GOVERNMENT SPEECH IN ELECTORAL CAMPAIGN

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Abstract

Government speech in electoral campaign poses a challenge towards constitutional law. The abuse of governmental communicative resources can lead the distortion of public speech as well as to the distortion of competition between the different political actors, i.e. the governmental parties and the opposition. As noted by international observers, in Hungary there is an acute situation during elections, in which the communication of the government and the governmental parties fuse, and thus huge official resources are allocated in partisan interests. The thesis examines the Hungarian jurisprudence, considering its context and the manifold ways the government may influence public speech. The German jurisprudence offers a great comparator, as there the Federal Constitutional Court set strict standards that prevented governmental misuse. The first question of the thesis is what factors caused that the Hungarian jurisprudence so far has not been able to prevent the situation, while the German has been. The second question tackles the role of regional soft-law bodies (OSCE, Venice Commission) as well as the European Court of Human Rights (ECtHR). The comparison shows that the cause of inefficiency of Hungarian jurisprudence is not a textual shortcoming but the underlying structure and context that can be traced back to the illiberal-populist politics of the government. It is also shown that the regional soft law bodies exert useful work and their guidelines serve as a frame of reference, and that the ECtHR has not dealt with the problem directly, but the case law may serve as a foundation on which an efficient jurisprudence on governmental speech in electoral campaign may evolve.

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Introduction

From a constitutional perspective governmental speech is of great significance, especially in times of elections. Imagine three situations, all of them taking place in the electoral period. In the first just three days before the election day one of the ministries reports on its official webpage on the party-assembly of the governmental party with the title 'Every vote is needed!'.[1] In the second the government launches a nation-wide billboard campaign praising its own achievements that have been carried out in the last term.[2] In the third, the government gradually decreases the interest rate to create better financial expectations for the voters, just to increase it back right after the elections.[3]

All of these situations share a common feature; in all of them the government uses its official status, resources or powers to create a more favourable situation for the governing parties in terms of communication. In the first situation this is explicit, as an official webpage of a ministry reports on a party-event, supporting the governmental party with its communicative resources. The second situation is more implicit, as the government campaigns for its re-election not in favour of particular parties, however, in modern democracies this is inevitably means for the re-election of the governmental parties themselves. Finally, in the third situation, the government uses its official power to artificially create a temporary situation before the elections just to reverse it after elections. As we will see, this third category is the most intractable one, as it is almost impossible to conceptualize and to prevent from happening.

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[1] As happened in Hungary. See part III. B).
[2] Like in the German case from the 1976 elections. See part IV. A).
[3] It was a common trick of the Thatcher administration. As at that time the government had the powers to determine the interest rate, it gradually decreased it starting from 18 months prior to the elections. The decreasing interest rate implied among others decreasing loan payback instalments for the citizens. This created a favourable environment for the government that, however, reset the rate to the previous level after the elections. See – David Sanders: Forecasting Political Preferences and Election Outcomes in the UK: Experiences, Problems and Prospects for the Next General Election, Electoral Studies, 14 (3), 1995, 249.

From a constitutional perspective the phenomenon can be analysed not just in theoretical but in practical terms. First, especially in Europe there is a tendency to regulate political speech to preserve the pluralistic public sphere. This takes the form of special bans on political advertisements, or limitations on third party contributions, etc. It aims to protect the public sphere from being captured by powerful political or economic groups. However, it is not only those groups that can endanger the pluralistic public sphere; the government itself can capture it and drive out other speech, especially, when it is coupled with regulatory asymmetries, as in the case of Hungary. Second, many jurisdictions have provisions prescribing state neutrality in the electoral campaign and the equal opportunities of parties. Both Constitutional courts and legislators recognized the incompatibility of democratic contest and state intervention in the elections. This body of law and its jurisprudence, coupled with the soft-law instruments of regional bodies such as the Venice Commission or OSCE offers itself to be analysed through comparative means.

This paper aims to analyse governmental speech in electoral campaign and the answers of jurisprudence of different countries as well as of European regional bodies, especially the European Court of Human Rights ('ECtHR') to it. The point of departure is the acute situation in Hungary, where both in the 2014 and 2018 elections huge governmental communicative resources were mobilised in favour of the governing parties.[4] Most recently, just before the campaign period of the 2019 European Parliament elections started, the government launched a campaign to warn about the threats of the way migration is handled within the EU.[5] The problem thus is both acute and timely.

As we will see the Hungarian jurisprudence did not establish a solid normative background to prevent biased governmental speech in electoral campaign as opposed to the German jurisprudence. The first main question of this thesis is what factors caused that the

[4] See Part II. A).
[5] See Part III. B).

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Hungarian framework could not prevent the situation and that the German could? Namely, was it due to the lack of textual provisions, or of independence of bodies, or the different political system or public sphere? The question is highly relevant, as the different answers imply different solutions; if the problem lies with the textual background, then a codification or legal transplant could solve the problem, on the other hand, if it is caused by deeper structural deficiencies (such as the lack of independency of interpreting bodies, or the illiberal-populist nature of government) then the solution may be achieved by different means.

The second main question concerns the role of regional bodies, especially the ECtHR in preventing distortion of public speech by governmental intervention in times of elections. The question is that to what extent is the problem recognized by these bodies and how and with what chances can it be conceptualized by the previous case-law of the ECtHR. The importance of this question is highlighted by the answer of this thesis to the first question, namely, that the dysfunctionality of the Hungarian legal mechanism is not caused by textual shortcomings but by deeper structural problems that are cannot be expected to disappear in the near future. This means that – in the lack of effective domestic mechanisms – the role of the ECtHR might be pivotal in the future.

The scope of the thesis does not cover the question of governmental speech outside of the campaign period, however, it is mentioned as part of the wider context (see Part II. B)). Speech in referendum campaigns and campaign related to other elections (European Parliament, municipality, etc.) is also not covered as it may imply different constitutional considerations, than parliamentary elections.[6] Moreover, the thesis analyses the misuse of the

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[6] As Sajó mentions, in Germany the strict neutrality standard does not apply to referenda, as these are related to expert matters. András Sajó: Government Speech in a Neutral State In. N. Dorsen, P. Gifford (eds.) Democracy and the Rule of Law, CQ Press, Washington D.C., 2001, 374.

resources of the government; the focus is on the (federal) government and its members.[7] As to the question what is meant by 'speech', which question also constitutes a limit of scope, further elaboration is required that is laid down in Part I.

Based on this, the analysis requires, on the one hand, to lay down the theoretical underpinnings, namely the different ways government can form public speech and its relationship to democracy, popular sovereignty and elections (Part I.). On the second hand, as the point of departure of Hungary, the brief description of the acute Hungarian situation is needed that covers the 2014 and 2018 elections as well as the regulatory framework of political speech and media environment (Part II.). On the third hand, the Hungarian framework and jurisprudence of governmental speech in electoral campaign is to be presented and analysed (Part III.). On the fourth hand, the German jurisprudence offers a great comparator, as there is no such distortion of public speech as in Hungary, and it has a case law as well as literature on the matter (Part IV.). On the fifth hand, in the next step the comparison of the Hungarian and German jurisprudence is carried out, pointing out what factors cause that the former was unable to prevent the distortion of public speech by governmental intervention, while the latter was successful (Part VI.). Finally, the regional framework is analysed with the focus on the ECtHR, examining both the presence of the question in regional soft-law instruments, and based on the previous case-law and materials that to what extend the Strasbourg could prevent governmental communicative intervention is the electoral period (Part VII.).

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[7] However, the thesis refers to case law on different actors, such as the Federal President in Germany (See Gauck case at part IV.) or municipalities and mayors (See cases regarding Hungary in III. B.). This is because the case law is interlinked to an extent, namely, normative standards set with regard to one actor may have an effect on the government and its members as well.

I. Theoretical underpinnings

Government speech in electoral campaign triggers some constitutional implications that are connected to the abstract notion of government, democracy, popular sovereignty and elections. This calls for the analysis on the one hand of the different ways a government may form public speech, as these are intertwined and have to be considered. Second, the fusion of government and governmental parties has consequences regarding the communicative position of the governmental parties and the opposition that may pose theoretical challenges to the problem at hand. Third, as I argue below, from the notion of representative democracy and functions of elections it follows that in the election period the government does not campaign for its re-election.

A) Government forming public speech

The government forms public speech in several ways. First, it regulates public speech, especially in the electoral context; it provides the free-speech of parties and other candidates both by not restricting their acts *(self-restrain approach)* and by creating an even-field for the competing actors *(intervention approach)*.[8] In this latter sense the government may prohibit political advertisements in television or in the radio to prevent financial groups from manipulating the public-speech sphere,[9] or it can prescribe that political advertisements could be run only for free, with the same aim.[10] The government with these acts forms the public sphere as it reduces the possible means of communication of other political forces. It is to be added, that in this context the government intervention is justified by 'systemic (institutional) communicative values.'[11] This justification is not universal; while the U.S. Supreme Court ruled that the restriction of campaign expenditure of corporations and unions violated the

[8] Sajó labels two main interventionist methods that 'both mandate certain governmental intervention into public discourse, partly by adding a government voice and partly by creating a level playground through restrictive and promotive regulation.' Sajó (2001) 372.
[9] Like in some Western European countries, such as the U.K. See the case law referred to in Part VI. B).
[10] As it is the case in Hungary. See Part II. B).
[11] Sajó (2001) 372.

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First Amendment,[12] in Europe systemic considerations prevail.[13] The importance of the intervention is that it affects the relative weight of government speech. Thus, as it will be seen in the Hungarian example, an intervention that reduces the parties' opportunities but in effect is not applicable to the government itself can effectively enhance the voice of the governmental parties and thus distort the democratic competition.

Second, the government shapes the context not just as a regulator, but as a sponsor. On the one hand, through the public media it can exert substantial influence to the public sphere. On the other hand, indirectly, through the advertisements of the government itself and its organs it can allocate great financial resources to certain media.[14]

Third, interlinked with the regulatory activities, the government can communicate itself, forming the public opinion directly. The government informs its citizens on running programs and other issues, and it does this in many cases where it is even its duty to do so.[15] However, apart from evidently neutral paradigmatic cases (e.g. information brochure on a new governmental programme)[16] the participation of the government directly in the public sphere raises constitutional questions. On the one hand, 'given the enormous resources at its disposal, unlimited government speech may drive out all other speech.'[17] This may be coupled with the government's regulatory powers that – under the pretext of creating an even field – can enhance the significance of government speech in the public sphere. If the robust public speech is threatened, then the democratic processes are threatened as well. On the

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[12] See Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).
[13] See for example the ECtHR ruling that upheld the ban on political advertisements in the UK. For different views see dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, Vucnic and Da Gaetano. – Animal Defenders International v. UK, App. No. 48876/08, Judgment of 22 April, 2013.
[14] This is especially the case in some post-communist countries. See Joint Guidelines I 7. The problem is also present in Hungary, See Part II. C).
[15] Helen Norton: Campaign Speech Law with a Twist: When the government is the Speaker, not the Regulator, Emory Law Journal, Vol 61., 2011, 225-226.
[16] However, in a certain context even this may violate the equal opportunities of the parties, as was shown in the 1977 case in Germany. See Part IV. A).
[17] Sajó (2001) 369.

other hand, through the abuse of government resources,[18] the political actor or actors behind the government can perpetuate their power, thus undermining the democratic process, which calls for the *'strictest scrutiny of government speech restriction.'*[19] This is called for, because, as Sajó notes *'[i]n the electoral context the intervention of government on behalf of its own (incumbent) candidates goes against the principles of representative democracy.'*[20]

B) Government speech, democracy, popular sovereignty

The focus of this paper is on the case when the government itself communicates and thus tries to perpetuate its power. However, with regard to democratic theory the constitutional problems with partisan government speech are not easy to conceptualise, partly because democracy implies some inherent fusion of the government and governmental parties and that governing itself is a communication that aims self-perpetuation, and partly because it affects the democratic process only indirectly.

First, as to the question of identification (i.e. the fusion of government and governmental parties), it is an inherent element of modern democracy that through the conduct of the government political actors identify themselves with the government and 'campaign' for their re-election. This means that in a representative democratic system voters assess the work of the government, identify it with the political actors behind it, and either affirm or reject the political actor through the elections, which are the competition of different political forces to form government.[21] In this sense every act of the government,

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[18] Note that by resources in this paper I mean a wide range of human, financial, material, etc. resources, 'as well as resources enjoyed in the form of prestige or public presence that stem from their position as elected or public officers and which may turn into political endorsements or other forms of support.' – OSCE-Venice Commission Joint Guidelines For Preventing and Responding To the Misuse of Administrative Resources During Electoral Processes ('OSCE-Venice Commission Joint Guidelines) I.9.

[19] Sajó (2001) 394.

