

## Working Paper

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# The Contradictions of Constitutional Engineering

An Analysis of the New Hungarian  
Parliamentary Election Laws and their  
Role in the Power System of the Orbán-  
Regime

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During the last two years, Hungary was often highlighted negatively by the foreign press. Topics like media regulation, the quality of the new constitution or the dual citizenship of Hungarians living abroad were regularly discussed and have marked the country's international image. Yet the subject of election reform, which was also implemented during this time, remained in the background, out of the spotlight of clear and critical interest. This is startling given that the effects of the adopted acts – a law on parliamentary elections<sup>1</sup> and a second on the election procedure<sup>2</sup> - have the potential to be as important, if not more so, to the future development of the Hungarian democracy than the other regulations mentioned above.

Obviously, electoral systems fundamentally influence the outcomes of elections through the aggregation of votes into mandates and have a huge impact on the development of the party system. They are often purely administrative, unquestioned elements of a democracy compared to party competition, and their rules are traditional and widely accepted by all political powers. The analytical interest is quickly piqued when reforms to the electoral system alter the existing rules of transforming votes into mandates, especially, if the reform is adopted and implemented by the overwhelming majority of a one-party government against the resistance and amendments of all other parliamentary forces. In consequence, it can be suggested that the changes only serve the political interest of the governing party. Does this hypothesis apply to Hungary?

This paper has two main objectives: to reveal the background of the electoral system reform in Hungary and to analyse the effect of the new system from the perspective of the current political situation and cleavages in Hungarian society with an emphasis on the forthcoming parliamentary elections in 2014.

## **The Parliamentary Election System in Hungary 1989-2012 – Strengths and Weaknesses**

The previous Hungarian electoral system<sup>3</sup> was born of a political compromise between the political forces of the oppositional round table and the representatives of the communist state party MSZMP<sup>4</sup> during summer and early autumn of 1989 in a transitional phase before the first free elections in spring 1990. In the autumn of 1989, the electoral success of the communist party was a realistic option. It was therefore desirable to adopt a mixed election system, with both majoritarian and proportional elements, which would allow a stable governing majority alongside proportional representation and the strong presence of oppositional parties to take root.

There were a total of 386 mandates, which could be won in three different ways. 176 mandates could be obtained in single mandate constituen-

<sup>1</sup> Act Nr. 2011/CCIII

<sup>2</sup> Act Nr. 2013/IIIVI

<sup>3</sup> Codified by act Nr. 1989/XXXIV.

<sup>4</sup> Hungarian Socialist Working Party

cies by winning absolute majority of the votes (if necessary, in two election rounds); 152 mandates were distributed via 20 territorial party lists (on the level of the 19 counties and Budapest) according to the Hagenbach-Bischoff system; and the remaining 58 mandates were distributed on the basis of a national-level compensation list, which gathered the ineffective votes of the constituencies and the territorial party lists, following the d'Hondt system.

Obviously, the implemented system was complicated, as the reform discourse of the current governing party Fidesz stated. The number of mandates and MPs was certainly high in comparison to the parliaments of other European countries with similarly sized populations. It is also true that, due to the increasing political polarisation of the Hungarian political field, the majoritarian dimension of the electoral system became more and more dominant. Conversely, this regulation made the Hungarian parliamentary system one of the most stable in East-Central-Europe for nearly two decades. Between 1990 and 2009 no pre-term elections took place, no minority governments existed and most governments completed their four year terms.<sup>5</sup> The only significant amendment to the law was adopted in 1994 when the threshold for party lists was increased from 4 to 5 percent to hinder the entrance of radical right-wing nationalist Hungarian Justice and Life Party (MIÉP) into parliament, that time with success.

The only grave deficiencies of the Hungarian electoral system, which also caused constitutional difficulties, originated in the fields of candidacy and equal ballot. 750 recommendation letters were needed from citizens eligible to vote in order to become a candidate in a constituency.<sup>6</sup> This system has always been in the crossfire of critics, who question whether it is compatible with the principle of secret ballots or not. The Constitutional Court declared in its 1991 judgement<sup>7</sup> that although the candidacy system based on recommendation letters is not unconstitutional, it violates important data protection standards and advised the legislative to choose a candidacy method better suited to these provisions. The ombudsman for data protection also repeated these concerns several times, but no legislative steps were taken during the last two decades. On the other hand, as can be seen below, the new electoral system inherited the same candidacy system. The question is obvious: Why does the legislature not fix such a bug within the framework of a comprehensive reform of the electoral system? The answer lies in the political effect of the recommendation letters. Gathering 750 letters per candidate was a huge challenge for small parties or newcomers. The candidacy system filtered parties more effec-

<sup>5</sup> Midterm changes happened concerning the person of the prime minister in 1993 as consequence of József Antall's death and in 2004 with the resignation of Péter Medgyessy, but these changes did not affect the political composition of the governing coalitions.

<sup>6</sup> The candidacy on party list or the right to establish a list was connected to the candidacy in the constituencies. A territorial list could be constituted if the party let stand candidates in one-quarter of the constituencies in a county (or Budapest). To establish a national level party list seven territorial lists were required.

