and 2,100, % of total population (estimated). Source: https://ec.europa.eu/eurostat/statistics-explained/images/7/7a/EUROPOP2023_Figure_3_Population_pyramids%2C_EU%2C_2022_and_2100.png (Accessed: 26 October 2024).

that in the meantime a natural population decrease experienced in 2022. In six countries (Ireland, France, Cyprus, Luxembourg, Malta and Sweden) both natural reproduction and positive net migration contribute to population growth. Among seven EU member states that reported a population decline in 2022, only Greece registered a population decline due to negative natural change and negative net migration. In the other six countries (Bulgaria, Croatia, Italy, Hungary, Poland and Slovakia), the positive net migration was not sufficient to compensate for the negative natural population dynamics. Albeit the Visegrád countries (Poland, Czech Republic, Slovakia, and Hungary) play a crucial role in Ukrainian migration, Lipták and Kincses (2023) for thematic and scope-related reasons, this segment will not be addressed in the current discussion.

3.4 Labor market and employment policies in light of crisis

During the first two quarters of 2020, European economies experienced their most severe economic downturn since World War II, with recessions that were both sharper and deeper than those triggered by the global financial crisis and the European sovereign debt crisis of 2007–2009 (International Monetary Fund, 2022). Since 2020, the European Commission has coordinated a unified response to the COVID-19 pandemic, including measures to mitigate its socio-economic effects. The SURE instrument provided financial loans to support Member States' public spending on job retention schemes, self-employment subsidies, and wage support (Hoffman et al., 2024). These measures varied significantly across Europe in terms of sectoral and demographic coverage, as well as their duration (European Commission Directorate General for Employment, Social Affairs and Inclusion, Icon Institute, 2020). Eurofound's COVID-19 EU PolicyWatch database registered over 1,300 measures (Eurofound and European Commission Joint Research Centre, 2021). The swift and large-scale policy responses implemented by EU and national authorities effectively mitigated labor market damage and supported a rapid economic recovery in 2021. Job retention schemes alone preserved around 4 million jobs, contributing to record-low unemployment rates and high labor force participation in several Member States by the end of 2021 (International Monetary Fund, 2022, p. 8–9). The labor market was affected by COVID-19 restrictions in 2020, showing a 1 percentage point decrease in the employment rate compared with 2019 (72.7% in the latter year), but then recovered in 2021 with a 0.4 pp. increase compared with 2019. The share of employed people in the EU was 73.1% (2021), which included 189.7 million people.

A qualitative comparative analysis on 2017 and 2018 data on 17 European countries found that institutional factors, such as immigration policies, welfare state configurations, and employment regulations, were significant on influencing the labor market outcomes for migrants, often relegating them to low-wage and precarious employment conditions (King, 2022). This analysis yielded two distinct combinations of institutional factors that have been identified as contributing to the high level of marginalization experienced by migrants. The first combination consists of restrictive immigration policy and a prominent low-skill sector, in conjunction with robust employment protection legislation. The second combination involves restrictive immigration policy and a prominent low-skill sector, along with the presence of a well-developed welfare state.

In their study, Kanas and Fenger investigate the role of non-cognitive skills in the exacerbation of labor market inequalities between immigrants and native workers in Europe. The non-cognitive skills to which they refer include such factors as interpersonal abilities, emotional intelligence and resilience. These skills are becoming important in the modern labor market, particularly in technological advancements which are reshaping both job requirements and workplace formations (Kanas and Fenger, 2023). The study underscores that immigrants frequently encounter obstacles in acquiring these competencies, which can result in disparate labor market outcomes compared to their native counterparts.

However, while native workers (the EU Member States' own nationals) experienced relatively stable employment, unemployment, and activity rates during the economic contraction, EU-born workers (workers born in other EU Member States) faced greater fluctuations, with even more pronounced impacts observed among non-EU-born workers. In 2020 the change was visible: "between the last quarter of 2019 and the first quarter of 2021, the employment rate of migrant workers born outside the European Union dropped by almost 6%, while for EU migrant workers, the loss of employment was closer to that experienced by natives, at approximately 3.1%." (Fasani and Mazza, 2023) Compared to the last pre-pandemic quarter (2019q4), in the first quarter of 2021 employment rates fell by about 2 percentage points (p.p.) for natives, 2.5 p.p. for EU-born and almost 4.5 p.p. for non-EU-born (Mazza et al., 2022, p. 7). Some of the non-native workers returned home because of job losses in Western Europe, for example, the number of members of Hungarian households working abroad decreased by 39,000 in 2020 (Gellérné Lukács, 2021, p. 106). Specifically focusing on the Visegrád countries (Czechia, Hungary, Poland, and Slovakia), Zieliński (2022) used Eurostat data to examine the impact of the COVID pandemic on the labor markets of these countries. Based on analysis of Eurostat database 2018–2021, Zieliński claims that the rate of layoffs was lower during the pandemic, presumably because employers were concerned about the difficulty of finding new workers and did not reduce employment. In the V4 countries the flexible forms of employment worked as a business cycle buffer, created a decline in temporary employment, part-time jobs and an increase in self-employment. Molnár et al. (2024) examine the trends in the Czech and Hungarian labor markets from a regional perspective, especially in light of the two recent crises and confirm that between the two crises analyzed—the 2008 financial and economic crisis and the COVID-19 pandemic—the former had a more significant impact in both of the countries (Molnár et al., 2024, 580). No mass return migration from Western EU Member States back to the CEE countries was detected (Zaiceva and Zimmermann, 2013, p. 4). A study examining the CEE region as a whole argues that returnees are less likely to actively participate in the labor market, they rather choose self-employment (Martin and Radu, 2012).

While the pandemic has not worsened the labor market situation of women (compared to other EU countries, see Mazza et al., 2022), it has worsened the situation of young people, those aged 55–64, and people with lower education levels. Also, significant outward migration to the EU-15, alongside the associated debates on posted workers and social dumping, as well as the events since 2008 financial crisis, have adversely influenced industrial relations and workers' labor rights in the EU (Czarzasty, 2024, p. 18).

In the short term, immediately after the economic shock of the 2008 crisis and the COVID pandemic, government intervention helped to reduce the rise in unemployment. Taking into account the effects of the intervention in terms of limiting labor market imbalances, similar measures are recommended in case of another shock. As state intervention implies an increase in public debt, its size should be adapted to the depth of the shock (Zieliński, 2022).

4 Discussion

4.1 Demographic transition

Coleman discusses the emergence of a "*third demographic transition*" in Europe, characterized by low fertility rates and high levels of immigration, which has significantly altered the demographic landscape of many European countries (Coleman, 2006). This perspective is essential for understanding the contemporary challenges faced by European societies, particularly in terms of integration and social cohesion. Reher's examination of the economic and social implications of the demographic transition provides insights into how demographic changes have been intertwined with economic development and social modernization in Europe (Reher, 2011). This analysis underscores the importance of considering economic factors alongside demographic trends to fully grasp their impact on society. The work of Billari highlights the shifts in fertility patterns across Europe, noting the decline in birth rates and the implications for future population structures (Billari, 2005). This decline is a critical aspect of the demographic changes observed over the century, as it directly affects population aging and the sustainability of labor markets and social welfare systems.

Europe's demographic situation in the recent years has been described as a "demographic winter" (Dumont et al., 1986, p. 21) and "wrinkled Europe" (Dumont and Verluise, 2014) which refers to a worldwide decline in birth rates. Today, no European country meets the ratio of around 2.1 live births per woman, which would be necessary for sustainable population in a country, not considering migration. In 2023, 3.66 million babies were born in the EU (in 2022 still 3,88 million babies), the number of children born in the EU has been continuously declining since 2016, when 4.38 million children were born.[9] In the last 7 years, the rate of decline in the number of

9 EUROSTAT, Fertility statistics, 24 February 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics and https://www.statista.com/statistics/253401/number-of-live-births-in-the-eu/.

births has been slightly more than the same rate as the population of Luxembourg. If the current rate of decrease in births continues, the EU27 will be missing a population equivalent to that of Estonia in the first half of the 2030s, within the next 7–8 years.

The number of elderly people in the EU—namely those over 80—is expected to increase by 57.1% between 2010 and 2030,[10] which has significant consequences for the labor market and social security systems. Between 1998 and 2018, the population in some EU regions decreased by 15% due to rapid depopulation and population aging. Such a rapid demographic change generated disproportionately high adaptation costs, primarily for the social security system, but indirectly for the economy and other areas as well.

Demographic indicators, including the age composition of the population, have a major impact on the economy, working capacity, and, ultimately, competitiveness of a country, region, or continent. In turn, aging has repercussions on the economy, the labor market, the sustainability of pension systems, and the increasing burden on health and social care systems. At this point, in the long term, fertility decisions have an invaluable role in terms of population development.

4.2 The effect of crisis on fertility indicators and governmental measures

The number of children born in Europe and the total fertility rate (TFR) has been influenced by various demographic, economic, and social factors over the years. Crisis plays a significant role: the EU's total fertility rate, after rising from 1.43 in 2001–2002 to a peak of 1.57 in 2008–2010, declined slightly, fluctuated until 2017, and then resumed its downward trend. During the COVID-19 pandemic, the rate dropped to 1.51 in 2020, briefly rose to 1.53 in 2021, and fell again in 2022 and reached a low of 1.46 live births per woman.[11]

The impact of the COVID-19 pandemic on mobility, health care and social welfare systems was considerable (Gyeney, 2021), and on birth rates it has been particularly notable. A study analyzing live birth data from 24 European countries found a significant decline in birth rates during the pandemic, with a reported decrease of 14.1% in January 2021 compared to previous years (Pomar et al., 2022, p. 2923). This decline happened 9–10 months following the peak of the epidemic and the lockdowns associated with the first wave of COVID-19 in Europe. It was more pronounced in southern European countries, where economic uncertainty and health concerns may have led to a reduction in family planning and childbearing decisions (Aassve et al., 2021). The pandemic's effects on birth rates have been compounded by existing trends of declining fertility, particularly in regions with historically low birth rates, such as Southern and Eastern Europe (van and Rózańska-Putek, 2016). In Southern Europe, lower levels of cash transfers and family allowances have been linked to higher poverty risks for families with children, which may deter couples from having more children (Barbieri and Bozzon, 2016). The relationship between economic stability and fertility is complex, as economic uncertainty can lead to delayed childbearing and lower overall birth rates (van and Rózańska-Putek, 2016).

It is clear from the fertility data that, despite the large-scale immigration wave of recent years, the desire to have children has decreased in Europe, and fewer and fewer children are born, more and more of them come from parents with an immigrant background. In 2013, one in eight children, and in 2021 one in six, was born to a mother of foreign nationality in the European Union. Two-thirds of the births in Luxembourg can be linked to mothers of foreign origin, while in Belgium, Germany, Austria, Sweden, Cyprus and Malta every third, in France, Spain, Ireland every fourth, and in Italy, Denmark, Greece, the Netherlands and Portugal every fifth newborn were born to immigrants. In Hungary, the same rate was much lower, only 4% (Pári et al., 2024).

After 2010, Hungary stood up for family values and the decisive community-shaping power of the family (Fűrész and Molnár, 2021). The Hungarian family policy in the last 14 years is already showing itself in serious results. Hungary has achieved the greatest growth in Europe in terms of having children and the stability of relationships: the fertility rate indicating the desire to have children increased by 27%, the number of marriages doubled, and the number of divorces and abortions decreased by 40% in more than a decade (Fűrész and Molnár, 2021). It can be said that the opportunities for families have significantly improved in Hungary over the past more than one decade, due to the fact that family life, especially large families, is a prominent aspect of the country's operation, and Hungary has managed to break with the "habituation" that those who have more children, will spend the life in poverty (Novák and Fűrész, 2021, p. 240–245).

During the COVID-19 pandemic, in Hungary, supporting families and children remained an overarching principle, the coronavirus caused no break in this either. Despite the social and economic difficulties caused by the virus, there has been no cutting or termination of benefits, quite on the contrary, the continuity and even the reinforcement of family policy measures was observed (Gellérné Lukács, 2021, p. 109). Perhaps the greatest demographic merit of Hungarian family policy is that over the past 15 years it has drawn a stable population onto the Hungarian age structure, as Figure 4 illustrates.

In recent years, the annual number of childbirths in Hungary has been between 85 and 93 thousand, which represents a low but stable number. The large cohort of children born in the Ratkó era[12] and their children (Ratkó grandchildren) were outstanding, however, regrettably, a third outgrowth on the Hungarian population pyramid is missing (the Ratkó great-grandchildren) (Figure 5).

10 Eurostat (2024) Mortality and life expectancy statistics, March 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Mortality_and_life_expectancy_statistics.

11 Eurostat (2024) Fertility statistics, February 2024, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics.

12 The Ratkó era—named after Anna Ratkó, the Cabinet Minister of Health from 1950 to 1953—is the name given to the population policy between 1952 and 1956, during which the natural reproduction rate increased significantly due to the abortion ban and the child tax. In 5 years, more than 1 million children were born in the country (Ratkó children). The highest number of live births during this period was in 1954, when 223,347 children were born and the total fertility rate (TFR) was 2.97. The so-called Ratkó grandchildren (born between 1974 and 1979) also had many children. This was the last in Hungary's demographic history when the fertility rate was above the replacement level.

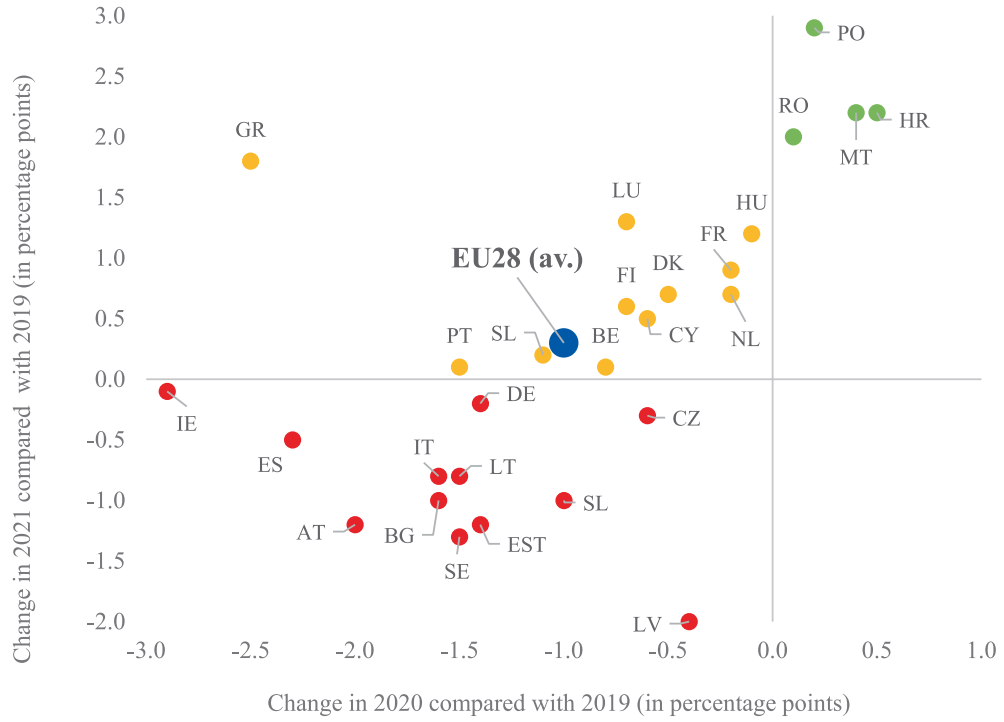

FIGURE 4
Annual change in employment rate, compared 2021/2019 with 2020/2019 [in percentage points (pp.)]. Source: Eurostat Tabel code: lfsi_emp_a (Accessed: 15/01/20251).

The situation is very similar in every CEE state including the challenges and the introduction of a series of family friendly measures (Gellérné Lukács and Mészáros, 2024). It is very important to establish a family-oriented value system at the social level and to support family-friendly workplaces. It can also be concluded that young adults are committed to the family (Michalski, 2024, p. 207). Therefore, the promotion of childbearing, or at least keeping it at the same level, must raise policy questions in EU decision-making that cannot be avoided from a demographic point of view.

> "It seems that exploring the topic of parenthood and its different dimensions—including the relationship between having children and being active on labor market—combined with dissemination of good quality knowledge should be seen as an urgent and necessary task to be done in order to create the best possible climate, regulations and solutions which would foster win-win synergy between parenthood and professional activity. Labor market is important, but it has no future without the fundamental work and effort that parents perform every day within their families." (Michalski, 2024, p. 209).

4.3 Demography as a new explicit driver for competitiveness

Huguenot-Noël and Corti analyzed the role of EU employment policies in promoting social citizenship by evaluating the evolution and distribution of individual entitlements over time and argue that the EU has broadened its influence on individual social rights in recent years (Huguenot-Noël and Corti, 2023, p. 190). The authors observe that this turn was endorsed by the aftermath of the 2008 crisis. It is evident that employment has always been a cardinal element of competitiveness, and both the provisions of the TFEU (Articles on the Internal Market and on social policy)[13] and several regulations and directives have been built upon the idea of decent work (Gyulavári, 2022). However, against the background of the financial and economic crisis in 2008, followed by Brexit and the subsequent adoption of the European Pillar of Social Rights (EPSR), EU policies established inclusive growth as a priority area and focus more on social rights. Directive 2019/1158 on work-life balance is a recent example of mandatory legislation which has twofold target objective. It does not only have a strong economic focus (widening the circle of employees), but it is also supporting social citizenship by establishing individual's rights as protected parents or carers. A research focusing on migrants' knowledge about their social rights—in Denmark, the Netherlands, and Germany—is positively correlated with their subjective well-being (Seibel, 2023). This research emphasizes that policy makers should take into account how they communicate policy regulations to migrant populations, because it has an effect on their subjective well-being as well.

Since January 2023, a refined European approach tailored also to addressing demographic challenges has gained prominence. First, the

13 Article 3 of the Treaty on European Union (TEU), and Articles 9, 10, 19, 45–48, and 145–161 of the Treaty on the Functioning of the European Union (TFEU).

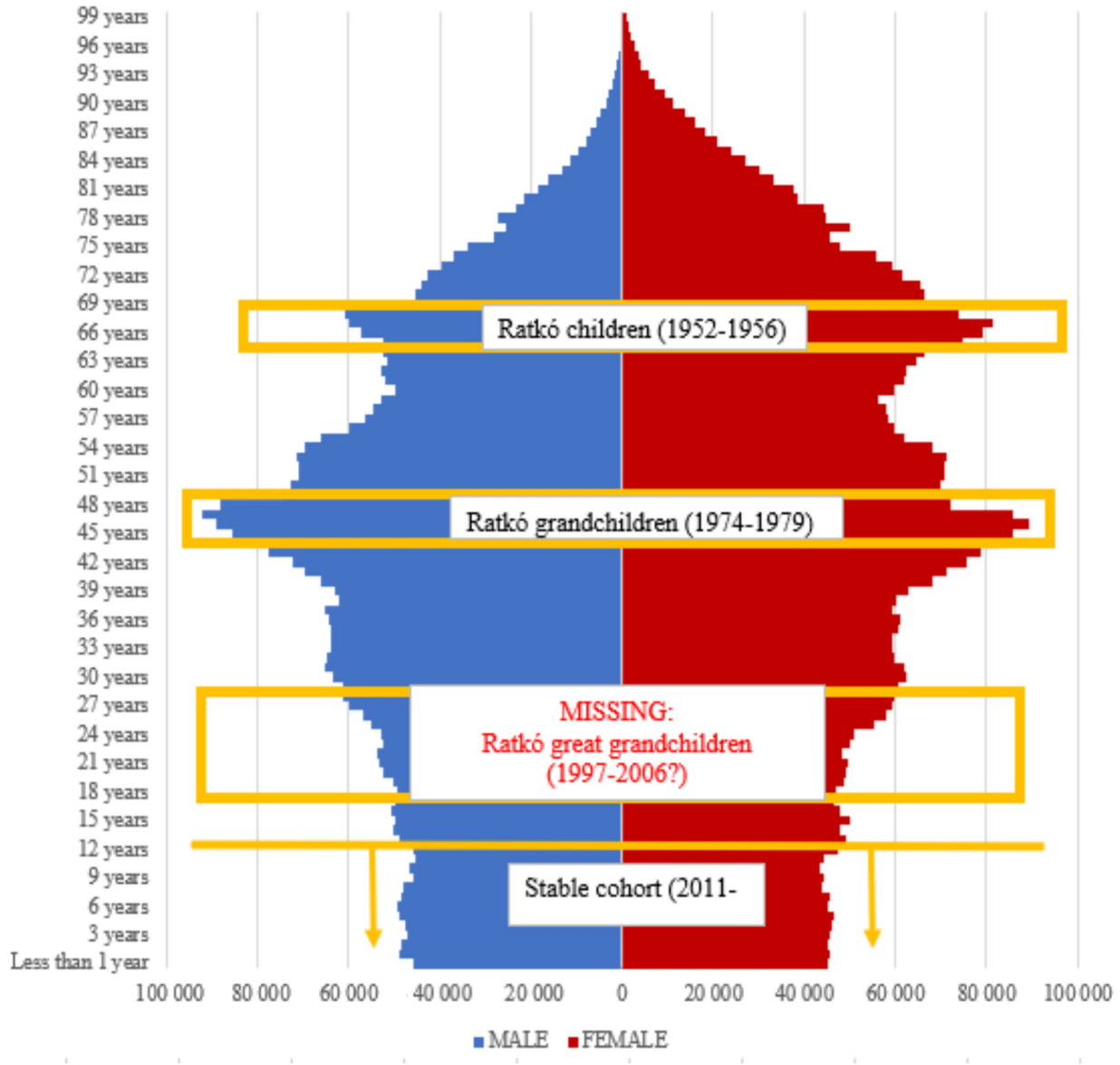

FIGURE 5
Population pyramid in Hungary, 1 January 2023. Source: Eurostat database (DOI:10.2908/demo_pjan), graph edited by the authors.

European Commission published its report *The impact of demographic change—in a changing environment.*[14] In June 2023 it was discussed by the European Council which in its June conclusions invited the Commission to *"present a toolbox for addressing the impact of demographic challenges on Europe's competitive edge."*[15] It has been made clear by the European Council that demography is an important element of competitiveness. The subsequent Granada Declaration of 6 October 2023 highlights that addressing the demographic challenge is part of efforts to build a stronger, more dynamic, more competitive and more cohesive Europe in a changing world.[16] The Declaration recognized the outstanding impact of the demographic challenge on the future of the European Union.

At the 9th Cohesion Forum held on 11–12 April 2024, Commission President Ursula von der Leyen and Cohesion Commissioner Elisa Ferreira highlighted the concept of a "triple

14 The impact of demographic change in a changing environment, https://commission.europa.eu/system/files/2023-01/Demography_report_2022_0.pdf (Accessed: 10.07.2024).

15 European Council meeting (29 and 30 June 2023) – Conclusions, Point 18 g, https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf (Accessed: 10.07.2024).

16 Council of the EU (2023a). The Granada declaration of 6 October 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/10/06/granada-declaration/pdf/ (Accessed: 10.07.2024).

transition." Alongside the green and digital transitions, which have largely dominated public discourse thus far, they emphasized the importance of demographics.[17] "Of crucial importance in this respect is the combined effect of the green and digital transitions on destroying and creating jobs, on the quality potential of new jobs and on wage levels," and significant fiscal challenges loom on the horizon, as demands for social spending are increasingly competing with the need for public funds to address the impacts of climate change and environmental degradation (Petmesidou and Guillén, 2022, p. 321). Demographic challenge as a third overarching issue requires a shift in approach for Europe to address competitiveness effectively.

The Draghi Report in September 2024 was straightforward regarding Europe's productivity challenge: *"Europe needs faster productivity growth to maintain sustainable growth rates in the face of adverse demographics. After the second world war, the EU experienced strong catch-up growth driven by both rising productivity and a growing population. However, both drivers of growth are now slowing."* (Draghi Report, 2024, p. 26) The Draghi report highlights a critical shift in demographic trends and labor force dynamics. Historically, steady growth in the working-age population has been a key driver of GDP in major economies. However, since the 1990s, this growth has slowed and entered a consistent decline over the last decade, largely due to falling fertility rates across EU Member States and Europe as a whole. Positive net migration, even in inclusive Western nations, has not sufficiently offset this decline. Moreover, long-term projections indicate further population shrinkage, exacerbated by significant aging trends.

The Draghi report further emphasizes that Europe is suffering from skills gaps across the economy, reinforced by a declining labor force… *"Demographic headwinds imply a shrinking labor force in Europe, while the US population is projected to expand in the coming decades. In this setting, a European strategy to address skills gaps—focused on all stages of education—is essential. Many of the skills gaps can be traced back to the underuse of existing talent, as witnessed by deep gender gaps in some occupations."* (Draghi Report, 2024, p. 36) From this perspective it is very important that almost parallel with the Demography Report, on 17 January 2023, the European Commission presented its communication *Harnessing talent in Europe's region,* as the first key initiative of the European Year of Skills.[18] The key message of the communication is that as the EU population is aging and the available workforce is shrinking, many regions in the EU are facing a massive brain drain of young and skilled workers. This threatens the economic dynamism of the regions concerned, curbs innovation and, thus, has a negative impact on the competitiveness and cohesion of the EU as a whole. The communication identifies 46 regions in the talent development trap (with 16% of the total EU population) and a further 36 regions at serious risk of falling into the talent development trap (with almost a third of the total population).

An analysis of the Central Eastern European countries as early as 2015 emphasized that" *Decisive measures are needed in order to raise the competitiveness levels in these countries and, as a result, support higher levels of productivity, employment and prosperity, today and in the future.*" (Myszkowska, 2015, p. 18) It is essential taking into consideration the fact that although, while CEE shows promise in sustainability, there is still a significant gap with advanced economies, highlighting the need for more robust environmental policies on the one hand, and the rigid labor markets in CEE hinder employment growth, necessitating reforms to enhance flexibility and adaptability in the workforce on the other hand. Many CEE nations face declining birth rates and high levels of emigration, particularly among younger generations: "*The region can draw on a well-educated workforce, although the high levels of emigration observed recently suggests that the available workforce will continue to shrink in the future—which is especially true of the younger demographic.*" (Myszkowska, 2015, p. 12) This might lead to an even more rapidly shrinking workforce, which can hamper economic growth, reduce productivity. Population aging exacerbates the negative effects of these challenges by leading to higher dependency ratios and increasing the burden on social services.

Related to available gainful and decent work, Enrico Letta, former Prime Minister of Italy, highlighted a paradigm shift in his recent report on the Internal Market (Letta, 2024). He acknowledges that free movement is not universally accessible, with barriers such as age, lack of skills, intergenerational obligations, home ownership, emotional ties, and the impact of "brain drain" disproportionately affecting residents in less developed regions. Letta emphasizes that mobility entails significant costs and calls for targeted support for all citizens, regardless of location and advocates for "freedom to stay" (Letta, 2024, p. 93–94).

5 Conclusion

Demographic issues in Europe, particularly concerning mortality, births, family policy, and migration, are complex and interrelated phenomena that reflect broader socio-economic and political dynamics. The interplay between inward migration, return migration, and demographic changes significantly influences and already influenced the demographic landscape of the European countries. Europe has been experiencing declining birth rates and increasing mortality rates, leading to an aging population. This demographic shift poses challenges for social welfare systems and labor markets.

In the article, we first reviewed key legal and policy intersections linking demography and employment, addressing major European trends, CEE specifics, and incorporating our own data sets. The analysis highlights that the longstanding downward trajectory of European demographic trends persists, exacerbated in CEE countries by their role as sending regions within the EU's internal mobility framework. Observing the experiences of the 2008 financial crisis and the 2019 COVID-19 crisis, it is evident that while EU labor markets demonstrated resilience, with quicker recovery post-COVID, mobile workers from CEE regions faced greater challenges. These included higher rates of job loss or transitions to less productive roles compared

17 Speech by Commissioner Elisa Ferreira at the opening ceremony of the 9th Cohesion Forum. https://ec.europa.eu/commission/presscorner/detail/en/speech_24_1978.

18 Harnessing talent in Europe's regions—Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Care Strategy, COM(2023) 32 final. Harnessing Talent Platform: https://ec.europa.eu/regional_policy/whats-new/newsroom/23-11-2023-10-eu-regions-will-receive-technical-assistance-under-pillar-1-of-the-talent-booster-mechanism_en (Acc).

to native workers, statistically leading to induced return migration, albeit not sustained as old patterns resumed post-crisis.

The article further notes a significant shift in European policy focus in recent years, where demography has emerged as a distinct policy issue rather than merely a labor market resource channel. This evolution is underscored by its inclusion as an independent element of the "triple transition" and a cornerstone of competitiveness. The importance of this development is amplified by two major 2024 reports by Letta and Draghi, advocating for the "freedom to stay," the enhancement of local opportunities for EU citizens, and the regional retention and harnessing of talent.

The demographic situation has shown limited, if any, improvement in recent decades, emphasizing the necessity for sustained efforts not only by EU Member States but also at the European level. Addressing demographic challenges through policies aimed at promoting higher birth rates, resilient labor markets and retaining talent is crucial for strengthening the EU's and the CEE region's competitiveness.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

ÉL: Conceptualization, Project administration, Writing – original draft. ÁM: Investigation, Writing – original draft. AP: Conceptualization, Data curation, Writing – original draft.

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The principle of *ne bis in idem* and the European arrest warrant as vehicles for the CJEU for redefining the powers of national prosecutions in EU law

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The article examines how the Court of Justice of the European Union (CJEU) through its judgments enlarged the ambit of the *ne bis in idem* principle in a certain aspect and redefined attributes of national prosecutions. More poignantly, how the Court's recognition of a possible *res iudicata* effect of prosecutorial decisions binding on other EU Member States triggering *ne bis in idem* protection not only empowered national prosecutions but also implicitly pushed Member States to further harmonize their criminal justice systems. At the same time, by finding that prosecutions may not only issue European arrest warrants (EAW) but also terminate criminal proceedings with *res iudicata* consequences obligatory for other Member States initiating EU wide recognition of the termination's *ne bis in idem* force, the CJEU elevated national prosecutions—depending on domestic legal prerequisites—to the level of national courts. It is argued that by reading these judgments together, the CJEU's jurisprudence might have created frictions between the Member States' criminal justice systems and reshaped terms such as "judicial authority" and "effective judicial protection" in a way which lowers the level of protection afforded to the individual, be that, to make cooperation in criminal matters more effective between Member States.

KEYWORDS

EU criminal law, CJEU, European arrest warrant, *ne bis in idem*, *res iudicata*, prosecution, judicial authority, effective judicial protection

1 Materials and methods

The research employs the general methodology of legal analysis; more specifically, it looks at fundamental principles of law and legal institutions by examining the relevant case-law of the CJEU. In the course of this, it was necessary to explore certain national laws of Member States to understand why the Luxembourg Court reached different conclusions. The study tried to find similarities between the utilization of the *ne bis in idem* principle and cases concerning the EAW by searching for their effect on the powers of national prosecutions as a common dominator. By studying the thus selected jurisprudence, it strives to understand the CJEU's aspirations and motivations by also pointing out some secondary, possibly adverse consequences.

2 Introduction—the *ne bis in idem* principle

It was a long road for the *ne bis in idem* (double jeopardy) principle to be accepted as a human right, protecting EU citizens in cross Member State relations (Van Bockel and Bastiaan, 2010; Hecker, 2015; Rossi-Maccanico, 2021), as opposed to its application only within one jurisdiction already guaranteed by the European Convention on Human Rights (ECHR) Additional Protocol 7 (Bartsch, 2002; Gellér et al., 2002; Gellér, 2004; Turmo, 2020). It must be pointed out that the double jeopardy ban also applies to non-EU citizens and blocks extradition to third countries (Wahl, 2022) and by that EU law does not only override public international law from time to time but also transforms *ne bis in idem* into an international human right as opposed to a limited internal and regional applicability (Van Bockel, 2016; Bárd et al., 2023).

The Framework Decision on the European Arrest Warrant (FDEAW)[1] adopted in 2002 was the first concrete measure putting the principle of mutual recognition (Janssens, 2013; Willems, 2019), that is, one Member State must recognize the decisions of another Member State's judicial authorities, into practice (Satzger, 2018; Maffei, 2019). Similarly, the objective of Article 54 of the Convention Implementing the Schengen Agreement (CISA) is to ensure that no one is prosecuted for the same act in several Contracting States on account of this person having exercised his/her right to freedom of movement (Joined Cases C-187/01 Hüseyin Gözütok and C-385/01 Klaus Brügge, para. 38. Case C-469/03. para. 32). For many years, the CJEU widened the scope of application of the *ne bis in idem* principle and also strengthened the EAW and, thereby, the reach of mutual recognition (Ronsfeld, 2023). With the adoption the EU Charter of Fundamental Rights Article 50 of which also defines the protection of *ne bis in idem*, this principle received the highest possible recognition in EU law.[2]

3 The public prosecutor's office as an authority making final decisions in the judgments of the CJEU

3.1 The relevant case-law of the CJEU until 2018

The Case C-268/17 AY and the Hungarian legal framework is a good starting point when analyzing the *res iudicata* nature of decisions made by the public prosecutor's office in EU Member States—particularly decisions to terminate proceedings—and their effect on *ne bis in idem* from an EU law point of view (Gellér, 2024).

Article XXVIII paragraph (6) of the Hungarian Fundamental Law states that "*With the exception of extraordinary cases of legal remedy laid down in an Act, no one shall be prosecuted or convicted for a criminal offence for which he or she has already been finally acquitted or convicted in Hungary or, within the scope specified in an international treaty and a legal act of the European Union, in another State, as provided for by an Act.*"[3] This definition primarily indicates that the principle is only applicable in the context of ordinary judicial proceedings; however, in the case of retrial or an extraordinary appeal, the principle cannot be applied, which can be seen as a significant—yet legally justified—limitation of the finality (irrevocability) of a decision (Ambrus, 2019, p. 123).

Pursuant to Section 4 (7) of Act XC of 2017 on the Criminal Procedure Code (CPC): "*A criminal proceeding may not be launched or a criminal proceeding already launched shall be terminated, if the act of the perpetrator has already been adjudicated with final and binding effect in a Member State of the European Union; or if a decision was adopted in a Member State regarding the merits of the act which prevents the launch of a new criminal proceeding regarding the same act, pursuant to the laws of the country where the decision was adopted, or the continuation of the criminal proceeding ex officio or based on any ordinary legal remedy.*"[4]

In EU law, as mentioned above, the principle of *ne bis in idem* is enshrined in Article 54 of the CISA,[5] Article 50 of the Charter,[6] point 2 of Article 3[7], and point 3 of Article 4[8] of the FDEAW (Coffey, 2023).

In one of the earliest CJEU judgments on the *ne bis in idem* principle—in the Joined Cases C-187/01 Hüseyin Gözütok and C-385/01 Klaus Brüggem—the Court had to decide whether the

1 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (FDEAW) [2002] OJ L 190/1.

2 *"Right not to be tried or punished twice in criminal proceedings for the same criminal offence:*
No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

3 The official English version of the Fundamental Law is available at: https://njt.hu/jogszabaly/en/2011-4301-02-00.

4 The official English version of the Code of Criminal Procedure is available at: https://njt.hu/jogszabaly/en/2017-90-00-00.

5 Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985, signed at Schengen on 19 June 1990: *"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*

6 *"Right not to be tried or punished twice in criminal proceedings for the same criminal offence:*
No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

7 *"Grounds for mandatory non-execution of the European arrest warrant,—"if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State."*

8 *"The executing judicial authority may refuse to execute the European arrest warrant:—"where the judicial authorities of the executing Member State have decided either not to prosecute for the offence on which the European arrest warrant is based or to halt proceedings, or where a final judgment has been passed upon the requested person in a Member State, in respect of the same acts, which prevents further proceedings."*

decision to terminate the criminal proceedings by the public prosecutor could be considered a "*final judgment*" as specified in Article 54 of the CISA. The Court ruled in para. 48 that "*the ne bis in idem principle laid down in Article 54 […] also applies to procedures whereby further prosecution is barred, such as the procedures at issue in the main actions, by which the Public Prosecutor in a Member State discontinues, without the involvement of a court, a prosecution brought in that State once the accused has fulfilled certain obligations and, in particular, has paid a certain sum of money determined by the Public Prosecutor.*"

The *Gözütok and Brügge* judgment was groundbreaking in many ways (Rosanò, 2017; Mancano, 2023). It not only enlarged the ambit of *ne bis in idem* protection through a *contra legem* interpretation of the concept "final judgment"—which a prosecutorial decision clearly is not—but it also strengthened mutual recognition encompassing now other decisions than court judgments, and as a secondary effect, it also forced Members States to harmonize further their criminal justice systems. This latter consequence was a result of the realization on part of the Member States that if they do not want to recognize a decision completely alien to their own jurisdictions, they have to adopt solutions and institutions similar to the other Member States.

It was obvious, however, that Member States will not give up easily the core of their sovereignty, which is their right to create criminal law (*ius puniendi*) (Ambos, 2013), and wish to utilize it according to their own aspirations, and either through a head-on refusal as a State or by implicit and individual institutional sabotage will try to cling on to their powers related to criminal justice as much as possible.[9]

The CJEU has a difficult task when interpreting the above cited Articles defining *ne bis in idem*, although it already held in para. 40 of the Case C-261/09 Gaetano Mantello that: "*In view of the shared objective of Article 54 of the CISA and Article 3(2) of the [FDEAW], which is to ensure that a person is not prosecuted or tried more than once in respect of the same acts, it must be accepted that an interpretation of that concept given in the context of the [CISA] is equally valid for the purposes of the [FDEAW].*" The Court thus has to be cognizant of the fact that Member States may either intentionally or subconsciously protect their citizens and simultaneously not put enough effort into protecting citizens of other Member States.

Therefore, the CJEU in the operative part of Case C-491/07 Turansky developed a fundamental test further clarifying when a prosecutorial or even a decision by the investigative authority will trigger *ne bis in idem* protection: "*the* ne bis in idem *principle enshrined in Article 54 […] does not fall to be applied to a decision by which an authority of a Contracting State, after examining the merits of the case brought before it, makes an order, at a stage before the charging of a person suspected of a crime, suspending the criminal proceedings, where the suspension decision does not, under the national law of that State, definitively bar further prosecution and therefore does not preclude new criminal proceedings, in respect of the same acts, in that State.*" It is evident that the decisive factor is not the nature of the authority issuing the decision to terminate or suspend the proceedings but rather whether the decision possesses *res iudicata* effect under the national law of the Member State in question.[10] In other words, the judgment indicates that the determination of the *res iudicata* character of decisions made by the public prosecutor falls within the competence of Member States. Furthermore, it is noteworthy that the CJEU emphasized this in the context of decisions arising from procedures involving a substantive investigation of the offense.

