Collapse of the independent institutions

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Last week, members of the political community were shocked more and more, each day. Independent institutions, which are responsible for controlling the acts of the state in order to monitor the maintenance of constitutionality, proved to be dysfunctional in fulfilling their responsibilities. These independent institutions failed to appropriately address critical electoral issues, even though, this failure of checks and balances is of the utmost importance as elections are the foundation of a democracy. The legitimacy of the Government depends on whether the elections are held under equal and fair conditions, or not. Citizens can accept the final outcome of elections only if they can be sure of the fact that the elections were held in a free and fair manner. This can primarily be ensured by the relevant state institutions who take all the necessary measures in order to guarantee the fairness of the electoral process. The current performance of the relevant Hungarian institutions, which are supposed to be independent from the Government, raises serious doubts.

The following conclusion can be drawn based on the "performance" delivered by the independent institutions throughout the last week: those striving for a radical change of Hungarian public law have achieved their final goal. The procedures and legal mechanisms which could provide substantial corrections on anti-democratic decision-making according to the rule of law have ceased to exist. The Constitutional Court (hereinafter, CC) refuses to review cases which touch upon the core of democracy based on unreviewable criteria. In this way, it avoids the potential risk of having to declare that clearly unconstitutional rules are in accordance with the Fundamental Law. Its decisions on rejection indicate arbitrariness, and significant cases are unresolved. This is a direct consequence of the new laws which provide blurred norms on the proceedings of the institution and is the result of the appointment of the governing party's political stakeholders to the judges of the CC. The unlawful cessation of the institution of the independent parliamentary commissioner of data protection and its replacement with the theoretically independent National Authority for Data Protection (hereinafter, NADP) seem to be even more harmful measures. The Head of the NADP did not hesitate to issue a statement which goes against a fundamental right falling under his protection and which is lacking the legal basis and goes against the relevant law. The cases of last week – affecting the elections – indicate that the possibility of corrections was duly removed from the Hungarian legal system. The performance of the independent institutions leads us to the conclusion that they rather serve the aims of the Government than constitutionality or the protection of fundamental rights.

The CC rejected two individual complaints within a couple of days, both based on formal reasons avoiding merit based decisions. One of the complaints questioned the constitutionality of the decree that extended the restrictions applicable in case of commercial posters to election posters, arbitrarily broadening the already existing restrictions provided by the Act on Electoral Procedure. In the view of the CC, it is not an issue of constitutionality. According to the second

complaint, the distinction drawn between those voters who have Hungarian citizenship but no residence in Hungary – the so-called non-resident Hungarians – can vote via mail ballot, while those having permanent residence in Hungary but staying abroad can vote solely at embassies or consulates. According to the CC, the complainant was not entitled to file a request for review of the relevant legal provision, since he was not directly affected by the law. The Head of the NADP took the stance that it would impose a disproportionately large burden on the election offices (and possibly even endangering the procedure of the elections) to examine whether there were any candidate who misused personal data in order to gain nomination ballots needed for registration in the elections. In addition, the National Election Commission (hereinafter, NEC) ignored the information that made it presumable that nomination ballots were misused on a massive scale and refused the argument that the examination of the phenomenon would be the task of the election authorities.

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1. Decision of the Constitutional Court on the special restrictions applicable to election posters

The Fourth and Fifth Amendment of the Fundamental Law, the new Act on Electoral Procedure and the relevant lower level implementation laws, have drastically changed the election campaign process. An election campaign should fulfill two functions: first it enables political parties to communicate their views and to convince the voters, at the same time, it enables citizens to gain information needed for making a decision on the day of the election.

The Fourth Amendment of the Fundamental Law would have entitled only the public media to broadcast political advertisements. This amendment was overridden by the Fifth Amendment as a response to of international pressure, hence, the right to air political advertisements was extended to the commercial media. However, according to the Fifth Amendment they can only be broadcasted free of charge. Due to the fact that commercial media generally are for-profit entities, it was not surprising to find that none of the commercial media service providers airs campaign spots. Therefore, campaign messages will only reach the citizens via the public television and radio stations, which do not reach a large percentage of the population.

