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Constitutional Dialogue and Legislation on Parliamentary Election in Hungary – 2010-2014[1]

I. Abstract

The paper deals with the Hungarian legislation on parliamentary elections (2010-2014) through the lens of constitutional dialogue and in the context of literature on electoral systems. The result of the constitutional dialogue may characterise the rules of law and democratic commitment of the political decision-maker, which is supported by observations of the actual working of the new electoral laws which are based on the general assumptions of researchers in the field of electoral systems. The Hungarian example also shows the difficulty of the constitutional assessment of electoral laws, especially when the overruling of the Constitutional Court's ruling is almost a daily practice. The paper illustrates that the supermajority could not stand temptation and tailors the constitutional and electoral system to its best interest.

After the election of 2010 the new political decision-maker gained a two-third majority in the Hungarian Parliament and immediately started to adopt reform legislations[2] which, including Act CCIII of 2011 on the election of members of the Parliament (hereinafter: Act 2011) got the attention of the Venice Commission,[3] some national NGOs as well as the Hungarian Constitutional Court. These bodies were actively engaged in a constitutional dialogue even in the field of electoral laws.[4] They criticized the policy choices and concrete electoral rules; the Constitutional Court declared some of the provisions unconstitutional and, after the 2014 parliamentary elections, we have experience on the actual working of the new electoral rules. Therefore, it seems to be topical to give a short summary about the constitutional dialogue and its result as well as the evolvement and assessment of the new electoral rules,[5] focusing mainly on the controversial issues raised by criticism and the extent the Hungarian legislative power acted according to the

[1] Research was supported by the Janos Bolyai Research Scholarship.

[2] See the book in German language of *Herbert Küpper* on the new Hungarian constitution – *Herbert Küpper*, Ungarns Verfassung vom 25. April 2011. Einführung – Übersetzung – Materialen, Frankfurt am Main 2012.

[3] See mainly CDL-AD (2013) 012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013; see also opinions on Hungary available at the website of the Venice Commission: http://www.venice.coe.int/WebForms/documents/by_opinion.aspx.

[4] See *Tímea Drinóczi*, Constitutional dialogue theories – extension of the concept and examples from Hungary, ZöR 1|2013 pp. 87-110; in the footnotes of this paper one can find a more enhanced account of the constitutional dialogue theories.

[5] To give a brief introduction to the constitutional regulation of elections, the following provisions need to be referred to. The basic rules for the national electoral system, suffrage, election bodies and the electoral procedure are regulated by the Fundamental Law (hereinafter: FL), the Act CCIII of 2011 on the election of members of the Parliament (hereinafter: Act 2011) and Act XXXVI of 2013 on Electoral Procedure. The right to vote and the new rules of disenfringement can be found in the part 'Freedom and Responsibilities' of the FL. In the part 'State' principles (universal and equal suffrage, direct and secret ballot, elections allowing the free expression of voters' will) the date of the parliamentary election (April or May four years after the election of the previous Parliament) and the setting of its date (by the head of state) can be found. There are new provisions on the involvement of minorities in the work of the Parliament and on national plebiscite.

expectations of literatures on electoral studies.[6] In the dialogic interaction, also the constitutional appreciation of the so-called Transitory Provisions of the Fundamental Law had a crucial role. That is why it is necessary to explain the place and role of Transitory Provisions in the legal source system of Hungary (II.). In chapter III. the development of the new electoral system is presented and used as a base to give an overview about the controversies such as electoral geography, registration for voting, compensating the winner, and electoral campaign. Where it is applicable I make reference and check the validity of observations of electoral studies against the Hungarian reality. By reaching the last chapter (IV.), it will certainly be clear why this paper lends credence to the position which can easily be summarized as follows: the two-third majority followed the same and usual pattern of misusing the majority power and setting aside democratic and professional considerations also in connection with the electoral system.

II. Constitutions of Hungary in 2012

1. Fundamental Law and Transitory provisions – constitutions of Hungary

Right after the 2010 election continuous, abrupt and hectic constitutional amendment procedures took place so as to establish and constitutionalize populist and revenger political purposes; as a result the former Constitution (Act XX of 1949) was amended 12 times.[7] Such procedures were afterwards followed by the fast and overwhelmingly politically-driven constitution-making process that did not meet the requirements of democratic constitution-making on any account.[8] It resulted in two texts composing the constitution of Hungary: the Fundamental Law of Hungary (25 April 2011) and the Transitory provisions to the Fundamental Law of Hungary (31 December 2011). They both came into effect by 1 January 2012 and were meant to be the product of the constitution-making power.[9] It was a clear intention of the constitution-making power to regard the Transitory provisions as a part of the Fundamental law, i. e. in Hungary two legal norms

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[6] See for instance *Joseph M. Colomer*, It's parties that choose electoral system (or, Duverger's laws upside down), Political Studies 53|2005; *Robert G. Moser*/*Ethan Scheiner*, Mixed electoral systems and electoral effects: controlled comparison and cross-national analysis, Electoral Studies 23|2004, *Carles Boix*, Setting the rules of the game: the choice of electoral systems in advanced democracies, American Political Science Review 3|1999.

[7] For comparison: the previous two-third majority (socialist and liberal coalition of 1994-98) amended the Constitution 6 times (1994-1998).

[8] See in English e.g., *Gábor Attila Tóth* (ed.), Constitution for a disunited nation. On Hungary's 2011 Fundamental Law (CEU Press, Budapest) 2012; *Kriszta Kovács/Tóth Gábor Attila*, Hungary's Constitutional Transformation, European Constitutional Law Review 7|2011; *Kim Lane Scheppele*, Guest Post: Constitutional Revenge, available at http://krugman.blogs.nytimes.com/2013/03/01/guest-post-constitutional-revenge/; *Drinóczi*, see fn. 3; *Tímea Drinóczi*/*Anita Blagojević*, Constitutional dialogue. Protection of constitutions – case studies: Hungary and Croatia, in: *Tímea Drinóczi* et al. (eds.), Contemporary legal challenges: EU – Hungary – Croatia (Pécs – Osijek 2012), also available at http://sunicop.eunicop.eu/sunicop/publications/category/2-the-conference-book.html.

