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**Characteristics of the opportunities for state intervention in the economy in  
the light of the Fundamental Law**

Doctoral theses

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2022

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## 1. SUMMARY OF THE RESEARCH OBJECTIVE

### 1) Justification of the choice of topic

In Hungary's economic constitutional law, 2011 marked the beginning of a new era with the birth of Hungary's new constitution, the Fundamental Law of Hungary<sup>1</sup> (25 April 2011), which was drafted<sup>2</sup> by the constitutional authority in a way that recognised and grasped the potential of responding to the challenges and crises of the 21<sup>st</sup> century, by elevating significant and hitherto missing provisions to constitutional level (e.g. the inalienable and substantive constitutional court interpretations of certain fundamental rights, financial provisions, etc.) and by omitting other elements (e.g. vestiges of socialism). In choosing the subject of the dissertation, I was motivated by several different aspects, the main one being that I have a personal involvement in one of the subject areas, as I spent my mandatory internship at the Constitutional Court as part of my legal studies. This was the time when the assessment by the Constitutional Court of the constitutionality concerns raised by the legislative act on consumer loan contracts and the settlement by the state of the legal problems that emerged from the great global crisis of 2008 was on the agenda, and these experiences made me so intensively and decisively aware of my professional and wide-ranging interest in the subject that the topicality and "public relevance" of the subject of these doctoral theses became clear to me, and as such *their importance, relevance and interest for research and, in particular, for the everyday person*. At the same time, I tried to avoid making the subject an overpriced topic of theoretical historiography, on which many studies and monographs have already been written.

### 2) A brief summary of the research task

The subject of the doctoral thesis is the presentation of the possibilities of state intervention in the economy and their characteristics in the light of the Fundamental Law, which, in examining the relationship between the state and the economy, requires an analysis of the provisions of the Constitution relating to the economic order, since certain tasks of the state in the economy

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<sup>1</sup> The Fundamental Law of Hungary entered into force on 1 January 2012.

<sup>2</sup> The legislative process started in the summer of 2010, and de facto began on 14 March 2011, when the draft (T/2627 Hungary's Fundamental Law) was submitted to Parliament. (date of downloading: 22.02.2019 <https://www.parlament.hu/irom39/02627/02627.pdf>)

depend on its role, and thus the implementation of state tasks requires a preliminary—constitutional—clarification of the main directions of the state’s economic role<sup>3</sup>.

As the Constitution was replaced by the Fundamental Law in 2012, which resulted in changes—sometimes minor, sometimes major—in the content of the relevant fundamental rights and constitutional guarantees, the Constitutional Court was forced into situations where it accepted as fact the arguments of legislators that it could not actually verify (“overriding public interest”, “national security considerations”, etc.). In this context, the question to be examined also arises: what freedom does the state enjoy as a legislator when it restricts certain fundamental rights, constitutional values and legitimate expectations on the grounds of public interest? In other words, how is the Constitutional Court able (or able at all) to impose genuine conditions on the constitutionality of the state’s legislative acts?

This examination includes the theoretical legal background of the topic, the relevant legal provisions and the results of their constitutionality assessment, i.e. the decisions of the Constitutional Court in each case and their analysis, their comparison and the issues of convergence and divergence in the field of fundamental rights protection. All in all, the aim of this dissertation is to review and compare the development of fundamental rights protection in Hungary after the entry into force of the Fundamental Law and to examine the system of interrelationships holistically<sup>4</sup>.

### 3) Objective of the theses

The objective of this doctoral dissertation is to present and analyse the economic constitution, as regulated by the Fundamental Law and as it appears in practice, from the perspective of the role expected of the state in the 21<sup>st</sup> century. The main focus of the dissertation is on the Hungarian practice regarding the level of constitutional protection of certain constitutional (fundamental) values and fundamental rights in the field of economic constitutional law in the light of the Fundamental Law, but in addition to the decisions of the Hungarian Constitutional Court, I will also refer to the decisions of the Strasbourg-based European Court of Human

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<sup>3</sup> József Petréttei: Rule of law and the distribution of power. In: Selected chapters from the field of systematic constitutional studies (Ed. László Kiss). Pécs, Faculty of Law of Janus Pannonius University, 1996., pp. 22-23.

<sup>4</sup> However, I would like to note that I will not present and analyse the less significant decisions of the Constitutional Court, which are not relevant in the shadow of the main decisions, because the formal framework and scope of the dissertation do not allow their analysis. I will refer to them only where and insofar as they are essential to the completeness of the topic.

