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in a Globalized World 16

Fruzsina Gárdos-Orosz *Editor*

# The Resilience of the Hungarian Legal System since 2010

A Failed Resilience?

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Editor

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# Preface

**Fruzsina Gárdos-Orosz**

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

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

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

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

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

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

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

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

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## **Part III**

# **Courts and Resilience**

# The Resilience of the Hungarian Court System Between 2012 and 2020



Mátyás Bencze

**Abstract** In this chapter, I will first outline the political challenges the Hungarian court system has faced since 2010 and also present the characteristics of the organizational setting of the administration of justice, which has been a decisive factor in the response to those challenges. I will then turn to a discussion of how the relationship between the political system and the courts has changed since 2010. Using statistical methods and content analysis, I will prove the hypothesis that sporadic governmental expressions of opinion on certain judicial decisions before 2010 have been replaced by the systematic assertion of the interests of political power in public communication to the courts since the change of government in 2010. I will then describe the reactions of the domestic judicial leadership and use content analysis to identify the extent and nature of the reactions and how the strength of the resistance has changed over time. Finally, I draw conclusions about the factors that influence the preservation of the resilience of the judiciary.

## 1 Introduction

What may be novel about the conclusion of this chapter is that while the relationship between courts and politics is examined in legal and political sciences, both for democracies<sup>1</sup> and in authoritarian regimes,<sup>2</sup> little attention has been paid to the role

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<sup>1</sup> Waldron (2006), p. 107.

<sup>2</sup> Among the classics of legal theory, see Radbruch (2006), pp. 1–11; more recently, Graver (2015), pp. 205–301; Ginsburg and Moustafa (2012), pp. 102–131.

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of courts in the transition from democracy to authoritarian rule.<sup>3</sup> In this context, the most relevant questions are under what conditions is effective judicial resistance likely to occur and what circumstances might lead the judiciary to ‘offer deference’.<sup>4</sup>

First, I briefly describe the political environment in contemporary Hungary and the most important developments of recent years. Then, I argue that, following the institutional settings of the Hungarian court system, the reactions of court leaders to external attacks are crucial in defending the independence of individual judges. After this, I examine the government’s communication toward the courts after 2012, focusing on the issue of whether that communication can be interpreted as exercising systematic political pressure on the latter. Finally, I analyze the frequency and the content of responses of the court leaders and draw conclusions about the factors which influence the effectiveness of the preservation of judicial independence.

## 2 Changes in the Hungarian Political Regime After 2010

In Hungary, until 2010, democratic and rule-of-law institutions were seemingly solid, and opposition parties had a realistic chance of winning political power in free and fair elections. After 2010, when the right-wing Fidesz–Hungarian Civic Alliance (Fidesz party) defeated the then-governing Hungarian Socialist Party (MSZP) in the general election and took political power, the situation changed surprisingly fast.

According to Freedom House’s latest list, Hungary is the only EU Member State not classified as a democracy but as a ‘Transitional or Hybrid Regime’.<sup>5</sup> Hungary has also gradually slipped down the ‘Rule of Law’ world rankings, placing last among EU countries on the World Justice Project index regarding the conditions for the rule of law in 2021. It is currently 69th on the global list with an overall score of 0.52 out of 1 (compared to 33rd in 2014, with an overall score of 0.61).<sup>6</sup>

Many legal and political scholars have sought to describe the essence of the political system in Hungary after 2010.<sup>7</sup> Tóth argues that new authoritarianisms (such as in Hungary) represent a *sui generis* political system located between the opposite poles of democracy and autocracy, and one of the main characteristics of those systems is the pretence of democracy.<sup>8</sup> Halmi writes on Hungarian ‘illiberal

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<sup>3</sup>An exception is a research project entitled *Judges under Stress* led by Hans Petter Graver. Graver (2018).

<sup>4</sup>The questions are taken from Graver and his co-author. Graver and Čuroš (2022), pp. 1147–1158.

<sup>5</sup>Freedom House (a). See the detailed country report on the condition of governance, civil society, media independence, elections etc., at Freedom House (b).

<sup>6</sup>World Justice Project: Rule of Law Index 2021, <https://rb.gy/tj1vqk>; World Justice Project: Rule of Law Index 2014, <https://rb.gy/kiadmj>.

<sup>7</sup>A more comprehensive account can be read in this book’s introductory chapter by Fruzsina Gárdos-Orosz and Nóra Bán-Forgács.