[9] The closing provisions of the new Hungarian constitution read as follows: 1. The Fundamental Law of Hungary shall take effect on 1 January 2012. 2. Parliament shall adopt the Fundamental Law pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949. 3. Parliament shall adopt the transitory provisions related to this Fundamental Law in a special procedure defined in point 2. 4. The Government shall be obliged to submit to Parliament all bills required for the enforcement of the Fundamental Law. – Sections 19(3)a) and 24(3) of Act XX of 1949 (that is the Constitution) refer to the fact that the Parliament acts as constituent power by adopting the Transitory provisions which requires a 2/3 majority.

constituted (until the entering into force of the 4th amendment on 1 April 2013[10]) the constitution: the Fundamental Law and the Transitory provisions. The existence of the latter, however, caused serious constitutional troubles that triggered a sharp dialogue between the Constitutional Court and the constitution-changing power (that is literally, de facto the same as the constitution-making power in Hungary between 2010 and 2014).[11] The constitutional character of the Transitory provisions was systematically denied, or rather was not recognised or was not considered at all by most academics.[12] Only by stating that the Transitory provisions were at a lower level in a legal hierarchy than the Fundamental Law, could the Transitory provisions be challenged before the Constitutional Court. The ombudsman brought the Transitory Provisions to the Constitutional Court on 13 March 2012 asking ex post review. The ombudsman asked the Court to examine if its provisions are in conformity with the rule of law and legal certainty principle of the Fundamental Law. According to him, the uncertain legal status of the Transitory Provisions may conflict with the rule of law as the Transitory provisions declare themselves to be the part of the Fundamental Law, and it is not the Fundamental Law that declares this relationship.[13] He pointed out that the reason of this declaration was to avoid the constitutional review of its provisions.[14]

As a reaction, the Government proposed the first amendment of the Fundamental Law on 17 April 2012 and adopted it on 4 June 2012[15] on the reinforcement of the constitutional status of the Transitory Provisions.[16] By this amendment, it was declared expressis verbis that the Transitory Provisions are to be treated as part of the constitution; and therefore the request for its constitutional review could not be admissible. After the change of the legal context, the Constitutional Court asked the ombudsman if he upheld the request. He did so,[17] and on 28 December 2012 the Court annulled the non-transitory type provisions of the Transitory provisions with retroactive effect (to the date of the adoption). The reason was, on the one hand, that the decision-maker had over-

[10] The 4th amendment repealed the remnant of the original Transitory provisions after the annulment of considerable part of it by the Constitutional Court (2012) and inserted the vast majority of these provisions into the Fundamental Law. Rules of the Transitory provisions not annulled were also incorporated into the text of the constitution. For critics, see CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013.

[11] And, we can add that after 2014, as well.

[12] See *Csink Lóránt/Fröhlich Johanna*, Az Alaptörvény és az Átmeneti rendelkezések viszonya (Relationship between the Fundamental Law and the Transitory provisions), Pázmány Law Working Papers Nr. 2012/02, available at http://www.plwp.jak.ppke.hu/images/files/2012/2012-2.pdf.

[13] This opinion could not be supported after having carefully read point 3. of the Final Provisions of the Fundamental Law.

[14] Based on the recently reinforced case law of the Constitutional Court, constitutional norms cannot be reviewed. In decision 61/2011 (adopted on 12 July 2011) the constitutional Court refused the constitutional review of constitutional amendments inserting the new Article 70/I(2) on retroactive taxation and the limitation of its own competences.

[15] First amendment of the Fundamental Law of Hungary (Magyarország Alaptörvényének első módosítása (2012. június 18.), Magyar Közlöny 2012. évi 73. sz. 11856).

[16] The new point 5 reads as follows: 5. The transitional provisions related to this Fundamental Law adopted according to point 3 (31 December 2011) are part of the Fundamental Law.'

[17] The ombudsman reckoned that the provision stating that the Transitory provisions are part of the Fundamental Law should not be interpreted on its own but with regard to the entire Fundamental Law; Transitory provisions cannot overrule the provisions of the Fundamental Law; neither can they make exceptions from the application of its regulations. Should the Transitory provisions be able to make exceptions from the Fundamental Law, the 'standard' itself would be infringed. Such a situation would question the constitutional status of the Fundamental Law.

stepped its competences allowed by the FL, and on the other hand, and stemming from the first reason that the Transitory Provisions were meant to be used as a 'slide' – in the wording of the Constitutional Court:[18] accordingly the new rules introduced into TPFL [Transitory provisions] by way of amending TPFL would automatically form part of the Fundamental Law without being actually integrated into the normative text of the Fundamental Law. Section 31 para. (2) of TPFL ("self-definition") and item 5 of the Closing provisions of the Fundamental Law introduced by AFL1 [first amendment to the FL], means "opening a gateway" on the normative text of the Fundamental Law. By way of the constant modification and amendment of TPFL, the latter can be turned into a "slide Act" or "competence-distracting Act" (a legal regulation distracting the Constitutional Court's competence), through which new provisions can be adopted again and again on the level of the Fundamental Law without incorporating them into the Fundamental Law. And why was all of it important – because the FL contained rules a constitution would contain, the Transitory provisions however were meant to be a depository of debated, controversial, and even previously annulled rules. The following examples will justify this statement and give examples of the result of constitutional dialogue with the Hungarian legislative and/or constitution-changing power.

