

# Constitutional Principles and Electoral Democracy in Hungary

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## 1. Introduction

This paper examines whether recent Hungarian electoral legislation lives up to the constitutional norms that are enshrined in Hungary's 2011 constitution. Given the limits of space, it only looks at the narrowly understood electoral system, i.e. the regulation of franchise, balloting, vote counting, and the conversion of votes into seats by Act CCIII of 2011 (henceforth 'the new election law') and Act XXXVI of 2013 (the new law on electoral procedures). The motivation for the focus on constitutionalism is provided by the domestic and international political controversies regarding democracy and rule of law under Viktor Orbán's government that came into office after the May 2010 elections.

## 2. The political context

Since the 1989-90 transition to democracy, Hungary has had a mixed electoral system: some deputies were elected in single-member districts and some on party lists (Renwick 2011; Tóka 1995). Unlike its German counterpart, the Hungarian system was not designed to produce proportional representation but had a somewhat majoritarian tendency like the mixed systems that, e.g., Italy and Lithuania experimented with since the early 1990s. Not least because of a constitutional provision mandating constructive votes of confidence, Hungarian governments enjoyed remarkable stability except that wholesale alternations between government and opposition occurred after all but one election since 1990. Probably as a result, something very close to a pure two-party system emerged by the 2000s, which then gave way to a dominant party system as the 2002-2010 socialist-led governments discredited the left-wing pillar of the party system and in the 2010 parliamentary elections the right-wing Fidesz-KDNP alliance<sup>1</sup> won nearly 53 percent of the popular vote and over 68 percent of the seats in the only chamber of the Hungarian parliament (Tóka/Popa 2013).

The new majority replaced the previous constitution with the 2011 Fundamental Law, and comprehensively rewrote several hundred other pieces of legislation, including all cardinal laws.<sup>2</sup> The bulk of these changes addressed social and economic issues, but the philosophy that underlined them put a great deal of emphasis on allowing the legislative majority and the

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<sup>1</sup> Fidesz-MPSZ and KDNP are two separately registered parties that only run joint lists and candidates in the last two national elections. Since all polling evidence since 1998 suggest that a separate KDNP list would not collect more than one percent of the vote, this essay will consider them a single party called 'Fidesz'.

<sup>2</sup> In post-1989 Hungarian law, key democratic institutions from the constitutional court via the presidency to the electoral system and the mass media are each regulated by separate "cardinal" laws that can only be changed by a two-thirds majority of parliament.

executive to make decisive choices with as little constraint as possible (Feher 2013). Critics often argued that these moves involved a comprehensive anti-democratic turn.<sup>3</sup>

## 2.1 The legislative process

Three threads run through all the above changes and significantly shaped public responses to the new electoral legislation too. First, the legislative majority strongly favored the speedy introduction of comprehensive new legislation over seeking political consensus with the opposition, and often ignored, or even mocked, the need to provide public justification for new legislation. In the debate over the new electoral rules too, key bills were introduced as individual member initiatives, thus avoiding some of the scrutiny and debate that legislation initiated by the government or parliamentary factions would be subject to under house rules. Important substantive changes passionately debated by the opposition and the media – such as why the new electoral system for national elections was significantly more majoritarian in its design than the previous electoral system – were left without meaningful public comments by the legislative majority.<sup>4</sup> The final text of laws often incorporated important amendments that were proposed by the government side shortly before the final vote, were never properly debated in parliament, and – as in the case of the delineation of constituency boundaries for elections – were introduced by inserting the breathtaking misspecification of „linguistic correction” in the mandatory field for „justification” on the required template for proposing legislation.<sup>5</sup>

All in all, the Fidesz-led majority embittered the opposition in an arguably calculated manner to underline that a two-thirds majority does not need to justify its actions or comply with formal and informal norms for legislative deliberation and social consultation. Critics were particularly alarmed by the violation of an informal norm for political consensus-building on changes in fundamental political institutions, which was by and large upheld and respected by all governments between 1990 and 2010, including the 1994-98 socialist-liberal coalition that had an even bigger majority of both the popular vote and legislative seats than Fidesz-KDNP in 2010 (Scheppele 2011).