[20] Sajó (2001) 374.

[21] The constitutional reality thus enforces that there is identification between the government and governmental parties, and indeed in Germany the proponents of the Parteienstaat argued with this reality. See Judge Rottmann's dissent to the 1977 decision (Part IV. B)). From the perspective of political science, this identification is even posed as a requirement towards electoral systems. Matthew Soberg Shugart for example defines *'an efficient polity as an ideal type in which the institutions permit the articulation of policy-based electoral majorities. [A mechanism] by which voters can weigh the policy record of the incumbent government*

such as construction of highways or hospitals is 'campaigning' for the given government and thus for the parties behind the government. Governing is nothing else but the communication of the political actors behind the government through the conduct of the government that is assessed by the voters.

This has implications regarding the public speech as well; in the political contest there will be always asymmetry, as huge bulk of the communication of the governmental parties is carried out through the actual conduct and performance of the government. In this fundamental and inherent sense political parties campaign for their re-election through governmental means. The asymmetry is present, as the opposition can campaign only through its restricted means of primer communicative means (television advertisements, leaflets, media presence, etc.), while the governmental parties may communicate through governing as well.

It follows from the above mentioned that the focus point of this paper is to an extent artificially construed. Here I focus on government speech, defined as an act solely with communicative aim, although, as shown above, to an extent every act of the government is communicative. Under our focus the case when the government builds a dam to enhance the electoral performance of the governing parties falls outside of the scope of this paper, however, the construction inevitably has communicative aspects as well, and inevitably caused asymmetry between the resources available for the governing and non-governing parties, as the latter cannot build a dam. This question seems extremely theoretical, nevertheless it has consequences apparent in the case-law, as shown by the case in Hungary, in which case the mayor ordered the distribution of apples with social purposes in the campaign period.[22] In this case the impartial observer intuitively thinks that misuse of

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and the policy commitments of an opposition party (or pre-election coalition).' Matthew Soberg Shugart: "Extreme" Electoral Systems and the Appeal of the Mixed-Member Alternative In Shugart-Wattemberg (eds.) Mixed-Member Electoral Systems: The Best of Both Worlds?, Oxford University Press, Oxford, 2003, 28.

[22] See Part III. B).

governmental resources happened, though it is very hard to distinguish the communicative ('re-elect us!') and non-communicative (distribution of apple to the pensioners as carrying out a governmental task) character of the act. Namely, it is almost impossible to sort out measures of 'ordinary' conduct of the public entity that falls into the inherent communication of democracy, and the measures that serve solely or predominantly communicative purposes to distort the electoral process.

Second, government speech can distort the political process, i.e. perpetuate the power of the governmental parties and cause imbalance in the political contest, only indirectly.[23] Even if a government actively campaigns for its re-election with explicit communicative means, the popular sovereignty remains with the people, who exercise their right to vote with the same conditions, if, though, not in the same public speech sphere.[24] Therefore, threat of indoctrination and of distorted public discourse posed by government speech depends greatly on the voters themselves. If they are perceived as 'civic smarties', then government speech may be even welcome, as voters are able to discount who and with what aim speaks to them.[25] From a more pessimistic anthropological viewpoint, however, indoctrination may be effective and voters are not able to discount these effects. At any rate, it is to be considered what, in a given society, are the main attitudes towards the government and towards 'officiality' in general,[26] as well, as the rational or emotional nature of the political debate in the given country.

C) Government speech in electoral campaign

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[23] A direct intervention is, for example, when the governing majority changes the electoral rules.
[24] Moreover, if the government affects the value-set of the society with its conduct, then it may perpetuate its power as it does not adapt its policies to the society, but the other way around, changes the society to prefer its policies. Namely, a more nationalist government can form the society to be more nationalist and thus more inclined to re-elect the government. This, however, extends far beyond the scope of this paper, and may be inevitable in every democracy.
[25] Norton (2011) 246.
[26] See Sajó (2001) 371-372.

Despite the hardships of conceptualization mentioned in the previous section, there are paradigmatic cases, in which all observers can agree that the government and the parties behind it use public resources in a way that cannot be justified under the principles of democracy and, more closely, under the principles of equal contest of parties. Government speech may be an explicit communication in favour of a political party or candidate, taking the form, for example, leaflets campaigning for a particular party funded by the government. In this case the main argument should not be that the government identified itself with a political power, as there is an inherent identification in democracy. The problem is rather that the government used official resources to do so, and in this way with an explicit communicative means intervened in the contest of political parties.

The case may be more evident, if it happens in a campaign period. Speech in the campaign period[27] poses greater threat than speech years before the elections. Campaigns are usually regulated with special rules and the procedure and enforcing bodies differ as well. This special scheme is needed as at this period the threat posed by the abuse of state resources is the most serious. In this way two periods may be distinguished; the governing period, in which the government – and the parties behind it – carries out its programme, and the election period, in which the parties contest and try to persuade the public about their views on the performance of the government and plans to governing in the future. In this latter period more stringent constitutional requirements prevail.[28] Under these requirements, the government should be neutral in the competition of the parties; it may not communicate (in the narrow and explicit sense) to enhance the voice of the governing parties.

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[27] In this thesis, when not explicitly mentioned otherwise, campaign period is understood broadly *'as a period much longer than the electoral campaign as strictly understood in national electoral law. It covers the various steps of an electoral process starting from, for example, the definition of the electoral constituencies, the nomination or the registration of candidates or lists of candidates for competing in elections. This period lasts until the election of public authorities'* OSCE-Venice Commission Joint Guidelines I. 13.
[28] Sajó (2001) 394.

II. The distortion of public speech in Hungary

The point of departure of this thesis is the acute situation in Hungary, namely, the misuse of governmental communicative resources in the electoral campaign. This section aims to show the importance and the magnitude of the governmental intervention in campaigns. To understand the magnitude and the context of this phenomenon, it is necessary on the one hand shortly describe the problem itself with examples from the recent elections of 2014 and 2018, and, on the other hand shortly embark upon the regulatory framework, finally, on the third hand, the media space.

A) 2014 and 2018 elections – fusion of government and governmental parties

Related to the 2018 parliamentary elections the OSCE-ODIHR report[29] summarized the connection between the government and the governmental parties as it was *'characterized by a pervasive overlap between state and ruling party resources, undermining contestants' ability to compete on an equal basis. […] The ubiquitous overlap […] blurred the line between state and party.'*[30] This was manifest in *'the ruling coalition's campaign messages and the government's anti-migration, anti-Brussels, anti-UN, and anti-Soros information campaigns, evident, in particular, in outdoor and online advertising.'*[31] The fusion was also shown by the communication of the prime-minister; Viktor Orbán *'also used his official Facebook account, which featured his campaign rallies and asked voters to vote for Fidesz.'*[32]

The phenomenon is not new; the OSCE-ODIHR final report on the 2014 elections[33] also mentioned that *'[t]he use of government advertisements that were almost identical to those of Fidesz contributed to an uneven playing field and did not fully respect the separation*

[29] Hereinafter '2018 OSCE-ODIHR Report'. Available at: https://www.osce.org/odihr/elections/hungary/385959?download=true (last download: 2019.03.29.)
[30] 2018 OSCE-ODIHR Report p. 1-2.
[31] 2018 OSCE-ODIHR Report p. 13.
[32] 2018 OSCE-ODIHR Report p. 13, fn 59.
[33] Hereinafter '2014 OSCE-ODIHR Report'. Available at: https://www.osce.org/odihr/elections/hungary/121098?download=true (last download: 2019.03.29.)

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of party and State, as required in paragraph 5.4 of the 1990 OSCE Copenhagen Document.'[34] This included a special governmental campaign *'Hungary performs better' (Magyarország jobban teljesít)*,[35] as well as '*notification letters [sent] to potential voters informing them of the savings that resulted from the government's initiative to decrease public utility prices, which was also a key feature of the Fidesz campaign.'*[36]

The magnitude of governmental intervention is shown by the report of Transparency International Hungary on the campaign spending of parties during the 2014 parliamentary campaign.[37] According to the organization's estimates, the government supported the campaign of the governmental parties Fidesz-KDNP with HUF 560 million. This is the third of the amount of the estimated campaign spending of the opposition 'Alliance', consisting of the parties of the traditional left-wing.[38] The government therefore supported its parties with enormous resources, increasing the unbalance between the government and the opposition.

The phenomenon thus was reported by international observers, however, in the Hungarian constitutional literature it has not been thoroughly analysed, maybe due to the numerous constitutional deficits of the country that up till now has deserved more attention. At any rate, the question of governmental propaganda was known,[39] and certain specific decisions were subjected to critical analysis by the literature.[40] But apart from brief detour to the topic in forms of blog posts,[41] is has not been systematically analysed. In this way the

[34] 2014 OSCE-ODIHR Report p. 2.
[35] This slogan was subsequently sold to the governing party (See Part III. B).
[36] 2014 OSCE-ODIHR Report p. 13.
[37] Transparency International Hungary: Kampányköd – Kampányfinanszírozási Tanulságok és Javaslatok: A 2014. évi országgyűlési és önkormányzati választások kampányköltéseinek monitorozása (hereinafter: 'TI Report'), available at: https://transparency.hu/wp-content/uploads/2016/03/Kamp%C3%A1nyk%C3%B6d-A-2014.-%C3%A9vi-orsz%C3%A1ggy%C5%B1l%C3%A9si-%C3%A9s-%C3%B6nkorm%C3%A1nyzati-v%C3%A1laszt%C3%A1sok-kamp%C3%A1nyk%C3%B6lt%C3%A9seinek-monitoroz%C3%A1sa.pdf (last download: 2019.03.28.)
[38] See chart at TI Report p. 8.
[39] See for example: Bernát Török: A politikai reklámozás magyar szabályozásáról In Ákos Cserny (ed.) Választási Dilemmák, Nemzeti Közszolgálati Egyetem, Budapest, 2015. 168-170.
[40] See for example the 2018/3-4. issue of the periodical Jogesetek Magyarázata.
[41] For example an English summary on the topic: Emese Szilágyi: Public Money in Political Campaigns. An Analysis on Hungarian State Propaganda, Jtiblog, 2018, available at: https://jog.tk.mta.hu/blog/2018/11/public-money-in-political-campaigns (last download: 2019.03.28).

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problem of the fusion of governmental and party communication was acknowledged as a question of constitutional law, however, it so far it has drawn only little attention.

B) Public speech in general - governmental voice magnified by a seemingly even field

The problem is exacerbated on the one hand by the regulation of public speech that enhances the relative weight of governmental communication. From a formal point of view, the Hungarian framework approaches the political debate from an 'egalitarian' perspective; the framework aims to create an even field for the parties. As we will see, however, when embedded into the Hungarian context, this approach in fact increases the ruling party's voice. The egalitarian framework consists of rules on political advertising, billboards and of campaign and party financing.

(i) Political advertisement in radio and television

First, under Article IX (3) of the Fundamental Law political advertisements in television and radio may be broadcasted only during the campaign period, i.e. the term starting 50 days prior to the election. The constitution does not give the definition of political advertisement, under the statutory framework it is *'any advertisement in television or radio that promotes or advocates support for a party, political movement, or the government, or promotes its name, objectives, activities, slogan, or emblem.'*[42] This means that outside the campaign period no direct political message may be broadcasted in television and in the radio.

Moreover, under Article IX (3) of the Fundamental Law political advertisements in television and radio during the electoral campaign period may be broadcasted even only for free. It is telling that the provision was originally in the Act XXXVI of 2013 on the Electoral

[42] Act CLXXXV of 2010 on media services and mass media (hereinafter: Media Act) 203 § 55. English translation is available at: http://nmhh.hu/dokumentum/106487/act_clxxx_on_media_services_and_mass_media.pdf (last download: 2019.03.28.)

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Procedure ('Electoral Procedure Act' or 'EPA'), however, it was annulled by the Hungarian Constitutional Court ('HCC') as an unduly restriction of fundamental rights.[43] Subsequently, a slightly modified version was put into the Fundamental Law. The only modification is that the original statutory provision explicitly prohibited the advertising outside the public media, while the constitutional provision does not exclude private media explicitly. However, requiring the absence of counter value has the similar effect; in the 2014 elections no advertisement was run in the private media, though, in 2018 some broadcaster run ads for free.[44] It is to be noted that these restrictions apply only to the television and radio broadcasters. In the offline and online press political advertisements may run outside the campaign period. The only restriction is that in the campaign period the offline and online press organs need to hand in a list of prices of their advertisements beforehand, and may sell their ad spaces accordingly.