2. Implied function of the Transitory provisions and related dialogue

The annulled as well as the non-annulled rules of the Transitory provisions, with little exceptions, became part of the text of the FL. Besides, the first case to be mentioned is the early termination of the mandate of the ombudsman of data protection prescribed by the Transitory Provision, which entered into force in 1 January 2012. This made it possible to elect someone else as a president of the newly established non-ombudsman type of authority of data protection.[19] Later on, the early termination of the mandate of the ombudsman of data protection was found as breach of EU obligation to create an independent authority for data protection.[20] The situation however did not change at all. The challenged provision is still part of the FL.[21]

The President of the National Judicial Office was authorized by the Transitory provisions to assign a court outside the general territorial jurisdiction determined by law to proceed in any case. After being criticised by the Venice Commission and NGOs from a professional viewpoint, and by the European Parliament from a political perspective, the Parliament changed this rule in the relevant act in August 2013 and with the 5th amendment of the FL (October 2013[22]) it abrogated the constitutional basis of this power of the President of the National Judicial Office. However, this constitutional basis was established by the 4th amendment in April 2013 after the annulment of the Transitory Provisions in December 2012.

New rules on re-registration of churches and recognition of churches were found to be contrary to the ECHR in the Case of Magyar Keresztény Mennonita Egyház and Others v. Hungary, judgment 8 April 2014. Previously, rules on establishment of church-

[18] Decision 45/2012 (XII. 29.) of the Constitutional Court, available at http://www.mkab.hu/letoltesek/en_0045_2012.pdf p33.

[19] Art. 6 (3) An independent authority set up by a cardinal Act shall supervise the enforcement of the right to the protection of personal data and of the right to access data of public interest.

[20] See C-288/12.

[21] Point 17 of the FL.

[22] Fifth amendment of the Fundamental Law of Hungary (Magyarország Alaptörvényének ötödik módosítása (2013. szeptember 26.), Magyar Közlöny 2013. évi 153. sz. 67822).

es prescribed by the Transitory Provisions[23] as well as the Act on churches[24] were annulled by the Constitutional Court, in the end of 2012 and the beginning of 2013, respectively. With the 4th amendment, however, the previously challenged rules became part of the FL. Besides this overruling of the decision of the Constitutional Court, no other legislative response has been taken yet.

The prosecutor general or the competent prosecutor was authorized by the Transitory provisions to make accusation in a court outside the general territorial jurisdiction determined by law. Adding this rule to the Transitory provisions was a response to the annulment of almost the same rule in the Criminal Procedure Act by the Constitutional Court earlier in autumn 2011. It was however not constitutionalised after the annulment of the Transitory Provisions in December 2012 by the 4th amendment.[25] Something similar happened with the 'registration' case.

3. Using Transitory provisions as a slide in connection with right to vote – constitutionalizing "registration"

During the period when the Constitutional Court was reviewing the Transitory provisions, that is between March and December 2012, the FL was modified. Its second amendment (9 November 2012)[26] was submitted by MPs to Parliament on 18 September 2012 and adopted on 29 October 2012. The new provision in Article 23(3)-(5) of the Transitory provisions required the prior registration of voters. Thus, for exercising the right to vote one needs to register before the next parliamentary elections. The idea of prior registration – that is a completely new legal institution in Hungary and even at first sight it seemed to be entirely unnecessary as there is a county-wide register of permanent addresses of inhabitants, and elections have been organized smoothly based on this registry – appeared first when the Electoral Procedure Act was submitted in autumn 2012.

After having given a second thought to the proposed new rule, and having considered the critical views about the introduction of the registration, it seemed to be more secure for the two-third parliamentary majority to put the 'prior registration' or 'sign-up' also to the Transitory provisions of Fundamental Law. After the adoption of the Electoral Procedure Act, some of its provisions were sent for ex ante constitutional review to the Constitutional Court by the President of the Republic and were declared unconstitutional by the Constitutional Court on 7 January 2013.[27] (Note that by the decision of the Court on 28 December 2012 (on Transitory provisions), it also annulled the rules introduced to the Transitory provisions by the second amendment.) The decision of the Constitutional Court touched upon the prior registration and the new rules of the electoral campaign. As a reaction to this decision – and given the fact that the Transitory Provisions had been annulled – the two-third majority adopted the 4th amendment to the FL that did not contain any rule on prior registration but some modified rules on electoral campaign and

[23] Decision 45/2012 (XII. 29.) of the Constitutional Court, http://www.mkab.hu/letoltesek/en_0045_2012.pdf p33.

[24] See decision 6/2013 (III. 1.) of the Constitutional Court.

[25] See *Tímea Drinóczi*, Influence of human rights standards? Hungarian style on dialogic interaction, in: Jerzy Jaskiernia (ed.), Wpływ standardów międzynarodowych na rozwóy demokracjy i ochronę praw człowieka, Tom 3. Wydawnictwo Sejmowe, Warsawa 2013, pp. 430-440.

[26] Second amendment of the Fundamental Law of Hungary (Magyarország Alaptörvényének második módosítása (2012.November 9.), Magyar Közlöny 2012.évi 149. sz. 25018).

[27] It delivered the decision in January 2013 (Decision 1/2013 (I. 7.) of the constitutional Court).

many other rules either previously declared unconstitutional by the Constitutional Court or being part of the Transitory Provisions.[28]

III. The new electoral system and controversies

1. Development

Development and adoption of new electoral rules were preceded by constitutional amendments prior to the 2012 Fundamental Law (2010-2011). After the formation of the new Government in May 2010, the new majority immediately started to amend Act 1949 on the Constitution of the Republic of Hungary (without any substantial and formal limitation as it had the required 2/3 majority) and without proper preparation, coordination and deliberation.[29] It reduced the number of MPs in Parliament from 386 to 200, and this new rule would have entered into force before the election in 2014.[30] There was also another amendment that restricted the passive right to vote of those having served or serving in the 'armed forces'.[31]

However, only some of the amendments 'survived' the adoption of the new Fundamental Law and appear in the new constitutional text and system.[32] The FL neither contains the number of MPs nor any limitation on passive right to vote of those having served or serving in 'armed forces'. Act 2011 did not change the mixed characteristics of the Hungarian electoral system,[33] but introduced some changes, including the introduction of the right to vote for Hungarian citizens residing abroad, one-round system in SMDs, and specific arrangements for national minorities. The number of voters' support for being candidate in SMDs was reduced. It also provides rules on the delimitation of the constituencies, including two annexes that define their actual delimitation, and contains provisions on candidacy rights, on the determination of election results, and on by-elections. In Act 2011 the number of the Parliament is 199, instead of 200 and the pas-

[28] See CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013.