Second, this bitterness was aggravated by a simultaneous reduction in the chance of any Hungarian legislation becoming scrutinized and possibly annulled in court. The 2011 reforms

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<sup>3</sup> E.g., Committee on Civil Liberties, Justice and Home Affairs (2013); Monitoring Committee 2013; Amnesty International (2011); Eötvös Károly Institute (2012); Fukuyama (2012); Human Rights Watch (2013); Norwegian Helsinki Committee (2013); Sapper/Weichsel (2011); Scheppele (2011); United Nations News Centre (2013); and Walker/Habdank-Kolaczowska (2012).

<sup>4</sup> The most elaborate attempt by any Fidesz politician at explaining some of the most controversial issues in the election law was an interview given by János Áder, the main author of the law who was a member of the European Parliament at the time and hence could not speak in the legislative debates (M. László 2011). The interview explains that winners of single member districts are to be “compensated” for the votes that they led ahead of the runner up because he personally finds the proportional representation principle “unacceptable” and considers it unjust that in order to achieve proportionality the losers of single-member districts would receive more compensatory seats than the winners. The point is remarkable partly because it does not provide an argument, and partly because it denies that the law he proposes nevertheless provides a mechanism for exactly what he calls unjust.

<sup>5</sup> See National Assembly (2011) for the legislative documents related to the new election law and its debate in parliament.

eliminated the right of citizens to appeal to the Constitutional Court against any legislation that they deemed unconstitutional, and packed the court with new judges often coming from unusually partisan backgrounds and elected only with the votes of the governing majority.<sup>6</sup>

Third, the new electoral legislation's content showed an apparent political bias (see Political Capital 2013; Renwick 2012). The opposition argued, and independent analyses have so far confirmed, that this bias may keep Fidesz in power in the next election even if there were an apparent popular will to the contrary (Szigetvári et al. 2011; Political Capital 2012; Tóka 2013). The next few subsections explore this issue further, which will require looking at the law in its political context.

## 2.2 The mismatch of declared objectives to the process and the outcome

The legal framework for Hungarian parliamentary elections between 1990 and 2010 was established by multiparty super-majorities bridging the opposition-government divide (Schieman 2001). The need for a significant reform became commonly accepted by 2010, when Fidesz won a sufficient majority to pass new electoral legislation without any opposition support. Their own manifesto pledge was limited to reducing the size of the assembly to around 200 in some unspecified way, arguing that the existing assembly of 386 members was unnecessarily expensive. Further impetus for reform derived from an early 2010 legislative commitment made to creating ethnic minority representation in parliament, and prior rulings by the Constitutional Court regarding the need to redraw single-member district boundaries to reduce population inequality across districts.

Thus, the political mandate for reform was unquestionable. It may have been possible to enact reforms with broad cross-party support: none of the above mentioned objectives were opposed by any of the political parties – in fact, prior attempts at such reforms failed in 2009 partly because Fidesz refused to negotiate them –, and a draft law submitted by Fidesz legislators in summer 2010 seemed capable of obtaining multiparty endorsement. This initial draft was, however, quickly withdrawn and the next already featured a number of controversial elements that critics thought were merely designed to increase the future parliamentary representation of Fidesz. We need to consider the public opinion polls of the time to unfold this argument.

