Governing Without Being in Power? Controversial Promises for a New Transition to the Rule of Law in Hungary

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Abstract

After 12 years of the governance of the national-conservative Fidesz in Hungary, from 2020 on, there seemed to be a real chance that the united opposition would win the election in Spring 2022. But even if the current opposition governs, either from 2022 or later it will face serious problems about really being in power, as Fidesz cemented all significant rules, institutions and positions into the constitution and cardinal laws. These can only be amended with a two-thirds majority in parliament, and it is very unlikely that the opposition could win such a large majority. A unique situation is likely to occur within the European Union (EU): a member state will be facing dilemmas of constitutional transition, while as an EU-member, it was not

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(and could not be) considered as a dictatorship, from which exceptional transitions are the only way out. This article argues why a new government should avoid illegitimate constitution making or constitution amending without the required majority at all costs and suggests alternative solutions for living with 'Fidesz's constitution'.

Keywords

Hungary – Fidesz – rule of law – transition – Hungarian Basic Law – Hungarian Constitutional Court – legitimacy – constitution making

I. Introduction: A 'New Democratic Transition' Within the EU?

'We were governing but we were not in power.' These words are commonly attributed to a senior politician of Hungary's national-conservative ruling party, Fidesz. He is said to have spoken them after Fidesz's election defeat back in 2002 when they lost power after their first term in government. The blame for the lack of actual power was directed at the informal socialist and liberal influence which remained in place in several institutions during the first Orbán-government.

Fidesz has obviously learnt from that experience: as they came to power again in 2010, they made sure to make this power real and durable. With their two-thirds majority in parliament, achieved thanks to the previous scandalous governance of the socialists, Fidesz could easily adopt a new constitution, the Basic Law, without any compromise with the opposition. This constitution was announced to be 'granite rigid' but it was later amended many times, alongside the government's daily political interests.[1] They also used the already existing category of cardinal laws, which must be amended and adopted with a two-thirds majority in parliament, to cement the new institutional solutions, including the electoral laws. Further, their parliamentary supermajority enabled them to appoint loyal officials to the top of state institutions that should in principle be independent. Last, but not least, this time they also cared about obtaining and keeping informal influence: their

1 For details see e. g. Beáta Bakó, 'Hungary's Latest Experiences with Article 2 TEU. The Need for "Informed" EU Sanctions', in: Armin von Bogdandy, Piotr Bogdanowicz, Iris Canor, Christoph Grabenwarter, Maciej Taborowski and Matthias Schmidt (eds), *Defending Checks and Balances in EU Member States. Taking Stock of Europe's Actions* (Berlin/Heidelberg: Springer 2021), 35-69 (45-47).

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economic and political circles have been supported with dominance in many fields[2] through media acquisitions, trickily designed public procurements and the outsourcing of certain state activities.

The reason why this cemented reality matters is not just the regular criticism from the EU towards the Hungarian government and the ongoing Article 7 of the Treaty on European Union (TEU) procedure against Hungary. That might be surprising after Fidesz's third overwhelming election victory, but at the election in Spring 2022, the opposition seemed to have a realistic chance of winning. Opposition parties have finally succeeded in adapting their strategy to the electoral law, which was changed in significant details by the Fidesz-majority; but, after all this is still a mixed electoral system, based on the same logic as the previous one.

In this mixed system, 106 Members of Parliament (MPs) are elected in districts in 'first past the post' system, while another 93 MPs come into parliament from party lists according to the principles of proportionality. But some tricks have been hidden in the details. Not only the losing but also the winning candidates of constituencies are compensated with the number of surplus votes that were not necessary for them to win,[3] which practically meant measurable extra mandates for the Fidesz on their party list.[4] The design of many constituencies,[5] which were often formed on an unproportional basis previously as well, clearly reflect gerrymandering purposes. Moreover, the definitions of the exact district borders count as 'cardinal' provisions, meaning they could only be changed with a two-thirds majority in parliament.[6] Experience shows that the smaller the new constituencies were, the better the result for Fidesz.[7] The fact that the rather pro-opposition

2 For details and background see e. g. Gábor Scheiring, *The Retreat of Liberal Democracy. Authoritarian Capitalism and the Accumulative State in Hungary* (Cham, Switzerland: Palgrave Macmillan 2020), 217-252.

3 § 15 (1) of Act CCIII. of 2011 on the election of the members of the National Assembly.

4 In 2014 this meant seven extra mandates for the governing party, see Réka Várnagy and Gabriella Ilonszki, 'The Conflict Between Partisan Interests and Normative Expectations in Electoral System Change. Hungary in 2014' Corvinus Journal of Sociology and Social Policy 8 (2017), 3-24 (17).

5 The new electoral law adopted by the Fidesz-majority in 2011, decreased the number of MPs from 387 to 199 so the former constituencies had to be redesigned. Decreasing the number of MPs in itself was absolutely reasonable in a country of less than ten million.

6 Eszter Bodnár, 'Alkotmányjogi dilemmák az új országgyűlési választási törvénnyel kapcsolatban' [Constitutional Dilemmas Regarding the New Law on Parliamentary Elections], Közjogi Szemle 1/2012, 40-48 (45).

7 For empirical data about the effects of the size and share of constituencies in more details see György Vida, 'Az egyenlőtlen politikai reprezentációt létrehozó választási földrajzi hatótényezők mérési lehetőségei' [Possibilities for Measuring Electoral Geographical Factors that Create Unequal Political Representation], Területi Statisztika 5/2016, 643-659 (653-655).

districts are generally bigger also means that a vote for the opposition has less value than a vote for the Fidesz. Based on this premise, the think tank '21 Research Institute' modelled the outcomes for the 2022 election and found that if the opposition parties run in the election together as a bloc, they need to get 3-4 percent more votes to gain a parliamentary majority than Fidesz needs for the same majority.[8]

And this is precisely what the opposition is planning to do in 2022. The six relevant opposition parties announced that they would run only one candidate against the candidates of the governing party in each constituency. The opposition also has a common candidate for Prime Minister, who, along with the candidates in the constituencies, has been chosen in primary elections. Furthermore, as regards the proportionality, opposition parties will set up one common list instead of having six distinct party lists.[9] The strategy is quite likely to work, but still, one thing seems to be sure: even if the current opposition wins, they probably cannot achieve a two-thirds majority in parliament, which is needed to change constitutional structures and important cardinal laws.

What could and what should they do in such a situation? Whether the opposition wins the election in 2022 or not, the problem will remain the same four and eight years later too, whenever a government with simple parliamentary majority needs to change the current constitutional system. The question is especially relevant in light of the criticism that the Hungarian government has been continuously receiving because of undermining the rule of law. On the one hand, such criticism is not without reason. On the other, the EU hopefully will scrutinise the respect for EU values and the rule of law in the future as well, reminding about the adherence to applicable provisions of national constitutional law when a new government will try to realise a second 'democratic transition'. Ideally, the making of a new constitution will be as closely watched from Brussels, as the adoption and entering into force of the current Basic Law was. Legally, the situation will certainly be far more

8 Election model of the 21 Research Institute published in October 2020, <https://21kutatokozpont.hu/wp-content/uploads/2020/10/manda%CC%81tumbecsle%CC%81s_tanulma%CC%81ny_okt7.pdf>, 2-3.

9 The decision about the common list was in fact enforced by a recent amendment of the electoral law, according to which only those parties are eligible for setting up a nation-wide list that had their own candidates in at least 71 (instead of the previous 27) of the 106 electoral districts: § 8 (1) of Act CCIII. of 2011 on the election of the members of the National Assembly. It seems that Fidesz realised that the opposition was aware of the fact that the electoral system is designed for a two-party system and they are finally able to play within these rules. The amendment clearly aims to create a situation in which third way parties (primarily, the joke party 'Hungarian Two-Tailed Dog Party') are forced to compete with the opposition also in districts where a close-run is expected.

problematic than the codification of a one-party constitution ten years ago. Before I mention some traps to avoid and make suggestions for both the current opposition and the EU about the handling of the situation (Section III.), it is necessary to briefly overview precisely how the hands of a new government will be tied (Section II.).

II. How the Silver Bullet of Two-Thirds Majority Has Been Used by Fidesz

As Hungary's National Assembly is a unicameral parliament, matters requiring a wider compromise have always been subject to a two-thirds majority requirement,[10] which has two versions. A 'big' two-thirds majority means two-thirds of all MPs. This majority is needed for adopting and amending the constitution and for the election of many important state officials: constitutional judges, the chief prosecutor, president of the Curia, president of the Election Office and so on. A 'small' two-thirds majority refers to the two-thirds of MPs who are attending at the given session: this is enough for the adoption and amendment of cardinal laws and of the parliamentary Rules of Procedure.

When the two-thirds majority criteria were introduced after the democratic transition as a guarantee for compromise, probably no one thought that a single party[11] could gain this majority alone. But this happened in 2010: since then, the requirement of this special parliamentary majority makes no further sense in practice. If Fidesz wanted to substantially keep the institution of cardinal laws, they should have raised the two-thirds requirement higher in order to uphold the need for a compromise.[12] Moreover, this would have logically implied raising the voting requirements of constitutional amendments, too. Of course, they did not do that, but they restructured the legal (and personal) environment to their benefit, to the disadvantage of the opposition.

10 The requirement of a four-fifths majority also exists in Hungarian parliamentary law but this applies to procedural decisions, like adopting legislative proposals in urgent procedure.