[29] See also *Kriszta Kovács/Gábor Attila Tóth*, Hungary's Constitutional Transformation, European Constitutional Law Review 7|2011, pp. 183-203.

[30] Art 1 of the modification of the Constitution published on 25 May 2010, Magyar Közlöny 2010. évi 85. sz. 19722 (Official Gazette 2010, nr. 85. p. 19722).

[31] The modification of the Constitution published on 11 August 2010, Magyar Közlöny 2010. évi 130. sz. 22370. [Official Gazette 2010, nr. 130. p. 22370].

[32] Examples are the rules concerning the Constitutional Court and its members, rule on trainee judge, clear and systematic enumeration of laws and decree issuing powers of autonomous administrative organs (without however mentioning them), and the 'legal status' of the Prosecutor General.

[33] The previous Hungarian electoral system was adopted in 1989 when the main compromise reached during the Roundtable Discussions was to establish a mixed electoral system that combines three essentially distinct systems to elect its unicameral 386-member Parliament: voting for single candidates from single-member districts (SMD; 176) contests, list-voting for parties in larger territorial districts (counties) using proportional rules to award seats from party lists (PL; 152), and proportionally allocated compensation seats from the national compensation list (58) in which voters do not vote but surplus votes are transferred to. The surplus vote in SMDs is the vote that is cast for a candidate during the first valid round but cannot result in mandate in any electoral turn. The surplus votes in the PR districts are the votes cast for a list in the valid electoral round that are not enough for establishing mandate or exceed the required number of votes for winning a seat. In the SMDs 176 MPs could have been elected by absolute majority vote or in the second round simple majority. Mandates were allocated from the lists by using the Hagenbach-Biscoff (territorial lists) and D'Hondt methods (national compensation list). Establishing the mix system after transition fits into the practice of transforming countries and observations of researchers. See *Colomer*, fn. 6, p. 3.

sive right to vote of those having served or serving in 'armed forces' is not limited even though the FL makes it possible for a cardinal Act to create further criteria concerning passive suffrage [Art XXIII(4)]. Art 2011 also introduced the 'compensating-the-winner' method as a link between the SMDs plurality or relative majoritarian system and proportionate representation list.

According to the Venice Commission and the OSCE/ODIHR the following developments are neutral with respect to international standards:[34] a one-round system instead of the two-round system, previously used for allocation of seats under the majoritarian part of the electoral system; a reduced number of seats in Parliament; a change in the rules for candidate registration; and extending the right to vote to Hungarian citizens living abroad (i. e. without a permanent residence in Hungary). Specific arrangements in the Act 2011 for improving the representation of the national minorities in Parliament are considered to be positive changes in the Act, in line with international standards and best practice that may improve the administration of elections.[35]

Electoral literature settles that already existing political parties tend to choose electoral systems that will crystallize, consolidate or reinforce previously existing party configurations and political party configurations dominated by a few parties tend to establish a majority rule electoral system. These assumptions do not really and entirely apply to the Hungarian case, neither the one also formulated by *Colomer*: "self-interested actors will prefer and tend to choose electoral rules creating low opportunities for them to become absolute losers".[36] These statements, even though generally true, need to be fine-tuned when studying the Hungarian case.

In Hungary, an electoral system was chosen exclusively by the ruling FIDESZ-KDNP-led majority of the Parliament, which is more majoritarian than the former one. The scope however was neither really the crystallization, consolidation, reinforcement of previously existing party configurations nor "creating low opportunities for them to become absolute losers". By changing the nomination rules (reducing the number from 750 to 500 and changing rules on campaign financing making it more attractive for newcomers) they made it possible for more actors not only to run in election but even for parties to be formed. The existing party configuration was not consolidated at all, but by allowing more fragmentation on the side of the opposition, more competing parties and candidates took part in the election.[37] By introducing "compensating the winner", the scope was not creating low opportunities to become absolute losers but the opposite: create high opportunities to become absolute winner. Nevertheless, the general observation of *Moser* and *Scheiner* seems to be valid also in Hungary, that is mixed systems to a great extent maintain the independent effects of PR and SMD tiers in countries with an established party system.[38] Also *Boix* is true when he writes that if new entrants are weak non-PR rule will remain in place,[39] but in Hungary this is to be supplemented with the overinsured system of the "compensating-the-winner" method, and the electoral laws that the adoption of which requires a 2/3 majority of votes in the Parliament.

These considerations are based on empirical research and the question is, in the Hungarian context, to what extent the electoral rules, configurations and the system itself are deemed democratic. There may be a lesson to be learnt also for other countries struggling

[34] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)012-e p. 4.

[35] Ibid. p. 4

[36] *Colomer*, see fn. 6, p. 2 and 1.

[37] It is another question whether these new parties are able to function as genuine political parties.

[38] *Moser*/*Scheiner*, see fn. 6, p. 595.

[39] *Boix*, see fn. 6, p. 622.

with a supermajority that does not really seem to be committed to certain common values such as respecting the constitutional framework.

2. Right to vote and registration

The Fundamental Law stipulates that every adult Hungarian citizen has both active and passive right to vote in the elections of Members of Parliament and it adds that the exercise or completeness of active suffrage may be subject to the requirement of residence in Hungary, and passive suffrage may be subject to further criteria under a cardinal Act.[40] Act 2011 differentiates between the electors who have domicile in Hungary and the ones who do not have, but the latter ones also have a right to vote limited to voting on party lists (but not on a candidate in an SMD).