The CJEU, while giving thus wide discretion to Member States to assign *res iudicata* effect to their prosecutorial or even investigative authority decisions and by that compelling the other Member States to accept and honor these, it tried to exclude decisions which were factually baseless. Such decisions are not necessarily the results of sham procedures but still lack objective grounds on which any decision must be founded. Hence in the operative part of Case C-486/14 Kossowski (2016), in which there was no detailed investigation by the Polish police, the CJEU confirmed that "*the principle of* ne bis in idem *laid down in Article 54 of the Convention signed in Schengen (Luxembourg), read in the light of Article 50 of the Charter, must be interpreted as meaning that a decision of the public prosecutor terminating criminal proceedings and finally closing the investigation procedure against a person, albeit with the possibility of its being reopened or annulled, without any penalties having been imposed, cannot be characterised as a final decision for the purposes of those articles when it is clear from the statement of reasons for that decision that the procedure was closed without a detailed investigation having been carried out; in that regard, the fact that neither the victim nor a potential witness was interviewed is an indication that no such investigation took place.*"

Consequently, it seemed that by 2018, a prosecutorial termination of criminal proceedings activated *ne bis in idem* protection, if there was a detailed investigation (Kossowski test) and the termination (suspension) under the national law of the executing State, definitively bared further prosecution in respect of the same acts against the same person (Turansky test).

3.2 Some relevant issues arising in Case C-268/17 AY (2018)

The *AY* case represents a significant turning point or at least an important further specification of the requirements for affording *ne bis in idem* (*res iudicata*) effect to non-judicial decision under EU law in criminal proceedings.

9 It is noticeable that even in the USA states will not relinquish their control over criminal justice. Approximately 5–10% of criminal cases fall under federal and 90–95% under state jurisdiction. In 2022, state courts processed approximately 15.6 million criminal cases, including 11.5 million misdemeanours and 2.9 million felonies. https://www.ncsc.org/newsroom/at-the-center/2024/court-statistics-project-releases-trial-court-caseload-trends?utm_source=chatgpt.com Accessed 12 December 2024. In the fiscal year ending 31 March 2024, U.S. district courts saw a combined total of 414,026 filings for civil cases and criminal defendants. https://www.uscourts.gov/data-news/reports/statistical-reports/federal-judicial-caseload-statistics/federal-judicial-caseload-statistics-2024 Accessed 12 December 2024. Between 1998 and 2022, 3,763,862 persons in federal investigations (https://fccps.bjs.ojp.gov/home.html?dashboard=FJSP-LawEnforcement&tab=LawEnforcementInvestigationsInitiatedAdvanced; Accessed 12 December 2024).

10 The judgment refers to Contracting State because the case was based on CISA.

The so-called "*Sanader and H*" (H is AY in the case before the CJEU) case is unique in EU legal history and might also be singular worldwide since it involves a former prime minister of a Member State (Croatia), and H, the CEO of the largest than state-controlled (through shares) and partially owned firm (MOL) of a Member State (Hungary), both were indicted for bribery in another Member State (Croatia). Moreover, the case was adjudicated by two respected international arbitration tribunals, the ICSID and the UNCITRAL (Gellér, 2024, p. 73–74).

The legally most important facts of the case are the following (Gellér, 2024, p. 72–74). In 2009, the Croatian Special Prosecution (CSP) started an investigation into the question of whether the contracts between MOL and Croatia concerning ownership of INA (the Croatian oil company) were harmful to Croatia. In 2011, CPS requested that Hungary should hear H as a suspect in the case involving bribery. Hungary, however, refused the request, relying on traditional cooperation in criminal matters, and at the same time, the Hungarian Central Chief Prosecution (HCCP) started an investigation on its own, based on the same facts (13 September 2011). On 20 December 2012, the HCCP terminated the case after a detailed investigation, stating that no crime had been committed. H was never charged, only interviewed as a witness. Using the possibility under Hungarian law of bringing private prosecutions, a small shareholder of MOL brought a private indictment against H for fraud, embezzlement, and bribery founded again on the same facts (6 September 2013). In the meantime, the Zagreb County Court in Croatia (ZCC) issued an EAW against H, which was not executed by the Budapest High Court (BHC) as the Court cited *ne bis in idem* based on the termination of the proceedings in Hungary by prosecution.[11] Nevertheless, the trial following the private prosecution initiated by the small shareholder continued in Hungary, and on 26 April 2014, the BHC acquitted H of the fraud and embezzlement charges and terminated the case regarding bribery, stating that the small shareholder did not have standing to bring a private prosecution for bribery. Subsequently, on appeal, the Capital Court of Appeals in Budapest (CCA) held that the small shareholder did not have standing as regards bribery. In addition, fraud and embezzlement would not be punishable if bribery had been committed since H would not have been expected to report the illegal use of the funds (that is, the alleged bribing of Sanader). Holding otherwise would violate the right against self-incrimination (3 December 2014). On 15 December 2015, the second Croatian EAW was sent to Hungary, but the BHC did not examine it, claiming that there are no new facts; similar treatment was given to the third EAW which was submitted to the Hungarian authorities by the ZCC on 27 January 2017.

A request for a preliminary ruling under Article 267 TFEU from the ZCC was received by the CJEU on 18 May 2017. It concerned the interpretation of Article 1(2), Article 3(2), and Article 4(3) of FDEAW concerning the issuing of an EAW by the ZCC in the proceedings against AY.

The CJEU gave a two-pronged answer to the ZCC's five questions out of which only the second concerns our topic. According to the second point of the operative part of the judgment *"Article 3(2) and Article 4(3) of [FDEAW] must be interpreted as meaning that a decision of the Public Prosecutor's Office, such as that of the Hungarian National Bureau of Investigation in question in the main proceedings, which terminated an investigation opened against an unknown person, during which the person who is the subject of the European arrest warrant was interviewed as a witness only, without criminal proceedings having been brought against that person and where the decision was not taken in respect of that person, cannot be relied on for the purpose of refusing to execute that European arrest warrant pursuant to either of those provisions."*

Although this judgment could be seen as further detailing the conditions for non-judicial *ne bis in idem*, it can be argued also that there is a significant flaw in this decision, namely, that it fails to address the differing evidentiary requirements in various Member States for charging a person. Consequently, if less evidence is needed for example in Germany to charge somebody as is necessary in Austria or Hungary, then *ne bis in idem* protection is afforded to persons much earlier and based on a lesser level of proof in Germany than in the other two Member States.

Accordingly, while the *Turansky* judgment links the *res iudicata* effect of prosecutorial decisions to national law, the *AY* judgment imposes an additional condition, specifically that such an effect is only admissible when the decision is ending proceedings in which the person in question was charged. This approach creates disparities in the EU wide application of *ne bis in idem* as the criminal procedure laws of Member States mandate charging a person with a crime under varying conditions, at different procedural stages, and with differing evidentiary thresholds. This will cause greater legal inequality and uncertainty among Member States and especially persons involved in competing criminal proceedings in different Member States. At the same time, the argument for the correctness of the CJEU judgment is clear and easy to accept: *ne bis in idem* can be invoked only by the same person, who has been investigated or prosecuted for the same facts before. A witness, although possibly a person of interest, has not yet been charged; therefore, it cannot be said that he/she was subjected to criminal proceedings.

It was even more striking that in Hungary, the prosecution and the courts themselves had differing opinions on the *res iudicata* quality of their decisions. The Hungarian Supreme Court (Kuria) did not wait for long after the *AY* verdict to voice its opinion on this matter. Its judgment published as decision No. BH 2018.301[12] stated that the prohibition of double prosecution—the application of the *ne bis in idem* principle—is a constitutional requirement in Hungary, enshrined in the Fundamental Law. The presumption of innocence under the Fundamental Law explicitly and exclusively links the final determination of criminal liability to a court's final decision, excluding decisions by other authorities. Furthermore, the provision enshrining the *ne bis in idem* principle applies explicitly to acquittals and convictions, which, by definition, can only be issued by a court. Consequently, within the Hungarian legal framework, only a court decision can possess *res iudicata* effect under the Fundamental Law. However, this does not preclude the recognition of legal acts issued by

11 The Budapest High Court cited Article 4 (3) of the FDEAW.

12 BH 2018.11.301: Kúria Bfv. III. 1.788/2017. (Hungarian Supreme Court Decision No. 2018.301.)

other authorities of other Member States which have equivalent effects.[13]

The Kuria decision under discussion raises many questions. Foremost, it seems that according to it, all prior decisions rendered by courts or other authorities which endowed *res iudicata* force to prosecutorial decisions were unconstitutional. Furthermore, it could be argued that it is the Constitutional Court of Hungary and not the Kuria which is competent in adjudicating constitutional matters. In addition, the absence of the *res iudicata* effect of prosecutorial decisions terminating criminal proceedings raises several new questions. First, it introduces legal uncertainty as there is no clear justification for why a subsequent prosecutorial decision can override an earlier one. Second, the statute of limitations offers insufficient safeguards against potential state abuse, which could leave an individual under the prolonged threat of criminal proceedings for years. Third, the availability of substitute private prosecution already provides adequate protection for victims in case the victims feel that the conclusion of the criminal proceedings by the prosecution was not satisfactory.

Moreover, according to the Kuria, a prosecutor's decision to terminate proceedings is less favorable to the accused than an acquittal since within Hungary a termination by the prosecution is now not final whereas an acquittal will entail a *ne bis in idem* protection. This approach effectively compels an innocent individual to seek an indictment in the hope of securing an acquittal as only the latter guarantees immunity from future proceedings. This inconsistency highlights the tension not only between different approaches within national jurisdictions (which may change by time as well) but also draws attention to discrepancies between national constitutional principles and evolving EU jurisprudence.

4 Evolution or further confusion?

Why would the CJEU allow a Member State to deprive someone of *ne bis in idem* protection by simply not charging that person? It could be argued that this is because of the term "criminal charge" in Article 6 para. 1 of the ECHR.[14] Indeed, criminal charge and hence criminal proceedings have an autonomous conventional meaning,[15] and the European Court of Human Rights (ECoHR) has developed two tests for assessing whether proceedings are criminal in their nature.[16] The idea behind the autonomous concepts, however, is precisely that states should not be able, by simple labeling, to avoid adherence to the Convention. Similarly, by attaching the *ne bis in idem* protection to the condition of charging a person, Member States may withhold such protection, where other Member States, based on a different standard of proof, by charging the person may afford him/her said right, and this clearly leads to discriminatory treatment, as argued above. In addition, it could be said that too early a charge is in violation of the directive on the presumption of innocence.[17] It is, therefore, suggested that common grounds must be developed within EU law as to the standard of proof and evidence required to charge a person within a Member State (Gellér, 2024, p. 77).

It is interesting to observe that the CJEU arrived at a very different result in Case C-147/22 *Terhelt5* (2023) involving Hungary and Austria. This case concerned suspected bribes to public agents through several companies established in different Member States to influence the decision to be taken in a procedure for the award of a public contract in Hungary. The Hungarian person of interest was not interviewed as a suspect in the context of the investigation carried out by the Central Public Prosecutor's Office for the Prosecution of Financial Crimes and Corruption in Austria (WKStA) as the investigative measures taken by the public prosecutor's office on 26 May 2014 seeking to locate him proved unsuccessful (para. 17. of Case C-147/22). By order of 3 November 2014, the WKStA discontinued the pre-trial investigation without further action, taking the view—referring to the results of the investigations carried out up to that point by the Austrian, British, and Hungarian authorities—that there were no real grounds for continuing the criminal proceedings, within the meaning of para. 190(2) of the Austrian Code of Criminal Procedure (StPO). The public prosecutor's office considered that, since there was no evidence that one of the suspects and the accused had actually committed the acts of corruption referred to in para. 307(1)(6) of the Austrian Criminal Code (StGB), those acts had not been established with sufficient certainty to give rise to a criminal conviction, with the result that it was necessary to discontinue the proceedings (para. 18. of Case C-147/22). On 10 April and 29 August 2019, the National Public Prosecutor's Office in Hungary filed with the Budapest High Court (BHC)—the referring court—an indictment on the basis of which criminal proceedings were brought in Hungary against the suspect for acts of corruption, within the meaning of paras. 254(1) and (2) of Act IV of 1978 [the Hungarian Criminal Code (HCC)]. The BHC decided to stay the proceedings and to refer the case for preliminary ruling (para. 21. of Case C-147/22).

When reading the facts of this case, it is clear that it involves issues comparable to *Turansky* and *AY*, yet *AY* is not mentioned once in the judgment. Instead of facing the music, the Court decided to sweep the

13 Last sentence of the operative part of Hungarian Supreme Court Decision No. 2018.301 referring to Article 6 (3) (d) of CPC and Article XXVIII (2) and (6) of the Fundamental Law.

14 Article 6 Right to a Fair trial:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order, or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

15 Guide on Article 6 of the European Convention on Human Rights (Prepared by the Registry, 31 August 2022), 9 onwards <https://www.echr.coe.int/documents/d/echr/guide_art_6_criminal_eng> accessed 1 December 2024; *Blokhin v Russia* App no 47152/06 (ECHR, 23 March 2016) para. 179; *Adolf v Austria* (1982) 4 EHRR 313, para. 30.

16 For the Engel-test, see *Engel v the Netherlands* App nos 5100/71, 5,101/71, 5,102/71, 5,354/72, and 5370/72 (ECHR, 8 June 1976), paras 82–83; for the Welch-test (art 7), see *Welch v UK* App no 17440/90 (ECHR, 9 February 1995); see, for comparison, *A v the Netherlands* App no 29094/09 (5 July 2016).

17 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

problem under the carpet as I pointed out in another study (Gellér, 2024, p. 82). The Court found that the fact that the suspect was not questioned was not hindering *ne bis in idem* protection, nor indeed did the fact that the decision of the prosecution had no *res iudicata* effect under national law, although proceedings could only be continued under strictly defined conditions, such as the emergence of significant new facts or evidence, and provided that, in any event, the offense is not time-barred. The same was the case in *AY* regarding decisions of the Hungarian prosecution, be that the Kuria changed its views on the *res iudicata* power of prosecutorial decisions or at least declared the lack of such after the *AY* judgment.

It is difficult to see why someone who was never formally charged and did not participate in the proceedings could benefit of *ne bis in idem* protection when a lack of evidence led to the termination of the proceedings (*Terhelt5*), while another person who did participate in a detailed investigation and gave a testimony under oath as a witness (clearly being a person of interest) was refused the same protection when the proceedings revealed that no crime had been committed (*AY*) (Gellér, 2024, p. 82).

At first glance, the *AY* judgment looks as a decision whereby the CJEU simply wanted to end the streak of judgments constantly enlarging *ne bis in idem*'s field of application. It added a further condition to the *Turansky test*: For a case to fall under *ne bis in idem,* it is no longer sufficient that the first proceedings be terminated by a decision having *res iudicata* effect under the national law of the Member State: The person in question also has to be formally charged.

The issue at point is raised currently by Case C-701/23 Swiftair. It is clear from the questions formulated by the Tribunal Judiciaire de Paris (France) that the difference between provisional dismissal and a dismissal which constitutes a final disposal of the case under Spanish law, and also the fact that no one was charged, and additionally the possible criminal responsibility of legal persons and the effect of *ne bis in idem* on them is examined. While one awaits the Opinion of the Advocate General with great interest, since this case advances legal points not yet clarified sufficiently by previous case law, it is anticipated that yet again not all problems will be addressed (Gellér, 2024, p. 84).

5 The public prosecutor's office as an independent judicial body under EU law

The issue of whether a decision by the prosecution can induce *ne bis in idem* protection through its *res iudicata* character is—or at least should be—connected to another quality of the prosecution, namely, it being a judicial authority. This latter characteristic, if interpreted correctly, must entail the authority's independence and impartiality within the meaning of Article 6 para. (1) of the ECHR as developed by the ECoHR's jurisprudence.[18]

The concept of "judicial authority" has been construed by the CJEU as well. Its judgment in Joined Cases C-508/18 and C-82/19 PPU (known as *OG and PI* cases) (2019) involved the following facts[19]: OG, a Lithuanian national residing in Ireland, had his surrender sought under an EAW issued by the Public Prosecutor's Office in Lübeck for the prosecution of murder and grievous bodily harm allegedly committed in 1995. The *PI* case concerned the request for the surrender of PI, a Romanian national, for the prosecution of a criminal offense identified as organized or armed robbery, pursuant to an EAW issued by the Public Prosecutor's Office in Zwickau (Germany) in 2018. The High Court in Ireland declared the warrant enforceable, and PI was subsequently arrested based on it. In both cases, the key issue was that the EAWs were not issued by a court but by the public prosecutor's office, as permitted by German law.

Within the meaning of Article 6(1) of the FDEAW "*The issuing judicial authority shall be the judicial authority of the issuing Member State which is competent to issue a European arrest warrant by virtue of the law of that State*." In accordance with the principle of procedural autonomy, Member States may designate the "judicial authority" competent to issue an EAW based on their national law, but the meaning and scope of this concept cannot be left completely to the discretion of each Member State.

It is important to note that, although the German public prosecutor's office is subordinate to the government and the government has the right to issue instructions, the CJEU did not regard the public prosecutor's office as part of the executive branch solely on this basis.

In German law, Section 146 of the *Gerichtsverfassungsgesetz* (GVG)[20] provides that "*The officials of the public prosecution office must comply with the official instructions of their superiors.*" Pursuant to Section 147 of the GVG: "*The right of supervision and direction shall lie with: 1. the Minister of Justice and Consumer Protection in respect of the Federal Prosecutor General and the federal prosecutors; 2. the Land Department of Justice in respect of all the officials of the public prosecution office of the Land concerned; 3. the highest-ranking official of the public prosecution office at the Higher Regional Courts and the Regional Courts in respect of all the officials of the public prosecution office of the given court's district.*"[21]

Para. 50 of the judgment in *OG and PI* states that "*the Court has previously held that the words 'judicial authority', contained in that provision, are not limited to designating only the judges or courts of a Member State, but must be construed as designating, more broadly, the authorities participating in the administration of criminal justice in that Member State, as distinct from, inter alia, ministries or police services which are part of the executive.*" Pursuant to para. 51, this implies that "*the concept of a 'judicial authority', within the meaning of Article 6(1) of Framework Decision 2002/584, is capable of including authorities of*

18 *"Die Beamten der Staatsanwaltschaft haben den dienstlichen Anweisungen ihres Vorgesetzten nachzukommen."* Neugefasst durch B. v. 09.05.1975 BGBl. I S. 1077; zuletzt geändert durch Artikel 1 G. v. 07.10.2024 BGBl. 2024 I Nr. 302. Geltung ab 01.01.1975; FNA: 300–2 Gerichtsverfassung.

19 The judgement was passed on 27 May 2019.

20 Gerichtsverfassungsgesetz in der Fassung der Bekanntmachung vom 9. Mai 1975 (BGBl. I S. 1077), das zuletzt durch Artikel 1 des Gesetzes vom 7. Oktober 2024 (BGBl. 2024 I Nr. 302) geändert worden ist.

21 § 147 GVG: *"Das Recht der Aufsicht und Leitung steht zu: 1. dem Bundesminister der Justiz und für Verbraucherschutz hinsichtlich des Generalbundesanwalts und der Bundesanwälte; 2. der Landesjustizverwaltung hinsichtlich aller staatsanwaltschaftlichen Beamten des betreffenden Landes; 3. dem ersten Beamten der Staatsanwaltschaft bei den Oberlandesgerichten und den Landgerichten hinsichtlich aller Beamten der Staatsanwaltschaft ihres Bezirks."*

a Member State which, although not necessarily judges or courts, participate in the administration of criminal justice in that Member State."

Para. 60 of the judgment says that a public prosecutor's office, which is responsible for prosecuting criminal offenses and bringing suspects before a court, must be considered as participating in the administration of justice of the relevant Member State. While para. 75 adds that when the law of the issuing Member State grants the authority to issue an EAW to a body that is not a court but participates in the administration of justice, the decision to issue the warrant, including its proportionality, must be subject to court proceedings that fully meet the requirements of effective judicial protection. Para. 88 of the judgment stipulates that if public prosecutors' offices are at risk of executive influence in issuing an EAW, they do not meet the requirement of acting independently, as required to be considered an "issuing judicial authority" under Article 6(1) of the FDEAW. The operative part of the judgment concludes that the concept of an "issuing judicial authority" does not include public prosecutors' offices exposed to the risk of being directed or instructed by the executive, such as a Minister for Justice, in issuing a European arrest warrant.

On the same day (27 May 2019), another judgment was also rendered by the Court in Case C-509/18 *PF*. The CJEU determined that the Prosecutor General of a Member State (in this instance, Lithuania), who operates independently from the judiciary in an organizational sense and performs prosecutorial functions, and whose status in that Member State ensures independence from the executive in the context of issuing an EAW, qualifies as an issuing judicial authority under the meaning of the FDEAW.

Later that year, in December of 2019, the CJEU examined the French public prosecutor's office in this respect. In the Joined Cases C-566/19 PPU and C-626/19 PPU (known as *JR and YC* cases), the requests for preliminary ruling were made in the context of the execution of EAWs in Luxembourg and in the Netherlands issued by the *Procureur de la République près le tribunal de grande instance de Lyon* (Public Prosecutor attached to the General Court of First Instance of Lyon (France)) for the purpose of prosecuting JR and by the *Procureur de la République près le tribunal de grande instance de Tours* (Public Prosecutor attached to the General Court of First Instance in Tours (France)) for the purpose of prosecuting YC.

Regarding the position of the public prosecutor's office, pursuant to Article 64(1) of the French Constitution of 4 October 1958: "*The President of the Republic shall be the guarantor of the independence of the Judicial Authority.*"[22] Within the meaning of Article 5 of Order No 58–1270 of 22 December 1958 enacting the institutional Act on the status of the judiciary: "*Public prosecutors are under the direction and control of their superiors and the Minister of Justice. They are free to speak at the trial.*"[23] Book I of the normative part of the *Code de procédure pénale* (French Criminal Procedure Code (FCPC)), titled "*The conduct of criminal policy, prosecution functions and investigations*," consists of four chapters. Chapter I of Book I of the FCPC, entitled "*The authorities responsible for the conduct of criminal policy, prosecution functions and investigations*," includes, inter alia, Articles 30, 31, and 36. Article 30 reads as follows: "*The Minister of Justice conducts the criminal policy determined by the Government. He ensures the consistency of its application on the territory of the Republic. To this end, he shall issue general instructions to the public prosecutors. He may not issue any instructions to them in individual cases.*" Article 31 of the FCPC states that: "*The public prosecutor's office shall conduct prosecutions and enforce the law with due regard for the principle of impartiality by which it is bound.*" Finally, Article 36 of the CPP provides as follows: "*The Attorney-General may order the public prosecutors, by written instructions and placed in the record of the proceedings, to institute or cause to be instituted proceedings or to submit to the competent court such written requisitions as the Attorney-General deems appropriate.*"[24]

Para. 55 of the judgment in *JR and YC* states that in France, public prosecutors independently assess the necessity and proportionality of issuing an EAW, considering both incriminatory and exculpatory evidence, without undue influence from the executive. Para. 56 adds that, while public prosecutors must comply with instructions from hierarchical superiors, the Court's case-law, particularly in *OG and PI* and *PF* confirms that the requirement of independence prohibits external instructions, especially from the executive, but allows internal instructions within the prosecutor's office based on its hierarchical structure in individual cases.

However, in addition to the legal status of the prosecutor's office and its jurisdiction, para. 59 of the judgment examined, as an additional condition, the right to effective judicial protection and its enforcement in the case of an EAW issued by a public prosecutor's office: "*The European arrest warrant system entails a dual level of protection of procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national decision, such as a national arrest warrant, is adopted, there is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision.*"

The reference to judicial review here and also in para. 75 of *OG and PI* is difficult to understand as it seems to contradict other similar judgments of the CJEU and the principle of double protection (effective judicial protection), as explained in the Case C-241/15 *Niculaie Aurel Bob-Dogi* (2016). Pursuant to Article 8(1)(c) of the FDEAW: "*The European arrest warrant shall contain the following information set out in accordance with the form contained in the Annex: … (c) evidence of an enforceable judgment, an arrest warrant or any other enforceable judicial decision having the same effect, coming within the scope of Articles 1 and 2.*"

As the Court explained in para. 56 of the *Niculaie Aurel Bob-Dogi* case "*The European arrest warrant system therefore entails, in view of the requirement laid down in Article 8(1)(c) of the Framework Decision,*

22 Accessed https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958.

23 Order No 58–1270 of 22 December 1958 Enacting the Institutional Act on the Status of the Judiciary (*ordonnance n° 58–1,270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*) https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000339259?utm_source=chatgpt.com Accessed 12 December 2024.

24 The translation used in the judgment has been quoted rather than the translation of the FCPC found at https://legislationline.org/sites/default/files/2023-10/France_Code_of_criminal_procedure_EN.pdf.

a dual level of protection for procedural rights and fundamental rights which must be enjoyed by the requested person, since, in addition to the judicial protection provided at the first level, at which a national judicial decision, such as a national arrest warrant, is adopted, is the protection that must be afforded at the second level, at which a European arrest warrant is issued, which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision."

In other words, the issuance of an EAW must be preceded by a national arrest warrant, which has to be issued by a court or—following the logic of the CJEU—by the public prosecutor's office if this meets the tests defined in the *OG and PI* and the *PF* judgments. However, if the national arrest warrant was issued by the prosecution, then the EAW must be issued by a court or vice-versa.

On this basis, the CJEU stated in the operative part of Case *JR and YC* that "*as regards a measure, such as the issuing of a European arrest warrant, which is capable of impinging on the right to liberty of the person concerned, that protection means that a decision meeting the requirements inherent in effective judicial protection should be adopted, at least, at one of the two levels of that protection.*"

Finally, in explaining the different interpretations of French law the CJEU stated in para. 69 that "*according to the French Government, in the French legal system, the decision to issue a European arrest warrant may, as a procedural step, be the subject of an action for a declaration of invalidity on the basis of Article 170 of the CCP. Such an action, which is available as long as the criminal investigation is ongoing, enables the parties to the proceedings to enforce their rights. If the European arrest warrant is issued in respect of a person who is not yet a party to the proceedings, that person may bring an action for a declaration of invalidity after his actual surrender and appearance before the investigating judge.*" Accordingly, the Court found that the requirement of effective judicial protection "*which must be afforded any person in respect of whom a European arrest warrant is issued in connection with criminal proceedings are fulfilled if, according to the law of the issuing Member State, the conditions for issuing such a warrant, and in particular its proportionality, are subject to judicial review in that Member State.*"

It is worth observing that the CJEU's jurisprudence by affording, although depending on corresponding national law, *res iudicata* effect to prosecutorial decisions previously reserved for courts (tribunals) and additionally, finding that they may qualify as judicial authority and form part of effective judicial protection clearly departed from the stringent Article 6 (1) ECHR case law of the ECoHR.[25]

6 Conclusion

The CJEU chose to supplement EU legislation in the field of criminal justice by forcing Member States to harmonize their respective laws or be compelled to recognize decisions completely foreign to their own systems. The most effective vehicle for that proved to be the *ne bis in idem* principle which not only appears in several key legal instruments but is part of the FDEAW as grounds for refusing the execution of an EAW (Gellér, 2018). By equating prosecutorial decisions as far as terminating criminal proceedings is concerned with court judgments, the CJEU forced Member States to recognize the other Members State's prosecution's decisions even where her own prosecution would have not been authorized to render such a decision. This undoubtedly was more expedient, than waiting for the States to bring their law in conformity with each other, but it also presupposed that Member States which reserved these powers for their courts did so unnecessarily and additionally this jurisprudence may have run counter the case law of the ECoHR. This latter problem is an issue to be further examined in the light of para. 168 of Opinion 2/13 of the CJEU of 18 December 2014 (Odermatt, 2015) and Article 53 of the ECHF.[26]

The diversity of national laws and the unjustly diverging protection provided by EU law in different Member States—and the emphasis is on EU law affording varying levels of rights protection to EU citizens—is keenly exhibited by the tests which make *ne bis in idem* protection under EU law dependent on the charging of the individual under national law which lacks any EU standard.

In addition, the CJEU also empowered prosecutions—subject to appropriate national legislation—to issue EAWs which must be executed by other Member States. The justification of these judgments redefines judicial authority and effective judicial protection encompassing prosecutorial decisions as well. Undoubtedly, the eagerness of the CJEU to draw the criminal justice systems of Member States closer and closer overrode not only the prior understanding of these concepts as parts of a larger human rights protection system but implies an evaluation of the affected Member States' prosecutorial system by which an independent prosecution is arguably more in conformity with EU expectations than one under governmental supervision.

One understands the frustration of those striving for an ever-closer cooperation between Member States with tardy EU law-making caused by Member State objections; nevertheless, judicial activism on part of the CJEU must not create inhomogeneous EU law protection in different Member States and must not chip away on rights developed and cherished for decades.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

25 ECoHR Öztürk v. Germany judgment, 1984, § 56, ECoHR Josseaume v. France judgment, 2012, § 32, ECoHR Célice v. France judgment, 2012, § 34, https://ks.echr.coe.int/documents/d/echr-ks/guide_art_6_criminal_eng.

26 Article 53 Level of protection (The Charter of Fundamental Rights of the European Union).

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Author contributions

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Paradigm shift in the European Union's space policy: institutional restructuring and its possible consequences for the CEE region

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Developing capabilities in outer space has become crucial as the space segment becomes an increasingly important pillar of the economy and defence capabilities of states. Despite the growing global competition in and for outer space, in recent decades the EU and the ESA have focused their strategy on the civil aspects of space exploration. However, the crises emerging from Russia's war on Ukraine has led the Member States to the conclusion that Europe must enhance its autonomous security and defence capabilities, especially in outer space. The main methods used in this study were the historical method and the legal analysis method. As a result of the crises, the EU has changed its politics recently adopted a space defence strategy, while it plans to propose an "EU Space Law Act" and is currently adapting its institutions to respond appropriately to the security challenges posed by the war on European territory and to the increasing competitiveness gap. First, the paper analyses the paradigm shift in the EU's space policy and its implementation at the level of the institutions. Second, it will scrutinize the potential of the CEE region in connection with this paradigm shift. As a result of the crises, the EU has changed its politics recently adopted a space defence strategy, while it plans to propose an "EU Space Law Act" and is currently adapting its institutions to respond appropriately to the security challenges posed by the war on European territory and to the increasing competitiveness gap.

KEYWORDS

European space Policy, politics of crises, war on Ukraine, security and defence policy, EU space law, competitiveness, CEE region

1 Introduction

The space industry is booming in several contexts, including both the civilian and military domains, both downstream, via increased demand for satellite data in various industries, and upstream, involving governmental conventional missions. The unprecedented intensity of space activities that has emerged is due to two main factors: the transformation of the space industry (New Space) and the militarisation of space activities due to geopolitical conflicts. The term "New Space" refers to the new wave of commercial space activities spearheaded by private companies, introducing innovative technologies with reduced costs and increased accessibility (Achilleas, 2024, pp. 9–13). Second, the increasing geopolitical tensions and crises around the world and the increasing exposure of societies to space systems have led to the militarisation of outer space, which in turn affects national and regional security policies.

These global tendencies are forcing Europe to make politics of crises and to engage fundamental changes to its space policy, including the institutional reforms necessary if it wishes to be a space power and an autonomous actor in geopolitics. The first of these challenges is related to the competitiveness of the European space industry in the New Space era. Whilst Europe has been a frontrunner in many aspects of space technology (e.g., the rocket propulsion

industry), the competitiveness gap is widening with its chief global competitors (mainly the United States and China). The second challenge is the militarisation of outer space, which has been accelerated by the war in Ukraine. The European Union (EU) and the European Space Agency (ESA) focused their strategy in previous decades on the civil aspects of space exploration. It is only lately, following the outbreak of Russia's war on Ukraine that the Member States of the EU decided to enhance the autonomous security and defence capabilities, especially in outer space. As a result, the EU has recently adopted a space defence strategy, with plans to propose an "EU Space Law Act" in 2025 and it is currently adapting its institutions to respond appropriately to the security challenges posed by the war on European territory.

The purpose of this study is to analyse the change in the EU's space policy following one of the major crises of the last decade, the war on Ukraine and to scrutinize the possible consequences of this paradigm shift for of the CEE region. Finally, it will make recommendations for the CEE region on how to foster competitiveness and autonomy through legal and other policy instruments. For the purposes of this study, the CEE region is defined as including Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. Although only some of these countries are analyzed in detail in this chapter, the conclusions drawn are applicable to the CEE region as a whole.

2 Materials and methods

In order to achieve the objectives of the study, the authors have analysed official documents of the EU, including primary and secondary sources of EU law, as well as other documents, on the policies and strategies of the EU in the field of space. With regard to international law, the materials referred to in this the study include international legal instruments as well as non-binding documents, including guidelines and recommendations adopted by the United Nations. At the national level, the authors studied national legislation in the field of space exploration, national space strategies and documents related to space programmes. In addition, recent literature in the area under study was reviewed. The main methods used in this study were the historical method and the legal analysis method. The historical method was mainly used to show the evolution of the European approach to space, the changes in its institutional structure and the space heritage of the Central and Eastern European Member States. The method of legal analysis was applied to the analysis of legal acts and their interpretation.

3 Discussion

3.1 Landscape of the European space Policy

The following section presents the current picture of the European space Policy, as well as the position of the Member States in the space domain.

3.1.1 Space programmes

The development of European space Policy has been shaped by the specific features of the history of the European continent and the EU. During the Cold War, the domain of space was for the most part within the reach only of the two superpowers, the US and the USSR whose national space agencies played a dominant role in pursuing space activities, while the rest of the world admired their achievements. However, in the 21st century, the concept of space activities has taken on a new meaning, and with the emergence of private actors in the field, leading to cost reductions and sustainable development, the role of the space domain has also changed. This is driven by the growing demand for space data and services in support of sustainability goals, where space programmes (including the EU's space programmes) can make a significant contribution to addressing challenges such as climate change, security, emergencies and mobility. It is also directly linked to the relevant need for an independent and resilient space infrastructure in response to an unstable geopolitical situation (EU Commission, n.d.). It is also worth mentioning that ESA puts also on emphasis on sustainable use of the space segment. For example, the Agency has published in 2022 its strategy to reduce space debris by 2030 (ESA Zero Debris Charter, n.d.). This development has also led to changes in the institutional landscape of the European space sector.

Based on the challenges outlined above, the European space Policy has dynamically evolved during the last few years. These developments are intrinsically bound up with the strategic autonomy of the EU and its Member States which has been considered in a number of documents adopted by the EU which culminated in the drafting of the European space Policy and its key milestones. Principal elements of this policy include the need to support the emergence of a highly competitive European space industry and its supply chains, which would enable Europe to participate in and contribute to the global growth of the space economy. The policy calls on all actors to work towards ensuring a global level playing field and to open their economies. Developed jointly by the European Commission and the ESA, the European space Policy sets out a basic vision and strategy for the space sector, addressing issues such as security and defence, access to space and space exploration. Particular attention is paid by the policy to space traffic management and space cybersecurity, which are essential elements for maintaining safe, autonomous, reliable, cost-effective and affordable access to space. A related and decisive step in strengthening the space sector was the Treaty on the Functioning of the EU (TFEU, Lisbon Treaty), which placed space on the political agenda at the highest level and explicitly mentioned cooperation between the EU and ESA. Article 189 of the Lisbon Treaty specifies the EU's competence in space, which operates alongside that of the EU Member States. It also provided the basis for establishing appropriate relations between the EU and the ESA.

All the major elements included in the European space Policy were subsequently included in the EU Space Programme for the years 2021–2027 (Regulation (EU) 2021/696, n.d.). The principal goal is to ensure high-quality, up-to-date and secure space-related data and services, increased growth and job creation in the EU due to use of such data and services, enhanced security and greater strategic autonomy of the EU. The programme stresses—inter alia—the importance of the EU's Galileo (EU Galileo, n.d.) and Copernicus (EU Copernicus, n.d.) and EGNOS (EUSPA EGNOS, n.d.) space programmes. In 2022, the European Commission proposed a regulation on the Union Secure Connectivity Programme for the period 2023–2027 (Regulation (EU) 2023/588) focusing on enhancing the robustness of EU communication services through the creation and management of a multi-orbital connectivity infrastructure, consisting of both space and ground segments, utilising a public-partnership approach called Satellite Communications for Air Traffic Management (IRIS). IRIS^2 will be a multi-orbital satellite constellation that will be able to provide secure communication services to

European governments (and commercial services at a later stage) (EU IRIS², n.d.).

One of the most recent milestones in shaping the EU approach to the space domain is the EU Space Strategy for Security and Defence (Joint Communication, 2023), which set the course for the development of the European space ecosystem to protect space systems and services in the EU, as well as to strengthen their resilience, as a response to increased counterspace capabilities and threats in the space domain (EU Space Strategy, n.d.). This shift in EU space policy in the direction of defence and security will be analysed in section 3.2.

Another important means of ensuring European autonomic access to space is the development of European launchers, which is the second largest area of space-manufacturing activity in Europe after commercial satellites. The issue is closely related to the services available at Europe's Spaceport in French Guiana and affects both the safety and competitiveness aspects of the European space domain. The first successful European space launch vehicle series, and for many years the only one, were the Ariane rockets. The various generations of Ariane launchers have served both the European governments as well as the commercial clients from all over the world. In addition, two other, smaller launchers were developed in French Guiana, i.e., Vega and Soyuz. In 2014, the ESA Council meeting at Ministerial level approved the development of the Ariane 6 and Vega-C launchers. Ariane 6 thus succeeded Ariane 5 to enable Europe to maintain its autonomy in launching services and the maiden flight of this system took place in 2024 (ESA Europe's launchers, n.d.).