11 Fidesz formally frames a union with the Christian Democrat KDNP, but it is not a real coalition, rather a gesture: without Fidesz, KDNP would not have existed for years; their own political support is extremely low.

12 Similarly Herbert Küpper, 'A kétharmados/sarkalatos törvények jelensége a magyar jogrendben' [The Phenomena of Two-Thirds/Cardinal Laws in the Hungarian Legal System], MTA Law Working Paper 46/2014, 1-11 (7).

1. Constitution Making and Constitution Amending

Hungary's new Basic Law was adopted in Spring 2011 and entered into force in January 2012. The constitution making had been on the table of previous governments too, but they could never find a compromise for the required two-thirds parliamentary majority. There were historical reasons behind the constant constitution-making intention: the constitution was formally still the old 'communist' one, numbered as Act XX of 1949. However, it was totally rewritten at the time of the transition, obviously. Still, the name Act XX of 1949 did not sound acceptable, and its structure reflected the old state socialist logic: for instance, the fundamental rights were placed at the very end of the document. Thus, even if the necessity of constitution making was heavily debated among constitutional lawyers,[13] there were good reasons to use the opportunity to adopt a new constitution. But there would have been good reasons also for engaging in a public debate with the opposition, instead of using the force of a two-thirds majority without substantial discussion.[14]

The new Basic Law received broad international attention only as it entered into force on 1 January 2012. However, this attention was motivated rather by symbolic issues, like the definition of the family, or the presence of the word Christianity in the preamble. The preamble also denies the legitimacy of the former communist constitution and derives 'our current liberty' from the revolution of 1956. Despite the ideological breach, the new constitution legally remains in continuity with the old one.[15] Some new bodies and institutions have been introduced and some of the existing institutions' roles and competences have been altered but the fundamentals of the constitutional system did not change in 2012. The original version of the new Basic Law itself gave in fact less reason for criticism than it got: its amendments are far more problematic. Since it entered into force, the new constitution has been amended nine times: some of these amendments were rather technical, but others contained quite controversial provisions.

13 For example, the first president of the Constitutional Court, László Sólyom argued that the constitution making was not necessary. See his interview entitled 'A határig el kellett mennem' [I Had to Go Until the Edge] in: Molnár Benedek, Márton Németh and Péter Tóth (eds), *Mérlegen az Alaptörvény* [The Basic Law on Balance] (Budapest: HVG Orac, Stádium 2013), 17-36.

14 A discussion with society was at least pretended: In the frames of a so-called national consultation a questionnaire was sent to each citizen with some simplified questions about the new constitution. Since then, such consultations have been repeated regularly on various topics with more and more simplified questions and answer options, but the results are not published. It is practically used as a substitute for direct democracy, which has been significantly weakened under the new Basic Law: I will discuss the issue of direct democracy in Section III. 3. below.

15 András Jakab and Pál Sonnevend, 'Kontinuität mit Mängeln: Das neue ungarische Grundgesetz', HJIL 72 (2012), 79-102 (83).

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For example, with the Fourth Amendment in 2013, several provisions have been codified in the constitution, which had previously been annulled by the Constitutional Court,[16] the substantive review over constitutional amendments was explicitly prohibited for the Constitutional Court[17] and the decisions of the Constitutional Court delivered under the old constitution were repealed.[18] The next, fifth amendment of the constitution a couple of months later merely served to allay the doubts of the European Commission regarding the decline of the rule of law in Hungary: some minor 'cosmetic' changes were temporarily enough for that.[19]

Soon after the Fidesz election victory, in Summer 2018, the Basic Law was amended for the seventh time in order to provide the constitutionality of a number of delicate laws that were planned for adoption by parliament at the time, including the 'Stop Soros' anti-immigration package[20] and the new Act on the Freedom of Assembly.[21] Furthermore, the concept of

16 See e. g. Constitutional Court decisions no. 45/2012 (XII. 29.) (MK [Magyar Közlöny] 2012, 38979) on the transitional provisions of the Basic Law; 38/2012 (XI. 14.) (ABH 2012, 185) on the unconstitutionality of criminalising homelessness; 6/2013 (III. 1.) (ABH 2013, 194) on the unconstitutionality of the regulation of churches.

17 Article 24 (5) of the Basic Law. The practical relevance of this amendment is rather precautionary as in its consequent case law, the Constitutional Court refused the material review of constitutional amendments also earlier. See e. g. Beáta Bakó, 'Láthatatlan után inkoherens alkotmány. A korlátlan alkotmánymódosító hatalomról' [First Invisible, Then Incoherent Constitution. On the Unlimited Constitution Amending Power], Magyar Jog 2/2017, 102-116 (105 et seq.).

18 Closing provisions of the Basic Law, point 5.

19 Similarly Zoltán Szente, 'Challenging the Basic Values – Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them' in: András Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values. Ensuring Member States' Compliance* (Oxford: Oxford University Press 2017), 456-475 (470).

20 The 'Stop Soros' package (Act VI. of 2018 on the amendment of certain laws related to measures against illegal immigration) was published in the official journal on the very same day as the Seventh Amendment of the Basic Law (MK [Magyar Közlöny] 2018/97). This piece of legislation is directed against migration through amending several laws, including the introduction of a new criminal offence called 'facilitating illegal migration'. At the same time, Article XIV. of the Basic Law was amended as stipulating that 'foreign populations' cannot be settled in Hungary. Further, the basic rules of granting asylum and the rules of submitting and evaluating asylum applications as well must be defined by cardinal law. It has also explicitly been codified on the constitutional level that those who arrived through a safe third country, are not eligible for asylum. (The same has been included in the German constitution for a long period of time: Article 16 a (2) GG).

21 Article VI. of the Basic Law, which guarantees privacy rights, has been amended with a sentence concerning the collision of privacy rights and of the freedom of expression and freedom of assembly. According to that, 'exercising the right to freedom of expression and assembly shall not impair the private and family life and home of others'. Less than a month later, on 20 July 2018, parliament adopted the new law on the freedom of assembly. The law makes it possible to prohibit an assembly if it is likely to violate others' right to privacy and family, human dignity and so on: 13. § (4) of Act LV. of 2018 on the freedom of assembly.

'constitutional identity' was introduced to the EU clause of the Basic law, in the spirit of a former, rather controversial judgement of the Constitutional Court.[22]

Finally, the latest, ninth amendment of the Basic Law is worth mentioning; it is a peculiar mix of provocation in the field of identity politics and of building a strategy on the longer term. Since December 2020, the Basic Law declares that 'the mother is a woman and the father is a man' and 'Hungary protects children's right to their identity based on their biological sex and provides their education aligned to Hungary's constitutional identity and Christian culture'.[23] While a significant part of public opinion began to discuss this, the practically much more relevant amendment was realised only by careful observers. Namely, that the amendment defines the concept of public money very tightly: 'public money is the revenue, the spending and the claim of the state'.[24] This means that information about the spending of state-owned companies and indirectly state-owned foundations will no longer be available to the public.

Apropos foundations! The same amendment foresees the establishment of special 'public interest asset management foundations performing public duty': the functioning of these foundations is regulated, of course, through cardinal laws.[25] As parallelly, the management of many public universities has been outsourced to foundations, these special foundations will be part of the informal influence toolkit after a possible change of government. This is only the most recent and most apparent element of the already established system of informal power. The details will be discussed later in Section III. 5. But first, the relevance of a two-thirds majority decision making must be explained in two further fields.

2. Cardinal Laws

The so-called cardinal laws must be adopted with a two-thirds majority of MPs present at the vote; this had been part of the Hungarian constitutional order before 2010 under the name 'two-thirds laws'. The requirement of adopting these laws with a qualified majority was originally rooted in 'mutual

22 For details see Beáta Bakó, 'The Zauberlehrling Unchained. The Recycling of the German Federal Constitutional Court's Case Law on Identity-, *Ultra Vires* and Fundamental Rights Review in Hungary', HJIL 78 (2018), 863-902 (877-899).

23 Articles L (1) and XVI. (1) of the Basic Law.

24 Article 39 (3) of the Basic Law.

25 Article 38 (6) of the Basic Law.

distrust'[26] at the time of the democratic transition: the solution aimed to enforce political compromise on key questions. The cardinal nature of a law merely depends on its subject, so there are laws that contain both cardinal and simple provisions. Of course, the distinction of these subjects is not always obvious. The Constitutional Court had ruled many times that regulating a cardinal subject in simple law was unconstitutional, but the Court's jurisdiction is not consequent[27] regarding this implicit hidden hierarchy between 'normal' and cardinal laws.[28]

The scope of cardinal laws has been changed only partly in the new constitutional system. A significant part of cardinal legislative subjects has remained the same, compared to the period before the Basic Law entered into force:[29] laws regarding the basic organisational structures of the state (Constitutional Court, ordinary judiciary, prosecutors, police) and the most fundamental rules of the democratic state order (parliamentary elections, citizenship, local governments, functioning of parties, media laws) belong to this category. Moreover, there are subjects, mostly related to certain fundamental rights, that used to be regulated through two-thirds laws and now belong to the scope of simple legislation.

