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ON MATTERS CONSTITUTIONAL

Constitutional Repair!

Mapping the Context, Needs and Limits of Rebuilding Constitutional Democracy in Hungary

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The unexpected happened: the hybrid regime in Hungary was swept away by elections that produced a constitution-making majority for a barely two-year-old opposition party. The magnitude of the win creates the impression of a constitutional moment. The new governing party will have 141 of 199 seats in Parliament, well above the 133 seats representing the two-thirds majority necessary for changing the Fundamental Law, and 6 more than the record of Fidesz held in this electoral system. Never since the fall of communism has participation been this high (nearly 80%, compared to the previous record of 72%), never in the democratic history of the country has any party received this many votes (3.3 million out of 7.6 million eligible voters) and never was the participation of young voters as high as this year. This was against a regime that had almost infinite resources and used its own Fundamental Law of 2011 as an instrument of everyday party politics.

Nevertheless, the impression of a constitutional moment is misleading. Certainly, the constitutional order must be repaired. Unnecessary obstacles to democratic decision-making must be eliminated, the independence of courts and important control institutions must be restored, unjustifiable limitations on fundamental rights must be lifted and the ideological contents of the Fundamental Law must be cut back. Yet it would be a mistake to unilaterally enact a new constitution, just like Fidesz did after its landslide victory over a collapsing socialist-liberal coalition in 2010. Even in the face of the catharsis of 12 April 2026 and the unprecedented authorisation for the new governing party, adopting a new constitution without a thorough and inclusive process would easily make that constitution a target for the parties of the opposition. This could seriously undermine its durability.

Hence a two-step approach seems appropriate: first, a quick constitutional repair needs to fix those elements of the Fundamental Law that are in breach of the common European values of democracy, human rights and the rule of law. In a second step, the momentum of the 2026 parliamentary elections could be used to start a bona fide inclusive constitution-making process allowing for sufficient discussion on the issues of a new constitution. What exactly this inclusive constitution-making process should look like remains to be decided; the Irish example certainly looks promising. Yet one thing is beyond doubt: whereas referenda on specific subject matters after thorough consultations are an appealing idea, putting the whole text of a new constitution to referendum would pose a disproportionately high risk. Even the best constitutional text could go down simply because in the age of social media the outcome of referenda does not depend on content if the subject matter is as complex as a constitution.

Needs and limits

The burning question is therefore what could be and what should be included in a quick constitutional repair. At first glance, the answer to the first question seems easy: legally speaking, anything could be changed as the constituent power is legally unlimited, at least domestically. Exactly this seemingly unlimited nature of the constituent power triggered the quest for binding standards and effective mechanisms at the European level when Hungarian constitutionalism seemed to be leaving the mainstream path. Indeed, there are limits on a constitution-making majority.

Some of these limits are soft, that is, their crossing does not result in formal illegality, yet they are powerful arguments. They include the common heritage of constitutional democracies ("we do not do this") and the need to avoid bad precedents for the future ("think how the next would-be autocrat could use this"). Yet there are hard legal limits as well: Article 19 (1) TEU and – as we know since last Tuesday – the values in Article 2 TEU may render certain constitutional contents illegal under EU law. A constitutional repair in a member state of the European Union has to respect these boundaries, if only for practical reasons that follow from the various conditionality mechanisms.

As regards the question of what should change, the Fundamental Law contains numerous provisions of concern, the vast majority of which have become part of the Fundamental Law through various amendments. Furthermore, however, in many cases the obstacle to the democratic functioning of the state is not the specific legislation but the actions of officials appointed on the basis of loyalty. In many cases, therefore, the problem lies not with the institutions or their powers, but with the specific manner in which those powers are exercised.

The amendments required to rectify the problematic provisions of the Fundamental Law can essentially be divided into three main groups: the first group comprises those amendments which enable the new democratic majority to exercise public power effectively and efficiently, whilst at the same time restoring the rule-of-law functioning of independent institutions. This group includes, for example, the issue of cardinal laws and the restoration of the independence of constitutional adjudication and of the judiciary. The second group comprises those amendments which remove restrictions on fundamental rights that are not accepted in European constitutional democracies, such as the possibility of suspending citizenship under Article G(3) of the Fundamental Law, the definition of family in Article L of the Fundamental Law or the rule set out in Article XVI(1) of the Fundamental Law, which places the very broadly defined rights of children above all other fundamental rights (ad absurdum, even the prohibition of torture). The third group consists of constitutional provisions of an ideological nature but with normative effect, such as the preamble referred to as the national avowal of faith and the elevation of this to a standard of interpretation in Article R(3).