<sup>7</sup> Judgement of the Constitutional Court Nr. 2/1991 (II.18)

tively than the 5% threshold rule and hindered nearly any innovation in the Hungarian party system until 2010, when the green party Politics Can Be Different (LMP) and the radical nationalist party Jobbik were able to enter parliament as a consequence of the collapse of the left-liberal political spectrum on one hand and the emerging social protest potential on the other. And how it looks like it will be some well-established political actors' interest to slow or hinder the party system's further innovations in the future too.

The source of the problems affecting the principle of equal ballot was not a structural shortcoming of the electoral system; rather it constituted an omission by the political decision makers. In order to secure the equality of votes, the territory of the constituencies should be reviewed from time to time to assure that roughly the same amount of votes will result in a mandate in all electoral districts. The borders of constituencies were drafted in 1990<sup>8</sup> and never really supervised until 2011. Due to citizens' mobility, differences in ratio of 2:1 existed after 2004 between the populations of some constituencies. The Constitutional Court stated<sup>9</sup> that this situation fundamentally undermines the principle of the equal ballot, declared the situation unconstitutional and called on the legislature and the government to redraft the borders of electoral districts. Yet this happened only in the wake of the 2010 elections.

The political discourse over the electoral system's fundamental reform started in 2009 with populist arguments by both great parties. Of greatest note is Fidesz call for a smaller, cheaper, more effective parliament instead of the "huge amount of well paid, lazy and idle parliamentarians".<sup>10</sup> A National Assembly consisting of not more than 200 MPs was formulated as a discursive frame for the new election law in the campaign of 2010 by Victor Orbán. However, many experts warned that a mixed election system does not make sense with such a low number of seats, because its proportional element cannot function effectively.

Fidesz presented the first draft of a possible new election law in May 2010.<sup>11</sup> The legislative proposal contained a mixed system with 90 single mandate electoral districts, a proportional party list with 78 mandates at the national level and a compensatory list with 30 mandates. Of all the proposals, this was most similar to the previous electoral system. It preserved the main structural elements in a simplified form, but refitted it to the lower number of parliamentarians. On one hand, the relatively majoritarian, "first past the post" rule was introduced in the constituencies instead of the absolute majoritarian method based on two election rounds which had existed in the previous system. This can be evaluated as an important principle change. On the other hand, when compared to the later accepted law, the majoritarian and proportional elements of the

<sup>8</sup> Resolution Nr. 2/1990 of the Ministerial Council

<sup>9</sup> Judgement of the Constitutional Court Nr. 22/2005 (VI. 17.)

<sup>10</sup> [http://www.valasztasirendszer.hu/wp-content/uploads/LaszloRobert-JuhaszAttila-AKisebbparlamentezesCsapdajaban\\_100310.pdf](http://www.valasztasirendszer.hu/wp-content/uploads/LaszloRobert-JuhaszAttila-AKisebbparlamentezesCsapdajaban_100310.pdf)

<sup>11</sup> Legislative proposal T/18.

system were better balanced and a greater number of mandates could be won on the proportional lists than in electoral districts. But Fidesz later dropped this concept, probably because it did not match the changing political environment or the party's electoral support any longer. The most important reason could be that this system simply could not assure a stable absolute majority of mandates in the parliament under any circumstances for a party with only a relative majority among the voters. As a consequence of this shift in voting behaviour, and more concretely, as a result of a definite decrease in the party's support within society, Fidesz needed and opted for an electoral system with more majoritarian characteristics.

Of course, Fidesz was not the only party with a well-prepared electoral system proposal. The Hungarian Socialist Party (MSZP) presented its draft in May 2010<sup>12</sup> as did the party Politics Can Be Different (LMP) in August 2011.<sup>13</sup> Besides the fact that both parties could not influence the process of the election system reform in any way, another common feature was that both concepts argued for strong proportional and compensatory mechanisms in the context of party list-based mixed election systems, in accordance with political reality and interests of the parties.<sup>14</sup>

The only proposal which tried to remedy the constitutional shortcomings of candidacy and the equal ballot in the election system belonged to the green party Politics Can Be Different (LMP). They suggested the introduction of moral candidacy requirements, like a property declaration and full transparency as to whether the candidate cooperated with the communist secret services prior to 1990. Concerning the equal ballot, they proposed the establishment of an independent "Electoral District Committee" which would supervise the population and borders of the constituencies once every ten years. Due to the independence of the committee, the probability of gerrymandering could be decreased compared to the situation of the Government fulfilling this task.

### **A Seemingly Perfect Choice – for a Temporary Situation**

The act Nr. 2011/CCIII on parliamentary elections was finally adopted by the Hungarian National Assembly on the 23<sup>rd</sup> of December, 2011. The law can be evaluated in manifold ways. On one hand it is surely one of the most modest legislations of the Orbán-government affecting the foundations of the constitutional and political system of the country. On the other hand, it contains some elements which can cause grave concerns; for example, the compensation of the winner in the constituencies. Yet this

<sup>12</sup> Legislative proposal T/20.

