



Courts and Populist Electoral Politics – the Case of Hungary

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Abstract

Elections are devices, through which the abstract concept of representation gains its specified institutional form, therefore they are highly relevant for populists. The paper examines the illiberal-populist project of redesigning the legal framework of elections in Hungary after 2010, focusing on the role of the Hungarian Constitutional Court (HCC) in reviewing electoral law as well as interacting with the ordinary courts through electoral adjudication. It is argued that although a distinct ‘populist imagination’ (Müller) of elections is discernible, there is no special populist electoral politics, rather the ‘inherent authoritarianism of democracy’ (Pildes) is exacerbated. In Hungary the electoral legislation was shrewdly tailored to the governmental parties’ needs, and electoral politics is constantly subjected to instrumental changes. It is argued that although apex courts could be key players in checking electoral manipulation, the HCC did not protect effectively the integrity of electoral law, and at a later stage it even intervened in an arbitrary and arguably politically biased manner. The paper argues that the Hungarian example underscores the need for enhanced court activism in terms of electoral law, especially when populists already came to power.

Keywords Populism · Electoral Law · Electoral System · Constitutional Review

1 Introduction

Elections matter for populists. These are the foremost devices through which the abstract and obscure conception of popular sovereignty gains its very concrete, flesh-and-bone form.¹ Populists aspire to be the sole authentic representative of the ‘true’ people,² and in modern political communities, no such representation is

¹ For a detailed analysis on the relationship between popular sovereignty and populism see: Sajó 2021, 114–122.

² Müller 2016.

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conceivable without some form of public consent, most notably, elections.³ Populist rhetoric extensively relies on the legitimacy provided by the will of the people, which is, in turn, understood in terms of electoral results.

However, populists do not aim merely to represent the political community as it existed before, but they aspire to redefine that very political community in a process where *‘the people are extracted from the people.’*⁴ This extraction may take the form not only of exclusionary rhetoric but can be effectively furthered by the modification of political institutions, most notably, the legal framework of elections.

Indeed, elections are institutions that do not only channel in the will of the people but also shape the political community, insofar as they determine to a great deal what majorities are formed in the representative bodies. In other words, they shape who exactly ‘the people’ is. Populists try to perpetuate their stay in office by minimizing the chances of being voted out, which involves institutional changes and electoral malpractices.⁵ In this article I refer to this phenomenon as ‘populist electoral politics.’⁷

Referendums and elections are important instruments of extracting people from the people. Referendums are relevant in controlling the agenda and translating issues into yes–no questions, thus deepening the cleavages in society. Indeed, in Hungary, since 2010, referendums were held on two occasions, in 2016 and 2022, with five questions in total, and the government initiated all of them, whereas questions framed by citizens or the opposition parties were discriminately handled and, in fact, banned.⁶ Moreover, the 2022 referendum was held on the same day as the parliamentary elections and, therefore, became handy in ruling the electoral agenda as well.

While referendum plays a relevant role in agenda setting, elections are the most important and effective instruments of extracting people from the people, and these are the cornerstones of the illiberal-populist regime, giving an overall ‘blanket’ legitimacy for the regime. Applying different electoral institutions (e.g., majoritarian or proportional electoral systems) to the same political community might give very different majorities. In Hungary, the electoral system transformed 45 percent of the votes into a two-thirds, that is, a constitution-making majority in the National Assembly, whereas in a pure PR system, this vote-share would not have been sufficient even for forming a government with a simple majority. Electoral politics in Hungary after 2010 underscores that in the unfolding illiberal regime, basic institutions of representation are not left as they were but are fine-tuned along partisan interests.⁷ Moreover, apart from institutional changes, the fairness of elections is questioned by electoral malpractices, such as the overlap between the government’s

³ Other form providing the source of legitimacy are referendums and other pseudo-direct democracy institutions, such as ‘public consultation’. These might provide a basis for distinct policy measures, however, elections give an overall ‘blanket’ legitimacy for the regime.

⁴ Müller 2016, 80–81.

⁵ Sajó 2021, 124.

⁶ Mécs 2023.

⁷ For a thorough description see: Ilonszki and Várnagy 2014.

resources and certain political parties.⁸ This underscores that when an illiberal system is in the making, the framework of elections becomes the first target, and thus, its protection might not only be justified but necessary as well.

Courts play or might play an important role in limiting populist electoral politics. On the one hand, apex courts with the power of judicial review could intervene as veto players when the institutional setting is being reshaped via lawmaking, and indeed, through the ‘constitutionalization of democratic politics,’ courts are more and more inclined to do so.⁹ On the other hand, courts guard free and fair elections as adjudicative-appellate bodies, and this activity could also interfere with electoral malpractices. Judicial intervention is, therefore, not just a theoretical necessity¹⁰ but also a practical possibility.

The transformation of the Hungarian constitutional and political system after the landslide electoral victory of Fidesz-KDNP in 2010 has been widely discussed in the literature. There is a lively discussion on how the Hungarian political system, which clearly departed from liberal democracy, might be labeled and the different aspects of its undemocratic nature.¹¹ Also, from the viewpoint of constitutional scholarship, the role of law and legality in such systems is discussed, as well, namely, whether the Hungarian constitutional system constitutes some new form of constitutionalism or illiberal constitutionalism is an oxymoron.¹² Furthermore, the ‘populist playbook’ has been analyzed extensively, pointing out the most important aspects of strategic institutional changes.¹³ Accordingly, there is a vast amount of literature on the deactivation and subsequent reactivation of the constitutional court.¹⁴ The pressure put on ordinary courts has also been at the forefront of scholarly interest.¹⁵ Also, changing the media landscape, that is, occupying the state media, building a highly unified and disciplined propaganda media as well as capturing the regulatory bodies were thoroughly researched.¹⁶

From a political science perspective, the role of elections and changing the electoral landscape was also subjected to scholarly works. Ilonszki and Várnagy described how regulations on party and campaign finance, on media coverage, and on the electoral system were changed along partisan calculations and as such was a

⁸ OSCE-ODIHR final reports on the 2014, 2018 and 2022 elections mention the ‘pervasive overlap’ between the government and the governmental parties. See for example the 2022 Final Report at 3, available at: <https://www.osce.org/files/f/documents/2/6/523568.pdf> (last download: 2022.08.29.).

⁹ Pildes 2012, 529–547.

¹⁰ Ely 1980. – It is notable that proponents of weak judicial review often make their theories contingent on the quality of the political process. Tamás Gyórfi, an adherent of weak review, expressly refers to Ely’s theory and proposes that courts engage in a more thorough scrutiny if the political process is ‘indeed prone to serious malfunctions.’ Gyórfi 2016, 210.

¹¹ For an overview of the different approaches see: Körösnéyi et al 2020, 3–8.

¹² See for example: Halmay 2020.

¹³ See for example publications of the Reconciling Europe with its Citizens through Democracy and Rule of Law Project (RECONNECT), available at: <https://reconnect-europe.eu/> (last download: 2022.08.29.).

¹⁴ See for example: Bodnár 2022.

¹⁵ See for example: Fleck 2021.

¹⁶ See for example: Bleyer-Simon et al. 2023.

*'building block in the construction of a predominant party system.'*¹⁷ Other studies also underscored the biased nature of elections and electoral law-making.¹⁸

Indeed, changing the electoral landscape played and has been playing a paramount role in the unfolding populist-illiberal political system in Hungary. Although Fidesz-KDNP won its first two-thirds majority in 2010 under the former electoral system adopted in 1989 during the democratic transition, the consecutive supermajorities in 2014, 2018 and 2022 were achieved in the new system, that, as described below, was tailored to the partisan needs of the reformers. Therefore, while the flaws of the former electoral system (most notably, disproportionality) and the constitution (most notably, lack of legislative and constitutional requirements beyond supermajority) account for the changes adopted between 2010 and 2014, modifications taking place after 2014 were enabled by the new electoral system. This latter is relevant, since, as pointed out below, it is the nature of the Hungarian populist-illiberal constitutional order that it is not 'finished' in a deistic fashion, but it requires the constant intervention of the two-thirds.¹⁹ Electoral politics are key to provide this necessary majority.