3.1.2 Institutional framework

The implementation of the European space Policy and Programme depends to a large extent on properly functioning space governance. Space governance at European level has grown considerably in recent years and become more diverse, based on several institutions. It remains, however, highly fragmented for several reasons. First of all, this is related to the penetration of both supranational and national elements and the dynamic changes taking place in the European space Policy field. From the institutional perspective, EU has taken a collaborative approach to the space domain which may help it to fulfil the conditions of safety, sustainability, and resilience in space across the entire EU. These requirements have been envisaged in the EU Space Programme which sets out the principles of its governance through the distribution of tasks and responsibilities between the entities involved in the implementation of each of the EU Space Programme's components and measures, in particular between the Member States, the Commission, the EU Agency for the Space Programme (EUSPA), ESA and EUMETSAT.[1] From the institutional perspective, the European space sector is led by the European Commission and its operational agency in charge of the Space Programme—EUSPA. The increasingly important role of the European Defence Agency also cannot be ignored. This institutional landscape is also inhabited by the ESA, although it is not a part of the governance system of the EU, due to the independent legal position of ESA.

The European Commission (EC), as the executive body of the EU, plays a major role in governing the European space domain, as well as in proposing policies and strategies. Its dominant role was established in the EU Space Programme according to which "*[i]n the area of space, the Union exercises its competences in accordance with Article 4(3) TFEU.*[2] *The Commission should ensure the coherence of activities performed in the context of the Programme*" (Regulation (EU) 2021/696, n.d.). The Commission currently plays a dual role in the Space Programme, not only initiating the legislative process and preparing EU space programme proposals, but also being responsible for their implementation (Schuman Papers, Salini, 2021). The EC has also been assigned overall responsibility for the implementation of the space EU Space Programme, involving the determination of the long-term evaluation and priorities of the programme as well as the supervision of its implementation; management of its components and determining the technical and operational requirements needed for the implementation and evaluation of these components.

The EU's Space Programme introduced a number of new instruments to unify the governance system of the space sector at the EU level (EU Space Programme, n.d.). Accordingly, the EC is responsible for creating and promoting synergies with other related EU programs and financial instruments and should ensure consistency between the approaches developed under these programs.[3] This is why, through its executive agencies, the EC additionally coordinates and manages programmes such as Horizon Europe,[4] the CASSINI Space Entrepreneurship Initiative[5] and many others (European space sector, n.d.). Another milestone in the unification of space activities from the institutional point of view was the publication of the EU Space Strategy for Security and Defence. The role of the EC in this context is to synchronise and coordinate activities in critical space technologies, together with the European Defence Agency and ESA as well as EUSPA (Council Conclusions, 2023). Similarly to the tasks performed under the EU Space Programme "*the Commission promote joint programming through enhanced coordination between relevant EU programmes*" (Joint Communication, 2023). The EC's activities in the defence industry, as well as in the Space sector are led by the Directorate-General for Defence Industry and Space (Directorate-General DEFIS, n.d.).

1 The European operational satellite agency for monitoring weather, climate and the environment from space on behalf of its Member States.

2 "In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs." (TFEU Art. 4).

3 "During the implementation of the programme, the commission should therefore promote synergies with other related union programmes and financial instruments, which would allow, where possible, use of access to risk finance, innovation partnerships, and cumulative or blended funding. The commission should also ensure synergies and coherence between the solutions developed under those programmes, particularly Horizon Europe, and the solutions developed under the programme." (Regulation (EU) 2021/696, n.d.).

4 The EU Framework Programme for Research and Innovation established by the European Innovation Council.

5 Under the umbrella of the European Commission, the European Investment Fund and European Investment Bank Competitive Space Start-ups for Innovation initiative (CASSINI) was officially launched in 2022.

The EU Agency for the Space Programme (EUSPA) was established to implement the EU Space Programme[6] as the EU decentralized agency in charge of the Space Programme. EUSPA acts as the operational manager of Copernicus, Galileo, EGNOS and all the other components of the space programme in terms of their security and coordinates the user-related aspects of Govsatcom in cooperation with the relevant Union agencies, the European External Action Service (EEAS), Member States and other entities. The responsibilities of EUSPA include the security accreditation of all the components of the EU Space Programme, as well as ensuring market development, communication and promotion of the services offered by Galileo, EGNOS, and Copernicus. Furthermore, according to the EU Space Programme, the EUSPA's competences also include implementation of activities related to the development of downstream applications as well as integration based on the data and services provided by EGNOS, Galileo and Copernicus (Regulation (EU) 2021/696, n.d.). The EUSPA provides security support to the EC in connection with other initiatives such as the Connectivity and Euro Quantum Communication Infrastructure (EuroQCI), and is a source of security expertise for components such as GOVSATCOM, Space Surveillance and Tracking (SST) and Space Situational Awareness (SSA) (EU Agency for the Space Programme, n.d.).

The institutional landscape in this area in the EU also encompasses the European Defence Agency (EDA). Due to the circumstances and threats that have emerged over the past few years, such as the Russian's aggression against Ukraine, increased development of counterspace capabilities and threats in the form of DA-ASAT[7] tests or cyberattacks on space infrastructure, the EDA has become increasingly important in the context of space activities. Programs coordinated by EDA are facing against these challenges by filling the relevant gaps in European defence capabilities. This includes efforts to build a more coherent European approach via programmes such as Space-Based Earth Observation (SBEO), SSA, Satellite Communications (SatCom) as well as Positioning, Navigation and Timing (PNT) (European Defence Agency, n.d.). In the context of the EU's broader space policy, with the aim of co-development, EDA is tasked with identifying the common requirements of defence users' military needs for space-based systems (EDA, Defence in Space, n.d.). Important changes in the roles of EDA have been envisaged in the European Space Strategy for Security and Defence. In line with this strategy, the EDA will be required to identify the needs expressed by Member States with regard to space domain, while also providing support for EDA's education activities in the field of space security and defence, as well as fostering the exchange of best practices in developing space-related skills.

A discussion of the institutional landscape of the EU would not be complete without outlining the role of the ESA. The relations between ESA and the EC were forged by a number of measures preparing the basis for future cooperation between the two organisations. On 16 November 2000, ESA and the EU Councils (at the time the European Communities) met for the first time to adopt parallel resolutions endorsing the jointly elaborated European Strategy for Space and to establish a structure for future cooperation (Council Resolution 2000/C 371/02). The next milestone in their cooperation was the drafting of the "Green Paper on European space Policy," prepared by the EC in cooperation with ESA. The Green Paper (European Commission, 2003) identified Europe's assets and weaknesses in the space sector in order to initiate a debate on Europe's space policy with all the involved players including national and international organisations, the European space industry and its users. The EU-ESA cooperation was formalized by the Framework Agreement signed by EU and ESA on 25 November 2003,[8] based on article 189 TFEU. The Framework Agreement recognises that both parties have specific complementary and mutually reinforcing strengths and commits them to work together to avoid the duplication of effort. However, it also stressed the continued independence of the ESA. The framework had two main aims: to establish a common basis for future activities and to put in place appropriate practical arrangements for efficient and mutually beneficial cooperation between the ESA and the EU, as well as to progressively develop a European space Policy to link the demand for services and applications in support of EU policies with the supply, through the ESA, of the space systems and infrastructure needed to meet that demand.

3.1.3 European states as independent actors of space policy and governance

In spite of the growing harmonization and unification of space-related laws within the EU, the Member States remain independent actors. Legally, that results from the provisions of the TFEU, which grants the EU only limited powers within the scope of regulating space activities. The current framework is derived from the TFEU, Article 189 of which empowers the EU draw up a European space Policy but excludes any harmonisation of the laws and regulations of the Member States. Thus, Member States—whether they are members of the ESA or not—are free to establish their own national space policies. The following section briefly outlines the currently highly fragmented regulatory landscape of space activities in the EU as regards the governance of space activities.

Most EU Member States regulate their national space activities through national legislation to keep pace with technological development (Sipos and Upadhyaya, 2024) while conforming with Art. VI. of the Outer Space Treaty which provides that States Parties to the Treaty shall authorize and supervise by the appropriate State Party to the Treaty (Outer Space Treaty, Art. VI, n.d.). The landscape of national space legislations of the Member States is very heterogenous due to the lack of legal competence of the EU in this field, as mentioned above, and to the lack of legally binding international legal instruments on the authorization and supervision of national space activities. In consequence, the EU's authority to act in relation to the national competences of the Member States is in parallel with them, which means that the Member States preserve their national authority to act within the space sector, even if the EU undertakes actions with the same subject and scope (Article 4.3. TFEU). In the present circumstances, the restriction on the harmonization of the European space laws has begun to be perceived as an obstacle to serving the interests of European societies in terms of safety and competitiveness in space. This has become all the more pressing since space was identified as a vital strategic domain.

6 It replaced and succeeded the European GNSS Agency established by Regulation (EU) No 912/2010, n.d..

7 Direct-Ascent Anti-Satellite Missile.

8 Entered into force on 28 May 2004.

To date, 12 Member States have enacted national space legislation in the EU (UN National space law database, n.d.). This paper only deals with countries which have enacted rules on the authorisation and supervision of space activities. Therefore, it does not consider Member States which only regulate the competences of their national space agency [e.g., Poland (Polish Space Agency, n.d.) and Italy (Italian Space Agency, n.d.)] or the registry of national space objects [e.g., Czech Republic (2014)]. Member States which have passed national space legislation can be divided into two broad groups. The first group includes those countries which do not regulate the rules for space activities in their entirety, but which have codified only certain aspects of them [e.g., Germany (SatDSiG, 2007)]. The second group includes those States that have established rules for the performance, control and registration of space activities in a comprehensive piece of legislation [Sweden (UNOOSA Sweden, n.d.), Spain (UNOOSA Spain, n.d.), Belgium (Belgian Space Law, 2005), France (French Space Law, n.d.), Netherlands (Dutch Space Law, n.d.), Austria (Austrian Space Law, n.d.), Denmark (Danish Space Law, n.d.), Luxemburg (Luxembourg Space Law, 2020), Greece (Greek Space Law, n.d.), Finland (Finnish Space Law, n.d.; Decree (74/2018), n.d.), Portugal (Portuguese Space Law, n.d.), Slovenia (Slovenian Space Law, n.d.)]. Most of the latter States supplement the law by implementing regulations, in order to codify the detailed, often technical rules contained in them (see Figure 1).

3.1.4 Space policy and governance specifics in the states of Central Eastern Europe

Faced with the legal landscape depicted in section 3.1.2., Member States are implementing both their own space strategies and national space laws, that involve science, research and development and international cooperation, and which increasingly possess elements of a defensive and security nature. The complexity of the processes involved in space activities requires both the adoption of appropriate strategies and taking suitable governance measures. It is possible to characterize different European regions in terms of their level of engagement with the space domain, depending on various indicators such as historical heritage, relatively low level of public and private investment in the space sector, the lack of awareness among local authorities of the potential of the space domain, the continued lack of prioritisation of the space sector as well as a low level of cooperation between institutions and industry (Malinowska et al., 2024).

In the current New Space Era, in addition to security and defence aspects, the increasing presence of private entities in the space

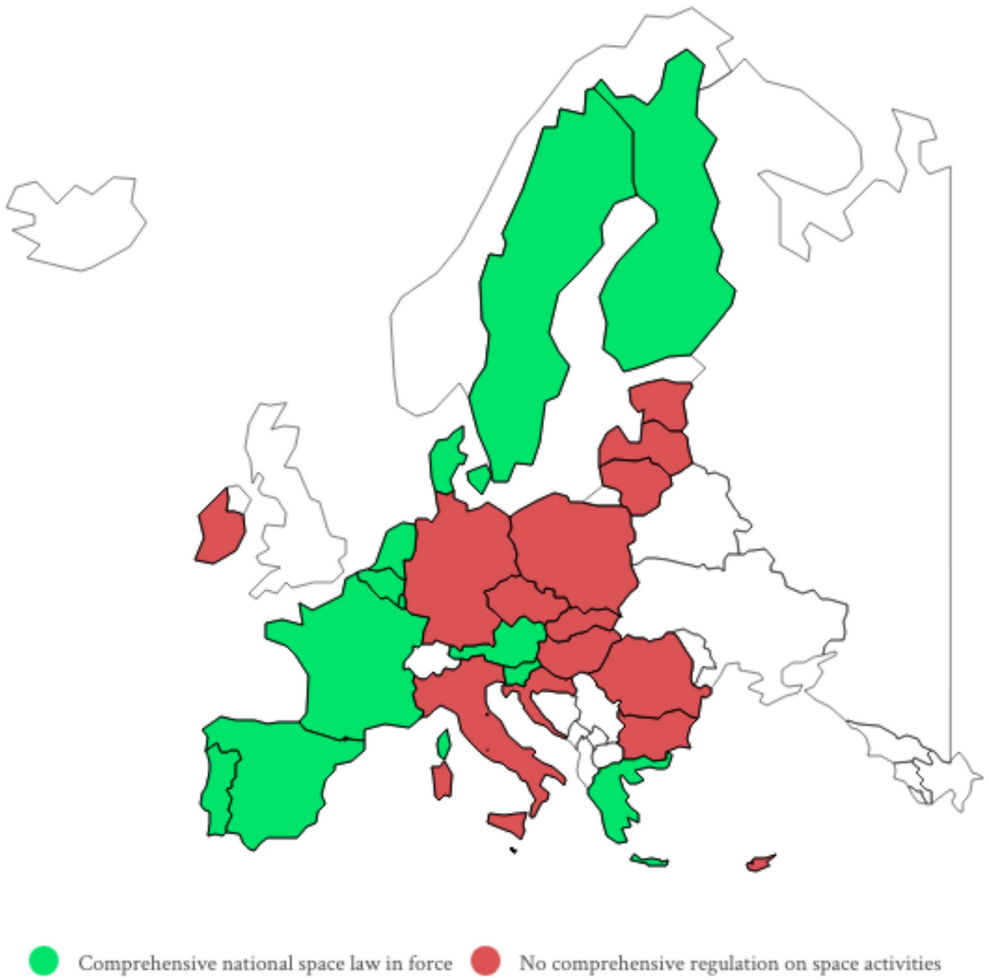

FIGURE 1
Comprehensive national space laws in the European Union. Based on the research of the authors of this paper, prepared by the authors.

ecosystem and the high risks associated with their activities make space governance increasingly difficult. The proper governance of the domestic space sector involves addressing several legal challenges, such as the issue of licensing, supervision and the registration of space objects. The countries of Central and Eastern Europe (CEE) are in a special position, having developed their space capabilities for decades behind the Iron Curtain. The consequences of such a legacy still affect their position and are evident in the lack of developed tools for governing national space activities, both from an institutional and regulatory perspective. The situation is not helped by the lack of space legislation in the vast majority of countries in the region. Along with the paucity of national space legislation, there is also a lack of relevant national space agencies with the authority to coordinate the national space sectors. Such a situation also exists in Hungary, where the governance of space activities is the responsibility of a department of a ministry, without the existence of a specialized agency.

Responsibility for coordinating space activities is often scattered among a dozen different entities. It is also often the case that these responsibilities are shared between the relevant ministry and the national space agency, which can lead to an unclear division of responsibilities and thus to many ambiguities or unnecessary procedural complications that may have a negative impact on the development of the domestic sector. Furthermore, a space agency (such as in Poland), although formally an independent legal entity, may at the same time report to the relevant ministry. Such a governance structure can significantly hamper the decision-making process and the implementation of space policies or programmes. In most countries in the CEE region, these activities are coordinated within one main ministry, but it is clear that these competences are also delegated within the various ministries which are responsible for individual space components. A small number of the countries analysed have a dedicated national space agency established either by a separate act or as part of national space legislation.[9]

The space governance model in most CEE countries is based on joint coordination between several ministries and the various related public agencies. Considering the concept of space governance in Western European countries, it seems that the new space countries of CEE are taking a similar path. A question that deserves more attention is whether the increasing dependence on space technologies and applications in the civil and military fields requires a rethinking of the role of space agencies. In this day and age, it is increasingly suggested that they should be given more independence and coordination powers, rather than being subordinated to various ministries.

Although the CEE countries share a common history of the beginnings of their steps into space exploration and had a similar start in the world of democratic space conquest, each of them is currently at a slightly different stage. This undoubtedly makes it difficult to compare them under uniform criteria. They differ in terms of the implementation of their space strategies and national space programmes, the level of institutional help available to local space industries and the establishment of the national space agency. Due to the differences in the size of their economies, differences in space sector numbers cannot be a reliable indicator for comparisons. There are also, however, some similarities, such as in the pattern of relations with the ESA (although of different nature) as well as the lack of national space laws (the only exceptions in this respect are Austria and, more recently, Slovenia).

3.2 Drivers of paradigm shift in the EU's space policy

3.2.1 Lack of competitiveness

The European space industry is considered highly competitive in some areas. The European navigation system (Galileo satellite network) has, since 2024, provided the most accurate and secure positioning and timing information, including for military applications. Galileo's High Accuracy Service is much more precise than any other Global Navigation Satellite Systems (GNSS), including the US GPS, China's Beidou and Russia's Glonass. The Copernicus satellite system offers the world's most comprehensive Earth Observation data, including for environmental monitoring, disaster management, climate change monitoring and security (Draghi-report, 2024, pp. 173–174).

Nevertheless, despite all these successes, there is a wide consensus that the EU has lost ground in recent years and is starting to lag behind its main competitors on the global market, the United States and China, with a widening capability gap (ESPI, 2022). In recent years Europe has lost its leading position not only in the market of geostationary satellites[10] but also on the launchers market, while its dependency on semiconductors and the American megaconstellations (such as Starlink) which have a huge competitive advantage over European projects.

It is also worth highlighting Europe's lag in autonomously accessing outer space. In the area of launchers, the problem is not only the delay in the development of the Ariane 6 launcher or the technical problems troubling the Vega-C launcher, but also the fact that Europe's competitors have technological advantages (Boston Consulting Group-ESPI, 2023). For example, the reusability of Space X's launchers significantly decrease the costs of its launches. On the topic of space transportation, where Europe does not have autonomous capabilities, the ESA will present its program proposal in 2025 (ESA Resolution, 2023). Finally, unlike the US, China, Russia and India, Europe has no plan to develop own space station in Earth orbit.

Because one of the focuses of the new European Commission will be competitiveness, Mario Draghi—former European Central Bank President—was tasked by the European Commission to prepare a report on the future of European competitiveness. The report, presented in September 2024, analyses 10 sectors, including the space sector, and articulates recommendations to foster competitiveness.

9 Of example, Polish Space Agency was established under the Act of 26 September 2014 on the Polish Space Agency, later amend by Act of 13 June 2019 amending the act on the Polish Space Agency and the act on government administration departments (Journals of Laws 2019 item 1248).

10 Geostationary orbits of 36,000 km from the Earth's equator are best known for the many satellites used for various forms of telecommunication, including television. Signals from these satellites can be sent all over the world. Telecommunication devices on the Earth's surface need to be able "see" the satellite all time and hence it must remain stationary in the same positions relative to the Earth's surface (ESA. The geostationary orbit, n.d.).

Draghi has identified the following root causes of the EU's competitive gap in the space domain:

a) The public funding for space policy in the EU is lower than in other regions, as it lacks large civil and military space programmes.
b) The lack of coordination among Members States' investment in space hinders the growth of the demand side.
c) Public investment in R&D in the EU does not have the required level of ambition.
d) EU space companies' ability to scale up is hindered by their limited access to finance and public contracts.
e) The governance model is fragmented. The co-existence of multiple institutional actors at national and European levels amplifies the fragmentation of the EU's space industrial base.
f) Coordination and synergies between space and military activities are not fully exploited in the EU.
g) European space activities and programmes face trade barriers and strategic dependency of foreign producers (Draghi-report, 2024, pp. 176–181).

The report lists five short-term and five med-term proposals to address these problems. It is worth highlighting two of these which the report deems as priorities and which might radically affect not only the governance of European space activities but also might significantly affect the position of central and eastern European countries. The first proposal is to abolish the ESA's geographical return principle to reduce the fragmentation of the EU's industrial base and modernise EU procurement rules. The second recommendation of the report is to establish a functioning Single Market for space, through a common EU legislative framework (Draghi-report, 2024).

3.2.2 War on Ukraine

Since its inception, space has been a subject of interest to States from a defence point of view. This was due to the unique capabilities created by orbital and observation mechanisms.[11] The military use of space was a major factor in space exploration during the Cold War, when the ASM-135 anti-satellite missile was developed and tested by the US Air Force in 1985. In the 1980s other countries also started to think about military uses of space.[12] The evolving space technologies demonstrated their military potential for the first time during the first Gulf War in the years 1990–1991, during which military forces relied heavily on remote sensing (ESPI, 2020). While the commercial use of space has evolved over the years, with the public image shifting from defence to civilian use of space, the military aspect has always been there, albeit behind the scenes. With each new conflict, the space industry becomes more important in the chain of command, especially in interstate wars.

Space defence has recently returned to the forefront with the increase in geopolitical tensions and this seems to be one of the main drivers of the change in EU space policy. In particular, the war in Ukraine clearly had a decisive influence on this shift. Examining this policy shift reveals the main trends in the space domain and, in fact, it is already shaping the future of space, especially in the military domain. The explicit symptoms of this shift can be seen in the example of the ASAT tests carried out in recent years by China, Russia, the US and India.[13]

Space applications are multiplying and are increasingly being used in the conduct of military operations, serving reconnaissance, meteorology, communication and navigation purposes, including such space assets as ballistic missile defence and ASAT weapons.[14] The capabilities offered by satellites involve two main aspects in relation to the defence. One concerns the ability to assist earth-based military operations while the second is the accelerating rise of in-space military capabilities which have been recently shown by some countries in the form of ASAT tests. This has led some experts to suggest that "Space for Defence" is being transformed into the "Defence of Space' (ESPI, 2020). As regards the first aspect, i.e., the application of space techniques for assisting military operations on Earth, remote sensing seems to be the most pertinent issue as it enables "intelligence, surveillance and reconnaissance".[15] This can be characterised as "space support for earth defence." Military operations in space, on the other hand, include kinetic contacts between space objects and proximity operations. It thus deals with defence and military actions in space. Both of these aspects have a common denominator which is the protection of space-based assets (ESPI, 2020).

The use of satellites has had several impacts on the course and conduct of the war. An explicit example of this is the mega-constellation of Starlink satellites launched from the USA by SpaceX, and Maxar (Deggert, 2023, p. 1). The main outcomes of these are improved communication, intelligence gathering abilities and battlefield awareness that may lead to a faster-paced and potentially more destructive conflict. This influences and supports not only specific military actions and decisions, but also military strategy through algorithms made available to commanders. For all these reasons Starlink has been called "a transformative tool for modern warfare." According to one report, military insiders "are in awe of Starlink," since it provides more resilience than some military specific communications systems, specifically against jamming (Starlink, 2023). Starlink has been vital to Ukraine since the early days of the war. Communications and speculatively limited PNT (Positioning Navigation and Timing) capabilities are used by Ukraine through Starlink. The Russian invasion of Ukraine in February 2022 put the latter in a difficult position in terms of remaining connected to the outside world. The use of the Starlink service in Ukraine has become indispensable for both the Ukrainian military and civilians (Palmer, 2024). No less important are the commercial images of enemy troops provided by Maxar and Icye, which have helped to draw international attention to the reality of war. More broadly, the experience with Starlink in Ukraine has shown the growing reliance of governments

11 For example, the US Corona satellites, and USSR Zenith satellites launched in 50s served military-recognizing purposes.

12 For example, Israel and South Africa (Ferreira-Snyman, 2015).

13 China 2007, Russia 2021, India 2019, USA 2008.

14 It is noteworthy that the space imagery component is considered the weakest part of the Russian space sector. According to some data, as of 2018, the U.S. military uses over 170 satellites while Russia operates 97 military satellites, and China's military has 100 (Kehrer, 2019).

15 "A capability for gathering data and information on an object or in an area of interest (AOI) on a persistent, event-driven, or scheduled basis using imagery, signals and other collection methods" (ESPI, 2020).

on private space operators in the absence of government equipment. This is an important indication of the autonomy of Europe and its Member States' governments and an important driver of the development of the space domain.

In response to the existing security challenges outlined above, Europe has been undergoing a rapid transformation in its approach to defence, and specifically to space defence, over the last few years. This involves a fundamental change within the EU, which is itself becoming an independent actor in this field, alongside the Member States. Taking into account global trends, including in particular the stance and actions of the United States, the EU started at the end of 2008 to develop its own Space Situational Awareness (SSA) system consisting of three separate segments: (1) Space Surveillance and Tracking (SST), (2) Space Weather (SWE), (3) Near-Earth Object (NEO) monitoring. The SSA system is a dual-use system, with its military components being built on the basis of military requirements defined by the EDA. The accelerating development of European space capabilities is also evident in the rapid development of EU space programmes such as Galileo and Copernicus which, although essentially civilian in nature, also have obvious defence and security potential (Kozioł, 2022).[16]

The shift in paradigm over the last 2 years has been demonstrated by the adoption of the Common Security and Defence Policy, and the creation of the Directorate-General for Defence, Industry and Space within the European Commission (ESPI, 2020). The Space and Defence Strategy was announced in 2022, in the Strategic Compass (EU Strategic Compass, n.d.). which called for a dedicated strategy to address the threats faced by European space assets. In parallel, the security and defence activities of the EU, such as the European Defence Fund and the Permanent Structured Cooperation (PESCO), have increasingly integrated space-based components in recent years. It seems that the evolution of the EU approach to space security and defence is in line with the EU's generally increased scope of engagement in the field of security and defence, as well as with developments in the international environment. The Space and Defence Strategy is intended to be a stepping stone towards an action-oriented roadmap, in three dimensions, by fostering the use of space systems and services for terrestrial security and defence activities, addressing the security of European assets in space and aligning Europe's political, operational, diplomatic and governance dimensions.

The strategy proposes actions to strengthen the resilience and protection of space systems and services in the EU and to meet this objective several actions were proposed such as (1) proposing an EU Space Law to provide a common framework for security, safety, and sustainability in Space, that would ensure a consistent and EU-wide approach, (2) setting up an Information Sharing and Analysis Centre (ISAC) to raise awareness and facilitate exchange of best practices among commercial and relevant public entities on resilience measures for space capabilities, (3) launching preparatory work to ensure long-term EU autonomous access to space, addressing in particular the security and defence needs of the union, as well as (4) enhancing the technological sovereignty of the EU by reducing its strategic dependencies and ensuring the security of supply for space and defence, in close coordination with the European Defence Agency and the ESA (Joint Communication, 2023; EU Space Strategy, n.d.).

3.3 Possible consequences of the paradigm shift for the CEE region

The increasing gap in competitiveness between the EU and its global peers and the growing international security risks led the Commission to announce in its 2024 work plan that the EC will propose in 2024 a "*European space law that will set rules, for example for space traffic management, but also on how we will keep our critical space infrastructure safe. It will be complemented by a strategy on the space data economy to increase the use of space data across economic sectors*" (European Commission, 2023). Although the proposal was due to be presented in April 2024, the project has been suspended due to the EP elections. However, it seems clear that the intention remains: a new portfolio has been created within the new EC for space and defence with the task to "*introduce common EU standards and rules for space activities and harmonise licensing requirements, as proposed the Draghi Report*" (von der Leyen, 2014). It thus seems clear that the future space policy of the European Commission will be founded on the recommendations of the Draghi report. Therefore, the following section will examine how a possible reform of the ESA's geographical return principle and the introduction of harmonized regulation on space activities—as proposed by Mario Draghi—might affect the Central and Eastern European Region's countries policies.

3.3.1 Reform of the geographical return principle

The geographical return principle is one of the key pillars of the cooperation between the 22 Member States of the European Space Agency, established in 1970. Its Convention stipulates that the industrial policy elaborated by ESA shall be designed—inter alia—to "*ensure that all Member States participate in an equitable manner, having regard to their financial contribution (…) in particular the Agency shall (…) grant preference to the fullest extent possible to industry in all Member States (…)*" (ESA Convention Art. VII. (1) c, n.d.). The main rule adopted by the Agency since at its Council at Ministerial level in March 1997 is that the ratio between the share of a country in the weighted value of contracts given to its industry and its share in the contribution paid to the Agency, must be of a pre-defined per cent by the end of a given period (ESA Industrial policy, n.d.). In other words, the ESA invests in each member countries through contracts for its space programmes an amount which is more or less equivalent to the country's financial contribution to the Agency.

According to Draghi, this policy has become increasingly outdated because it amplifies the fragmentation of the EU's space industry base, which has proved ineffective and even counterproductive because it creates a mismatch between the most competitive industrial actors and the actual allocation of resources based on geographical repartition (Draghi-report, 2024, p. 179). The Draghi report therefore recommends removing the geographical return principle from the ESA's industrial policy and aligning the Agency's governance framework with the EU's procurement, financial and security rules (Draghi-report, 2024, p. 185).

16 See also the statement of Thierry Breton, which said that: "although it has been a taboo at the European level up to now, the time has come to break this taboo and to recognise that space is an enabler of security and defence, with a defence dimension for Galileo and a security element for Copernicus" (Messina, 2021; ESUPA, Breton, n.d.).

This reform would certainly have a major effect on the space industry of the Member States of the ESA, especially on countries with less developed space technologies (such as in the CEE region). In practice, such a reform would mean that the contracts for ESA projects would most likely be obtained by western member states with a mature space industry. It might lead to smaller states, including those in the CEE Region, questioning whether it is at all worthwhile remaining members of the ESA and paying financial contributions to it. Although it is difficult to deny that overall European competitiveness might well increase in the short term, this would cut off the smaller states with immature space industry, which in the long term, in our opinion, does not serve the interests of Europe. The issue is complex and indicates one of the EU's structural problems. As Moeller notes, Draghi falls short in leveraging Europe's multi-stakeholder environment and appears rather simplistic in calling for the removal of this intergovernmental mechanism through which more than 50% of European space industrial activity is implemented, without a plan for creating a significant new source of EU funding (Moeller, 2024).

As for the likelihood of such a reform, it is first of all important to note that the ESA is not subordinated to the EU, but is an independent international organization whose Member States must agree unanimously to amend the Convention, so such a reform could not be implemented against the will of the smaller member states of the ESA (ESA Convention, Art. XVI, n.d.). Even if such a drastic change in the ESA's governance policy seem unlikely, it appears probable that the ESA itself will consider some minor adjustments in the hope of reaching a compromise. Jean-Philippe Baptiste, president of the French Space Agency (CNES) called the principle a poison stating that "*either ESA is able to change, or if it does not change…the European Commission at some point will do without (it)*" (Baptiste Interview, 2023). The ESA itself made a first step towards the reform of the geographic return principle in May 2024. Although the implementation of the new process remains to be seen, the goal is to enhance "*fair and transparent public procurement processes which support the development of a diversified and innovative European space industry*" (ESA Resolution, 2024).

As for the interests of the CEE region, it is important to find a compromise where developing space industries also have a chance to grow and participate in ESA projects, without hampering the overall competitiveness of European projects.

3.3.2 Harmonization of national space legislations

As mentioned above, one of the measures which is intended to realise the EU Space and Defence Strategy is promoting the idea of EU space law. The concept of an EU space regulatory framework was announced for the first time in late 2022 in the form of a Communication of the Social Economic Committee (Joint Communication, 2022; European Economic and Social Committee, n.d.). Soon after it was presented as an inherent part of the Strategy (March 2023), where the reasons behind the idea were explained in the following way:

> "*To enhance the level of security and resilience of space operations and services in the EU, as well as their safety and sustainability, the Commission will consider proposing an EU Space Law. It will encourage the development of resilience measures in the EU, foster information-exchange on incidents as well as cross-border coordination and cooperation.*" (Joint Communication, 2023, p. 7).

Therefore, it seems that one of the main objectives of the law is to establish an information exchange network and provide a first level of analysis and reporting of these weak signals through the EUSPA. It has also been noted that the EU Space Law would ensure a consistent EU-wide approach and build on the Joint Communication on an EU Approach for Space Traffic Management (Joint Communication, 2023, pp. 172–184). In addition, the Strategy proposed that the EU Space Law would complement the implementation of the NIS 2 Directive (Directive (EU) 2022/2555; Directive (EU) 2018/1972, n.d.), the upcoming Cyber Resilience Act (Regulation (EU) 2019/1020, n.d.), as well as other existing cybersecurity frameworks. EU Space Law (EUSL) would set specific cybersecurity standards and procedures in the space domain.

As it explained in the mission letter of Commissioner-designate Kubulius, the Act would also aim to harmonize licensing requirements, "as proposed the Draghi Report." While that report does not specify any plans for harmonizing licensing conditions, it is important to note that Art. 189 of the TFEU explicitly excludes the harmonization of the laws and regulations of the Members States. It is also worth remembering that there was a strong unwillingness among the Member States at the time of the adoption of the Lisbon Treaty to give up their sovereignty in the era of space (Potter, 2023, p. 6; Linden, 2016, p. 7). Hence, it will be interesting to see the legal base of the awaited proposal.

Also, it is important to note that—regarding the level of harmonization—the expectations lean towards a regulation rather than a directive which will leave much less margin for Member States to act at the national level. Based on historical experience, the 13 Member States that have already adopted a comprehensive national space law may resist modifying their legal system. As for the CEE Region, where only Slovenia has adopted a detailed regulation, countries willing to a adopt national space law—such as Hungary—will have two options. The first is to wait for the adoption of the EUSL to see in what questions they can complement the regulation at the national level, if needed. However, the European legislative procedure might take a long time, resulting in damage to the competitiveness of these countries. Their other option is to act now. However, doing so might harm the principle of predictability that is so important for industry players, as these countries might then have to modify their national legislation as soon as the EUSL enters into force.

4 Conclusion

At the dawn of a new space age, Europe has come to a crossroads. Europe must simultaneously catch up with its main competitors in terms of competitiveness, while, as a result of the crises and the new geopolitical environment, it must expand the scope of its previously civil-focused space policy. The challenges and problems were precisely identified by the European Union in the recently presented Draghi report, although implementing the proposals it made may have several negative effects on the CEE region.

While the further strengthening of the Europe's military defence capabilities in space is clearly in the interest of the CEE region, the proposals made regarding the governance of the ESA could even result in the disintegration of the Agency. If the so-called georeturn principle were no longer to apply in the ESA tenders, the developing companies of smaller member states would probably not be able to participate in

many projects that are important for their operation and development. At the same time, the reform seems inevitable, which is clearly proven by the problems of the competitiveness of the European space industry. A compromise must therefore be found so that all European states can contribute to the development of Europe's space capabilities in the long term.

If the European Union harmonizes the law of the member states regarding space activities it would also lead to significant change. Although there is a delay in the publication of the proposal, and the details of its content remain unknown for the public, the intention of the European Commission is clear. However, many obstacles to the success of the project can be foreseen. First of all, the legal basis of such a harmonization is questionable, as it is not clear how it can be reconciled with Article 189 of the TFEU. Secondly, it is not clear whether the 12 EU member states that have already passed legislation on their national space activities will support the amendment of their existing national legal systems, especially since they vary significantly. The vast majority of states in the CEE region have not yet adopted national space legislation. These states may now be facing an even more difficult decision. Either they wait for EU legislation, which may take years, and their competitiveness may be damaged, or they adopt national legislation in the interim, in which case there is a risk that they will have to amend it within a short period of time in the event of the possible adoption of the regulation.

To conclude, European states and the European Union must act if they do not want to fall behind with an increasing speed their main rivals, which would also threaten Europe's strategic autonomy. The European space industry must be strengthened, which does not mean that the state's role and participation should be diminished. Ambitious plans and committed states might be the basis of this paradigm shift. Of course, an EU-level regulation can be an element of this, but care must be taken to ensure that this does not further impair the competitiveness of European industry, and that the development of the CEE region's space industry does not come to a halt.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

BB-G: Visualization, Writing – original draft, Writing – review & editing. KM: Writing – original draft, Writing – review & editing.

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The authors declare that the research was conducted in the absence of any commercial or financial relationships that could be construed as a potential conflict of interest.

Generative AI statement

The authors declare that no Gen AI was used in the creation of this manuscript.

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Glossary

CEE - Central and Eastern Europe

CNES - French Space Agency

DA-ASAT - Direct-Ascent Anti-Satellite Missile

DG DEFIS - Directorate-General for Defence Industry and Space

EC - European Commission

EDA - European Defence Agency

ESA - European Space Agency

EU - European Union

EUMETSAT - European Organisation for the Exploitation of Meteorological Satellites

EuroQCI - Connectivity and Euro Quantum Communication Infrastructure

EUSL - EU Space Law

EUSPA - EU Agency for the Space Programme

GOVSATCOM - EU Governmental Satellite Communications

NEO - Near-Earth Object

PESCO - Permanent Structured Cooperation

PNT - Positioning, Navigation and Timing

SatCom - Satellite Communications

SBAS - Satellite-Based Augmentation Systems

SBEO - Space-Based Earth Observation

SSA - Space Situational Awareness

SST - Space Surveillance and Tracking

SWE - Space Weather

TFEU - Treaty on the Functioning of the European Union

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The role of public participation and legal certainty in lawmaking in a special legal order – with particular reference to Central European practice

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This study deals with the issue of public participation and legal certainty in the context of legislation in special legal order. The hypothesis of the research is that in times of crises, we cannot fully disengage from the rule of law, as the special legal order does not result in a situation of extra-legalism, as its purpose is to restore normality. The aim of this thesis is to examine how the principles of quality legislation (e.g., the right to be consulted by society, the prior assessment of the impact of legislation, or the requirement for preparation time before the legislation is put into force) that can be defined in the normal legal order apply in special legal order situations. In examining this question, the study draws on literature and case law. After clarifying the basic doctrinal concepts, the study examines the qualitative legislative requirements in the normal legal system, and then takes these as a starting point to examine the differences in special legal order. The conclusion of the study is that public participation in legislation can be restricted in special legal situations (e.g., the right to consult on legislation or the right of assembly for the collective expression of opinions), while legal security requirements such as the requirement for the adequate preparation time or the linking of special legal norms to empowerment cannot be ignored. With regard to the latter, it is particularly important that the legislator does not deviate from the purpose justifying the introduction of the special legal order, as failure to do so will cause legitimacy problems both with regard to the legislation issued and the sustainability and social support for the special legal order introduced. Only by adhering to these principles can special legal order legislation remain a process within the constitutional legal order and not outside it, and only in this way can it effectively serve the quick and efficient return to normal legal order.

KEYWORDS

special legal order, legal certainty, legislation, democratic legitimacy, public participation, expression of opinion, prior impact assessment, requirement for preparation time

1 Introduction

The COVID-19 pandemic in 2019–2020, the Russian-Ukrainian war in 2022, and the resulting energy crisis that hit Europe as a whole have had an impact on all aspects of life, and in many cases are still having an impact today. This is no different in the way states work. Crises also cause and demand changes in the functioning of the state (Hromadskyi and Kos, 2017). In many cases, the impact of crises cannot be resolved within the normal legal

framework. Therefore, countries will introduce special legal orders (e.g., emergency situations) whose constitutional framework will be different from the normal framework.