At the same time, commercial media service providers were charged with airing a campaign spot by the Government. The campaign spot was composed of the same types of slogan and visual elements as an advertisement of the governing coalition, and it was handed over to the governing parties by the Government for an insignificant amount of money. According to the decision taken last week by the NEC, the advertisement broadcasted by the commercial media does not qualify as a political campaign spot, even though the two spots were identical in their content. The justification was that the regulation does not apply for the case of the Government. Therefore, the decision of the NEC enhanced the advertisement disparity through keeping the doors of the commercial media closed for campaign of the opposition political parties and letting the Government advertise slogans in favor of the supporting political parties freely in the commercial media.

Under such media regulations – which in our view violate international law – how political parties can reach out to voters via alternative communication channels is an issue of utmost importance. The governmental decree on the location of billboards was amended in mid-January. Its provisions now also apply to election posters used according to the Act on Electoral Procedure and which have always been a usual tool for political campaigns. The Act on Electoral Procedure provides detailed regulation on the location of campaign posters with special regard to the campaign period. For instance, election posters can be put on the walls of a building only with the approval of its owner, and on the walls of public buildings or in certain public areas only

under the conditions defined by the local self-government. Compared to the reasonable and narrow restrictions imposed by the Act on Electoral Procedure, the governmental decree introduced much broader restrictions on the location of political advertisements. The decree prohibits the location of advertisements, for instance, on lampposts, above public roads or on the open road within 100 meters from a highway and primary routes. This prohibition does not make a distinction between an advertisement of a firm producing toothpaste or an election poster of a political party.

The candidate of a political party whose poster was placed on a lamppost and who was found responsible for violation of the law by the NEC and the court, after having exhausted all the possible remedies turned to the CC by filing a constitutional complaint. The complainant claimed that political communication enjoying the legal protection of freedom of expression was regulated by a governmental decree, even though according to the relevant provisions of the Fundamental Law and the unambiguous case-law of the CC fundamental rights may be restricted only by Laws. The CC rejected the complaint without deciding on the merits reasoning that the complainant did not present a detailed argumentation on the issue of how his right to freedom of expression was violated by the decree and by the judicial decision delivered based on that.

For those who have kept an eye on the decisions of the CC throughout the last few years it is common knowledge that the court prefers rejecting complaints based on reasons of formalities in order to avoid merit based decisions. In the present case, where it is obvious that restrictions imposed on the location of campaign posters also impacts the communication rights of the candidates, rejection of the complaint can be qualified as an especially serious mistake since this argument was detailed in the complaint. This is underpinned by the fact that seven of the judges attached dissenting opinions to the decision, all of whom took the stance that the complaint was not deficient and the CC should have made a decision based upon merits.
The absurdity of the majority opinion could be similar to a hypothetical situation where a citizen filing a complaint against the death penalty imposed on him would be obliged to convince the court that capital punishment would restrict his right to life. Under such circumstances, it would be difficult to talk about fair campaign regulations, constitutional justice or efficient protection of fundamental rights in Hungary.

2. Decision of the Constitutional Court on the possibility to vote by mail
As of today, it is widely known that voters staying abroad have the possibility to cast their votes under unequal conditions. Those who have registered address in Hungary are allowed to vote only personally at Consulates or Embassies of Hungary – not sparing their time and money for the travel. At the same time, those citizens who do not have registered address in Hungary may vote also by mail that requires insignificant time and money.[1] The differentiation between the two groups is a violation of the principle of equality in the right to vote and before the law. It is also known that both the Government and the National Election Office encourage those without registered address in Hungary to take part in the parliamentary elections and do everything to have an increased number of voters from those living beyond (and having no permanent address within) the borders of Hungary by overlooking the mistakes of the registration forms.[2] Meanwhile, those with registered address in Hungary, who are much more closely tied to

[1] People with Hungarian nationality, who have never lived in Hungary and do not plan to move there either, live mostly in countries of the Carpathian Basin on territories that were part of the former Kingdom of Hungary before the end of the First Word War are granted Hungarian citizenship by the ruling government, while citizens with registered domestic address often leave the country to work abroad because of the insufficient possibilities in Hungary.
[2] Those without registered address have to register as voters on the list of voters by mail.