<sup>8</sup>Tóth (2019), pp. 37–61.

democracy’,<sup>9</sup> while Pap characterizes the phenomenon as ‘new populism’, which ‘is hollow in the sense that there are no positive, alternative grand narrative constructions. Playing on the criticism and rejection of the current discourses, political and policy regimes seem to suffice. This shallowness and emptiness are the unique and engaging features of the (potentially exportable) Hungarian model of illiberal democracy and, as I argue, of new populism.’<sup>10</sup>

Finally, Guriev and Treisman describe some modern forms of politically oppressive regimes (including that of Viktor Orbán, Prime Minister of Hungary) as ‘informational autocracies’. In these systems, the rulers are keen to monopolize power, like traditional dictators, but they do it with a new strategy: ‘Rather than intimidating the public, they manipulate information—buying the elite’s silence, censoring private media, and broadcasting propaganda—in order to boost their popularity and eliminate threats.’<sup>11</sup>

The above-outlined model of governance (a pretence of democracy and rule of law, dominance over and manipulation of the media, populist public policy and communication) is reflected in the government’s measures and communication toward the Hungarian justice system. In the following step, I present the Hungarian judicial structure, which is essential for understanding the response of the court system to challenges deriving from the political sphere.

### 3 Hungarian Judicial Structure

In the construction of a modern court system, Hungary followed the so-called Prussian model. According to this, the judge is a well-educated, competent and disciplined bureaucrat, a legal specialist whose primary duty is the unbiased and impersonal application of the law.<sup>12</sup> This model can also be characterized as a ‘Weberian’ one.<sup>13</sup>

Another feature of the bureaucratic Hungarian judiciary has been that—from the beginning of the modern era—the judge has been a part of a hierarchical organization<sup>14</sup> in which their activities outside of adjudication have been controlled by other, higher-ranked judges. At the time of the transition from a feudalistic judicial system to a liberal one in the late nineteenth century, having strict, bureaucratic control over judges was very reasonable. Accordingly, the understanding of members of the judiciary was that they were subordinate officials.

<sup>9</sup>Halmai (2021), pp. 51–74.

<sup>10</sup>Pap (2018), pp. 2–3.

<sup>11</sup>Guriev and Treisman (2019), pp. 100–127.

<sup>12</sup>Máthé (1982), pp. 17–26.

<sup>13</sup>Weber (1978) pp. 809 and 853.

<sup>14</sup>Damaška (1975), p. 481.

During the socialist era, the bureaucratic character of judicial work became stronger. In the 1950s, the government had the right to remove judges from their positions or transfer them to another court without their consent.<sup>15</sup> From the mid-1960s onwards, during the age of the ‘soft dictatorship’,<sup>16</sup> direct political influence on courts gradually disappeared; however, the bureaucratic mentality of judges was further strengthened. Judges were generally conceived of as technocrats and apolitical civil servants.<sup>17</sup>

In the process of the post-1989 political transition, ideas of reforming the judicial system received surprisingly little attention from the designers of the new constitutional setup. The latter focused only on the formal constitutional guarantees of judicial independence, while changes in the internal court structure were not on the agenda.<sup>18</sup> This can be explained by the fact that judges were generally conceived of as neutral bureaucrats in the late socialist period, not as servants of the communist regime; thus, their individual independence was somehow taken for granted. As a result of this, while organizational independence was guaranteed, the individual autonomy of judges remained limited to their freedom of decision-making.

That is why, after the political transition, the control of judges’ administrative activity by their superiors remained at the same level. This means that serious administrative decisions such as case assignments, individual assessments of judges, promotions, the initiation of disciplinary procedures, and—to a certain extent—salary increases have remained within the court leaders’ competence.<sup>19</sup> There are only a few vague criteria in the relevant laws concerning the exercise of these powers.

Therefore, judges in lower courts are generally encouraged to align their judicial activity predominantly with the viewpoints of the reviewing second instance panel and its judicial style, regardless of any opposing professional convictions.<sup>20</sup> Accordingly, within a bureaucratic judicial system, the successful preservation of judicial independence in decision-making is highly dependent on the behaviour of court leaders.

In the following, I will show what governmental communication was directed towards the courts between 2012 and 2020 and why the hypothesis that the latter should be understood as pressure and not just as criticism (which is natural in a democratic public domain) is justified.

<sup>15</sup> Horváth (2017), p. 128.