In my study, I examine how the principle of democratic legitimacy, i.e., the role of society (the people) in the exercise of power, is implemented in the field of legislation in situations of crisis, i.e., in periods of special legal order. As a starting point, I will analyse the concept of society (people) and democratic legitimacy, the role of legal certainty in legislation and its requirements in the normal legal order, as well as the general characteristics of special legal order situations. On this basis, I examine how social participation and legal certainty are differently implemented in legislation in times of crisis. Thus, I will, inter alia, address the impact on legislation of public participation (e.g., public consultation on legislation), public expression (in particular the right of assembly), and legal certainty requirements (e.g., the importance of impact assessment, the time for legislation to enter into force) in specific legal orders. In my research, I give examples from the practice in Central European countries. The research methodology of the study is based primarily on the analysis of literature and (where appropriate and possible) case law.

The hypothesis of my study is that in times of crises, i.e., special legal orders, we cannot fully disengage from the rule of law, because the special legal order does not result in a situation of extra-legalism, as its purpose is to restore normality. This is no different regarding social participation required in legislation.

2 Dogmatic bases

In order to examine the issues identified in the introduction to the study, it is essential to clarify some basic dogmatic concepts. These include the constitutional concept of the people, democratic legitimacy, the social contract and the special legal order.

2.1 The constitutional concept of the people

First of all, it is necessary to examine the concept of society, i.e., the people, since the people can be seen as the bearers of people's sovereignty (Grotenhuis, 2016). In a democratic state, it is an unquestionable principle that the source of power is always the people, i.e., the people who have a public relationship with the state (primarily the citizens). People are the basis of social processes. However, it also follows that it is the responsibility of the individual to choose the society in which he or she lives (Komáromi, 2020). Society is built by people, and people are responsible for what they build. Therefore, shaping democratic power is not only a right but also a duty of man. International documents (e.g., Article 25 of the International Covenant on Civil and Political Rights) and the constitutions of democratic states (see, e.g., Article B of the Hungarian Fundamental Law) are almost unanimous in stating that the source of public power is the people. However, in the context of defining the concept of the people, it is important to stress that sovereign social groups as political units can only be expressed in terms that are substantially different from each other. In line with this, European constitutions also usually refer to the subjects of people's sovereignty by different names (e.g., *people*, *nation*). According to János Zlinszky, the people is an ethnic concept, which is to be understood primarily as a group of persons bound together by a common mother tongue and a common culture, who, although not racially united, are nevertheless consciously part of the people, regardless of nationality, political affiliation or social status (Zlinszky, 2006). On this basis, it is not possible to exclude from the concept of people, for example, neither the educated, nor the rich, nor those living in another country. By contrast, a nation is a political concept, whereby the citizens of a state belong to a sovereign nation (Grotenhuis, 2016). In Pope John XXIII's encyclical "*Pacem in terris*," the nation is considered political, and the term people is considered an ethnic category. According to this: „ A special instance of this clash of interests is furnished by that political trend (which since the nineteenth century has become widespread throughout the world and has gained in strength) as a result of which men of similar ethnic background are anxious for political autonomy and unification into a single nation. For many reasons this cannot always be effected, and consequently minority peoples are often obliged to live within the territories of a nation of a different ethnic origin. This situation gives rise to serious problems" [Pacem in Terris, 1963, point 94]. In the context of the constitutional definition of the people, it should be pointed out that it can be understood as a community of those living under the sovereignty (i.e., the population) and as a community of citizens (Yack, 2001). In my view, the concept of belonging to a people can be conceptualized on a scale, with a number of options between the two endpoints (i.e., one is *definitely being a member of the people,* and the other is *definitely not*). And to make a clear distinction, we need to define a reference point beyond which someone is clearly considered to belong to the people, and below which he or she is not. However, it is not easy to define this point, because however we define it, there are always critical voices: if we define too strong a bond, we exclude people who are undoubtedly members of the people (such would be the case, for example, if only citizens who pay personal income type taxes were considered members of the people), and if we require too weak a link, we include those who are clearly not members of it (e.g., if we consider everyone who temporarily stays in the country for at least a few months as part of the definition of the people). This is why the most commonly used benchmark is the requirement to have a citizenship. A further benchmark for determining membership of the electorate may be to determine membership of a community of voters (Preuß, 2019), but this is not an optimal choice, since it can hardly be said that a person who is not entitled to vote (e.g., a child) cannot be a member of the political community and thus the state should not take his or her interests into account. Finally, the concept of a people can also be defined as the sum of all those belonging to a cultural nation (Paruch, 2018), but this should be treated with reservation from this point of view, because according to this view, persons who are citizens of a given country but do not belong to a nationality that constitutes the majority of that country would not be members of the concept of the people. The exclusive use of the concept of cultural or ethnic nation in a democratic constitution to describe the political community would also be incompatible with the principle of moral equality, as it would exclude or disadvantage citizens who identify themselves as belonging to different minorities or are classified as such by others (Majtényi, 2014). It should be added, of course, that the meaning of the concept of the people cannot be defined uniformly in all cases relating to the exercise of people's sovereignty. However,

in the case of parliamentary elections (the most important exercise of people's sovereignty), there is a general tendency for some European countries to require citizenship as a condition for active voting (Halász, 2018). This does not, of course, imply that the concept of people cannot be defined in other terms (indeed, in my view, states have a great deal of freedom in determining who they consider to be the bearers of people's sovereignty), but it does mean that, on the basis of European trends, the definition of people (i.e., the subjects of people's representation) can most often be linked to the existence of citizenship of the country in question.

2.2 Basic questions of democratic legitimacy

We can also look at the concept of democratic legitimacy as a further concept to be clarified. On the basis of the concept of democratic legitimacy (consistent with the above), its essence can be defined as follows: the unbroken chain of people's transfer of power effectively empowers the holder of power to exercise it (Kriesi, 2013). It follows logically from the principle of the democratic rule of law that the political will of the people must be formed: in modern constitutional democracies governed by the rule of law, the acts of public authority in the exercise of public power must always be traceable to the will of the people, and must ensure that the people can participate equally in the formation of the will of the public authorities (Petrétei, 2017). This so-called formation of political will also means forming the will of the people and the will of the state. The "*will of the people*" can be derived from the will of the individual through the legal process in accordance with the constitutional order. This process of will formation presupposes that all individuals can participate freely and equally so that the will formation produces the homogeneous will of the majority (Dieleman, 2015). The will of the people therefore does not exist separate from and independent of individual wills, but the will of the people is not just the sum of all individual wills. This idea is linked to the concept of the common good in the social teaching of the Catholic Church. In the encyclical Centesimus Annus (point 47) of Pope John Paul II, issued on the anniversary of the encyclical Rerum Novarum, he says: „[…] the common good [….] is not simply the sum total of particular interests; rather it involves an assessment and integration of those interests on the basis of a balanced hierarchy of values; ultimately, it demands a correct understanding of the dignity and the rights of the person." Therefore, in a democracy, the will of the people is not a given, but a political process in which all members of a constitutionally defined people can participate and influence through their participation. In a democracy, the will of the people is therefore formed in a free and open process of political will formation, and in constitutional terms it is formed on the basis of the freedom of democratic participation of individuals, and its content is outlined in this process (Petrétei, 2017). In constitutional terms, individuals belonging to the people can participate in the formation of political will by exercising their fundamental political rights and freedoms, which include in particular the right to vote and to participate in referendums (Komáromi, 2023), but it can also include involvement in the drafting of legislation. But the people are not just the source of power, they also participate in its exercise, so the principle of people's participation is one of the main pillars of the democratic exercise of power (Beckman, 2009).

2.3 Briefly about the concept of social contract

Among the dogmatic foundations, it is also necessary to say a few words on the question of the social contract in relation to the hypothesis of the study. As Jean-Jacques Rousseau had already said, the social contract gives people the right to participate in the making of laws on an equal basis with others (Bluhm, 1984). It follows from this that political sovereignty can only be exercised by the people as a whole, so neither representation nor power-sharing is acceptable (Rousseau, 1947). Point VI of the Declaration of the Rights of Man and of the Citizen, adopted at the time of the French Revolution, stated that every citizen had the right to participate in the making of the law, either in person or through representatives. In a democratic state, therefore, the participation of the people, i.e., the members of society, in the legislative process (and, more broadly, in the functioning of the state) is indispensable, and this principle must be applied not only in "peacetime" but also in times of crisis (i.e., special legal orders).

2.4 Briefly on the concept of a special legal order

The main question of the study is how the requirements of public participation and legal certainty in lawmaking change in times of crises, i.e., in special legal order. However, in order to examine this, it is also necessary to briefly discuss the concept of special legal order.

A constitutional state may be confronted with a situation that threatens the state or the constitutional order, which cannot be averted or cannot be averted quickly enough within the normal legal order. Therefore, democratic states respond to such situations at the constitutional level by creating special rules of law that provide specific, but not extra-legal, rules for dealing with or averting the threatening situation. The purpose of the special legal order is, therefore, to return to the normal constitutional situation since exceptionalism conceptually implies the expectation of temporal limitation (Csink, 2017). In relation to special legal orders, a number of constitutional requirements can be laid down (Erdős and Tanács-Mandák, 2023; Agamben, 1998), which I will not go into in detail here, at the same time, it is important to state that any measure that allows for a solution that deviates from the general rules (for example, the regulation or restriction of fundamental rights by means of a decree, or the amendment of legislation by means of a lower level of legislation that does not take into account the provisions of the hierarchy of legal sources, or the "flexible" treatment of the *vacatio legis* requirement) must be justified, must fit into the constitutional order and must have the effect of ensuring a return to the "normal" constitutional state.

3 Requirements for quality legislation—under normal legal order

In order to examine the role of public participation and legal certainty in lawmaking in times of crises (i.e., special legal orders), it is important to briefly clarify what requirements we can formulate in general terms on the issue of quality legislation.

Legal certainty is inseparable from the rule of law (Lavoie and Newman, 2015), because the rule of law alone is not enough to achieve

the public weal. People must live by laws that are both the bearers and the implementers of values recognised by the community. According to Herbert Küpper, the rule of law can be defined—at the most basic level—as the ultimate and highest standard for all socially significant aspects of life in the rule of law (Küpper, 2011). And according to András Zs. Varga that the rule of law is nothing else but the primacy of legal norms in relation with the exercise of power; even more concisely: it is exercise of power bound to (preliminary drafted) law (Varga, 2019). In an early decision, the Hungarian Constitutional Court—which body, according to Csaba Varga adopted a formalistic and neutral approach to the rule of law that focused on legal certainty (Varga, 2021)—stated, for example, that procedural guarantees derive from the principles of the rule of law and legal certainty, which are of fundamental importance for the predictability of the operation of certain legal institutions. Only by following the rules of formalised procedure can a valid law be created, and only by following procedural norms can the administration of justice function constitutionally (Decision no. 11/1992 (III. 29.), 1992). Miklós Kocsis takes a similar view, considering as a general element of legal certainty the regularity of social relations, the clarity of legal regulation, the effective applicability of legislation, the avoidance of unjustified changes, the uniformity and predictability of the application of the law, and the enforceability of decisions by the law enforcement authorities (Kocsis, 2005). The rule of law must therefore apply to all decisions, actions, and omissions of the state (Küpper, 2011). Therefore, only such rules can meet the requirement of clarity arising from the principle of legal certainty that define the purpose, the framework, the criteria and the rules of the legal instrument. However, legal certainty does not mean that the legal system is unchangeable, but that the norms change within a predictable framework. This was confirmed by the Hungarian Constitutional Court when it ruled that the requirement of legal certainty cannot be absolutised in an interpretation that would effectively elevate the demand for unconditional (absolute) immutability of the legal system, without exception, to a constitutional requirement. The requirement of legal certainty therefore implies the requirement of relative stability and predictability (Decision no. 16/1996. (V. 3.), 1996).

Based on this, the requirement for quality legislation is an approach that promotes the achievement of short-, medium-, and long-term social and economic objectives through the public preparation, adoption, and support for the implementation of effective and enforceable legislation in a planned way (Drinóczi, 2011). According to Tímea Drinóczi, quality legislation can be understood in two senses: as a procedure on the one hand, and as the quality of the legislation on the other (Drinóczi, 2011). It is important to emphasise that in order to be able to provide a tangible opinion on the quality of legislation in a way that can be assessed by a wider range of legal entities, it is essential to go beyond the technical approach of norm preparation. People are less interested in how excellent the legislative arsenal of a given legislator is, because what matters to society is the actual consequences of the legislation (Osnabrügge and Vannoni, 2024). Ferenc Petrik formulates three legal policy theorems for legislation: the justification of regulation, the stability of legislation, and the democratisation of lawmaking (Petrik, 2008). However, the justification for the legislation is not determined by the purpose alone. In order to avoid over-regulation or duplication of regulation, it is necessary to define the purpose of the regulation with sufficient precision before the preparatory work on codification begins. It is important that this goal is defined in a way that can be achieved through legislation. In practice, the legislator often makes the mistake of defining the regulatory objective without first considering its feasibility, and simply creates the law without considering its effects. But the purposes should not be confused with the means, achieving a given objective may not require legislation (Mousmouti, 2018). This decision-making is helped by a proper ex-ante (i.e., before the legislation is adopted) impact assessment. But why is such an impact assessment important? Among other things, because impact assessment achieves the objective of ensuring that the legislator's decision-making position is well-founded. The Organisation for Economic Co-operation and Development defines impact assessment as: „impact assessment is an information-based analytical approach to assess probable costs, consequences, and side effects of planned policy instruments (laws, regulations, etc.). It can also be used to evaluate the real costs and consequences of policy instruments after they have been implemented." The real meaning of law lies in the consequences it produces, which is why it is important for the legislator to gather as much information as possible when preparing legislation. It is also important to emphasise that new legislation—in accordance with the criteria of quality legislation—can only be created if it is justified by a new life situation or if the previous legislation no longer meets the requirements of social development.

The issue of quality legislation cannot be separated from other aspects classically linked to the principle of legal certainty. One such issue is the question of substantive validity, i.e., how the law fits into the hierarchy of legal sources (Pino, 1999). It is also important to highlight the requirement for preparation time (Article 10: Date of Coming into Force, 1935), which is also an essential element of the requirement of legal certainty. The preparation period before a law enters into force is essential to allow members of society (i.e., the people) to adapt to the changing regulatory environment. However, the length of this period cannot be objectively determined. It can only ever be specified on a case-by-case basis. It is usually up to the constitutional courts to decide on this.

It can be concluded from the above that the legislative process can only be conducted in accordance with the principle of legal certainty if the procedural guarantees that are intended to ensure this are respected. In Giovanni Sartori's view," mass-produced" laws are norms in name only, not worthy of the name in content (Vincze, 2001).

4 Result and discussion

Under the *social contract*, as stated above, the state has the duty to take into account the will and opinion of society, i.e., of the people, when creating binding rules of conduct (i.e., norms), and, on that basis, must make laws which, while meeting the constitutional requirements for legislation, benefit society. However, in the course of various crises (i.e., special legal order situations)—as I have already mentioned in subsection 2.4 –, these requirements must be deviated from in many cases in order to restore the "normal" situation, i.e., the disturbed normal constitutional situation, as soon as possible. In my view, the special legal order legislation raises two important issues with regard to the requirements of public participation and legal certainty: firstly, the extent to which the opportunities for members of society to have a say and form their opinions are reduced, or may be reduced, under a special legal order, secondly, whether it is possible

to deviate from the quality requirements expected in the legislative process (e.g., prior impact assessments, sufficient preparation time) and if so, to what extent.

4.1 Public participation in lawmaking in times of crisis

The members of society, i.e., the people in the constitutional sense, in a normal legal order, can have a say in the course of legislation on the basis of a *social contract* (Williams, 2007). This can take many levels and means, from individual opportunities to express their views (e.g., the obligation to consult on legislation) to community communication (including opinions expressed through the exercise of the right of assembly and ultimately even binding decisions in referendums). However, these options are not or not fully applicable in times of crisis situations with a special legal order.

4.1.1 The possibility of social consultation on legislation

When legislating, it is of paramount importance that the norm in question has a high level of acceptance among members of society (Canen et al., 2023). The obligation to comply with the law, which derives from the principle of the social contract, will only be effectively implemented if the recipients of the norm feel that the content of the binding norm is "their own." This acceptance can be significantly increased by the institution of social consultation on legislation (Piróg, 2019). The aim of social consultation is therefore to ensure that as many opinions as possible are taken into account in order to produce sound legislation (Reçi and Kuçi, 2023). There are two forms of public consultation (according to the Hungarian legislation): the consultation provided through the contact details on the website (general consultation), and the direct consultation of persons and organisations involved by the minister (direct consultation). From the point of view of the members of society, the first group of cases is undoubtedly more relevant. Ensuring the possibility of social consultation is also a priority for the European Union. The European Union sees this as a quasi-rule of law requirement. This is also confirmed by the fact that in autumn 2022, the European Commission demanded that the Hungarian Government strengthen the process of social consultation on legislation and only allow its omission in narrow exceptions.

However, in a crisis situation (i.e., in a special legal order), the requirement for social consultation of legislation cannot (fully) be met. Because, as I will discuss in section 4.2 below, it is important to react quickly in a special legal order. Because the prevention of a circumstance that gives rise to the introduction of a special legal order (be it a pandemic, an energy crisis or a war), and the prevention of its consequences, justifies an immediate reaction by the legislator (in most of these cases, the government), with the rapid enactment of legislation. This, however, does not allow for social consultation of the special legal order's norms. In a crisis situation, therefore, the possibility of social consultation of legislation cannot be provided, or can only be provided in very justified and narrow cases.

4.1.2 The collective expression of opinions by members of society

It is important to emphasise that the members of the constitutional people cannot only have an individual say in the legislative process (by giving their opinion on a specific piece of legislation).,there are also forms of collective participation. The institution of the referendum—which I do not intend to go into in detail in this study, but there is a wealth of literature on the topic (see, e.g., Komáromi, 2023; Kużelewska, 2018; Pomarański, 2018)—is the most powerful instrument since it is a direct exercise of power by the people, i.e., in a referendum the members of the constitutional people do not formulate an opinion on a law, but "create" it themselves. It is worth noting, however, that there is another form of referendum in general, where the people do not take binding decisions, but merely express their opinion (Cserny et al., 2013). However, this form of referendum is not allowed in some countries, such as Hungary.

However, the "real" means of collective expression in the legislative process is the exercise of the right of assembly (Hajas, 2014). In assemblies, the people are able to express their views on the functioning of the state (and ultimately on legislation) collectively and much more quickly, which, with sufficient "force" (i.e., a significant number of people in one place at one time), can also be sufficient pressure—directly or through a petition (Bódi, 2018)—on the legislator. An example of this in Hungary is the so-called "internet tax" protest in 2014, which was a response to the government's legislative plan to make users pay a tax on the use of internet services. After the legislative plan came to light, tens of thousands of people (some say hundreds of thousands) took to the streets to protest against the proposed legislation, which eventually forced the government (or legislature) to back down. This example also illustrates perfectly that the exercise of the right of assembly has or can have a significant impact on legislation. However, in the context of a special legal order, an additional aspect arises: the presence of members of society in the same place at the same time (for the purpose of forming a common opinion) may entail security risks under the special legal order (e.g., an escalation of an epidemic situation). This is why, for example, during the coronavirus pandemic, assembly was restricted or even banned in many countries (Kurunczi, 2023). These bans were then examined by the constitutional courts of these countries. Of the countries that have introduced a total ban on assembly, Albania (Decision no. 11/2021., 2021; Hajdini and Skara, 2022) and Hungary (Decision no. 23/2021. (VII. 13.), 2021) were the only ones where the Constitutional Court declared that the complete ban was justifiable along the lines of the necessity-proportionality test. Several authors (Chronowski, 2022; Orbán, 2023) have criticised this Hungarian decision, particularly in relation to the proportionality test. It is particularly interesting to examine this in the light of the fact that the Slovenian Constitutional Court (Kurunczi, 2023) justified the unconstitutionality of the rule on the grounds of disproportionality. At the same time, the position of the Hungarian Constitutional Court—shared by the Constitutional Courts of Kosovo (Kurunczi, 2023) and Slovenia –, stating that it is not the task of the Constitutional Courts to judge public health rules in a pandemic, should not be overlooked. In this context, it is questionable, for example, whether a constitutional court may, when examining the constitutionality of a restriction of a fundamental right, declare unconstitutional a means of defence against an epidemic—the right of assembly, which is a fundamental right that can only be exercised by a number of people (case of Patrick Coleman v. Australia, 2006), and in the case of a rapidly spreading epidemic, necessarily carries dangers—and thus remove one of the means of defence of a politically responsible government. If there is a subsequent increase in the number of cases

due to infection (which then places a heavy burden on the health care system), the political responsibility for this must lie with the government, while the decision to increase the number of cases was not taken by the government. Of course, the answer to this question from a constitutional point of view is that it can and must declare this means of defence unconsitutional (see for example the case of Kosovo or Slovenia), but in the meantime, it is also possible to argue for the position taken by the Hungarian Constitutional Court. On the basis of all this, it can be concluded that under a special legal order, the most important instrument of society for the formation of collective opinion, which also influences legislation, i.e., the exercise of the right of assembly, is not as strong and effective as under a normal legal order.

In addition to the above, it is worth noting another common opinion-forming "opportunity', which was a very specific phenomenon in Hungary during the coronavirus pandemic. In the process of lawmaking, even under normal legal order, it is not unusual for a legislator to assess the "expectations" of society before adopting a law, i.e., to create a law that reflects the will of the people, their need for regulation (e.g., a tax has been reduced because the people or even opposition politicians repeatedly raise the need for this). This can be seen as a kind of populism, but it is (unfortunately or not) part of politics. In Hungary, during the special legal order introduced in spring 2020, there were numerous examples of government legislation following the expectations of society (i.e., the public mood). The best examples of this are the closure of schools and kindergartens in spring 2020 and the switch to online education. There was no intention on the part of the government to close the schools and kindergartens in the first place, and this was strongly communicated. In the meantime, however, there had been a growing demand from the people (especially on social media) to close these institutions. Presumably as a result of this, on the same day that government communications said in the morning that the schools and kindergartens would remain open, the Prime Minister announced in the evening that they would be closed and that they would switch to online education. In addition to this example, there are many other similar situations, such as the introduction of curfews (which were also preceded by strong social expectations and demands), or the removal of them (which often would not even be justified by the epidemic situation). These examples also show that the populist character is also strongly present in legislation, which is even more so in a special legal order that arouses or reinforces a sense of fear among the people. However, this undoubtedly works against thoughtful and responsible legislation.

4.2 Changes to the requirement of legal certainty in a special legal order

In section 3 of this study, I have already discussed in detail the normal legal order's requirements for quality legislation. These aspects (fitting in the hierarchy of legal sources, adequate preparation time, and prior impact assessment) can be identified as key legal certainty requirements. However, in a crisis situation, the devaluing effect of the requirement to react quickly also comes into play in this area. In the following, I will therefore consider the legislative aspects that cannot be fully or at all applied in a special legal order. But before I get to that, it is important to note one important viewpoint. A special legal order is *per definitionem* linked to the reason for its introduction. In this context, Szabolcs Till argues that the periods of special legal order that deviate from the normal legal order—even with all these possibilities of deviation—can only be interpreted within the concept of constitutionality: there are constitutional limits and institutions whose task is to enforce the conditions for the exercise of power so that the abusive exercise of rights does not result in the arbitrary exercise of state power (Till, 2019). It is therefore of paramount importance in special legislation that the legislation adopted in this area is consistent with the reason for the introduction of the crisis situation (Erdős and Tanács-Mandák, 2023). Failure to do so creates problems of legitimacy, both in terms of the sustainability and social support for the legislation enacted and the special legal regime introduced. This problem of legitimacy can lead to a breach of the principle of legal certainty (A Facade of Legality: COVID-19 and the Exploitation of Emergency Powers in Hungary, 2022).

The first point I would like to address is the issue of ex-ante impact assessment. As I have already mentioned, the purpose of the impact assessment is to provide a preliminary assessment of the expected (economic and social) effects of the legislation. This is of particular importance, as it is the basis for deciding whether or not this legislation is really necessary, and is an important element of quality legislation. However, in a crisis situation (as in the case of public consultation on legislation), it is not expected that time will be allowed for a prior impact assessment to be carried out. The resolution of a situation giving rise to a special legal order, and the prevention of possible imminent damage or threats requires an immediate response, which is not a preliminary impact assessment, but rather a preliminary assessment or anticipation. However, as legislation is often very fast in such a situation, it is also possible to change the law more quickly, which means that the absence of an ex-ante impact assessment will not cause a significant legal certainty problem.

The question of the entry into force of legislation under the special legal order is also an important issue. I have already mentioned in point 2.4 of the study that flexibility in dealing with the *vacatio legis* requirement in a special legal order is at least as important as the existence of a reasonable length of preparation period in a normal legal order (which will, of course, vary from case to case). In a crisis situation, there are often situations that can justify an entry into force time of up to half an hour (such was the lifting of the petrol price freeze in Hungary in December 2023, which came into force half an hour after its promulgation, in order to avoid supply problems; a similar situation was where countries such as Slovakia or Poland have ordered border closures with short deadlines to prevent the spread of the coronavirus). In general, however, it cannot be said that a special legal order is equivalent to the elimination of the *vacatio legis* principle. If it is compatible with the purpose and the principle of effectiveness of the legislation in a special legal order, then, of course even at this time, there must be sufficient time for the legislation to enter into force.

Finally, it should also be mentioned that the requirement of fitting into the hierarchy of legal sources cannot be interpreted in the case of a special legal order. A specific feature of special legal order legislation is that, contrary to the principle of the hierarchy of legal

sources, it is possible to derogate from act at the level of decree. This is possible because the derogation from the act is temporary (Csink, 2017). The derogation will also be allowed because it will be the quickest and most effective way to respond to the crisis. However, it is important that the derogation—as I have already indicated above—is not arbitrary and unjustified. In any case, it will be up to the constitutional courts to examine this (for more on the powers of constitutional courts, including the Hungarian Constitutional Court, see more: Erdős and Tanács-Mandák, 2019). However, in addition to this, there is another viewpoint in the legal literature, according to which these so-called "force of act" orders/regulations are inherently part of the legislative hierarchy, being on the same level as the act/statute of parliament (Cserny et al., 2018).

5 Conclusion

The exercise of power by the sovereign people (i.e., society) in a democratic state is not only possible through elections every 4 or 5 years. It is important that members of society also have a say in the exercise of power between two elections (Kilberg, 2014). The strongest way to do this is, of course, through a referendum. However, a successful referendum is extremely lengthy and complicated to conduct, and even then, it may not be successful. Therefore, between two elections, the members of the people can effectively influence the exercise of power in two ways: by expressing their opinions individually or collectively. However, the scope of these possibilities will be narrower in a special legal order (i.e., in a crisis situation). In many cases, there are constitutionally justified reasons for the restrictions (primarily on the basis of the need for the restriction/measure), however, we must always strive to ensure that this is at most a restriction and never a total disenfranchisement because a special legal order is not a situation outside the law, it is never a "legal" dictatorship.[1] Since, therefore, in a crisis situation, the influence of the members of society on the functioning of the state will be more limited, greater attention must be paid to the requirements of legal certainty in legislation (legal safeguards are therefore needed, such as ensuring that deviations from the hierarchy of norms are only temporary and in no way arbitrary). At the same time, however, the requirements of quality legislation cannot be fully taken into account in a special legal order. However, the justification for certain derogations (e.g., the absence of an impact assessment or public consultation, or the extremely short period of entry into force) can be constitutionally justified. Concurrently, it is very important that the state respects the basic rule of law requirements (e.g., notgoing beyond the purpose of introducing the special legal order, i.e., not making rules not related to the crisis situation by abusing the special legal order mandate), because only in this way can the legislation in special legal order remain a process within the constitutional legal order and not outside it, and only in this way can it effectively serve the quick and efficient return to normal legal order. However, all this requires appropriate legal guarantees (at the level of the act or even in the constitution of the country concerned), which can be enforced primarily by constitutional courts. Such a legal guarantee could be, for example, the possibility that if the legislator, during a special legal order, creates a norm that exceeds the mandate on which the special legal order is based (i.e., makes a rule inconsistent with the mandate), the constitutional courts may abolition this norm without any further examination, based on this circumstance alone. It would also increase the transparency of norms adopted under a special legal order if the procedure for constitutional review of these norms were subject to a short time limit. This would avoid the constitutionality of a norm being decided by the constitutional courts only after the norm in force at the time of the special legal order has ceased to be in force (such a situation has been repeatedly reversed in Hungarian practice, and in such cases the Hungarian Constitutional Court has decided to terminate the proceedings instead of examining the merits, which, however, does not serve the 'development' of legislation under the special legal order). In my view, if these guarantees were implemented, legislation under the special legal order would also be more transparent and compatible with the rule of law.

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The author(s) declare that no Gen AI was used in the creation of this manuscript.

1 Because the special rules of law can easily be misused. For example, deportations in Hungary during the communist dictatorship of the 1950s were carried out with reference to the special legal rules of Article II of the 1939 National Defence Act. (Horváth, 2014).

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Crisis frames in the public discourse of the Municipality of Budapest after the COVID-19 pandemic

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This paper aims to investigate the Municipality of Budapest as a discursive actor; as an agenda-setter, politics-interpreter, and policy problem-definer. The focus of the research is to explore how the city government has used the term crisis to frame issues, political positions, and policy proposals, and to influence the thematic directions in the public discourse after the COVID-19 pandemic. To this end, the analysis collects the policy-relevant collocations of the crisis frame used by the municipal politicians of Budapest, or rather lists the terms in which the crisis frame activated. In addition, the study searches the main characteristics of the most and least frequently used collocations with regard to their tone, context and the values attached to them. Besides all that, the text also discusses the role of the crisis frame in the definition of (certain) public policy problems and the political strategies that have been associated with the use of the term.

KEYWORDS

crisis frames, Municipality of Budapest, urban politics, problem definition, agenda setting, local governance, policy discourse

Introduction

Budapest, the capital of Hungary, is virtually the only municipality in the country that has truly significant international visibility. But this means more than just the fact that the city's panorama and emblematic buildings appear in the global mediaspace on a regular basis or that Budapest is by far the country's most popular destination for tourists from abroad. Indeed, Budapest is the sole Hungarian municipality that is consistently the subject of research on urbanism, local governance, public policy formation and political struggles published in international journals (see cf. Kerényi, 2011; Olt and Lepeltier-Kutasi, 2018; Udvarhelyi, 2019; Oross et al., 2021; Oross and Kiss, 2023). Although the capital city stands out from other Hungarian settlements in terms of its population, GDP, administrative position and political leverage, these factors alone do not induce or explain the academic attention it attracts, especially in recent years. A major political turnaround contributed to this. In 2019, István Tarlós, the governing party Fidesz candidate for Budapest, was defeated in the municipal elections, losing the office he had held since 2010, and Gergely Karácsony, co-chair of the Dialog for Hungary – Green Party, won the mayoral seat (and was re-elected in 2024). As a consequence, Budapest (along with Bratislava, Zagreb, Istanbul, and until 2023 Prague and Warsaw) became one of the opposition-led cities that the relevant literature examines primarily as the spatial and institutional base of resistance to the political ambitions and pursuits of central governments. Accordingly, in a number of analyses, the Hungarian capital is qualified as an interesting, influential, typical, even paradigmatic case of urban politics, city democracy, and conflictual dynamics between "illiberal" central governments and "liberal" local governments (see cf. Begadze, 2022; Drapalova, 2023; Aksztejn et al., 2024; Panzano et al.,

2024). However, much less is said about the communicative actions of the city government. Studies have mostly been limited to mentioning and discussing the phenomena of city diplomacy and city branding at the level of generalities (see cf. Buzogány and Spöri, 2024) and examining the mayor's posts in the social media (Niklewicz, 2021; Musil and Yardımcı-Geyikçi, 2023).

This highly specific choice of topic is based on three deeper considerations. First: in the literature on local government, the problem of crisis is almost exclusively presented as an objective reality, a set of extreme external circumstances that need to be addressed. An analytical approach that focuses on crisis as an interpretative framework (see Vincze and Balaban, 2024) may therefore bring a new dimension to the field of LG research. Second: a recurring, important, and integral part of the rhetoric of Fidesz, which has been in power in Hungary since 2010, is the characterization of certain political situations as 'crises' (c.f. Antal, 2024a). The reference to the migration crisis, the crisis of Western culture and values, the economic crisis and the war crisis, i.e., the frequent use of the crisis frame, is central to the narratives of the governing party. It may therefore be interesting to examine whether an opposition-led local government, which defines itself ideologically as the counterpole of the ruling party and politically as its counterpart, is able to come up with alternative crisis frames that are sharply differentiated from these, whether it is able to develop a counter-interpretation and thereby also demonstrate its otherness, its difference and its resistance. The third consideration is that, following the COVID-19 pandemic, the status of the term crisis may have changed. Consequently, it may be worth looking at which situations, issues and events in the post-Covid period could be relatively consensually and legitimately (or at least without provoking serious rejection and outrage) described as crisis in the municipal political arena.

Background

This study aligns with Schneider and Jordan (2016 p. 20) who argue that crises are "central research topics" in political science.

The problem of decision-making in the context of "state of exception," in pressing, ambigous, urgent situations, defined as crisis, i.e., situations of stress, uncertainty, high risk and complexity, has long received much attention in international political science (Rossiter, 1948; Allison, 1969; Hermann, 1979; Herek et al., 1987; Stone, 2011). Research on crisis is therefore closely linked to issues of political leadership (Ansell et al., 2014; Boin et al., 2017), governance (Boin et al., 2008; Blyth, 2013; White, 2019) and public policy-making (Kingdon, 1984; Birkland, 1997; Baumgartner and Jones, 2009; Nohrstedt and Weible, 2010). This includes the study of governmental responses to crisis situations, the rhetoric of crisis, and the public communication in crisis (Edelman, 1977; Cobb and Elder, 1983; Malhotra and Kuo, 2008; Reeves, 2011). Works analyzing international crises form a distinctive subset of the literature (Gelpi and Griesdorf, 2001; Powell, 2002; Widmaier et al., 2007).

It is also noteworthy that, since the 1970s, the term crisis has been used quite frequently by political scientists to describe fundamental structural challenges and threatened collapses of political systems and/or regimes, often linked and overlapped in content with the phenomenon of political instability and associated with political violence (see Binder and La Palombara, 1971; Almond et al., 1973; Linz, 1978; Zimmermann, 1979; Sanders, 1981). Although the inquiry of this issue has lost some of its appeal in the optimistic atmosphere of the 1990s, the study of "democracy in crisis" is experiencing a renaissance in the 21st century (see f.e. Gaon, 2009). The renowned and influential publisher Routledge even has a bookseries entitled Routledge Studies in Democratic Crises.

Crisis-research also plays a crucial role in Hungarian political science. The most extensive literature is on the interconnection/intertwining of crisis and political leadership (Körösényi et al., 2016; Körösényi, 2017). Related to this, the study of the governance that continuously declared new emergencies and maintained the "state of exception" – which has been a recurrent feature of Hungarian politics for a long time, and which became particularly pronounced after 2010 – has developed into a research field in its own right (Antal, 2021; Antal, 2023a; Antal, 2024a; Antal, 2024b). Also, the dramatic encounter of self-professed permanent crisis management governance with the COVID-19 pandemic and its contradictory relationship with the taking of measures to deal with ecological disaster has triggered many academic publications (Hajnal and Kovács, 2020; Hajnal et al., 2021; Mészáros, 2020; Bene and Zs, 2021; Antal, 2021, 2023b). The academic perception of the importance of the issue is well illustrated by such motto-like formulations as that Hungarian politics has entered an Era of permanent State of Exceptions, or that the domestic situation is summed up as Crisis as Usual. A different approach from the previous ones has been the analysis of changes in the degree of political control exercised by the government in the management of fiscal/budgetary crisis (Hajnal and Csengődi, 2014).

The literature on Hungarian municipalities, local government system and local governance contains a number of precise, objective observations and in-depth analyses (Soós, 2015; Dobos, 2016, 2021a,b, 2022; Dobos and Várnagy, 2017; Pálné Kovács, 2017; Pálné Kovács, 2017a; Kovarek and Littvay, 2022; Hajnal and Rosta, 2019; Hajnal and Kucsera, 2023). On the other hand, it actually tells a sad metanarrative of the loss of hopes and dreams of effective self-governance, decentralization, regionalization and Europeanisation, the failure of reforms aimed at developing the local government system, the under-utilization of the middle level and the hollowing out of the local governance as a whole (Hajnal, 2003; Pálné Kovács et al., 2016; Pálné Kovács, 2017b, 2020; Pálné Kovács, 2021; Kákai and Pálné, 2021; Kákai and Pálné, 2023). In addition, in recent years, the issue of democratic backsliding/deficit (or some aspect of it) has been increasingly emphasized in the academic study of Hungarian LGs. For example, the problematic of single-party dominance established (also) in subnational politics (Jakli and Stenberg, 2021; O'Dwyer and Stenberg, 2022); the shaping of the workfare system into a specific form of poverty governance that reinforces the dependence of the rural population on the governing party (Szombati, 2021); the use of austerity measures as a partisan political weapon by the incumbent against selectively targeted opposition-led LGs (Kovarek and Dobos, 2023); the obvious and increasing impact of political alignment on the grant allocation to municipalities (Vasvári and Longauer, 2024) and the different types of political favoritism in relation to local governments (Reszkető et al., 2022). In this context, it is not surprising that the municipal elections of October 2019 have received considerable analytical attention, with the opposition scoring significant successes (f.e. Kovarek and Littvay, 2022). However, the analyses also include rather specific topics such as scapegoat-based policy making by mayors of the far-right Jobbik party (Kovarek et al.,

2017) or the role and functioning of municipally owned corporations (Hajnal and Kucsera, 2023).

The literature overlaps between local government and crises only at a few points, most notably in the context of disaster management in the wake of the COVID-19 pandemic (Dobos, 2020; Finta et al., 2020; Fekete et al., 2021; Hoeman, 2021). A relatively recent, rather tentative trend has been to explore the phenomenon of resilience to crises (Pálné Kovács, 2023).