However, this is an egalitarian framework only on paper, in reality the prohibition of political advertisement regarding television and radio outside campaign period does not apply to the government itself. This is achieved by the flexible interpretation of the statutory background. As opposed to political advertisements in television and radio, public service advertisements may be broadcasted any time, i.e. outside campaign period as well. These are defined by the statutory framework as *'any communication or message with a public purpose, which does not qualify as a political advertisement, is not for profit and does not serve advertising purposes, is transmitted for or without consideration, and which aims to influence the viewer or the listener of the media service in order to achieve a goal of public*

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[43] Decision 1/2013 (I. 7.) of HCC [95]-[100], English translation available at; https://hunconcourt.hu/uploads/sites/3/2017/11/en_0001_2013.pdf (last download: 2019.03.28.).

[44] Those private broadcasters who want to play political ads needed to register. In 2018 two television broadcasters (ATV, RTL) and one radio registered. See: http://www.valasztas.hu/documents/20182/558074/Politikai+rekl%C3%A1m+k%C3%B6zz%C3%A9t%C3%A9tel%C3%A9re+bejelentkezett%2C+nem+k%C3%B6zszolg%C3%A1latinak+min%C5%91s%C3%BCl%C5%91+m%C3%A9diaszolg%C3%A1ltat%C3%B3/e91f3c26-bb05-42e6-bfe8-d4620a8b5b67?version=1.4 (last download: 2019.03.28.).

interest."[45] In the recent years it has been the practice of the government to advertise its partisan messages under the disguise of public service advertisements, for example, the so-called 'Soros campaign' was run in this way.[46] Consequently, while parties were barred from advertising in television and radio outside the campaign period, the government effectively could. As a consequence it can be said that outside the campaign period the government enjoys advertising monopoly in television and radio.[47]

The magnitude of this is shown by the figures by atlatszo.hu, an independent non-profit journal that asked for public data on governmental spending on communication on its conduct. According to the data received, between May 2010 and September 2018 the government spent HUF 69,3 billion on communication. In the months preceding the elections, January, February, March 2018 it spent HUF 3,2 billion, 4,2 billion and 3,2 billion respectively. This included for example the 'Stop Soros' campaign mentioned above launched January 2018, three months prior to the elections.[48] Just to compare these amounts, the upper limit of campaign spending for a party in the entire campaign period is HUF 1 billion (see below at *(iii)*).

(ii) Campaign and party finance

Furthermore, under the Hungarian campaign finance regulation, there is an upper limit for campaign spending. This limit depends on the number of the candidates a given party has, but it is at the maximum 995 million HUF, approximately 3 million EUR.[49] Moreover, under

[45] Media Act 203. § 64.
[46] In January 2018, only three months prior to the elections the government tuned up its campaign against the billionaire-philanthropist George Soros. The campaign ran under the slogan 'Stop Soros!'The spots ran in televisions and that was possible as they were labelled as public service advertisements. A description of the campaign as well as a tv spot is available at: https://24.hu/kozelet/2018/01/19/elindult-a-stop-soros-tajekoztato-kampany/ (last download: 2019.03.28.)
[47] Outside the campaign period the framework is interpreted by the Media Authority that held in many controversial cases that the spots were public service advertisements. Due to the lack of standing, the decisions are not able to adjudicated further.
[48] Attila, Bátorfy: Nyolc év alatt 70 milliárdot költött a kormány önfényezésre és rettegtetésre – infografikák, atlatszo.hu, 2019.01.09. Available at: https://atlatszo.hu/2019/01/09/nyolc-ev-alatt-70-milliardot-koltott-a-kormany-onfenyezesre-es-rettegtetesre-infografikak/ (last download: 2019.03.28.)
[49] Act LXXXVII of 2013 ('Campaign Finance Act') 7 §.

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the party finance act parties cannot receive funds from any corporations or from abroad.[50] State funds are available both for financing the parliamentary campaign and other party activities.[51]

It can be seen from the above mentioned that a seemingly even field is created for parties. Political advertisement can be broadcasted only in campaign period, and even then only for free, however, as we could see, this de facto does not apply to the government. Campaigning via billboard and campaign spending is limited, therefore the chance of the parties to reach people is limited as well as the opportunities for parties to raise funds. This, coupled with the involvement of government in partisan matters, enhances the relative weight of governmental communication.

C) Media space

The restricted 'even-field' makes the public sphere more dependent on the context, meaning that as parties are restricted, other actors' voice is enhanced. This places a special emphasis on among others media pluralism. The Hungarian context in this respect suffers from the lack of free media and press environment. As it does not belong to the focus of this paper, here I just highlight the main deficiencies.

On the one hand, all the county newspapers are owned by the same pro-government entity. The internet penetration – and this the source of alternative information – is much lower in the countryside, than in Budapest, and the countrywide newspapers have little penetration as well. This enhances the relative weight of the county-newspaper network. In the eighteen newspapers belonging to this network news are written in a centralised method, and report in a biased way, omitting topics disadvantageous for the government.[52] On the

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[50] Act XXXIII of 1989 ('Party Finance Act') 4. §.
[51] Parties achieving at least 1 percent on the parliamentary elections receive funds for ordinary functioning. Parties having national lists at the parliamentary elections receive campaign public funding as well as individual candidates.
[52] An NGO, Mérték – Médiaelemző Műhely conducted a country-wide monitoring on the county publishing network. The monitoring supported among others the assumption that centralised news were published, in a

other hand, governmental advertisements distort public speech not only directly, but they also serve to finance non-public media entities that are supportive towards the government and hostile towards the opposition.[53] On the third hand, the public media – television and radio broadcasters – report also in a highly pro-government way. Thus, this pro-government media and press is financed either directly (as regards public media) or indirectly, through governmental advertisements, (as regards pro-government private media and press) by the government and thus by the ruling political actors. This contributed greatly to the deficiencies related to media pluralism.[54]

The Hungarian situation and the strategy of the government can be summarized as the following; the government (and through it the governmental parties) restrict the communicative channels of other parties, thus enhancing the relative weight of the governmental communications, in a context were the public media is pro-government and the private media is partly funded by the government itself. This has led to the serious distortion of the public sphere, and one important component is the active communicative participation of the government.

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biased (pro government) way. Mérték – Médiaelemző Műhely: 'Megyejáró: megyei napilapok elemzése – összegzés', 2019.02.04., available at: https://mertek.eu/2019/02/04/megyejaro-megyei-napilapok-elemzese-osszegzes/ (last download: 2019.03.28.).

[53] Ágnes Urbán: Állami hirdetések Magyarországon 2006-2017, www.mertek.atlatszo.hu, 2018.02.23., available at: https://mertek.atlatszo.hu/allami-hirdetesek-magyarorszagon-2006-2017/ (last download: 2019.03.28.).

[54] The government's influence on media is described in a comprehensive analysis carried out by Friedrich Ebert Stiftung and Political Capital. See: Patrik Szicherle – Veszna Wessenauer: A média és politika új viszonya Magyarországon, Political Capital and Friedrich Ebert Stiftung, 2017. Available at: http://www.politicalcapital.hu/pc-admin/source/documents/FES_PC_A_media_es_a_politika_uj_kapcsolata%20_171004.pdf (last download: 2019.03.28.).

III. Government neutrality in the Hungarian jurisprudence

Government neutrality in the electoral campaign is an existing normative concept in the Hungarian jurisprudence. However, its content is divergent as the case law is not consistently strict when assessing governmental speech in the campaign. In this section I describe first the textual requirements then embark upon the case-law of the 2014 and 2018 parliamentary eletions.

A) Textual requirements

The Fundamental Law does not contain explicit provisions on state neutrality as regards the electoral process in the narrow sense.[55] This means that there is no provision that explicitly prescribes the requirement of equal chances of parties and the prohibition of state-interference in the electoral process. However, the requirement may be derived from the provisions that prohibit direct party intervention in the exercise of public power [Art. VIII. (3)], provisions on the general equality of chances (Art XV), and on the basic functions of the parties, i.e. participation in the formation and expression of the will of the people [Art. VIII. (3)],[56] as well as from the general concept of democracy and popular sovereignty [Art. B)]. Indeed, the HCC derived the requirement of equal chances of the parties and state neutrality in the electoral contest with references to political pluralism as a necessary prerequisite to democracy.[57] Therefore the Hungarian case law acknowledges that the prohibition of state intervention in the electoral process stems from the very nature of modern democracy that is based on the competition of parties.

The constitutional requirements are transposed by 2. § (1) c) of the Electoral Procedure Act that contains the principle equal opportunity for candidates and nominating

[55] In the broader sense, the constitution includes provisions on state neutrality in scientific matters (Art. X) or with regard to religion (Art. VII.).
[56] As it was mentioned in the report of the reference group of the Curia on the court's case-law in electoral and referendum matters. See: Curia: A választási és népszavazási eljárásokkal kapcsolatos jogorvoslat tárgyában létrejött joggyakorlat-elemző csoport – Összefoglaló Vélemény, Budapest, 2018 (hereinafter: 'Curia Report') 192.
[57] Decision no. 63/2008. (IV. 30.) of HCC.

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organizations (i.e. parties). As a principle it is an abstract rule and, as we will see, the interpreting bodies derived more concrete requirements from this principle regarding state neutrality. This is due to the fact that the Electoral Procedure Act does not contain specific limitations on state intervention; it does not prohibit explicitly the scope and details of unlawful intervention of municipalities and the government (and other state-organs) in the electoral process. The only relevant specific rule was enacted after the 2018 elections; it excludes from the notion of campaign activity those activities of municipalities and other state-organs that are exercised when they carry out their tasks prescribed by law.[58] This could give room to an interpretation that enables state communicative intervention based on the argument that the given activity was needed in order to carry out a task prescribed by law.

Furthermore, it is to be noted that the problem may also be approached from a campaign-financing perspective. If a government launches communication that favours a party, then the communicative means imply inevitably financial means as well. The relevant statute, however, does not prohibit explicitly the financing from the government, however, it may be argued that the provision prohibiting contribution from legal persons[59] covers the government as well. At any rate, as the problem has never been brought up as a question of campaign finance, it is hardly conceivable that the case law will develop via this route.[60]

B) Case law

In Hungary, the jurisprudence on state neutrality in electoral campaign is formed mostly by the HCC and the Supreme Court ('Curia'). During the electoral process a network of electoral commissions is set up, the participating EMBs differ according to the type of the election (parliamentary, municipal, etc.). The most important actor among them is the National Election Commission (hereinafter 'NEC'). After the 2010 elections the whole public-law system was changed, and among others the EPA was enacted in 2013 and was

[58] EPA 142. §.
[59] See Party Finance Act 4. § (2).
[60] This would be partly more efficient, as the scope of Party Finance Act is not restricted to the campaign period.

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first applied in the 2014 parliamentary elections, therefore here I focus on the case law subsequent to 2013.

(i) Period of application

The fact that the requirement is made explicit within the EPA has special consequences related to its period of application. EPA determines the duration of the campaign period, stipulating that it starts 50 days prior to the election day (EPA 139. §). Moreover, it defines campaign activity as an activity exerted in the campaign period (EPA 141. §). This gained special importance in a recent case, when after the announcement of the exact date of the 2019 European Parliament elections but prior to the start of the campaign period the government launched a campaign on the alleged threats of the handling of migration within the European Union. Both the NEC and the Curia stated[61] that the mechanism laid down by EPA is applicable only in the campaign period as determined by the law. This means that the 2. § (1) c) of EPA that stipulates equal opportunities for parties may be referred to only with regard to governmental activity in the legally determined campaign period.

This is of great importance as there is no effective remedy against abusive governmental campaigns that are run shortly before the campaign period. As noted in the previous part, in January-February 2018, shortly before the elections television and radio spots advertised the governmental agenda (for example the above mentioned 'Stop Soros' campaign) disguised as ordinary governmental communication. Due to the interpretation that renders limited scope of the legal mechanism under EPA, these could not have been effectively adjudicated.

(ii) Political advertisement, governmental billboards

[61] 32/2019. (NEC) Kvk.IV.37.364/2019/2. (Curia).

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One set of case law is related to political advertisements broadcasted in television and radio. The problem of state neutrality emerged at the 2014 parliamentary elections; during the campaign period the government launched a campaign that was centred around the slogan of *'Hungary performs better' ('Magyarország jobban teljesít')*. This slogan was the same as what was used by the governmental coalition Fidesz-KDNP,[62] moreover, the visual characteristics of the campaign was similar to that used by these parties. As part of this communication campaign, advertisements were broadcasted in one of the main private television broadcasters.

The case was brought before the NEC,[63] the applicants argued that the governmental campaign violated among others the principle of equal opportunities as laid down in the EPA. On the first instance the NEC followed a formalistic approach, and highlighted that the said advertisements did not mention any parties, moreover it was explicitly indicated that they were produced at the order of the government. Therefore they could not be labelled as a political advertisement, but as a public service advertisement.

