
STUDIA IURIS

JOGTUDOMÁNYI TANULMÁNYOK / JOURNAL OF LEGAL STUDIES

2024. I. ÉVFOLYAM 4. SZÁM



Károli Gáspár Református Egyetem
Állam- és Jogtudományi Doktori Iskola

A folyóirat a Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskolájának a közleménye. A szerkesztőség célja, hogy fiatal kutatók számára színvonalas tanulmányaik megjelentetése céljából méltó fórumot biztosítson.

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Kiadó: Károli Gáspár Református Egyetem Állam- és Jogtudományi Doktori Iskola

Székhely: 1042 Budapest, Viola utca 2-4

Felelős Kiadó: TÓTH J. ZOLTÁN

A tipográfia és a nyomdai előkészítés CSERNÁK KRISZTINA (L'Harmattan) munkája

A nyomdai munkákat a Robinco Kft. végezte, felelős vezető GEMBELA ZSOLT

Honlap: <https://ajk.kre.hu/index.php/jdi-kezdolap.html>

E-mail: doktori.ajk@kre.hu

ISSN 3057-9058 (Print)

ISSN 3057-9392 (Online)

URL: KRE ÁJK - Studia Iuris

<https://ajk.kre.hu/index.php/kiadvanyok/studia-iuris.html>

CAN FINES STIMULATE PUBLIC CONTROL ON LEGISLATION?

ÁKOS KÁNTOR¹

ABSZTRAKT ■ A jogalkotás szabályainak viszonylagos állandósága a demokrácia záloga, mivel a jogszabály egyik érvényességi kelléke, hogy szabályozott keretek között szülessen meg, melyre nézve kifejezetten hátrányosan hat a gyakori változás.

A jogalkotásra vonatkozó szabályok korábban szankciót nem tartalmazó, *lex imperfecta* jellegűnek voltak mondhatók, mivel csak a legkomolyabb normasértések okozták a jogszabállyal szemben alkalmazható legsúlyosabb szankciót: a közjogi érvénytelenséget, melynek megállapítása hosszadalmas folyamat.

A 2022-ben történt törvénymódosítással olyan módon változott meg a jogalkotási eljárás, amely a jogszabályelőkészítésben való társadalmi részvétel elmulasztását pönalizálja. Az eljárás is rendhagyó, mivel a kormányzati ellenőrzési szerv évente vizsgálja a kötelezettség teljesítését, és a mulasztó szervezetre jelentős mértékű bírságot ró ki.

A kormányzati jogalkotási tevékenység vizsgálatáról éves jelentés készül az Európai Unió részére, amelyre az EU a következő éves jogállamisági jelentésben reagál.

Jelen tanulmány célja a hazai jogalkotási eljárás változásai és az első vizsgálati ciklus tapasztalatai, az arról készült vizsgálati (KEHI) jelentés, valamint az EU visszajelzésének bemutatása. Az előzményekben a vonatkozó szakirodalmi elméletek kerülnek áttekintésre, különös tekintettel a jogalkotási folyamat hiányainak hatásaira. A változások és a vizsgálat megállapításainak ismertetése magyarázattal szolgál arra nézve, hogy a jogszabályok *lex imperfecta* jellege hogyan és miért látszik megszűnni.

ABSTRACT ■ The key of democracy is the relative stability of the rules governing legislation, given that one of the conditions for a law to be valid is that it shall be adopted within a regulated framework—a particularity that is negatively affected by frequent changes.

The rules on legislation were previously *lex imperfecta*, lacking sanction, since only the most serious breaches of law triggered the application of the gravest sanction against the law, namely public-law invalidity, which takes a lengthy process to establish.

With the legislative amendment in 2022, the legislative procedure has been altered so that the absence of public participation should be penalised. The procedure itself is also unusual: the Government's controlling body examines each year the fulfilment of the obligations, and imposes substantial fines on organisations in default.

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An annual report is prepared for the European Union regarding the rule of law, to which the EU reacts in its next annual Rule of Law Report.

My study aims to describe the changes in the Hungarian legislative procedure and the experience gained in the first cycle of examination, and to present the corresponding report prepared by the Hungarian Government Control Office (hereinafter: KEHI) and the EU's assessment of the same. It will also review relevant theories presented in literature, especially those concerning the impacts of the shortcomings of the legislative procedure. Presenting the changes and findings of the assessment will explain how and why the *lex imperfecta* nature of the legislation seems to be diminishing.