The extra cardinal subjects since 2012 concern rather practical, policy issues, like the protection of families, the basic rules of taxation and pensions and matters related to finances: the protection of 'national assets', the functioning of the Central Bank and of the Budget Council. The latter body supports the legislative activity of parliament by examining the feasibility of the central budget. The Council may veto the budget in certain circumstances,[30] which is delicate for more reasons. First, parliament may be dissolved by the President of the Republic if it fails to adopt the budget in the first quarter of the current year.[31] Second, two of the Council's members are appointed by the President of the Republic and the third member is elected

26 Küpper (n. 12), 4.

27 Boldizsár Szentgáli-Tóth, 'A sarkalatos törvényalkotás egyes alkotmányossági dimenziói. A sarkalatos törvényekkel kapcsolatos hazai alkotmánybírósági gyakorlat múltja, jelene, jövője' [Constitutional Dimensions of Cardinal Legislation. The Past, Present and Future of the Constitutional Court's Case Law on Cardinal Laws] Alkotmánybírósági Szemle 1/2019, 16.

28 András Jakab, 'Zoltán Szente to Paragraph 19 § of the Old Constitution', in: András Jakab (ed.), *Az Alkotmány kommentárja* [Commentary of the Constitution], (2nd edn, Budapest: Századvég 2009), 19, § paras 221-231.

29 For a detailed comparison see András Jakab and Emese Szilágyi, 'Sarkalatos törvények a magyar jogrendben' [Cardinal Laws in the Hungarian Legal System], MTA Law Working Paper 32/2015, 4-7.

30 See Article 44 of the Basic Law.

31 Article 3 (3) b) of the Basic Law.

by a two-thirds majority of parliament.[32] And this leads us to the third aspect of the cardinal problem: the state institutions led by Fidesz-loyal officials, cemented with a two-thirds majority for many years.

3. Key Staff

The only – with a two-thirds majority – elected member of the aforementioned Budget Council is the president of the State Audit Office, who happens to be a former MP of the Fidesz, changing his parliamentary seat directly to the presidency of the State Audit Office in 2010. Before the elections of 2018, the State Audit Office fined the biggest opposition party about 2,5 million EUR, which is noteworthy not only because the decision was based on a controversial legal amendment[33] but also because there are no remedies provided against the decisions of the State Audit Office.[34]

And this is only one example of how loyalist-led state institutions function. Another, even more telling case is that of the Prosecutor General, who is also elected by the two-thirds parliamentary majority. The incumbent Prosecutor General is an ex-member of Fidesz. In 2019, he was re-elected for a second nine-year term. Moreover, in November 2021, the rules of his removal were changed so from now on, the dismissal of the Prosecutor General will require two-thirds majority in parliament, too.[35] Under his leadership, investigations concerning corruption cases related to circles close to Fidesz have often been terminated[36] and Hungary is now one of the member states that is most affected by European

32 The Budget Council consists of the president of the Central Bank, the president of the State Audit Office and its own president. The latter is appointed by the President of the Republic for six years (Article 44 (4) of the Basic Law), while the president of the Central Bank is appointed by the President of the Republic on the proposal of the Prime Minister, also for six years. The president of the State Audit Office is elected by the two-thirds majority of parliament for a renewable twelve-year term (Article 43 (2) of the Basic Law).

33 At that time Fidesz temporarily lacked the two-thirds majority due to a defeat at an interim election in a single district. As the rules of campaign and party financing are subject to cardinal legislation pursuant to Article VIII. of the Basic Law and § 354 of Act XXXVI of 2014 on the election procedure, the new rules about listed prices for political advertising (the so-called billboard law) were passed as an amendment of the act on landscape protection. (For details see Bakó n. 1, 42). The Constitutional Court found no problem about that: AB decision no. 3001/2019. (I. 7.)

34 § 1 (6) of Act LXVI of 2011 on the Act on the State Audit Office.

35 Bill no. T/17282. § 75. Adopted by parliament on 9 November 2021.

36 The most famous case is linked to the son-in-law of the Prime Minister. His former company modernised the streetlights in several Hungarian towns using EU funds, but the company avoided the rules of the public procurement procedures many times and the projects were also overpriced – this has been explored and proven by the media, with documentation. An OLAF investigation took place in the case, but it cannot do much without the cooperation of the Hungarian authorities. The Hungarian investigation took a long time, and finally, the investigation was cancelled in November 2018.

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Anti-Fraud Office (OLAF)-investigations, moreover, the financial impact of those investigations is very high.[37] At the same time, the government has refused the idea that Hungary should join the European Public Prosecutor's Office, which would be able to conduct investigations in the member states concerning cases in which the EU's financial sources are affected.

Former politicians got positions even at the Constitutional Court. Since 2010, former MPs and even an ex-minister[38] of the governing parties have been elected as constitutional judges.[39] A two-thirds majority in parliament had also been a requirement earlier for appointing constitutional judges but the Fidesz-supermajority introduced further rules to cement their people at the Court. They not only raised the number of judges from eleven to fifteen and defined a longer, 12 year term for constitutional judges,[40] but the nomination procedure was also changed. Nominations are made by a distinct ad hoc parliamentary committee. This committee formerly used to be parity based: each parliamentary party group could delegate 1-1 members. Now its composition reflects the power relations in parliament.[41] This means that Fidesz already dominates the nominations, and opposition candidates do not even have the chance of being considered by parliament's plenary. As a result, by September 2014, 'one party judges', who have been nominated and elected exclusively with the votes of Fidesz, became the majority in the Court.[42]

The stance and strategies of the Constitutional Court have been changed accordingly.[43] Basically, the Court has not become the active helper of the government (even if there are some memorable exceptions to this),[44] instead

37 See the 2019 OLAF report, especially figure 13 and 2020 OLAF report, tables 5-6.

38 However, one of them, former chancellery minister, István Stumpf was a suprise as he counted as a 'renitent' judge in the court, often taking contrary positions to the government.

39 It must be added that this also happens in countries that are considered to be proper liberal democracies. For example, the current president of the German Federal Constitutional Court used to be deputy chairman of the parliamentary group of CDU/CSU just before being elected as a constitutional judge.

40 Article 24 (8) of the Basic Law.

41 First, the old constitution was amended with this rule in July 2010. For the procedure of nomination see § 7 of Act CLI of 2011 on the Constitutional Court.

42 Zoltán Szente analysed empirically the activity of the constitutional judges in the light of the political side they were appointed by and found a surprising extent of political adaptation between 2010 and 2014, especially after 2013. In details see Zoltán Szente, 'Die politische Orientierung der Mitglieder des ungarischen Verfassungsgerichts zwischen 2010 und 2014', Jahrbuch für Ostrecht 57 (2016), 45-67.

43 For details see also Bakó (n. 1), 48-53.

44 See e. g. decision no. 22/2016 (XII. 5.) about the introduction of identity review and ultra vires review of EU law (for details see Bakó [n. 22], decision no. 3001/2019. (I. 7.) about the aforementioned 'billboard law' (n. 33), decision no. 2/2019. (III. 5.) about the interpretation of the EU clause of the constitution, decision no. 16/2020 (VII. 8.) about the merger of hundreds of pro-government media outlets.

it has been trying quietly to avoid conflict with parliament. This most often means the avoidance of a substantial review of politically delicate cases. As it was openly explained by the president of the Constitutional Court: the focus of the court's case law has been shifted away from the control of the legislative towards the control of the judicative.[45] He claimed that the reason for this tendency was the introduction of constitutional complaint. However, neither the constitution, nor the act on the Constitutional Court defines any priority order or ranking between the different procedures before the court,[46] so there is no legally justified reason for neglecting politically delicate norm controls. Moreover, a very high percentage of constitutional complaints are refused without a substantial review,[47] so it seems that the Constitutional Court's alleged intention to control the constitutionality of the application of law is not very strong.

But the Court's intention to control the legislative is even weaker – in many cases it does not exist at all. Its most common methods[48] for avoiding such conflicts are systematic delays[49] and refusing substantial

45 Conference recording available at the Facebook-page of the Constitutional Court: <https://www.facebook.com/706883626001952/videos/674672246815495>.

46 Article 24 (2) of the Basic Law, Section II. of Act CLI. of 2011 on the Constitutional Court.

47 In detail Fruzsina Gárdos-Orosz, Viktor Lőrincz and Zsolt Ződi, 'Egy új alkotmányjogi panaszeljárás (Abtv. 27.) jelentőségének mérhetősége a bírósági és az alkotmánybírósági alapjogvédelem rendszerében' [How the Significance of a New Constitutional Complaint Could Be Measured in the System of Fundamental Rights Protection Before the Constitutional Court], MTA Law Working Papers 23/2017; Dániel Karsai, 'Néhány gondolat az alkotmányjogi panasz hatékonyságáról – még viccnek is rossz?' [Some thoughts on the efficiency of constitutional complaints – a bad joke?] Fundamentum, 2020/1. 68.

48 For empirical data see e. g. Fruzsina Gárdos-Orosz, 'Alkotmánybíróság 2010-2015' [Constitutional Court 2010-2015] in: András Jakab and György Gajduschek (eds), A magyar jogrendszer állapota (Budapest: MTA TK JTI 2016), 442-479 (449); Kálmán Pócza, Gábor Dobos and Attila Gyulai, 'Mítosz és valóság. Mennyire korlátozta az Alkotmánybíróság a törvényhozás mozgásterét?' [Myth and Reality. To What Extent Did the Constitutional Court Limit the Legislative?], Állam és Jogtudomány 1/2020, 76.