As the above suggests, we know a lot about how institutions such as the constitutional court were changed, as well as about how the electoral regulation was altered, nevertheless, the special role courts played or could have played in the process has not been thoroughly examined. Studies either described the institutional changes affecting how the constitution and the law is enforced, or how the institution of elections is reshaped. However, no analysis showed an insight on how the former amplified the latter, namely, on how disfunctions related to the rule of law in general led to the exposure of elections to partisan intentions. On the one hand, the Hungarian Constitutional Court (HCC) could have been a veto player, when the new rules were adopted. For example, the court could have annulled the manipulative modifications of the electoral system, barring the populist government from entrenching itself. On the other hand, courts could have and to some point in fact have prevented some electoral malpractices, such as the misuse of governmental resources in the campaign. As we will see below, a dynamic emerged between ordinary courts and the HCC, in which the latter effectively hindered the former from adjudicating some malpractices effectively.

This paper focuses on the role courts played in the unfolding illiberal-populist electoral politics taking place after 2010 in Hungary. This requires a complex approach. On the one hand, the relationship between populism and representation needs to be described. The question here is what the distinct populist 'imagination of representation' is (using Jan-Werner Müller's term), and what role elections play in this imagination. On the other hand, a brief description is required as to how this populist-illiberal approach has been, in fact, implemented. Is there a peculiar

¹⁷ Ilonszki and Várnagy 2017 3.

¹⁸ Tóka 2014., Unger 2018.

¹⁹ Just in the 2018–2022 term, the constitution was amended four times. Another example is the electoral law, which is in constant move, as described below. Also, permanent two-thirds is needed in order to elect key constitutional checks (most notably, members of the HCC).

populist electoral politics or populism is just another factor that exacerbates the ‘inherent authoritarianism’ of democracy, that is, the structural risk that political actors might adopt strategies of manipulating electoral legislation?²⁰ On what level (constitutional and statutory) and how electoral politics related to parliamentary elections unfolded in Hungary after 2010? Third, in light of the aforementioned electoral politics, the relevant jurisprudence of courts needs to be examined, regarding both the review of legislation and adjudication in electoral disputes. Here, the focus will be on the HCC, as this court is responsible for the review of legislation, and it is the uppermost appellate body in electoral adjudication. How did the Court react to the unfolding populist electoral politics and what dynamics emerged between the HCC and other domestic courts, most notably the supreme court (‘Curia’)?

Accordingly, the paper proceeds as follows. First, the populist imagination of representation and the related role of elections is described from a theoretical point of view. Second, electoral politics taking place in Hungary after 2010 on the constitutional level is described, analyzing the normative continuity between the former constitution (‘Constitution’)²¹ and the new Fundamental Law (‘FL’).²² Since populist electoral politics takes place predominantly on the statutory level, in the next section the changes implemented through ordinary legislation are described. As the HCC could have been a key player in the process, in Section 5 the Court’s related case-law and the factors explaining its reluctance to intervene are examined.

A final remark regarding the scope of the current analysis is due. Elections are complex instruments, and electoral results are the consequences of the interplay of many factors. For example, changing the media landscape and creating a highly unified and concentrated media market, where the governmental parties indirectly control a vast network of media outlets, is highly instrumental in influencing electoral results as well as creating a societal context in small towns that is characterized by dependent relationships in the disadvantaged areas, or stifling NGO activities. These contextual factors are relevant; however, they are linked only indirectly to the right to vote, and these phenomena require legal answers other than those required by issues directly linked to the electoral procedure and the right to vote, moreover, they might involve different institutions that interpret and apply the law. This paper focuses on issues directly linked to the constitutional and legal framework of elections and the right to vote. The aim is to show the peculiar dynamic between the two-thirds majority on the legislation side, the HCC and the Curia. The reason for this scope, on the one hand, is that due to the direct link to the elections and the right to vote, these pose theoretically distinct challenges. Changing the electoral system or the way the ballot might be cast affects the right to vote directly and thus should trigger heightened scrutiny on behalf of the courts. Moreover, these issues can be and already have been framed by relevant legal actors within the framework of the right to vote and electoral legislation, whereas contextual elements are often hard to

²⁰ Pildes 2003.

²¹ Act 20 of 1949, in force until 31 December, 2011.

²² In force since 1 January, 2012. For the official English translation see: https://njt.hu/translation/TheFundamentalLawofHungary_20220723_FIN.PDF (last download: 2022.08.29.).

put into these frameworks. On the other hand, this paper argues that many aspects of populist electoral politics related directly to the electoral legislation in the narrow sense could be handled in the existing legal framework, but they are not, as a consequence of the general rule of law challenges. Examination of the case law and the dynamic between the relevant actors thus shed light on the characteristics of the Hungarian illiberal-populist legal system when issues with the highest political stake, that is, related to elections, emerge. On the third hand, the paper aspires to give an in-depth analysis of the dynamic between the legislator and the courts in electoral matters. Due to the character limits, this is only a viable option if the scope is narrowed. As such, the paper aspires only a part of a complex analysis of the Hungarian elections after 2010. Nevertheless, the current paper uses examples related to the contextual elements as well (e.g. the ban of political advertisements, or government speech in the campaign).

2 Populist Imagination of Elections

Although it is widely acknowledged that populism is a notoriously elusive concept, covering very different political movements (e.g., left or right, negative or positive populism) it also has some core features that justify the discussion of the phenomenon.²³ Moreover, some of these core features are also related to representation and, more closely, to elections, therefore a peculiar populist imagination of representation and elections is discernible.

As to the core features, definitions might diverge, but most of the scholars agree that populism involves a distinction between a corrupt elite and the morally good people, where the latter enjoys moral superiority, and therefore the task of politics is to give expression to the will of the people.²⁴ A core aspect, therefore is some understanding of popular sovereignty, what, however, is mixed with anti-pluralism of representation. Moreover, as noted in the literature, populists rely on some extreme form of majoritarianism that *'regards electoral empowerment as an expression of the will of the people and, on that basis, rejects the constitutional restriction of power.'*²⁵

This means that populism, on the one hand, is distinct from mere despotism or authoritarianism insofar as there is a real chance that those in office can be voted out. Populists gain and renew their power through free, and, to a very limited degree, fair elections, and the populist agenda heavily relies on elections. Indeed, electoral victories, as the acclamation of 'the people', are often referred to in order to justify the implementation of populist policies that are against minorities or counter-majoritarian institutions.²⁶ Moreover, there are intellectual attempts to justify these policies by alluding to some sort of republicanism or political constitutionalism that in turn

²³ Szente 2021.

²⁴ Mudde and Kaltwasser 2017, 5.

²⁵ Szente 2021, 23. – see also literature in footnote 138.

²⁶ Sajó 2021, 191.

also rely on the legitimacy provided by the political process.²⁷ Therefore, regarding both ordinary political rhetoric and intellectual endeavor, elections are part of the populist imagination of representation.

On the other hand, populism clearly diverges from the classic liberal approach to representation and elections, the most important difference being its anti-pluralistic characteristic. As Jan-Werner Müller argues, populism involves a ‘*moralistic imagination of representation*’, under which populists are the sole ‘true’ representatives of the people, as opposed to the morally corrupt ‘others’, be they the opposition parties, or other stakeholders.²⁸ From the one side, this approach presupposes a united, and morally superior political entity (the people), and, from the other side, it also asserts that the people cannot be represented by anybody else, but the populists.²⁹ Of course, the question of who could *best represent* the people is also part of the political contest in liberal-democracy. Representation in this approach is decided by empirical methods, most notably, by elections.³⁰ In the moralistic imagination of politics, however, representation is not a matter of contest between equally legitimate actors but is more a fight between actors of different moral qualities – between the morally superior populists, as the *sole representer* and the morally inferior elites. Therefore, representation is not decided empirically, but it is determined a priori, in a normative (moralistic) fashion.³¹ This is an inherently anti-pluralistic approach, that is obviously at odds with even a minimalist conception of free and fair elections, which requires the acknowledgement of the possibility that it might be others that win the elections, and thus represent the people, not the populist forces.