This was reversed, however, on the second instance by the Curia.[64] The court noted that the decisive factor is not the person that ordered the advertisement but its content. Based on the examination of the content it could be established that the government's campaign magnified the voice of the governmental parties, therefore it was a political advertisement. It therefore violated among others the requirement of equal opportunities. The core of the decision could be summarized that if governmental communication advocates both the government and other parties at the same time in the campaign period, then it will be qualified as a political advertisement and thus it will violate the principle of equal opportunities. The decisive factor is not the form of the advertisement, but the content.

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[62] In fact, the government 'sold' the rights to use the slogan to the governing parties. See 2014 OSCE-ODIHRReport p. 13.
[63] 745/2014. (NEC).
[64] Kvk.III.37.328/2014/6. (Curia).

Nevertheless, the decision has some flaws that are the results of some obiter dictum statements of the court. First, the decision notes that *'the question does not even emerge whether the government can run campaign activities during the electoral campaign.'*[65] This is a rather questionable approach and it suggests that so long the government's slogan and the visual perception of its advertisement does not amplify the voice of parties, it may run political advertisements in the television and the radio during the campaign period. Second, the court *'emphasised, that similar advertisement may run outside of the campaign period.'*[66] Thus, it is reinforced that the said advertisement may qualify as a public service advertisement, the only problem with it is that it explicitly amplifies the voice of certain parties. It is rather questionable that any advertisement that promotes governmental performance in such general terms can be qualified other than political advertisement under the statutory definitions.

Another important case dealt with the display of governmental billboards that contain anti-migration messages. During the 2018 parliamentary election campaign the government set out billboards that displayed a blurred marching mass of migrants in the background and a 'STOP' symbol similar to the one used as a traffic sign.[67] The picture of the background was used before on the social media surface of the governmental parties.

The applicant argued that the billboards aimed to amplify the message of the governmental parties, whose communication was centred around migration, and that they do not provide any information rather affect the emotions, thus they may be labelled as propaganda. The government argued that the billboards are part of a long-term governmental campaign, and they need to be straight to the point due to the characteristics of the

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[65] Ibid.
[66] Ibid.
[67] The image is available here: https://magyarnemzet.hu/wp-content/uploads/2019/01/stop_plakat.jpg (last download: 2019.03.28.).

advertising surface. The NEC rejected the application,[68] referring to among others to the test applied in the 'Hungary performs better' case described above. The commission argued that this test requires the comparison of the communication of the parties and the government. Violation of the equal opportunities may be established only if the two communications are capable of being confused with each other, but in the present case the form of the governmental communication could not have been confused with the communication of the governmental parties.

The Curia, however, decided in favour of the applicant.[69] The court noted that the applicable test is not whether the communications are capable of being confused with each other, but whether the governmental communication amplifies the messages of one of the contesting parties. The court noted that the government may give information to the public even during the campaign period, but this needs to contain *'concrete matter of information, and this necessarily implies the actuality of the information.'*[70] This means that the government should have proved that some new event required the public being informed, otherwise it may be perceived as a distortion of the competition among the contesting parties. As in the present case the government did not prove that the communication was necessitated by an objective event, it constituted the violation of the equal opportunity.

Furthermore, the Curia stated that the government is not the subject of fundamental rights, namely, that it is not a right holder with regard to freedom of expression. Consequently, the necessity-proportionality test is not applicable. This put an end to the controversies around the government and its freedom of expression.[71]

The decision is of utmost importance and shows that by the 2018 parliamentary elections the case law had conceptualized the problem of governmental communicative

[68] 647/2018. (NEC).
[69] Kvk.III.37.421/2018/8 (Curia).
[70] Ibid at [22].
[71] For the analysis of this question as well as the whole decision see: Emese Szilágyi: A Kúria döntése a Kormány „STOP" plakátkampányáról, Jogesetek Magyarázata, 2018/3-4, 51-57.

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intervention via advertisements and set out standards. As a summary, it can be said that the government can inform the public on matters of general interest, but in the electoral campaign this activity must be necessitated by objective events or happenings. If there is no such event or happening, and the governmental communication can amplify the message of the governmental parties, then the communication will be the violation of the principle of equal opportunities.[72]

(iii) Exercising governmental PR tasks

The Court applied a more lenient approach when it assessed cases involving communication that seemingly aimed to carry out neutral state communicative activities. One example is the case involving the communication of the Prime Minister's Office in the 2014 parliamentary elections.[73] The Office published a report two days prior to the election-day with the title *'Every vote is needed'* and *'Up to the victory'*. Both reported on the assembly of the governmental parties Fidesz-KDNP. The applicants argued that the reports violated the principle of equal opportunity. Both the NEC and the Curia decided, however, that the conduct of the Office was prescribed by law, namely, it was a statutory task of it to give information to the public. The Curia highlighted that the EPA did not affect those functions of state organs that fall out of its scope, namely, those activities that are not campaign activities. Therefore campaign activities need to be distinguished from the activities through which the government provides information. As the communication fell into this latter category, it did not violate the equal opportunities of the parties.

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[72] The principle of equal opportunity was reinforced in cases involving municipal publications and press, i.e. press organs that are owned by the municipality. Since the focus of this thesis is on the intervention by the government and its members, I do not go into details, here it is enough to note that the Curia applied the requirement of equal opportunity of parties to the municipalities as well. See for example the decisions of the Curia Kvk.IV.37.359/2014/2 and Kvk.IV.37.360/2014/2.

[73] Kvk.II.37.478/2014. (Curia).

The court thus applied a formal approach and it did not give any reason why a report on the official webpage of a governmental organ on a campaign activity of certain parties just two days prior the elections would not constitute campaign activity.

Another case involved seemingly neutral state activity that involved only indirect communication.[74] Although it was not carried out by the government or its members, but by a mayor, it shows the challenges of the jurisprudence when acts of state authorities have both communicative and non-communicative nature. In the case during the 2014 parliamentary election campaign period the candidate was also the mayor of the given district. In this latter authority under the statute on social allowances he ordered the distribution of apples to those residents of the district who were also pensioners. The distribution took place in the campaign period.

The applicants claimed that the municipality engaged in campaign activity, and with this it violated the principle of equal opportunities. Both the NEC and the Curia rejected the claims. The court highlighted that the implementation of the tasks of the municipalities need to be distinguished from campaign activities. The distribution of apples is part of the social powers of the municipality, and as such can be assessed in light of the law on these powers.

The case tackles the question of state subvention during the electoral campaign, and, more broadly, the distinction between 'ordinary' functioning of the government (distributing apples) and the communicative act ('re-elect me!') expressed by it. The issue emerged in 2018 as well, when the government pronounced on 7 March (in the campaign period) that every pensioner receives HUF 10.000 voucher, and household bills were going to be reduced by HUF 12.000.[75] The case was not brought before any authority, and it is rather questionable that either the NEC or the Curia would establish the violation of the requirement of equal opportunities. The pronouncement of such a subvention in the electoral campaign

[74] Kvk.II.37.398/2014/2. (Curia).
[75] See 2018 OSCE-ODIHR Report pp. 13-14.

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can be problematic as it provides unduly advantage to the government and thus to the governmental parties, however, as noted above, there are no clear standards applicable in these cases.[76] Namely, as the ordinary governmental and state functioning should continue even in election period, it cannot and should not be prohibited for these organs to carry out their tasks. However, this functioning inevitably creates an asymmetry in communication as noted above at the theoretical underpinnings.

(iv) Party connecting to governmental communication

A special aspect of state neutrality emerged in a case during the 2018 parliamentary elections, namely, when a party connects to an existing governmental communication and thus it enjoys its resources. The governmental party Fidesz put out billboards that displayed the prime minister, Viktor Orbán, who is also the president of the party and was the leading candidate in the joint list of the governmental parties. The visualisation of the billboard was similar to the visualisation of the governmental communication; Orbán stood at the right side and in front of a background consisting of Hungarian flags. On the left of the billboard a slogan could be read: *'For us Hungary is the first!' ("Nekünk Magyarország az első!")*.[77] The applicant argued on the one hand that from the billboard it does not clear that who ordered it, therefore it violates the requirement that any such material should be clearly identifiable. On the other hand, more importantly, the applicant argued that as the visualisation of this billboard and the general governmental communication is very similar, the equal opportunity of the parties is violated as well.

The NEC rejected the claim, the Curia reversed the decision and judged in favour of the applicant.[78] The case went up to the HCC that reversed the judgment of the Curia. [79]

[76] However, as we will see, the OSCE-Venice Commission Joint Guidelines prescribe that governments should avoid such announcements in the campaign period. See Part VI. A).
[77] The image is available here: https://arsboni.hu/wp-content/uploads/2018/04/orbanplakat.jpg (last download: 2019.03.29.)
[78] 599/2018. (NEC), Kvk.VI.37.414/2018/2. (Curia).
[79] Decision no. 3130/2018. (IV. 19.) of HCC.

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However, neither the Curia nor the HCC examined the case in the light of the aspect of the equal opportunity of parties; both bodies focused on whether the billboards may deceive the voters as they do not display clearly who ordered them. The interpreting bodies thus missed the constitutional relevance of the case entirely.[80] The case shows that the idea of misuse of governmental communication powers and strict neutrality is not deeply rooted in the case-law, indeed, it could be perfectly overlooked by the interpreting bodies.

(v) Statements of public officials

Finally, the case law is rather ambivalent with regard to the statements and conducts of public officials. One example comes from the 2018 parliamentary elections, and although it involves the statement of a mayor, it shows the lack of solid case law.

During the campaign, five days prior to the voting day the mayor of a substantial Hungarian city sent out a letter to the residents of the district, in which letter he urged them to vote for the candidate of the governing parties. It was not sent with a heading of the municipality, nor was it financed by it in any way, however, it referred several times to the official status of the speaker (for example: 'I ask you, as a mayor…') and it was signed as by the mayor.

The case went before the NEC and the Curia, both of whom established that there had been a violation of equal opportunities of the parties.[81] The Curia established that the mayor sent the letter in its official authority, and it was qualified as a campaign activity. The HCC, however, overturned the decisions, and stated that it violated the right to free speech of the mayor. The decision is not clear and controversial in its many findings,[82] but its two main flaws are, on the one hand, that it treats the mayor in his capacity of a right holder of

[80] Viktor Kazai: A józan ész beteget jelentett – a választási plakátok alkotmányjogi megítélése, www.arsboni.hu, 2018.04.13. available at: https://arsboni.hu/jozan-esz-beteget-jelentett-valasztasi-plakatok-alkotmanyjogi-megitelese/ (2019.03.28.).
[81] 714/2018. (NEC), Kvk.V.37.466/2018/2. (Curia).
[82] Decision no. 3154/2018. (V. 11.) of HCC. For a comprehensive critical analysis of the decision see: János Mécs: Az Alkotmánybíróság határozata a polgármester országgyűlési választási kampányban való részvételének és az állami semlegességnek a kapcsolatáról , Jogesetek Magyarázata, 2018/3-4., 3-13.

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subjective fundamental rights and thus places the requirement of neutrality into a right-limitation paradigm, rather treating it as a limit to the communication of a state organ during elections, and, on the other hand, it has some obiter dictum statements that question that the communication of mayors could be restricted at all.[83]

C) Conclusions

The recent Hungarian jurisprudence is controversial in many aspects. On the one hand it textually declares the equal opportunity of the parties, and the HCC derived the requirement from specific provisions of the constitution, as well as from the abstract notion of democracy. Moreover, both in 2014 (Hungary performs better case) and 2018 (Stop case) the Curia interpreted this framework in a way that effectively hindered the government and the parties behind from misusing governmental resources in the electoral campaign. It can be said, therefore, that the cause of deficiencies is not to be found in the law as it is, but as it is applied.

However, on the other hand, the case law is not solid, as was shown by the case involving the report on the ministry webpage on a party assembly shortly before the election day, and by the case when the governmental party connected to the government campaign, in which the whole equal opportunity aspect was overlooked. Furthermore, the recent case involving the letter from the mayor brings up serious doubts whether the framework can be interpreted effectively if the HCC is involved. The fluid nature of the equal opportunity principle is also shown by the dogmatic inconsistencies of the case law. Prior to the Stop decision in some cases the NEC and even the Curia treated the government as a subject of the fundamental right of speech.[84] The Stop decision may have put an end to this case law regarding the government, however, as we saw at the mayor case, it is still not settled and may be reopened if not the government itself communicates but one of its members.

[83] Mécs (2018).
[84] See Szilágyi (2018b).

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The problem is exacerbated by two factors. First, as mentioned above, the EPA is modified as to exclude from the campaign activity *'those activities of municipalities and other state organs that are the implementation of tasks prescribed by law.'*[85] This opens the possibility of a more lenient standard, and it may drive the case law in the direction of the formalistic ministry webpage decision. Second, a most recent change is that electoral cases are relocated to a new supreme court, to the Supreme Administrative Court, that, according to the opinion of the Venice Commission *'lacks effective checks and balances in government.'*[86] These factors, coupled with the previous inconsistencies, question greatly that the state neutrality in the electoral campaign will be enforced effectively.