The crisis theme appears only occasionally, and even then rather indirectly and metaphorically, in writings focusing specifically on urban politics and local governance in the capital of Hungary. Environmental pollution and climate change (Kerényi, 2011; Oross et al., 2021), residential struggles in the context of urban rehabilitation and housing problems (Olt and Lepeltier-Kutasi, 2018; Udvarhelyi, 2019) are mostly discussed as phenomena that induce innovative and collaborative public policy action, urban political and civic activism – but not as crises by definition.

Research design, theory, data, and methodology

This paper focuses on the public discursive actions of the Municipality of Budapest, in particular on the use of the term crisis as a frame. The inquiry is based on the processing of qualitative, textual data collected between the second half of 2021 and the beginning of 2025, after the end of the intense period of the COVID-19 pandemic.

It seemed a well-founded decision, both from a theoretical and methodological point of view, to examine the public discourse of the Municipality of Budapest, which is the most prominent actor in the Hungarian local government system in several aspects (importance, size, leverage, political agenda-setting capacity). However, the case selection was also justified by the fact that the Hungarian capital is not only an interesting but also an *influential case* (see Seawright and Gerring, 2008) for the more general phenomena of responsive/resilient/resisting urban politics and conflictual dynamics between opposition-led 'liberal' cities and recentralizing 'illiberal' central governments.[1] It was the situation that provided the broader political context for the analysis, the 'bigger picture' against which the specific detailed findings take on added value, weight and relevance.

It was perhaps no exaggeration to say that it might offer novel insights departing from the mainstream literature on crisis. As we have seen above, the majority of research treats the crisis as a phenomenon, a situation, an external factor, which is objectively given. Of course, the crisis perceived and analyzed as a reality can also be the result of human activity (negligence, error, bad decisions, antagonistic conflict of interest, deliberate and conscious crisis generation, sabotage). But then, through a process of external objectification, it becomes a compelling environmental factor for subsequent human activity. Some of the works on the subject draw attention to the perceptuality of the crisis phenomenon, the importance of classification, categorization and interpretation, but the focus of the analyses is still on the crisis as a situation/challenge and its management.

The concept of crisis has been considered and analyzed from semantic, conceptual, philosophical and methodological perspectives by several scholars (Robinson, 1968; Svensson, 1986; Koselleck and Richter, 2006; McConnell, 2020). The issue of competing frames applied to actual crisis situations has also been addressed in academic work (Boin et al., 2009; 't Hart and Tindall, 2009). Nevertheless, analyses dealing specifically with the *use of the term crisis* as a political and policy frame are scattered and sporadic in the literature. The most important of these works, which played a decisive role in shaping the design of this research (as a reference point, as a model and as an inspiration), is the analysis by Vincze and Balaban (2024).

A further fundamental methodological consideration was that the analysis should be separate and distinct from the situation created by the COVID-19 pandemic. There are four reasons for this. First, the period of the pandemic is not so much relevant for the studies in terms of frames as in terms of the actual crisis management measures. Second, as mentioned earlier in the presentation of the background to the research, there is already a literature of a meaningful scope, quantity and quality on the epidemic management activities of Hungarian municipalities. Third, the most important forum for public discourse in the Municipality of Budapest, the General Assembly, was out of session for a long time during the pandemic. And fourth, examining the discourse of the post-Covid period provides an opportunity to assess whether the global shock has changed the (local) logic, rules and referents of crisis-classification.

In this way, the study focused its data collection and analysis on the period between the resumption of the General Assembly's regular sessions in September 2021 and the end of the research in January 2025.

In addition, the fact that although local elections were held in Hungary in the summer of 2024, the Mayor of Budapest, Gergely Karácsony, was re-elected, is in favor of this decision. Actually, it can be stated that despite the significant rearrangement of the party balance in the General Assembly (and the spectacular advance of the political newborn and newcomer Tisza Party), there was no change in the leadership, ideological and public policy direction of the city government. Thus, there would have been far fewer arguments in favor of using an alternative timing-logic aligning with the electoral cycle (focusing on the period between 2019 and 2024).

The theoretical background of the study was framing theory (Entman, 1993; Reese, 2001, 2007) and discourse theory (Fischer, 2003; Chilton, 2004), while the methodological framework was a combination of thematic/rhetorical framing analysis (cf. Niklewicz, 2021; Vincze and Balaban, 2024) and political/policy discourse analysis with an interpretative structuralist approach (Phillips and Hardy, 2002: 23–25). They grounded the conceptualization of the research and the procedures used in the analysis.

According to definitions that are considered canonical in the framing theory literature frames 'are organizing principles that are socially shared and persistent over time, that work symbolically to meaningfully structure the social world' (Reese, 2001: 11), and to frame is 'to select some aspects of a perceived reality and make them more salient in a communicating text' (Entman, 1993: 52). In this research, following a somewhat more operationalized definition, the concept of frame can be understood as *a term/collocation used as a*

1 The present research thus shares the methodological consideration of Aksztejn et al.'s (2024) study that, following the case selection classification, Budapest is not so much a typical or paradigmatic case, but rather an influential case (for the phenomena mentioned above).

discursive resource for construct, articulate and/or formulate a social phenomenon to a certain community (cf. Vincze and Balaban, 2024), *'in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation'* (Entman, 1993: 52).

Discourse, in the context of the present work, is understood as *an interactive (linguistic and meta-linguistic) sign-use process that assumes a shared knowledge base.* Public discourse, however, is also characterized, beyond what has been said so far, by *being widely and unrestrictedly accessible to members of a given society, synchronously and/or diachronicly* (cf. Fischer, 2003). Closer to the object of analysis, political discourse is interpreted as *an intersubjective process of meaning-making that constructs the intertwining of the public good and power*, and policy discourse as *'the communicative interactions among political actors that translate problems into policy issues'* (Fischer, 2003:30).

However, the two categories denote closely related phenomena. Frames function embedded in discourses, and discourses often revolve around certain 'macroframes'.

The application of thematic/rhetorical framing analysis in this research meant that frames were presented as static linguistic forms related to specific issues, and as interpretive schemas capable of producing a social effect. In other words, the research did not focus on framing as schema formation itself, as a dynamic, multi-stage process.[2]

The interpretive structuralist approach to political/policy discourse analysis meant that the textual data was examined from a constructivist perspective (focusing on meaning-making) and in reflection to the 'bigger picture', the broader political-institutional context and the discourse that supports it (Phillips and Hardy, 2002: 23). The aim was not to micro-analyze individual texts (i.e., social linguistic analysis), nor, in the case of an opposition-led municipality, to reveal the discursive manipulations of actors communicating from a position of power (i.e., to carry out critical discourse analysis). The collected expressions, phrases, sentences, paragraphs and longer passages, selected and categorized according to the criteria of the study, were thus analyzed as markers and constituents of a given political context.

Accordingly, a keyword search for the term 'crisis' was carried out on the budapest.hu website[3], the official communication platform of the Municipality of Budapest, on four consecutive occasions: 1 September 2024, 1 October 2024, 1 November 2024, and 1 February 2025. The starting point of the study was the result of the first search, which later became the first set of textual data of the research. The second search was used as a supplement to this, and its results were used to correct the text database. The third and fourth searches were essentially control searches. Their purpose was to check whether there had been a substantial shift in the content of the website using the crisis frame, either in terms of quantity or quality.

A keyword search on the digitally archived minutes of 36 General Assembly meetings held between 1 September 2021 and 29 January 2025 was also carried out. This resulted in the second major set of the research text database.

This textual source base was subsequently supplemented by the inclusion of proposals, memoranda, professional programs and policy materials from the period under study, as well as content published on other online platforms with a capital city connection.[4]

In addition, two semi-structured interviews were conducted with recognized experts who have a particular insight into the public policy role of the Municipality of Budapest through their research or work.

The four questions (or question-clusters) this research sought to answer were:

> *RQ1*: What are the policy-relevant collocations of the crisis frame in the public discourse of the Municipality of Budapest? In what terms has the crisis frame been activated? What are the most frequent terms and were they used more often by (local) incumbent actors or (local) opposition actors?[5]
>
> *RQ2*: What are the main characteristics of the most frequently used collocations (as typical cases) and the least frequently used collocations (as extreme/deviant cases) in terms of their tone, context and the values attached to them? Were there any macroframes that rose above the others in terms of importance, or that brought several other crisis frames under their own umbrella of meaning, merged them or even incorporated them?
>
> *RQ3*: What is the role of the crisis frame in problem definition? What are the main findings of a comparison of the most frequently used collocations? Were functional crisis frames or abstract-symbolic crisis frames predominant in the public discourse of city government?
>
> *RQ4*: What political and public policy strategies are associated with the use of the crisis frame? What political and public policy strategies can be derived from the particular ways in which the crisis frame is used?

Analysis

The analysis was conducted manually, without the use of software. While this procedure was time-consuming and could potentially reduce the quantitative scope of the study and weaken its reliability, it also increased its validity, nuance, and capacity for self-correction. Moreover, it clearly met both the characteristics of the qualitative data under scrutiny (the textual source base) and the standards of an interpretative structuralist approach (see f.e. O'Connor, 2000; Heracleous and Barett, 2001). The methodology used in this study can therefore be considered consistent with the existing literature. The manual analysis allowed the elimination of formal/redundant, non-substantive multiple mentions (e.g., the

2 That is, the four-step model (input, frame building, the frame's appearance, and frame setting) described by Niklewicz (2021) did not appear in the research.

3 Which is also linked to certain partner websites as a kind of hub and makes certain content available from them.

4 Primarily: https://enbudapestem.hu/.

5 This research question (or set of questions) built heavily on the research questions used in the Vincze and Balaban study, cited several times already (cf. Vincze and Balaban, 2024).

repeated appearance of the same assembly resolution text in the minutes), while terms that were grouped together in common syntactic structures (e.g., economic, cost-of-living *and* energy *crisis*) were taken into account.

To answer the first research question (or perhaps rather question-cluster), the textual data source of the budapest.hu website and the minutes of 36 General Assembly sessions filtered by keyword searches were used. However, the corpus of website texts required further selection for relevance. After excluding the content that was not of political context at all (but private, entertainment, educational), content that was no longer topical (historical or archival), and content where no collocations meaningful in a policy context were found, 159 relevant mentions remained for analysis. On 1 February 2024, this was extended to 167 relevant mentions (i.e., no significant changes in the course of the research). After reviewing the minutes, it was found that in 9 cases the crisis frame was not mentioned at all, and in one case only one of its thematic equivalents (climate *emergency*) appeared. Thus, in the end, it was possible to carry out a meaningful analysis of the proceedings of 26 General Assemblies with 226 relevant mentions.

The policy-relevant collocations that appear in both public discourse forums of the Municipality of Budapest are *housing crisis*, *energy crisis*, *economic crisis*, *COVID-crisis*, *refugee crisis*, and *cost-of-living crisis*. This set partly reflects the broader socio-political context, major processes and events in the 2010s and 2020s in Central and Eastern Europe, as well as the political agenda at national level (*Covid crisis*, *refugee crisis*, *energy crisis*), and it is partly embedded in longer-term political-cultural specificities, attitudes and mentalities (*cost-of-living crisis*). However, the emergence of the *housing* issue and its framing as a *crisis* has already taken place largely independently of these contextual factors. It therefore shows specific, local-level problem perception and/or autonomous agenda-setting ability.

There is also a considerable overlap between the most commonly used terms in the corpus of the website and the minutes. *Housing crisis* and *energy crisis* are certainly two of the most salient, but the position of the third is uncertain. On this point, the discourse of the website and the discourse of the General Assembly are quite different. In the case of the former, the third most frequently used term is *climate crisis*, while in the case of the latter, this term is rarely used in this form (only two mentions), rather its thematic equivalent (*climate emergency*) appears somewhat more regularly.

This is probably related to the fact that budapest.hu gives a much broader and more diverse scope of actors a voice than the Assemblies. The reports, conversations, interviews and reviews published here draw from a wider range of the population, with activists, members of NGOs, artists, academics and ordinary citizens of the capital regularly speaking alongside local politicians and officials. *Climate crisis* seems to be their preferred frame, while professional institutional actors either avoid the topic or use the term *climate emergency*. The latter is no coincidence: the General Assembly led by Gergely Karácsony declared its recognition of the *climate emergency* and its intention to act against it at its inaugural session in autumn 2019. The term has therefore taken root in this form and has become – for the current leadership of the municipality – emblematic.

At the same time, the crisis frame is also activated in atypical terms that may seem strange at first sight, such as the *crisis of statue-overproduction*. This shows that its use is not subject to overly strict conventions or prescriptive standards, and leaves room for freedom of interpretation and innovative formulations.

It is clear from the minutes of the General Assembly that the (local) *incumbent actors used the crisis frame significantly more* (three times as often) than the opposition actors. The conclusion is that the term was not a discursive tool of criticism to the capital's leadership, nor was it linked to municipal mechanisms of control and accountability. In contrast, it has emerged as more of a source of criticism and accountability for the actions of the national government by incumbent politicians in the Municipality of Budapest (in opposition at the national level) – highlighting that the crisis in question is either unmanageable or exacerbated by the government, or perhaps self-inflicted.

The answers to the first research question (RQ1) are presented in Tables 1, 2 in a comprehensive and detailed way.

Moving on to the second research question (RQ2), to answer this one, a decision had to be made on the range and number of collocations that were most and least frequently used. After careful consideration, it seemed theoretically and methodologically fruitful to take the three most used terms on the website and the three least used terms in the minutes of the Assemblies. The first two of the website's most prominent collocations are identical to those of the Assemblies, and the third is an emblematic frame for the entire metropolitan administration. The comparison with the terms that are not often mentioned is likely to reveal the rhetorical resources that determine the success of the crisis frames (beyond the importance and weight of the signified policy issue).

The tone of the most prominent collocations (*housing crisis*, *energy crisis*, *climate crisis*) is equally dramatic, while one of the less frequent terms, *polycrisis*, is neutral, professional and abstract, and the other, *statue-overproduction crisis*, is subtly light, playful and ironic. It seems plausible that the successful functioning of the crisis frame involves the alarming, mobilizing emotional power of the word combination. Collocations that neutralize or extinguish the inherent emotional tension of the crisis term, or explicitly reverse its sinister affective charge, act as a private suffix or have an oxymoronic effect at the level of connotations.

TABLE 1 The policy-relevant collocations of the crisis frame on budapest.hu.

Collocations	Prevalence	Frequency ranking
Housing crisis	42	1
Energy crisis	33	2
Climate crisis	24	3
Economic crisis	19	4
Covid-crisis	16	5
Refugee crisis	5	6
Overhead cost crisis	4	7
Ecological crisis	4	7
The crisis of faith in democracy	4	7
Cost-of-living crisis	3	8
'*triple crisis*'	3	8
Other (in sum)	10	9
In conclusion	167	1–9

TABLE 2 The policy-relevant collocations of the crisis frame in minutes of General Assembly meetings.

Date of the General Assembly meeting	Prevalence	Collocations	Most frequent	Incumbent/Oppositon (+ Non-committed)
1 September 2021	12	Cost-of-living crisis, housing crisis, Covid-crisis, "the Crisis" (i.e., COVID-19), economic crisis	Covid-crisis/"the Crisis"	11/1
29 September 2021	0 (3)	(climate emergency, used synonymously)	(climate emergency, used synonymously)	(1/2)
27 October 2021	0	-	-	-
24 November 2021	11	"the Crisis," refugee crisis,	"the Crisis" (i.e., COVID-19)	7/4
15 December 2021	3	"the Crisis," crisis budget	"the Crisis" (i.e., COVID-19)	3/0
26 January 2022	2	Economic crisis, social crisis	Economic crisis/social crisis	2/0
23 February 2022	0	-	-	-
13 April 2022	9	Refugee crisis, economic crisis, statue-overproduction crisis,	Refugee crisis	9/0
27 April 2022	5	Housing crisis, world economic crisis, vast global crisis	Housing crisis	4/1
25 May 2022	non-quorate, 0	-	-	-
8 June 2022	0	-	-	-
29 June 2022	16	Cost-of-living crisis, housing crisis, social crisis, energy crisis	Housing crisis	14/2
31 August 2022	23	Cost-of-living crisis, energy crisis, economic crisis, energy & economics crisis, health crisis	Energy crisis (energy & economics crisis)	16/7
28 September 2022	10	Energy crisis, economic crisis, energy & economics crisis	Energy crisis (energy & economics crisis)	7/3
26 October 2022	13	Cost-of-living crisis, energy crisis, economic crisis, energy & economics crisis, "the Crisis"	Energy crisis (energy & economics crisis)	12/1
30 November 2022	1	Energy crisis	Energy crisis	1/0
14 December 2022	9	Energy crisis	Energy crisis	6/3
25 January 2023	3	Housing crisis	Housing crisis	1/2
22 February 2023	12	Cost-of-living crisis, energy crisis, economic crisis	Energy crisis/econimic crisis	11/1
29 March 2023	0	-	-	-
26 April 2023	0	-	-	-
24 May 2023	4	Energy & economics crisis	Energy & economics crisis	
28 June 2023	0	-	--	-
27 September 2023	2	Energy crisis	Energy crisis	2/0
25 October 2023	2	Economic crisis		2/0
29 November 2023	0	-	-	-
13 December 2023	2	Housing crisis	Housing crisis	2/0
31 January 2024	0	-	-	-
28 February 2024	1	Domestic crisis situation (of abused persons)	Domestic crisis situation (of abused persons)	1/0
27 March 2024	2	Crisis situation (financial, debt-related), energy crisis	Crisis situation (financial, debt-related), energy crisis	1/1
24 April 2024	11	War crisis, Covid-crisis, "the Crisis," energy crisis	Energy crisis	11/0
4 October 2024	7	Social crisis, housing crisis,	Housing crisis	6/0 (+ 1)

(Continued)

TABLE 2 (Continued)

Date of the General Assembly meeting	Prevalence	Collocations	Most frequent	Incumbent/Oppositon (+ Non-committed)
30 October 2024	41	Cost-of-living crisis, energy crisis, economic crisis, housing crisis, polycrisis	Housing crisis	14/13 (+ 14)
27 November 2024	7	Housing crisis, health crisis, energy crisis	Housing crisis, health crisis	1/3 (+ 3)
18 December 2024	10	Housing crisis, energy crisis, cost-of-living crisis, economic crisis, triple crisis	Housing crisis	6/3 (+ 1)
29 January 2025	8	Housing crisis, climate crisis	Housing crisis	6/2
In conclusion	226	Least frequent, discrete, unique: statue-overproduction crisis, domestic crisis situation (of abused persons), polycrisis	Housing crisis (9), energy & economics crisis (9), Covid-crisis/"the Crisis" (3)	156/51 (19)

Looking at the context outlined by the speakers, we see a colorful and diverse range of problems around the most salient terms.[6] In the case of *energy crisis*, these are *war*, *economy*, *dependency*, *gas*, *electricity*, *cost*, *comfort*. In relation to the *climate crisis*, these are *nature*, *economy, industry, consumption, pollution, transport, survival.* And, around the *housing crisis* frame, *economy, cost-of-living, university students, inflation, government policy, poverty, homelessness.* Interestingly, there were no significant, trend-like, perceptible differences between (local) incumbent and (local) opposition speakers in this area.

The rare term with a dramatic tone, *domestic crisis situation (of abused persons),* has a much more limited context *(abuse, domestic violence, escape),* while for *polycrisis* we only know that its context is further crises – without any specification. However, the contexts highlighted differed not only quantitatively but also qualitatively. The contexts of the most frequently used frames outstripped those of the least frequently used terms not only in number, but also in importance and scale.

The situation is similar for the values associated with collocations. Terms with a prominent number of mentions imply a large set of core values, while the value implications of odd, rarely used terms are more limited in terms of both quantity and importance. Even if the list of values outlined by the (local) incumbent speakers on the *housing crisis* (*social equality, human dignity, solidarity, fairness, livelihood, personal autonomy, mobility*) differs sharply from the value associations of the (local) opposition actors (*livelihood, career, family, security, ethno-cultural homogeneity*), these are still, individually and separately, more numerous and more serious than the values threatened by the *statue-overproduction crisis* (*aesthetic quality, good artistic taste, well-being in urban public spaces*).

The textual source base does not contain any words or phrases that function clearly and in all respects as macroframes in the public discourse of city government. There is one expression that has played a structurally similar role, namely the term *'triple crisis'*. It was used mainly in the mayor's speeches, and was intended to cover the main hardships of the period: the Covid pandemic, the energy crisis and the difficult financial/budgetary situation of the municipality of the capital as a result of the *'domestic political crisis'* (i.e. the constant conflict with the central government, the hostile government actions, and central government's cutbacks). However, the somewhat nondescript term did not become accepted and widespread even among (local) incumbent politicians, so it could not become a central, prominent, dominant and integrative interpretative schema.[7]

The detailed answers to the second research question (RQ2) are summarized and presented in Table 3.

In answering the third research question (RQ3), the analysis was focused exclusively on the communication of (local) incumbent actors in relation to the three most frequently mentioned collocations. The aim of the investigation was to explore the role of the crisis frame in the policy problem definition processes. An attempt was made to do this on two levels and in two ways. First, by looking in general terms at what it means when a policy issue is placed in the crisis frame. Then, specifically and comparatively, focusing on the similarities and differences between the use of the three collocations. In addition to drawing inspiration from the general literature on problem definition (Dery, 1984, 2000; Dunn, 2018; Peters, 2018), the criteria for the latter, more specific analysis was based primarily on the categories discussed in Rocheford and Cobb's studies (Rocheford and Cobb, 1993, 1994).

According to Dunn, there are four main characteristics of policy problems: interdependency, subjectivity, artificiality and instability (Dunn, 2018: 71–73). One of the empirically well-supported implications of the crisis frame is the tendency to reduce the acceptance of subjectivity and artificiality. In relation to both the *housing crisis*, the *energy crisis* and the *climate crisis* (and *climate emergency*), it has been a recurrent assertion that the existence and severity of the problem is a fact, that the situation is not a matter of individual judgment but exists objectively. In addition, the instability of policy problems is called into question. Because of the implications of urgency and unsustainability inherent in the term crisis, the final elimination of instability, the prevention of the problem's recurrence once and for all, i.e., the achievement of final stability, appears on the horizon of objectives.

Comparing the three prominently mentioned collocations along Rocheford and Cobb's categories, we see that the crisis classification alone does not carry and does not result in any clearly discernible pattern in problem definition with respect to problem causation, incidence, novelty, proximity or solution (Rocheford and Cobb, 1994).

In the public discourses of the Municipality of Budapest, the *energy crisis* is understood as an intended, temporary, unprecedented situation,

6 These problems can be identified by taking stock of the references, assumptions and statements made in the excerpts where the particular crisis frames occur.

7 It appears three times on the website and only twice in the minutes.

TABLE 3 The main characteristics of the most and least frequently used collocations (tone, context and values associated).

Collocation	Tone	Context	Values associated with the frame/ values threatened by the crisis (incumbent coalition)	Values associated with the frame/ values threatened by the crisis (opposition)	Values associated with the frame/ values threatened by the crisis (non-committed)
Energy crisis	Dramatic	War, economy, dependency, gas, electricity, cost, comfort	Livelihood, credibility predictability, free choice fairness	Credibility, free choice	-
Climate crisis/climate emergency	Dramatic	Nature, economy, industry, consumption, pollution, transport, survival	Social equality, human dignity, solidarity, fairness survival	Habitude, customs, clean air, free choice freedom to travel by car	-
Housing crisis	Dramatic	Economy, cost-of-living, university students, inflation, government policy, poverty, homelessness	Social equality, human dignity, solidarity, fairness, livelihood, personal autonomy, mobility	Livelihood, career, family, security ethno-cultural homogeneity	Livelihood personal autonomy, mobility, modern, European-standard living environment.
Statue-overproduction crisis	Light, ironic	Art vs. slush, politics of memory, democratíc deficit	Esthetic quality, good artistic taste, well-being in urban public spaces	-	-
Domestic crisis situation (of abused persons)	Dramatic	Abuse, domestic violence, escape	Dignity, security	-	-
Polycrisis	Neutral, abstract, professional	Crisis embedded in the context of other crises	-	-	-

whose affordable solutions from the institution's budget are considered morally objectionable, while the acceptable solutions are considered unaffordable.[8] In contrast, the *climate crisis* is accidental and impersonal, growing in the long term, unprecedented, and for the time being there is no available solution. At the same time, a *housing crisis* is both intended/accidental, growing in the short run, familiar, with available, acceptable, but (in the longer term) unaffordable solutions.

The one thing that is common to the use of the crisis frame in all three cases is the two-leveled nature of proximity: the crisis is understood both as a structural, systematic-social macro-level condition and as an individual, personal micro-level condition. The best example of this specificity, which is important for the problem definition, is provided by the documents on the *housing crisis*.

The public policy strategy "Home, for all" adopted in the summer of 2022, as well as the municipal decree adopted by the General Assembly on 29 June 2022, distinguish between *housing crisis*, which can be characterized as systemic or aggregate problem, and (acute) *housing crises situations* at the level of households, families and individuals. The different nature, level and scale of the two phenomena are accurately reflected in the language used: social-systemic crisis is always singular (a single, coherent, interconnected, systemic entity), while the categories covering personal living difficulties are usually plural. The latter are collected and listed in both documents. (*Acute*) *housing crises situations* include housing arrears (rent and utility bills) reaching critical levels, inadequate housing conditions, evictions without accommodation, loss of housing, staying in a family's temporary home, temporary or long-term homelessness. Although the discourse places the containment, or even the elimination, of the systemic phenomenon at the distant horizon of public policy, concrete, targeted measures are aimed at the micro-level, at the level of individuals. The planning and implementation of *crisis management* and *crisis intervention* thus involves many small, concrete, individual, but well-defined and effective steps, and is only really directed at the systemic crisis as such, as a distant, cumulative effect of these. The two-level application of the crises frame in problem definition thus allows for both a 'big picture' approach, thinking in terms of longer-term, macro-level outcomes, and the efficient operation of street-level bureaucracy to fit within this, given the seriousness and urgency of the problem.

Following Reese's (2007) suggestion, we can make further observations by examining the extent to which the crisis frames used in public discourse of the city government are 'functional' (i.e., they lay out actionable policy) and/or abstract-symbolic. On the basis of the textual data, it seems that (relatively) clear (particular) *problem definitions, causal interpretations, and treatment recommendations* can be deduced from the most commonly used crisis frames. Compared to the 'crisis of the West' frame in the discourse of the governing party at national level, even the *climate crisis* can be said to be functional, not to mention the *energy crisis* or the *housing crisis*. This impression is further reinforced by the large number of technical papers, policy proposals and action plans produced on the issues in question, as well as by the experts interviewed.

8 It has been repeatedly stated in the Assemblies that, in order to find the right and acceptable solutions to the crisis, the Municipality would rather take on debt than cut back on public services in an unacceptable way.

TABLE 4 Functioning of the most frequent frames in problem definition processes.

Frame	Problem causation	Incidence	Novelty	Proximity	Solution
Energy crisis	Intended personal	Temporary, growing in the short term	Unprecedented	Personal and social	Objectionable- affordable acceptable- unaffordable
Climate crisis/climate emergency	Accidental impersonal	Growing in the long term	Unprecedented	Personal and social	Non-available (at the moment), acceptable
Housing crisis	Intended/accidental personal/impersonal	Cyclical, re-entrant, constant, growing in the short run	Familiar	Personal and social	Available acceptable unaffordable

The detailed answers to the third research question (RQ3) are set out in Table 4.

Finally, let us turn to the fourth research question (RQ4).

In order to uncover the political and/or policy strategies promoted, complemented, made more effective and implemented by the crisis frames, we need to start from the broader context and to trace our statements back to it. This context is the responsive/resisting urban politics pursued by the municipality of the capital and the conflictual dynamics between the opposition-led 'liberal' city and recentralizing 'illiberal' central government.

In this political situation, four basic strategies emerge for city government as a discursive actor. The first (1) is an attack on the reputation of central government, questioning its credibility, competence, principles, intentions and capabilities. The second (2) is to shield the reputation of the Municipality of Budapest and to prove its credibility, competence, principles, intentions and capabilities. The third strategy (3) is to oppose, reject or block a public policy measure promoted and/or initiated by the central government, while the fourth strategy (4) is to justify a public policy measure promoted and/or initiated by the local government. The first and third are offensive, delegitimizing (or legitimacy-reducing) strategies, while the second and fourth are defensive, legitimizing (legitimacy-enhancing) strategies.

The *economic* and *cost-of-living crisis*, as a frame, is clearly embedded in the first, offensive and delegitimizing strategy in the textual sources. In other words, according to the interpretation of the incumbent politicians in the capital, the serious situation that has emerged is clearly the result of the central government's misguided economic policies, incompetence, hypocrisy and social insensitivity.

The use of the terms *Covid crisis* and *energy crisis* as a framework was associated with the combined and interlinked, simultaneous application of the first and second strategies. According to the narrative of the Budapest leadership, the capital came up with more effective and efficient solutions to both crises, and handled the situation better – in fact, it was ahead of the central government in terms of action. The central government initially belittled and ridiculed these measures, but later adopted them – whether in the form of compulsory mask-wearing or austerity.

The *climate crisis* frame was linked to the combined, but separate and not simultaneous application of the first two strategies. The narrative of the metropolitan government is that central government has not and is not doing anything to address the climate crisis. It either does not perceive the problem as important enough or denies it. It is not willing to take risky, unpopular measures, such as confronting the motoring lobby. In contrast, the Budapest authorities are realistic about the scale of the problem and are taking bold and effective action to tackle the climate crisis (increasing the proportion of green spaces, insulating houses, creating cycle lanes, reducing public transport fares, setting up the Budapest Climate Agency etc.).

The term *housing crisis* as a frame correlated with all four strategies and was used in a wide variety of arguments. But perhaps the most emphatic strategy was the fourth, defensive and legitimizing one. This was used by the municipal leadership in narratives aimed at justifying the innovative policy model represented by the newly created Budapest Housing Agency.

A case of particular note was a major scandal, in which two crisis frames acquired strategic significance. Up until January 2025, it appeared that the central government was selling a brownfield site in central Budapest to a UAE-affiliated company to build a complex of buildings including skyscrapers, similar to an earlier project in Belgrade. An important discursive tool used by the capital's municipality to protest against the project, previously dubbed 'mini-Dubai', was the inclusion of the *housing crisis* and *climate crisis* frames in the argument. In order to effectively oppose the conception and block the implementation of the plan (i.e., to pursue the third strategy mentioned above) the linking of the investment with these two issues has become a key reference.

In several of his speeches, mayor Gergely Karácsony relied heavily on the emotional and argumentative power of the two crisis frames. Speaking at a demonstration, he said: '*We want to prepare our common home for the 21st century. But there is one obstacle. The politics that hates this city and understands nothing about the housing crisis or the climate crisis, and knows nothing about the public interest, only the private interest.*' (…) '*Budapest does not need Europe's tallest building, it needs Europe's highest life expectancy, a much healthier city, an end to the housing crisis and a residential community*'.[9]

On another occasion, in even stronger and more pithy terms, he said: '*The rapist state (…) wants to impose on Budapest an investment that serves private interests, destroys the cityscape and exacerbates the housing and climate crisis*'.[10]

Discussion and conclusion

Looking a little further than the empirical analysis perspective of textual data, it is also worth considering how the findings presented here fit into the existing academic descriptions of responsive/resilient/

9 Textual source: https://enbudapestem.hu/2024/03/22/rakosdubaj-a-kezdodo-beruhazas-ellen-tuntetnek-a-civilek.

10 Textual source: https://enbudapestem.hu/2024/05/03/karacsony-es-vitezy-szerint-is-sulyos-gondok-vannak-rakosdubajjal.

resisting urban politics as practiced by the Municipality of Budapest. To this end, this paper adopts the concept that seems to be the most appropriate from among the available studies (f.e. Begadze, 2022; Drapalova, 2023; Buzogány and Spöri, 2024; Panzano et al., 2024).

Aksztejn et al. (2024) list seven general reactive actions as basic forms of local responses to 'illiberal' recentralization: '*policy proposals*' (1), '*counter-policies*' (2), '*lawsuits*' (3), '*disobedience*' (4), '*political mobilization*' (5), '*communicative actions*' (6), and '*transnationalization*' (7).

The use of crisis frames is obviously most appropriate for the sixth type of response, but it also plays a role in the second, third and fourth types of action.

According to the narratives of city government, the central government's power-concentrating actions explicitly hinder the handling of certain serious, pressing, urgent situations (framed/defined as crisis), both at local and national level, and even exacerbate them. On the one hand, by neglecting them and focusing its attention and resources on the political struggle rather than on the actual resolution of policy issues, and on the other hand, by reducing the public policy capacities of local institutional actors. The central government, working to establish its own dominance, has failed to address the *climate crisis*, its short-sighted actions have reinforced the already existing *housing crisis*, while the *economic crisis* and the *cost-of-living crisis* have been triggered by its own misguided economic policies, some of which are purely designed to gain political support. In these communicative actions, the Municipality of Budapest, as a discursive actor, consciously built on the rhetorical potential of the crisis frame: the attention-grabbing power, the emotional power, the dramatic effect of expression. In this way, by highlighting the gravity of the unaddressed (or inadequately addressed) or unresolved (or not yet resolved) situations, the LG also emphasized the negligence, irresponsibility, power fixation and short-sighted incompetence of the central government. In conjunction with this, the use of crisis framing also served to strengthen Budapest's case against the central government on controversial policies or policy areas (environmental policy, urban development, real estate policy, housing, social policy).

At the same time, the use of crisis-frames has been integrated into the formulation of certain 'counter-policies'. These are defined by Aksztejn et al. (2024) as 'locally elaborated and implemented policies, regulatory measures or public services aimed at the local public that either counteract the undesirable effects of recentralization or demonstrate how the values and political profile of the LG differ from those of the central government'.

Thus characterized 'counter-policies' have emerged mainly in two areas, *environment/energy/climate policy* and *housing*. A distinctive and innovative approach to tackling related public policy (sub) problems was demonstrated by the launch of two new project organizations in 2024, the *Metropolitan Housing Agency* and the *Budapest Climate Agency*. Two dedicated actors that are flexible and less bound by rigid bureaucratic structures.

Based on the summarized mission statement on its website, the aim of the Metropolitan Housing Agency is to increase the stock of available housing and to provide affordable and secure rental accommodation for tenants. To this end, it is committed to property management cooperation for private individuals (utilization, management and rental of private homes with different offers), and renovation of non-residential properties for change of function.[11] The Budapest Climate Agency, however, in the framework of the *100 Climate Neutral and Smart Cities Mission*, aims "to stimulate residential building energy efficiency investments and facilitate the achievement of Budapest's climate neutrality targets."[12]

The two institutions were described in the relevant discursive actions as entities that demonstrate the metropolitan municipality's commitment to addressing the increasingly pressing issues, countering the irresponsible, negligent attitude of central government, and intended for 'crisis management'. The crisis frames (i.e., *housing crisis*, *climate crisis*, *energy crisis*) have been used as key concepts, reference points, strong arguments in speeches and documents. By highlighting the seriousness, difficulty, complexity and ambiguity of the situations, the terms also underlined the justification, adequacy and relevance of the new innovative public policy solutions initiated by Budapest.

This is also reflected by the fact that the 12-point, HUF 20 billion action plan approved by the General Assembly in October 2024 was presented at all official communication forums as "the biggest housing programme of the last 30 years," which aims to solve the "*housing crisis*," "one of the biggest challenges facing our future."[13]

Crisis frames were also associated with responses of the 'disobedience' and 'lawsuits' type. As mentioned by Aksztejn et al. (2024), the city government refused to pay the so-called 'solidarity contribution' (or 'solidarity tax') that had previously been raised in such a way that specifically disadvantage Budapest. Indeed, it subsequently challenged the legality of the measure in court (and won the case in January 2025). For both actions, an important argument was that the unfair financial withdrawal would result in the inability of the capital to deal with the existing crisis situations, and that the measure itself would create a kind of *budgetary and management crisis*.[14]

As a (more) higher level reflection on the findings, let us see what conclusions can be drawn. The metropolitan municipality, as a discursive actor, functioned as agenda-setter, policy-interpreter, and policy problem-definer both during and through the use of crisis frames. In these roles, however, it has operated in different ways and with varying degrees of effectiveness.

As an agenda-setter, Budapest has achieved a clear and resounding success in one area at the expense of central government crisis-frame issues. Following a radio interview with the Prime Minister in October 2024, politicians from the ruling party Fidesz also started to talk about the need for 'affordable housing', adopting and increasingly using the '*housing crisis*' frame. This partly complemented, partly counterbalanced and partly replaced the crisis framing they had typically used until then in relation to 'migration', 'war', and 'demography'. Officials of the municipal government have repeatedly,

11 Summarized mission statement of The Metropolitan Housing Agency. Available at: https://budapest.hu/eselyteremto-budapest/elerheto-lakhatas/lakasugynokseg.

12 Online Communique of Department for Climate and Environmental Affairs, Mayor's Office of Budapest, May 7, 2024. Available at: https://smartcity-atelier.eu/allgemein/budapest-sets-up-its-climate-agency/.

13 Textual source: https://budapest.hu/eselyteremto-budapest/elerheto-lakhatas.

14 This frame was mentioned only twice in the period under review and is therefore shown in the summary table only under the category 'Other' and not specifically mentioned.

in several forums and with palpable satisfaction, acknowledged this turnaround in the political and public policy agenda. Ambrus Kiss, Director General of the Mayor's Office, for example, said in a background briefing that although politicians of the capital 'had been talking about it for quite a long time', a 'few weeks ago the government had also noticed that there was a *housing crisis* in Budapest'.[15]

As a politics-interpreter, however, the capital's leadership failed to construct a truly distinctive, characterful, strong crisis macroframe that could have served as a comprehensive and integrative interpretive scheme to explain political struggles and delineate opposing positions. In other words, it could not, or could not really, counterbalance the ruling party's crisis macroframes, which divided the political space between actors supporting and opposing the processes and actions that give rise to the 'migration crisis', 'war crisis', and 'the crisis of Western values'. Perhaps consciously, perhaps on the basis of values, but in the end the communication of the capital's municipality did not produce a similar discursive pattern of binary oppositions (pro-migration vs. anti-migration, pro-war vs. anti-war, pro-gender vs. anti-gender) to classify political actors and positions. Although the frame of the *climate crisis* could have been used as a macro-frame to integrate the discussion of political issues, and a series of oppositions (climate-conscious vs. climate-agnostic, pro-hydrocarbon vs. pro-renewable energy, motorist vs. cyclist, pro- and anti-extinction) could have been derived from it, the Municipality of Budapest did not start communicating in this way, creating enemy-images and replicating the radical environmentalist tone.