Furthermore, it is noted in the literature describing populist-illiberal politics in Hungary, that although the institution of elections is kept, its function has changed profoundly.³² In my view, the most accurate descriptions of the changed function of elections in Hungary rely on Max Weber’s ‘Plebiscitary Leader Democracy’ (PLD) approach.³³ In PLD, politics is extremely personalized, the political process is organized in a top-down manner, and ‘*democracy prevails in a minimalist sense, as an approval of incumbents or leaders, rather than a kind of self-government of the people or a means of making leaders accountable.*’³⁴ Approval, being the

²⁷ Halmai 2020.

²⁸ Müller 2016, 20.

²⁹ Ibid.

³⁰ Ibid 20–21.

³¹ Ibid 44.

³² Under the ‘hybrid regime’ approach, elections are part of a competitive authoritarian system, nevertheless, due to the misuse of legislative power, the competition is distorted. Steven Levitsky – Lucan A. Way: *Competitive authoritarianism. Hybrid regimes after the Cold War*, Cambridge University Press, 2010. – Anna Unger argues that theories emphasizing restricted competition are misleading, and the Hungarian system is not in a middle ground between democracy and autocracy, but it is a ‘competitive autocracy’. Unger 2018.

³³ From a constitutional-law perspective: Sajó 2021. From the political-science literature: Körösnéyi et al. 2020. Please note that in this study I do not want to engage in the debate whether Hungary is a democracy or not, therefore the usage of PLD here does not imply anything in this regard. It merely suggests a name, with which Max Weber labelled the phenomenon.

³⁴ Körösnéyi et al. 2020, 8.

most important function of elections in PLD, means that elections gain a plebiscitary character, where casting the ballot is more about giving a blanket mandate and legitimacy to the leader, than deciding between the different political agendas of the political actors.

In sum, elections held in reasonable intervals are part of the populist imagination of representation, and electoral results are used as a point of reference, however, representation is conceived of as determined not by electoral results but by the political actors' different ethical quality, and this gives an anti-pluralistic and plebiscitary character to elections.

3 Implementing the Populist Imagination of Elections – Electoral Politics on the Constitutional Level

The above sketch on the populist imagination of elections relies both on theoretical-conceptual works and on studies that describe the political transformation in Hungary. From these a peculiar imagination of elections is discernible. That is, elections are kept, but they are anti-pluralistic and plebiscitary. The question remains as to how – on what level – this imagination is implemented, if at all.

Populism might remain on the level of politics, or, in other words, on the level of rhetoric.³⁵ That is, the elite-people distinction with all its implications can be present on the communicational level, and every political issue might be framed accordingly in the public sphere.³⁶ This is detrimental to the democratic political process, however, the legal framework of democracy might remain intact. Populists in opposition can implement their vision only on this level.

Nevertheless, when in power, populist aspirations might not stop at the level of politics, but – from the policy-politics-polity triad – might have effects on the level of polity as well, in other words, they aspire to change the underlying constitutional setting in general and the legal framework of the political process (in U.S. terminology, *'law of democracy'*) in particular.³⁷ This means that new constitutions are adopted, checks and balances are weakened or diminished, and fundamental political institutions, such as elections, referendums, or the parliament are changed.

Indeed, it is recognized in the literature as well that while populism involves anti-institutional sentiments, populist do use institutions to solidify and exercise their power. However, it is also true that populism has an ambiguous relationship with institutions and the law. On the one hand, the success of populism *'depends primarily on nonlegal factors'* as it is *'an emotionally manipulated patronage system that maneuvers around the law.'*³⁸ This is valid regarding elections as well. That is, the anti-pluralistic, plebiscitary, and leader-oriented nature of elections is not

³⁵ Here I refer to the politics-polity-policy triad.

³⁶ For a thorough examination see: Körösényi et al. 2020.

³⁷ By law of democracy I mean the legal framework of the political process, covering elections (suffrage electoral system, electoral administration), party regulation, party and campaign finance.

³⁸ Sajó 2021, 10. – emphasis as in original.

institutionalized in Hungary by changing the underlying constitutional setting (e.g., by introducing a presidential or semi-presidential system, or by banning parties), but – as argued below – prevail within the classic framework of liberal-constitutional representation. On the other hand, institutions are not left intact, but fine-tuned along partisan interests. Therefore, while it is true that populism cannot be understood solely by the examination of the formal structures, it is also true that understanding the complex interplay between components of the formal structures (e.g. between the HCC and ordinary courts) is inevitable for understanding populists' success – at least in Hungary.

3.1 Elections in the Fundamental Law

It is a commonplace that populist regimes keep the façade of liberal constitutionalism, therefore it is not a surprise that regarding the level of constitutional text, there is a normative continuity between the former and the new constitution. After winning the 2010 elections with a two-thirds majority, a new constitution, the Fundamental Law was enacted in 2011. Regarding representation in general and elections in particular, the FL shows normative continuity with the previous, liberal Constitution. Indeed, as pointed out by the HCC itself, the former Constitution and the FL regulate basic concepts of elections, such as the right to vote, with the same substance.³⁹ The FL, similarly to its predecessor, prescribes representative democracy through elections held in reasonable intervals, under the principles of general and equal suffrage, direct and secret ballot in a way that ensures the free expression of the voters' political will.⁴⁰ Moreover, political parties (their fundamental functions and the freedom to establish them) remained also constitutionally entrenched.⁴¹ From the text of the FL, therefore, a democracy based on free and fair elections with the competition of political parties follows.⁴²

A chance to disrupt this normative continuity could be through restricting the interpretive room of the HCC, and indeed, there are some features in the FL insinuating that this was the two-thirds majority's goal. First, the most spectacular attempt to disrupt the continuity was the repeal of the HCC's case-law interpreting the former constitution.⁴³ After the FL came into force, the HCC stated that its case-law on *'fundamental values, human rights and freedoms and on constitutional*

³⁹ Decision no. 1/2013. (I. 7.) of the HCC. para [49].

⁴⁰ Article B (1) and (3), XXIII,2 (1) and (3).

⁴¹ Article VIII (3). It is to be mentioned, however, that under Article U) the former communist party and its successors share responsibility for the regime preceding 1989–90. This might affect the opposition party MSZP, nevertheless, to this date this article was not applied to exclude this party in any way from the political competition.

⁴² Although my focus here is on elections, it is notable that despite the highly politicized preamble (the 'National Avoval') the text of the FL did not change fundamental aspects of the political community – namely, democracy, capitalism and fundamental rights. It is argued in the Hungarian literature that it is in fact not a new constitution, but a comprehensive modification of the former constitution. See Bragyova and Gárdos-Orosz 2016.

⁴³ Section 5 of Closing and Miscellaneous Provisions of the FL. This section was inserted by the infamous Fourth Amendment in March, 2013.