<sup>16</sup> From 1963 until 1989 in Hungary, the authoritarian political leadership gradually abandoned open aggression and threats toward citizens and tried to acquire legitimacy by creating social and financial security for people. Besides this, it introduced some civil liberties in limited forms. Gitelman (1981), pp. 187–210; Nyssönen (2006), pp. 153–172.

<sup>17</sup> Fleck (2001), p. 105.

<sup>18</sup> Révész (2017), p. 122.

<sup>19</sup> Ravasz (2015).

<sup>20</sup> The Hungarian situation in this regard is very similar to that of the German courts. Lautmann (2011), pp. 116–119.

## 4 Governmental Communication Concerning the Courts in Two Different Political Eras

In this subsection, I look at governmental communication from 2012 to 2020. The endpoints are chosen because these years were almost entirely determined by the work of two judicial leaders—the President of the Supreme Court of Hungary (Curia) and the President of the National Office for the Judiciary—who were elected by the Fidesz-led parliament, and whose decisions and statements fundamentally shaped the activity of the court system and the external image of the courts.

In 2021, when András Varga Zs. was appointed President of the Curia, a new story began. He, as opposed to the previous president, Péter Darák, had not served as a judge before his appointment. In his scholarly work, he has openly represented the government's viewpoint on the rule of law, labelling it an 'idol'.<sup>21</sup> His personnel policy, especially the reorganisation of the structure of the adjudicative panels in the Curia, is also accused of being in Fidesz's interests.<sup>22</sup>

In order to show how challenging government pressure has been in the Fidesz era, it is necessary to compare this period with the one before it. From a methodological point of view, it seems optimal to compare the period 2012–2020 with 2002–2010. On the one hand, they both cover a relatively long period of homogeneous governmental politics: between 2002 and 2010, a left-wing (socialist and liberal democrat), and between 2010 and 2020, a right-wing (Fidesz-led) parliamentary majority and government were in power. On the other hand, news about the relationship between the government and the courts can be reliably traced back to around 2002 on internet news portals, greatly facilitating the research work.

For a better overview, I have included in two tables specific statements addressing the work of the courts. These include the information necessary to identify the politicians and the cases, the exact wording of the criticism/expectation or its essence, and whether there was any reaction from the courts. If there was a protesting reaction, this is indicated with 'Yes', and if the representative of the judicial organization did not substantively react, I have indicated this with 'No'. The other two options were: Agreed with criticism ('Agree') and declined to give a substantive response ('Avert'). I have not written about the context of the statements; however, relevant references are included.

In 2002–2010, the following criticisms and expectations were made toward the courts by the government (Table 1).

Since 2012, many more government-aligned politicians have sharply criticized the courts' actions when they thought they had decided wrongly or made strong demands about the 'right' direction of judicial practice. For methodological reasons, I have not included in the table criticisms published by journalists who are perceived to be government loyalists since, although it is very likely, it is not possible to prove

<sup>21</sup> Varga Zs. (2019).

<sup>22</sup> Kovács (2023).

**Table 1** Government expectations/criticisms of Hungarian courts (2002–2010)

Number	Name of politician	Political function	(Essence of) criticism/expectation	Year	Reaction
1.	Péter Medgyessy	Prime minister	‘There is no democracy if anyone [a judge in a verdict] can call for exclusion [or] call their fellow human beings primitive.’ <sup>a</sup>	2003	Yes
2.	László Kovács	President of the MSZP, Minister of Foreign Affairs	He was ‘dismayed’ to learn of the judgment of a court. <sup>b</sup>	2003	Yes
3.	József Petrétei	Minister of Justice and Law Enforcement	Court procedures should be as made efficient and timely as possible using managerial tools. <sup>c</sup>	2006	Yes

<sup>a</sup>Lomnici a primitivézés ellenzőitől félti a jogállamiságot [Lomnici fears the rule of law from opponents of primitivism]. <https://bit.ly/3tiiayU>

<sup>b</sup>Árpád Szakács: Kormányzati támadás [Government attack]. Magyar Nemzet 9 November 2003. <https://bit.ly/3ttieyE>

<sup>c</sup>MTI: Petrétei elfogott levelet lobogtatja a Fidesz [Petrétei’s intercepted letter is waved around by Fidesz]. <https://bit.ly/3OdBl7t>

that the negative statements and derogatory expressions were ‘commissioned’ by the government (nor have I included the statements of journalists who belonged to the political left in the period 2002–2010). Statements from government-aligned politicians are summarized in the following table (Table 2).