The capital government's only attempt to do so has been neither too emphatic, nor too forceful, nor too successful. Interestingly, one of the components of the *'triple crisis'*, the *'domestic political crisis'* resulting from the conflict between central and local government, was used as the crisis macroframe to explain the political situation. Or, as the mayor put it, "this crisis is the result of the Hungarian government's visible commitment to an anti-Budapest politics."[16]

But while in this interpretative framework the anti-Budapest position meant recentralization, the reduction of powers, the withdrawal of financial resources, additional taxes imposed, activities contrary to the interests of the local community, and thus was capable of giving a pithy characterization of one of the actors, the "pro-Budapest" position meant nothing more than what the actual functioning of the municipality of the capital itself specifically implies. The use of the schema therefore remained an occasional attempt; it did not spread widely or take root in public discourse.

And last but not least, it is worth noting that the capital, as a public policy problem-definer, created functional frames (not abstract-symbolic ones). Moreover, as the two experts interviewed in the course of the research agreed, they were not used merely to create 'placebo policies'. Indeed, the municipality of the capital did not seek to diffuse blame, defend the status quo, and frame 'placebo policy' as a solution (McHugh et al., 2021). According to the consensus of experts, the use of the crisis frame by the city administration was associated with the idea that the situation interpreted in this way was an opportunity for political and policy change and a way to break the status quo. In other words, the action plans and project organizations (especially in the areas of housing and climate/energy) that they have created, offered and framed as solutions can be considered as a real 'treatment policy'.

However, whether the COVID-19 pandemic has substantially changed the legitimacy and acceptability of framing certain political and public policy issues as crises could not be reconstructed on the basis of empirical analysis of the collected textual data. Answering this question should therefore be the subject of further research.

15 Textual source: https://enbudapestem.hu/2024/11/20/a-12-pont-amivel-a-fovarosi-vezetes-lakhatasi-valsagot-kezelne.

16 Textual source: https://enbudapestem.hu/2023/04/19/a-fovaros-felfuggeszti-a-kormany-finanszirozasat.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

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Ethical review and approval was not required for the study on human participants in accordance with the local legislation and institutional requirements. The participants provided their written informed consent to participate in this study.

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Subsidiarity as an answer to the crisis of local self-government system

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Local self-governments have faced many difficulties in recent years in the middle of crises. Many reforms have been carried out with a view to efficiency, including territorial reforms in a number of countries. However, in addition to efficiency, local communities are also claiming the right to decide their own affairs. As regards the distribution of powers, little attention is paid to the principle of subsidiarity in this process. This principle is a well-known concept in EU law, with a clear meaning, but it receives little attention in relation to local self-government. However, this principle is a fundamental principle of the social teaching of the Catholic Church, which helps to provide a stable reference point for local self-government in a changing world. Subsidiarity helps to provide a fuller and more accurate understanding of local self-government, while at the same time providing a basis for the local community to claim the right to decide on matters that concern them. Ultimately, it is partly this principle that justifies the very existence of local self-government.

KEYWORDS

subsidiarity, local self-government, local community, territorial reforms, distribution of powers

1 Introduction

Local self-government throughout Europe is based on centuries-old traditions. Although local self-government systems have many differences from one state to another, they are everywhere decentralized institutions that society expects to carry out local public affairs effectively. However, they are also democratic institutions that should not only be efficient but also expected to carry out their tasks on behalf of and for the benefit of the local community.

Over the past more than a decade, dozens of European countries have introduced territorial reforms, and the number of European local self-government units has fallen by more than 5,000. In some countries, this transformation is ongoing. The economic crisis of 2008 and subsequent years has contributed significantly to the resurgence of territorial reforms, which have been dominated by cost-saving arguments (Swianiewicz, 2018. p. 2–3). States have used a variety of techniques to address the issue of economies of scale. The Scandinavian states (and to some extent the Anglo-Saxon countries and Germany) have tried to adjust the number and size of municipalities to the increased municipal responsibilities by merging municipalities (Hoffman, 2017. p. 223). In other states, however, the regional level has been strengthened or duplicated (e.g., in the states of the Latin model) and the role of associations has been strengthened (Hoffman, 2015. p. 36–37).

In most cases, the reforms have been accompanied in part by mergers of municipalities, but it is questionable whether territorial fragmentation is a real problem, and even more questionable whether mergers are a solution (Swianiewicz, 2018. p. 7). In addition, some research suggests that population growth has a negative impact on participation rates. Since reforms involve an increase in the size of the political unit, they change the information environment and the chances and expectations of individuals to exert greater influence on political decisions. Voters thus become less informed and lose interest in local elections, leading to a sharp drop in turnout following reform (Heinisch et al., 2018. p. 478). According to Colin Copus et co-authors, this is a move away from democracy toward technocracy, in which there is a disconnection from the local reality (history, people, culture, etc.; Copus et al., 2017. p. 9). Fixed costs are difficult to reduce through the merger of municipalities, with unit costs in many areas being almost static (e.g., in social services, costs are almost independent of size; Ebinger et al., 2019. p. 16–17). The essence of the problem, in the words of Christopher L. Eisgruber, is that democratic participation requires a certain "intimacy," because the authority has to be small enough to allow everyone who cares to enter the community scene (Eisgruber, 2001. p. 87–91).

Even in Hungary, local self-government is going through difficult times, and some elements are in crisis. There are no clear directions for reform of the system, and the county level of local self-government in terms of powers has almost disappeared. Moreover, during the COVID-19 pandemic, the system was almost completely turned upside down, and local self-governments were constantly faced with new challenges. In a matter of days, the state of danger has spread to local governments, which in some ways is quite understandable, as they are the smallest but most important bastions of community coexistence in legal terms. During this period, new powers have been given (e.g., introduction of curfews) and taken away (e.g., parking policies), financial restrictions have been introduced (e.g., on certain taxes) and powers have been transferred to mayors (e.g., local government decrees). These do not respect the principles of local self-government.

There is no doubt that in times of pandemic or other crises, self-governance and autonomy can be overshadowed by the need for unified action, in which there is not really room for different solutions. This may seem acceptable at first sight, but it is contradicted by the fact that in Hungary, for example, during the pandemic, it was quickly realized that curfew restrictions cannot be decided centrally, because it is worth adapting to local characteristics. This points to the fact that differences in local conditions can even provide grounds for the mayor to restrict a fundamental right. It was also in this direction (i.e., the importance of the local government's role) that a government decree made it a duty of the local self-government to care for persons over 70 years of age. In effect, this meant that the local self-government was given a state administrative task, because it seemed to be more efficient in this area to solve the problem locally.

Although these ideas seem to be at opposite sides of the spectrum, they are not irreconcilably opposed. Situations requiring crisis management, such as special legal orders, have a significant impact on the functioning of the administrative organization, typically involving the strengthening of one-person rather than broader decision-making bodies and of narrower bodies. Crises primarily expand the Government's scope for action, even at the expense of the National Assembly's right to decide (Kádár and Hoffman, 2021. p. 7). Consequently, the epidemic crisis has clearly moved the state toward a more centralized approach (Hoffman and Balázs, 2022. p. 274). At the same time, however, it is also true that the role of local self-government in emergency situations is becoming more important, given its knowledge of local social relations. The ability to react quickly is particularly important in managing a crisis (Siket, 2021. p. 203).

In the light of the above, the economic and epidemiological crises of recent years have motivated me to find reference points that help me to understand more deeply the situations in which it is worthwhile to delegate a task to local self-government and to understand the needs of local communities as well. Although studies on local self-government systems typically focus on the principles of decentralization and autonomy, within the framework of this paper I will focus on the principle of subsidiarity. My hypothesis is that the principle of subsidiarity helps to provide a stable reference point for local self-government in a changing world.

2 General reference points for examining the principle of subsidiarity

Subsidiarity is a concept most people associate reflexively with the European Union. As it is a fundamental EU principle, it is no wonder that this is how legal scholars treat the concept. Although this principle is also encountered in the literature on local self-government (mainly by German authors), its role is less clear than that of autonomy or decentralization. Moreover, it is not even clear that subsidiarity is always the focus of interest as a legal principle, but it is often used as a point of reference in various political interests and arguments (Tamás Cs, 2010. p. 20).

Although most authors refer to the Catholic origins of the principle, and most briefly discuss its original meaning, and some analyse its broader meaning, most treat it almost exclusively as a principle that is fundamental to the functioning of the European Union. However, this is a considerable simplification of the original meaning of the concept, as is the other extreme, i.e., the over-emphasis on its Catholic origins.

Treating it as a purely EU principle is a significant simplification of its original meaning, but it does not change the essence: it prohibits unjustified interference by higher levels of power in the sphere of competence of lower levels, i.e., interference that is incompatible with the common welfare (Frivaldszky, 2006. p. 36), and it also stipulates that the higher level may only intervene in the relations of the lower level in order to help it.

Despite the general approach, the importance of local self-government in the field is in itself paramount because the European Charter of Local Self-Government (hereinafter: Charter), without naming the concept, requires its implementation.[1] It is less often

1 Charter 4(3).

explicitly mentioned in national constitutions in relation to local self-government (although Article 118 of the Italian Constitution does provide for its application, both in substance and by name), but the Member States which are party to the Charter (with the exception of those which may have reservations) have undertaken to implement it.

However, I am also convinced that the principle of subsidiarity is able to bring a perspective to the analysis of the meaning of self-government that is capable of giving the idea of self-government a broader and more democratic content.

2.1 The ideological foundations of this principle

The Latin word subsidium, which is the basis of the principle, means reserve, metaphorically help or assistance (Paczolay, 2006. p. 60). It is a form of assistance that promotes the initiative of individuals in relation to organizations at a higher level of society and helps them to achieve a given public good (Novitzky, 2007). Its conceptual and historical origins can be approached from two directions. According to the Anglo-Saxon utilitarian school, the role of the state is limited to promoting individual interests. Continental Catholic philosophy (following Cicero and St Thomas Aquinas), on the other hand, sees the caring for citizens as the primary task of the state in the close relationship between state and society. The first subordinates the state to the interests of the individual, while the latter sees the individual as bound to the state and society in solidarity (Pálné Kovács, 2008. p. 28). Benjamin Constant had already formulated the essence of this principle (without naming it at this time) in relation to local government in the early 19th century, when he wrote that "the administration of the affairs of the whole is the business of the whole, that is to say, of the representatives and ambassadors of the whole. What concerns only one part must be decided only by that part: what concerns only the individual must depend only on the individual. It cannot be too often repeated that the public will is no more worthy of respect than the private will once it has gone beyond its sphere" (Constant, 1862. p. 125). In the same way, as already in 1,816, List argued that the structure of political institutions should be based on this general principle. If the wellbeing of the individual is the public interest in itself, the role of the state begins only when the individual cannot achieve it. But if a more limited association is more effective in this than the state, then the task must be left to this type of association. Therefore, the state should not only permit them, but should directly create them (Chaloupek, 2012. p. 5). Although the principle is still prominent in German legal literature, its idea has also been introduced by American authors. As a constitutional value, some authors argue that it may be important (Jackson, 2014), but there are also authors who explicitly associate it with federalism (Calabresi and Bickford, 2014).

The Catholic Church adopted this principle, already well known in the Middle Ages, in its social teaching when it proclaimed the requirement of subsidiarity (Hörcher, 2023. p. 132). The true expression of the concept is due to this. Although the principle of subsidiarity was not explicitly formulated until the encyclical Quadragesimo Anno, certain references to it can be found in Pope Leo XIII's encyclical Rerum Novarum of 1891 (Novitzky, 2007). The definition of subsidiarity is now classically described in the Quadragesimo Anno encyclical: "*Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them* (Pope Pius XI, 1931)." The essence of the principle, according to St John Paul II, is that "*a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good* (Pope John Paul II, 1991)." The encyclical Centesimus Annus rarely mentions subsidiarity explicitly, but speaks more about cooperation between people, the right of association. It is clear from the text that to deny man his personhood is to deny him his three most important rights: private property, religious freedom and the right of association (Szalai, 2011). Arno Waschkuhn does not fail to note that subsidiarity also plays a major role in Protestant ethics. Most importantly, he points out that the Evangelicals' approach to this issue is rather ambivalent. He points out that the Catholic position can only be interpreted in terms of a very simplistic society, and that there is a fear of over-integration (he notes that the EU's goals in this direction have aroused mistrust, especially in Protestant states), but that its foundations are also in line with Protestant ideas, and in some respects are derived directly from Calvinist teachings, and have therefore themselves contributed to the spread of the principle (Waschkuhn, 1995. p. 31–35).

2.2 Subsidiarity as a principle of social organization

Although subsidiarity is considered by all to be a common sense principle, it is much easier to define its content in theory than to define it in concrete terms (Locatelli, 2000. p. 54). It is, in general terms, a guiding principle that regulates the power necessary to achieve the common good. It protects free initiative in society, the rights of the little ones in social life and the building of a bottom-up society. Social action is essentially subsidiary, that is to say, helping, an assistance which people develop together with a view to improving the personality of each individual (Novitzky, 2007). Subsidiarity is based on the hypothesis that individuals (alone or together) have the potential to address and satisfy collective needs (Vittadini, 2012. p. 23). It assumes a traditionally hierarchical and segmented social model, with layers of concentric circles around the individual as the original reference point for autonomy (Kaufmann, 1985. p. 55).

This principle cannot be considered as a stand-alone principle, but the common role of the concepts of individuality—solidarity—subsidiarity in social life is emphasized. Overemphasizing either of these at the expense of the other two makes it meaningless or even impossible to achieve the desired goal, i.e., the common good

(Novitzky, 2007). In the social teaching of the Church, the principle of subsidiarity, together with the principles of the common good, personality and solidarity, thus provide a more complete and correct interpretation of subsidiarity, which can be said to be not only a principle of the organization of the State but also of the organization of society (Frivaldszky, 2006. p. 50–55). According to Péter Novitzky, subsidiarity is a facilitator, i.e., it can never be seen as an goal in itself. At the same time, subsidiarity should never be seen as a substitute for the shortcomings that are manifested, as this would be contrary to solidarity based on the common good. In its view, the concept of subsidiarity only provides a framework for society to better achieve the common good (Novitzky, 2007). It is important to stress that subsidiarity both defines and limits freedom of action. Indeed, the legitimate authority is empowered to replace a failing actor if necessary (Berthet and Cuntigh, 2006. p. 186).

Based on this, Peter Novitzky approaches the principle of subsidiarity from two sides, following Wolfgang Ockenfels' view: on the one hand, he sees it as a principle based on helping oneself, and on the other hand, as a principle of helping others. Its role can therefore be essentially reduced to these two tasks. The first defines the right and duty of the individual or small community to take responsibility for their actions, while the latter regulates the right of the higher community to provide support where it is needed, where self-help is not sufficient (Novitzky, 2007). János Frivaldszky argues that this assistance is essentially indirect, i.e., it respects the dignity of the persons concerned, has a specific purpose and is identity-fulfilling. This is the true legitimacy and task of political formations organized at a higher level of public authority in relation to the common good. At the same time, it also coordinates the various social and political entities (Frivaldszky, 2006. p. 36–37). Between the state and the individual, reciprocity is presupposed by a general capacity for law (based on human status) and loyalty based on membership expressed by citizenship (Varga Zs, 2009. p. 105). In a positive context, this principle ensures and promotes the development of community autonomy and thus the focus on the wellbeing of citizens (a new form of popular sovereignty), while in a negative context it prohibits unwarranted interference by higher authorities in the sphere of competence of lower ones (Frivaldszky, 2006. p. 36). In essence, subsidiarity is a self-limiting principle binding both the state and the individual (Varga Zs, 2009. p. 105).

It should also be noted that, as our world is constantly changing, social relations are becoming more complex. According to Franz-Xaver Kaufmann, the idea of social layers in the form of concentric circles surrounding the individual has recently become functionally questionable due to the reorganization of social relations. In his view, the larger-smaller relationship can no longer be applied unambiguously, but must take into account that the relevant circles of life are no longer concentric but overlap. He therefore proposes linking the idea of subsidiarity to another theoretical construct, namely the necessary length of chains of action. The division of tasks and the specialization that this enables will lead to greater efficiency, i.e., the lengthening of chains of action may in itself be associated with more rational problem management. It is also possible that the capacity to act is higher in a higher action context (Kaufmann, 1985. p. 55–57).

3 The normativity of the principle of subsidiarity in relation to local self-government

Article 4(3) of the Charter states that public responsibilities shall generally be exercised in preference by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy.

This declaration is a statement of the principle of subsidiarity, and maybe the clearest and most precise of all the normative provisions. This is of special importance because the normative nature of the principle of subsidiarity is generally highly questioned.

According to Nóra Chronowski, the main deficiency of this principle is its low normative force (Chronowski, 2005. p. 87). Hugo Preuß also draws attention to the fact that it would be difficult to derive the principle's legal force from a positive law perspective. He argues that, although it may be possible to agree with this principle, it is never a legal principle, and in fact the state does not in any way limit itself to a secondary role (Preuß, 1889. p. 81). Reinhard Hendler is more permissive when he says that subsidiarity can only have legal force if the state recognizes that. Without it, it is only a political planning principle (Hendler, 2007. p. 17). Undoubtedly, the Charter provides for its application, but Gábor Kecso argues that even within the Charter its role is secondary, because the residuality principle in Article 4(2) takes priority over it, which is a principle that is privileged over subsidiarity in the system of the Charter (Kecso, 2016. p. 133–134). I disagree with this to the extent that the provision of the Charter referred to above by Gábor Kecso is more about the application of the generic clause model, which not only does not oppose subsidiarity, but actually opens the way to it (as opposed to the enumeration model). However, Franz-Ludwig Knemeyer considers the principle of subsidiarity to be a constitutional reality. He sees it as one of the most important principles, even in the absence of any mention of it in a constitution (Knemeyer, 1990. p. 174). According to Arno Waschkuhn, this principle also infuses the German Basic Law, indirectly in relation to fundamental rights, more specifically in relation to state competences, and explicitly in the bottom-up federal structure (Waschkuhn, 1995. p. 58). More carefully, Reinhard Hendler argues that the German constitutional law reflects subsidiarity at several points while contradicting this principle at others. It follows, in his view, that this principle cannot be described as a general constitutional requirement from which specific requirements for the organization of the state structure can be derived. The constitutional starting point for legal argumentation and conclusion is not the independent constitutional principle of subsidiarity, but rather the relevant constitutional rules (Hendler, 2007, p. 17). This might be hard to disagree with in itself, but it is a principle that is now widespread, supporting those who can take their own initiative to solve their problems and not seek help from a higher, anonymous and pre-determined source (Novitzky, 2007). Although the principle of subsidiarity is not necessarily stated explicitly in state constitutions, the role of local communities in local public affairs is recognized, but without undermining the unity of the state. I can agree with

András Zs Varga that the triad of solidarity-personal dignity-subsidiarity can be derived from the dogmatic interpretation of law and from the conceptual analysis of positive law (e.g., according to him, the obligation of bearing public burdens is a positive legal representation of the dogmatic requirement of subsidiarity; Varga Zs, 2009. p. 105).

4 Subsidiarity as a "catalyst"

The essence of local self-government can be explained through different principles. Decentralization, autonomy, efficiency, local democracy, vertical division of powers are all principles by which local self-government is usually described. In practice, however, they cannot be implemented in isolation, but often act in combination with other principles. There are a number of contradictory approaches which, in my view, can be systematically examined by focusing on the principle of subsidiarity. Indeed, subsidiarity brings into the analysis a point of view (in effect a catalyst) that can give democratic content to any principle. Arno Waschkuhn formulates this as a regulative idea that can express the bridge between "sein" and "sollen" (Waschkuhn, 1995. p. 9, 18). He argues that subsidiarity participates in the construction of democracy as a means of limiting state power and guaranteeing freedom. He also links it to decentralization as a balancing principle and as a principle that is important in the distribution of tasks. He also shows how different political communities have different views of this principle, which he sees as ultimately bringing Europe closer to federation (Waschkuhn, 1995. p. 31–182).

It is also linked to federation (and possibly more generally to vertical division of powers). Nóra Chronowski sees subsidiarity (even though she examines it explicitly in the context of the EU's relationship with its member states) as a guarantee of the vertical division of powers (Chronowski, 2005. p. 86). While Loren King essentially argues that subsidiarity and federalism are similar and complementary. The reason, she argues, is that many political problems have different territorial scales and do not affect different communities in the same way. The classical problem with federalism is that there is a unification, but interests differ from territory to territory, thus not creating an undifferentiated sovereign state (King, 2014. p. 311).

In my view, the relationship between subsidiarity and the vertical division of powers becomes most visible when the central government decides to delegate a public task to a local (or at least sub-central) level.

In this context, it is very important what counts as a local public affair. At the heart of local self-government is undoubtedly the exercise of local public affairs. István Balázs also points out that, according to the Charter, the role of local authorities is to manage local public affairs with guaranteed autonomy (Balázs, 2018. p. 387). It is local public affairs that give substance to self-government and give meaning to its status.

However, on the one hand, the allocation of functions cannot be decided on the basis of practical considerations alone, and on the other hand, it must be done at a high normative level. The Charter enables this precisely by the constitution or by statute.[2] In my view, the really interesting thing about this issue is the criteria that limit the decision-makers when they decide on a local public affair.

In theory, it is a sovereign decision for each state to decide what, to what extent and according to what criteria it recognizes as a local public affair. However, the question is not so simple, because it also imposes obligations on the state in the context of subsidiarity. It could also be ensured by way of deconcentration, therefore the role of the principle of decentralization should be added to the analysis.

Whereas, in the case of deconcentration the territorial body enjoys only executive autonomy, in decentralization powers are effectively shared with territorial decision-makers, who are not subordinate to the central bodies (Pálné Kovács, 1996. p. 141). Zoltán Magyary illustrates the difference between decentralization and deconcentration very aptly when he writes that the geographical location and distance to the center of local government and deconcentrated bodies are the same. The difference, according to him, is in the organization on the one hand and in its relation to the center on the other (Magyary, 1942. p. 120). A decentralized body has a democratic content, while a deconcentrated body is characterized by a bureaucratic organizational logic, the former having relative autonomy, the latter being organized in a strict hierarchy (Pálné Kovács, 2008. p. 24). From a decentralization perspective, the creation of local self-government is a self-limiting decision by the central authority based on efficiency. In this approach, the emphasis is on the origin of local self-government: local self-government is established by the central power and not by the individuals belonging to the local self-government (Csink, 2014. p. 161). The state exercises a kind of self-limitation by delegating certain powers to the territorial or municipal levels (in this logic, local self-governments are also state actors, and the rights of self-government are based on state recognition; Fogarasi, 2010. p. 35).

The academic literature is divided as to whether the subsidiarity principle is more in the interests of efficiency or democracy (Soós, 2010. p. 57; Tamás, 2010. p. 359). The relationship between decentralization and subsidiarity should be considered explicitly here. The ultimate consequence of decentralization is a multilevel governance (Soós, 2010. p. 57). In the words of Edit Soós, the principle of subsidiarity is the accompanying principle of decentralization. The implementation of multilevel governance is based on respect for the principle of subsidiarity, which prevents decisions being concentrated at a single level of power and ensures that policies are elaborated and implemented at the most appropriate level. Subsidiarity and multilevel governance are inseparable, as subsidiarity is linked to the competences of different levels of government, while multilevel governance focuses on the interaction between levels of government (Soós, 2010. p. 62).

The thoughts of Arno Waschkuhn presented above also closely link subsidiarity with decentralization, but he also points out (partly referring to other authors) that the principle of subsidiarity is especially relevant in relation to decentralization, that the appropriate tasks should be assigned to the appropriate levels and that relative autonomy is necessarily linked to

2 Charter 4(1).

it. In his view, decentralization, subsidiarity and federalism are complementary concepts and, in contrast to separatist aspirations, have a legitimating meaning. In his view, this principle is of great importance in times of growing regionalism, as it helps to balance conflicting aspirations (Waschkuhn, 1995. p. 89–91). Gérald Orange stresses that all European states have a more or less decentralized administrative and territorial level, which is also required by the principle of subsidiarity. The proximity of leadership allows better information, consideration of opposing interests and greater efficiency. As greater autonomy is to be promoted, the systems allow more scope for decentralization, except in France, where he believes there is reluctance on the part of deputies and parties (Orange, 2006. p. 117). György Képes even mentions the role of the principle of subsidiarity in the territorial distribution of power in the United States of America, which he refers to as an accepted principle in the sense of self-government (Frivaldszky, 2006).

It goes without saying that the concept of decentralization is perfectly understandable and can be explained without the additional meaning of subsidiarity, but not in relation to self-government. The reason is that decentralization without subsidiarity thus appears to be a purely efficiency issue, the existence or extent of which depends primarily on the State's decision on the basis of utilitarian considerations. However, I have argued above that the principle of subsidiarity also requires local self-government to ensure that its functions are performed at the lowest possible level. Thus, the two principles are closely linked, since what is decided by the State in one direction is demanded by the members of the local community in the other. Ultimately, subsidiarity, from the point of view of local self-government, is the basis for the right to decentralization.

Finally, I must stress once again that, in principle, it is the sovereign decision of the State to recognize what is a local public affair, but that this also imposes obligations on the State in the context of subsidiarity. This could also be ensured through deconcentration, but through decentralization (thus recognizing autonomy), the central power necessarily limits itself, because it transfers powers to local authorities which it cannot claim to have the central executive take over. The result is that the central level of the state necessarily relinquishes its right to decide on the matter in question.

5 The importance of subsidiarity in relation to local self-government

In the light of the above, it is not surprising that the principle of subsidiarity has taken on a prominent role in relation to local self-government. This principle prohibits unjustified interference by higher levels of power in the sphere of competence of lower levels, i.e. interference that is incompatible with the common good (Frivaldszky, 2006. p. 36), and also stipulates that the higher level may only intervene in the relations of the lower level in order to help the latter. In essence, it is the principle of limitation of power and at the same time the principle of the necessity and regulation of intervention (Somlyódiné Pfeil, 2003. p. 15). It is a complex principle that covers the whole range of relations between the individual and local self-government and between the state and the international community (Verebélyi, 1996. p. 57). The practical consequence, in agreement with the conclusion of András Zs Varga, is that without the triad of solidarity—personal dignity—subsidiarity, there is no point in constitution-making, because society will not feel the result as its own, but the constitution will be only a possible instrument of legal positivism, more or less regulating the exercise of power (Varga Zs, 2009. p. 107).

There can be no doubt that a local self-government can fulfill its constitutional function if it can manage, on its own responsibility, the affairs arising from the needs of the people who make up the local community in a given community (Somlyódiné Pfeil, 2003. p. 262). Theoretically, it is those decision-making powers at local level that have a local character, where local room for maneuver and initiative are more valuable than the equally important standardization (Kaltenbach, 2010. p. 47). The principle of subsidiarity regulates the burden of evidence in these very difficult matters, as the presumption is in favor of the autonomy of smaller communities, so that those who wish to restrict them must justify their intervention (Kaufmann, 1985. p. 55).

Subsidiarity therefore requires that problems are solved at the level closest to where they arise, wherever possible. According to Imre Verebélyi, it is primarily the individual and his self-organizing small community that must be empowered to take care of themselves (i.e., the subsidiarity constraint also applies to local self-government). Subsequently, within the local self-government system, the municipal self-government is the beneficiary, while the county self-government is the level closer to the central and regional state bodies (Verebélyi, 1996. p. 57). This means that the relationship between the levels of local government (and the rules for the delegation of tasks and powers) is determined by the idea of subsidiarity (Somlyódiné Pfeil, 2003. p. 13). However, it should also be stressed that the principle is not about over-emphasizing freedom over the state, but about ensuring cooperation in partnership (Heinze, 1985. p. 15). In this way, it also contributes to the construction of a well-functioning society.[3] Therefore, it is also part of subsidiarity if, in certain cases, a task that cannot be solved at a lower level is transferred to a higher level (Waschkuhn, 1995. p. 59). The higher level acts when the capacity of the smaller unit is no longer sufficient.[4] If a local government function must be performed, the decisive criterion is

3 Ilona Pálné Kovács points out that German politicians call subsidiarity the Magna Carta of Europe, referring to the way in which territorial decision-makers are integrated into Community decision-making. (Pálné Kovács, 2006. p. 289).

4 This interpretation of the principle of subsidiarity has already been expressed in the reasoning of the Hungarian Constitutional Court, which emphasized that the transfer of tasks from the municipal self-government to the county self-government can be assessed in the light of this principle. {Decision 8/2021 (2. III.) AB, Reasoning [171]} See in English: https://eccn.hu/decision/164. There has also been a reference to the principle of subsidiarity in the filling in of the regulatory mandate. {Decision 29/2015 (2. X.) AB, Reasoning [35]}.

whether the situation of the competent local authority allows it to be performed, since under subsidiarity the essential criterion for the existence of competence is capacity to perform (Somlyódiné Pfeil, 2003. p. 263). In the light of these observations, one can in fact agree with Imre Verebélyi that subsidiarity (at least in itself) does not provide a basis for considering the municipal self-government to be more valuable than the county self-government or the deconcentrated bodies. There is not a difference in value between the different levels, but a division of tasks and powers (Verebélyi, 1996. p. 58).

Despite the general acceptance of this principle, it can be also criticized. According to Andreas Føllesdal, its popularity is partly due to the fact that it obscures the central issues and rarely solves problems of separation of powers. The competing conceptions (EU, US, Catholic Church, international law) are all based on contested premises and point to important compromises in very different ways. In his view, these different ideas and their conflicting implications are too often ignored (Føllesdal, 2014. p. 215). At the same time, he acknowledges that one of the advantages of the concept is that it can help to build arguments on the most appropriate allocation of powers in each area and (in the US context) can improve the stability of federal regulation (Føllesdal, 2014. p. 226).

I myself do not think that either the normative content of the principle of subsidiarity or the premises of this principle are of critical importance from a practical point of view. The name comes from the Catholic Church, its content is also influenced by other factors, but the essence is this: local communities have a need to manage their own affairs, which must be given some space by the state.

Despite possible criticisms, the principle of subsidiarity helps to provide a fuller and more accurate understanding of local self-government, while at the same time providing a basis for the local community to claim the right to decide on matters that concern them. This principle prohibits the higher authorities from unjustified interference in the competences of the lower ones. This principle states that it is the role of the higher levels of power to help the lower levels. Ultimately, it is partly this principle that justifies the very existence of self-government.

6 Conclusions

In recent decades, many European countries have implemented local self-government reforms. Their focus has generally been on more efficient functioning. However, local self-governments are also democratic institutions, which makes it difficult to implement reforms. Even in Hungary, local self-government is going through difficult times, and some elements are in crisis. There are no clear directions for reform of the system, and the county level of local self-government in terms of powers has almost disappeared. Moreover, during the COVID-19 pandemic, the system was almost completely turned upside down, and local governments were constantly faced with new challenges.

These situations could be resolved by a rediscovery of the principle of subsidiarity. This principle is often referred to in EU political discourse, but its underlying meaning is rarely discussed nor is it used in local government discourse. I have pointed out that the ideological basis of the principle of subsidiarity is much more diverse and value-oriented than is commonly used today.[5] Its significance in relation to local self-government lies not primarily in its normative content, but in the fact that it is a 'catalyst' that gives much deeper meaning to all the other principles that apply to local self-government. Therefore, this principle is not primarily a principle of state organization, but a principle of community organization. In my study, I set out to explore why it would be more worthwhile to pay more attention to this principle. Subsidiarity helps to ensure a reasonable distribution of powers, while taking due regard of the interests of local communities.

There can be no doubt that a local self-government can fulfill its constitutional function if it can manage, on its own responsibility, the affairs arising from the needs of the people who make up the local community in a given community. Theoretically, it is those decision-making powers at local level that have a local character, where local room for maneuver and initiative are more valuable than the equally important standardization. The principle of subsidiarity regulates the burden of evidence in these very difficult matters, as the presumption is in favor of the autonomy of smaller communities, so that those who wish to restrict them must justify their intervention. Subsidiarity therefore requires that problems are solved at the level closest to where they arise, wherever possible. However, it should also be stressed that the principle is not about over-emphasizing freedom over the state, but about ensuring cooperation in partnership. In this way, it also contributes to the construction of a well-functioning society. Therefore, it is also part of subsidiarity if, in certain cases, a task that cannot be solved at a lower level is transferred to a higher level. The higher level acts when the capacity of the smaller unit is no longer sufficient.

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5 It should be noted that this concept is often used in a simplified and narrow sense, not only in the literature on local self-government, but even in the literature on EU law. (Koller, 2023. p. 17).

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One succeeds and the other fails? Criminal justice in times of emergency

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The Government has declared a state of emergency for the whole territory of Hungary for a period of 210 days from 1 November 2022 in view of the armed conflict and humanitarian disaster in Ukraine and to avert and manage the consequences of such conflicts in Hungary. Under the rules of emergency legislation, the Government is thus once again in a constitutional position to suspend the application of certain laws, derogate from statutory provisions and take other extraordinary measures. On the basis of this authorization, Government Decree 3/2023 (I. 12.) on the different application of certain provisions concerning the execution of sentences during a state of emergency was adopted at the beginning of the year, according to which, upon the request of a non-Hungarian convict, the national commander of the penitentiary system shall suspend the execution of the sentence until the transfer of the sentence, provided that certain conditions are met and there are no grounds for exclusion. Based on a detailed analysis of the legislation, it can be concluded that in practice this may also mean the remission of the remaining part of the sentence, since the receiving foreign state must ensure the enforcement of the sentence under Hungarian rules, but it is questionable whether this will be done. This outcome, however, runs counter to the fundamental principle of criminal justice, the principle of proportionate punishment, as it discriminates between offenders based on nationality. How compatible is this solution with the fundamental principles of the rule of law, such as non-discrimination or the principle of the obligation to be punished?

KEYWORDS

extraordinary legal order, execution of the sentence, suspension of execution of the sentence, emergency powers, criminal justice

1 Introduction

Value is the most abstract scientific category in philosophy and other social sciences, such as law and political science, yet it is very much part of our everyday lives.[1] What is the value of criminalization?—the question may arise, since criminalization itself always implies a kind of value selection, value commitment. From the point of view of values, traditional criminal policy can be regarded as unchanging, since the range of values it protects is historically constant. In contrast, changing views on criminal policy follow or reflect the moral, political and historical changes in society.[2] How specific can criminal policy be in times of emergency? What is the risk of misuse of emergency legislation?[3]

1 Bihari, 2009, p. 3.
2 Németh, 2013, pp. 361–365.
3 Mészáros, 2024, pp. 1–10.

The Government has declared a state of emergency for the whole territory of Hungary for a period of 210 days from 1 November 2022 in view of the armed conflict and humanitarian disaster in Ukraine and to avert and manage the consequences of such conflicts in Hungary. Under the rules of emergency legislation, the Government is thus once again in a constitutional position to suspend the application of certain laws, derogate from statutory provisions and take other extraordinary measures. On the basis of this authorization, Government Decree 3/2023 (I. 12.) on the different application of certain provisions concerning the execution of sentences during a state of emergency was issued at the beginning of the year, according to which, upon the request of a non-Hungarian convict, the national commander of the penitentiary system shall suspend the execution of the sentence until the transfer of the sentence, provided that certain conditions are met and there are no grounds for exclusion. What exactly does this provision mean? Can prison doors be opened on the grounds of danger?

2 Emergency legislation in Hungary

The Ninth Amendment to the Constitution of Hungary[4] is a milestone in the regulation of the special legal order, as it fundamentally redrew the system of the Constitution with effect from 1 November 2022. [5] The scope of the special legal order has been narrowed down to three categories (state of war, state of emergency and state of danger),[6] in which cases the Government has extraordinary legislative powers: it can issue decrees to suspend the application of certain laws, derogate from legal provisions and take other extraordinary measures, as specified in a cardinal law. [7]

The pivotal law referred to is Act XCIII of 2021 on the Coordination of Defense and Security Activities, which stipulates that in such cases the Government may suspend the application of certain laws, derogate from legal provisions and take other extraordinary measures by decree in order to guarantee the safety of life, health, persons, property and legal security of citizens and the stability of the national economy. The Government may, however, exercise this power in a very broad and general list of cases, as set out in the Act.

(a) Relating to personal liberty and living conditions,
(b) In the context of economic and supply security,
(c) Relating to restrictions for security purposes affecting communities and to the provision of information to the public,
(d) Relating to the operation of the state and local government,
(e) Relating to the maintenance or restoration of law and order and public security,
(f) Relating to national defense and the movement of persons,
(g) In other regulatory matters not covered by the foregoing points, directly related to the prevention, management, liquidation, and prevention or remedying of the harmful effects of an event giving rise to a state of war, state of emergency or emergency.[8]

In the exercise of its powers, the constitutional principles of necessity, proportionality and purpose must be considered: the Government may exercise these powers, to the extent necessary and proportionate to the objective to be achieved, in order to prevent, manage, eliminate and prevent or remedy the harmful effects of the event giving rise to the state of war, state of emergency or emergency. In the case of regulation relating to personal freedom and living conditions, the law imposes an additional condition, namely that the Government may exercise its powers, without prejudice to the above, only in connection with the introduction of measures which are necessary and proportionate to the threat to be dealt with to respond immediately.[9]

In a special legal order, to achieve the above objectives, fundamental rights may be restricted only to the extent strictly necessary and proportionate to the objective pursued, in relation to the event giving rise to the special legal order. Suspension of fundamental rights may occur if the above restrictions are not sufficient for the purpose and the prevention, management, elimination, prevention or remedying of the event giving rise to the special legal order cannot be guaranteed by other means.[10] These requirements relating to the restriction or suspension of fundamental rights may not be derogated from. The Government shall ensure that these requirements are always complied with, and if the conditions for restriction or suspension are no longer met, the Government shall immediately ensure that the restriction or suspension of the fundamental right is lifted.[11]

How unique is this Hungarian regulation?[12] The answer to this question does not necessarily require us to dig into the depths of individual national regulations, as the appropriate mandate can be found within the Council of Europe.[13]

In the context of Article 15 of the Convention, the following logical basis for State discretion can be established. The text proposes an objective interpretation both justification for the derogation and of the appropriateness of the measures taken, the principles of democracy, subsidiarity and proportionality providing a concrete instrument for State discretion. A real threat presents democratic

4 Ninth Amendment to the Constitution of Hungary (22 December 2020), Article 11.

5 Regarding the previously applicable legal framework see: Hungler et al., 2021, pp. 4–7; Szente and Gárdos-Orosz, 2022, pp. 156–158.