The task is thus to find solutions that respond to the needs of constitutional repair. Those solutions shall respect well-established traditions of constitutional democracies, do not create dangerous precedents, and be in conformity with common European standards.

All this has to be done in the context of dismantling a hybrid regime. We are certainly not talking about an ordinary constitutional amendment process, nor can we assume that the precedents of dismantling fully-fledged dictatorships are automatically relevant. This requires modifying the traditional theory of transitional justice.

Here are some of the most important institutional issues that might require consideration also on the basis of the above-described limits.

The stability of the constitution: the electoral system

The Fundamental Law can be amended with a two-thirds majority in the unicameral Parliament. In parallel, the current electoral system has thus far always yielded a two-thirds majority for the winner (2014, 2018 and 2022 for Fidesz, 2026 for the opposition). The Fundamental Law thus never truly functioned as a paramount law. This combination allowed for fifteen amendments in fifteen years. The restoration of constitutional democracy means restoring the stability of the constitution.

One way to go about this is to make constitutional amendments more difficult. Yet in the above described two steps approach for a new constitution-making, such hardening of the current Fundamental Law does not seem useful.

What can and must be changed swiftly is the electoral system. Naturally, a comprehensive electoral reform goes beyond the scope of a constitutional repair, even if the reform were to consist of the introduction of a proportional electoral system. Yet a quick

fix can and shall include the abolition of winner compensation, without which there would not have been a two-thirds majority in 2014, 2018 and 2022. This amendment can be implemented at the statutory level. At the same time, it is necessary to enshrine in the Fundamental Law clear guarantees against such grave violations of the equality of the vote.

Besides, party financing and the use of public money for campaign purposes must be revisited. In view of the abuse of public funds for campaigning a constitutional guarantee is needed to outlaw the use of budgetary resources for party-political messages.

Radically narrowing the scope of cardinal laws

A closely related question is the issue of cardinal laws. Restoring the democratic functioning of the state requires, above all, addressing this issue.

Although the term 'cardinal laws' is archaic, and there are similar instruments in other democratic countries, the legal institution itself is a specific product of the collapse of socialism: originally termed 'constitutional laws' and requiring a two-thirds majority for adoption, these acts functioned during the transitional period as quasi-supplements to the Constitution, ensuring that rules which were not formally part of the Constitution nevertheless possessed constitutional status. At the same time, rules adopted by a qualified majority restrict the democratic majority of the day from exercising public power in accordance with its democratic mandate.

Currently, the Fundamental Law prescribes cardinal-law regulation in 38 areas, and on this basis, some laws are in total classified as cardinal, whilst an even greater number of laws are classified partly as cardinal. The extent of fundamental legislation is illustrated by the fact that the list of fundamental laws enacted since the adoption of the Fundamental Law runs to 69 pages in the document available on the National Assembly's website.

Therefore, as part of a constitutional repair, the scope of matters falling under cardinal legislation must first and foremost be radically reduced: only those subject matters that are absolutely essential for the functioning of constitutional democracy shall be subject to this higher majority. The laws on the electoral system, the municipalities, the Constitutional Court, and the organisation of the judiciary could be examples for this.

Restoring the effective and independent functioning of the Constitutional Court

The restoration of the effective and independent functioning of constitutional adjudication is necessary both to ensure the constitutional functioning of all legislative power and to prevent the Constitutional Court from unjustifiably blocking legislation for party-political reasons.

With regard to the Constitutional Court, the problem lies mostly not with the rules governing its jurisdiction and procedures but with the fact that currently 11 of the 15 judges were appointed only by the government majority, without the consent of the opposition, and at the same time the age limit of 70 for constitutional judges was abolished for political and personal reasons.

A comprehensive reform would certainly be more effective, whereby the Fundamental Law would set the number of Constitutional Court judges at 11, would provide for the termination of the mandates of all incumbent constitutional judges after a certain transitional period and, at the same time, would lay down electoral rules for the election of constitutional judges that would require a consensus between the governing parties, which hold a two-thirds majority, and the opposition. There is the possibility, however, that such a regulation would be used by the new opposition (Fidesz) to obstruct the election of justices.

As part of a constitutional repair, therefore, the reintroduction of the 70-year age limit for constitutional judges could be a solution, at the level of the Fundamental Law, with effect extending to judges currently in office. As a result of this measure, out of the 15 judges 4 new judges would be elected by the new government, whereas 7 judges who had been appointed by Fidesz would remain on the Court, together with further 4 judges who had been appointed by Fidesz with the consent of the opposition. Such an amendment could not be interpreted as

court packing or takeover and would not necessarily be regarded as a disproportionate restriction on judicial independence, given that this age limit is typically applied in Western European constitutional courts. The previous, politically motivated ad hominem abolition of the age limit would also justify its application to sitting judges.