49 That was the case with the laws that chased away CEU from Budapest and that listed NGOs funded from abroad. In both cases, the Constitutional Court suspended the constitutional review with reference to the respective infringement actions being in progress: decisions no. 3198/2018 (VI. 21.), 3199/2018 (VI. 21.) and 3200/2018 (VI. 21.). But in fact, infringement procedures and constitutional reviews function with completely different standards, moreover, the Constitutional Court has not decided about the laws after the dismissing judgments of the ECJ, ECJ, *Commission v. Hungary*, judgement of 6 October 2020, case no. C-66/18, ECLI:EU:C:2020:792 and ECJ, *Commission v. Hungary*, judgement of 18 June 2020, case no. C-78/18, ECLI:EU:C:2020:476 moreover, the Court officially closed the cases regarding the 'lex CEU' without a substantial decision in July 2021: decisions no. 3318/2021 (VII. 23) and 3319/2021 (VII. 23).

review.[50] Even if the Court goes into a substantial review of the challenged legal norms, it often establishes 'constitutional requirements' as erga omnes interpretations rather than annulling a law.[51] As an alternative to the latter, the Court also tends to use the (previously also existing) possibility of declaring unconstitutionality due to the omission of the legislative assembly. In this case, the Court gives a deadline to parliament for correction,[52] but the respect of that deadline cannot be enforced: no wonder that such deadlines are often exceeded by the parliamentary majority.[53]

50 It is quite common in constitutional complaint procedures, especially related to political questions, like cases related to elections or the rule of law. Examples and tendencies in detail: Ágnes Kovács, 'A passzív nem puha, avagy miért nem igazolható az Alkotmánybíróság gyakorlata a politikai konstitucionalizmus alapján?' [Passive is Not Soft, or Why Could Not the Constitutional Court's Case Law Be Justified on the Grounds of Political Constitutionalism?] in: Fruzsina Gárdos-Orosz and Zoltán Szente (eds), *Jog és politika határán. Alkotmánybíráskodás Magyarországon 2010 után* (Budapest: HVG Orac 2015), 213-259 (232-242); Lóránt Csink and Johanna Frölich, 'Mire lehet alkotmányjogi panaszt alapítani?' [What Could Be a Basis for a Constitutional Complaint?], MTA Law Working Paper 25/2017, 1-26 (13-16).

51 For example the Court declared that the 'offence of homelessness' was not unconstitutional, but the respective provision may only be applied if the affected homeless person could actually be provided with accommodation by the social system: decision no. 19/2019 (VI. 18). In another case, the government used the COVID-pandemic to establish 'special economic zones' in the area of municipalities under certain circumstances: the tax income of such zones are taken away from the municipality and transferred to the Fidesz-controlled county councils. The opposition-led town Göd, which lost one-third of its income as a consequence of the measure, issued a constitutional complaint. The complaint was refused but as a constitutional requirement, the Court made clear that parliament must ensure sufficient financial sources for local governments for the performance of their mandatory functions and powers: decision no. 8/2021 (III. 2). Constitutional requirement was also used in another case related to the state of danger due to the COVID-pandemic. A government decree extended the deadline for fulfilling requests for public data from 15 to 45, in certain cases to 90 days. Upon the motion of an opposition MP, the Constitutional Court declared that the rule was generally not contrary to the constitution but the authorities should give a reasoning in each case, and how the pandemic held them back from fulfilling the concrete request in due time: decision no. 15/2021 (V. 13).

52 This solution is sometimes applied in policy issues like the age of compulsory education (decision no. 17/2021), and sometimes in politically relevant matters, like the so-called 'slave law', an amendment of the Labour Act that led to huge demonstrations at the end of 2018, because it enabled more flexibility to employers concerning overtime pay (decision no. 18/2021). Another example is the conflict of privacy rights and the right to peaceful demonstrations: in that case, following the relevant rulings of the Constitutional Court (the concrete subjects were demonstrations in front of the houses of politicians), a new law on freedom of assembly has been adopted, which obviously prioritises privacy over demonstrations. See Constitutional Court decisions no. 13/2016 (VII. 18) and 14/2016 (VII. 18) and § 13 (4) of Act LV. of 2018.

53 For example, the Act on the freedom of religion (Act CCVI. of 2011) was amended more than half a year after the deadline established in decision no. 36/2017 (XII. 29) had expired. In that case, the Court did not find it unconstitutional that the recognition of churches belonged to the competences of parliament but it pointed out that such a parliamentary decision must be subject to certain deadlines specified in law.

So, not only constitutional provisions, but also cardinal laws and key office holders, who are supposed to apply the laws and the constitution, are cemented by the two-thirds majority. Moreover, as the elections are approaching, the government may exert such officials for premature resignation so that their successor can be elected by the Fidesz-majority for another tenure. This scenario seemed to happen in the case of the president of the Media Authority, whose term was going to expire five months after the elections, in September 2022. But she suddenly resigned in October 2021: in return, she has been appointed as vice president of the State Audit Office.

The fact that the leadership of several state institutions are occupied by Fidesz-loyal officials, raises the question of how the next government could make a real change and whether it will be able to be in power beyond merely governing.

III. What the Next Government Would and Could Do

After announcing their cooperation at the 2022 election, the six opposition parties published a list of promises, called 'the guarantees of the change of era' (hereinafter: Guarantees) in December 2020.[54] Without going into detail, the document outlines how a new government will deal with the heritage of 'illiberal constitutionalism' after twelve years of Fidesz-rule. A more detailed common opposition draft-program was published in June 2021, with proposed substantial elements of a new constitution.[55] Based on the two documents, the most important plans of the opposition are the following:

- Making a new constitution and confirming it via referendum,
- Making a new electoral law according to the principle of proportionality,
- Recovering the independence of state institutions and strengthening the Constitutional Court,
- Enhancing the role of referendums (as the institution of nation-wide referendum for public initiative almost ceased to exist, because a 50 percent turnout was introduced as a requirement for validity by the Basic Law),
- Introducing the direct election of the president of the republic (currently the president is elected by parliament).

54 The full text in Hungarian is available at <https://momentum.hu/hatparti-dontes-szuletett-a-kozos-listarol-es-annak-garanciairol/>.

55 The points concerning constitutional matters are available in Hungarian at <https://kozosalap.hu/szabad-magyarorszag/>.

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Based on the relevant points of that document, in this section I will analyse the feasibility of the opposition's promises concerning the adoption of a new constitution (point 1.) and the perspectives in correcting the problematic points of the current one (point 2.). I will then turn to the possible role of referendums in changing rules that can normally be amended with a two-thirds majority in parliament (point 3.). I will also address the aforementioned problem that Fidesz-friendly officers are cemented in the leading positions of several 'independent' institutions (point 4.). Finally, I will point out a challenge that goes beyond the strictly understood constitutional framework, but it can make a real 'change of era' more difficult. This is the durable informal power of Fidesz in several significant fields, from business through media to tertiary education (point 5.).

1. Throwing 'Fidesz's Constitution' Out of the Window?

'The parties with a common list undertake to create a new constitution, involving civil society and all parties with real political support. The new constitution will be confirmed through a referendum.' This is how the opposition parties formulate their plan in the Guarantees. The promise is limited to procedural issues: the involvement of civil society and parties with real political support followed by confirmation through a referendum.

Regarding the latter, it is important to note that Article S of the Basic Law clearly defines the rules of adopting a new constitution. The requirement is the same as for constitutional amendments: a 'big' two-thirds majority of parliament, i. e. the two-thirds majority of all MPs is needed. There is no word about referendums at that point, moreover, Article 8 of the Basic Law explicitly prohibits holding a referendum on constitutional issues. But in fact, it is very unlikely that the current opposition will win the elections with a two-thirds majority, so the referendum is probably not meant as a mere political confirmation but rather as a substitute for the lack of a constitution-making majority. This means that the promised new constitution is not intended to be adopted in compliance with the current rules of constitution making but the legal continuity will be broken.

This raises a set of problems that leads us to the other promised procedural guarantee, the involvement of all political parties in the constitution-making process, which also aims at strengthening the legitimacy of the new constitution. It is highly doubtful whether the involvement of Fidesz in a new constitution-making process could be successful. For the

party, it would be a reasonable strategy to refuse such an opportunity and to call their voters for the boycott of any constitutional referendum in order to keep the turnout below 50 percent, which is required for the validity of a referendum according to Article 8 paragraph 4 of the Basic Law. Of course, one can argue that because the new constitution will not be adopted pursuant the provisions of the former one, neither does the confirming referendum have to comply with the Basic Law's provision on the turnout required for validity.

However, this logic could lead to a slippery slope. The opposition has been attacking Fidesz precisely on the grounds that it has undermined the rule of law and constitutionality. So, a government composed of the current opposition parties should avoid any similar behaviour, like making a new constitution regardless of the relevant provisions of the old one and confirm it in a referendum where the turnout is less than the majority of voters, both with the clear motivation to substitute the lacking parliamentary majority for constitution making. Such a move could not be justified with the wide-spread argumentation that the Basic Law itself was not legitimate because it lacked the support of the whole of society and does not reflect any compromise between the political powers.[56] The previous constitution, which had been replaced by the Basic Law, had a similar legitimacy-deficit.[57] Still, the same circle of commentators argued in 2011/12 that there was no need for a new constitution, so upholding the previous one with the legitimacy-deficit would have been right.[58] This illustrates, on the one hand, how fluid concepts legitimacy and its deficit are. On the other, the German Basic Law is the perfect example showing that the legitimacy and the success of a constitution do not necessarily go hand in hand.[59]

Legitimacy-deficits can theoretically best be grasped through the distinction of constitution-making power (*puovoir constituant*) and constitution-amending power (*puovoir constitué*).[60] However, this distinction is

56 See e. g. Tímea Drinóczi, 'Az alkotmány legitimitásáról' [On the Legitimacy of the Constitution], Pázmány Law Working Papers 37/2011. Gábor Mészáros, '"Macskabölcső", avagy a jogállamiság látszata' [Cat's Cradle or the Appearance of the Rule of Law], Fundamentum 2-3/2018, 62-68 (62).