*institutions that have not been changed by the Fundamental Law remains valid.*⁴⁴ As a response, the constitution was amended with a section explicitly repealing the court's previous case-law. This, however, had very limited effect, as the HCC, although admitting that pursuant to the modification it needs to give detailed reasoning when relying on the previous case-law, stated that it is by no means barred from relying on the arguments of its previous jurisprudence.⁴⁵

Second, the FL prescribes some methods of interpretation, that are understood in the literature as an attempt to restrict the HCC's interpretive freedom.⁴⁶ Article R) (3) prescribes that interpretation needs to be in line with the preamble and the '*achievements of the historical constitution*', and Article R) (4) entrenches the protection of constitutional identity and Christian culture of Hungary. Moreover, Article 28 mentions morality, common sense, and the public good as guidelines, when interpreting laws and the constitution. In theory, these could support a populist way of constitutional interpretation in general, and probably regarding elections in particular. For example, to the ambiguous normative element of historical or the elusive concept of the public good an exclusionary interpretation of representation could be read into. However, as Fruzsina Gárdos-Orosz' analysis points out, regarding the HCC's decisions '*the new methods of interpretation prescribed in the text of the Fundamental Law do not have much relevance.*⁴⁷ This general comment is supported by the review of the court's decisions in electoral matters, as the new methods did not play any role in the related jurisprudence.⁴⁸

This means, that regarding the level of the constitutional text (regulating representation substantively, and the interpretation of the text itself), the populist imagination is not institutionalized. However, as I will argue in Section 4, this does not mean that the populist agenda was not furthered by the overall constitutional setting and by the HCC's case law. It rather implies that it does not occur on the level of constitutional text, but rather through either inconsistent decisions, or through exploiting the blind-spots of the pre-2012 constitutional doctrine.

3.2 Instrumentalization of Constitutional Amendments

Keeping the façade of liberal-constitutional values in the FL, besides its apparent benefits, had its cost. Namely, because of the HCC's early activism and of the

⁴⁴ Decision no. 22/2012. (V. 11.) of the HCC, para [41].

⁴⁵ Decision no. 13/2013. (VI. 17.) [27]-[34]. Former HCC Justice Miklós Lévai stated in an interview that the 2013 decision is substantially the same, as the 2012 verdict mentioned in the previous footnote. Kazai 2016.

⁴⁶ Gárdos-Orosz 2021, 151.

⁴⁷ Ibid. 159.

⁴⁸ I do not know of any decision in electoral matters where the new methods of interpretation would have played an important role. In the Voter Registration Case Justice Balsai in his dissenting opinion referred to these as to establish discontinuity between the Constitution and the FL – See Decision no. 1/2013. (I. 7.) of the HCC, paras [153]-[154]. This line of reasoning, however, was not taken up by the Court subsequently.

general nature of legal texts, the new constitution conflicted with populist aspirations of redesigning the political process.

One example is the case with the restriction of political ads. When the 2013 Electoral Procedure Act ('2013 EPA') was enacted,⁴⁹ it prohibited political ads outside of the public media sphere, that is, in the commercial media. The HCC, however, in a 2013 decision annulled the said legislation, arguing that it unconstitutionally restricted the freedom of speech.⁵⁰ As a response, the FL was modified, and a paragraph was included that elevated the annulled statutory provision to the constitutional level. Although due to international criticism the section was later modified, under the provision in force today political ads can be broadcast only for free, therefore the new rule have almost the same effect as the annulled parts of the 2013 Electoral Procedure Act, since it is not in the interest of commercial media outlets to give free airtime to political advertisements. Prescribing the freedom of speech and pluralistic public sphere on the constitutional level therefore had its consequence, that could have been 'remedied' later with a casuistic amendment of the FL.

Another, most recent example, is the eleventh amendment to the FL, that changes electoral calendar of municipal elections. It is not related to parliamentary elections, however, the change is illustrative of the instrumentalization of constitutional politics. According to the election calendar, EP elections are to be held Spring 2024, and municipal elections were supposed to be held Autumn, 2024. After the crushing defeat of the opposition at the 2022 parliamentary elections, this would have given some room for opposition parties to develop political identity and agenda separately, considering that at the EP elections separate lists compete, while at the municipal elections – similarly to the parliamentary elections – thorough cooperation is a necessity following from the electoral system. Tampering with the dates changed the room for strategy profoundly, since the opposition is forced to unite at an earlier point, something that lessens the chance that any single actor can emerge – something that would be the most dangerous scenario from the view of Fidesz-KDNP.⁵¹ This second example underscores that legal and constitutional texts, in some cases, have clear and exact meanings (e.g., the date of elections), and this might conflict with particular political interests. In this case the situation might be overcome only by instrumental amendments.⁵²

4 Electoral Politics on the Statutory Level

As we have seen above, there is no distinct populist electoral politics on the constitutional level; the classic liberal-constitutional understanding of democracy and elections is mirrored in the FL (continuity), something that is overcome in some cases

⁴⁹ Act XXXVI of 2013.

⁵⁰ Decision no. 1/2013. (I. 7.) of the HCC.

⁵¹ The government argued that changes were necessitated by budgetary considerations.

⁵² Pozsár-Szentmiklósy et al. 2023.

by instrumental and casuistic constitutional amendment (discontinuity) – however, this latter is rare.

Populist electoral politics is more evident, however, when we examine the statutory level. Electoral law in Hungary is subject to a two-thirds majority in the unicameral National Assembly, nevertheless, apart from this enhanced majority, there are no other procedural requirements.⁵³ Because of the disproportional potential of the previous electoral system enacted in 1989, Fidesz-KDNP won by two-thirds in 2010 (with around 52 percent of the votes) and therefore could unilaterally (that is, without the opposition or any relevant stakeholders) change the relevant legislation. This enabled the government parties to change election law completely between 2011 and 2013, including the electoral system, electoral procedure, and campaign finance.⁵⁴ Through these changes the two-thirds majority was recreated at the 2014 and 2018 elections, that in turn made it possible to further change the legislation along partisan purposes – a clear example for the ‘*multiplier effect*’, where partisan changes enable the incumbents to stay in power and implement further modifications.⁵⁵

4.1 Electoral System

The most effective tool of ensuring victory is changing the electoral system itself. As noted in the literature as well, political actors engage in a contest not just within the framework of law of democracy, but there is a ‘meta-electoral’ struggle, namely, they also aim to change the very framework, if its favorable.⁵⁶ The Hungarian example supports this insight.

It is notable that at first blush the changes are not spectacular. The system adopted in 2011 resembles to a great degree to the 1989 electoral scheme.⁵⁷ Namely, it is also a Mixed-Member-Plurality (MMP) system, where voters cast two distinct votes, one at the first-past-the-post (FPTP) single member branch, and one at the list branch. However, the new system was shrewdly tailored to the partisan needs of Fidesz-KDNP. To understand this, we need to submerge into some technicalities, nevertheless, it should be kept in mind that such technicalities had profound effect on the results in terms of seat share.

The most important factor is the enhanced disproportionality of the new system. Proportionality of electoral systems denotes how the percentage of votes cast for a political actor is transformed into a percentage of seats, or, in other words, how the

⁵³ There is no second chamber involved in the legislative process, and no freezing period – that is, a time before elections within which fundamental rules of elections cannot be changed. Moreover, in Hungary no referendum can be held on electoral matters, therefore enacting electoral law remains in the exclusive competence of the National Assembly.

⁵⁴ For a detailed description see: Ilonszki and Várnagy 2017.

⁵⁵ Multiplier effect describes the situation where ‘*a party locked into power by gerrymandering can further manipulate gerrymandering.*’ Levy and Orr 2018, 143.

⁵⁶ Birch 2011, 71–88. – This is also the fundamental tenet of the rational-choice theory on electoral reforms. Benoit 2004.