## 2.3 The party political context

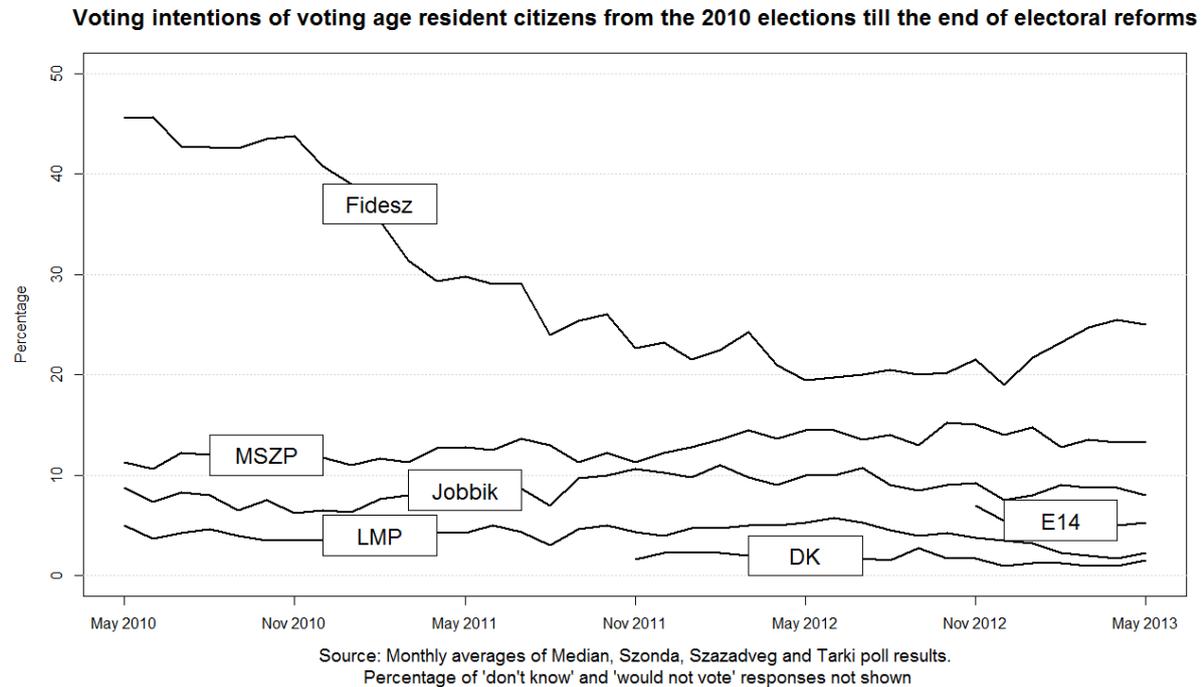
In 2010, the socialist party (MSZP) garnered just over 19 percent of the popular vote and thus Fidesz – under the guise of an electoral alliance with the KDNP that, according to polls, has virtually no voters on its own – could win 173 of the 176 single-member districts and a supermajority of all seats in parliament. The opposition of the new government was not just weak but also fragmented. Although both previously relevant small parties – the conservative MDF and the liberal SZDSZ, by 2010 both more likely to align with the MSZP than Fidesz – disappeared, a radical right (Jobbik) and a green-left party (LMP) emerged anew and took almost a quarter of the party list votes. While Fidesz popularity sharply dropped and some new left of center parties (first DK and then E14) emerged in 2011-2012, the incumbents

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<sup>6</sup> When a risk of judicial veto nonetheless arose with respect to specific elements of the intended new electoral legislation, they were protected from legal challenges by inserting them into quickly expedited amendments to the 2011 Fundamental Law; see Venice Commission (n.d.) regarding the Fourth Amendment of the Fundamental Law and Act CLI of 2011 on the Constitutional Court. Nonetheless, Fidesz declined to introduce citizen-initiated advance voter registration for resident citizens following its rejection by the court.

nonetheless kept a commanding lead in the polls throughout the whole period when new electoral legislation was drafted (see Figure 1).

Figure 1



Against this background, any new electoral rule increasing the expected seat share of the largest party in future elections would have appeared as self-interested manipulation by Fidesz. The new law did signal such an intention in multiple ways, above all via changing the proportion and allocation of list seats and reducing the options for multi-party electoral alliances. At the same time, the proposed new constituency boundaries seemed one-sidedly to favor Fidesz' ability to win seats, as did a few electorally less important proposals – like the extension of voting rights to non-resident citizens – that will only be mentioned in section three to the extent that they raised issues of constitutionality. For now, let's just focus on the numerically most consequential points.