Naturally, common European standards on judicial independence both under the ECHR (as articulated by the ECtHR and the Venice Commission) and EU law protect judges against early dismissal. Whilst this guarantee is not wholly absolute, there can only be exceptions to that principle if they are warranted by legitimate and compelling grounds, subject to the principle of proportionality. Arguably, creating a truly independent Constitutional Court is such a legitimate and compelling reason, and the circumstances and guarantees surrounding the reform in both cases could ensure respect for the principle of proportionality. All the more so, as the reform should also include repealing Article 37(4) and (5) of the Fundamental Law, which excludes the Constitutional Court's jurisdiction in budgetary and tax matters.

Restoring the independence of the judiciary

Although the situation in Hungary cannot be compared to Poland, the independence of the ordinary judiciary has been a point of concern. Most importantly, consecutive rule of law reports (see 2021, 2022, 2023) have criticised the rules that made possible the election of the president of the Kúria (the Supreme Court of Hungary). Milestone 214 (which is a super milestone) of the RRF Plan of Hungary required changing these rules. In fact, two consecutive amendments of laws were necessary to make the current president eligible, and even the National Judicial Council voted with an overwhelming majority against his election.

Naturally, the protection against early dismissal under the common European standards is strong. Still, it must be examined whether new constitutional rules could allow for the removal of the sitting president of the Kúria because his election was made possible by ad hominem legislation and against the vote of the National Judicial Council. Arguably, this solution is not in violation of common European standards, especially if formal guarantees were to be included in the Fundamental Law that require the consent of the National Judicial Council for the election of the president of the Kúria.

Further quick judicial reforms should include reducing the excessive competences of the president of the National Judicial Office and extending the rights of self-governance of the judges. These administrative changes could be carried out without significant limits imposed by European standards, as long as they increase rather than reduce judicial independence.

Media

Restoring press freedom and the independence of public media is essential for the functioning of a democracy based on the rule of law. This is all the more necessary as there is currently an infringement procedure underway against Hungary based on the European Media Freedom Act and the Audiovisual Media Services Directive.

A solution is needed that, as far as possible, excludes bias over the long term, whilst also enabling the elimination of the current bias. The long-term interest is therefore the imperative of broad consensus, whilst the short-term interest is effective decision-making. A complete overhaul of the public service media and national media regulatory authorities seems inevitable, but the new regulations must ensure pluralism in both content and the composition of the various supervisory bodies. How this can be done in a polarised country like Hungary is one of the major challenges.

Accountability and the Public Prosecutor's Office

One of the central demands of the electorate is accountability for the corruption-related crimes of the past 16 years. This is a matter of effective criminal prosecution and not of constitutional repair *per se*. Yet effective prosecution requires effective prosecutorial services. That Hungary will join the European Public Prosecutor's Office is a given. Renewing the Public Prosecutor's Office may also be necessary. A comprehensive reform is certainly beyond the limits of a quick

constitutional repair. What could be done is to transfer the right to nominate the Prosecutor General by constitutional amendment from the President of the Republic to the Minister of Justice, thereby reflecting the executive branch's responsibility for law enforcement.

Rationalisation of constitutional reservations regarding EU law

When Article E) of the Fundamental Law was worded, it essentially reproduced the text of Section 2/A of the previous Constitution almost word for word. This text also contained reservations regarding the primacy of EU law based on the practices of other EU member states – essentially the human rights reservation and the ultra vires reservation known from the case law of the Bundesverfassungsgericht. These reservations could be addressed through interpretation without jeopardising our EU membership. The seventh amendment to the Fundamental Law, however, expanded the reservations to include provisions, some of which, if taken seriously, could call into question the fulfilment of our membership obligations. Their deletion is justified.

Safeguards for restrictions on fundamental rights

Article 52(2) of the Fundamental Law currently allows for the complete suspension of virtually all fundamental rights under a special legal order. It is therefore necessary to stipulate, following the model of Article 15(1) of the ECHR, that derogations are permitted only to the extent strictly required by the exigencies of the situation.

Building the common European standards of constitutional repair

The above list is far from exclusive, nor are the analyses of the issues complete. In the coming weeks many contributions in this symposium will expand on them from various perspectives. Whatever the outcome, not only the rules of the Hungarian Fundamental Law will change. The body of common European standards of constitutional repair will also evolve just as the standards applicable to constitutional crises have evolved. Ultimately, Hungary can contribute to the evolution of European law, now from a more positive angle.

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