KEYWORDS: legislation, public participation, *lex imperfecta*, Hungarian Government Control Office, KEHI investigation, fines

1. HISTORY

The rules governing legislation are characterised by relative permanence, despite the fact that an important feature of law is its variability². Yet, the regulation of legislation varies rhythmically, with Act XI of 1987 on law-making being followed only 23 years later by Act CXXX of 2010³ of the same title, which, after numerous amendments, is still in force today.

The provisions regulating the legislative process are *lex imperfecta*⁴, since only a very serious breach of these grants means the application of the only possible sanction, i.e. invalidity under public law.

An important requirement for a law to be valid is that it must have been drafted in accordance with the legal norms in force at the time. This requirement also makes it important to preserve the relative stability of the system of rules governing legislation⁵. The Constitutional Court of Hungary has also pointed

² Cp. ZOLTÁN TÓTH J.: *Jogalkotástan Jogdogmatikai és jogszabályszerkesztési ismeretek*. Budapest, Dialóg Campus Kiadó, 2019. 37.

³ The fundamental difference between the two laws is that while the 1987 law required a two-thirds vote of the members present to pass, the 2010 law is not considered a cardinal law. The old *Jat.* was also amended several times, but between 17.01.2001 and 15.06.2007 – for six years – the text did not change, which may be due to the need for a qualified majority amendment.

⁴ „Vannak jogtételek, melyek a bennök foglalt parancs megszegéséhez semminemű szankciót (másodtételt) nem fűznek (*leges imperfectae*)” GUSZTÁV SZÁSZY-SCHWARZ: *Parerga – Vegyes jogi dolgozatok*. Budapest, Athenaeum Irodalmi és nyomdai részvénytársulat, 1912. 14.

⁵ For example, the text of the *Jat.* remained unchanged for almost six years between 01.08.2013 and 14.04.2019, while the longest such period for the *Jat.* was four year long, between 06.06.2014 and 17.05.2018.

out in several decisions that the procedural guarantees of legislation derive from the rule of law principles and those of legal certainty; therefore a valid law can only be created by observing the rules of formalised procedure. This is a formal requirement and therefore relatively easy to assess for those who have a view of the whole legislative process. The purpose of defining formal validity criteria is to reduce legal uncertainty as to whether a given provision constitutes a legal norm and is therefore legally binding.

The Constitutional Court has a consistent history of examining the observance of the rules of legislative procedure guaranteeing the observance of the rules of the legislative procedure and can thus annul a law adopted in a legislative procedure that is seriously flawed in its form. In the case of Acts, serious formal defects imply errors in the parliamentary procedure. In the preparatory phase of a law, a failure to consult the public as required by law or to carry out a prior impact assessment may constitute a formal defect. However, according to the consistent practice of the Constitutional Court, the mere procedural omission by the legislator to obtain the views of the persons concerned from the bodies entitled under the legislative law during the preparatory stage of the legislative process does not, as a general rule, render the legislation unconstitutional, unless a specific and institutionalised obligation to provide an opinion is provided for in a separate law.

The Hungarian Parliament introduced the publicity of legislation with Act CXXXI of 2010 to promote, as part of good governance, the involvement the most diverse groups of society in the preparation of laws, thereby enabling a multifaceted grounding of legislation in the public interest and thus improving the quality and enforceability of laws⁶. Public participation in the legislative process is achieved through various forms of consultation rights. These include, in particular, the right to comment, the right to be informed, the right to make proposals and the right to express an opinion.⁷ ILDIKÓ VADÁL stated that information is an indispensable condition for public participation in the legislative process, but in order for an informed opinion to be made, it is necessary to have access to other materials in addition to the draft norm, such as impact assessments and expert materials. It is important that sufficient time is allowed for consultation, but in practice the legislative departments have often failed to ensure this, often claiming that they too had less than the required five days. Vadál herself highlighted the shortcomings of the legislation, which does not penalise failure

⁶ Cp. ISTVÁN STUMPF: Az Alkotmánybíróság és az Országgyűlés viszonya a közjogi érvénytelenség tükrében. *Miskolci Jogi Szemle*, 2020/1, 277–290, 277–278.

⁷ Cp. ILDIKÓ VADÁL: *A kormányzati döntések konzultációs mechanizmusai*. Budapest, CompLex, 2011. 101.

to carry out the social consultation process or to do so properly. In her book, she proposed clarifying the rules and adding guarantee rules. She argued that a guarantee element would be to provide a legal remedy in the event of a breach of the rules on the consultation procedure by public bodies⁸. A similar conclusion was reached by the drafters of the document entitled *Társadalmi Egyeztetés Eljárási Normarendszere*⁹, who proposed a system of sanctions for infringements of the rules on public access to legislation, which would not establish political responsibility and consequences¹⁰. In the case of a serious breach, they proposed the annulment of the legal norm adopted.