One of the ways the new election law limits the ability of the more fragmented side of the political spectrum to win seats is the elimination of French-style runoff elections in the single member districts.<sup>7</sup> Between 1990 and the 2011 reform, Hungary had 176 single member districts where the winner was decided by a majoritarian rule. If no candidate won an absolute majority in the first round, supporters of multiple first-round candidates could join forces and defeat the erstwhile plurality winner in the second round. The runoff helped the political right as long as it was more fragmented than the left, and it was indeed crucial in its 1998 election victory. By 2011, however, the center-right was united under the Fidesz umbrella while the left became far more fragmented, unable either to merge into a single electoral alliance or staging credible primary elections. Hence the elimination of the runoff favored Fidesz.<sup>8</sup>

<sup>7</sup> The other innovation that serves this purpose concerns the treatment of so-called joint candidates (of multiple parties) and will be discussed in section three as it raises a question of constitutionality and its likely effect cannot be quantified.

<sup>8</sup> In spite of this, the elimination of the runoff did not encounter much objection from the opposition probably because it did not concern the far right, it was consistent with the popular

The 2011 reform also reduced the number of single-member districts from 176 to 106 and the number of list seats assisting proportional representation from 210 to (maximum) 93.<sup>9</sup> The weight of majoritarian allocation thus increased in the system, and the new rules for allocating party list mandates reinforced rather than counterbalanced this shift.<sup>10</sup>

If these two changes favor Fidesz as long as it remains the single biggest party, the new boundaries of single-member districts should help the party to win more single-member seats than MSZP even if the latter wins a few percent more of the popular vote nationwide. This is, of course, just a “what if” inference that only remains probable as long as the geographic distribution of the vote for the major parties remains broadly similar to what was seen in 2010, 2006, and 2002. But if so, then Fidesz can win in seven to ten percent more of the new single-member districts than MSZP – or a left-wing alliance involving it – would if they had exactly the same share of the popular vote as Fidesz did.<sup>11</sup>

Table 1 illustrates with my own calculus the combined impact of all the reforms mentioned so far on the distribution of seats between the parties. Rows one and two show vote and seat shares in the 2006 and 2010 elections.<sup>12</sup> Row three shows the results of a counterfactual

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goals of simplifying the electoral system and reducing the costs of election administration, and the arguments about the likely effects were naturally complex, contradictory, and highly counterfactual.

<sup>9</sup> Under the new rules, this number may be further reduced by the number of seats won by ethnic minority lists (see section 3).

<sup>10</sup> Both under the old and the new electoral system, the list seats are allocated among the party lists that receive at least five percent of the vote nationwide. Before 2011, most list seats were allocated within the nineteen counties and the capital city on the basis of a quota system and the party list votes received in the given territorial unit. The remaining list seats were distributed proportionally by the d’Hondt method among all “remainder votes” of the same parties. These votes were the national sum, calculated for each party, of the votes of their non-winning single-member district candidates and those party list votes that have not earned a quota-based mandate in the regional units. Under the new rules, all the list seats are allocated with the d’Hondt method at the national level among the parties that won at least five percent of the party list votes nationwide, on the basis of their sum of list votes and remainder votes. While the abolition of regional-level allocation increases proportionality, for most conceivable distributions of the vote this is counterbalanced by adding the so-called “surplus votes” to the remainder votes (see section 3).

<sup>11</sup> This point was first demonstrated with computations by three would-be founders of the E14 opposition party before parliament voted on the new election law (Szigetvári et al. 2011), but was later confirmed by nonpartisan analyses too (Political Capital 2012; Tóka 2013). Note that apparent gerrymandering is a novelty in postcommunist Hungary because the previous district boundaries were drawn in the course of the democratic transition, when no one could guess the future geographic distribution of the votes. By 2010, some districts had more than twice as many eligible voters as the smallest districts, but no analysis ever demonstrated that the districting plan favored one party over the others as a result.

<sup>12</sup> In the 2006 election, MDF had joint candidates with Fidesz-KDNP in two, and MSZP with SZDSZ in 11 out of 176 districts (one of the SZDSZ-MSZP joint candidates was, formally, just an SZDSZ candidate who was unopposed by an MSZP candidate). Since the new electoral system involves different constituency boundaries, we cannot easily guess how these joint candidates could have fared in the new districts. To facilitate the comparison across the

simulation, i.e. what the distribution of the seats may have been if, instead of the old electoral system, the new electoral rules were at place with the 106 newly drawn single-member constituencies, 93 list seats, just one round of the elections, and the new rules for allocating seats, but each party had single-member candidates and party lists on the ballot in exactly the same localities, and received exactly the same number of list and constituency votes everywhere as in the 2006 and 2010 elections, respectively.