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[85] EPA 142 §
[86] See fn. 122. the report is available here (last download: 2019.03.29.)
https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e

IV. Government neutrality in the German jurisprudence

In Germany the requirements of government neutrality and the equal chances of parties were derived from the Basic Law by the Federal Constitutional Court ('FCC'). As it will be presented below, these requirements are not explicitly mentioned in the text, the FCC used the normative concepts of democracy, popular sovereignty, elections and political parties to set a framework that effectively prevents the misuse of governmental communicative resources in the electoral campaign. In this section I first delineate the most important decision from 1977 that laid down the basic elements of the normative framework. Second, I present some counterarguments related to the approach of the court, and thirdly the most recent case law is presented.

A) The foundations - the 1977 decision

The communicative role of the government in electoral campaign and the related requirement of state neutrality ('Neutralitätsgebot') is formed by the jurisprudence of the FCC. The question appeared as early as 1966 in the jurisprudence in the FCC, however, not directly linked to communication but to the role of the state in party financing. In the 'Party Finance Case III'[87] the court examined rules concerning the public funding of political parties. It emphasized that the forming of the will of the people cannot start with the state, meaning that *'state organs are in principle prohibited from becoming active in forming the people's will and opinion.'*[88] The court thus laid down the requirement of a 'state-free' process of forming the popular will.

The most important decision in the field is a decision from 1977 ('1977 decision')[89] that established the approach towards the communicative role of government in electoral campaign. Prior to the federal elections of 3 October 1976, the SPD-FDP federal government

[87] 20 BVerfGE 56.
[88] Quoted by Kommers. See Donald P. Kommers: The Constitutional Jurisprudence of the Federal Republic of Germany 2nd edition, Duke University Press, 1997, 205.
[89] 44 BVerfGE 125 (1977).

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ordered a number of advertisements that emphasized the achievements of the government in essential areas of policies (economy, education, etc.). The exact content differed but all underlined the achievements of the government, with the slogans like 'The government has given you, all in all, more freedom'[90] or 'Performance deserves trust, we secure the German future.'[91] The advertisements were published in newspapers (such as Spiegel, Bild) and in the radio and television. Besides the advertisements, the government published information booklets and brochures on different public matters, showing the effectiveness of the government. From these materials 59,5 % were received and distributed by the governing parties SPD and FDP, and only 0,26 % by the opposition parties CDU and CSU.[92]

The CDU initiated proceedings available for state organs under Article 93 (1)-1 of the Basic Law ('Organstreit' proceeding)[93] before the FCC as in its view the above descried conduct violated Art. 21 (1) of the Basic Law in conjunction with Art 20 (2) and Article 38 (1). Article 21 (1) lays down the basic function of the parties, thus among other their participation in the forming of the will of the people,[94] Article 20 (2) stipulates that all state authority emanates from the people,[95] whereas Article 38 (1) enshrines the principles of elections, the free mandate of the representatives, and the right to vote. The basic argument was that the government violated the basic concept of democracy and people sovereignty through violating the equal opportunities of parties as it intervened in the formation of the will of the people with its advertisement and information booklets using public funds in the competition of the parties.

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[90] Ibid at 128.
[91] Ibid.
[92] Ibid at 129.
[93] A procedure involving different state organs. Under the case law of the FCC parties have standing in Organstreit proceedings. See 44 BVerfGE 125, 138.
[94] Article 21 (1) Political parties shall participate in the formation of the political will of the people. They may be freely established. Their internal organisation must conform to democratic principles. They must publicly account for their assets and for the sources and use of their funds.
[95] Article 20 (2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

The FCC ruled that the conduct of the government was indeed incompatible with the basic concepts of democracy and popular sovereignty laid down in Art 20 (1) and (2) and violated the equal opportunity of parties derived from Article 21 (1) and Article 38 (1). First, the court argued that from democracy and popular sovereignty it follows that the government is responsible to the people through democratically held elections. This requires a free process of the formation of the public will, which integrity is preserved throughout the process. This integrity is required especially when it comes to the elections, and it is necessary that the will emanates from the people towards the state not the other way around. It follows that in the election period state organs are *'prohibited to identify themselves as state organs with political parties or candidates and to support or oppose them by using state resources, in particular to influence the decisions of the voters by advertising.'*[96] It is prohibited as well, if the government does not campaign for particular political forces but its re-election. The court emphasized that this does not preclude political actors from campaigning for re-election outside of their official status. As regards equal opportunity of the parties, the court noted that minority groups must have the same opportunity to become the majority. According to the court it is not restricted only to the electoral process in the narrow sense, but it covers the electoral preparation.

Second, the FCC acknowledged that the government has certain duties related to providing information to the citizens about its conduct, therefore in many cases it has a legitimate purpose. However, under the FCC's view this legitimate providing of information needs to be distinguished from unconstitutionally influencing the political competition. Although it is perfectly normal that the agenda of the government and the ruling parties 'coincide', it can be basically said that the 'permitted governmental information is limited

[96] 44 BVerfGE 125, 141.

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when the electoral campaign begins.'[97] To decide whether this limited scope was violated, the Court examined the content and the form of the communication. As to the content, according to the court, partisan character may be recognized if the government presents itself as a government of certain parties, or it campaigns for its re-election. As to the form, the court considers the proportion of the information conveyed and the advertising component. Moreover, the legitimate scope may be violated if the government publishes otherwise admissible materials very close to the elections. Therefore, the timing is also decisive, and although the court did not set an exact date, the date when the president sets the election date may 'serve as a reference.'[98]

Applying these abstract norms to the case, the court noted that the advertisements promoted the government and its achievements and presented its will to remain in office. As these fell into the critical period prior to the elections they were unconstitutional. Apart from the advertisements, the brochures and reports were used by the governing parties as advertising materials and this fact also violated the requirements laid down in the Basic Law, even if the content of these brochures in itself would not have been problematic.

B) Parteienstaat – an alternative interpretation?

The 1977 decision tried to draw a clear line between the conduct of the government and the governmental parties in the electoral period and set some requirements that emphasized the difference between the governing party and the government. This approach was criticised forcefully by the dissenting opinion of judge Rottmann as well as by part of the subsequent literature. One commentator labelled the decision as *'not one of the sharpest intellectual achievements of the court'* and expressed a view that it *'smelled of musty anti-*

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[97] 44 BVerfGE 125, 150.
[98] 44 BVerfGE 125, 153.

pluralism' and the idea that the government is some neutral entity floating above the society.[99]

Judge Rottmann criticised the decision from the viewpoint that Germany is a 'party-state' ('Parteienstaat'). Under the Parteienstaat doctrine parties enjoy a *'legally privileged status […], [t]hey are elevated to the status of a constitutional institution and recognized as a 'unity of action' [Hanglungseinheit] that is required by democracy in order to unite voters into groups capable of political action and to make them possible to effectively influence the affairs of the state.'*[100] Parties have 'virtual monopoly' over choosing candidates to the Bundestag and choosing the chancellor, who is usually the leader of the majority party and the federal ministers are usually members of the parliament. Consequently, the government is not a non-neutral organ, but the *'executive committee of the governing party or coalition.'*[101] The government does not carry out a politically neutral agenda, but the program of the majority, who won the election, which is about the choice among the substantially different approaches of the general interest. Judge Rottmann concludes that from the abstract notion of democracy and popular sovereignty it does not follow that a government may not identify itself with parties, or may not campaign for its re-election.

The dissenting opinion mainly agrees with the majority opinion insofar as the equal opportunities of parties would be violated if the state or its organs use their resources to campaign against or for a candidate. Rottmann even states that *'the massive dissemination of governmental material seems alarming.'*[102] However, he argues that this standard requires a 'closer and different concretization' and that the conduct of the government did not violate

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[99] Maximilian Steinbeis: Saarlands Verfassungsgerichtshof will der Regierung das Wiedergewähltwerdenwollen verbieten, Verfassungsblog, 2010.06.01., available at: https://verfassungsblog.de/saarlands-verfassungsgerichtshof-der-regierung-das-wiedergewhltwerdenwollen-verbieten/ (last download: 2019.03.29.).
[100] 44 BVerfGE 125, 182.
[101] Ibid at 183.
[102] Ibid at 196.

these standards.[103] In this regard the dissenting opinion emphasizes that the government needs to carry out its task till the election day and this requires the providing of information. Moreover, the effectiveness of the communication was not proven.[104] Judge Rottman would have preferred a 'warning decision' and 'announcement decision' ('Warnentscheidung und Ankündigungsentscheidung') on the new requirements.

The majority decision and the dissenting opinion of Judge Rottmann greatly illustrates the different viewpoints present in the German literature.[105] On the one hand many scholars and the subsequent case law presented below emphasize that the political competition requires that state organs do not identify themselves with parties *(Identifikätsverbot)*. This is based on the separation of the society and the state. On the other hand, the German system is constitutionally acknowledged as a *Parteienstaat*, according to which parties are links between the society and the state, and their very nature is to identify themselves with the state in the democratic competition. This 'political reality'[106] calls for a more nuanced view on the relationship of the state and the society (parties). As Kuch summarises, both viewpoints misses something from the 'triangle relationship' (Dreiecksverhältnis) of state, citizens and parties; those who emphasize the distance between state and society distance the will of the people and the will of the state as well, and this is not compatible with the proper functioning of democracy. However, those, who argue that the political and constitutional reality calls for the abandonment of this approach forget that the citizens are also part of this scheme, whose rights may be violated if the governmental resources are used by the governmental parties.[107]

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[103] Ibid at 188.
[104] Rottmann at 192.
[105] The different viewpoints are summarized by: David Kuch: Politische Neutralität in der Parteiendemokratie, Archiv des öffentlichen Rechts, 142/ 4, 2017, 491-527.
[106] The argument of political/constitutional reality is one of the cornerstone of the Parteienstaat principle. See: Emanuel Towfight: Demokratische Repräsentation im Parteienstaat, Reprints for Max Planck Institute for Research on Collective Goods, Bonn, 2011.
[107] Kuch (2017) 142.

At any rate, there may be differences regarding the relationship of state, citizens and parties on a theoretical level, but as Rottmann acknowledged as well in his dissent, the use of government materials to promote partisan interest in the election period violates the constitutional norms in every approach. The question is more on the application; Rottmann argued for a more lenient scrutiny from the viewpoint of the government, while the majority opinion applied stricter standards.

C) The new case law – officials

Despite the criticism of the approach of the 1977 decision, it prevailed and the communicative conduct of the government remained under strict scrutiny. This one the one hand is shown by the example of the 2010 decision of the Saarland Constitutional Court, which repeated some requirements set by the decision and drew a strict line for state government speech in the campaign period.[108]

On the other hand in recent decisions the FCC determined strict standards not just for the government, but for government officials as well.[109] In the *Schwesig case*[110], Manuela Schwesig, who was member of the government, said in 2014 in an interview that *'It must be the top priority to prevent NPD [a neo-Nazi party in Germany – J.M.] from winning seats in the legislature.'* The statement was made in Weimar months prior to the state elections of Thuringia. The court acknowledged the government's – and its members' – duty to inform the public on governmental policies and other matters of general interest, however, it argued again that the requirement of equal opportunities of parties needs to be respected. Government officials cannot use their official status and other resources to influence the

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[108] Shortly before the state elections the prime-minister of the state ordered advertisements and sent letters that appraised his work. The Saarland Constitutional Court found the violation of the state constitution. See: Steinbeis (2010).
[109] For the summary of these cases see: Thomas Kliegel: Freedom of Speech for Public Officials vs. the Political Parties' Right to Equal Opportunity: The German Constitutional Court's Recent Rulings Involving the NPD and the AfD, German Law Journal, 18/1, 2017, 189-212.
[110] 138 BVerfGE 102 (2014).

competition of the parties.[111] This does not bar them however, to participate in party politics as party politicians. In the present case based on the circumstances the court held that the statement was made as a party-politician, and therefore there was no violation of the equal opportunities of parties.

In the *Wanka case*,[112] Johanna Wanka, member of the federal government published a press release on the website of the ministry denouncing the far-right party Alternative für Deutschland ('AfD'). The publication was conducted in November 2015, outside of the campaign period. As to the general normative matters, the court basically repeated its earlier arguments and held that there was a violation of the equal opportunities of the parties, as from the circumstances of the said press-release (published on the official website of the ministry, etc.) it was established that the communication was carried out with the use of official resources.