As for the exercise of the right to vote, decision 1/2013 (I. 7.) of the Constitutional Court is of utmost importance. The Court declared that the registration for Hungarian citizens having a domicile in Hungary is unconstitutional, but it is a constitutional tool for those having no domicile in Hungary. The Court stated that the

> Act rules on the central registry of names – and the request for registration therein – in the framework of regulating the election procedure, and it specifies the filing of such a request as a precondition, in the absence of which the right to vote may not be exercised. This way, on the basis of the Act, the request for registration in the central registry of names is considered to be a restriction on exercising a fundamental right that can be done in accordance with Article I(3) of the Fundamental Law.[41] Consequently, the Constitutional Court had to examine if there is a fundamental right or constitutional value the protection of which makes it absolutely necessary to file a request – as regulated in the Act – for registration in the central registry of names. The Act introduces an active method of election registration, making the exercise of one's right to vote conditional upon filing a request for registration in the electoral register […]. However, in the case of Hungarian citizens having a domicile in Hungary […] there is no constitutionally justifiable reason for excluding from the exercise of the right to vote those who have not asked for registration in the electoral register. One may establish, also from the text of the Act itself, that even without individual requests, the State can obtain the data necessary for compiling the central register of names about the Hungarian citizens having a domicile in Hungary.

In connection with the other groups of voters, the Court emphasises that Article XXIII of the FL – unlike the former Constitution – does not specify the domicile as a general condition of the right to vote in the case of Hungarian citizens,[42] making it possible for a cardinal Act to require domicile in Hungary as condition of the right to vote or of the completeness of the right to vote. This way, in principle, the FL widens the personal scope of those having the right to vote. The possibility of filing a request for registration in the central registry of names, as an element of the new election procedure rules, enables adult Hungarian citizens not having a domicile in Hungary (e. g. those who live abroad, or who live in a rented apartment without registration, etc.) to exercise their right to vote granted in the FL. Similarly, registration can enable the national minorities living in Hungary to exercise their right granted in the FL, and to set up a minority representation in the Parliament. In certain cases a relevant special request can grant the actual

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[40] Cardinal Act shall mean an Act, the adoption or amendment of which requires the votes of two-thirds of the Members of Parliament present. Art T) (4) FL.

[41] The rules relating to fundamental rights and obligations shall be laid down in Acts. A fundamental right may only be restricted in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionately to the objective pursued, and respecting the essential content of such fundamental right.

[42] It is a requirement only for adult citizens of other Member States of the European Union.

exercising of the right to vote for those who wish to file a request for voting assistance. In these cases, prior registration is thus not unconstitutional.

As it has been mentioned above, the two-third majority left hold of registration of voters having domicile in Hungary as such and did not put it into the FL by the 4th amendment, unlike other issues mentioned above.

The decision of the Constitutional Court can be seen as a final say in the dialogue on the issue of exercising the right to vote of voters having domicile in Hungary. The intention of the political decision-maker with the introduction of registration was to deal with the issue of the increased number of new voters who were invited by them with the introduction of very preferential naturalization rules not requiring permanent address in Hungary. Thus, on the one hand registration was meant to be a guarantee rule for those having no domicile in Hungary and a procedural requirement for other voters having a permanent address in the country. The idea behind it may have been that for the opposition it is traditionally more difficult to mobilize its voters even for the election. The two-third majority could easily let the "registration" issue go as it could still rely on the new rules on electoral geography and the method of "compensating the winner", which also led us to the question raised at the end of chapter III.1.

3. Electoral geography

Reducing the number of the MPs elected in SMDs has also consequences in terms of creating new districts, but the principles of determining the electoral geography remain the same. However, its application faced some serious criticism.

The rules are as follows: the number of voters in any single-member constituency may only deviate from the national arithmetic mean of voters in single-member constituencies by any rate above 15% in order to enforce the provisions Act 2011 (single-member constituencies shall not cross county boundaries or the boundaries of Budapest and shall form contiguous areas) also in consideration of geographical, ethnic, historical, religious and other local characteristics and of any migration of the population. If this deviation exceeds 20%, the Parliament shall amend the related Annex; however, it may not be amended during the period between the first day of the year preceding the general election of MPs and the day on which the general election of MPs is held, with the exception of any election held due to the voluntary or mandatory dissolution of Parliament.

The Venice Commission and the OSCE/ODIHR hold that it is in line with international standards and good practice[43] that as required by the Constitutional Court, electoral constituencies are less unequal than previously, when the differences violated the constitutional principles. They however make the following key recommendations:[44] i) concrete constituency delimitations should not be written into a cardinal law that requires a two-thirds majority; rather the process and the formula of how to delimitate should be regulated by such law; ii) the law should establish an independent commission, composed of for example a geographer, a sociologist and a balanced representation of the parties and, where relevant, representatives of national minorities, to be charged with drawing electoral constituencies' boundaries; iii) the law should define a periodic review of the distribution of seats, at least every 10 years and preferably more frequently, outside electoral periods, not waiting for a 20 per cent limit to be crossed, as defined in the current Act 2011, iv) the law should define the maximum admissible variation among electoral constituencies within a county, limited to a maximum deviation of ten per cent from the county average.

[43] http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)012-e p. 4.

[44] Ibid. p. 5

There are studies[45] that prove that in some cases the determination of a boundary of a district is – in terms of the perspective of sociology, geography and political considerations – correct; these are territories that have turned to be more conservative than leftist. As for other territories of the state, some manipulation is realized such as when the traditionally loose or hesitating district is changed to be more conservative or when in a traditionally leftist district there are more voters (approx. 6000 in average) living than in a traditionally conservative one. The government argued that boundaries had to be changed because of the former decisions of the Constitutional Court. *Századvég Foundation* claims that "there are no constituencies on the map that have an unusual shape raising suspicion of gerrymandering".[46] The *Századvég Foundation* also reflected on the Venice Commission and the OSCE/ODIHR recommendation and (quite cynically, given the actual political situation, i. e. the two-third majority of the 2nd and even of the 3rd *Orbán* government) found that the two-third majority is a kind of a guarantee as it is difficult to achieve with a lack of political consensus, and that it prevents gerrymandering.[47]

It is suggested (also by these studies in line with the recommendation of the Venice Commission/OSCE ODIHR) to be problematic that the Act 2011 on election contains the districts as it is to be adopted by a two-third majority even though it is required neither by the FL nor the Constitutional Court.