The communications of the Fidesz government are similar to each other in that they avoid any legal/professional arguments, while most of them appeal directly to the sense of justice of ‘ordinary people’ using the rhetoric of populism. It is also not difficult to notice that some criticisms contain a thinly veiled threat or make specific demands about pending cases.

It can be said that while before 2010, we can speak of sporadic criticisms of court decisions that were not based on the presumed or real indignation of public opinion, after 2012, criticisms cannot be examined in isolation, independently of each other; they ‘reach a level’ both in terms of quantity and content. As such, they can be interpreted not as simple criticism but as systematic pressure.

## 5 The Response to Pressure

Although the focus of my previous research has been on what judges do (how they decide) rather than what they say (how they speak), in this paper, I take stock of how court leaders have responded to criticisms and attacks on judges’ work. This is because it is not only direct pressure that can influence judges’ decisions but also the extent to which they are supported by the court leadership and the extent to which they perceive that the leadership of the organization does not leave them alone.

**Table 2** Government expectations/criticisms of Hungarian courts (2012–2020)

Number	Name of politician	Political function	The (essence of) the criticism/expectation	Year	Reaction
1.	Tibor Navracsics	Minister of Justice	In one case, he said that sentencing practice was too lenient and asked the President of the Curia to investigate. <sup>a</sup>	2013	Yes
2.	Antal Rogán	Fidesz parliamentary group leader	The Minister of Justice should investigate why someone was released from pre-trial detention to house arrest in a particular case. <sup>b</sup>	2013	Yes
3.	Antal Rogán	Fidesz parliamentary group leader	The Curia sided with the banks in the case of foreign currency mortgages. <sup>c</sup>	2013	Yes
4.	Viktor Orbán	Prime minister	'I find the court's decision today to allow the anti-Zionist demonstration on Saturday unacceptable.' <sup>d</sup>	2013	No
5.	Viktor Orbán	Prime minister	'It is scandalous that the Curia has decided in favour of the public service providers.' <sup>e</sup>	2013	Yes
6.	Gergely Gulyás	Vice-President of the Parliament	'The judiciary lacks not only the will but also the competence to restore moral order.' <sup>f</sup>	2015	Yes
7.	Szilárd Németh	Vice President of Fidesz	As the so-called Hagyó case and the red sludge disaster verdicts outraged the majority of people, the courts must be held accountable. <sup>g</sup>	2016	Yes
8.	Fidesz (press release)		The penalty imposed on the former chief of the Metropolitan Police and his fellows is outrageously light. <sup>h</sup>	2017	No
9.	Fidesz (press release)		'The verdict in the case of socialist politician Dezső Hiszékeny is outrageous.' <sup>i</sup>	2017	No
10.	János Lázár	Minister for the Prime Minister's Office	'A certain justice of the Curia, András Baka, is very angry with Hungary and because of some 'mysterious coincidence' all company tax related cases are allocated to him.' <sup>j</sup>	2017	Avert
11.	László Kövér	President of the Hungarian Parliament	'[George Soros's organizations] have people in the judiciary.' <sup>k</sup>	2017	No
12.	Viktor Orbán	Prime minister	'The Curia has clearly and grossly interfered in the elections. Studying the ruling of the Constitutional Court, it is evident that the Curia has not risen to the challenge of its task intellectually.' <sup>l</sup>	2018	Yes (partly 'Avert')

(continued)

**Table 2** (continued)

Number	Name of politician	Political function	The (essence of) the criticism/expectation	Year	Reaction
13.	László Trócsányi	Minister of Justice	‘[I]t is common nowadays for the judge to reinterpret the law or to give an extensive meaning of the interpreted legal concept that is contrary to the legislator’s intention. In this case, the judge takes over from the legislator, and we are faced with judicial governance.’ <sup>m</sup>	2018	No
14.	István Hollik	Spokesman of the Fidesz–KDNP <sup>n</sup> parliamentary group	‘[The] Helsinki Committee holds pro-immigration sensitization training with the clear aim of sensitizing court staff from the migrants’ perspective, representing their interests.’ ‘[...] there is also a risk that in a particular case, an attorney paid by Soros to represent migrants could have a court hearing with a judge in a particular case whom he has sensitized. This clearly puts the independence of the judiciary at risk.’ <sup>o</sup>	2018	Curia-Avert; NOJP-Agree
15.	János Halász	Fidesz deputy parliamentary group leader	‘[I]t is shocking and very worrying that the Soros network has already set foot in Hungarian courts’; ‘Fidesz is requesting data of public interest to the courts about the influence of the Soros network, they would like to know who exactly, what organizations, when, where and for whom such pro-migrant sensitization training has been held for Hungarian court employees.’ <sup>q</sup>	2018	
16.	László Kövér	President of the Hungarian Parliament	‘The lawyers and politicians of our time must decide for themselves which values they will defend and on whose side they will stand: those who defend and build the state, or those who attack and destroy it.’ <sup>r</sup>	2019	No