Hungary and bear significant financial burden to take part in the elections, have to face serious difficulties already when registering at the Embassies as voters.[3]
The obviously discriminatory and consequently unconstitutional regulation has been challenged by constitutional complaints of a number of individuals – such as a client of the HCLU – several months ago. Less than one month before the date of the elections, the CC delivered its decision no. 3048/2014. (III. 13.) AB dismissing a constitutional complaint. The complainant had requested the nullification of the discriminatory rule restricting the possibility to vote by mail in the case of certain people staying abroad on the day of the parliamentary elections. Through the nullification of the restriction, the possibility to vote by mail would have been extended to everyone staying abroad. The CC did not even consider the complaint based upon its merits and refused it for formal reasons, holding that the applicant was not concerned by the impugned regulation. What was the reasoning behind this stance? The CC held that one of the impugned rules entitled only those without registered address in Hungary to vote by mail and the petitioner was not a member of this group of people. However, the petitioner was placed in a disadvantageous situation exactly by the failure of the rule to cover the petitioner's situation. As the igyirnankmi-blog writes: „Of course, this is a bit similar to it as if the Supreme Court of the US would have dismissed a petition of an afro-American challenging services available exclusively for the white citizens by arguing that the contested rule concerned only the white people, therefore, afro-American citizens were not affected by it."

By this decision the CC not only denied the only legal remedy capable of restoring the equality of tens of thousands of Hungarian citizens in the right to vote, but it also arouse serious doubts as to whether the CC will ever deal with a complaint concerning discrimination in which the petitioner claims that the impugned rule unlawfully discriminated him/her just by failing to provide him/her with the same advantages given to others? Is the right to be equal before the law still an enforceable right in Hungary?

The petition of the complainant represented by the HCLU has been declared admissible and is pending decision, but due to the above discussed developments there is not much reason to be optimistic. It is apparent that the CC does not dare to act as an independent guardian of one of the cornerstones of a democratic and constitutional state, namely the constitutionality of the election procedure. Its decision of last week on the voting by mail indicates that the CC wriggles out of its obligation of defending the right to vote not only by arbitrarily construing the rules of constitutional complaint procedures. This time, the CC interpreted its own procedural rules that resulted in protecting the supporters of discriminatory law-making, namely protecting the Parliament disregarding the equality of citizens before the law.

3. The resolution of the NEC and the position paper of the Head of the National Authority for Data Protection on the investigation into misuse of data included in nomination ballots
For the first time, this year's voters were entitled to support the nomination of more than one candidate with their signatures. This new rule enabled political parties to exchange signature and personal data of voters and to sell or buy them of each other. 500 supporting signatures were needed to register someone as a candidate. In case a candidate did not obtain 500 signatures, more candidates could still share their signatures and as such reach the necessary number of signatures for each candidate.

Data included in the nomination ballots are handled by the election offices of election districts and election commissions. Election commissions registered the candidates based on the nomination ballots managed by election offices. For registration, the election offices checked all the nomination ballots within three days after their arrival. Although the election authorities did

[3] Those with registered address in Hungary must register at the Embassy where they want to cast their vote.

not experience any anomaly while registering the candidates, a number of news sources and reported facts highlighted the malpractice that occurred on a large scale.