These recommendations and criticism have not triggered any legislative changes in any account mentioned above under i)-iv). The rules on electoral geography seem to be preferential to *FIDESZ* which is, as usual, not responsive to any recommendations (see that of the Venice Commission) and unwilling to reconsider any rules that they have adopted. The reason is that its goal is to keep the power as long as possible. That is why it does not change the two-third requirement that still governs the annexes of the Act 2011 containing constituency boundaries and only formally complies with the necessity of periodic review of constituency delimitations and upholding the „compensation-the-winner" formula.

[45] See e. g. *Szigetvári Viktor*/*Tordai Csaba*/*Vető Balázs*, Túl a demokrácián – Az új országgyűlési választási rendszer modellje (2. rész), http://www.hazaeshalaladas.blog.hu/2011/11/25/tul_a_demokracian_az_uj_orszaggyulesi_valasztasi_rendszer_modellje_2_resz; Hungarian elections 2014: Turnout and the impact of the electoral system, http://4liberty.eu/republikon-institute-election-2014-turnout-and-the-impact-of-the-electoral-system/; *Attila Tibor Nagy*, Hungarian electoral system and procedure, http://www.meltanyossag.hu/content/files/Hungarian%20electoral%20system%20and%20procedure.pdf, p. 2

[46] *Századvég Foundation*, The new Hungarian electoral system, http://www.politics.hu/20130903/read-and-comment-on-szazadvegs-report-on-the-new-hungarian-electoral-system/, p. 11.

[47] Ibid. p. 21.

4. Nomination rules, voting and results – compensating the winner

Pursuant to the new rules less nomination (500 instead of 750) is needed to be a candidate in an SMD and one voter may recommend more candidates. There is no more territorial list election but voters can vote for the national list from which 93 mandates can be allocated based on votes cast and surplus votes. The national list can be party list or nationality list representing minorities. Party lists are reserved for parties having independently nominated candidates in at least 27 SMDs in at least 9 counties and in the capital. Nationality list is reserved for the nationwide government of a minority provided that 1% but at least 1500 voters registered in the list of minority voters belonging to the given minority (minority-voter) support the nationality list. The nationality list implements the new rule of the FL making the Parliament constitutionally obliged to regulate the participation of nationalities living in Hungary in the work of Parliament in a cardinal Act.[48] In the National Avowal part there is another proclamation: "We proclaim that the nationalities living with us form part of the Hungarian political community and are constituent parts of the State." Also, Article XXIX stipulates that nationalities living in Hungary shall be constituent parts of the State.

As mentioned above, Act 2011 differentiates between i) voters with residence in Hungary, ii) national minority voters (voters with residence in Hungary who are enrolled on the electoral register), iii) voters without residence in Hungary or out-of country voters. The first group of voters (with residence in Hungary) may vote for one candidate in any single-member constituency and one party list. A national minority voter may vote for one candidate in any single-member constituency and the list of their national minority or, in the absence thereof, for one party list. Voters without residence in Hungary may vote only for one party list.

Mandates from the national list are distributed by using a 5% threshold for party lists, preferential quota (total votes cast to the national list divided by 93 and divided by 4) and preferential mandate (that is given when the preferential quota is passed) for nationality lists, and the D'Hondt method. Preferential mandates allocated to nationality lists are subtracted from the number of seat available from the national list. If a nationality list passes the 5% threshold it can get mandate allocated by using the D'Hondt method. Should there be a case that a nationality list has not got any mandate, not even a preferential one, its minority is represented by a special representative (minority spokesman) of that minority in the Parliament. This seems to be a good solution but not a really effective one: in reality, it solely creates a position of a spokesman without the entitlement to vote in legislative processes. Despite the fact that it is more involvement in parliamentary work than minorities had before but without active support of the respective minority (that would presume at least an active mobilization capacity) or changing the rules on the distribution of seats they will never be able to get even a preferential mandate.

The definition and thus the role of surplus votes were changed; a new role was added, indicated as ii) below. According to Act 2011 surplus votes are votes i) cast for any candidate who failed to win the mandate and ii) the number of votes remaining after deducting the number of votes for the runner-up candidate plus one from the number of votes for the candidate who won the mandate. According to some analyst it has minimal importance when the political powers are balanced and it is not necessary when a party has much support as the two-third majority can easily be reached without this distortion; furthermore, it makes the entire system unnecessarily complicated as if the aim is to support the winner it could be done by putting an end to the compensation mechanism. It is also mentioned that in a multiparty system, it may have an unpredictable effect. In

[48] Art 2(2) FL.

another analysis authors take a view that the "compensating-the-winner-method" is introduced and used against small, but already established parties.

And, indeed out of the 18 party lists, only 4 won seats, no one nationality self-government out of 13 reached even preferential mandate, *FIDESZ-KDNP* won with 2/3 majority. According to the *Republikon Institute*, the mandate allocation mechanism of the electoral system has never been as disadvantageous to other parties to this extent before as it is now: *FIDESZ-KDNP* received 1.5 times more mandates, while the proportion of mandates of other parties became less than their proportion of votes. Without the compensation of the winner or without the out-of country votes *FIDESZ-KDNP* would have had only a simple majority.[49] These data seem to justify the assumption made in chapter III.3 above. The question here is if this phenomenon can be addressed constitutionally. The Hungarian Constitutional Court gave an answer in decision 3141/2014. (V. 9.) in which it examined the constitutionality of the compensating-the-winner mechanism.