Although these cases were subject to criticism with reference to the hardships to divide the official and political status of members of the government,[113] they show that the 1977 judgment is being followed and parties can be successful in adjudicating governmental conduct that uses the official resources in the competition of parties. The 1977 decision and the decision of the Saarland Constitutional Court show that wider governmental communicative conduct may be prevented, while the new cases focused on the singular statements of governmental officials. Certain distinctions, for example the exact boundaries between the legitimate information providing and partisan campaign, or between the official status and politician status of the speaker may be subject of debate, but it is safe to say that the German legal background has been proven to be capable of preventing the misuse of communicative governmental resources.

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[111] Ibid at 117-119.
[112] BVerfG -- 2 BvQ 39/15, November 7, 2015.
[113] For the summary of the critical arguments see: Kliegel (2017) 204-211.

V. Comparing the Hungarian and German jurisprudence and its context

As we have seen above in Part III and IV, governmental neutrality and the equal opportunity prevail differently in the jurisprudence in Hungary and in Germany. As noted above, in Hungary the case-law is not solid and is some cases the interpreting bodies set too lenient standards that may have contributed to the systemic problem presented in Part II. In Germany, however, the FCC applied strict standards that may have contributed to the fact that in Germany the communicative intervention of the government is not a systemic problem. This part examines the different factors in the two countries to identify the reasons why the framework of Hungary did not work out as effectively as the one in Germany.

First, the textual background is being examined, then, second, the independence of the interpreting bodies. Thirdly the illiberal populist context is taken into consideration, fourthly the relationship between the government and the governmental parties and finally the relationship between the government and society is being described.

A) Textual background

The textual background is rather similar in the German and Hungarian jurisdictions from several aspects. Neither the Hungarian nor the German constitution mentions explicitly the equal opportunities of parties, or the requirement of state neutrality in the political contest. However, both contain references to parties and their functions as well as to the general principles of democracy and popular sovereignty. Neither of the statutory frameworks lays down an explicit normative framework; although the Hungarian statute EPA mentions the equal opportunities of parties explicitly, it does not set any more specific normative standard, similarly to its German counterpart. It is thus the task of the interpreting bodies to set the exact normative framework in the framework of these broad principles.

This is relevant in the comparative perspective as it can be stated that the differences may not be explained by the textual shortcomings or additional textual elements of the

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respective jurisdictions. The Hungarian framework does not contain any provision that could effectively hinder the interpreting bodies from setting more demanding standards to the governmental speech,[114] neither contains the German regulation any textual 'best practice', the implementation of which could solve the Hungarian deficiencies at one stroke. This means that the deficiencies of the Hungarian jurisprudence may not be solved by a simple codification implementing a legal transplant from Germany.

B) Independence of the interpreting bodies

In Germany the interpreting body is a highly respected organ, one of the most powerful constitutional courts in the world. The FCC enjoys wide societal support as well as institutional guarantees and a long tradition of independent operation. This means that the FCC can interpret the normative background boldly (i.e. in a way that may harm the governmental interest).

As shown above, in Hungary the framework is largely set by the HCC and the Curia. The HCC underwent significant changes after the 2010 elections that may question its independence. The number of the judges was increased from nine to fifteen, and this change made it possible for the governmental parties to nominate six additional judges. As they had secured a two-thirds majority, they could change the nomination rules in a way that did not require the cooperation of the opposition and the governmental parties.[115] In this way 'one-party' judges could be nominated. Moreover, the governmental parties tried to restrict the powers and jurisprudence of HCC in several ways in the form of constitutional amendments.

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[114] It must be added, however, that the modification of the EPA after the 2018 parliamentary elections may pose some challenge to the interpreting body. As noted above at Part III. A), the EPA has been modified to exclude from campaign activity those activities of municipalities and other state organs that are prescribed by law. This either follows from the general legal background without this special rule, and in this case it is superfluous or it tries to steer the case law towards a more formalistic approach such as was seen at the Ministry webpage decision (See Part III. B)).

[115] Prior 2011 the nomination was made by a parliamentary committee consisting of equal numbers of MPs from the government and the opposition. This was changed, and the government has majority in the new nomination committee, therefore it can nominate and elect judges without deliberating with the opposition.

One technique was to annul the previous case law of the court,[116] the other was to modify the constitution in case the court ruled that a certain provision was unconstitutional; this way the decision could be overruled by the constituent power. These factors generally moved the court towards less independence, and that has its trance in the jurisdiction of the court. This is especially prevalent in the case-law regarding the right to vote, including cases of the electoral system,[117] and this may explain the controversial decision in the Mayor case presented above.

The reform of the Curia (prior to 2012; Supreme Court) was not less controversial. As an example, the case of the former president of the Supreme Court, András Baka can be cited. The statutory requirements of the president of the newly formed Curia was set as to exclude the experience gained at international courts. As András Baka had been judge at the European Court of Human Rights, he did not have the years to be eligible. The case went up to the Strasbourg court that noted that the conditions were set because Baka criticized the government's policies on the matters of courts.[118] Apart from this, the independence is questioned as the EPA was amended without the consent of the opposition in the summer of 2018 to overrule some of the decisions of the Curia. Moreover, after a judgment made in the 2018 elections (regarding the validity of postal votes) the prime-minister stated in an interview that the court *'has not grown up intellectually to the task.'*[119] Finally, as noted above electoral cases are relocated to a newly formed Supreme Administrative Court, that, according to the opinion of the Venice Commission *'lacks effective checks and balances in*

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[116] See: Gábor Halmai: Second Grade Constitutionalism – The Cases of Hungary and Poland, CSF-SSSUP Working Paper Series 1/2017, 6-7.
[117] For the analysis of the case law see: Eszter Bodnár – János Mécs: A választójog védelme az Alkotmánybíróság legújabb gyakorlatában, Fundamentum, 2018/2-3, 17-27.
[118] Baka v. Hungary, App. No. 20261/12, Judgment of 23 June 2016.
[119] Quoted in: https://www.napi.hu/magyar_gazdasag/orban_a_valasztasokrol_a_kuria_intellektualisan_nem_nott_fel_a_feladatahoz.661884.html (last download: 2019.03.29.).

government.'[120] It can be seen, that neither regarding its personnel, nor its case law enjoyed the Curia such independency as to openly judge against the government, however, as it is emphasized above, it step up in many decisions and judged in sensitive matters against the government.

C) Illiberalism, populism, anti-pluralism

The independence of the interpreting bodies and the constitutional politics followed by the governmental parties lead us to an underlying phenomenon, the populist nature of the Hungarian government and to its consequences regarding the public sphere in Hungary as opposed to the classic liberal-democratic system in Germany. This has implications regarding not just the constitutional-institutional and societal background, but regarding the abstract concept of public debate as well.

As Jan-Werner Müller notes, populism is distinguished from liberal democracy by a 'moralistic imagination of politics' that excludes pluralism, as in the populist imagination the morally right people is opposed by an immoral opposition (be it an elite, or its 'alliances').[121] Hence, after the authorization of the leader, who is unquestionably competent in discerning the right way, there can be no legitimate opposition, moreover, no legitimate dissenting opinion. Therefore the unified and moralistic people presupposes a unified and pre-given 'way.' This factor determines the peculiarities of debate and opposition. Müller argues that it is not unusual in democratic systems that politicians question the result of the political processes, claiming that it is not right. But what distinguishes populism is the consistent and continuous strategy to *'deny the very legitimacy of their opponents.'*[122]

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[120] Venice Commission: Hungary: Laws on administrative courts lack effective checks and balances in government, according to the Venice Commission, 2019.03.15, available at: https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680937270 (last download: 2019.03.29.).
[121] Jan-Werner Müller: 'The people must be extracted from within the people': Reflections on Populism, Constellations, 21/4, 2014. 12.
[122] Müller (2014) 18.

Under this paradigm it is impossible to distinguish neutral messages of public interest and messages with political meaning and, more broadly, the sphere of party contest and the sphere of general interest. As populism presupposes a morally right people and its pre-given interests and values, there is no room for debate and no room for clashing opposing opinions that are legitimate, as there is one legitimate opinion and other illegitimate ones. This causes disturbances when one tries to distinguish the case when the government informs the people and thus fulfilling its constitutional requirement and the case when it merely runs propaganda.[123]

This is present in Hungary in the case described above, regarding how the government circumvents the prohibition of political advertisement in television and radio outside the campaign period; from an illiberal perspective the message 'Stop Brussels together!' (Állítsuk meg Brüsszelt!) is not a partisan message but one affecting general interests. And indeed, this campaign was run as a public service advertisement. As was presented above, the government often argues that its propaganda is in fact just informing the people on matters of general interest. This is often based on a populist concept of general interest described above.

This practice of governmental information fits into the wider description and normative aims of the Orbán-regime.[124] The prime-minister explicitly stated that he aimed to create a 'central power-field' that is capable of uniting the society and to overcome the disputes dividing the society.[125] Therefore there is an inherent antipluralism in the system,

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[123] As to the term propaganda, Emese Szilágyi, research fellow at the Hungarian Academy of Sciences wrote: *'I use the term 'propaganda' intentionally, since what is happening cannot be described as mere information campaign; the communication carried out by the government aims to initiate a sort of emotionalism in the political community. The messages are incredibly simple, the information communicated is neither balanced, nor objective (in some cases even distorted), the communicative acts do not discuss arguments and counter-arguments, and their primary aim is to manipulate the emotions and the instincts (such as envy and fear) of the citizens.'* Szilágyi (2018a).

[124] András Körösényi: A magyar demokrácia három szakasza és az Orbán-rezsim In András Körösényi (ed) A magyar politikai rendszer – negyedszázad után, Osiris Kiadó, Budapest, 2015, 401-422.

[125] Ibid 416.

which is based on an agenda that 'rejects or at least tries to marginalize both the debates in the public sphere and the political contest taking its form in a dualistic party system.'[126]

The effect of populism on the public speech sphere, more closely on the blurring border of public interest and partisan debate is hard to overestimate. It is not manifest only in the conduct of the government, but it is palpable in the society as well; in the permanent conflict scenario it becomes hard to distinguish partisan messages and messages of general interest. This creates difficulties as regards the task of the interpreting bodies; on the one hand they have to distinguish between general interest and party interest in a public speech sphere where the two are presented as one, and, on the other hand, the legitimacy of their decision is dependent on public support as well, in a public sphere where the perception of public interest and partisan interest cannot be sorted out anymore.

D) Relationship between government and governmental parties

The relationship between the government and the parties behind it also differs in Germany and in Hungary. Arguably to an extent the misuse of governmental resources does not emerge in Germany due to the fact that the government in the recent years was formed as a grand coalition, i.e. the alliance of the two big parties, the CDU and the SPD. It can be assumed that the chance of governmental misuse is the greatest, when there is a greater fusion between the governmental parties and the government itself. This may be especially the case if there is a one-party-government (as in Hungary) or the governmental parties are confident that after the elections they want to form a government again (as in Germany in the 1976 elections). In these cases the identification of the parties with the government is beneficial, as opposed to situations, where the parties of a coalition run against each other in the elections. In Germany there has been a grand coalition since 2013, and for example in the 2017 federal elections campaign the two big parties were not sure to continue in the same government.

[126] Ibid 416.

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There was, therefore, less incentive to run a pro-government campaign, as it would have blurred the line between the two competing parties and that was not the interest of those parties. In Hungary the coalition between the governmental parties is a formality, therefore since 2010 the government is effectively a one-government party with the same party-leader, who has been at the same time the candidate for being prime-minister. The ruling parties had therefore strong incentives to blur the line between the government and governmental parties.

It is to be added, however, on the one hand that in Germany the above described recent cases emerged when a grand coalition was in place. This means that the existence of a grand coalition does not eliminate the possibility of the misuse; although in this case the mainstream parties may not use this against each other, they can use it against the far-right parties. On the other hand, grand coalitions were in place only in the periods of 1966-1969; 2005-2009; and since 2013. Therefore the occurrence of grand coalitions may explain why the problem has not arisen in the recent years between the mainstream parties, but cannot explain that it occurred even in times of grand coalition against far-right parties and did not occur even when grand coalitions were not in place.[127]

E) Relationship between the government and the society

A relevant factor is the indirect relationship between the government and the society.[128] As Körösényi points out, the current Hungarian system is based on populist governing that is suspicious towards any transmitting link between the government and the society. Indeed, the Hungarian government uses 'national consultations' ('Nemzeti konzultáció') that are surveys with extremely questionable methodology on governmental

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[127] The German party system has been undergoing significant changes, as the two traditionally strong parties, the CDU-CSU and SPD have been losing popularity, while the AfD emerged. This, however, does not reduce the chance of a grand coalition in the future, on the contrary; 'as a six party system consolidates, the recourse to a grand coalition solution seems to become more rather than less likely in the future, as the smaller parties are unlikely to find common ground.' Patricia Daenhardt: Tectonic shifts in the party landscape? Mapping Germany's party system changes, In Marco Lisi (ed.) Party System Change, the European Crisis and the State of Democracy, Routledge, 2019, New York, 111.
[128] Körösényi (2017) 417-418.

policies. Apart from these 'pseudo direct-democratic' means the government initiated a referendum in 2016 to gain popular support for its anti-migrant campaign. Moreover, a wide campaign was launched against NGOs,[129] what also can show the government's hostility towards intermediaries.