6 Constitution, Article 48.

7 Constitution, Article 53(1). The text has been clarified by the Tenth Amendment to the Constitution of Hungary (24 May 2022), Article 1: In Article 53(1) of the Constitution, the words "The Government in the event of an elementary disaster threatening the security of life and property" shall be replaced by "The Government in the event of an armed conflict, war or humanitarian disaster in a neighboring country, and an elementary disaster threatening the security of life and property." For a detailed analysis of the special legal regime, see. Ungvári and Sabjanics, 2021, pp. 284–287.

8 Act XCIII of 2021, § 80 (1)–(2), para.

9 Act XCIII of 2021, § 80 (3)–(4), para.

10 Act XCIII of 2021, § 81 (1)–(2), para.

11 Act XCIII of 2021, § 81 (3). For more details see. Stumpf, 2021, p. 251.

12 For a theoretical justification of the special legal order, see. Csink, 2017, pp. 8–10.

13 The European Convention on Human Rights' rules on the protection of democracy, set out in Article 15, allow for the suspension of all rights except absolute rights in the event of "war or other public emergency threatening the life of the nation." A loophole has thus long been open for States Parties to step aside in the event of a potential threat to violate certain Convention rights.

authorities with an honest dilemma, in which they must choose between fulfilling their obligations under the Convention and exercising the rights allowed by Article 15, the latter being derogated from if circumstances permit. Assessing whether these circumstances arise is generally not easy and may involve balancing conflicting public interests on the one hand, and order and stability on the other. The Convention cannot be interpreted as meaning that the rights it enshrines must be upheld even if this would jeopardize the unity of a given national democracy by limiting the state's ability to deal effectively with disorder. A given emergency can bring a range of proportional responses, from which it is not easy to choose. But this choice should be left to the national authorities, for three reasons. First, they are closer to the fire and therefore theoretically in a better position to make the right decision. Second, the choice is inherently political rather than judicial and can be highly contentious. Third, different responses can be justified for different emergencies in different states. The key moment in the assessment of the instrument of state discretion lies in the credibility of the evidence that the democratic unity of the state in question is openly threatened and cannot be defended without extraordinary measures.[14] We can see that there is then a clear justification for state discretion, which is why a higher level of implementation of the principle of democracy is required in these cases.[15]

3 The Hungarian government's decision on foreign criminals

In times of crisis, any political system gives the executive an exceptional mandate, since it is not possible to face new and rapidly changing challenges within the framework of existing laws.[16] However, the first key question in relation to the declaration of an emergency is always whether it is necessary to declare it at all, or whether, once declared, the legislation made with reference to it is necessary (directly causally linked) to crisis management.[17]

Under the emergency clause of the Constitution, the Government may declare a state of emergency in the event of an armed conflict, war or humanitarian disaster in a neighboring country, or in the event of a serious incident threatening the safety of life and property, in particular a natural disaster or industrial accident, and in order to avert the consequences thereof.[18] This happened in the autumn of 2022, in view of the armed conflict and humanitarian disaster in Ukraine, and in order to avert and manage the consequences of these in Hungary, the Government Decree 424/2022 (X. 28.) on the declaration of a state of emergency and certain emergency rules declared a state of emergency for the entire territory of Hungary.[19] The Regulation entered into force on 1 November 2022 and will expire on 20 November 2024,[20] therefore maintains the exceptional regime for 2 years.[21] Emergency measures in relation to emergencies are provided for in separate government decrees.[22]

The latter enabling provision brings us to Government Decree 3/2023 (I. 12.) on the different application of certain provisions concerning the execution of sentences during emergency situations, which is relevant to our topic and will be analyzed in detail.[23] During a state of emergency, the Government Decree provides for the different application of certain provisions concerning the execution of sentences, according to which, at the request of a non-Hungarian convict, the national commander of the penitentiary system shall, if certain conditions are met or there are no grounds for exclusion, suspend the execution of the sentence and the Hungarian State shall transfer the execution to the other State indicated by the offender in his request.[24] What is this special provision? Does the State waive its legitimate criminal right to punish the offender, i.e., does it "let the offender go"?

The legislation is summarized below:

Under the Government Decree, an interruption may be made if.

(a) The Minister responsible for justice declares that the transfer of the enforcement of the custodial sentence is not excluded;
(b) On the basis of a preliminary opinion of the National Directorate General for Aliens, the expulsion of a foreign prisoner subject to expulsion or, in the case of a foreign prisoner not subject to expulsion, the expulsion of a foreign prisoner subject to expulsion may be ordered and its enforceability is not excluded;
(c) The return of a foreign national not subject to the above rule to the State in which the custodial sentence was transferred is guaranteed;
(d) The foreign prisoner undertakes to leave the territory of Hungary after the suspension of the enforcement of the custodial sentence, to cooperate with the authorities to this end and to submit to the aliens' proceedings against him, to return to the State concerned by the transfer of the custodial sentence and not to return to the territory of Hungary before the enforcement of the custodial sentence is completed or its enforceability has ceased or during the period of expulsion or, if an aliens' expulsion order is issued, during the period of the prohibition on entry and residence;
(e) The foreign prisoner consents to the enforcement of the custodial sentence in another State;

14 United Communist Party of Turkey and others v. Turkey, judgment of 30 October 1998, Reports of Judgments and Decisions, 1998-I, 1, 45. §.

15 Greer, 2000, pp. 23–24.

16 Stumpf, 2021, p. 248.

17 On the need to declare a state of emergency, see. Horváth, 2021, p. 152.

18 Constitution, Article 51(1).

19 Article 1 of the Government Decree No. 424/2022 (X. 28.) on the declaration of a state of emergency and certain emergency rules in view of the armed conflict or humanitarian disaster in Ukraine and to avert and manage the consequences thereof in Hungary.

20 Government Decree 424/2022. (X. 28.) § 4–5.

21 It should be noted that the maintenance of a special legal order for many years is not unique in Europe, see. Ságvári, 2017, p. 179.

22 Government Decree 424/2022. (X. 28.) § 3 (1).

23 Hereinafter: Government Decree.

24 The Government Decree thus creates a special case area for the regulation of interruption compared to the Bv. tv., since according to the general rule of law, the execution of imprisonment may be interrupted ex officio or upon request for important reasons, due to the personal or family circumstances of the convicted person or his/her state of health. See Article 116 (1) of Act CCXL of 2013 on the Enforcement of Penal Sanctions, Measures, Certain Coercive Measures and the Imprisonment for Offences (Bv. Act).

(f) The grounds for exclusion provided for in the Regulation do not apply.[25]

The enforcement of a custodial sentence may not be interrupted if.

(a) A further custodial sentence is to be served for which the statutory conditions are not fulfilled,
(b) Criminal proceedings are pending against the foreign prisoner in the territory of hungary,
(c) The authorized interruption of the enforcement of the custodial sentence has been terminated earlier due to the foreign convict's misconduct,
(d) It cannot be ensured that the interruption of the enforcement of the custodial sentence is carried out in such a way that the remaining part of the custodial sentence is the shortest possible period of the custodial sentence that can be handed down,
(e) There are 5 years or more remaining on the term of imprisonment,
(f) The foreign convict has been sentenced to life imprisonment,
(g) The foreign national has been sentenced to a term of imprisonment to be carried out for offences defined in the Regulation (e.g., crimes against humanity or against peace, war crimes, crimes against the State, terrorist offences, seizure of a vehicle or a vehicle for the transport of aircraft, rail, water, road, public transport or goods, capital offences).[26]

The foreign prisoner may submit his application for the suspension of the enforcement of the sentence in the penitentiary institution. In his application, he must state the State in respect of which he consents to the transfer of the custodial sentence and his personal circumstances in relation to the State he has indicated, in particular the grounds for his right of residence there, the documentary evidence of his right of residence and the means of securing his return to the country in which the custodial sentence is to be transferred.[27]

The prison institute forwards the foreign prisoner's application to the national commander. On receipt, the national commander first checks whether there are any grounds for exclusion and, if there are none, sends the foreign national's application to the Minister, the competent prison judge and the Directorate-General.[28] The Minister shall declare within 30 days of receipt of the request whether the transfer of the enforcement of the custodial sentence is excluded, and shall indicate the shortest period of custodial sentence that may be transferred in the case of a foreign prisoner if the transfer of the enforcement of the custodial sentence is not excluded.[29] Within 30 days of receipt of the request, the enforcement judge shall inform the foreign prisoner of the place of residence in the other State, of the personal circumstances of the foreign prisoner which justify the transfer of enforcement, in particular the legal basis and documentary evidence of his right of residence in the State in which enforcement of the sentence is transferred, and of the means of ensuring his return to the State in which enforcement of the sentence is transferred. The judge shall send the record of the hearing to the national commander.[30] On receipt of the request, the Directorate-General will give a preliminary opinion on the enforceability of the expulsion or, if an expulsion order is necessary, on the enforceability of the expulsion order.[31]

Within 3 days of receiving the report of the hearing of the foreign prisoner, the Minister's statement and the opinion of the Directorate-General, the national commander decides to suspend the sentence.[32] The convicted person and the prosecution can file a judicial review against the decision.[33]

From the point of view of our topic, the main question is in which cases it is possible for a prisoner—in most cases arrested during the proceedings and then serving a custodial sentence—to be released.

Reading the legislation, it seems at first glance that the fate of the convicted person depends on whether he or she is subject to expulsion[34] or deportation.[35] If yes, he or she will be handed over by the penitentiary to the police on the day of the start of the expulsion to be accompanied by the authorities, and if no, he or she will be released by the penitentiary.[36] But this is not the case in practice.

Previously, the decision of a court, immigration authority or asylum authority ordering deportation had to be enforced by an official escort (deportation) in several cases, but in the case of prisoners in detention, this is now only required, following a later legislative amendment, if the control of their departure is necessary for national security, the enforcement of an international treaty obligation, or the protection of public safety or public order. Based on this, the authority is free to decide whether to deport the prisoner, and if it does not consider it justified, to release him. The practice is definitely in the latter direction.[37] In this case, however, it is strangely up to the prison to decide when the conditions of release can be secured, when the prisoner is "put out on the street." Could he be in for another week if he cannot prove that the conditions of release are

25 Government Decree § 2 (1).

26 Government Decree § 2 (2). It should be noted that the case law has already developed a different jurisprudence in the short time that has passed, interpreting the legal scope of the legislation in a restrictive way. For example, the administrative authority, acting in its discretionary power, will consider as an exclusionary circumstance if a transfer procedure has been initiated before the entry into force of the Regulation, in which case it will not allow the interruption under the new rules. However, the conditional reduction of the custodial sentence - which is not automatic and requires a decision by a bv. judge - is in practice "anticipated" by the authority, which requires the 6 months to be served before that date.

27 Government Decree § 3 (1)–(2).

28 Government Decree § 3 (3)–(4).

29 Government Decree § 4.

30 Government Decree § 5 (1) and (3).

31 Government Decree § 6 (1).

32 Government Decree § 7 (1).

33 Government Decree § 8 (1).

34 Section 33 (1) (i) of Act C of 2012 on the Criminal Code (hereinafter: Criminal Code) and Sections 59–60 of the Criminal Code.

35 Paragraph 43 (2) of Act II of 2007 on the Entry and Residence of Nationals of Third Countries (hereinafter: Harmtv.), which was repealed by the new regulation, Section 98 of Act XC of 2023 on the General Rules for the Entry and Residence of Nationals of Third Countries (hereinafter: Btátv.)

36 Government Decree § 9 (1).

37 Since the entry into force of the Government Decree, deportations have been ordered in less than 10% of cases in the Western Transdanubian region.

not assured?[38] How does this fit in with the guarantees of the rule of law?

In some cases of expulsion and deportation by immigration authorities, the prisoner would therefore be under official escort, which would optimally cease when the enforcement of his or her custodial sentence is taken over by another State.[39] In practice, however, this is not the case. On the one hand, we have seen that, under the Government Decree, an interruption is possible, inter alia, if the Minister of Justice declares that the transfer of the execution of the custodial sentence is not excluded. However, for a significant proportion of the offenders concerned by the legislation, the basic offence of smuggling of human beings (e.g., taking a single person across the border for the first time in his or her life without consideration) is not punishable in Austria or Germany, so that the punishment of offenders who often come from these countries cannot be interrupted. On the other hand, even in the case of deportation under the Government Decree, the other state does not physically take charge of the detainee, nor does it wait for him on the other side of the border, unless he is also under criminal investigation in that country. The Hungarian authorities will escort him to the border where he will be released. Of course, the Minister of Justice sends the information to the ministry of the country of destination, but at the moment it is a big question whether the remaining sentence will be executed there.[40]

Following the legislation in January 2023, there was a substantial change in April. Based on the procedure for emergency legislation detailed above, the Government adopted Government Decree 148/2023 (27 April 2023) on the reintegration detention of persons convicted of the crime of smuggling of human beings. Under the new rule, if the court has imposed a custodial sentence for the crime of smuggling or preparation of smuggling and has also ordered the expulsion of the convicted person, provided that the convicted person is not under criminal proceedings for any other offence in Hungary, or he is not serving a further custodial sentence for which the above conditions are not met and has not yet been placed under a reintegration detention order, the remaining period of the custodial sentence imposed on the sentenced person after his release from the penitentiary shall be converted into a reintegration detention order.[41] In practice, this means that the offender has to leave Hungary within 72 h, as the place of execution of the reintegration detention is the territory of the state of the former habitual residence of the sentenced person before Hungary or, if this is not known, the state of his nationality.[42] It is clear from this rule alone that this reintegration detention has the least to do with these two words: on the one hand, it is not reintegration, since there is no intention of integration; on the other hand, it is not detention, since we are releasing prisoners. In practice, therefore, it is a simple amnesty to reduce the prison population.[43]

4 Conclusion

Criminal justice is the exercise of the criminal power of the State, and the application of substantive criminal law involves the determination of the offence and the imposition of a penalty. A criminal sanction is a punishment, a penalty. Legitimate punishment has a symbolic function: criminal orders cannot be violated with impunity, even if there is a reason to do so.[44] Does Hungary comply with this legal principle? Or can the offender escape?

A detailed analysis of the legislation shows that, on the one hand, the Government Decree allows for the release of the sentenced person, and that the practice so far has made this a general rule. On the other hand, the interruption may also mean the remission of the remaining part of the sentence, since the receiving foreign state must ensure the execution of the sentence under Hungarian rules, but it is questionable whether it will do so under its own law. But this outcome goes against the fundamental principle of criminal justice, the principle of proportionate punishment,[45] as it discriminates between offenders based on nationality. There can be neither retribution nor deterrence, since the sin committed thus remains essentially unpunished. What, then, is the legal policy rationale for the legislation? (Figures 1, 2)

The prison population has swollen enormously in recent years, almost topping 20,000, a level not seen since the change of regime. The Eurostat tables above clearly show that Hungarian prisons are over 100% full, with the country having the highest number of people in prison as a proportion of its population. At the same time, the armed conflict on the territory of Ukraine poses the risk that armed persons from the neighboring state may "stray" to commit crimes, in which case they would of course have to be "accommodated" in prisons. We need to improve the indicators, so we need the space, and it is advisable that it is not occupied by foreign people smugglers, for whom one of the main aims of the penitentiary system, reintegration and rehabilitation into society, is practically impossible, as the Hungarian state does not envisage their future in our country.

The legislator envisages that up to half (later estimated at a quarter) of the convicts concerned could leave the country thanks to the new legislation, and the case law of the time that has passed

38 Paragraph 14 (1) of the Government Decree: *expulsion ordered by a court or expulsion by an immigration authority shall be carried out under escort by the authorities if the control of the foreigner's departure is necessary for the protection of national security, the enforcement of an obligation under an international treaty, or the protection of public security or public order.*

39 Government Decree § 10 (1).

40 Based on current practice, there is no experience in this respect, and feedback should be provided to the Minister of Justice, but there are currently no statistics in this direction.

41 § 1–2 of Government Decree 148/2023 (IV. 27.) on the reintegration detention of persons convicted of the crime of smuggling of human beings.

42 Government Regulation No 148/2023 (27.IV.) § 2 (2)–(3).

43 For the Hungarian amnesty provisions see. Váczi, 2013, pp. 553–562.

44 Constitutional Court Decision 23/1990 (X. 31.) on the unconstitutionality of the death penalty, concurrent opinion of Dr. András Szabó, Constitutional Judge.

45 *"The principle of proportionate punishment is the only possible constitutional punishment under the rule of law, because it is the only one compatible with the ideal of equality of rights. Any other consideration would be a declaration of inequality of rights." Cf.* the decision of the Constitutional Court 23/1990 (X. 31.) on the unconstitutionality of the death penalty, parallel opinion of Dr. András Szabó, Constitutional Judge.

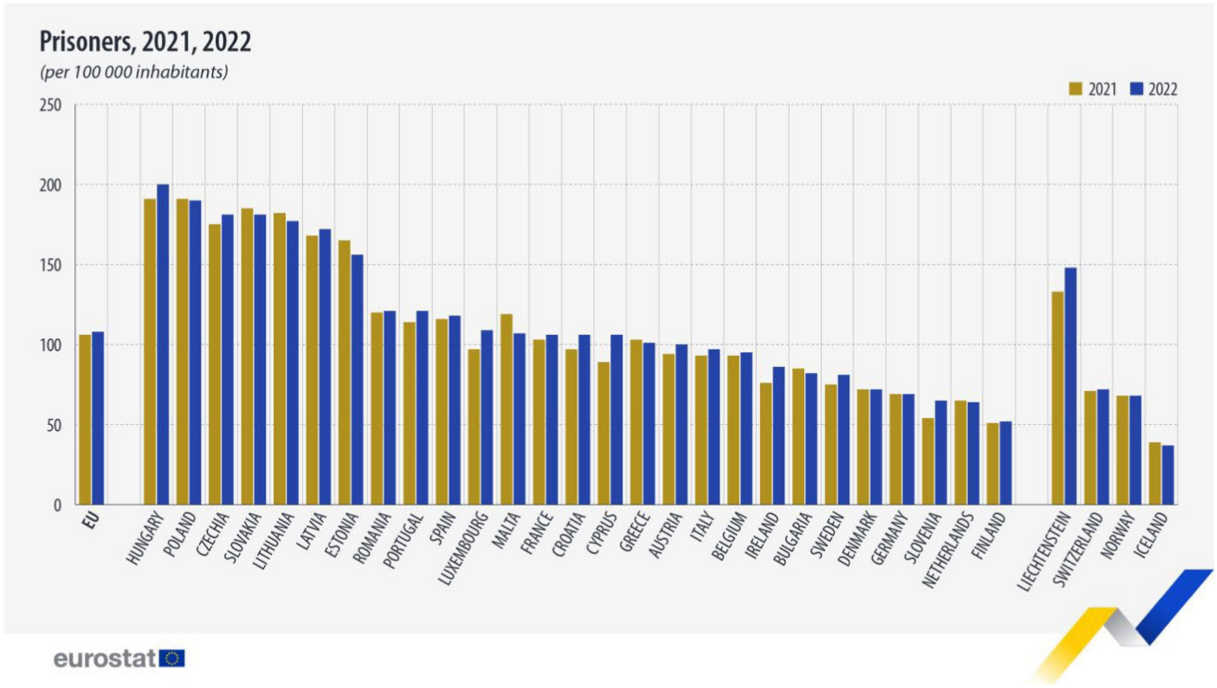

FIGURE 1
Prison population as a proportion of the population.

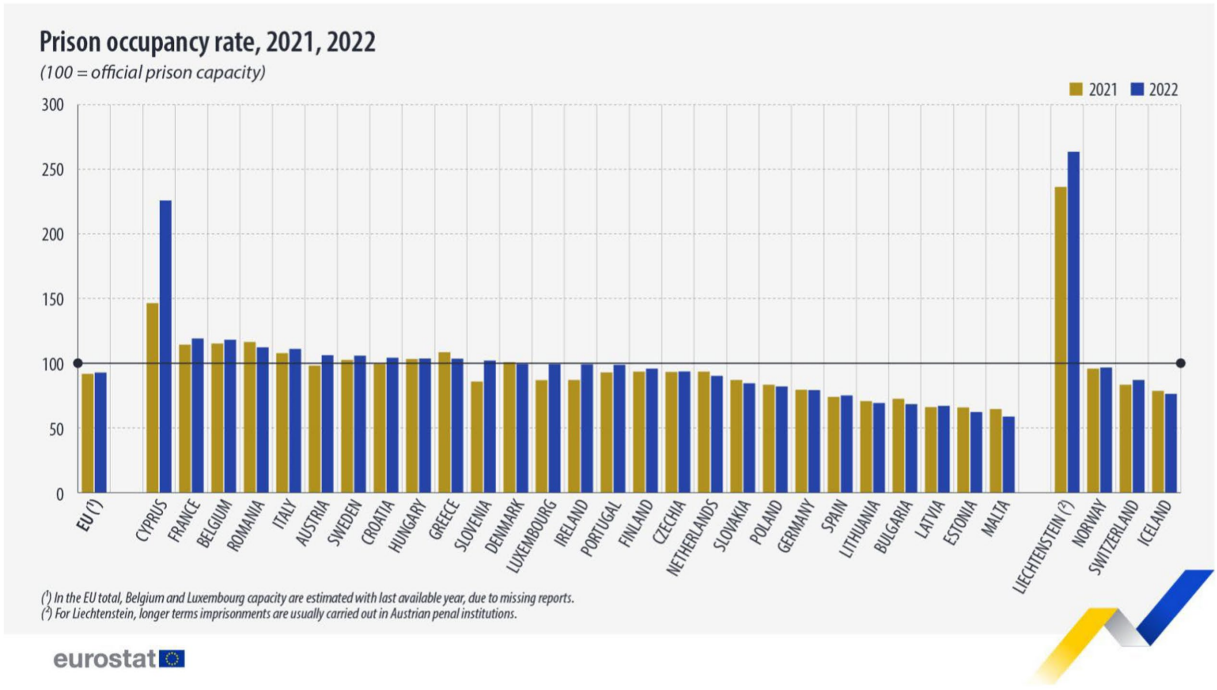

FIGURE 2
Prison occupancy rate.

shows that the introduction of reintegration detention for people smuggling convicts is producing the expected results. The question is, however, at what price? To what extent is the legislative objective achieved by means of the rule of law? As an old Hungarian song goes: 'one man succeeds, another man fails'. If two members of a criminal organization of different nationalities are convicted of

smuggling people, the Hungarian convict must serve his sentence, while the foreign national does not. This, although legal under the current legislation, is not fair.

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The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

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Legal protections for children in refugee and migrant crises in central and Eastern Europe

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Child refugees and migrant children in Central and Eastern Europe are among the most vulnerable populations in humanitarian crises, underscoring the urgent need for legal protections grounded in the best interests of the child principle. This study provides an in-depth legal analysis of international, regional, and national frameworks, focusing on Central and Eastern Europe-particularly Slovakia, Czechia, Hungary, and Poland-to evaluate how well these laws uphold children's rights in practice, especially in the areas of family reunification and education access. Drawing on case law from European and national courts, empirical data from recent crises (such as the Ukrainian refugee influx), and policy reports, the analysis highlights how key legal principles are applied, including the best interests of the child, the right to family reunification, access to education, and special protections for unaccompanied children. The findings reveal both successes and gaps: strong legal standards exist and have been effectively mobilized in certain contexts (for example, during the Ukrainian refugee influx under the European Union's Temporary Protection regime), yet consistent implementation and enforcement remain a challenge across the region. Finally, the study offers policy recommendations aimed at strengthening legal frameworks and practices to ensure that the rights of children in migration crises are fully protected.

KEYWORDS

child refugees, migration crisis, central and Eastern Europe, international law, children's rights, best interests of the child, education access, family reunification

1 Introduction

Armed conflicts and humanitarian crises have thrust unprecedented numbers of children into displacement, making the protection of refugee and migrant children a pressing legal and moral concern. Central and Eastern Europe have faced successive migration crises in recent years—from the 2015–2016 surge of refugees along the Balkans route, through the protracted situation of migrants at the EU's external borders, to the mass displacement caused by the war in Ukraine since 2022. Children are at the heart of these crises: they constitute a substantial share of the refugee and migrant population—nearly half of the world's displaced persons are minors—and are entitled to special care and protection under international law. These children are among the most vulnerable, having often witnessed violence and endured trauma, only to face uncertain futures in host countries' asylum and migration systems. Ensuring their rights—to safety, education, family life, and development—is both a legal obligation and a humanitarian imperative.

This article examines the extent to which legal protections for children in migratory contexts are implemented in Central and Eastern Europe, focusing on four EU Member States—Slovakia, Czechia (Czech Republic), Hungary, and Poland—while also

considering developments in Croatia, Serbia, Romania and beyond. These countries provide a representative snapshot of the region's varied experiences: some are EU frontline states on major migration routes (like Hungary and Croatia), some have become primary hosts for refugees from Ukraine (like Poland, Czechia, Slovakia, Romania), and others have served as transit or temporary host countries (Serbia, which is outside the EU but within the Council of Europe system). By comparing these contexts, the research sheds light on common challenges and divergent approaches in the protection of child refugees and migrants.

This research employs a multidisciplinary legal approach, combining doctrinal legal analysis, case law examination, and empirical data evaluation to assess the protection of refugee and migrant children in Central and Eastern Europe. The study primarily relies on legal doctrinal research, systematically reviewing international treaties, European Union directives, national laws, and court rulings relevant to child refugees in Slovakia, Czechia, Hungary, and Poland. A key component of the analysis is the interpretation of case law, particularly judgments from the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), to evaluate how legal principles, such as the best interests of the child and non-refoulement, are applied in practice.

To complement this legal framework, the research integrates empirical data from official government sources, reports by international organizations (such as UNICEF, UNHCR, and the European Commission), and statistical records on refugee children's access to education, healthcare, and social services. Comparative analysis is also applied, allowing for a cross-country examination of legal harmonization and implementation gaps.

The plight of children in refugee and migrant crises has become a defining humanitarian and legal challenge of our time. Children constitute a significant portion of displaced populations—for example, over 60% of children in Ukraine have been forced from their homes during the current conflict (UNICEF, 2022). Whether fleeing war, persecution, or disaster, these young refugees and migrants are among the most vulnerable, facing risks of violence, trafficking, family separation, and interruption of education. International law recognizes their vulnerability: the UN Convention on the Rights of the Child (CRC) obliges states to ensure that any child seeking refugee status receives appropriate protection and humanitarian assistance (Art. 22, UNCRC, 1989). Likewise, under EU law and regional human rights frameworks, states must prioritize the best interests of the child in all actions concerning them, including migration decisions. The EU Temporary Protection Directive (2001/55/EC)—activated unanimously in March 2022 in response to the Ukraine crisis—explicitly guarantees that children granted temporary protection can access education under the same conditions as nationals. In parallel, the European Court of Human Rights (ECtHR) has repeatedly condemned practices like the detention of migrant children except as a last resort and for the shortest possible period, underscoring that deprivation of liberty or exclusion of minors must be strictly necessary and considerate of their age and rights [European Court of Human Rights (ECtHR) (2021, 2022)].

Despite the existence of these frameworks, ensuring effective protection for child refugees in practice remains challenging, especially amid large-scale crises. The significance of safeguarding children in migration is both moral and pragmatic: failures to protect can lead to lost childhoods, trauma, and long-term social costs, whereas successful protection and integration can restore stability, education, and hope to a generation uprooted by conflict. These stakes are evident in Central and Eastern Europe (CEE), a region thrust to the forefront of refugee reception during recent crises. CEE countries have encountered waves of child refugees—from the 2015–2016 European migration crisis to the ongoing displacement of millions of Ukrainian women and children since 2022. Historically, many CEE states had limited experience as destination countries for migrants, and legal protections for asylum-seeking children were often untested. The Ukraine crisis, however, reversed this dynamic: Poland, Czechia, Slovakia, Hungary, and neighboring states like Romania and Croatia suddenly became host to hundreds of thousands of refugee children, testing the capacity of their child protection, education, and integration systems. This context provides a compelling rationale for analyzing child protection through a CEE lens. It allows us to examine how a region with varying prior approaches to migration has adapted its laws and policies to uphold children's rights amid an unprecedented influx, and to identify gaps between legal commitments and on-the-ground realities.

Crucially, the CEE perspective also highlights contrasts and commonalities within Europe. Some states in the region have been praised for rapidly granting legal status and access to services for Ukrainian children, reflecting a spirit of solidarity; others have faced criticism for inconsistencies or slower implementation. For instance, Poland's welcoming stance toward Ukrainian families marked a dramatic shift from its restrictive responses to earlier refugee flows. Yet even in Poland, as in other CEE countries, initial goodwill had to be bolstered by concrete protection measures to prevent exploitation and ensure children could continue their schooling. The urgency of these issues has prompted an interdisciplinary approach in this analysis—one that considers legal frameworks, policy measures, and empirical data on education and integration, alongside human rights principles and child development needs. By examining both law and practice, we can better understand how effectively CEE countries safeguard child refugees and what improvements are necessary.

2 International and regional frameworks for protecting child refugees

Before turning to national responses, it is important to outline the key legal frameworks that govern the protection of child refugees and migrants. Modern human rights theory recognizes children not just as passive beneficiaries of adult protection but as independent rights holders. The 1989 United Nations Convention on the Rights of the Child (CRC) crystallizes this view, affirming that children (individuals under 18) are entitled to the full range of human rights. Refugee and migrant children thus simultaneously hold rights as children and as (potential) refugees. As the European Council on Refugees and Exiles (ECRE) emphasizes, *"refugee children have full rights both as children and as refugees,"* and in any proceedings or decisions affecting them, *"the best interests of*

the child should always prevail." Children on the move should foremost be treated as children and benefit from all rights under the CRC, in addition to specific protections due to their migration status. This dual recognition is crucial: it means that a child fleeing war or persecution is entitled to special care and protection under international law by virtue of being a child, regardless of immigration status or nationality.

At the international level, the 1989 Convention on the Rights of the Child (CRC) (United Nations General Assembly, 1989) is key to this debate. All CEE countries have ratified the CRC, committing to its broad guarantees of children's rights. Several CRC provisions directly address displaced children: Article 22 mandates that states *"take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee… receive appropriate protection and humanitarian assistance"* and Article 3 establishes the best interests of the child as a primary consideration in *"all actions concerning children."* These principles mean that whether a child is an asylum-seeker, refugee, or migrating irregularly, their safety, well-being, and developmental needs must guide state actions—from border procedures to asylum adjudications and integration services. Other international instruments reinforce these obligations: the 1951 Refugee Convention (United Nations General Assembly, 1951) [and its 1967 Protocol (United Nations General Assembly, 1967)] guarantees basic rights to refugees without discrimination by age, while soft law like the UNHCR Guidelines on Child Asylum Claims (United Nations High Commissioner for Refugees (UNHCR), 2009) and the Global Compact on Refugees (United Nations General Assembly, 2018) call for child-sensitive asylum systems and access to education for refugee children.

In the European context, additional layers of protection exist. All EU member states in CEE are bound by the EU Charter of Fundamental Rights, which in Article 24 echoes that children have the right to protection and care necessary for their wellbeing and that their views must be considered (European Union, 2007). More concretely, the EU's Common European Asylum System (CEAS) includes directives that set standards for the treatment of minors: the Reception Conditions Directive requires that asylum-seeking children have access to education within 3 months of arrival and mandates special care for unaccompanied minors (European Parliament Council of the European Union, 2024), and the Asylum Procedures Directive contains child-specific procedural guarantees. Crucially, EU law prohibits the detention of minors in immigration procedures except as a measure of last resort after consideration of less coercive alternatives. The Temporary Protection Directive (TPD) of 2001, which had never been used before 2022, proved to be a cornerstone in the Ukraine crisis (European Council, 2001). When the EU triggered the TPD for Ukrainians, it obliged member states to provide immediate temporary protection (residence rights, access to education, healthcare, etc.) to displaced persons including children for an initial period of 1 year. Article 14 of the TPD explicitly entitles persons under 18 to access the education system under the same conditions as host-country nationals. CEE countries incorporated these protections into their domestic law via emergency legislation (such as Poland's Special Act and Czechia's "Lex Ukraine") or by invoking existing asylum laws.

Beyond the EU, Council of Europe instruments also shape standards. All the countries in this study are parties to the European Convention on Human Rights (ECHR) (Council of Europe, 1950), which has been interpreted to offer important safeguards for migrant children. The ECHR does not explicitly mention children or asylum, but the ECtHR has developed its jurisprudence applying the Convention to child migrants—often referencing the CRC as an interpretive aid. For example, the ECtHR has ruled that detaining migrant children in unsuitable conditions can violate the prohibition of inhuman treatment (Article 3 ECHR) and the right to liberty (Article 5) as well as the right to family life (Article 8). In Bistieva and Others v. Poland (2018), the Court found Poland in breach of Article 8 for detaining a mother and her children for nearly 6 months without adequately considering the traumatic impact on the children [European Court of Human Rights (ECtHR), 2018]. In M.H. and Others v. Croatia (2021), concerning an Afghan child who died during an illegal push-back at the Serbia-Croatia border, the Court underscored that even amid migration control, states must ensure effective protection of children's lives and liberty, and that detaining or expelling children without due care to their best interests is incompatible with the Convention [European Court of Human Rights (ECtHR), 2021]. These cases, alongside others from Western Europe, send a clear message to CEE states: legal obligations to protect children apply equally at borders, in asylum camps, and within host communities. A failure to uphold these obligations can lead not only to moral and social costs but also to legal accountability at the European level.

In summary, CEE countries have entered the current refugee crises with a comprehensive legal toolkit—from the CRC and Refugee Convention to EU directives, the Temporary Protection scheme, and human rights law—all of which demand that children in migration be protected, not neglected. The following sections examine how four CEE countries (Slovakia, Czechia, Hungary, and Poland) and additional regional actors (Croatia, Serbia, Romania) have implemented these standards. Each national perspective reveals both promising practices and persistent gaps, illustrating the tension between law on paper and the complex reality of protecting children on the move.

3 National legal frameworks protecting child refugees

National law is where these international and EU obligations are put into practice. All the countries in focus have incorporated the relevant international treaties (the CRC often has direct effect or is reflected in child protection laws), and EU directives have been transposed through national legislation on asylum, foreigner regulation, and child welfare. However, the degree of harmonization and the effectiveness of implementation vary. Generally, the right to education is enshrined in their constitutions and education laws, and applies to "everyone" or all children on the territory, though sometimes with distinctions (such as different rules for compulsory education or language of instruction). All four countries also have specific asylum/refugee laws and migration laws that include provisions on minors, and child protection legislation that may extend to foreign children in need.

Poland's legal framework strongly protects the right of every child to education and has been explicitly extended to refugee children, particularly those from Ukraine under temporary protection. The Polish Constitution (Art. 70) (Republic of Poland, 1997) and the Act on Education (Republic

of Poland, 1991) guarantee the right to education for all children residing in Poland. The Act of 14 December 2016—Law on School Education—provides that education is compulsory from age 6 until 18 for everyone in Poland, including non-citizens (Republic of Poland, 2016). This means that any child living in Poland, regardless of status, must be given a place in school at least until they turn 18 or finish secondary school. In line with this, school attendance for younger children (kindergarten from age 3) is a right, and reception class, primary and lower secondary education (1 year pre-school, the 8-year primary cycle, ages ∼7–15) is compulsory. Pupils aged 15 to 18 have an obligation to be enrolled in education, but only have a compulsory attendance part-time in school settings for secondary schools or non-school settings if the pupil choses to follow vocational training (Prawo oświatowe, 2016). This law was a solid foundation so that when refugees arrived, no change was needed to entitle children to schooling – they were already covered.

When the EU Temporary Protection Directive was activated, Poland moved quickly to implement it through national law. It had a pre-existing Act of 22 April 2005 on temporary protection, but given the scale of the Ukraine influx, a special law was enacted: the Act of 12 March 2022 on Assistance to Citizens of Ukraine in Connection with the Armed Conflict (Republic of Poland, 2022a,b,c). This act granted Ukrainian nationals and their immediate family members a broad range of rights, effectively operationalizing temporary protection. It explicitly confirms that children from Ukraine who have temporary protection have the same entitlement to access the Polish education system as Polish children. In practice, Ukrainian children can enroll in public kindergartens and schools, free of charge, and attend classes alongside Polish pupils. Recognizing practical challenges, the Ministry of Education issued ordinances (on 21 March 2022 and 11 August 2022) to guide schools. These ordinances allowed flexibility such as: increasing the maximum number of students per class (by a few pupils) to accommodate more children; (Regulation of the Minister of Education and Science of 21 March 2022 on the organization of education, upbringing, and care for children and youth who are citizens of Ukraine, 2022) permitting classes to be held outside regular school buildings if needed (with safety standards specified); and exempting Ukrainian children from compulsory education if they were instead participating in online learning from Ukraine upon parental declaration. The latter was an innovative approach—acknowledging that some families initially preferred to keep children in Ukraine's distance learning program, Poland allowed that in lieu of attending Polish school, to respect parental choice and the children's continuity of curriculum (Regulation of the Minister of Education and Science of 11 August 2022 amending the regulation on the education, upbringing, and care of children and youth who are citizens of Ukraine, 2022).

To overcome documentation issues (many refugees fled without school records), Poland's regulations, drawing on an earlier Ordinance of 2017 (Republic of Poland Ministry of Education Science, 2017), permit school principals to enroll a child and determine an appropriate grade based on an interview and the child's age, even if no transcripts or certificates are available. This ensures that lack of paperwork is not a barrier to a refugee child's education. Schools were also instructed to provide Polish as a second language support. Under the law, non-Polish speaking students have a right to free Polish language instruction, delivered by a person proficient in the student's mother tongue. Many schools set up "preparatory classes"—transitional classes where refugee students intensively learn Polish and adapt to the Polish curriculum, before joining general classes. By May 2023, over 92,000 Ukrainian students in Poland were receiving additional Polish language classes alongside regular lessons (Service of the Republic of Poland, 2023).

Poland also took steps to support schools and teachers. The 12 March 2022 Special Act provided extra funding to local governments for each Ukrainian pupil enrolled. It also allowed schools to hire additional teaching staff or assistants, including Ukrainian-speaking teaching aides without full Polish qualifications, to help bridge language gaps (Republic of Poland, 2022a,b,c). For example, a Polish school could employ a Ukrainian national as a classroom assistant if they speak Polish sufficiently to communicate, even if they aren't certified to teach in Poland, to support refugee children. Teachers taking on extra Ukrainian students could be paid for overtime. Furthermore, all Ukrainians under temporary protection were given access to public healthcare and psychological services. Specifically for children, schools could bring in psychologists and counselors; and a 2022 ordinance enabled hiring of Ukrainian- or Russian-speaking psychologists to support refugee students (though funding for these specific hires was not earmarked). Every Ukrainian with temporary protection, including children, also has the right to free mental health care through municipal services (Act of 12 March 2022).