Rights<sup>5</sup> (ECtHR) and the European Court of Justice<sup>6</sup> (CJEU) in Luxembourg, which point the way forward, without going into detail on the practice of these courts<sup>7</sup>. The main reason for this is that the decisions of the latter two judicial organisations are legally binding on Hungary, as a consequence of the international conventions establishing them, but the enforcement of their decisions could be the subject of a separate treatise.

My research had three objectives: first, to clarify the basic legal concepts of certain fundamental rights through national and foreign practice, and second, to show, by means of examples (legislation and decisions of the Constitutional Court), that the legislator often interprets the reference to the “public interest” as a formal command of constitutionality to be fulfilled. Third, in order to approach the topic in a complex way, it was inevitable to answer the question of whether there is a constitutionally relevant solution to the situation.

The aim of this dissertation is, therefore, to give a comprehensive picture of the characteristics of the state’s opportunities to intervene in the economy, with emphasis on the Hungarian Constitutional Court’s practice, to holistically evaluate these using dogmatic and critical analytical methods, to point out their possible contradictions and shortcomings, and thus to formulate *de lege ferenda* proposals for the future.

## 2. BRIEF DESCRIPTION OF THE RESEARCH METHODS AND ANALYSES USED, PROCESSING METHODS

This dissertation examines the characteristics of state intervention in the economy. My dissertation is based on primary and secondary sources: as primary sources, in addition to the analysis of the decisions of the Constitutional Court, I tried to include the most significant foreign practices/studies on the topic. The dissertation prioritises, therefore, the case-law approach by examining other relevant legal documents, contracts, legislation and reports as well. As far as the secondary sources are concerned, I sought to process the now significant Hungarian literature in its entirety (the dissertation is based on several books, articles published in collections of papers and journals) and I also sought to take into account and synthesize the results of both foreign and Hungarian legal literature. It is true, however, that Hungarian sources

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<sup>5</sup> European Court of Human Rights

<sup>6</sup> European Court of Justice

<sup>7</sup> I will also outline the practice of these forums in a separate section.

are somewhat predominant, partly due to the relevance of the Hungarian aspects of the topic. I have used both print and internet sources to cite the literature.

As regards the methods used, besides dogmatic analytical and descriptive methods, I have also emphasized the comparative method at certain points in the doctoral dissertation, so that the dissertation contains both the descriptive method and the methods of dogmatic synthesis and deduction.

As a (general economic) foundation of this dissertation, it is not possible to omit the outline of the economic principles of the concept of the economic constitution, which is the foundation of the topic, as well as its content and the history of the development of the state's role in the economy, which also helps to place and analyse (economic) fundamental rights in the system of fundamental rights. The first part of the dissertation clarifies, therefore, the history of the development of state involvement, the concepts of economic order and economic system, and the main features of the market economy. In this part of the dissertation, I have drawn on economic literature in a number of places, but I have not attempted to make an in-depth analysis of it. In the second part of the doctoral dissertation, I presented the legislative solutions to the cardinal issues and their background, as well as an analysis of the decisions of the Constitutional Court. In the third part, since we are talking about a two-year period, it is not possible to exclude from the topic an inventory of the legislative acts passed during the qualified period, in a state of emergency, and an analysis of the decisions taken in connection with them. The dissertation concludes with a final section summarising the main conclusions and recommendations, but I have not numbered this section.

The formulation of my proposals for making the current system of examination more effective was greatly assisted by my participation in the Civics Workshop project "Challenges of State Organisation and Governance in Hungary after the Entry into Force of the Fundamental Law", supported by the flagship project "Improvement of the Civil Service for Good Governance", and by a series of consultations with experts with considerable professional knowledge.