The relative stability expected from legislation based on democratic requirements was affected by many other factors besides the accelerated development in recent years, such as the accelerated digitalisation caused by the pandemic, or the annual rule of law reports among others.

The chapter of the Rule of Law Reports entitled *“Other institutional issues related to checks and balances”* has, year after year, judged social consultation in Hungary to be formal¹¹. *“The lack of public consultation coupled with the accelerated legislative process has further weakened the quality of the regulatory environment. Whilst the government has organised ‘national consultations’ on certain topics, the absence of effective public consultation on draft laws raises questions as regards legal certainty and the quality of legislation”*.¹² In relation to public participation in the preparation of laws, it is noted that *“CSOs report that decisions are made without the genuine involvement of relevant stakeholders. The Government has been almost systematically failing to comply with its legal obligation of publishing online draft laws for public consultations.”*¹³ In addition, *legislation is often not prepared through traditional administrative channels, but “government policies often circumvent existing consultation mechanisms by submitting significant bills through individual members of Parliament or by using extraordinary or urgent procedure.”*¹⁴ *The report attaches particular importance to this, which also has an economic impact: “For business stakeholders, the quality of law-making is an important*

⁸ *“A régi Jat. 43. §-a alapján a kormányhoz fordulhattak a jogaikban sérelmet szenvedett szervezetek, de az új jogalkotási törvénybe (új Jat.) ez a lehetőség sem került be.”* VADÁL 2011, 106.

⁹ ISTVÁN FARKAS et al.: *A Társadalmi Egyeztetés Eljárási Normarendszere*. Győr, Nonprofit Információs és Oktató Központ (NIOK) Alapítvány, Magyar Természetvédők Szövetsége (MTvSz), Reflex Környezetvédő Egyesület, Pátria Nyomda, 2007.

¹⁰ FARKAS 2007, 37.

¹¹ 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, 17; 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, 21; 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, 24.

¹² 2022 Rule of Law Report, 24.

¹³ Ibid.

¹⁴ Ibid.

factor for investor confidence and a reason for concern about effectiveness of investment protection for nearly a quarter of companies in Hungary.”¹⁵

The findings of the Rule of Law Report became a more pressing issue when the EU suspended and conditioned a total of € 6.3 Billion in 2022.¹⁶

2. CHANGES

The Hungarian Government has prepared a self-regulatory response to the comments on legislation: it made a commitment, and promised to monitor its execution as well as to and report regularly back to the EU. It also imposed sanctions on the member of the government responsible for non-compliance.

In order to reach an agreement with the European Commission, several laws have been amended, one of which is Act XXX of 2022 amending Act CXXX of 2010 on law-making (hereinafter Jat.) and Act CXXXI of 2010 on public participation in the preparation of law-making (hereinafter Jet.), which amended the rules set out in the Jat. and the Jet.

Chapter 5 of the Jat. requires that those responsible for the preparations of laws carry out a prior regulatory impact assessment. Act XXX of 2022 added that the Hungarian Central Statistical Office (hereinafter: KSH) shall assist in conducting a preliminary impact assessment in the preparation of Acts, Government Decrees or Ministerial Orders by providing official statistical data. The same cooperation is also required by the Act for ex-post impact assessments by the KSH. Ex-post impact assessment remains to be carried out as necessary after the amendment, although it could be an important tool to assess the validity and effectiveness of legislation.¹⁷

The amendment of the Jet. is based on the Government’s commitment that, for draft laws covered by the Act¹⁸, provided that these are published in the Magyar Közlöny¹⁹, the proportion that has been subject to public consultation will be ninety percent.

¹⁵ Ibid.

¹⁶ <https://www.consilium.europa.eu/hu/press/press-releases/2022/12/12/rule-of-law-conditional-mechanism/> (21.11.2023).

¹⁷ “A hatásvizsgálattal, azok gyakorlati működésével és hatásával kapcsolatos legfontosabb tény, hogy azokról tények nem állnak rendelkezésre.” Cp.. GYÖRGY GAJDUSCHEK: Előkészítetlenség és utólagos hatásvizsgálat hiánya. In: ANDRÁS JAKAB – – GYÖRGY GAJDUSCHEK (ed.): *A magyar jogrendszer állapota*. Budapest, MTA Társadalomtudományi Kutatóközpont, 2016. 796-822. 799., 813.