Table 1: Election results when the old and the new electoral system is applied to the actual distribution of the votes in the 2006 and 2010 elections

	2010				
	Fidesz-KDNP	MSZP	Jobbik	LMP	Others
List votes (%) in the actual election	52.7	19.3	16.7	7.5	3.8
Seats (%) under the previous system	68.1	15.3	12.2	4.1	0.3
Seats (%) if the new system applied	75.9	11.6	9.0	3.5	0.0
	2006				
	Fidesz-KDNP	MSZP	SZDSZ	MDF	Others
List votes (%) in the actual election	42.0	43.2	6.5	5.0	3.2
Seats (%) under the previous system	42.5	49.5	4.9	2.8	0.3
Seats (%) if the new system applied	50.3	43.2	3.5	3.0	0.0

The table shows that with both the 2010 and 2006 votes, Fidesz-KDNP would have obtained nearly eight percent more of all seats if the new rather than the old rules were applied to calculate the due distribution of seats. Even with MSZP winning more votes as in 2006, the new rules can give Fidesz an overall majority of seats. Thus, the seat distribution can get somewhat disconnected from people's choice.<sup>13</sup>

two electoral systems, the calculus regarding the 2006 election reported in the table replaces the joint candidates with two separate candidates each. The vote shares of these fictitious candidates were estimated for each precinct (about 40 to 90 of which made up each old district) by multiplying the observed votes for the joint (MDF and Fidesz-KDNP, or MSZP and SZDSZ) candidate who actually run there with his or her own parties' list votes, and dividing the product with all supporting parties' combined list votes. Hypothetical vote totals could thus be estimated for separate MSZP, SZDSZ, MDF and Fidesz-KDNP candidates for every one of the old and new single-member districts under the assumption that cross-party vote coordination would occur the same way as in 2006 but only in the second round. Note that the only deviation that this adjustment of the data causes from the actual 2006 election results under the old electoral system is that MSZP wins one more and SZDSZ one less compensatory list seat. Hence Table 1 displays the MSZP and SZDSZ seat shares for the 2006 election under the old rules as 49.5 and 4.9 percent, rather than 49.2 and 5.2 as it was in the actual election.

<sup>13</sup> A recent analyses by a strongly pro-Fidesz think-tank sought to refute this claim by suggesting that if MSZP and SZDSZ merged in 2006 (i.e. they had joint candidates and lists everywhere and those won the simple sum of the actual MSZP and SZDSZ votes in 2006), then this fictional left-wing party would have won a majority of seats even under the new rules (Századvég 2013). However, such a party would have had 49.7 percent of the list votes and yet "just" 57 percent of the seats, while the same source suggests that with a 47 percent share of the list votes and something akin to the 2006-2010 geographic variation, Fidesz

### 3. Constitutional principles

The possible pro-Fidesz bias of the new Hungarian system – nearly 8 percent – seems strong even by the comparative benchmark provided by American states where a single party controlled a recent redistricting (Campagna/Grofman 1991; Gelman/King 1994), and is unheard of in American federal elections since the early 1960s (Cox/Katz 2002). This bias arguably violates normative requirements of popular sovereignty and the equal weighting of all votes. Yet even in the US, the Supreme Court only recognized partisan gerrymandering as justiciable as recently as 1986, and the implementation of this ruling by lower courts still remains to be seen (Grofman/King 2007). Legal remedies seem even less available in the Hungarian context: since the constitution, unlike many of its European counterparts, does not prescribe proportional representation in elections, no feature of the new electoral system discussed so far appears to be unconstitutional. Other details may raise such concerns though. This section briefly reviews them after stating relevant principles.

Without reference to the constitution, the introduction of the 2011 election law specifically acknowledges the following guiding principles (articles of the new constitution stating the same principles are shown in parentheses):

- popular sovereignty (§B(3));
- universal and equal suffrage (§XXIII(1) and §2(1));
- direct and secret ballot (§2(1));
- the participation of political parties in the expression of the popular will (§VIII(3));
- recognizing the rights of nationalities in Hungary to participate in the work of parliament (§2(2)); and that
- “Hungarian citizens living beyond the borders of Hungary shall be a part of the political community”.