### 3. A SUMMARY OF THE RESEARCH CARRIED OUT AND ITS RESULTS, AND USE OF THE RESEARCH RESULTS

#### 1) Short summary of the academic results

The doctoral dissertation examines the characteristics of state intervention in the economy after the entry into force of the Fundamental Law. Since the core question regarding the constitutionality of the provisions challenged in the petitions submitted to the Constitutional Court in relation to the regulations adopted in the last decade was in fact the role of the state in the economy, the starting point for the elaboration of the cardinal guiding principle of the doctoral dissertation is the *principles and constitutional theses* of the Constitutional Court in its previous practice in relation to the economic function of the state (its relationship to economic policy in the context of the state's role in the economy). As regards the state's relationship to economic policy, the foundations were generally laid by Decision No 33/1993. (V. 28.) of the Constitutional Court, which stated that [...] The Constitution is neutral in terms of economic policy, beyond the declaration of a market economy. The extent, the power, still less the prohibition of state intervention... cannot be directly deduced from the Constitution. The freedom of the legislator to determine the economic policy of the state... is very great, and the competence of the Constitutional Court is very limited". (1993 Decisions of the Constitutional Court, 247, 249-250)

These findings were further developed by the Constitutional Court in its Decision No 21/1994. (IV. 16.), which stated that "as a direct characteristic of the market economy, the Constitution only contains that public and private property are equal and enjoy equal protection. Moreover, the Constitution does not commit itself to any substantive market economy model. [...] The Constitutional Court may, therefore, define the critical level of state intervention in an abstract and general way, limited to extreme cases, the exceeding of which is unconstitutional because it is detrimental to the market economy. Intervention that would conceptually and obviously preclude the existence of a market economy, such as general nationalisation, could be deemed to be such.

In its Decision No 8/2010. (I. 28.) on taxes on certain high-value assets, the Constitutional Court added that the definition of economic policy becomes a matter of constitutionality if a specific legislative implementation of economic policy is carried out in a manner that violates a constitutional right or is discriminatory. [Decision No 59/1995. (X. 6.) of the Constitutional

Court, in 1995 Decisions of the Constitutional Court, 295, 300.] (2010 Decisions of the Constitutional court, 23, 54) The market economy has become a fact in terms of constitutional law and has remained a programme; on the other hand, its maintenance and protection is also a continuous constitutional task, which the state can and must achieve by supporting economic competition as provided for in the Constitution, and from 2012 in the Fundamental Law, but above all by enforcing and protecting certain fundamental rights.

In the last decade, the legislator has established new regulatory regimes in several sectors of the economy, based on different foundations, which have negatively affected some of the actors involved in the sector, and, after the adoption of sectoral legislation (amendments), it was expected that those negatively affected by the legal regulation (slot machine operators, tobacco retailers, savings cooperatives, banks, etc.) would exercise their right guaranteed by the Fundamental Law and international conventions to initiate proceedings in all possible fora to neutralise the provisions that were detrimental to them.

The Fourth Amendment to the Fundamental Law, in its Article 19, stated, among its final provisions, that “Constitutional Court decisions taken before the entry into force of the Fundamental Law shall cease to have effect”. The Constitutional Court, however, soon made it clear that where its decisions on the application of the previous Constitution remained relevant after the entry into force of the new Fundamental Law, it would apply the interpretative principles it had previously developed. (See Decision No 13/2013. (VI. 13.) of the Constitutional Court.)

With regard to the constitutional protection of the fundamental right to property and the constitutional conditions for the restriction of this fundamental right, Article XIII of the Fundamental Law does not differ in substance from the provisions of the former Section 13 of the Constitution, but after the entry into force of the Fundamental Law, the Constitutional Court’s attitude towards property and the extent of the state's economic role has changed noticeably.

With the entry into force of the Fundamental Law, the change is not so much in the constitutional conditions as in the fact that the legislator made much greater use of the right to property, by law, than before: the object of state intervention was typically not traditional things (real estate), but the deprivation of the rights (legal, or at least in economic terms, the rights of property) of the actors doing business in certain economically significant markets. The legislator has acted in a formative way in long-term contractual relationships; sometimes to



protect one party to the relationship (the consumer) and sometimes to oblige businesses to leave the market for reasons of public interest or national economic considerations.

This also required (at least partly) a change in the legislator's attitude. Over the last decade, a number of problems and crises have arisen which the legislator has sought to resolve by means of powerful legal intervention, and thus to deal with the problem quickly and, in some respects, efficiently. In such cases, a choice has often had to be made between a protracted but constitutionally sound solution and a quick and effective solution to the problem, in the latter case with less emphasis on constitutional guarantees.

State intervention in these cases has always been justified by the legislator: sometimes with stronger and more convincing arguments and sometimes with less acceptable ones. In some cases, the reasons justifying the intervention are not sufficiently convincing, with the legislator's frequent reference to the categories of public interest, economic necessity, national security risk, etc.; therefore, the Constitutional Court has been able to "judge" them in its decisions only in a rather contradictory manner.