¹⁸ The Act’s scope covers the provision of opinions on draft legislation prepared by ministers. These opinions may be provided by natural persons, non-state bodies, and non-municipal organizations. Jet. 1. § (1) paragraph.

¹⁹ The official journal of Hungary.

The technical rules for social consultation have not changed.

The new provisions of the *Jet.* create a public obligation to verify whether social consultation has taken place. The Government Control Office²⁰ (hereinafter KEHI) will verify whether the Minister responsible for the preparation of the law has fulfilled the public consultation obligations set out in the *Jet.* In the event of failure to comply with this obligation, a fine is imposed on the ministry headed by the minister responsible or on the ministry designated by them. The verification of noncompliance with the public consultation has become systematic and regular, with a tangible sanction and a relatively quick fine within two months of the end of the year following the end of the year verification.

Each year, KEHI summarises, in the case of Acts, Government Decrees and Ministerial Orders promulgated in the previous year and provided that their preparation subject to the Act, public consultation has taken place. A relevant report is then made by KEHI, and published by the Minister of Justice by 31 January of the following year.

The *Jet.* amendment states that the Government is responsible for ensuring that ninety percent of draft laws prepared in a given calendar year that is not covered by the exceptions is subject to public consultation and that exceptions are used only where justified. The amendment also specifies the type of sanction, with the defaulting party paying a fine, the responsibility for payment lies with the minister responsible for preparing the draft, and must also take into account other findings of KEHI.

The legislator has delegated the power to determine the amount of the fine, the criteria for its determination and the detailed rules for its payment to the Government, which is responsible for the obligation, but the *Jet.* guarantees that the amount of the fine must be determined in such a way that it has a sufficient deterrent effect against the ringing conduct.

The detailed rules on fines are set out in a Government Decree²¹. When imposing a fine, the KEHI must take into account all relevant circumstances of the case; the main aspects are the level of regulation of the law, the social and economic impact thereof, the duration (length) of the delay in case of delay, and the recurrent nature or frequency of the failure as a subjective circumstance. The amount of the fine may be between one million and one hundred million forints, payable within thirty days of the decision imposing the fine becoming final.

²⁰ Kormányzati Ellenőrzési Hivatal (Government Control Office).

²¹ Government Decree No. 567/2022 (XII. 23.) sets out the fines to be imposed in the event of a breach of the obligation under the Act on Public Participation in the Preparation of Legislation.

Another guarantee is that the amendment of the Jet. provides for an obligation to audit on the basis of the KEHI's examination, the body auditing European grants²² certifies that 90% of draft legislation has been subject to public consultation and prepares a report on this by 31 March of the year following the year in question, i.e. within two months of the KEHI report.

However, the amendments to the Act and the Jet. did not introduce rules on the use of the Integrated Legislative System (hereinafter: IJR), the digitalised system for legislation in Hungary. The IJR provides a Social Consultation Service, which would allow for the public consultation of drafts prepared in the system, thus presumably preventing fines.

3. EVALUATION OF THE FIRST PERIOD

Under the transitional provisions of the amendment of the Jat. and the Jet., a report was required for the first time for draft legislation submitted for consultation with government bodies between 30 September 2022 and 31 December 2022. The KEHI report²³ found that a total of 682 Acts, Government Decrees and Ministerial Orders were published in Magyar Közlöny during the period under review. Of these, 123 were not covered by the Jet; 154 had been subject to consultation with government bodies before the period audited and could therefore not be taken into account in the audit.

Of the 405 laws under the Jet. prepared and promulgated during the period under review, 373 (92% of the total) were promulgated after public consultation, thus meeting the 90% threshold; the remaining 8%, 32 laws were promulgated without public consultation, of which 21 did not require²⁴ public consultation and 11 could not be subject²⁵ to public consultation.

The Government fulfilled the obligations set out in Section 5/A (3) points a) and b) of the Jet., as 92% of the Acts, Government Decrees and Ministerial Orders prepared and promulgated in the period under review and falling under the scope of the Jet. were promulgated after public consultation, and the exceptions under the Jet. were applied for a justified reason.

²² Directorate General for Audit of European Funds – EUTAF.