⁵⁷ See Act CCIII of 2011 on the elections of members of parliament.

distribution of votes is mirrored in the representative body.⁵⁸ While there are plausible justifications for disproportionality (e.g., governability),⁵⁹ it is also a highly effective way of transforming the will of a relative majority into an absolute, or even constitution-amending majority in the parliament. An example cited above, is the 2014 Hungarian elections (the first general parliamentary elections held under the new legislation), where 45 percent of the votes resulted a two-thirds (that is, 67 percent) majority for the governmental parties. The relative majority was transformed into a constitution-making majority. In 2018 and 2022 the vote-share—seat-share percentage of Fidesz-KDNP was 49 percent—67 percent; and 54 percent—67 percent, respectively. The impact of this is hard to overestimate, as in the Hungarian constitutional order two-thirds majority in the unicameral National Assembly is something of a ‘constitutional singularity’, where any kind of legislation and even the constitution can be amended.⁶⁰

The 1989 electoral system was ‘prone to’ being disproportionate, meaning that if there was a significant nationwide difference between the winning actor and the runner up, then it could produce highly disproportional results.⁶¹ However, the new system was fine tuned in a way that enhanced this potential of disproportionality. First, the ratio of FPTP single member districts was raised from 46 to 53 percent. Second, a new kind of winner bonus was included. There has been a compensatory mechanism in the Hungarian mixed system since 1989, under which at the single-district branch votes cast not to the winner candidate (but to the second, third, etc.) were transferred to the list branch in order to compensate them for not resulting mandate at the district.⁶² In the new system, however, the difference between the winner’s and the runner-up’s votes is transferred to the list branch as well. Namely, if candidate A wins the district by 30.001 votes, and the runner up is candidate B garners 10.000 votes, then candidate A has the mandate and she transfers 20.000 surplus votes to the list branch – twice the number of B’s compensatory votes, despite the fact that B did not receive any mandate in the district.⁶³ Winner surplus votes resulted at the 2014, 2018 and 2022 elections six, five and five additional mandates for Fidesz-KDNP, respectively, in a parliament of 199 MPs, elevating the government

⁵⁸ For a description of proportionality and its most basic indexes see: Gallagher 1991.

⁵⁹ It is a well-known consequence of majoritarian electoral system that they promote one-party governments that are more stable than coalition governments. Also, they promote two-party systems. Sartori 1994.

⁶⁰ Constitutional amendment does not include any other veto-players, such as the inclusion of referendum. Moreover, in Hungary some legislative subjects are protected by two-thirds majority (e.g., the most important checks and balances), that is, they are ‘cardinal laws.’

⁶¹ For example, in 1994, the Hungarian Socialist Party (MSZP) won 54 percent of the seats with only 33 percent of the votes, as it secured a firm 13–14 percent fore compared to the runner-up. By 2006, however, two blocks emerged, and the elections produced much more proportional results.

⁶² Note that this is not like the German system, where second votes determine the seat share, namely, there is “full” compensation for the votes not resulting mandates at the single branch. The Hungarian compensatory mechanism is much weaker, that is, it cannot counterweight the disproportionality of the single branch.

⁶³ The exact number is the difference between A and B votes minus one. This is because the justification for the new element was that the votes above the runner-up’s votes plus one were not needed for the victory, therefore they should be compensated too.

parties' seat-share above supermajority. Third, disproportionality is also exacerbated by changes that render it way more difficult for the opposition to cooperate. This includes on the one hand, the abolition of the runoff system in the single districts,⁶⁴ and, on the other hand, a complex network of incentives for the parties (the opposition) to run separately.⁶⁵

Besides enhanced disproportionality, the districts were gerrymandered through the new boundaries adopted with the 2011 electoral system.⁶⁶ According to political scientist Gábor Tóka's analysis, at the 2022 elections if the united opposition should have won by more than 3 percent nationwide in terms of vote-share to secure majority in terms of seat-share.⁶⁷ As it was pointed out in the legislative debates in 2011, right-leaning districts had in average of five to six thousand fewer voters.⁶⁸ This latter aspect might have been important, as under the HCC's case law, there might be some differences between the constituencies, however, even negligible differences could be unconstitutional.⁶⁹

4.2 Electoral Procedure

Changes took place regarding electoral procedure as well. Similarly to other areas mentioned above, no new imagination of elections or electoral procedure was codified. Indeed, the underlying principles of the 2013 EPA (e.g., fairness, equal chances of political actors) underscore the basic liberal-constitutional conception of elections.

Nevertheless, some changes took place, the most important among them are the attempt to introduce active voter registration and the discrimination in postal voting. As to the former, in Hungary passive voter registration had been in place since the democratic transition, namely, voters were automatically on the electoral roll. In the 2013 EPA, however, an active scheme was introduced, in which voters should have indicated beforehand if they wanted to be on the roll. This presumably served partisan purposes, as Fidesz-KDNP's voters are considered more dedicated compared to the opposition's, therefore they are more likely to register. As mentioned below at Section 5, the HCC annulled the legislation.

⁶⁴ In the previous electoral system a second round took place in the single district, if the turnout was below fifty percent, or, more importantly, if no candidate garnered an absolute majority. In terms of cooperation this enabled alliance-forming after the first round, so the negotiating partners had clear results at the table, and they could also preserve their independent political identity more by having separate candidates in the first round.

⁶⁵ The most important incentive is the mixed nature of the system: even if a party cannot win a single mandate, it might become a parliamentary party by reaching the 5 percent threshold. Moreover, rules on campaign finance also incentivize parties to run separately.

⁶⁶ For a thorough analysis see: Political Capital: Félúton a választási reform, 19 April 2012, available at: http://www.valasztasirendszer.hu/wp-content/uploads/PC-FES_ConferencePaper_FelutonAValasztasiReform_120417.pdf (last download. 2022.08.29.).

⁶⁷ Tóka 2020.

⁶⁸ Gergely Karácsony, former MP pointed out this in his speech at the opening of the general discussion on the proposed 2011 Election Act.

⁶⁹ Decision no. 22/2005. (VI. 17.) of the HCC.

As to the discrimination regarding postal voting, under the election procedure act, only voters without Hungarian residence could vote this way, those living in Hungary but staying abroad need to go to a foreign representation, that might imply a travel of few thousand kilometers. This also presumably serves partisan interests, as voters without Hungarian residence are predominantly Fidesz-KDNP voters, while those staying abroad with Hungarian residence are inclined towards the opposition.⁷⁰

4.3 Poor Quality of Legislative Procedure

Another trait of manipulative electoral politics is the poor quality of the legislative procedure. Law-making in Hungary has been suffering from significant irregularities after 2010 in general – the misuse of expedited procedures, exclusionary procedure in terms of opposition participation, poor quality of preparatory work and reasoning, just to name a few.⁷¹ Electoral legislation is no exception to this general trend, the adoption of the 2011 Electoral System was marred by procedural flaws.

The deliberative quality of the reform was low, as one commentator observed, the majoritarian character of the new system, for example, *‘were left without meaningful public comments by the legislative majority.’*⁷² Also, as the act was initiated as a single MP proposal, in which case no formal public consultation needs to be initiated and no impact study shall be attached. Also, the new system was adopted with the explicit disapproval of the opposition, moreover, as OSCE-ODIHR noted *‘not broadly discussed among all the relevant stakeholders and in particular the political parties before adoption.’*⁷³

The quality of the legislative procedure is relevant as in case one political actor secures the necessary two-thirds majority, then the low quality indicates that no genuine reform took place, but the changes served partisan purposes. The 2011 reform is not an isolated case: as noted below, after the 2018 elections the 2013 EPA was amended unilaterally, moreover, in 2020, the electoral system was slightly modified in the middle of the COVID-19, with other procedural irregularities.

4.4 Once in Power, Always in Power—the Multiplier Effect

Finally, as a characteristic of the unfolding electoral politics, it should be mentioned that electoral legislation was instrumentalized not just at the moment of creation of the new legislation, but also subsequently. In other words, electoral law – just like

⁷⁰ 94 percent of postal ballots were cast to the Fidesz-KDNP list in 2022. Indeed, the comprehensive analysis of the think-tank Political Capital lists the discrimination as favoring the right-wing parties. Political Capital: Két választási reform között?, 2015, available at the following link: http://www.valasztasrendszer.hu/wp-content/uploads/FES_PC_tanulmany_20151015_interactive.pdf (last download: 2022.08.29.).

⁷¹ For a thorough description of the phenomenon, as well as a typology of malpractices see: Kazai 2021.

⁷² Tóka 2014, 312.

⁷³ Venice Commission – OSCE ODIHR (2012) 52.

other aspects of the law of democracy⁷⁴ – became in a constant move, that was enabled by the renewed two-thirds victory of Fidesz-KDNP.