Petitioners (one of the political parties and a private person) submitted a constitutional complaint claiming that the decision of the *Kúria* (Supreme Court) upholding the decision of the National Electoral Commission on the electoral results of the parliamentary election 2014 is unconstitutional. The Constitutional Court considered the complaint admissible and after examination in the merits it rejected the complaint. According to the petitioners, who referred to the previous case-law of the Constitutional Court, the Parliament has wide margin of appreciation in connection with the formation of the electoral system. They have not denied the importance of compensating surplus votes cast for a candidate who did not get mandate as the constitutional justification of this mechanism is the support it gives to the implementation of equality of votes. Consequently, the "compensating-the-winner" method does not have any constitutional basis as it gives even more votes to the winner. One vote (cast in the single member constituency) may theoretically result in more than one mandate. They argue that the reason of other states which apply the "compensating-the-winner" mechanism is to facilitate the creation of a governing majority. However, the Hungarian system is a mixed system and contains more majoritarian elements than the formal one. Therefore "compensating the winner" is not necessary at all for the creation of a governing majority, and it infringes constitutional provision on the right to vote,[50] prohibition of discrimination[51] and equal suffrage.[52]

The Constitutional Court found however, that the equal suffrage in itself is not a fundamental right but a constitutional principle and constitutional guarantee, and so its violation cannot be decided by applying Article I(3)[53] of the FL on the rules of restriction of fundamental rights. The Court reiterated that equal suffrage means that each voter has the same number of votes and each vote counts the same during the vote counting; from the perspective of material equality, it does not signify how many votes are equivalent with one mandate. The Constitutional Court has never demanded the "effective equality" of suffrage. However, the "compensating-the-winner' mechanism is connected to the

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[49] Hungarian elections 2014, see fn. 45, p. 1, 3.

[50] Article XXIII(1) FL: Every adult Hungarian citizen shall have the right to vote and to stand as a candidate in elections of Members of Parliament, local government representatives and mayors, and of Members of the European Parliament.

[51] XV(2) FL: Hungary shall guarantee the fundamental rights to everyone without any discrimination, in particular on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status.

[52] 2(1) FL: Members of Parliament shall be elected by direct and secret ballot by citizens eligible to vote, on the basis of universal and equal suffrage, in elections which guarantee free expression of voters' will, in a manner laid down in a cardinal Act.

[53] See fn. 41.

"effective equality" of suffrage the rules of which are neutral in terms of not placing any voters' group into a disadvantageous position. Advantages or disadvantages of the disproportionality applied in mandate allocation emerge only after the votes are cast. Against this background, the Constitutional Court held that the question was not the discriminative nature of the challenged rule but the proportionality of the electoral system. This practice of the Constitutional Court is in line with ECtHR case law. According to the Constitutional Court the impugned rule is not a "looser compensation", but a "winner premium" and, based on the regulation in effect, it is only a significant number of surplus votes cast to the winner that could result in a mandate. The Court reiterated that one single electoral rule or single electoral institution in itself can rarely be held to limit a free election. Electoral rules in their entirety have to be in compliance with the requirement to facilitate the free expression of opinion of voters. The parliament fulfilled its objective obligation to protect the right to vote when it has adopted Act 2011 as it established guarantees and has not restricted unconstitutionally the free exercise of the right to vote. The method of the "compensating the winner" in itself cannot be examined isolated from other electoral rules and as a compensation rule (making the system more proportionate) it is in itself not unconstitutional.

As for the approach of the Constitutional Court in case of "compensating the winner", it cannot be considered as a ruling supporting democratic elections and equal distribution of votes. "Effective equality" of suffrage cannot constitutionally be demanded, however, it was the Court itself that reiterated that the "method of 'compensating the winner' in itself cannot be examined isolated from other electoral rules". The Court made a mistake when choosing its point of reference: the question was not the discriminative nature of the challenged rule but the proportionality of the electoral system. Taking the intention of the legislative power, the entire system and the possible effects of the "compensating-the-winner" method, or focusing more on the recommendations and opinions (of the Venice Commission) as a source of inspiration, the Court could have reached another opinion. However, in the decision cited, the Constitutional Court seems to yet examine the issue isolated from other rules of the electoral laws. The legal consequence of a decision of this kind could have been the declaration of the unconstitutionality of the challenged provision with an ex nunc effect. This did not affect the result of the election as the annulment of the legal regulation does not affect the legal relations originating on the day or before the decision was published and the rights and obligations resulting therefrom,[54] but it would have made it impossible to use this kind of method in the future; obviously apart from the possible and potentially foreseeable action of the constitution-changing power inserting a "compensating-the-winner" method into the FL.

[54] Art. 45(3) of the Act CLI of 2011 on Constitutional Court, http://www.mkab.hu/rules/act-on-the-cc.

5. Electoral campaign

In its decision 1/2013 the Constitutional Court annulled some provision on electoral campaign of the Act on Electoral Procedures.[55] Pursuant to these rules, in the campaign period, political advertisements could only be disseminated in the public service media. The provision prohibits this type of political communication in any other media service – including non-public televisions and radios – that would result in eliminating the possibility of political advertising in the very forms of media that reach the widest scope of layers in the society. The Constitutional Court found that "the prohibition is a significant restriction of expressing political opinion in the course of the election campaign" and "with regard to the aim of allowing the free formation and the expression of the voters' will and found it gravely disproportionate". According to the Constitutional Court, the

> predominant influencing power of the media services may justify imposing by the legislation certain extra obligations – with due respect to the equal opportunities of the running political parties – even if the campaign activities are not restricted in general. However, with regard to the aim of allowing the free formation and the expression of the voters' will, it is gravely disproportionate to ban political advertisements on the wide scale as specified in […] the Act, especially when the legislator has significantly eliminated the restrictions applicable to the campaign activities. With regard to the diverse relations between political advertisements, the freedom of expression and the freedom of the press, such advertisements cannot be constitutionally prohibited, as found in the Act under review, even outside the scope of the public service media.[56]