57 András Körösényi, 'Alkotmányozás és Alaptörvény' [Constitution Making and Basic Law] in: András Körösényi (ed.), *A magyar politikai rendszer – negyedszázad után* [The Hungarian Political System – After a Quarter-Century], (Budapest: Osiris 2015), 96-97.

58 E. g. interview with László Sólyom (n. 13).

59 Similarly András Jakab, 'On the Legitimacy of a New Constitution – Remarks on the Occasion of the New Hungarian Basic Law of 2011' in: Miodrag A. Jovanović and Đorđe Pavićević (eds), *Crisis and Quality of Democracy in Eastern Europe* (The Hague: Eleven 2012), 61-76 (74).

60 Emmanuel Joseph Siéyes, *What Is the Third Estate?* (London: Pall Mall Press 1963) [Qu'est-ce que le Tiers-État? 1789], 126.

completely lacking in the Hungarian constitutional system: Article S of the Basic Law gives both the constitution-amending and the constitution-making power to the two-thirds majority of parliament, excluding the direct participation of the people.[61] As it is not more difficult to adopt a new constitution than to amend the existing one, a political block that newly gains a two-thirds majority is attracted to making a new constitution rather than bother amending the existing one. And what is more likely, if the current opposition wins only a simple majority, it will be easier to explain the making of a new constitution in the lack of the required majority than the amending of the Basic Law. Taking the trending narratives in oppositional circles into account, this could be supported by political arguments, like the Basic Law is a 'one-party-constitution' and as such, illegitimate or, the change of era (or 'regime') should be based on a new constitution and so on.[62] Moreover, through a new constitution, the new government could easily get rid of the constraints imposed by dozens of cardinal laws[63] and changing officials at the top of some independent institutions might also be explained on those grounds. Regarding the latter, it is worth remembering that constitutional restructuring is not a legal and sufficient reason for such moves, as was found in the early termination of the terms of the Supreme Court president and the Data Protection Commissioner in 2012.[64]

If the future government decides for an explicit break with the current constitutional system and if it makes a new constitution without respecting the relevant provisions of the current Basic Law, this will constitute an interesting theoretical anomaly as well. The open denial of the normativity of the Basic Law would reflect the same approach as Carl Schmitt's decisionism.[65] At the same time, the opposition's intellectual circles regularly complain that Orbán is doing something evil by making politics along Schmittian ideas, based on the friend-enemy dis-

61 Article 8 of the Basic Law. In detail see point 3. below.

62 See for example Zoltán Fleck, 'After Orbán', Verfassungsblog, 29 April 2021,< https://verfassungsblog.de>.

63 Boldizsár Szentgáli-Tóth, *Hogyan tovább kétharmad? A minősített többségű törvényalkotás múltja, jelene, jövője Magyarországon* [What Next for the Two-Thirds Majority? Past, Present and Future of Legislation with Qualified Majority in Hungary] (Budapest: ELTE Eötvös Kiadó 2019), 174.

64 ECtHR (Grand Chamber), *Baka v. Hungary*, judgement of 23 June 2016, no. 20261/12; ECJ, *Commission v. Hungary*, judgement of 8 April 2014, case no. C-288/12, ECLI:EU:C:2014:237.

65 Carl Schmitt, *Verfassungslehre* (Berlin: Duncker & Humblot 2003) [1928], 75. For an interpretation with regard to current populism, see Julian Scholtes, 'The Complacency of Legality: Constitutionalist Vulnerabilities to Populist Constituent Power', GLJ 20 (2019), 351-361 (358).

tinction[66] (and more recently: on the state of exception[67]). In light of these considerations, it would not be a reasonable move to engage in a constitution-making process that does not take the legal requirements into account but only the political will. This would be the first step on the road leading to new constitution-making processes every four years, following each election.

The idea of insisting on making a new constitution also leads to practical difficulties of a political kind. The opposition promises social peace and the restitution of prestige and stability of state institutions, which have to a large degree lost their independence during Fidesz rule. Of course, it is hard to find out what could bring peace to such a harshly divided society as that of Hungary. But what surely will not bring it is precisely the denial of the legality and binding force of the Basic Law,[68] which was adopted by a parliamentary majority with the support of a significant majority of the electorate.[69] The opposition does not contribute to social peace either when,

66 See e. g. Sándor Radnóti, 'Megjegyzések Sorosról' [Comments on Soros], Magyar Narancs, 2 July 2017, 20-21; Péter Techet, 'Büszke lenne-e Carl Schmitt Donald Tuskra?' [Would Carl Schmitt Be Proud of Donald Tusk?] Azonnali, 27 April 2020, <https://azonnali.hu>; Attila Antal, 'The Political Theories, Preconditions and Dangers of the Governing Populism in Hungary', Politologický časopis – Czech Journal of Political Science 1/2017, 5-20; Gábor Mészáros, 'Carl Schmitt in Hungary: Constitutional Crisis in the Shadow of Covid-19', MTA Law Working Papers 17/2020, 1-17.

67 Due to the COVID pandemic, a special legal order called state of danger was introduced twice, the second one is still in force as of November 2021. During the state of danger, the government is empowered to adopt decrees derogating from laws and fundamental rights might be limited more than it is necessary and proportional. However, the practical relevance of the special legal order is very limited, given that the government has two-thirds majority in parliament, so it could practically do anything also earlier through laws, cardinal laws and even constitutional amendments. See also Beáta Bakó, 'Orbán Has Been Ruling by Decree for Years', Spiked, 3 April 2020, <https://www.spiked-online.com/>.

68 Such considerations are echoed, for example, by former constitutional judge Imre Vörös, who suggests Article C (2) of the Basic Law as a basis for a 'new regime change'. (See Imre Vörös, 'A jogállami alkotmányosság helyreállítása' [Restitution of the Rule of Law and Constitutionality], published online at <https://civilbazis.hu/allasfoglalas/>.) According to that provision, 'no one shall act with the aim of acquiring or exercising power by force, and of exclusively possessing it. Everyone shall have the right and obligation to resist such attempts in a lawful way.' However, an oppositional victory on the elections will actually prove that Fidesz has not acquired exclusive power, even if they pursued that aim. Additionally, the second sentence explicitly refers to lawful resistance. Finally, there is also a logical anomaly in Vörös's argumentation: if the Basic Law were to be invalid because of its Article C (2), then that Article must also be invalid and the legal basis for nullity is lost.

69 Regarding the meaning of majority, many commentators argue that the Hungarian election system is not proportional so Fidesz could gain a two-thirds majority with much weaker support than 66 percent of the votes (not to speak of the percentage of the entire population, as the proportion of passive voters is relatively high). This is true but democratic decisions are made by active voters according to the respective electoral rules.

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among the substantial elements of the planned new constitution, it lists such divisive issues as Hungary's commitment to an ever closer European Union or explicit references to a multiple-rate tax system.[70] If their aim is to get wider social support (at a referendum) for a new constitution than the Basic Law (indirectly) had, the cleverest thing to do would be to avoid concrete statements in such divisive matters and stay as minimalist as possible.

2. Let's Keep and Correct It!

Desirable minimalism is much easier to reach by amending only the most problematic points of the current Basic Law, rather than by making a new constitution. This is especially the case when the government is composed of several, very different parties. For example, it is hard to imagine that left and liberal parties could agree with the right-wing Jobbik regarding the definition of marriage in the new constitution: should it be a right of 'two persons' or of 'a man and a woman'? Open intra-coalition fights over such questions of identity politics could do considerable harm to the reputation of a government. These fights could be spared if the coalition restricts itself to the amendment of the Basic Law on the points it is strictly necessary to change in order to make the constitution and the rule of law work properly. Beyond the intra-coalition fights, there is another practical reason for this option: it is easier to find allies in parliament[71] for specific constitutional amendments than for an entirely new constitution. At this point it is worth remembering that it is very unlikely that the oppositional block could win a two-thirds majority.

Instead of insisting on opening a tabula rasa through adopting a new constitution without the necessary majority, the new government (if a new government is elected at all) could also use this situation to show real respect for constitutionalism by keeping the constitution in a corrected form. It is important to see that the constitution was not respected even by its creators. The Fidesz supermajority amended the Basic Law nine times: some amendments aimed at providing the constitutionality of laws that had previously been annulled by the Constitutional Court or at securing the government's political interests on a constitutional level.[72] Apart from that, it can generally

70 See Szabad Magyarország, 'Free Hungary)' <https://kozosalap.hu/szabad-magyarorszag-alkotmanyozas/>.

71 Beyond Fidesz and the oppositional block, the far-right Mi Hazánk (Our Homeland) and the joke-party Magyar Kétfarkú Kutyapárt (Hungarian Two Tailed Dog Party) have the realistic chance of gaining more than 5 percent and getting into the parliament.