A notable example is the comprehensive amendment of the 2013 EPA after the 2018 elections. By the time of the second general elections held under the new electoral legislation, a firm case-law was established, mostly by the Curia, that ensured many aspects of electoral procedure and campaign.⁷⁵ Moreover, the court's jurisprudence by that time seemed to have handled the most problematic aspects of the misuse of government communication resources, namely, the case when the government campaigned for Fidesz-KDNP.⁷⁶ After the 2018 elections the law was modified, and several decisions of the Curia were 'over-codified', that is, casuistically invalidated by changing the text of the statute. Among others, provisions on campaign were changed in a way that government activities were exempted from being scrutinized under the 2013 EPA. As a result, legal answer to the overlap between the communication of government and governmental parties became and remains muddled.

Another example, related to the electoral system, is a change regarding the threshold that parties need to meet in order to set up national party lists. Prior to a 2020 modification of the law, parties had been required to have candidates in at least twenty-seven constituencies (from the overall 106), and those constituencies should have covered at least nine counties and the capitol ('27–9-Budapest rule'). This enabled the opposition to have multiple party lists, thus retaining some of their political identity, even if it was negotiated that every district a single opposition candidate should run against the Fidesz-KDNP candidate. While such cooperation had seemed implausible before, at the 2019 municipal elections the opposition formed an electoral alliance, winning in many major cities and in Budapest as well, foreshadowing an electoral alliance at the 2022 elections.

As a response, certain aspects of the law of democracy were changed in a way to exclude some of the opposition's strategic options.⁷⁷ Part of this process was changing the 27–9-Budapest rule to seventy-one constituencies in at least fourteen counties plus Budapest (71–14-Budapest rule). This effectively ruled out the possibility

⁷⁴ A notable example is the formation of parliamentary groups. In 2012 the socialist party split, and those leaving and establishing a new party wanted to have a parliamentary group. As a response, the standing orders were changed in a way that the required number of MPs was increased just above the number of MPs leaving the socialist party, moreover, it was required that only those parties can create a parliamentary group that run at the previous general elections – something that was impossible for the newly forming party.

⁷⁵ For example, the Court made it clear that signatures needed for candidacy can be collected at parking lots, even if they are owned by private companies, or, that parties might launch applications that help citizens to share their cars in case of voting abroad.

⁷⁶ Most notably, in the 2018 elections the government launched a billboard campaign that featured a blurred crowd of migrants and a 'STOP' text, similar to the one on traffic signs. The Curia held that although the government is not barred from communicating with the citizenry (not even in campaign period), it cannot magnify one of the competing parties agenda, and the timing of the communication should be justified by objective reasons.

⁷⁷ As a first step, rules of forming parliamentary groups were changed in a way to prevent the opposition from setting up independent candidates (they cannot join a parliamentary group anymore), or to run as an election party that then dissolves into smaller parties.

of having separate lists and cooperating at the single constituencies at the same time, and also made it harder for smaller parties to set up a national party list. It is notable that the modification was adopted in the middle of the COVID-19 pandemic, therefore the public discourse was hindered partly by the pandemic dominating the agenda, and partly by legal means, since, as a pandemic-measure, no demonstration could take place at the time. Moreover, even though the amendment was submitted as a government proposal, neither the text nor an impact study had been published for public consultation despite the related statutory requirements. Finally, although the explanatory memorandum to the proposal argued that the modification was necessary because of the high number of the abuse of state subsidies by ‘fake parties’ (an indeed existing problem), it is to be noted that the said problem had been present for years, therefore the timing remains suspicious.

It is noteworthy that the Venice Commission and the OSCE-ODIHR, besides highlighting the procedural defects mentioned above, gave an analysis of the 71–14–Budapest rule, taking into consideration the particular context and concluding that *‘the amendment looks favorable to the incumbents.’*⁷⁸ The opinion acknowledged the putative legitimate aim behind the legislation (preventing party fragmentation and combating fake parties) in an abstract sense, however, it highlighted that considering the plurality on the opposition side, the concrete legislation favors the governmental parties. The opinion is a good example of that the procedural quality of an electoral legislation needs to be considered, moreover, that changes that are justifiable in an abstract sense should be viewed against the actual context.

5 Role of the Constitutional Court

The Hungarian Constitutional Court can interfere with the unfolding electoral politics in two ways. On the one hand, through judicial review of the modified, or newly enacted legislation the court can become veto player in the lawmaking process. On the other hand, through electoral adjudication (i.e., deciding electoral disputes) the HCC can bar populists from applying electoral malpractices, related, for example to campaign activities of the government.

As shown above, electoral politics in Hungary after 2010 did not discard explicitly the basic liberal-constitutional conception of representation, however, it could implement partisan electoral politics without significant judicial intervention. The HCC’s case-law is instructive in answering how this might have happened. I argue below, that on the one hand the Court has become less accessible, and its focus was steered towards a rights-based approach, in which manipulative electoral politics is harder to conceptualize legally. On the other hand, electoral legislation has been a blind spot of constitutional doctrine – neither the previous Constitution, nor the Fundamental Law provided sufficient protection against partisan changes, at least as interpreted by the HCC since 1990. On the third hand, although the constitutional framework could have provided protection in some cases, especially in issues

⁷⁸ Venice Commission – OSCE ODIHR 2021. 7.

directly related to the fundamental right of the right to vote, however, I argue that through changing the composition of the HCC, it was first deactivated, not to intervene, and then reactivated, to support populist electoral practices.

5.1 Review of Legislation – Constitutional justice, Blind Spots, Court-Packing

One of the factors explaining the lack of effective judicial review is the shortcoming of constitutional justice as institutionalized in the FL and in the related legislation. First, in order courts to be able to intervene, they need to be easily accessed. This was provided by the previous Constitution with the so-called *actio popularis*, through which virtually anyone could initiate abstract review of any law. In the new constitution no such route exists, only a handful of public law actors might initiate abstract review.⁷⁹ Of them, the most relevant is the possibility that fifty MPs might turn to the Court, however, this requires a broad cooperation within the opposition. Moreover, although there is the possibility of constitutional complaint, a rights-based remedy, in that case strict admissibility criteria prevail. Therefore, there are cases that simply does not reach the HCC.⁸⁰

Second, even if the Court is accessed, for successful litigation it is key that the constitutional claim is formulated in a way that the underlying issue can be grasped in the existing legal framework. Constitutional complaint is a rights-based remedy, through which citizens might lodge a complaint if their fundamental rights are violated. However, some cases are simply hard to conceptualize in a rights-framework. For example, if electoral legislation is changed shortly before the elections, then the systemic values of rule of law and democratic accountability are violated, however, the relationship with the right to vote might be more indirect, and under the Court's case-law, such systemic values, as a general rule, cannot be the basis of constitutional complaints.⁸¹ Moreover, even if the case is admitted, the rights-based framework is not sufficient to grasp the manipulation. Indeed, as noted in the U.S. literature, a rights-based approach triggers too much court intervention in some cases, whereas it does not provide ample protection in others.⁸²

Another factor is that the subject of electoral systems has been a blind spot of constitutional doctrine in Hungary. Neither in the previous Constitution, nor in the FL was a specific electoral system entrenched (as in Ireland, for example), neither contained the constitution a principle of elections that would narrow down the institutional options (e.g., principle of proportional representation, as in the

⁷⁹ Article 24 (2) e) of the FL.

⁸⁰ Neither the gerrymandered districts, nor the abolished runoff was litigated, and the divergent interests within the opposition presumably played a dominant role in this matter.

⁸¹ Regarding the rule of law, there are two exceptions: ex post facto legislation and if there is not ample time provided for the subjects of the law. Decision no. 20/2014. (VII. 3.) of the HCC para [53]. But besides this, Article B (1) stipulating rule of law and democracy cannot be referred to in a constitutional complaint.

⁸² Pildes 2003.