(continued)

**Table 2** (continued)

Number	Name of politician	Political function	The (essence of) the criticism/expectation	Year	Reaction
17.	Viktor Orbán	Prime Minister	He criticized a court's decision to award compensation to the families of Roma children who had suffered segregation and another court's decision to grant parole to a convict for a crime against life. <sup>s</sup>	2020	No <sup>t</sup>

<sup>a</sup>Prime Minister Viktor Orbán said in Parliament that in a 'private' conversation he would also find the sentence too lenient. <https://bit.ly/39fNfz9>

<sup>b</sup>Babett Oroszi: Rogán bepöccent Rezesova luxusbörtöne miatt [Rogán pissed off about Rezesova's luxury prison]. 24.hu 3 December 2013. <https://bit.ly/3NJZByw>

<sup>c</sup>Rogán: a Kúria a bankok oldalára állt [Rogán: the Curia sided with the banks]. HVG 16 December 2013. <https://bit.ly/3MRWSlq>

<sup>d</sup>Prime Minister's statement, 3 May 2013. <https://bit.ly/3aRfWTw>

<sup>e</sup>Orbán harcba hív az energiaszolgáltatók ellen – percről percre [Orbán calls for a fight against energy suppliers – minute by minute]. HVG 11 March 2013. <https://bit.ly/3Hephkm>

<sup>f</sup>Tolmácsot ajánlok! [I recommend a translator!]. Népszava 26 Juny 2015. <https://bit.ly/3NS5mdC>

<sup>g</sup>Az igazság bajnokai [Champions of justice]. 168 óra 16 February 2016. <https://bit.ly/3HeWpIF>

<sup>h</sup>MTI: Fidesz: Felháborítóan enyhe a Gergényi-ítélet [Fidesz: The Gergényi verdict is outrageously mild]. Magyar Idők 13 February 2017. <https://bit.ly/3HknhQ5>

<sup>i</sup>Nem tetszik nekik a jogerős ítélet, másról fenyegetőzik a Fidesz [They do not like the final judgment, Fidesz is already threatening]. Magyar Narancs 30 January 2017. <https://bit.ly/3xFZST>

<sup>j</sup>Péter Urfi: A Kúria reagált Lázár János szavaira, aki szerint direkt olyan bíróhoz kerülnek a tao-ügyek, aki 'haragszik Magyarországra' [The Curia reacted to the words of János Lázár, who said that the corporate tax cases will be directly assigned to a judge who is 'angry with Hungary']. 444.hu 16 November 2017. <https://bit.ly/3Qhh6I4>

<sup>k</sup>Judit Windisch: Kövér átjavította a nemzeti konzultáció egy pontját – videón pár erős mondása [Kövér reworked a point of the national consultation – video of some of his strong statements]. HVG 6 October 2017. <https://bit.ly/3tyo161>

<sup>l</sup>MTI: Curia has grossly interfered in elections. 7 May 2018. <https://rb.gy/ttdn1>

<sup>m</sup>A bírói kormányzás antimemokratikus [Judicial governance is anti-democratic]. 26 May 2018. <https://rb.gy/rgcojf>

<sup>n</sup>KDNP – Christian Democratic People's Party

<sup>o</sup>A Fidesz szerint Soros György befolyásolja a magyar igazságszolgáltatást [Fidesz says George Soros is influencing the Hungarian judiciary]. 168 óra 26 May 2018. <https://bit.ly/3xSC1dv>

<sup>p</sup>NOJ – National Office for the Judiciary

<sup>q</sup>Újabb fokozatba kapcsolt a Fidesz támadása a bíróságok ellen [Fidesz's attack on the courts has entered a new gear]. HVG 27 May 2018. <https://bit.ly/39p4huG>

<sup>r</sup>A természet rendjét tagadó liberális veszély miatt a bíráknak el kell döntenüük, hogy az államot építők vagy rombolók oldalára állnak [The liberal threat to the natural order means judges must decide whether to side with the builders or the destroyers of the state]. 444.hu 24 April 2019. <https://bit.ly/3NPiQH0>