The new constitution also stipulates that:

- Hungary is a democratic, law-bound state (§B(3)); where
- elections assure the free expression of the popular will (§2(1));
- citizens have the right to appeal against decisions of public authorities that violate their rights or legitimate interests (§XXVIII(7)); and
- all members of parliament have equal rights and duties (§4(1)).<sup>14</sup>

Naturally enough, most provisions of the new election and electoral procedure laws are clearly in line with all the above, and the present review can only highlight the exceptions.

#### 3.1 Voting rights

One of the politically most controversial issues in the new election law granted voting rights to citizens without an established residence in Hungary. “Residence in Hungary”, in this context, means having had a one-off contact with a municipal office in Hungary to register a

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would likely win 63 percent of the seats – which again confirms that the new electoral system gives about 8-9 percent more seats to Fidesz than to the left for a similar share of the vote.

<sup>14</sup> This is not an exhaustive list of constitutional articles related to electoral democracy, just those of direct relevance for the conduct of parliamentary elections. In particular, articles 2 to 8 have much more to say about the timing of parliamentary elections, how parliament can be dissolved, the rights and duties of parliamentarians, the legislative process, and referenda, and some of their content might raise constitutional concerns that cannot be discussed here.

home address<sup>15</sup> or be registered as a homeless person living in that municipality. The novelty of the 2011 election law was therefore not that it confirmed the right of the 300,000+ voting-age citizens who also have a residence abroad to cast their vote at a Hungarian consulate. Rather, the change concerned a then unknown fraction of the approximately five million citizens of other countries who, following the adoption of a new citizenship law shortly after the 2010 elections, may acquire Hungarian citizenship in an expedited manner solely on account of descent and speaking some Hungarian.

The 2011 election law stipulates that, pending on voluntary voter registration, these new citizens can vote for party lists but not for candidates in the single-member districts. Apart from never-ending speculation about how much this can shift election results in Fidesz' favor,<sup>16</sup> this raised two major questions for constitutional law that have so far not been reviewed by the Constitutional Court.

Since most of these people do not live under Hungary's jurisdiction, it is arguably undemocratic that Hungarian election outcomes can be influenced by these dual citizens without taking up residence in the country. Yet the 2011 Fundamental Law allows this and international human rights conventions ratified by Hungary require that all citizens should have equal voting rights (Bodnár 2012). The Venice Commission/OSCE-ODHIR (2012) joint opinion about the Hungarian election law also turns elusive on this issue. Point (41) „welcome[s] in principle the possibility for citizens to vote from abroad” as it increases “the universality of the suffrage” but point (43) expresses concern that „their votes may have a considerable impact upon Hungarian political life and may influence the composition of the Hungarian parliament should they all be allowed to vote” before adding that „under these circumstances ... the decision of the legislature to limit the right to vote for Hungarians living abroad to the proportional part of the elections seems justified on the ground of technical conditions to their full enfranchisement”, and that „it could also be considered whether the right [to vote] should be restricted to citizens having close ties with the country”.

The treatment of non-resident citizens by the new electoral legislation prompted some further controversies. Most prominent among these were the arguments that postal balloting, which is available for non-resident citizens, should also be allowed for resident citizens – at least for the hundreds of thousands who live abroad –, and that the law should permit the same cross-partisan scrutiny and transparency in the counting of votes from non-resident citizens that it promotes otherwise (Balogh 2013).

The new election law also provides for separate representation of ethnic minorities in the Hungarian parliament. It mainly offers a chance to ethnic Germans (census data suggests that they are just over one percent of the electorate) plus the much larger Roma minority. The provision allows the national self-government of any recognized minority<sup>17</sup> to set up a list of

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<sup>15</sup> Claims must be backed merely by a signed statement from the legal occupier of the address confirming that the claimant lives there.

<sup>16</sup> As confirmed by opinion polls, Fidesz have overwhelming support among the Hungarians of Romania, who account for two-thirds of the people who received citizenship since the passing of the 2010 citizenship law. However, since only half a million newly enfranchised non-resident citizens are expected to be eligible by 2014, their vote can only give one or two extra seats to Fidesz in the next election (Századvég 2013).