As a response to the decision of the Constitutional Court, the 4th amendment replaced Article IX.3 of the Fundamental Law and provides i) that "political advertisements shall be published in media services, exclusively free of charge" and (2) that "political advertisements published by and in the interest of nominating organisations setting up country-wide candidacy lists for the general election of Members of Parliament or

[55] Actually it annulled Article 151. It read as follows: (1) In the campaign period, political advertisement can only be disseminated in the public service media, on the same conditions for the nominating organisations setting a national list in the election of the members of the Parliament, and the nominating organisations setting a list in the election of the members of the European Parliament. It is prohibited to attach any opinion or an evaluating comment to political advertisements. (2) The public service media provider may not ask and may not accept any consideration for disseminating a political advertisement. (3) In the 48 hours before the election, political advertisements cannot be disseminated by the public service media. (4) After registering all the lists under para. (1), the public service media providers shall disseminate the political advertisements of the nominating organisations in the length and the occasions specified by the National Election Committee. The broadcasting time available for the above purpose – the maximum duration of which shall be 600 minutes, or 300 minutes in the case of the election of the members of the European Parliament – shall be distributed evenly between the media providers and between the nominating organisations. If the national list was set up by two or more parties according to Section 8 para. (2) of the Act CCIII of 2011 on the election of the members of the Parliament or Section 5 para. (1) of the Act CXIII of 2003 on the election of the members of the European Parliament, the above obligation of dissemination shall only be applicable with regard to the joint party-list and not for the separate parties. (5) The ordering party of a political advertisement to be aired in the audiovisual media service shall provide for subtitling the advertisement or supplying it with sign language interpretation. (6) The provisions of the Act on the media activities shall otherwise be applicable to the dissemination of political advertisements. (7) With the exception of the media service specified in para. (1), it shall be prohibited in the campaign period to disseminate any political advertisement or political announcement in any other media service, the internet websites, and teletext services of the providers.

[56] The Constitutional Court also established that in the case of the cinemas there are no special reasons that might justify the particular restrictions applicable in the case of media services.

candidacy lists for the election of Members of the European Parliament shall exclusively be published by way of public media services and under equal conditions".

According to the Opinion of the Venice Commission on the 4th amendment of the FL, this

> second regulation forbids any, even unpaid, political advertising by these organisations in commercial media services prior to elections. According to the Hungarian authorities the ban on political advertising on private television during the electoral campaign strives "for the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity". The Venice Commission cannot agree that this is a sufficient justification for the prohibition of any political advertising in commercial media services prior to elections. Indeed one has to take a particular look at the effects of the amended Article IX.3 of the Fundamental Law. Since the Government usually has a better chance of public appearances, the governing parties' positions will already be promoted indirectly through media coverage of governmental activities and statements. The prohibition of any political advertising in commercial media services, which are more widely used in Hungary than the public service media, will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage.

The amended Article IX.3 provides that only "nominating organizations setting up countrywide candidacy lists for the general election of members of Parliament or candidacy lists for election of Members of the European Parliament" shall be published by way of public media services on equal conditions. According to the Act on Electoral Procedure of 2012 parties which do not set up nationwide candidacy lists and independent candidates have 1/30 of the air time available to a national list per candidate. The Venice Commission therefore recommended that a constitutional guarantee also for non-nationwide lists and independent candidates would be welcome.

Finally, the Venice Commission also draws attention to the fact that the abovementioned Article IX.3 of the FL contains rather detailed rules which might require amending from time to time and are therefore usually regulated by ordinary laws. Raising such provisions to the level of the Constitution withdraws them from constitutional review.

The 5th amendment to the FL touches upon the issue of electoral campaigns. It modified Article IX(3) again, and the provision constitutionalised by the 4th amendment now, since 1 October 2013 reads as follows:

> In the interest of the appropriate provision of information as necessary during the electoral campaign period for the formation of democratic public opinion, political advertisements may only be published in media services free of charge, under conditions guaranteeing equal opportunities, laid down in a cardinal Act.[57]

In the explanatory memorandum, a reference is made to the opinions of the Venice Commission, European Commission and the decisions of the Constitutional Court as a basis for the modification. The Act on Electoral Procedure was amended accordingly. This may be seen either as a withdrawal or conviction by the arguments of critical opinions. It is however a little bit odd from a rule of law perspective that, also in this respect, the FL was substantially modified twice, which cannot be considered at all as a daily practice in advanced democracies.

[57] English version of the Fundamental Law as of June 2014: http://www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A9426D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf.

IV. Summary

The Hungarian two-third parliamentary majority does not in all respect behave as expected based on the literature of electoral systems. It has alone upheld and tailored the existing electoral system to its needs by overstepping the boundaries of constitutionalism in certain cases. The two-third majority followed the same and usual pattern of misusing the majority power and setting aside democratic and professional considerations.

It is true, that in certain issues the political decision-maker demonstrated a certain extent of self-restraint (regarding of registration of voters), but it is not certain if this was merely a consequence of the conviction which resulted from the constitutional dialogue with others, or because the main goal, that is ensuring the staying in power, could be achieved in other ways: with the new electoral geography and the applied method of "compensation the winner". None of the latter was deemed unconstitutional, but rules on electoral geography seem to be contrary to the opinion of the Venice Commission, and the "compensating-the-winner" method, similarly to other provisions of electoral laws, was not supported by the opposition and the decision was not discussed in any form of consultation.

Parliamentary majority should be free to choose the best fitting electoral system but it should also take the opinion of the opposition into account and try to create a system that in itself promotes free and democratic elections where votes are treated equally. Elements of an electoral system cannot be seen isolated, certain political considerations pertaining to the electoral system cannot be, in themselves, constitutionally assessed, except for fundamental right issues. But when some important components of the system give raise to certain concerns as to the democratic nature and equality of the system, the entire system needs to be examined and constitutionally reviewed. A more active Constitutional Court should have acted so regarding the "compensating-the-winner" formula.