<sup>s</sup>Orbán szerint a gyöngyöspatai cigány diákok szegregációs kárpótlása mindenféle munka nélkül kapott pénzt [Orbán Orbán says gypsy students in Gyöngyöspata received segregation compensation without doing any work.]. Index 9 January 2020. <https://bit.ly/3xKNco8>

<sup>t</sup>Following the Prime Minister's statement, the panel of the Curia, which was hearing the case of compensation for segregation, stated that 'according to Hungary's Fundamental Law, judges are independent and subject only to the law, and cannot be instructed in their judicial decision-making'. <https://bit.ly/3zuXiuQ>

Between 2002 and 2010, the statements of Péter Medgyessy and László Kovács were clearly and firmly condemned by the then President of the Supreme Court, Zoltán Lomnici.<sup>23</sup> In the latter case, the president of the court that handed down the judgment also called the statement of László Kovács ‘unprecedented’. The President of the National Council of Administration of Justice, after hearing the presidents of the courts, replied to József Petrétei’s letter that they would continue to act as they had done until then, in accordance with the law.<sup>24</sup>

In contrast to this unanimity, the picture is much more mixed when looking at reactions after 2012. For the sake of clarity, these are presented separately for the actors concerned. In brackets, I also indicate the case to which a particular reaction relates using the ordinal numbers in Table 2.

## 5.1 *The Curia*

In Hungary, the Curia functions as a supreme court. Although there is no precedent system in the country (only a weak form of it was introduced in 2021), because of the wide range of ordinary and extraordinary remedies channelled to the Curia and because of its duties in the field of the unification of judicial practice, it is a judicial organ which plays a crucial role in the court system. This is why it is a justified expectation that its president should react to criticism addressed to a particular judgment or adjudicative practice.

The former President of the Curia, Péter Darák (between 2012 and 2020), responded to Tibor Navracsics’ letter criticizing the excessive leniency of sentencing practice in a statement in which he stressed the importance of the independence of the courts, while he ‘welcome[d] and underst[ood] the attention and concern of a Minister of Justice for the Curia’s responsibilities in guiding the judicial practice’ (1).<sup>25</sup> He also stood up for the Curia’s ‘foreign currency debtors’ decision, and while he recognized the importance of the social problem caused by the foreign currency debts, he said that treatment of the crisis was not primarily a task for the courts but for politics (3).<sup>26</sup> In the Rezesova case, he stressed that ‘any statement that could be used to create the appearance of influencing proceedings must be opposed’ (2).<sup>27</sup>

<sup>23</sup> Lomnici a primitívezés ellenzőitől félti a jogállamiságot [Lomnici Fears the Rule of Law from Opponents of Primitivism]. <https://bit.ly/3ttiayU>.

<sup>24</sup> Minutes of the meeting of the Parliamentary Committee on Constitutional Affairs, Justice and Administration held on 28 November 2006. <https://bit.ly/3xL1Ufb>.

<sup>25</sup> A Kúria minden megtesz az egységesítési gyakorlatért, de a Cosma-ügyben jelenleg nincs tennivalója [The Curia is doing its utmost to ensure uniform case law, but there is currently nothing to do at the moment]. 17 May 2012. <https://bit.ly/3aQdkoJ>.

<sup>26</sup> Devizahitelek – Darák Péter: a Kúria nem tehetett többet (1.) [Foreign currency loans – Péter Darák: the Curia could do no more (1.)]. 18 December 2013. <https://bit.ly/3zwJ3We>.

<sup>27</sup> Zsuzsanna Wirth: Edzett bírák akadtak ki Rogán üzenetén [Trained judges upset by Rogán’s message]. Origo 5 December 2013. <https://bit.ly/3xoJtLJ>.

The President also defended the judicial decision about the ‘consumers vs public service providers’ case on the basis of the Fundamental Law, stating that ‘public confidence in the courts can only be preserved if the opinions expressed on their work are objective, professional and based on accurate knowledge of the facts. Reactions and opinions outside the procedural framework do not influence judgments’ (5).<sup>28</sup>

On the day after the statement of Szilárd Németh, Darák responded strongly in defence of the independence of the judges, but in a general way, without referring to specific cases and without mentioning the critic’s name (7).<sup>29</sup>

In comparison, in response to a journalist’s question concerning the criticism by János Lázár, who personally attacked a judge of the Curia for his decisions and criticized the case allocation system, the Curia answered that ‘they do not respond to political statements of public figures’ (10).<sup>30</sup> The Curia expressed an almost identical reaction to press inquiries about the government’s response to the government party’s accusation that ‘Soros organizations’ were gaining ground in the courts (14–15).<sup>31</sup>