<sup>17</sup> The system of minority self-governments dates back to 1993 and is largely uncontroversial within Hungary.

candidates in national elections with less than three percent of the supporting signatures required for setting up a party list. Each minority list can win its first seat in parliament with slightly less than a quarter of the votes that a proper party list needs to win a list seat. However, only citizens who register as minority voters in advance can be candidates on such lists, support that such a list is set up, and can vote for the list.

These provisions hardly at all prompted political or legal dispute, but raise concerns. The new constitution only mentions that nationalities are constituent parts of the Hungarian state (§XXIX(1)) and that a cardinal law shall “regulate the participation of ethnic minorities in the work of parliament” (§2(2)), plus that special measures promoting equal opportunity and protecting vulnerable social groups may be compatible with the notion of equal rights (§XV(1-2)). None of these provisions seem sufficient to justify why a vote for an ethnic minority list may be worth four times more than a party list vote. In addition, once citizens registered as ethnic minority voters – and this can happen before the list of candidates was announced –, they are only allowed to vote for party lists if the national self-government of their minority fails to set up a list. Otherwise they can only vote for the list of “their” minority, no matter who the candidates turn out to be. This way the freedom and secrecy of their choice are arguably undermined (see also §257 of Act XXXIV of 2013 on how voters receive the ballot from their precinct committee). This concern has a party political dimension too. Due to a super-majoritarian system of electing national minority self-governments, the currently biggest of the many sharply divided Roma organizations, which is closely aligned with Fidesz, exclusively controls the Roma national self-government. Chances are that government-sponsored advertising of the option for registering as Roma voters can persuade many more citizens to register as Roma voters than as many will be needed to win the first seat for a Roma list. However, if some of these citizens discover later on that the list is exclusively composed of Fidesz-supporting Roma candidates whom they object to on partisan grounds, then they will only be able to avoid voting for them in the actual election by not casting a list vote at all, which defeats the whole purpose of better representing ethnic minority interests in parliament.

Another concern regarding equal rights is that while the new constituency map significantly reduced, it did not eliminate inequalities between the population sizes of districts. These can have electorally relevant consequences and likely to favor Fidesz over its opposition (Tóka 2013). It is doubtful though whether the current inequalities between districts are unconstitutional. They are not fully consistent with the non-binding recommendations of the Venice Commission, but comply with the criteria set by the Hungarian Constitutional Court (see Venice Commission/OSCE-ODIHR 2012).

Similarly, the equality of voters is arguably violated by the new electoral system stipulating that list seats should be allocated among parties and minority lists not only according to the list votes and the votes of single-member district candidates who did not win in their constituency, but that this combined pool of list and “remainder” votes should be increased for each party with the “surplus” votes of its victorious candidates in the single-member districts.<sup>18</sup> This provision is meant to promote the proportional representation of votes. But it would only do so if a party won very-very large majorities of both the popular vote and the single-member district seats. This is a highly unlikely and hitherto unprecedented scenario. In

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<sup>18</sup> The surplus is calculated as one less than the number of votes that the winning candidate leads over the closest competitor in the constituency.

all realistically conceivable eventualities the provision will just do the opposite, and amount to a double-counting of the “surplus” votes, violating the principle of equal votes.

Clear violations of the equal voting right principle concern citizens under guardianship who are deprived of voting rights on the basis of ‘mental disability’. The new Hungarian electoral legislation made progress towards, but stops short of meeting the commitments that Hungary took on herself by ratifying the UN Convention on the Rights of Persons with Disabilities (Committee on the Rights of Persons with Disabilities 2012). It is likely that approximately 50,000 Hungarian wards will still be disenfranchised at the time of the 2014 elections against the terms of the Convention. Similar concerns were raised by the Venice Commission/OSCE-ODIHR (2012: 10) opinion regarding the rights of the just slightly smaller group of citizens convicted for relatively minor criminal offenses, because Article XXIII (6) of the constitution and Article 2 (3) of the election law strip them of voting rights in a manner that is arguably too vague. Altogether, nearly one percent of all otherwise eligible citizens may be subject to disenfranchisement on these two grounds.