Data and signature of the citizens are personal data that are under the enhanced protection of criminal law; misusing them invokes criminal responsibility. Violation of legal rules on the elections also qualifies as a criminal act. (Investigations have already been triggered based on the suspicion of the misuse of signatures.) This practice – which was made possible by the new Act on Electoral Procedure – is even more worrisome due to the following facts: First, it opens up the possibility for certain candidates and parties to gain financial support for a campaign without a genuine intention to take part in the election. This malpractice is facilitated by the circumstances (created also by the legislator) that the financial support to the amount of hundreds of millions is provided from the central budget to those parties who can create a party-list based on their candidates and that the use of this public fund is not controlled efficiently. In addition to the fact that the misuse impairs the central budget, this malicious participation in the election process also questions the fairness of the whole electoral process. The cases of such serious violations of law which even invoke criminal responsibility, in our view, clearly provide a good reason for the election commissions (who are supposed to control the legality of the elections) to thoroughly examine potential cases of misuse and in case of serious suspicion to file criminal reports. In case they fail to do so, they will raise serious doubts about the transparency, effectiveness and democratic procedures associated with the elections.

Parties creating fraudelent lists may take votes from parties having a real chance for getting into the parliament. In this way, they can influence the balance of forces between the governing and the opposition parties.

The NEC rejected the relevant complaints based on an outrageous reasoning. It held against the complainant that he referred only to the link of a news portal and failed to attach the entire relevant article, as well as that he only initiated the hearing of a journalist, but failed to attach the statement of the journalist (briefly, he failed to submit documentary evidences). Following these arguments, it stated that election offices handling nominations are not specifically obliged by the Act on Electoral Procedure to control the genuineness of signatures. In the present case where the NEC interprets the Act on Electoral Procedure so narrowly that election authorities are not supposed to control the genuineness of the signatures even if there is a reasonable suspicion of fraud, the NEC not only enables certain candidates and parties to endanger the credibility of elections, but also itself violates its obligation to safeguard the fairness of the elections. To top it all, the NEC argued that the complainant should not have called the election authorities to enforce the principle of exercise of rights *bona fide* but he should have respected it himself by refraining from filing complaints.

Fortunately not only the Act on Electoral Procedure but also the Act on Information Rights and the Freedom of Information provides regulation on handling personal data relevant to nominations. According to these rules, the subject of the concerning data is entitled to request information about his or her personal data handled by the authorities. The Head of the NADP issued a preliminary statement on Friday upon a request which posed the question whether voters who signed for a candidate's nomination are entitled to obtain information from the election authorities about the potential misuse of their personal data. According to the Head of the NADP, this would pose such an extreme workload on the election authorities that it could not be managed without endangering the procedure of the elections. According to the calculation done by the index.hu which turned to the NADP, each data-check would take three working hours.

The position of Attila Péterfalvi confirmed all of the previous doubts raised by the cessation of the independent office of the parliamentary commissioner for data protection and the establishment of the NADP. While it can be reasonably presumed that the misuse of personal data of voters was committed on a large scale, and the current legal regulations make it possible to conduct proper investigations on the relevant cases, the head of the authority which is supposed to protect personal data is opposing any kind of investigation referring to unacceptable and legally uninterpretable reasons. In such a way, he directly goes against the mandate of his own institution and in doing so makes the information rights meaningless.

The position paper of the Head of the NADP is fortunately not the final act in the proceeding discussed above. In case the election authorities reject also those motions which were filed by the voters aiming at the investigation of potential misuse of personal data, the decision on rejection can be appealed against before court. Since according to the law, nomination ballots must be preserved for 90 days after the election, for the sake of the fairness of the elections we encourage everyone - who supported a candidate on a nomination ballot - to request the investigation into the use of his or her own personal data using the following form.

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Following all the foregoing events, the sole (although significant) positive development was the correct decision delivered on Monday by the Curia that confirmed the basic principle of rule of law, namely, that fair decisions can be expected only from independent institutions and stakeholders. The supreme judicial body held in its decision - delivered at the end of a review proceeding on the decree restrictions on posters - that rules provided by the Act on Electoral Procedure cannot be overwritten by governmental decrees.