Regarding one of the most direct and clearly slanderous criticisms (the electoral case), the President of the Curia considered it important to say that anyone has the right to criticize the decisions of the courts, including the Prime Minister but also explained that ‘judges make their own professional decisions, and what the press brings up to justify [the] political motivation [of the court] is open to question’ (12).<sup>32</sup>

It must be noted that it was also Péter Darák who, at the end of his presidential term, emphasized in an interview that judges must not adjudicate for the public mood.<sup>33</sup> In my view, this can be seen as making a stand against pressure from the government because the government attacks were rhetorically made ‘in the name of the people’ instead of emphasizing any public policy considerations.<sup>34</sup>

<sup>28</sup> Darák visszaszólta Orbánnak: ‘a bírák függetlenek, nem utasíthatóak’ [Darák hit back at Orbán: ‘Judges are independent, they cannot be ordered about’]. HVG 13 March 2013. <https://bit.ly/3mJ80Gx>.

<sup>29</sup> Communication from the President of the Curia, 1 February 2016. <https://bit.ly/3mIbaue>.

<sup>30</sup> Péter Urfi: A Kúria reagált Lázár János szavaira, aki szerint direkt ilyen bíróhoz kerülnek a tao-iügyek, aki ‘haragszik Magyarországra’ [The Curia has reacted to János Lázár’s words that the Tao cases will be handed directly to a judge who is ‘angry with Hungary’]. 444.hu 16 November 2017. <https://bit.ly/3mGKiKR>.

<sup>31</sup> Judit Windisch: Behódolt a Fidesznek az Országos Bírói Hivatal [The National Office for the Judiciary has given in to Fidesz]. HVG 28 May 2018. <https://bit.ly/3aY8Nkf>.

<sup>32</sup> Tamás Németh: Elmagyarázta a Kúria elnöke a levélszavazatos döntésüket [The President of the Curia explained their decision to vote by letter]. Index 7 May 2018. <https://bit.ly/3mLov4E>.

<sup>33</sup> András Seregi: Nem a közhangulatnak kell ítélezni – Darák Péter az Indexnek [Not to be judged by public sentiment – Péter Darák for Index]. Index 2 November 2020. <https://bit.ly/3tuISH6>.

<sup>34</sup> Bencze (2020), pp. 83–96.

## 5.2 *The NOJ*

The National Office for the Judiciary (NOJ) has been much more restrained in its reactions to criticism of the courts. The reason for this may be the different conceptions of the role of the two presidents, but this may also be because the criticisms have mainly concerned judicial activity and less concerned the organizational and personnel issues that fall under the competence of the president of the NOJ.

The president reacted to Szilárd Németh's aforementioned opinion in a statement a day later, in which she 'asked' the 'representatives of the other branches of government to respect the independence of the judiciary and to trust in the responsibility of the judiciary'. During the same press conference, there was also a reference to the responsibility of the presidents of the courts: 'As long as judges are not influenced by different opinions, the courts, [and] the presidents of the courts, must pay close attention to these voices' (7).<sup>35</sup>

The response of the president to Gergely Gulyás' statement criticizing the work of the courts is also a telling one. In it, in addition to stating that 'the presidents of the courts must take more decisive action against attacks on judges', she considered the most important task to be fighting against 'delaying' cases and wanted to see the legislation changed so that annulments and orders to repeat the whole trial court procedure could only take place in the case of serious procedural errors (6).<sup>36</sup> The intention to avoid confrontation is even more apparent in the statement responding to the accusation of 'Soros organizations' gaining ground in the courts. The reaction was not that there was no evidence of any illegitimate influence (which is the case in reality), but that '[t]he general experience of recent years has shown that the activities of individuals or organizations, including education, may be aimed at imposing their preferred worldview and interpretation of the law on judges. What we believe to be benevolent knowledge sharing may in fact be an attempt to influence' (14–15).<sup>37</sup>

<sup>35</sup> Függetlenség és felelősség [Independence and responsibility]. <https://bit.ly/3mGADUE>.

<sup>36</sup> Handó Tündének elege lett a bírákat ért támadásokból [Tünde Handó fed up with attacks on judges]. HVG 23 Juny 2015. <https://bit.ly/3tw57v>.

<sup>37</sup> Oktatásnak vagy kutatásnak álcázott befolyásolási kísérletek [Attempts to influence disguised as education or research]. <https://bit.ly/3tgEjze>.