### 3.2 Neutral treatment of political alternatives

The neutral treatment of political alternatives is an obvious requirement for free and fair elections, but many aspects of Hungary’s new electoral system would seem, in their local social and political context, give a competitive advantage to Fidesz. Of the rules not mentioned so far, the main example is the election of seven members of the National Election Committee by a – possibly just simple – majority of parliament for nine years.<sup>19</sup> The members elected in 2013 are considered Fidesz partisans by some critics, who consequently voice concerns about how impartial election administration will be in the coming years.

Yet, except for allowing a privileged treatment of ethnic minority lists, Hungarian electoral legislation does not violate the principle of neutrality towards political alternatives explicitly. Obviously, there are no paragraphs in any law that would name a party or ideology whose candidates for election should receive votes, seats, media access or public funds under different rules than the general ones. Yet the election law violates neutrality without being explicit about this. Consider the example when multiple parties nominate a ‘joint’ candidate in a single-member district. Under the previous electoral system, the votes for so called such candidates could be counted, in a pre-defined proportion, as remainder votes for the separate party lists of the nominating parties if the candidate in question failed to win his or her single-member district seat. Under the new electoral system, this is only possible if the nominating parties have a joint list, like the Fidesz-KDNP alliance did for the last two elections. In contrast, the left of center opposition would have almost certainly preferred to run separate party lists but joint candidates in the single-member districts in 2014. It is unclear what legal argument could defend the opposite legal treatment of the two electoral alliance formats.

### 3.3 Rule of law

The rule of law is the final constitutional principle that arguably conflicts with some elements of the new electoral system. The new rules on drawing constituency maps, while marginally clearer and more egalitarian than the 1989 rules, did not keep pace with the development of legal norms that took place in other democracies, and leave too much discretion in the hands

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<sup>19</sup> The NEC oversees the entire electoral process and is the appeal body for all disputes emerging in local election committees. Its other members are delegated by the political parties that manage to set up a national list following the required collection of supporting signatures from at least 27,000 citizens with a certain required spread across single-member districts.

of partisan bodies (Venice Commission/OSCE-ODIHR 2012). In particular, they remain silent about the mathematical formula that should regulate the allocation of single-member district seats among the counties and allow for many poorly specified substantive considerations (from ethnic composition to transportation issues) to justify deviations from perfect equality of district sizes within counties in unspecified ways. They leave the entire process of drawing district boundaries in the hands of the legislature, do not require public hearings where citizens could make an input, and allow no legal appeal. Since the current district boundaries were adopted as part of the election law, a one-third majority of future parliaments can prevent redistricting even if law required it.

#### 4. Conclusions

Among the contemporary electoral reforms in the world's democracies, the 2011-13 Hungarian reforms stand out as a one-party imposition that avoided consensus building and followed perceived self-interest (Renwick 2012). The magnitude of partisan bias in the new law will likely be high in the 2014 election, but will stem mainly from elements of the system that cannot be called unconstitutional. Some details of the system – including the rules regarding the drawing of constituency boundaries – might be open to legal challenges, but it is unlikely that fixing them would make much difference in the near future. Reversing some other arguably problematic rules – like those on joint candidates and surplus votes – may have been more influential but were probably not so obviously incompatible with the constitution. The legislative process that adopted the electoral reforms lacked some required elements of justification and social consultation, but if this was enough to annul a Hungarian law, then probably not much of the legal system would remain at place.

The positive side of all this is that those elements of the new electoral system that would likely fail simple tests of constitutionality – such as the disenfranchisement of wards, or the unequal availability of the postal vote to different citizens – are probably quite few and hardly look terribly important for election outcomes. The reforms did something popular by reducing the size of parliament and also had some undisputed if small positives, such as explicitly allowing international observers at Hungarian elections, providing for the use of Braille on ballot papers, or reducing size differences between single member districts. The negative side is that the system, at least on the short run, will probably distort the expression of the popular will in seat distributions, and thus generate cynicism regarding democratic institutions and a drop in political legitimacy in Hungary.

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