72 For details see Bakó (n. 1), 45-48.

be said that the main problem of the Basic Law is not its text but the lack of consistency in its application.[73]

At a minimum, the following contradictions should be corrected within the Basic Law:

- Resolving quasi-hierarchical relations between certain fundamental rights, which are the result of some ad-hoc constitutional amendments. For example, thanks to the seventh amendment, the Basic Law generally prioritises the right to private and family life over the right to freedom of expression and assembly (Current Article VI. (1) of the Basic Law). Or, since the fourth amendment, human dignity has been the absolute limit of freedom of expression in a general wording (Article IX. (4) of the Basic Law), which is problematic, as the criticism towards politicians and other public figures should be allowed more widely.
- Detailed rules are unreasonable to be specified on a constitutional level, so these should be deleted. Such provisions, for instance, prescribe political advertising to be published free of charge in the media during election campaigns (Article IX. (3) of the Basic Law) or define requirements of studying at public universities free of tuition fee (Article XI. (3) of the Basic Law). In fact, the opposition does not seem to learn from Fidesz's failures but intends to follow this controversial practice: they suggest codifying policy issues such as multiple-rate tax system or the rules of redundancies in the constitution.
- Corrections regarding the financial provisions of the Basic Law will also be necessary. There is a constitutional command to decrease the public debt until it is less than half of the gross domestic product (GDP).[74] In itself, this rule is not problematic at all.[75] But it is absolutely unnecessary to exclude the review of acts regarding public revenue and expenditure from the competence of the Constitutional Court,[76] while the Budget Council has veto right over the law on the central budget precisely with the reasoning that the debt brake should be respected.[77]

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73 Similarly András Jakab and Eszter Bodnár, 'The Rule of Law, Democracy, and Human Rights in Hungary. Tendencies from 1989 until 2019' in: Tímea Drinóczi and Agnieszka Bień-Kacała (eds), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (London: Routledge 2020), 105-118 (115-116).

74 Article 36 (4)-(5) and Article 37 (2)-(3) of the Basic Law.

75 For example, the German constitution contains a much stricter limit for debts, see Article 109 of the Grungesetz.

76 See Article 38 (4) of the Basic Law. According to a stricter interpretation, this means that the constitution is not necessarily the highest law of the country, see Gábor Halmai, 'From "Rule of Law Revolution" to an Illiberal Democracy in Hungary' in: Hermann-Josef Blanke, Michael Sachs, Johannes Dietlein, Helmut Siekmann, Michael Nierhaus and Günter Püttner (eds), *Der grundrechtsgeprägte Verfassungsstaat, Festschrift für Klaus Stern zum 80. Geburtstag* (Berlin: Duncker & Humblot 2012), 1063-1082.

77 Article 44 (3) of the Basic Law.

- Decreasing the number of cardinal laws[78] is unlikely to succeed without a two-thirds majority in parliament. Contrary to the aforementioned corrections, which might be able to get some support from the future opposition, liberating a government from so many constraints in so many policy fields is not something that other MPs (especially from Fidesz) will support. But there might be a solution that, in principle, should be supported by 'every democrat', as it concerns direct democracy.

3. Referendum: The Jolly Joker?

At first sight, referendums may seem to be a plausible tool for decreasing the number of cardinal laws. A question like 'do you agree that all laws should be adopted by a simple majority of parliament' would do. But this is not that easy: that is why the last element of the above list would ideally be the need for changing the constitutional rules of referendums.

The Hungarian legal system knows the institution of nationwide referendums initiated either by the government or by the president of the state, or by the citizens. However, there are several prohibited subjects.[79] Holding a referendum about the adoption of a new constitution is not expressly excluded but, as mentioned above, Article S of the Basic Law describes the procedure for adopting a new constitution: the issue is obviously referred to the competence of the parliament. In principle, no provisions prohibit parliament from holding an affirming referendum about the adopted constitution, but that would be a political affirmation that does not affect legal validity.

Constitutional amendments, on the contrary, are subjects explicitly excluded from referendums: this rule was introduced by the new Basic Law.[80] As the fields to be regulated by cardinal laws are specified by the constitu-

78 See Section II. 2. above.

79 Upon the initiative of the government, the President or 100,000 citizens, parliament has the discretion to decide about holding a referendum. Upon the initiative of 200,000 citizens (about 2,5 percent of the total number of citizens eligible to vote; the signatures must be collected within 4 months) parliament is obliged to order a referendum: valid referendums are always binding. (See Article 8 paragraph 1 of the Basic Law.) Next to constitutional amendments, prohibited subjects are, for example, the central budget, election acts, dissolution of parliament, obligations stemming from international treaties, matters concerning military actions and different kinds of a special legal order. For the full list see Article 8 paragraph (3) of the Basic Law.

80 Article 8, paragraph (3), point a) of the Basic Law. Before 2012, the old constitution declared only its provisions on direct democracy as prohibited subject to referendums (§ 28/C, paragraph (5) point c) of the old constitution), but the Constitutional Court also interpreted this prohibition extensively earlier.

tion, this also means that no referendum could take place on decreasing the number of cardinal laws, or on the elimination of this category of laws. Constitutional amendments are not the only problematic point in the list of prohibited subjects. One of the most important promises of the opposition is the creation of a new electoral law (which is, by the way, also cardinal). But according to the long list of Article 8 of the Basic Law, laws regulating the elections could not be subject to referendums either.

At least regarding these two points, that list should be modified. Contrary to countries that require constitutional referendums in order to protect the constitution from the arbitrariness of the parliamentary majority, the Hungarian constitution follows a not too democratic logic as it instead protects itself from the people. A plausible reason for this prohibition might be the fear of such popular initiatives as, for example, the reintroduction of the death penalty, which is a topic regularly returned to by popular initiatives in Hungary.[81] However, such initiatives not only conflict with the constitutional subject as a prohibited subject but they touch on an already existing obligation of Hungary under international law,[82] which also counts as a prohibited subject,[83] so this cannot be an argument for excluding the people from constitutional amendments.

A more nuanced approach regarding constitutional referendums would be desirable. A distinction should be made within the citizen-initiated referendums concerning constitutional amendments. Initiatives in the strict sense of the word, or more precisely explicit or implicit motions for a constitutional amendment, could eventually be further forbidden, while the government, a part of parliament, or the president of the state should also be able to call a referendum on constitutional issues.[84]

Excluding electoral laws from referendums is unreasonable for other reasons. From a theoretical point of view, direct democracy is always exceptional compared to representative democracy. But whenever direct democracy is used, it has primacy over representative decision making.[85] So, it is a

81 For example, as recently in 2015, five initiatives were put forward on this topic, but this number has since dropped to zero. All initiatives for referendums are available on the homepage of the National Election Office (in Hungarian), <https://www.valasztas.hu/hu/nepszavazasi-kezdemenyezesek>.

82 Article 1. of Protocol No. 6. to the European Convention on Human Rights (ratified by Hungary in 1992); Article 1 of the Second Optional Protocol to the International Covenant on Civil and Political Rights (ratified by Hungary in 1994).

83 Article 8 paragraph (3) point d) of the Basic Law.

84 Of course, such a logic implies that institutions of the state are generally more trustworthy than the people, which cannot necessarily be regarded as axiomatic in a country like Hungary.

85 Constitutional Court (AB) decision no. 52/1997 (X. 14.)

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contradiction to exclude the people from decisions regarding their own representation. There is a pragmatic reason as well: the current opposition insists on creating a new, proportional election system. As this is also a cardinal subject pursuant to the constitution, the only legal option to change the electoral law without a two-thirds majority is a referendum. Of course, this requires a two-thirds majority at another point, by changing the list of prohibited subjects for referendums in the Basic Law. But probably it is easier to find allies in parliament for a constitutional amendment that generally broadens the opportunities for citizens' direct participation than for an entire and concrete electoral law package.

At this point, the question occurs, whether referendums could be a jolly joker tool for changing any cardinal laws without a two-thirds majority in parliament. Some authors doubt that, on the grounds that Article T paragraph (4) of the Basic Law defines the meaning of cardinal law as acts 'the adoption and amendment of which require the votes of two thirds of the Members of the National Assembly present'. From this wording they conclude that changing these laws via referendums would violate the constitutional provisions on referendums, as this would actually mean an implicit constitutional amendment.[86] However, by applying this logic, one could come to the conclusion that no referendums could take place on any legislative subject, as Article 6 of the Basic Law regulates the legislative procedure, without referring to referendums. This is obviously absurd.

The reason why referendums may not be the solution for changing all cardinal laws is not that cardinal laws would be excluded subjects for referendums but that a 50 percent participation turnout is required for the validity of a referendum.[87] This requirement was (re)introduced[88] in 2012 by the new Basic Law and, since then, it has proven to be unrealistic. Not even the referendum on 'refugee-quotas', initiated by the government in 2016, succeeded in reaching the necessary turnout for validity. It is more likely to reach a compromise in parliament (with a two-thirds majority) on

86 András Szalai, 'Manipuláció vagy korrekció? A népszavazás, mint a parlamentáris kormányzat ellensúlya' [Manipulation or Correction? Referendum as Counterbalance to Parliament and Government], Pro Publico Bono – Magyar Közigazgatás 3/2013, 125-142 (135); Szilárd Szabó, 'Adalékok a népszavazás intézményének 2013 utáni hazai szabályozásához' [Comments on the Regulation of Referendums After 2013], Metszetek 6 (2017), 1-21 (11).