## 6 Conclusion

Looking at the reactions of the leaders and representatives of the domestic judiciary described above, several observations can be made. The first is that, over time, leaders elected by parliament have responded to criticisms of the government with less and less frequency. Until 2017, every negative government utterance but one was met with a judicial response. Thereafter, there was either no response or, if there was, it averted or accepted the criticism (and often only in answer to press inquiries). It is also important to note that several of the court leaders' statements emphasized the government's right to criticize, an element which was completely absent from the statements of leaders before 2010.

Second, the tone and the language in which court leaders communicated have become much softer and more diplomatic than before 2010; they speak now in general terms, not even mentioning the names of the politicians who attacked them or the specific cases they reacted to.

Finally, it also appears that the president of the NOJ was much less firm in her opposition to government criticism than the president of the Curia, who was responsible for the unity of judicial practice, and that agreements with criticisms came largely from her.

In light of all this, it is perhaps not premature to conclude that the constant pressure, year after year, case after case, has had its effect and that the court leaders, after a while, stopped engaging in open confrontation and became defensive. There is, therefore, no well-defined specific case to which the turnaround can be linked. Rather, reaching the 'breaking point' can be understood in terms of the analogy of the mathematical 'catastrophe theory'. The essence of this theory is that contrary to our intuition, continuously and linearly changing circumstances may not only have gradually changing effects but also cause sudden, significant transformations. For example, the  $N+1$ th straw on the back of a camel breaks the camel's back, but this straw is no different from the previous  $N$  straws ('quantity turns into quality').<sup>38</sup>

Similarly, 2017 did not witness anything new compared to the previous government's behaviour, but only a continuation of the constant pressure that may have led to the weariness of the judicial leaders. The consistency of the pressure has made the government's behaviour (even a fraction of which had caused huge uproar before 2010) increasingly 'normal'. Besides this, at that time, it was becoming more evident that Fidesz would win the following general election to be held in 2018, which is why, considering the interest of the judiciary, it would not have been a good strategy to antagonize the government.

The fact that constant criticism has created a 'catch-22' situation for these leaders has contributed to this situation. If they take little or no action, they may radically reduce confidence in the courts, as the perception will be that the judiciary has given up its independence and succumbed to pressure from the government. If, on the other hand, they firmly reject and condemn slanderous government criticism at every turn,

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<sup>38</sup> Stewart (1992), pp. 208–221.

they may unwittingly compromise the appearance of neutrality and be accused of ‘doing politics’.<sup>39</sup>

What also makes resistance more difficult is that the government does not usually criticize the courts on the grounds of its own political aims but emphasizes that the judges’ decisions are contrary to the opinion and sentiment of the average citizen. In a climate where there is growing demand for courts and their representatives to come down from their ‘ivory towers’, it is difficult for them to resist the demand to take into account the views of ‘ordinary people’.<sup>40</sup>

In addition, it cannot be ignored that the changes in the organization of the judiciary and other of the government’s activities concerning the courts, which have been negatively assessed by domestic<sup>41</sup> and international organizations,<sup>42</sup> have been *in strictu sensu* legal (even if there were legislative changes that were later found to be unconstitutional). For a legal community essentially socialized on legalism, this is also a circumstance that takes the wind out of the sails of effective resistance since it is precisely the institutional system set up to enforce the law that should be opposing government regulations that are legally flawless.

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<sup>39</sup> Shapiro (2012), p. 334.

<sup>40</sup> For more on this, see Bencze (2022), pp. 50–54.

<sup>41</sup> Amnesty International (2020); Hungarian Helsinki Committee (2018).

<sup>42</sup> European Commission: Opinion 663/2012 (CDL-AD(2012)001), <https://bit.ly/3Hidlhn>; European Commission: Opinion 683/2012 (CDL-AD(2012)020), <https://bit.ly/3MJ5Tgr>; European Commission: Opinion 943/2018 (CDL-AD(2019)004), <https://bit.ly/3MI1Ukb>; European Commission: Opinion 1050/2021 (CDL-AD(2021)036), <https://bit.ly/3MJKxzq>; European Parliament: Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012 (2012/2130(INI)), <https://rb.gy/9sgpcz>; European Parliament: Report on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), <https://rb.gy/yhzdn5>; ENSZ-szakértő: veszélyben a magyar bíróságok függetlensége [UN expert: independence of Hungarian courts at risk]. HVG 8 April 2019. <https://bit.ly/3HdC8TT>.

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