All these factors show that the government communicates directly with the people and attacks all intermediaries between itself and the voters. This, coupled with other paternalistic and etatist measures,[130] places the government itself into the political contest instead of the governmental parties. This has far reaching implications not just in the ordinary course of governing but in the campaign period as well, as it is hard to imagine that in this period the government steps back and gives room for the parties to contest alone, as it is also hard to expect the voters to criticize the government intervention in this period as this meets their everyday experiences.

F) Media environment

A further difference is the media environment that has effects on the jurisprudence as well. As noted above at the description of the Hungarian situation, there are systemic dysfunctions regarding media pluralism and the independency of public media. In the latest Freedom House report, Hungary is categorized as 'partly free' with regard to freedom of the press, moreover, the report notes that '[i]n countries including Turkey and Hungary, ruling parties have engineered more friendly media sectors through opaque or coerced ownership changes.'[131] Whereas Hungary scored 44 in a scale where 0 is most free and 100 is least free, Germany scored 20 and it is labelled as free regarding the freedom of the press.[132]

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[129] NGO's were presented as 'spies of George Soros' and as organizations 'financed from abroad.'
[130] Körösényi (2017) 417-418.
[131] Freedom House: Freedom of the Press 2017, 2. available at: https://freedomhouse.org/sites/default/files/FOTP_2017_booklet_FINAL_April28.pdf (last download: 2019.03.29.)
[132] Ibid 27.

The media environment and free press was mentioned above as it is an important component of the distorted speech in Hungary, and a tool that exacerbates the problem of governmental speech. Apart from this, it is a factor that also has effects on the context of the jurisprudence as well. In the Hungarian polarized media sphere it is less likely that governmental intervention would be condemned by a wide range of the media; it is more likely that it would be contextualized as a partisan issue between the government and the opposition. That affects the jurisprudence from two sides; on the one hand it relieves the deferential bodies as it creates the perception that the question is not a constitutional, but a political one, on the other hand it makes the active bodies vulnerable to attacks from governmental media in case they set strict standards.

G) Conclusions

The differences between the two jurisdictions may not be explained by the textual background, the reasons thus may be found 'deeper', which also means that the solution may be more complex, than the change of the constitutional or statutory background. First, the interpreting bodies in Hungary are not as independent as the FCC in Germany and this clearly reduces the chances that the case-law sets strict standards against the government. Second, the underlying illiberal-populist governing excludes pluralism and causes the fusion of public and partisan interest that makes it harder to set the borders of governmental communication. Third, in Hungary the fusion of the government and the governmental parties is more prevalent, motivating the actors to use governmental resources, as opposed in case of a grand-coalition. Fourth, the indirect practices of the government eliminate intermediaries between the society and the government and that also means that the government will be expected to 'fight' in the political contest, not the governmental parties. Finally, the media environment does not motivate actors to be active rather gives an excuse to be deferential.

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It is important to note that the above mentioned reasons do not explain either the acute situation or the jurisprudence in Hungary by themselves. It is like a mosaic, only one or two elements may not cause the deficiencies, but the all the factors together gives the picture of a full-blown populist-illiberal state, in which the juridical interpreting bodies are at least in a hard – if not impossible – position to set demanding standards as regards the governmental speech.

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VI. Regional framework - state neutrality and ECHR

The second main question of this thesis concerns the role of the regional bodies with a special focus put on the ECtHR. As we have seen above, the acute situation in Hungary may not be solved by a simple legal transplant, the causes of the partly dysfunctional jurisprudence lie deeper and therefore the solution may be distant.

The Hungarian situation puts emphasis on the regional framework in two senses. On the one hand, as we could see, the lack of solid case law may be helped by the norm setting and analytic work of the regional bodies, which work articulates standards and offers guidelines. Namely, in the absence of a well-established domestic case law, the bodies willing to step up actively can refer to the framework set on the regional level. On the other hand the regional framework may be used to enforce the standards if the domestic bodies are reluctant to do so.

Accordingly, this section first describes the work of two regional soft-law setting organs, the Organization for Security and Co-operation in Europe ('OSCE') and the European Commission for Democracy Through Law ('Venice Commission'). Second, the relevant case-law of the ECtHR is presented.

A) Regional instruments: OSCE, Venice Commission

There are several soft-law instruments, declarations, recommendations and other legal instruments that deal with the question of state neutrality in electoral campaign. Here I focus on the two most important organizations with regard to elections, on OSCE' and the Venice Commission that was formed within the Council of Europe.[133]

The OSCE Copenhagen Document from 1990 in I. 5.4. emphasizes that the 'clear separation between the State and political parties' is inherent element of democracy and that 'in particular, political parties will not be merged with the State.' Observation missions set up

[133] For other legal instruments see the enumeration in the OSCE-Venice Commission Joint Guidelines section I.8.

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under the aegis of OSCE-ODIHR refer to this provision, for example in the above cited report on the 2018 Hungarian elections.[134]

The other important organ is the Venice Commission. Its Code of Good Practice in Electoral Matters ('Code')[135] mentions the equality of opportunity as an element of equal suffrage. Under section 2.3.a.i. of the Code equal opportunity *'must be guaranteed for parties and candidates alike. This implies a neutral attitude by state authorities, in particular with regard to […] the election campaign.'* State is neutrality also mentioned at 3.1.a. that stipulates that *'[s]tate authorities must observe their duty of neutrality.'* Therefore in the basic documents of both organizations the principles are present, on which more detailed normative background may be built.

The Venice Commission's work has its influence on the jurisprudence on electoral matters, especially with regard the Code. Although the standards setting in electoral matters is not easy, as Amaya Úbeda de Torres concluded '[i]n seeking to develop a *ius constitutionale commune* the Venice Commission encounters particular difficulties in the field of elections',[136] the Hungarian bodies use the Code as a frame of reference. The HCC has referred to it previously,[137] and as a new element the Curia referred to it as well in the Stop decision. In this case the Curia stated that its interpretation is in align with the standards of the Venice Commission (with the Code).[138] The court thus used the Code to strengthen its interpretation, and this shows how the soft law standards of the Venice Commission may help the courts.

The two bodies, the OSCE-ODIHR and the Venice Commission issued the Joint Guidelines for Preventing and Responding to the Misuse of Administrative Resources During

[134] See 2018 OSCE-ODIHR Report p14. fn 61.
[135] Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev2-cor-e (last download: 2019.03.29.)
[136] Amaya Úbeda de Torres: Between Soft and Hard Law Standards: The Contribution of the Venice Commission in the Electoral Field In Brice Dickinson – Helen Hardman (eds.) Electoral Rights in Europe, Routledge, New York, 2017. 43.
[137] Eszter Bodnár analysed the references to the Code in the Hungarian jurisprudence. She came to the conclusion that *'[t]he Hungarian Constitutional Court often refers to the documents of the Venice Commission.'* Eszter Bodnár: A Velencei Bizottság választási ajánlásainak érvényesülése a magyar szabályozásban és bírósági gyakorlatban, Jogtudományi Közlöny, 2018/3, 154.
[138] Kvk.III.37.421/2018/8 at [18].

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Electoral Processes ('Guidelines').[139] The Guidelines recognizes the threat and wide-spread nature of misuse of governmental resources in electoral campaign and names the phenomenon as *'one of the most important and recurrent challenges'*.[140] It provides a useful instrument to conceptualise the problem of the misuse of governmental communicative resources as I uses broad and flexible terms. It gives for example a broad definition of 'resource' in sections I.9. and I.11-12. respectively. Moreover, the scope of electoral process is also broad, thus the Guidelines avoids the trap of sticking to formalistic campaign periods laid down by legal instruments. However, with regard to neutrality the Guidelines focuses mostly on civil servants, therefore its applicability is restricted with regard to the conduct of Government and higher governmental officials, as in their cases the constitutional considerations are not the same as with civil servants.[141]

The Guidelines prescribes in section II. B. 1.1. that public authorities should be prohibited taking unfair advantage of their status, for example, *'charitable events, or events that favour or disfavour any political party or candidate.'* Regarding our topic the most important provision is section II. B. 1.3 that is worth quoting in its entirety:

> '*The ordinary work of government must continue during an election period. However, in order to prevent the misuse of administrative resources to imbalance the level playing field during electoral competitions, the legal framework should state that no major announcements linked to or aimed at creating a favourable perception towards a given party or candidate should occur during campaigns. This does not include announcements that are necessary due to unforeseen circumstances, such as economic and/or political developments in the country or in the region, e.g. following*

[139] Available at: https://www.osce.org/odihr/elections/227506?download=true (last download: 2019.03.29.)
[140] Guidelines I.4.
[141] This is shown by section II. A. 4. that lays down neutrality as a principle, however, the provisions are on the conduct of civil servants. For example 4.2. mentions that *'the legal framework should provide for a clear separation between the exercise of politically sensitive public positions, in particular senior management positions, and candidacy'* that is clearly not applicable in the case of members of the government or the prime minister.

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a natural disaster or emergencies of any kind that demand immediate and urgent action that cannot be delayed.'

This shows that both organizations recognized the need for 'ordinary' government functioning and, more narrowly, communication even in the election period as well as the need to distinguish this from partisan communication. This section might help national interpreting bodies to show that the problem is recognized on the regional level. However, as we have seen above, the devil is in the details; the questions as what factors distinguish ordinary and partisan governmental communication as well as what happens if the communication creates favourable perception to the government and not directly to the parties behind it, are not easy to answer. If an body applies the above cited section in a very formalistic approach, it may render it practically ineffective, for example stating that the wide governmental campaign in electoral process is neither linked nor aimed at creating favourable perception towards a given party or candidate. This, of course, does not mean that the Guidelines and its cited sections would not matter at all, just that a promptly phrased textual background in itself cannot solve the problem if the interpreting bodies are do not or, due to external circumstances cannot apply it effectively.

The regional soft law instruments show that despite the lack of consensus in several electoral matters, there is a democratic core that can be applied in the whole region. The Guidelines, although its provisions are far from level of concretisation as to be applicable in a domestic legal system, show that it is true for the misuse of government resources, including communicative resources as well.

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B) Strasbourg jurisprudence

The ECtHR so far has not dealt directly with the question of governmental speech as a distortion of public speech in electoral campaign, therefore there is no directly applicable case law at hand. However, the court decided on cases related to the integrity of public

speech as well as on the neutrality of state during the elections. As argued here, from these pieces of mosaics a case law may emerge that would effectively prevent the phenomenon of governmental misuse of communicative resources. In this part I focus on two interrelated articles of the ECHR; on the one hand on Article 10 that stipulates freedom of speech, on the other hand Article 3 Protocol 1 that enshrines the right to free elections.

(i) Integrity of public speech – violation of Article 10

The integrity of the public speech sphere, namely, the prevention of influential groups to capture the public sphere and thus strip it of its pluralistic nature was dealt with in the case law of the Court, especially with regard to political advertisements.[142] The cases did not involve the government as a speaker but as a regulator, and therefore the government did not appear as a group trying to capture the media. The question of the integrity of public speech sphere focused on the regulation that tried to prevent that influential political or economic groups other than the government distort the public speech sphere. Moreover, the case law focused on the regulation of media covering television and radio, as it attached to special status to these, based on their influence.[143] However, as noted above, there are certain parallels that make the case law, or its certain statements at least partly applicable.

In these cases the objective value of pluralism of media sphere appeared on both sides. The state either has *'a positive obligation to intervene to guarantee effective pluralism in the audiovisual sector'*[144] that entails the restriction of the freedom of speech of some actors (to prevent influential groups to distort public speech), or it has a *'fundamental negative obligation […] to abstain from interfering'*, as cited by the dissenters in Animal

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[142] Animal Defenders International v. U.K. App. No. 48876/08, Judgment of 22 April, 2013 (hereinafter: 'Animal Defenders International'; AS and Rogaland Pensjonistparti v. Norway, App. No. 21132/05, Judgment of 11 December, 2009; VgT Verein gegen Tierfabriken v. Switzerland, App. No. 24699/94, Judgment of 28 June, 2001. For an overview see: Brice Dickinson: Electoral finances, human rights and fairness In. Helen Hardman – Brice Dickinson (eds.) Electoral Rights in Europe, Routledge, New York, 2017. 190-207.
[143] Animal Defenders International para 119.
[144] Ibid para 111.