87 Article 8 (4) of the Basic Law.

88 After the transition, a similar 50 percent validity quorum was defined but it was changed in the nineties because the decision makers feared that pursuant to that strict rule, the referendums on NATO (and later, EU) accession would have been invalid.

decreasing this validity turnout[89] than on redesigning the system of cardinal laws.

It is worth mentioning at this point that the opposition intends to make referendums for popular initiatives possible for more complex policy questions, which is to be welcomed, as currently people have to answer simple yes/no questions at referendums, without having a detailed legislative proposal at hand. Further, it is not only the issue of referendums where the opposition wants to enhance citizens' direct participation: they promise to introduce the direct election of the president of the state, which leads to the next crucial question of a 'new regime change'.

4. To Fire Old Personnel or to Cooperate With Them?

In the new constitutional order, the opposition parties intend to introduce the direct election of the president of the republic hoping that he would then act as a real counterbalance to the government. Of course, this is another matter requiring a constitutional amendment (or an entirely new constitution, which is suggested by the opposition). Currently, the president of the republic is elected by parliament: basically, a two-thirds majority is needed but if there is no sufficient support for any of the candidates, a simple majority is enough in the second round.[90] Hungary's current president, János Áder was a Fidesz politician: he used to be the party's group leader in the Hungarian parliament and later he was elected as a Member of the European Parliament (MEP). The party called him home from Brussels in Spring 2012 when his predecessor had to resign following a plagiarism scandal. Now, Áder is heading towards the end of his second term, after a decade of extreme passivity. He almost never declined to sign laws and he turned to the Constitutional Court for preventive norm control very rarely.[91]

As the tenure of the president of the republic is for a maximum of two terms,[92] a new candidate must be elected to the position in Spring 2022.

89 The turnout should not be completely abolished, and returning to former rules is not the best option either. Previously, the only quorum was the 25 percent of yes votes according to all citizens eligible to vote. This meant that in the case of a strong agreement (e. g. 90 percent yes and 10 percent no votes among the votes cast), the participation of 30-35 percent could be enough for a valid referendum, while referendums in divisive matters could not reach the validity even if some 45-48 percent voted.

90 Article 11 (4) of the Basic Law.

91 Most recently, he challenged a law that would establish the option right for tenants of flats in recognised historic buildings owned by municipalities, for a significantly decreased price. The Constitutional Court partly annulled the law. Case no. I/2644/2021.

92 Article 10 (3) of the Basic Law.

Áder's term will expire on 10 May 2022 and his successor should be elected in the previous 60 to 30 days. Before the parliamentary election in early April, the ruling party had the opportunity to elect a new president of the republic in the person of Katalin Novák, former minister and former Vice President of the Fidesz party. This means that the direct election of the president of the republic could be introduced in 2027 at the earliest unless a new government dismisses the incumbent president. However, such a move could hardly be justified, especially in the case of a newly elected president who cannot be qualified as unworthy based on such a short performance in office.

Basically, the direct election of the president does not have that much legal relevance, as the head of state is relatively weak compared to the government and parliament. He has only a few effective competences that he could actually use against the parliamentary majority, like initiating a preventive norm control before the Constitutional Court and calling for a referendum.[93] Thanks to the malfunctions of the Hungarian constitutional system, neither of these tools works properly at the moment, as demonstrated above.

The opposition program contains the extension of competences of the president of the republic without providing a list of new competences. Only one concrete example is mentioned, suggesting that the president should be granted the right to initiate the dissolution of parliament in the case of a repeated legislative omission that results in an unconstitutional situation.[94] It begs the question of who decides on what counts as such a legislative omission. This can usually be established by the Constitutional Court. But the Court itself has been turned to a loyal ally of the current government, which leads to one of the most serious challenges before a new government.

In their draft program, the opposition parties express their 'determination' to revive the Constitutional Court as a guarantor of the constitution and of people's constitutional rights. However, the question of how is answered only in terms of competence. According to the document, the constitutional review of acts concerning public revenues and expenditure should be possible again without constraints, and the Constitutional Court should have the competence for the substantial review of constitutional amendments.[95] The opposition also suggest reintroducing the actio popularis, which was abolished in 2012 and which enabled anyone, without being affected, to initiate

93 Article 9 (3) of the Basic Law.

94 See Szabad Magyarország (n. 70).

95 Since the fourth amendment of the Basic Law, the Constitutional Court can review constitutional amendments only formally, with regard to procedural aspects. The Court was also self-restrained earlier and it consequently refused the substantial review over constitutional amendments. In detail see Bakó (n. 17).

an abstract constitutional review of any acts. This idea does not make much sense because in the frames of actio popularis, a massive amount of motions arrived, and as a significant part of them was not serious, at the end of the day many motions had not been decided upon but rather delayed to eternity.[96]

Emphasis should rather be placed on the actual functioning of the existing procedures, providing that a substantial decision is made in due time. As mentioned above, the biggest problem regarding the current Constitutional Court's work is that several issues are either refused for examination on their merits or delayed until they lose their importance.[97] This practice could be corrected by a legal amendment that prescribes a deadline for the decision in different procedures.[98] Further, easing the admissibility criteria for constitutional complaints should also be considered, given that a very high proportion of constitutional complaints are refused examination on their merits.[99] As the Act on the Constitutional Court is also cardinal, such an amendment would require a two-thirds majority according to the current rules. However, this is a realistic expectation, as any opposition is always interested in making the counter-majoritarian tool of constitutional review more effective.

After all, a new government will find itself in a controversial situation regarding the Constitutional Court. It should make sure that the Court does not avoid or delay substantive decisions; however, a properly functioning Constitutional Court will restrain any government. The question is whether a future government, committed to the rule of law, would like to be constrained by a Constitutional Court that has been filled up with Fidesz candidates and which admittedly pursues constitutional control of the judicative rather than of the legislative.[100] There seem to be no other choice, as dismissing constitutional judges should be a red line for any government that considers itself to be democratic and committed to the

96 Beatrix Vissy, 'Megkötözött szabad kezek' [Free Hands Tied], Fundamentum 1-2/2014, 81-84.

97 See Section I. 3.

98 According to the current rules, the Constitutional Court is bound to a deadline only regarding judges' motions in ongoing judicial procedures (90 days) and formal review of amendments to the constitution (30 days). See Articles 24 (2) b) and 24 (6) of the Basic Law. Constitutional complaints initiated by any person whose fundamental rights have been violated by a new law or regulation or by a judicial decision, are to be decided 'within a reasonable time' (30. § (5) of the Act on the Constitutional Court), which in practice often means 2-3 years. No deadline applies to abstract constitutional review initiated mostly by one-fifth of parliament (in practice, the opposition), or rather rarely, by the Commissioner for Fundamental Rights. § 24 of Act CLI. of 2011 on the Constitutional Court.

99 See n. 46 above.

100 See Section I. 3. above, particularly n. 44.

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rule of law. Such a step was not even made by Fidesz after 2010,[101] the only party that used this option within the EU was Poland's PiS in 2015.[102]

The operation of the two-thirds Fidesz-majority illustrates a peculiar anomaly in terms of institution building. The rules governing the functioning of the most important institutions of the state are codified in cardinal laws, requiring two-thirds majority in parliament. Moreover, such institutions are led by officials appointed by two-thirds majority of parliament as well. Still, experience shows that these institutions are, in fact, not strong at all. Institutional strength is much more than hindering the change of respective rules and the replacing of personnel. It also requires *real functioning*, which means that officials are eager to keep their institution alive instead of emptying that through pseudo-work. This requirement is often not fulfilled in Hungary. Ironically, institutional weakness is the result of one-party decision-making with two-thirds majority. Officials appointed exclusively with the votes of Fidesz-MPs do not want (or do not dare) to uphold the effective functioning of institutions that are designed (even by Fidesz's Basic Law!) to counterbalance the government and the parliamentary majority. So, they simply do not use their possibilities (and sometimes do not fulfil their obligations) stemming from the constitution and from cardinal laws, but rather keep operating at a minimum level.[103]

And there is an even more apparent problem than weakening state institutions: the outsourcing of public tasks together with their financial hedge in an untransparent and irreversible manner, practically founding a 'deep state' in the (formally) 'private' sector, excluding huge amounts of public money and social capital from the sphere of constitutional law.

101 The tenure and nomination rules of constitutional judges have been changed, but with pro futuro effect: no incumbent judges have actually been fired.

102 For the whole story from different viewpoints see Arkadiusz Radwan, 'Lange Tradition und kurzes Gedächtnis des polnischen Konstitutionalismus. Ein Beitrag zum Verständnis der Verfassungskrise von 2015-2016', Bucerius Law Journal 10 (2016), 1-6; Mariusz Muszyński, 'Legal Analysis of the Election Process of the Judges of the Polish Constitutional Tribunal in the Autumn of 2015', Iustum Aequum Salutare, XIII, 1/2017, 127-143. The latter author is, ironically, a constitutional judge (meanwhile also vice-president of the CT) elected in a controversial way by the PiS in December 2015.

103 Similarly, in more detail András Jakab, 'Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary', Am. J. Comp. L. 68 (2020), 760-800 (763-768) and (774-781).