Netherlands).⁸³ Accordingly, under the HCC's consistent case law the legislator enjoys a wide margin of appreciation, when adopting the electoral system.⁸⁴

Moreover, from a rights-perspective, the exact implications of equal right to vote has been muddled since the democratic transition. It was clear from a 1991 decision of the HCC on the electoral threshold that equality of the vote does not mean proportional representation (*'effective equality'*, in the Hungarian terminology). It is also settled that the right covers numerical equality that excludes, for example, additional votes granted to those with children, moreover, it is recognized as well, that equality rules out malapportionment.⁸⁵ It was not clear, however, whether and to what extent other aspects of the electoral system are covered by the equal right to vote, and whether they should be examined in the framework of a classic proportionality test. The deference and the uncertainties related to the equal right to vote exposed the electoral system even before 2010 to the cartel of parliamentary parties, who were eager to squeeze out smaller competitors, most notably by the increase of the electoral threshold from four to five percent.⁸⁶ After the 2010 elections, when one actor secured the necessary two-thirds majority, the legislation was exposed to partisan changes detrimental to the parliamentary opposition as well.⁸⁷

The impact of the above factors is illustrated by the HCC's 2014 decision on winner bonus.⁸⁸ Although the law was adopted in 2011, no abstract procedure was initiated until the elections of 2014, presumably due to the required number of MPs and the deep cleavages within the opposition. After the 2014 elections, a constitutional complaint was initiated, and the complainant based the violation of the right to vote on the argument that the legislator unnecessarily deviated from the equal right to vote by giving additional weight to votes that already contributed to a mandate at the single district. The HCC, however, reiterated on the one hand that deference should be given to the legislator, and that the equal right to vote does not entail proportional representation – it even noted that a pure FPTP system would be constitutional.⁸⁹ This implies that tampering with the proportionality of the electoral system falls outside of the domain of constitutional protection.

Lastly, in some cases the Court's inactivity cannot be explained by anything else, that it was simply not willing to counter the legislator's ambitions. This is shown by the change of attitude between 2013, when the HCC annulled voter registration and the restriction on political ads, and its reluctance to enforce the constitutional protection at the postal voting case in 2016.

When the two-thirds majority implemented active voter registration and the restriction of political ads to public media in the 2013 EPA, the HCC intervened,

⁸³ Article 53 (1) of the Constitution of the Netherlands, Article 16 (2) 1. of the Constitution of Ireland.

⁸⁴ Decision no. 63/B/1995. of the HCC.

⁸⁵ Decision no. 3/1991. (II. 7.) of the HCC; Decision 22/2005.. (VI. 17.) of the HCC.

⁸⁶ Ilonszki and Várnagy 2014, 421.

⁸⁷ Kenneth Benoit explains the relative stability of the Hungarian electoral system with the fact that no single political actor secured two-thirds majority; the only time of such supermajority is the period between 1994 and 1998, however, the coalition parties had very different political interests in terms of electoral institutions. Benoit 2004, 377.

⁸⁸ Decision no. 3141/2014. (V. 9.) of the HCC.

⁸⁹ Ibid at para [39].

showing that the existing legal framework, namely the right to vote and free speech are capable of grasping some of the malpractices.⁹⁰ The Court noted that the right to vote might be restricted only in line with the general necessity-proportionality test, and it also underlined that its previous case-law can be referred to, due to the fact that suffrage is regulated with the same substance in the former Constitution and the FL. The HCC emphasized that whereas active voter registration is not *ab ovo* ruled out, and might be constitutional in a newborn democracy, in Hungary by 2013 there had been a more-than-two-decade practice of passive registration. As the active registration did not serve any legitimate aim, it was ruled unconstitutional.

The decision underscores that the HCC was not completely trapped by provisions of the Fundamental Law in electoral matters. The most noteworthy argument is the one giving weight to the previously evolved democratic traditions. Elections are constitutionally underdetermined; there is no single electoral system or procedure that would be considered constitutional universally, indeed, choosing from different electoral systems is more of deciding between different conceptions of democracy.⁹¹ Countries with unquestionable democratic pedigree use different electoral systems and procedures. Thus, from an abstract view a wide range of institutional options are constitutional; in our example, many countries use active-voter registration. However, accepting reference to foreign examples or to overly abstract arguments at face value would mean that the system is exposed to manipulation, as any partisan change may be disguised as pursuing the abstractly legitimate aim behind an institutional option. The HCC's interpretation in the 2013 decision prevented this by taking into account the existing democratic traditions and the exact context. Therefore, it foreshadowed an effective case-law looking into the actual context of the legislation. Moreover, it was also shown that the rights-based review with the framework of necessity-proportionality test can detect whether the legislation serves only partisan purposes.

Nevertheless, shortly after the voter registration case, in April 2013, the majority was turned in the Court, and judges nominated and elected solely by the two-thirds majority (without votes of the opposition) gained majority.⁹² The contrast between the attitude of the old and the new HCC is shown by the 2016 decision on voter registration.⁹³ As mentioned above, under the new law on electoral procedure, only voters without Hungarian residence could cast ballot via postal voting. A constitutional complaint was lodged before the Court, alleging the violation of the right to vote and the prohibition of discrimination. The HCC, although it reiterated that the right to vote is a fundamental right, argued that the regulation on postal voting as a special voting arrangement is a mere technicality, it does not bar anybody from voting, therefore it does not affect either the right to vote, or its exercise.⁹⁴ As a result, not a necessity-proportionality test (as some type of 'strict-scrutiny', in the U.S. terminology)

⁹⁰ See Decision 1/2013. (I. 7.) of the HCC.

⁹¹ Katz 1997.

⁹² For an overview of the changes see: Bodnár 2022.

⁹³ Decision no. 3086/2016. (IV. 26.) of the HCC.

⁹⁴ In the Hungarian doctrine there is a distinction between the right to vote, namely, the personal scope of the right, and the exercise of suffrage. The former can be restricted only in the constitution, whereas the latter might be restricted on the statutory level, however, only with the observance of the necessity-proportionality test. See Decision no. 1/2013. (I. 7.) of the HCC, paras [59]-[63].

was applicable, but a far more lenient test of rationality, under which the legislator needs only to show that the law furthers some goal that is not unreasonable. The HCC argued that this standard was met, since there was a difference between voters with Hungarian residence, as they had two votes (single district and list), while those without domestic residence only one vote (list). The decision is extremely vague at this point, indeed, as commentators pointed out, it is not clear that how the difference in the number of ballots is connected to the possibility of postal voting.⁹⁵

The contrast between the Voter Registration Case and the Postal Voting Case underscores that while accessibility, changed focus, and doctrinal blind spots explain to a degree the HCC's inactivity, a highly relevant factor was the changed composition and the related decrease of willingness to counter the lawmaker's ambitions. Indeed, the Court has not annulled a piece of electoral legislation since 2013. This is to be viewed against the backdrop of the well-known challenges that affected the court's independence, most importantly, court-packing.⁹⁶

5.2 Electoral Adjudication

The HCC also plays an important role as the last appeal in electoral disputes. With the introduction of a new kind of constitutional complaint in the FL, the Court's competences now cover deciding on the constitutionality of ordinary court judgments.

The HCC's default stance is deference towards the courts. It stressed in numerous decisions that it does not perceive itself as a court of fourth instance, and it is not its job to interpret the law, but to ensure that the case-law remains within the constitutional framework.⁹⁷ Moreover, the Court applied strict admissibility criteria, pushing away many of the petitions, in some cases with a rather questionable argumentation.⁹⁸ It seemed that the HCC was not keen on interfering with the case-law of the ordinary courts.