²³ Kormányzati Ellenőrzési Hivatal, Ellenőrzési jelentés a jogszabályok előkészítésében való társadalmi részvételtől szóló 2010. évi CXXXI. törvény végrehajtásának vizsgálatáról (KEHI-11-74/16/2023) Budapest, 2023.

²⁴ Jet. 5. § (3) paragraph.

²⁵ Jet. 5. § (4) paragraph.



Figure 1

Source: KEHI report 2023.

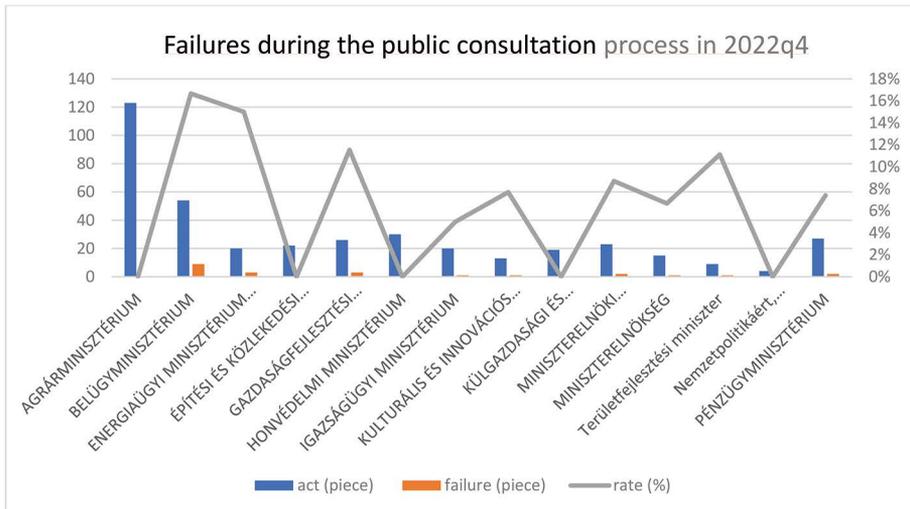


Figure 2: Default rate between 30 September 2022 and 31 December 2022 – by the author

For a total of 198 drafts prepared by five of the bodies examined, KEHI did not find any omissions.

For four of the portfolios, it found 1 noncompliance each for 57 drafts, with the highest number of noncompliances by a single organ being 9 for 54 drafts, representing 17% of the proponent’s performance over the period.

The amount of fines imposed was also adjusted accordingly: the total sum was HUF 23.3 million, lower than the maximum that can be imposed on a department. The amount of the fines indicates that the penalty imposed by KEHI took into account the circumstances of the failure to comply with the legal requirement.

In the 2023 Rule of Law Report, the EU already assessed the impact of the changes: *“The changes to the rules on public consultations are intended to improve the legislative process, but their practical impact has yet to be assessed. The quality of legislation and the frequent changes to laws remain a major concern regarding the effectiveness of investment protection for companies in Hungary.”*²⁶

The Rule of Law Report also found that the practical impact of changes brought about by the amended Act on the quality of legislation is not yet visible.

4. SUMMARY

The amendments to the Jat. and the Jet. introduced procedural rules, compliance with which can be enforced by the ministry preparing the draft law. This should be ensured by the regular monitoring and certification introduced in the Act, as well as by the legal institution of fines, which removes the *lex imperfecta* character of legislative rules, since practice and KEHI’s analysis show that the legal institution of social consultation can be made viable by providing for sanctions and regular monitoring.

A long-overdue sanctions regime for legislative rules has been put in place for 2022, but the use of fines as a sanction is a novelty compared to previous proposals. Although the *lex imperfecta* nature of the laws has been removed, the legislator did not consider it necessary to include a remedy as a guarantee in cases where public consultation on drafts was omitted or was not carried out properly, despite the legal obligation.

Amendments of the laws have created the possibility for social control of legislation, although with a low efficiency, and the 2023 Rule of Law Report confirmed that no significant effects were felt during the period under review.

²⁶ 2023 Rule of Law Report, 36.

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Act XI of 1987 on law-making

Act CXXX of 2010 on law-making

Act CXXXI of 2010 on public participation in the preparation of law-making

Act XXX of 2022 amending Act CXXX of 2010 on law-making and Act CXXXI of 2010 on public participation in the preparation of law-making

Government Decree 301/2010 (XII. 23.) on the publication and consultation of draft legislation and regulatory concepts

Government Decree No. 567/2022 (XII. 23.) sets out the fines to be imposed in the event of a breach of the obligation under the Act on Public Participation in the Preparation of Legislation