5. The Real Challenge: Informal Power and a Strange Outsourcing

The Fidesz government is not content to make a new constitution and to cement the changed institutional setup with a two-thirds majority. It also learned lessons from the past, thus it wants to secure tentacles of informal power, or a deep state, as some commentators call it,[104] which was resented twenty years ago by the prominent Fidesz politician mentioned at the beginning of this article. A significant tool for this is the building of a pro-government media empire within the private sector and the distortion of the media market through the allocation of state advertising. These developments have been discussed in detail elsewhere[105] so I will concentrate on a more recent innovation of the Fidesz government: a new (surprise: cardinal) act that introduced the category of 'public interest asset management foundation performing public duty' based on a new constitutional provision introduced by the ninth amendment of the Basic Law.[106]

Such foundations may be established by being listed in the annex of that act.[107] Through them, the state in practice outsources the public task of public asset management to private entities. These special foundations received blocks of shares and properties from the state to the value of around 1,000 billion HUF (2,85 billion EUR) for free.[108] Again: this was paid by Hungarian taxpayers and the state will not be able to regain these assets thanks to the tricky details of the new act. According to the law, the state as founder can confer the founders' rights to the boards of trustees of these foundations. The board of trustees cannot either waive these rights or transfer them to third persons and it is exclusively up to the board to decide on the succession if a seat within it falls vacant. As the boards of trustees have been filled with people loyal to the government (there are also incumbent ministers among

104 András Schiffer, 'Mélyállamtól mélyállamig' [From Deep State to Deep State], 24.hu, 15 December 2020, <https://24.hu/belfold/2020/12/15/schiffer-andras-alaptorveny-ner-melyallam/>.

105 See Péter Bajomi-Lázár, 'Particularistic and Universalistic Media Policies: Inequalities in the Media in Hungary', Javnost – The Public 24 (2017), 162-172; Attila Bátorfy and Ágnes Urbán, 'State Advertising as an Instrument of Transformation of the Media Market in Hungary', East European Politics 36 (2020), 44-65.

106 New Article 38 (6) of the Basic Law.

107 Act IX. of 2021 on public interest asset management foundations performing public duty.

108 A more detailed overview András Bódis, 'Perverz privatizáció zajlik a mélyben' [A Perverted Privatisation Is Going on in the Background], Válasz Online, 14 April 2021, <https://www.valaszonline.hu/>.

them!), it seems to be impossible to abolish these foundations or to change their operation.[109]

The situation is ironic. While during the governance of Fidesz, counter-majoritarian institutions such as the Constitutional Court have been openly weakened, the government now cements a different kind of counter-majoritarian institution from public money, safeguarding that those foundations are excluded from the scope of future democratic decisions. Of course, public interest asset management foundations will not exercise public power, their relevance hides in soft power. Most of them carry out cultural activities, and what is more important, the majority of Hungarian universities are now managed by such foundations.[110] How the quality and autonomy of higher education will be affected by this change is not yet clear.

Constitutional concerns have of course been raised in the matter: opposition MPs initiated an abstract norm control of the law before the Constitutional Court, suggesting that it violates the principles of separation of powers, of popular sovereignty and of the rule of law. Further, the initiators argue that the autonomy of universities and different constitutional provisions related to the protection of national wealth are also violated by the new system of these foundations.[111] At this point, it is worth remembering the Constitutional Court's general practice of refusing substantial decisions in politically relevant matters and the constitutional prohibition of reviewing acts related to public finances.[112] In this context, it is highly questionable whether the case will ever be decided on its merits.

The other question is, how all these could be reversed. The composition and competences of the boards of trustees of these new foundations are cemented into cardinal law, moreover, the list of foundations and their public tasks are defined in the annex of that law. In principle, that law is not impossible to change or abolish without the required two-thirds majority in parliament, via referendum.

But in fact, the general functioning of politics suggests a completely different solution. Why should the new governing parties abolish that system if they could turn it to their own benefit, at least partially? In a bargain, some oppositional members could be included in some boards of trustees, while in

109 In detail Miklós Ligeti, 'Amit elloptam, az az enyém – kormányzati alapítványok az örökkévalóságnak' [What I Have Stolen Is Mine – Governmental Foundations for the Eternity], Telex, 16 April 2021, <https://telex.hu/velemeny/2021/04/16/alapitvanyok-kozvagyon-lopas-velemeny-ligeti-miklos-transparency>.

110 See § 117/C of Act CCIV of 2011 on the national tertiary education.

111 Case no. II/02280/2021.

112 See Sections II. 3. and III. 2. respectively.

return, others would not be bothered. This is a solution that would not be used for the first time and that leads us to a somewhat disappointing conclusion.

IV. Conclusion: Western Institutions and the Hungarian Reality

As soon as Spring 2013, it became obvious that the Fidesz government did not want to play according to the principles of limited government and the rule of law, but it was ready to use its two-thirds majority for anything that helped it to keep the power. That was the time when the Basic Law was amended for the fourth time, with provisions that had formerly been annulled by the Constitutional Court. Just to be sure, it has been forbidden the Court to substantially review constitutional amendments, and its former judgements have been repealed.[113] Still, the government was re-elected with a two-thirds majority the next year and – following further controversial public law reforms – again in 2018.[114] So, experience has shown that the proper functioning of the rule-of-law institutional design is not an overall priority for Hungarian voters[115] – and not was it so prior to 2010.

The problem has its roots in the transition of 1989/90. Transformations to democracy in the former socialist bloc 'were much more given to *emulation*, *adoption* and *installation*, than to *institutionalisation*'.[116] Copying the western institutions seemed to be the only option, just like in the socialist times, when soviet communism was imposed as a no-alternative approach.[117]

113 See the current Article 24 (5) and (6) of the Basic Law and point 5. of the closing provisions.

114 At this point it must be noted that Fidesz made some changes in the electoral system that favours the strongest party, which gains a two-thirds majority with somewhat less than the absolute majority of votes, but the relative majority of voters (around 45 percent) supported Fidesz at these elections: this is still very significant social support.

115 Similarly Joseph H. H. Weiler, 'Orbán and the Self-Asphyxiation of Democracy', I CON 18 (2020), 315-323, <http://www.iconnectblog.com>. The same root of the problem can also be discovered in Poland, see Tomasz Tadeusz Koncewicz, 'Poland and Europe at a Critical Juncture. What Has Happened? What Is Happening? What's Next?', Verfassungsblog, 16 August 2021, <https://verfassungsblog.de>. Hungary and Poland are not the only examples in this regard, only the most apparent ones. For a wider comparison among Central and Eastern European EU member states see Jakab (n. 103), 796-799.

116 Martin Krygier, 'The Challenge of Institutionalisation: Post-Communist "Transitions", Populism and the Rule of Law', Eu Const. L. Rev. 15 (2019), 544-573 (559). Italics in the original.

117 Ivan Krastev and Stephen Holmes, *The Light that Failed. A Reckoning* (New York: Penguin 2019), 14.

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But successful institution building requires more than accurate copying. At a minimum, a committed, participating civil society would also have been necessary.[118] However, society would not be truly motivated by reasoning like 'we should do it like this because the EU and the North Atlantic Treaty Organization (NATO) requires us to do so in order to get accepted as a member'. No wonder that no strong social demand for the rule of law and constitutionalism could be reached: that would have required different arguments like 'we should do it like this because it is good for us this and that way'.

After four decades of socialist dictatorship, the experience of imitating western models has also affected the Eastern European concept of freedom, which does not primarily mean freedom from their own elected government (in the form of checks and balances) but from the oppression by foreign powers,[119] be they either from the East or from the West.

Hungary is a country where the majority is not only dissatisfied with the results of the democratic transition but is also nostalgic towards the soft socialism.[120] And Hungary is a country where a huge number of citizens (and at least the relative majority of active voters) have been open to Fidesz's messages about a freedom fight against the 'declining West' and 'the liberals who are slavishly following them'. From these two facts, an obvious lesson should be learned for the future: public law reforms, especially if they aim at the tricky avoidance of the two-thirds majority requirement (which they should not do at all, by the way), must not be justified with reference to the pressure of the EU. (Of course, this does not mean that some critical points, that have been resented by the EU as well, should not be corrected.)

The situation can become difficult in this regard, especially taking the potential in the new so-called rule-of-law-mechanism[121] into account. It could happen sooner or later that EU funds to Hungary will be suspended for deficiencies that can entirely or partly be corrected only through amending a cardinal law (such as laws governing the prosecution and the judiciary).

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118 Andrew Arato, *Civil Society, Constitution and Legitimacy* (Washington DC: Rowman and Littlefield 2000), 77.

119 For a detailed theoretical argumentation see Peter J. Verovšek, 'Caught Between 1945 and 1989: Collective Memory and the Rise of Illiberal Democracy in Postcommunist Europe', Journal of European Public Policy 28 (2021), 840-857.

120 Policy Solutions, 'A rendszerváltás társadalmi megítélése 30 év után' [Social Image of the Democratic Transition After 30 Years], <https://www.policysolutions.hu/userfiles/Rendszervaltas30_final.pdf>, 58.

121 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

Such a case should in no way be used as an excuse for overriding national rules in the name of the restoration of the rule-of-law. Neither should the ongoing Article 7 TEU procedure be used for that. The EU should also avoid communication that might be interpreted as an authorisation for avoiding national constitutional law in this regard.

It is useful to remember another case when a government started to adopt clearly unconstitutional laws and dismissed public officials in order to avoid the constitution, for the amendment of which it lacked the necessary majority. That party was PiS in Poland. No party or government that takes the idea of a 'new era based on constitutionality and rule of law' seriously, should follow their example and nor can the EU afford to turn a blind eye to that. Otherwise, they would send a message that there is good and bad 'illiberalism'.

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