However, a friction was inevitable between the courts, most notably, the supreme court (the Curia), and the HCC. In the Hungarian constitutional system Curia is the highest in the ordinary court-hierarchy, therefore its task is focused on interpreting statutes, while it is the HCC's constitutional function to ensure that the interpretation of statutes remain within the constitutional boundaries. After it became evident, that the Curia interpreted in many cases the statutes and the background constitutional provisions in a way consistent with their *prima facie* meaning (that is, with liberal constitutionalism), the HCC activated itself in an arbitrary manner, overstepping its competences and trespassing the law-interpreting competences of the Curia.⁹⁹

⁹⁵ Moreover, that the reason d'etre of the distinction is the difference in the connection to the state (residence). However, this would justify a scheme that gives benefits to those having Hungarian residence, while the legislation at hand gave opposite results. For a thorough analysis of the decision in English see: Bodnár and Varsányi 2018.

⁹⁶ Bodnár 2022.

⁹⁷ In electoral matters see: Decision no. 3319/2019. (XI. 21.) of the HCC.

⁹⁸ Bodnár and Mécs 2018.

⁹⁹ Mécs 2019.

A recent example is a case, when the Curia needed to decide on the permissibility of government speech in the 2022 electoral campaign. As mentioned above, by 2018 a firm case-law was formed that could handle the most serious abuse of government resources in the electoral campaign period in terms of communication, namely, when the government launches a campaign that amplifies the governmental parties' agenda, distorting the political competition. As a response, the law was changed to exempt government speech from scrutiny in the framework of the 2013 EPA. Nevertheless, the basic principles of the act were not changed, most notably, it still prescribed the equal chances of parties, moreover, the constitutional background remained intact as well, from which the Curia (and the HCC as well) read out the requirement of state neutrality in the campaign period.¹⁰⁰ Therefore it was not clear, to what extent the modification reached its goal.

It was in this context that a case was decided by the Curia on e-mails sent out by the government in the campaign period. As to the facts of the case, after the war against Ukraine broke out, the government sent out e-mails via the database that had been collected in order to keep the citizens updated on the COVID-19 measures and the possibilities of vaccination. However, the e-mail contained the government's statement on the war, and also, an accusation that the opposition 'irresponsibly' would send soldiers and weapons to Ukraine. The Curia decided that the Government violated the principle of equal chances of parties, and although the government's measures taken within its competences are not campaign activities, and therefore are exempted from scrutiny, however, criticizing the real or putative message of the opposition does not fall within this category.¹⁰¹

The HCC overturned the decision, with a rather questionable verdict that is hard to defend with legal arguments.¹⁰² First, the constitutional complaint was lodged by the government, and according to the petition, the Curia's interpretation was so *contra legem* that it violated the government's right to free trial. It is notable that the government has had problems with using the rights-based constitutional complaint, as it can be the subject of fundamental rights to a very limited degree. Recently, however, the HCC interpreted the government's right to fair trial in a sweeping manner so it could admit politically sensitive cases.¹⁰³ Second, the HCC in fact submerged deeply in the interpretation of the statutory background, instead of highlighting the constitutional boundaries, thus violating the distribution of competences between itself and the Curia. The Curia, the decision went, did not attach to the situation of war sufficient weight, and under the HCC's interpretation in such a situation the government's communication might cover '*providing information on the opposition's views*'.¹⁰⁴

¹⁰⁰ Mécs 2020.

¹⁰¹ Decision no. Kvk.II.39.260/2022/5. of the Curia, paras [77]-[78].

¹⁰² Decision no. 3130/2022. (IV. 1.) of the HCC.

¹⁰³ Another example is the referendum initiated by the government, that was held on the same day as the 2022 parliamentary elections. One chamber of the Curia found one of the questions inadmissible, however, the HCC overturned the decision, holding the case admissible relying also on the government's right to fair trial.

¹⁰⁴ Decision no. 3130/2022. (IV. 1.) of the HCC, para [40].

The decision is illustrative of the HCC's approach to the most politically sensitive electoral matters. It does not negate explicitly the liberal-constitutional principles (such as in our case state neutrality), on the contrary, it usually reinforces them on the abstract level of reasoning. However, there is always a part in the decision that leaves the track of these principles, making the political motivations conspicuous. The result is that the HCC effectively prescribes the exact statutory interpretation that favors the ruling parties' interests.

6 Conclusions

From the above, a conclusion on the one hand, can be drawn, that there is no distinct populist electoral politics, in the sense that the peculiar imagination of representation and elections are not transformed directly into the constitutional-statutory level by adopting institutional options that would be populist per se. Instead, populist shrewdly put together already existing and *in abstracto* justifiable elements in a way that serve self-entrenchment. In this sense, populism can be considered a factor that exacerbates the 'structural risk' inherent in democratic systems.¹⁰⁵

On the other hand, this does not mean that electoral politics is irrelevant, on the contrary. Modifying electoral institutions is a highly effective way of self-entrenchment, and indeed, the Hungarian example shows that by changing elements that might seem technicalities and are complex (and thus, flight under the radar of the average voter) governmental and even constitutional majority can be manufactured. As argued above, in the process of '*extracting the people from the people*' tampering with the (dis)proportionality of the electoral system as well as gerrymandering are especially effective practices. This majority, in turn, will be the basis of subsequent institutional changes in terms of legal requirements and, also, of rhetorical basis. Moreover, similarly to populist constitutional politics, electoral politics does not stay static, but the law is constantly tailored to the actual political situation. This is labelled as the '*multiplier effect*', where partisan changes enable the incumbents to stay in power and implement further modifications.

Moreover, electoral politics unfolding in Hungary is a complex process, that cannot be examined without the broader constitutional context. It involves changing electoral law, however, it also requires modifications in terms of electoral justice. Since the HCC is key both in terms of reviewing legislation and adjudicating in electoral disputes, the Court's challenges in terms of independence are also instrumental in the unfolding electoral politics.

It was also argued above that while apex courts might be key players in the unfolding electoral politics in populist regimes, the Hungarian Constitutional Court did not protect electoral legislation, and this might be explained along multiple factors. These include the way constitutional justice is institutionalized (limited access, changed focus), and the fact that electoral legislation and especially electoral

¹⁰⁵ Pildes and Issacharoff 1997.

systems are blind spots of Hungarian constitutional doctrine. Nevertheless, it is also a key factor that due to its changed composition and the fear from backlash from the two-thirds majority, the HCC presumably was simply not willing to intervene, as indicated by the sharp contrast between its case-law until 2013 and afterwards. It is argued that while the HCC deactivated itself and promoted the unfolding electoral politics this way, at a later stage it was reactivated, often trespassing the competences of ordinary courts, especially in political sensitive cases, such as electoral or referendum cases.

This leads us to a more general conclusion, namely, that although keeping the façade of liberal constitutionalism but tampering with the institutional context might be very effective, it has its cost, as it inevitably causes a friction between judicial bodies and the populist expectation. In other words, if you write the guarantees of free and fair elections into the constitutional text, then there might be some, who actually take those words seriously. While the National Election Commission's and the HCC's attitude was changed by modifying the composition of those bodies, ordinary courts remained more intact. The 'fight' between the Curia and the HCC underscores this insight and shows that while the former builds a coherent case-law, that in some cases might conflict political expectations, many of the latter's decision cannot be explained along legal reasons.

Finally, based on the Hungarian experience, it can be emphasized that although the changed composition and institutional setting played a paramount role, the gap in constitutional doctrine regarding electoral law is conspicuous. Giving free hands to the legislator will inevitably lead to such results. This underscores that heightened scrutiny is warranted when electoral legislation is changed, especially, when an illiberal-populist regime is in the making. Nevertheless, court-intervention and enhanced activism in terms of judicial review is not without theoretical riddles. It might be argued, in the spirit of John Hart Ely, that courts do nothing more in this case, but enforce the rules of the political process.¹⁰⁶ However, since there is no a priori given way of organizing democracy, courts will inevitably trespass the competences belonging to the political community. Also, there should be more thoughts given to procedural requirements beyond enhanced majorities, like 'freezing periods.' But one thing is for sure; the most important conclusion that should be drawn from the Hungarian experience is that electoral legislation must not remain unprotected.

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¹⁰⁶ Ely 1980.

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