Poland's domestic law, backed by strong policy measures, created an enabling environment for refugee children's education. The strong legal mandate (compulsory education for all children up to 18) meant that by law, schools had to open their doors to refugee children. The government's emergency legislation and subsequent regulations then addressed practicalities: easing enrollment, funding the influx, adapting class sizes, and providing language support. As a result, even though Poland faced the largest wave of refugee children in the EU (nearly half a million Ukrainian school-aged children at the peak), by the end of the 2021/22 school year some 182,000 of them had been integrated into Polish schools. This number represented roughly 46% of all Ukrainian refugee children of school age in Poland by late 2022, with the remainder either enrolled in Ukrainian online schooling (about 27% were using Ukraine's online platform) or not attending formal education yet (Service of the Republic of Poland, 2023). Poland's legal framework thus exemplifies an inclusive approach, though it also reveals the strain on capacity which is discussed later (teacher shortages, crowded schools, etc., have been identified as ongoing challenges).

Outside the education context, Polish law also provides protections aligned with international standards. Unaccompanied minors in asylum procedures are placed under guardianship (usually through family courts assigning a guardian or the child being cared for in a youth care facility). Poland's Act on Granting Protection to Foreigners contains special chapters on unaccompanied minors, reflecting EU asylum directives (Republic of Poland, 2003). There is a statutory prohibition on placing unaccompanied children in guarded detention centers for immigrants; instead, they should be directed to child care facilities. However, Poland has come under criticism for detaining children

with their parents in some cases, albeit the law says it's only allowed as a last resort if necessary for deportation and for the shortest time. The Bistieva ECtHR case (2018) illustrated Polish courts' tendency to approve detention of a family if the parents were undocumented, but the ECtHR judgment has pushed authorities to seek alternatives. Poland's more recent practice during the Ukraine crisis was notably different: rather than detention and strict immigration enforcement, Poland essentially legalized the stay of millions of Ukrainians overnight via the temporary protection law, avoiding any need for detaining new arrivals. This contrast—treating one group of asylum seekers generously while another group (from the Middle East and Africa, arriving via Belarus) faced pushbacks—raises issues of consistency with non-discrimination norms, which we will explore under challenges.

The Czech Republic (Czechia) has similarly solid legal provisions guaranteeing education and has adapted quickly to the Ukrainian refugee situation, though some recent policy shifts have raised concerns about equal treatment. Under the Education Act (Act No. 561/2004), all children in Czechia (citizens or not) have the right to basic education (Czech Republic, 2004). Compulsory school attendance in Czechia lasts 9 years, typically from age 6 to 15, and this obligation by law also applies to children who are nationals of other countries residing in Czechia under certain visas or protection. Specifically, the Act was amended over the years to include children granted international protection (refugee status or subsidiary protection) or long-term residence. In 2022, with the Lex Ukraine, it was clarified that those granted temporary protection are treated equivalently (Czech Republic, 2022b). Therefore, a child from Ukraine with temporary protection must enroll in school within 3 months of arrival, a timeline consistent with the EU Reception Directive's standard.

Czechia had a Temporary Protection Act (No. 221/2003) already on the books, which it activated via an emergency Lex Ukraine package in March 2022 (Czech Republic, 2003). The Lex Ukraine (Acts No. 65/2022 and 67/2022, among others) not only granted status to Ukrainians but also contained education-sector measures. Act No. 67/2022, in particular, addressed schooling for Ukrainian children. It assigned local school directors the responsibility to admit refugee children even outside normal enrollment periods and, importantly, required coordination if capacity is limited. If a particular school or district has no space, regional authorities must find an alternative placement, and if an entire region is full, the Ministry of Education can direct the child to a school in a different region, taking into account the family's location. This legal mechanism aimed to prevent children from being left out due to local capacity issues—essentially mandating the government to find some school for every child. Moreover, Act 67/2022 stipulated that refugee children should start compulsory schooling within 3 months of their arrival in Czechia, aligning with EU requirements.

To facilitate integration, Czech law guarantees language support. All newly arrived foreign pupils are entitled to free Czech language classes, financed by the state (Section 20 of the Education Act and Decree No. 48/2005). In fact, Czechia has developed a Framework Curriculum for Czech as a Second Language to guide schools in teaching Czech to foreigners. Under emergency measures, the government also allowed employing Ukrainian teaching assistants. The Ministry of Education issued guidance in 2022 stating that schools may hire pedagogical staff who do not speak Czech for classes composed solely of Ukrainian students (e.g., to lead preparatory classes in Ukrainian). It also waived certain administrative hurdles: Ukrainian educators could attest their qualifications via affidavit if documents were missing, and fees for recognizing foreign qualifications were waived. These steps helped quickly mobilize refugee teachers and volunteers to support Czech schools.

Notably progressive was Act 175/2022 (an amendment to the Lex Ukraine education law) which introduced an anti-segregation clause: it instructed that refugee children should not be placed in separate classes consisting only of foreign children unless absolutely necessary, and even if initially placed in such a class, they should be moved into regular classes as soon as feasible (Czech Republic, 2022a). This reflects a commitment to inclusion—ensuring that Ukrainian kids learn alongside Czech peers, which aids integration and prevents stigmatization.

During the first year of the war, Czech authorities managed to integrate a large share of Ukrainian children. By the 2022/23 academic year, ~51,281 Ukrainian refugee students were enrolled across Czech kindergartens, primary and secondary schools. This represented about 60% of the school-aged Ukrainian children in Czechia—a relatively high enrollment rate (Czech Statistical Office, 2022a,b). The Ministry of Education indicated that, as of spring 2023, the system still had capacity (it reported thousands of open places in preschools and basic schools).

This spare capacity was in part due to Czechia's declining demographics and also concerted efforts like opening new class sections and hiring more staff. The government also provided financial support: a program reimbursed schools for extra costs, and a per-student subsidy was given for each Ukrainian child to help cover their needs (similar to Poland's approach).

Domestic asylum law in Czechia, governed by the Asylum Act (325/1999), contains special provisions for minors, such as appointing a guardian for unaccompanied minors and exempting minors from certain asylum procedure accelerations (Czech Republic, 1999). Unaccompanied asylum-seeking children are generally placed in specialized child protection institutions (in Czechia, facilities for foreign children, or foster care) rather than detention—Czechia has had a relatively good track record of not detaining unaccompanied minors. Families with children are also rarely detained in asylum proceedings; in practice, Czechia almost never uses detention for families (preferring open reception centers), which aligns with the ECtHR rulings discouraging child detention. This is an area where Czechia's practice has been more humane than some peers.

One legal adjustment in 2023, however, has raised controversy: Czechia's parliament passed a law (as part of "Lex Ukraine VII") enabling a separate school enrollment period for refugee children, effectively allowing schools to give priority to Czech children in the regular spring enrollment and defer Ukrainian children's admission to a later date (in June). The intention was to manage capacity—to see how many places remain after accommodating local demand. However, UNICEF and child rights advocates warned this could institutionalize a two-tier system and risk exclusion of refugee children (UNICEF, 2025). Such a practice might conflict with the

principle of non-discrimination in education (CRC Art. 2 and ECHR Protocol 1, Art. 2). The Czech government has defended it as a temporary measure to cope with surges in certain cities, pledging it will ensure all children do get a place by the later date.

Slovakia's legal framework concerning refugee children's education reveals a notable gap: unlike its neighbors, Slovakia did not impose compulsory schooling on children who only have temporary protection or other short-term stay, which led to many refugee children remaining outside the school system. The Education Act (Act No. 245/2008—"School Act") in Slovakia makes education compulsory for children with permanent residence in Slovakia, roughly from age 6 to 16 (National Council of the Slovak Republic, 2008). However, children who are in Slovakia on a temporary basis (including asylum seekers or those with temporary refuge) are not automatically subject to compulsory education. When the influx of Ukrainians occurred, the government clarified that Ukrainian children with temporary protection were exempt from the legal obligation of school attendance. This meant that, unlike in Poland or Czechia, there was no legal requirement for refugee parents to enroll their kids, nor a requirement for municipalities to ensure every refugee child finds a place. The policy was likely intended to give flexibility to families uncertain about their length of stay. However, in practice it contributed to low enrollment rates.

Nonetheless, Slovak law does provide the right to education for these children. Article 146(1) of the School Act states that foreigners who have been granted residence permits (which would include temporary protection, considered a form of tolerated stay/residence) and their children may access education under the same conditions as Slovak citizens. Thus, schools are open to refugee children, and they cannot be charged fees at public schools or denied enrollment on account of nationality. The Act instructs school directors to place a child in an appropriate grade by evaluating their age, prior education, and Slovak language proficiency. If a child lacks proof of prior schooling, the director can use interviews or tests to decide on placement (though no detailed national guidelines exist). Importantly, if language is a barrier, the law allows conditional placement—meaning a child might initially audit classes or be placed and then supported to catch up—to avoid misplacement due to poor language skills.

In response to the Ukraine crisis, Slovakia adopted Government Resolution No. 185/2022 under its asylum law framework, which directed the Minister of Education to take measures to facilitate the access of children with temporary protection to education. (Government of the Slovak Republic, 2022a,b) The Ministry of Education issued methodological instructions to schools, encouraging them to enroll Ukrainian children even though it was not mandatory, and outlining how to organize Slovak language courses. Under Act 353/2022 (Slovakia's Lex Ukraine), temporary refuge is formally recognized and children with that status are entitled to join the school system. One positive aspect: the School Act [Art. 146(3)] and Act No. 596/2003 on State Administration in Education mandate the provision of Slovak language courses for non-Slovak speaking students, funded by the regional school authorities (National Council of the Slovak Republic, 2003). Schools can request extra resources to run Slovak classes for refugees. The State Pedagogical Institute produced Ukrainian-Slovak bilingual materials and basic curricula to help Ukrainian students integrate, available on a dedicated website (European Commission, 2023; UNESCO, 2023).

Furthermore, Slovakia allowed modest increases in class size to accommodate refugees: schools could go up to 3 extra pupils per class beyond the usual limits, so long as safety standards (set by health regulations) were still met. This was to relieve the capacity pressure in popular schools. Also, refugee children are entitled to join Slovak children in benefiting from school meal programs under the same conditions (Slovakia provides free lunches to primary kids by policy, which extended to refugees).

Despite these legal provisions, a crucial shortcoming was the absence of a clear mandate or tracking mechanism initially to ensure refugee children were in school. Recognizing this, in mid-2024 Slovakia amended its laws to empower municipalities to collect data on school-aged refugee children in their area and their enrollment status. This was an attempt to identify children not in school and encourage their registration. Even so, by the end of 2024, the majority of Ukrainian children in Slovakia were still outside the Slovak education system—many continued in Ukrainian online classes, and some perhaps did neither. Statistics from the Ministry of Education illustrate the impact of the legal approach: nearly 60% of Ukrainian refugee children were not in Slovak schools, one of the lowest enrollment proportions in the region (Ministry of Education, Science, Research, and Sport of the Slovak Republic, 2024). This outcome links back to the legal framework: because attendance is not compulsory for refugee children, many schools took a hands-off approach, integration lagged.

Outside schooling, Slovakia's asylum law (Act No. 480/2002) and child welfare laws provide that unaccompanied minors should be placed under care of the Office of Labor, Social Affairs and Family, which runs dedicated children's homes for unaccompanied minors. Slovak law, in line with EU rules, forbids the detention of unaccompanied children and generally avoids detaining minors (though there have been cases of short-term detention of families at borders, Slovak practice is relatively sparse in that regard) (Slovak Republic, 2002). The Family Act of Slovakia would apply for guardianship appointments. During the Ukraine crisis, Slovakia instituted relatively efficient procedures at the border to identify unaccompanied or separated children and transfer them to social services or to relatives. One innovative practice was the use of *"Blue Dots"* (child-friendly spaces run with UNICEF and UNHCR) at entry points to support and screen children—though this is a policy measure, not a law, it complements the legal framework by operationalizing child protection on the ground.

In summary, Slovakia's domestic laws grant refugee children the right to access education and language support, but by not mandating attendance, they relied heavily on voluntary uptake and parental initiative. The result was a protection gap: many children effectively had de facto full access to education withheld, at least initially, because integration was optional. Efforts are underway to address this through better data and outreach, but it highlights how domestic legal choices (compulsory vs. optional schooling) directly influence children's experiences.

Hungary's legal regime provides formal guarantees for refugee children's education and welfare, though implementation has been uneven. Under Act CXC of 2011 on National Public Education

(the Education Act), education is compulsory for all children in Hungary from age 3 (kindergarten) up to age 16 (end of mandatory schooling) (National Assembly of Hungary, 2011). Notably, kindergarten attendance from age 3 is compulsory in Hungary—a unique feature in the region—which underscores an early start for integration. Article 92 of this Education Act explicitly states that children who are applicants for or beneficiaries of temporary protection (as well as asylum seekers and refugees) are subject to compulsory education and entitled to free public education on the same basis as Hungarian citizens. This means that the moment a child enters Hungary and is under a protection regime (including the mass influx of Ukrainians who got temporary protection status), they have exactly the same right—and obligation—to attend school as any local child. School directors are tasked with facilitating admission and recognizing the student's previous studies (they can evaluate foreign report cards or, if needed, use placement tests). When the Ukraine war broke out, Hungary, like other EU states, enacted the Temporary Protection status via a Government Decree in March 2022 (Government of Hungary, 2022a). This automatically granted Ukrainian refugees residence permits. In the education sector, Hungary's approach was to integrate where possible but it faced challenges (language being a big one, given Hungarian is very different from Ukrainian). Hungarian law provides for free Hungarian language instruction to refugee children: Government Decree 301/2007 (an asylum law implementing rule) guarantees that minors granted protection who enroll in school are entitled to free Hungarian language classes, with the costs reimbursed to schools by the asylum authorities. Additionally, children with temporary protection can access the general child support services—for instance, Hungary's rule that children in preschool and primary school receive free or discounted meals based on need was extended to refugee children, which helped address basic needs and encourage attendance.

To bolster capacity, Hungary created a grant program in spring 2022: for March–June 2022, schools could receive 130,000 HUF (≈*e*350) per month per Ukrainian student if they provided at least 5 hours of extra tutoring or support to that student (Government of Hungary, 2022b). This incentive aimed to encourage schools to admit refugees and give them remedial help. However, the funding was not continued in the next academic year, which reflects a lack of sustained commitment. By the 2022/23 year, integration relied mostly on existing resources.

Hungary's domestic asylum law (Act LXXX of 2007) used to have problematic provisions regarding children—notably, after 2015, Hungary kept nearly all asylum seekers, including families with children, in transit zone camps on the border, which were effectively closed detention. That practice led to several court rulings against Hungary [e.g., R.R. and Others v. Hungary (2021) where an Afghan family with children was confined for months; the ECtHR found that the conditions and lack of freedom for the children amounted to inhuman treatment and unlawful detention; European Court of Human Rights, 2021)]. In May 2020, the CJEU also struck down the transit zone detention regime, prompting Hungary to close the zones. Currently, asylum-seeking families are not detained in Hungary; they are either not allowed to enter at all due to Hungary's restrictive policies or, if they do, they might be placed in open camps. Unaccompanied minors under 14 are placed in a children's home (in Fót) under the child protection system, and those 14–17 were previously treated as adults (detained in transit zones) but post-2020 that practice ended. Hungary's child protection law recognizes all children (regardless of nationality) in Hungary as entitled to protection if they are in need—meaning unaccompanied minors can be taken into state care. The challenge has been that since 2020, Hungary practically shut its asylum system (requiring asylum applications to be made at consulates abroad, which almost no one could do), so few asylum-seeking children from outside Ukraine actually get any formal status or support.

For Ukrainian refugees under temporary protection, Hungarian law on paper provided access to education, but uptake has been low. As of 2024 only around 31% of school-aged Ukrainian children in Hungary were enrolled in Hungarian schools (Hungarian Central Statistical Office, 2024). Many families chose to keep their children in Ukrainian online schooling or send them to *ad-hoc* Saturday schools run by the Ukrainian diaspora rather than entering Hungarian schools. The Hungarian language barrier, the hope of returning soon, and instances of limited space in some urban schools contributed to this. Unlike Poland or Czechia, Hungary has relatively few Ukrainian speakers, and the education system had less support structure for integrating non-Hungarian speakers (teacher shortages in general were an issue). Although Hungary's student-teacher ratio nationally is low (about 10:1 in primary), refugees tended to reside in Budapest or western Hungary, where certain schools filled up (Hungarian Central Statistical Office, 2024). Some Hungarian schools indeed reported being at capacity, and if the nearest school was full or lacked a Hungarian language preparatory class, families might opt for online learning instead. One unique response in Hungary was the establishment of separate educational institutions for Ukrainians. For example, a dedicated Ukrainian-language school was opened in Budapest in late 2022, teaching the Ukrainian curriculum so students could continue seamlessly.

In Hungarian domestic law, another relevant aspect is guardianship and legal representation. When unaccompanied minors (14–17) apply for asylum, a guardian ad litem (usually from the child protection authority) is appointed to represent them. Under temporary protection, if unaccompanied children arrived (for Ukraine, this was relatively rare, as most came with a relative or family friend), a guardian from child protection would be appointed. Hungary's system faced criticism around 2015–2017 for not having enough qualified guardians and for delays, but with fewer asylum-seeking minors now, the caseload is smaller.

Overall, Hungary's laws provide formal parity of treatment—refugee children should, by law, be sitting in the same classrooms and enjoying the same benefits as Hungarian children. In practice, various obstacles have prevented full realization. In the case of Hungary, this is not a legal, but rather an implementation gap.

In summary, across these four countries, the domestic legal frameworks widely acknowledge the right of refugee and migrant children to education and basic services, often mirroring international and EU law. Poland and Hungary explicitly make education compulsory for refugee children, embedding inclusion as a duty. Czechia extends compulsory education to long-term residents and those with protection and took legislative measures to accommodate the influx, emphasizing integration.

Slovakia guarantees the right but not the obligation, which has proven to lessen uptake. All have laws or policies for language training and have (to varying degrees) mobilized additional resources. Child protection laws in each country provide for guardianship of unaccompanied minors and generally avoid child detention in law or policy. The effectiveness of these frameworks, however, depends greatly on implementation and political will, which we explore through case law, data, and reports in the next sections.

4 Case law and policy evaluations

Legal protections on paper do not always translate into reality. Case law from European and domestic courts, as well as evaluations by international organizations, reveal how laws have been applied—sometimes upholding children's rights, other times exposing failures. This section analyzes key jurisprudence and policy assessments concerning refugee and migrant children in Central/Eastern Europe, shedding light on detention practices, access to education, and treatment disparities.

A recurrent issue in asylum management is the detention of migrants, including families with children. The ECtHR has developed a rich jurisprudence condemning the prolonged or inappropriate detention of minors. In Bistieva and Others v. Poland (2018), as discussed, the Court found Poland violated Article 8 ECHR by detaining a mother and her three children for nearly 6 months in a guarded center pending deportation [European Court of Human Rights (ECtHR), 2018]. The Court acknowledged the state's interest in immigration control but ruled that authorities failed to consider less-coercive alternatives or the psychological impact on the children. It stressed that keeping the family together in detention was not enough—the children's best interests required that detention be a last resort and as short as possible. This judgment reinforced that CEE countries, when tempted to detain families who may abscond, must still prioritize children's wellbeing and seek alternatives like open family shelters or reporting requirements.

Hungary's practices were scrutinized in R.R. and Others v. Hungary (2021), where an Iranian-Afghan family with three minor children was confined in the Röszke transit zone on Hungary's border for several months while their asylum claim was processed (European Court of Human Rights, 2021). The transit zone was essentially a closed camp surrounded by fencing and guards. The ECtHR held that the conditions of confinement for the children, combined with the length and the lack of age-appropriate support, amounted to inhuman and degrading treatment in breach of Article 3 ECHR. The judgment noted that the family's living space was very restricted and the environment was carceral; one of the children was a toddler and another a teenager, and the situation caused them significant distress. The Court also found a violation of Article 5 §1 (right to liberty) because Hungary had de facto detained the family without a sufficient legal basis or individualized justification. It emphasized that unaccompanied minors should not be held in a closed immigration detention and by extension children in families should only be detained under exceptional circumstances. This case, along with a CJEU ruling in 2020 against Hungary's transit zones, effectively pushed Hungary to abandon that policy (Court of Justice of the European Union, 2020a). It stands as a precedent for the region that detention of child asylum seekers is highly disfavored and legally risky.

Another pertinent ECtHR ruling is M.H. and Others v. Croatia (2019), albeit outside our four focus states, where the Court condemned Croatia for the tragic outcome of a failed migration management: an Afghan family with small children was placed in a detention center from which a 6-year-old child escaped and was killed by a train while crossing into Serbia. The Court found multiple violations, underscoring the necessity of vigilant care for children in migration and that detaining them near dangerous borders was incompatible with their safety (violation of Article 2 right to life, in that case). This sent shockwaves reminding all states of the severe consequences when children's best interests are neglected during enforcement actions.

Few cases directly litigating refugee children's education in these countries have reached European courts, likely because states generally did allow access. However, the Ponomaryovi v. Bulgaria case from the ECtHR, is important in the CEE context (European Court of Human Rights, 2011). Bulgaria had argued that since secondary education wasn't compulsory, charging undocumented migrant teens fees was permissible. The Court disagreed, noting the importance of secondary education and that the discriminatory impact on these youths was not justified by the state's immigration control aims (European Court of Human Rights, 2011). The judgment implies that if any of our focus countries tried to impose barriers like tuition or separate inferior schools for refugee children, it would likely breach the ECHR. This is relevant given the recent Czech measure of separate enrollment—while not as extreme as fees, it is a form of different treatment that could be scrutinized under Article 14 (non-discrimination). If, hypothetically, a Ukrainian child in Czechia is denied a school place because all spots were filled by earlier enrolling Czech children, that child could argue their right to education is being infringed due to nationality. The Czech government would need to show that its two-phase enrollment is proportionate and still results in full access. Domestic courts in these countries have had limited prominent rulings in this area, perhaps because issues get resolved via policy rather than litigation, or refugees may not often litigate in national courts. One exception is in Poland: Polish courts have seen cases about the pushbacks and denial of asylum at the Belarus border and at least one district court found that border guards violated the law by refusing to accept declarations of asylum from families with children. However, Poland's government ignored some of these rulings and continued pushbacks under a state of emergency in 2021. The Polish Constitutional Tribunal, in recent years aligned with government stances, upheld legislation that effectively legalized summary pushbacks, which likely conflicts with international refugee law—a matter possibly heading to ECtHR review.

The best interests principle has been reinforced in return/deportation contexts by the CJEU. In case M.A. v. État belge C-112/20 (Belgium, 2021), the question was whether authorities must consider the best interests of the child when ordering a parent's deportation (the child was an EU citizen) (Court of Justice of the European Union, 2021). The CJEU ruled

yes—Article 5 of the EU Return Directive and the EU Charter oblige states to take due account of the child's best interests even if the child isn't the one being deported. Extrapolated to our focus, if any of these countries were to remove a child's parent (or caregiver), they must assess how that affects the child and consider less harmful solutions (like issuing a residence permit on humanitarian grounds). Similarly, national courts in Europe have sometimes halted deportations of families where a child had special needs or health issues, deeming removal contrary to the child's best interests or right to private life. For instance, Hungarian courts in the past have granted tolerated stay to families with school-enrolled children nearing graduation, on a case-by-case human rights basis, though such practice is not consistent.

One striking phenomenon in CEE has been the disparate treatment of different groups of refugees. The law in principle is ethnicity- and nationality-neutral, but state practices sometimes diverged. Poland, Hungary, and Czechia faced a CJEU judgment in 2020 (joined cases C-715/17, C-718/17, C-719/17) for refusing the mandatory EU refugee relocation quotas set in 2015. The CJEU unambiguously held that by rejecting asylum applicants from Italy and Greece (mostly Syrians, Iraqis, Eritreans at that time), those countries violated EU law (Court of Justice of the European Union, 2020b). They could not cite public security or administrative issues to justify a blanket refusal. This legal defeat underscores that under EU solidarity mechanisms, countries must share responsibility for refugees irrespective of origin. While that episode preceded the Ukrainian crisis, it set the stage: Poland, Hungary, and Czechia were sanctioned for not doing their part in one refugee situation, yet later would host huge numbers of a different refugee population. The contrast has been noted by many observers as evidence of a double standard: refugees from predominantly Middle Eastern or Muslim countries were largely unwelcome in 2015, whereas refugees from neighboring Ukraine were embraced in 2022. Legally, such selective treatment runs afoul of non-discrimination principles if a comparably needy refugee is turned away solely due to nationality or religion.

An example of this is the Poland-Belarus border crisis of 2021. Belarus, in retaliation against EU sanctions, facilitated thousands of Middle Eastern migrants to its border with Poland, Lithuania, and Latvia. Poland responded with a hardline approach: sealing the border, pushing people back without asylum processing, and detaining those who got through in rudimentary camps. Children were among those stuck in freezing forests between armed guards. Amnesty International reported that Polish authorities arbitrarily detained nearly two thousand Middle Eastern asylum seekers in 2021, subjecting many to abuses like strip searches, beatings, even sedating some during deportation (Amnesty International, 2022). These actions stood in *"stark contrast with the welcome shown to those fleeing Ukraine,"* Amnesty noted, calling out the unequal treatment. Indeed, days after war broke out in Ukraine, Poland opened its border widely, set up reception points, and in a matter of weeks passed the generous assistance law for Ukrainians. Yet just earlier, Polish border guards had been forcing Kurdish or Afghan families (with small children) back into Belarus, disregarding asylum requests and even defying interim measures from the ECtHR to provide humanitarian aid to stranded children. One tragic case involved an unborn child: in late 2021, an Iraqi woman miscarried at the border, and a 1-year-old from Syria died of cold—grim outcomes linked to pushbacks (InfoMigrants, 2021).

From a legal standpoint, these pushbacks violate the 1951 Refugee Convention (right to seek asylum) and Article 3 ECHR (if people are returned to danger or exposed to inhuman treatment). They also conflict with EU asylum law which requires states to at least register asylum claims. Several cases arising from this are pending at the ECtHR.

The disparity in treatment has fueled a debate: are refugee children's rights contingent on politics? Legally they should not be—CRC and human rights law apply universally. The law hasn't changed between 2015 and 2022, but state behavior did, proving that implementation is the weakest link. In Hungary, a similar disparity exists: while Hungary did allow Ukrainian refugees in, Hungary's policy toward non-European asylum seekers remains restrictive. Essentially, since 2020 Hungary isn't processing asylum claims of people who arrive irregularly at all—they are escorted out.

On a more positive note, domestic courts sometimes proactively protected migrant children. In Slovakia and Czechia, because the numbers were historically small, most issues were solved administratively (e.g., granting tolerated stay to a sick child rather than deport). None of these four countries have reported cases of deporting well-settled children who grew up there (unlike some Western European controversies). Jurisprudence has been a crucial backstop for refugee children's rights in CEE, especially in curbing detention and gross mistreatment. The ECtHR and CJEU have reinforced principles of non-discrimination, best interests, and humane treatment that echo through national policies. Yet, not all issues reach courts; some, like education access, have been handled relatively well without litigation, whereas others like pushbacks represent ongoing violations awaiting legal reckoning.

5 Critical challenges in legal protection and policy recommendation to protect migrant children

While the legal frameworks in Central and Eastern Europe broadly align with international standards, several critical challenges and gaps persist in protecting refugee and migrant children. These gaps can undermine children's rights and wellbeing, revealing areas where further legal or policy development is needed:

1. Discrepancy between law and implementation—Perhaps the most fundamental gap is the difference between what laws promise and what happens in practice. All four focus countries legally allow refugee children to access education and basic services, yet the actual enrollment rates and service uptake vary widely. In Slovakia and Hungary, despite formal rights to schooling, the majority of Ukrainian refugee children did not actually enroll in 2023–2024. This indicates that simply having a right in law is not enough—proactive measures and enforcement are necessary. Slovakia's choice not to make education compulsory for temporary protection holders exposed a flaw: without a legal obligation or a strong nudge from authorities, many children remained outside the system. This suggests the need for legal reform (e.g., amending

Slovak law to extend compulsory education to all resident children regardless of status) or at least more assertive policy direction to bridge the implementation gap. Similarly, Hungary's education law did mandate enrollment, but there was little follow-up to ensure it—no system to check if each child granted protection was attending school. A gap here is the absence of an accountability mechanism. One possible remedy is to assign responsibility to local governments to monitor refugee children's schooling (as Slovakia belatedly tried to do by empowering municipalities to gather data).

2. Unequal treatment and potential discrimination—The different treatment of refugees based on origin is a glaring challenge. Legally, all refugee or asylum-seeking children should be treated equally, yet in practice Ukrainian children have been welcomed, while children from Middle Eastern or African families have faced hostility or indifference. This two-tier approach violates the non-discrimination principle in human rights law. The challenge is ensuring that legal protections and humanitarian standards apply universally. One gap is that Poland and Hungary still have laws or policies enabling summary expulsions at some borders (Poland legalized pushbacks in a 2021 amendment; Hungary continues "escort to border" practices). These measures likely contravene EU and international law for children but have not been fully revoked.

3. Capacity constraints in education systems—Even with the best intentions, physical and human resource limits have posed a major challenge. Schools in CEE were not prepared overnight to absorb tens of thousands of new students. Teacher shortages, lack of classroom space, and insufficient language instructors were common issues. These constraints risk turning the right to education into a nominal right—e.g., a child might be technically enrolled but sitting in an overcrowded class unable to understand the language, which diminishes the quality of that education. While emergency measures (bigger classes, volunteer teachers, etc.) helped, the gap remains between needs and supply. This is partly a policy implementation issue, but also a budgetary/legal one: governments must allocate funds and perhaps relax certain regulations (like teacher qualification requirements or retirement rehire rules) to fill gaps. The Czech separate enrollment policy emerged directly from capacity worries; it's essentially a "rationing" mechanism that is at odds with equality. The challenge is to manage capacity without violating rights. One idea is double-shift schooling, which some countries outside Europe have done for refugees (host students in the morning, refugees in the afternoon in the same school). CEE hasn't widely done this, partly due to potential segregation effects and logistic complexity. Instead, Poland and Czechia increased class size caps and used community centers as temporary classrooms. These were short-term fixes; a more sustainable solution requires investing in school infrastructure and teacher recruitment.

4. Language barriers and inclusive curriculum—Language is one of the toughest barriers and can become a rights issue if not properly addressed—a child cannot effectively enjoy the right to education if they cannot understand the instruction. Each country has offered language classes, but the scale and quality vary. In Slovakia, for example, many schools initially had no Slovak-as-second-language teacher, leaving Ukrainian kids to sink or swim. By law they should get courses yet implementing that took time. In Hungary, free Hungarian classes are promised, but executing them for all who need it was problematic due to lack of Hungarian-as-second-language teachers. There is a risk that children fall behind academically or drop out if they feel lost due to language. The challenge is training and deploying sufficient language instructors and providing learning materials in native languages for bridging. Additionally, integrating elements of the child's native curriculum (teaching Ukrainian language or history as extra-curriculars) could help children maintain a connection to their heritage and reintegrate later. Some Polish and Czech schools have begun offering optional Ukrainian language classes or allowing Ukrainian Saturday schools to use their premises—a good practice to formalize. The gap in legal protections here might be seen in that none of the countries legally guarantee bilingual education or mother-tongue instruction for refugees. However, this could be considered under the broader right to education and development if a child's entire schooling is in a foreign tongue with no support. The CRC Committee has noted that linguistic needs of minority and foreign children should be accommodated to ensure meaningful education (CRC General Comment No. 6).

5. Mental health and psychosocial support—Legal frameworks say little explicitly about psychosocial care, but it falls under the right to health and to recovery from trauma (CRC Art. 39). In practice, psychosocial support has lagged. Many refugee children carry psychological wounds—separation from family, witnessing conflict, adjusting to exile. Host countries' mental health services for children are often overstretched even for locals. The gap is evident in all four countries: there are not enough child psychologists or counselors in schools to address the trauma and anxiety issues in refugee kids. Poland's move to give free psychological assistance to all Ukrainians under municipal services is progressive, yet uptake is limited because refugees may not know how to access it or may face language issues with therapists. The challenge is ensuring culturally and linguistically accessible mental health care. Without addressing this, children's academic and social outcomes suffer. Mental health support is not systematically integrated into the refugee response. States could strengthen this by, for example, mandating trauma-informed training for teachers and by contracting bilingual psychologists on a larger scale. The *best interests* principle would dictate that psychosocial healing is a priority for these children's development.

6. Risk of statelessness and documentation issues—Generally, Ukrainian refugees have citizenship and documents. But some migrant children (e.g., some born en route, or orphans from places like Donetsk whose documents were lost) might face issues proving who they are, which can hamper access to services or future legal status. Countries must ensure every refugee child's birth is registered and they have valid identity documents.

7. Long-term integration vs. return dilemma—The temporary protection regime is by definition short-term, but as it extends, a gap in policy is how to transition families to long-term solutions. Children particularly need stability—they thrive with routine and a sense of the future. If their legal status is precarious or short-term, it can affect mental health and investment in integration. As the war continues, it becomes more

likely some families will stay for many years or permanently. None of the four countries have yet articulated a clear strategy for what happens when EU temporary protection eventually ends. Will refugees be asked to go home (even if conflict persists or their home is destroyed)? Will they be offered facilitated paths to residency or citizenship? The uncertainty is a policy gap. From a children's rights perspective, abruptly uprooting children again after they have integrated in a host country would be harmful. The best interests of the child should guide any future decisions on return or further stay. This implies that if a child has spent, say, 3–4 formative years in a host country, attending school and integrating, that should weigh heavily in favor of allowing the family to remain if they cannot safely return to their origin. Domestic law might need amending to create a bridge from temporary protection to permanent status (for instance, allow years spent under TP to count toward residency for citizenship purposes).

8. Protection of unaccompanied minors—While frameworks exist (guardianship, foster placements), there are practical gaps in the quality of guardianship. The guardianship systems are under-resourced—one guardian might handle dozens of cases, making meaningful support hard. There's also sometimes confusion of roles: social workers vs. legal guardians vs. facility directors. Ensuring that every unaccompanied child (whether a 17-year-old asylum seeker from Afghanistan or a 10-year-old evacuated orphan from Ukraine) has a dedicated guardian who looks after their legal and social needs is a challenge. Hungary had issues here historically, Slovakia too (with very few certified guardians, the director of a children's home often is the de facto guardian). The gap can be closed by training more guardians. Legally, it could mean amending laws to reduce the maximum caseload per guardian or guarantee legal representation in addition to guardianship.

9. Detention and border practices—Despite improvements, the risk remains that in future migration events, states might resort to detention or pushbacks again. Hungary's transit zones are closed now due to court rulings, but its legislation still allows asylum detention in some cases, and its practice of denying entry at the Serbian border continues. Poland's response to the Belarus tactic suggests that under pressure, rights can be sidelined. This is a gap in *legal resilience*: the laws did not prevent those abuses because states declared emergencies or found loopholes. Strengthening domestic legal checks—for example, better parliamentary or judicial review of emergency decrees that affect migrants, or codifying alternatives to detention explicitly—would help. There's room to advocate for legal reform to explicitly prohibit the detention of children in migration contexts, in line with international guidance.

It is clear that the main challenges and gaps revolve around ensuring that legal entitlements are effectively delivered, maintaining equality and consistency in protecting all refugee children, and adapting systems to the scale and duration of current crises. Addressing these requires not only legal reforms but also policy innovations, adequate funding, and a commitment to upholding the spirit as well as the letter of child protection laws.

It is clear that the main challenges and gaps revolve around ensuring that legal entitlements are effectively delivered, maintaining equality and consistency in protecting all refugee children, and adapting systems to the scale and duration of current crises. Addressing these requires not only legal reforms but also policy innovations, adequate funding, and a commitment to upholding the spirit as well as the letter of child protection laws.

6 Conclusion

The refugee and migrant crises in Central and Eastern Europe have put national legal frameworks and child protection systems to the test. This analysis has shown that Slovakia, Hungary, Czechia, and Poland—supported by international and regional law—have made significant strides in safeguarding the rights of displaced children, especially in the unprecedented influx of Ukrainian refugees. Grounding their responses in the core principles of children's rights (non-discrimination, best interests, right to development and education), these countries demonstrated the capacity for empathy and inclusion: Poland and Czechia rapidly opened schools to tens of thousands of refugee students, Hungary ensured legal equality in schooling.

Yet, the analysis also makes clear that gaps remain between the letter of the law and the lived reality of refugee children. Many are still *"on hold,"* their education interrupted and futures uncertain. Challenges such as inconsistent treatment of non-European refugees, resource shortages, language barriers, and psychosocial stressors have prevented some children from fully enjoying their rights. The case law reviewed serves as a caution that even well-meaning governments can falter, and that constant vigilance and legal accountability are required to protect vulnerable children.

In response, this paper offered a range of recommendations, urging both legal reforms (such as banning child immigration detention and extending compulsory education to all minors) and policy enhancements (like boosting school capacity, training teachers, and providing mental health support). Key among these is the call to firmly center the best interests of the child in every decision—from border control practices to classroom placement—as required by international law and basic humanity.

Implementing these recommendations will demand political will, funding, and perhaps shifts in public attitudes. However, the investment is worthwhile. By strengthening protections for refugee and migrant children, CEE countries will not only comply with their legal obligations but also foster a generation of youth who, despite displacement, can heal, learn, and contribute—whether back in their home country or in their new communities. In many ways, these children are bridges between nations; how we treat them now will shape the climate of our region for years to come.

In conclusion, while Central and Eastern Europe faces ongoing and emerging challenges in protecting refugee and migrant children, it also holds the tools and principles to meet them. By reaffirming a commitment to the rule of law and children's rights—and by translating that commitment into concrete actions on the ground—Slovakia, Hungary, Czechia, Poland and their neighbors

can set an example of how to safeguard the dignity of every child, even in times of crisis.

Data availability statement

The original contributions presented in the study are included in the article/supplementary material, further inquiries can be directed to the corresponding author.

Author contributions

LG: Writing – original draft, Writing – review & editing.

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