The transformation of the state's role in the economy can be seen not only in legislative practice, but also in the practice of the Constitutional Court. The former President of the Constitutional Court, Barnabás Lenkovics, stated on several occasions that the role of the Constitutional Court must change as a result, and that the economic emergency requires a reassessment of previous practice.

This question of the constitutionality of the restructuring of sectors by the state in certain subsystems of the economy following the entry into force of the Fundamental Law, essentially now boils down to the justification, extent and manner of the state's involvement in the economy, i.e. the assessment of its necessity and proportionality. I am researching all this in relation to the decisions of the Constitutional Court delivered on legal acts that were passed in the context of normal legal order and are of great relevance to the topic (without claiming completeness: in relation to the regulation of gambling, foreign currency loans, the integration of savings cooperatives, the tobacco retailing act and the Quæstor cases, etc.) as well as to the ones on legal acts applied by the legislator during the state of emergency, which have become significant in scope.

Nevertheless, when legislators burden certain fundamental rights, constitutional values and principles, it is important to clarify the legal-dogmatic system, and in this context, the chapters also contain terminological explanations of legal *terminus technicus*.

The individual fundamental rights, constitutional principles and values have been dealt with in separate chapters along the decisions taken in the above order, thus outlining the Constitutional Court's practice, which is in fact one of the main segments of the study.

In the second part of the doctoral dissertation, as a result of the research carried out, I am of the opinion that *the provisions of the Fundamental Law could be expanded with concrete categories of the possibility of restriction*, such as the inclusion of necessitating cases of public interest, e.g. public order, public health, public morals, public peace, etc.<sup>8</sup> In addition, it may be necessary to seek even better coherence between the fundamental rights provisions of the Fundamental Law and the standards of the European human rights protection system<sup>9</sup>. In this context, legislation analysis raises the need for the Constitutional Court to declare (should have declared) that, for example, for a substantive restriction of the right to property or interference in contractual relations, it is not sufficient for the preamble, the wording of the norm or the justification of the legislation in question to refer to the "public interest", its protection and the fulfilment of the objectives related to it as an explanation of the legislation. The justification for a restriction of a fundamental right should, therefore, be subject to the fulfilment of conditions which the legislator can be held accountable for, such as economic and statistical analyses, ex ante and ex post impact assessments, etc.

On the basis of the results of the doctoral thesis, it can be concluded that the Constitutional Court, having existed for three decades, has remained, in my opinion, in debt with the establishment of a consistent *market economy test*, and thus could have controlled (could control) the economic interventions of the state. This would be of particular importance and weight in the context of the assessment of the constitutionality of emergency legislation, since such control would not imply a takeover of economic policy objectives, tasks and responsibilities by the government.

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<sup>8</sup> Antal Ádám: On the evolution of constitutional values. JURA, 2002. vol 1, 13.

<sup>9</sup> The dissertation explains the cases in which the legal protection differs, for example, decisions in tobacco retailing.

Summarising the above, the following can be concluded:

1. In the significant decisions of the Constitutional Court in recent years, *the Constitutional Court should have built on the foundations with regard to the fundamental rights and principles set out in the new regulatory system established by the Fundamental Law*, but, in contrast, given that this has not been done, there is a noticeable regression by the Court from the level of protection previously provided in the context of certain fundamental rights (see, for example, the analysis of the right to property).

2. The coherence between domestic and international protection of fundamental rights is losing its value, despite the provisions of Decision No 61/2011. (VII. 13.) of the Constitutional Court, which stated in principle that “in the case of certain fundamental rights, the Constitution formulates the substantive content of the fundamental right in the same way as an international treaty (for example, the International Covenant on Civil and Political Rights and the European Convention on Human Rights). In these cases, the level of fundamental rights protection provided by the Constitutional Court should in any event be no lower than the level of international protection (typically as developed by the Strasbourg-based European Court of Human Rights)” (See Point 2.2 of Part V of the Reasoning to Decision No 61/2011. (VII. 13.) of the Constitutional Court.)

3. The consequence of the evolution of the level of legal protection in Hungary is that the correlation (between the degree of state intervention and the question of constitutionality) can be understood largely *in concreto* and on a case-by-case basis.

4. *The provisions of the Fundamental Law could be expanded with concrete categories of the possibility of restriction*, such as the inclusion of necessitating cases of public interest, e.g. public order, public health, public morals, public peace, etc.