Defenders International.[145] Both the negative and positive obligation aims to create a pluralistic media environment, but from different directions; the former emphasizes the fragility of public sphere, what should be strengthened and protected by state intervention, while the latter presupposes the self-regulatory power of the 'market of ideas', to which governmental intervention poses the greater threat. From both angles, however, it endangers the democratic process *if 'a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media.'*[146] The abstract constitutional objective thus is the same in both cases.[147] Therefore, although the question of governmental speech driving out other speech is not dealt with explicitly, the pluralistic media sphere is emphasized both as a legitimate aim to step up against powerful private groups thus restricting their freedom of speech and to provide the freedom of speech of other actors.

The court therefore acknowledged that it is a legitimate aim to protect the democratic process through limitations on speech,[148] and in Bowman v UK[149] the court examined this protection related to the restriction of campaign spending, placing the question in the electoral context. Although the Court held that the restriction was not proportionate, it underlined that the regulation that excluded campaign expenditures by third parties pursued the legitimate aim of *'protecting the rights of others, namely the candidates for election and the electorate.'*[150] The court therefore acknowledged that in the election context a restriction on speech[151] can pursue the legitimate aim of not just the broader political process, but the electoral process as well.

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[145] Ibid Joint dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, Vucnic and De Gaetano para 12.
[146] Ibid Joint dissenting para 11.
[147] Animal Defenders International para 112.
[148] See Animal Defenders International para 78.
[149] Bowman v. U.K. App. No. 141/1996/760/961, Judgment of 19 February, 1998.
[150] Ibid para 38.
[151] Similarly to the U.S. approach, the Court accepted that the restriction affects the *'the amount of money which unauthorised persons are permitted to spend on publications and other means of communication during the election period […] there can be no doubt that the prohibition […] amounted to a restriction on freedom of expression.'* Ibid para 33.

The question is how this may be brought before the court, namely, how can be the above mentioned objective values be transformed to become litigable before the ECtHR as individual rights in cases involving governmental speech. On the one hand, the regulatory context that increases the relative weight of governmental speech might be questioned as a restriction that violates the freedom of expression. As we could see in Hungary political advertisements may not be broadcasted in television and in radio outside the campaign period, and even during it they may be aired only for free. If we take this out of its context, the regulation may pursue the legitimate aim of preserving media plurality, as accepted in Animal Defenders International. However, as shown above, in Hungary not the private sphere, but the state poses the greatest threat to media- and public speech pluralism, and it may use its different – regulatory, speaking, etc. – resources to drive out other speech. If you add to this that the government runs advertisement on television and radio outside the campaign period disguised as public service advertisement, it becomes clear that the regulation does not serve the aim of preventing economic groups from distorting the public speech, but to enhance the relative weight of government speech. Therefore, the restrictions that may be in align with the Convention in other countries such as the UK may be without legitimate aim or may pose disproportionate limitation of freedom of speech in the Hungarian setting. This interpretation is further strengthened by the fact that in Animal Defenders International the court put great emphasis on the context, i.e. on the parliamentary debate and the previous discussions. This 'procedural dimension'[152] of subsidiarity that supported the upholding in the restriction in Animal Defenders International may result thus different answers in different member states, and indeed, the Hungarian case does not show that the restrictions would have been thoroughly debated.

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[152] Robert Spano: Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity, Human Rights Law Review, 14/3. 499.

On the other hand, the legitimate aim of preserving pluralistic media and public speech environment may support the prevention of abuse of governmental communicative resources in cases when the person holding a governmental position were to question the application of domestic law before the Court. Namely, if a member of the government is judged against at the domestic level for not observing neutrality and equal chances of parties, she may argue with the curtailment of her free speech before the court relying on her rights Article 10. In this case a legitimate aim of restriction, besides effective political democracy can be the preservation of pluralistic public speech.

However, it is more challenging to capture the problem if governmental speech itself should be the subjected before the court based on Article 10. If government distorts the public sphere, it may violate the abstract value of plurality of speech. The connection therefore can be too distant between the act and the violation of the individual right laid down in Article 10. As mentioned above, the Convention is based on the protection of individual rights, and as such it is limitedly capable of preventing violations of objective values such as plurality of speech. Nevertheless, the connection between plurality of public speech and freedom of expression is made more direct by the wording of Article 10 that includes the right not just to impart but to receive information. It is not alien to the Court to interpret the scope of Article 10 broadly; in the Helsinki v Hungary case[153] the court held that the applicant organization's right to freedom of expression was violated as the state organs did not disclosed information to it. The Court emphasized the requirement that rights should be practical and effective under the Convention and, considering the applicant's role and the public nature of the information it held that the denial to access to information constituted an interference with Article 10.[154] If taking the effective and practical aspect seriously, in a case where a partisan governmental speech is made to an extent that distorts the public speech, it may be argued

[153] Magyar Helsinki Bizottság v. Hungary, App. No. 18030/11, Judgment of 8 November, 2016.
[154] Ibid paras 195-204.

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that the right of freedom of expression of the applicant (who may be even an ordinary citizen) is violated.

It can be seen from the above mentioned that the context that enhances the relative weight of governmental speech may be held as a violation of the Convention, moreover the objective values may serve as legitimate aim to restrict the freedom of speech of government officials. However, the governmental speech itself may be harder to put into this framework, and it would require activism from the Court.

(ii) Free elections – violation of Article 3 Protocol 1

In the electoral context government speech and the regulatory framework may not only violate Article 10 but the right to free elections in Article 3 Protocol 1 as well that prescribes free elections that among other entail *'conditions which will ensure the free expression of the people.'* As mentioned by András Sajó, in the electoral context governmental speech may not (only) be perceived as speech but as electoral activity.[155] This underlines that the problem can be put to the context of elections that involves additional aspects and rights.

However, the question is not easy to grasp with the existing case-law. As mentioned above, the examined phenomenon does not include the direct restriction of voting rights but the violation of objective values such as pluralism in public speech and the equal opportunity of parties. The main spheres of the case law include conditions for active and passive voting right, questions regarding the electoral system and electoral administration and procedure.[156] These elements are directly connected to elections in a sense that they affect the circumstances in which the right to vote may be exercised. Governmental speech affects elections only indirectly in the sense that it aims to distort the context not the legal

[155] Sajó (2001) 373.
[156] See Eszter Bodnár: The Level of Protection of the Right to Free Elections in the Practice of the European Court of Human Rights In Helen Hardman – Brice Dickinson (eds.) Electoral Rights in Europe, Routledge, New York, 2017.

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framework.[157] The two on the other hand, are interlinked, the Court itself emphasized that *'free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system'*[158] and that *'it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.'*[159]

Due to the interlinked nature of these issues many of the cases were judged under Article 10, however, there are some that affected the right to free elections, the most important among them is Communist Party of Russia v Russia. The applicant alleged the violation of its rights under Article 3 Protocol 1,[160] referring to the unequal media coverage by televisions owned partly by the Russian state. The Court reiterated that *'free elections are inconceivable without the free circulation of political opinions and information'* and the role of the state as *'ultimate guarantor of pluralism.'*[161] Based on this the Court held that the case was able to be examined under Article 3 Protocol 1. The Court, moreover related the issue to the part of the convention text that prescribes elections *'which will ensure the free expression of the opinion of the people.'*

However, the Court took a deferential stance on the question, stating that while it is 'mindful' of equal opportunity present in the Venice Commission's guidelines that entails *'a neutral attitude by state authorities'*, it also reiterates that Article 3 Protocol 1 was not designed as a *'code on electoral matters'*, therefore states enjoy considerable margin of appreciation.[162] The applicants argued that neutrality of the broadcasting companies was ensured only de jure, not de facto, however, the Court followed a deferential reasoning and

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[157] See Communist Party of Russia and Others v. Russia, App. No. 29400/05, Judgment of 19 June, 2012, para 111.
[158] Bowman v. U.K. para 42.
[159] Ibid.
[160] The applicant also referred to Article 10, the Court, however, examined the case under the right to free elections, while giving 'due consideration to its case-law under Article 10 where this may be applicable *mutatis mutandis* in the context of the electoral process.' Communist Party of Russia and Others v. Russia para 57.
[161] Ibid. para 79.
[162] Ibid para 108.

emphasized the role of the domestic courts – in particular the Russian Supreme Court – that established that there was no direct influence from the government.[163] Neither found the Court that there was a violation of positive obligations on behalf of the state.

The case shows that while textually the distortion of public speech and plurality may be grasped and attached to Article 3 Protocol 1, as well as the requirement of neutrality, in electoral matters a considerable margin of appreciation prevails and the Court puts great emphasis on subsidiarity, especially in matters not affecting directly the active or passive right to vote and its exercise.[164] It is quite telling that the Court stated that Article 3 Protocol 1 is not a code on electoral matters and has limited applicability. Furthermore, the relevance attached to the domestic courts' decision questions that if there is a systematic dysfunctionality in the case law, then with what success can the case brought before the Court. It is to be noted, however, that in the Russian case the applicants could not establish a firm connection between the government and the lack of neutrality of the public media broadcasters. If the government speech itself favours a party or a candidate, this link can be more easily established.

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[163] Ibid paras 114-122.
[164] For the different levels of scrutiny see: Bodnár (2017).

VII. Conclusions

The Hungarian situation shows that government speech in electoral campaign deserves the attention of constitutional law. The enormous resources available for the government coupled with its regulatory powers can result a public speech sphere where government speech drives out other speech and thus distorts the political process.

As was shown, the Hungarian jurisprudence could not effectively stop the phenomenon. Although the statutory background offers means to set strict standards, and the problem was conceptualised by the literature, the case law show swings regarding both the scope and the substantive elements of the standard that question the existence of a solid jurisprudence that could stop the abuse of governmental resources. The problem is further exacerbated by recent modifications of the statutory background, and the fact that in the future the new administrative court will examine these cases.

The German jurisprudence put an end to the practice that governmental communicative resources were used in the campaign period as early as 1977. Although the jurisprudence brings up theoretical questions regarding the distinction between government and governmental parties as well as the practical applicability of the new case law, but the core problem was acknowledged by all, namely, that the use of governmental communicative resources in the election period distorts the political context. As a consequence in Germany there is a solid jurisprudence regarding the matter.

The first main question of this thesis regarded the factors that caused that in the Hungarian jurisprudence no solid case law emerged, whereas the German counterpart worked effectively. The first conclusion is that the cause is not textual, as in both jurisdictions there is a textual background at hand that, when interpreted actively, can set strict standards. The second conclusion is that the difference is caused by the underlining structural characteristics of the Hungarian jurisprudence, namely, by the lack of independency of the interpreting

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bodies, by the close relationship between the government and governmental parties, by the direct relationship between the government and the citizens, in which relationship the government is hostile towards intermediaries, and by the polarised media environment. To an extent all these factors are the results of the character of politics of government in Hungary, namely, the results of the illiberal-populist and anti-pluralist politics. As was shown above, this does not only exclude political debate on the theoretical level but makes the distinction between general interest and partisan interest impossible, and thus hinders the jurisprudence in sorting out those communication of the government that serve providing information on matters of general interest (public service advertisements) and on partisan interest (political advertisements). It is the liberal state that presupposes that neutral governmental functioning can continue even in the campaign period, as it also presupposes the distinction between general and partisan interest. However, in an illiberal-populist setting this distinction does not work, which exacerbates the problem both theoretically and practically.

The answer to the first question leads us to the second. If the problem lies with the structure of politics in Hungary, there is little chance that it will be solved by the domestic actors alone. The second question tackled the role of the regional bodies with a special emphasis on the ECtHR. The first conclusion is that the problem is present on the agenda of both the OSCE and Venice Commission, and there are standards available. These soft law instruments can help the courts to set strict standards and to support their reasoning, and indeed, the Curia referred to the guidelines of the Venice Commission in the Stop case. Therefore, a regional framework is available that can be and is actually referred to by the domestic actors. However, this works only to the extent the domestic actors are willing to set strict standards.

The second conclusion is that although the Strasbourg jurisprudence has not dealt with the case directly, it emphasized objective values present in the Convention that may help

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to build an effective case-law. Both Article 10 and Article 3 Protocol 1 offer a case law that may be referred to in cases when the government abuses its resources. On the one hand, the seemingly even regulatory field may be questioned under Article 10, as it does not serve a legitimate aim, on the contrary, it only enhances the relative weight of the government. On the other hand the right to free elections may be invoked. However, it is to be noted, that the case law on free elections mostly deals with questions that directly affect the right to vote and its exercise, and that the infringement of freedom of speech may be hard to establish, as governmental speech distorts public speech, therefore it violates an objective value, and only indirectly an individual right.

The final conclusion is that in the near future it is not likely that the Hungarian jurisprudence will be able to effectively prevent governmental intervention. In lack of direct case-law, it is hard to judge the fate of applications before the ECtHR in the matter. This will pose a great opportunity for the court as well as a great burden, as the question cut illiberal-populism right to the quick.

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