5. It is expected that the legislator should elaborate the background of the reference to the public interest, develop it in sufficient detail, and specify the methods, solutions, detailed statistical data and studies that can be used to verify the reference to the public interest. This legal background could already provide a basis for the Constitutional Court to decide whether or not to accept the legislative reference made in the specific case. In none of the cases examined did the legislator substantiate its arguments in this direction.

6. For the sake of coherence in the protection of fundamental rights and legal certainty, the mandatory disclosure of the methods and data described in Point 5 would be necessary to verify

the content of the public interest, and as such could constitute a control of the content. This can and should be justified by a detailed elaboration and presentation of the mandatory ex-ante and ex-post impact assessment by the legislator.

7. The role model characterising state intervention in normal times, i.e. in peacetime, shows that Hungary has a strong government in constitutional terms, with a very large room for manoeuvre in terms of constitutional law: thus, a strong government faces much less resistance, especially during a qualified time of emergency, in the area of intervention in economic legislation<sup>10</sup>.

8. The provisions on special legal order set out in the Fundamental Law empower the Government to determine the measures necessary to overcome the emergency and restore normal functioning during the emergency, while the political control of these measures is exercised by the Parliament and the constitutional control by the Constitutional Court, whose operation cannot be restricted even during the special legal order [Paragraph (2) of Article 54 of the Fundamental Law]<sup>11</sup>. Although the Fundamental Law provides for control mechanisms even in the case of a special legal order, the analysis of the decisions of the Constitutional Court presented in this dissertation (insufficiently detailed reasoning, e.g. lack of substantiation of certain statements with arguments, verbatim adoption of legislative reasoning, etc.) shows that, in a situation of a qualified period of time, a strict and coherent constitutional control would be a particularly important guarantee.

9. By setting up a consistent *market economy test*, the Constitutional Court could have controlled (or could control) the economic interventions of the state. This would be of particular importance and weight in the context of the assessment of the constitutionality of emergency legislation.

## 2) The usability of the results

The hypotheses of the dissertation can serve as an overview of the current system of fundamental rights protection for those who are academically interested in this topic, and it also contains a kind of stocktaking of current (in the last decade) state involvement in the economy.

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<sup>10</sup> See also István Stumpf: *Erős állam – alkotmányos korlátok* [Strong state - constitutional limits]. Századvég Kiadó, Budapest, 2014. 219. In his global examination of the Fundamental Law, Stumpf concluded that the power system is undeniably in flux, with some nodes of power fading and others growing stronger.

<sup>11</sup> Paragraph [27] of the Reasoning to Decision No 23/2021. (VII. 13.) of the Constitutional Court

Its conclusions and recommendations can be useful not only for legal scholars but also for decision-makers in the field of fundamental rights protection.

## LIST OF PUBLICATIONS RELATED TO THE SUBJECT OF THE THESIS

1. Ildikó Kovács: The regulation of foreign currency loans and the constitutional principle of legal certainty, JURA 2015: 2 pp. 91-99., 9 p. (2015)
2. Ildikó Kovács: The appearance of certain principles of the Fundamental Law in the Constitutional Court's assessment of the regulation of foreign currency loans, Magyar jog, MAGYAR JOG (HUNGARIAN LAW) 62: 10 pp. 593-603., 11 P. (2015)
3. Péter Tilk, Ildikó Kovács: Thoughts on the starting point for calculating the required preparation time, JOGTUDOMÁNYI KÖZLÖNY (LAW GAZETTE) 70: 11 pp. 549-555., 7 p. (2015)
4. Ildikó Kovács, Péter Tilk: „Problems in the interpretation of the required preparation time in the practice of the Hungarian Constitutional Court”, Pravo i Politika (2016)
5. Ildikó Kovács: Regulations concerning foreign currency loans and the constitutional principle of legal certainty, JURA 2017/2.
6. Ildikó Kovács: Certain issues of savings cooperative integration in the light of the Fundamental Law, JURA 2018/1.
7. Ildikó Kovács: Certain issues of the integration of savings cooperatives in the light of the Fundamental Law of Hungary, JURA, 2018/2. vol. 24
8. Ildikó Kovács: The new economic role of the state in terms of the Fundamental Law, JURA 2019/1.
9. Ildikó Kovács: Constitutionality issues of the Tobacco Shop Act in the light of the Fundamental Law of Hungary, JURA 2019/2.
10. Ildikó Kovács: Characteristics of the economic role of the state in a special legal order, JURA, 2022, (in publication)