<sup>13</sup> Legislative proposal T/3855.

<sup>14</sup> According to the socialist proposal 176 mandates could be distributed on 20 territorial lists (19 counties and Budapest) with Hagenbach-Bischoff system and 23 on a national level compensatory list with d'Hondt system. "Politics can be different" (LMP) drafted an election system with 135 electoral districts, with a national level party list distributing 25 mandates and with a compensatory list of 85 mandates.

seeming contradiction is superficial. The aim of the reform was completely fulfilled by this law: it allows the party with the relatively strongest electoral support (currently for Fidesz) to obtain an absolute majority of mandates in the legislative and creates the possibility of a stable one-party government. A more radical change in the electoral system, such as the introduction of a pure majoritarian system, would not be in the party's political interest, as a serious negative shift in the political attitudes of the society against the government could engender a dramatic loss of mandates for Fidesz in that case.

The new electoral system is composed of 106 electoral districts based on the "first past the post" principle and by a national-level proportional list with 93 mandates. The distribution of the proportional mandates is based on the d'Hondt-system among parties that reach the 5% threshold.

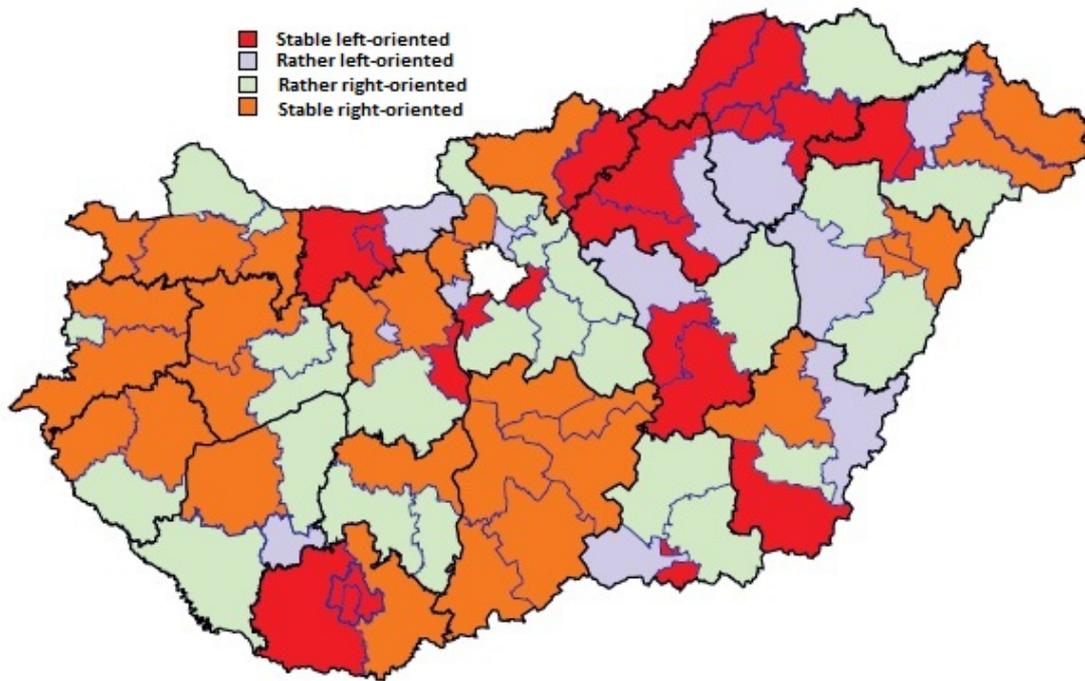
Unfortunately, the legislative did not seriously consider the correction of the earlier constitutional deficiencies. The candidacy system remained basically the same. The only difference is that the number of the required recommendations was increased in the single-mandate electoral districts from 750 to 1,000, following the growth of the number of voters in the enlarged constituencies (106 instead of 176). Moreover, instead of recommendation letters, recommendation lists were to be instituted in future elections. Consequently, the new election system can cause similar concerns over secret ballots and date protection as the old one.<sup>15</sup> The filtering effect of this candidacy method, that is, penalizing smaller and new parties in the constituencies, also persists. The candidacy of the national-level party list is furthermore linked to the constituencies, although theoretically it became easier. With the new system it is possible for a party, which fulfilled the candidacy requirements in one-quarter of the electoral districts. This means that the establishment of a national level party list is possible with 27.000 signatures, where earlier 36.750 signatures were required for this purpose.<sup>16</sup>

Moreover, a supervision system of the constituencies was introduced into the new law, eliminating the possibility of great differences among the population of the electoral districts', which would violate the principle of equal ballot. The disparity can generally not be higher than 15% and if it reaches 20%, the National Assembly is obliged to supervise the list of the constituencies. An independent body is not responsible for the question, as was proposed by the party Politics Can Be Different (LMP), and so the possibility of gerrymandering cannot be excluded. However, the legislative at least made a step towards the solution of this serious constitutional gap.

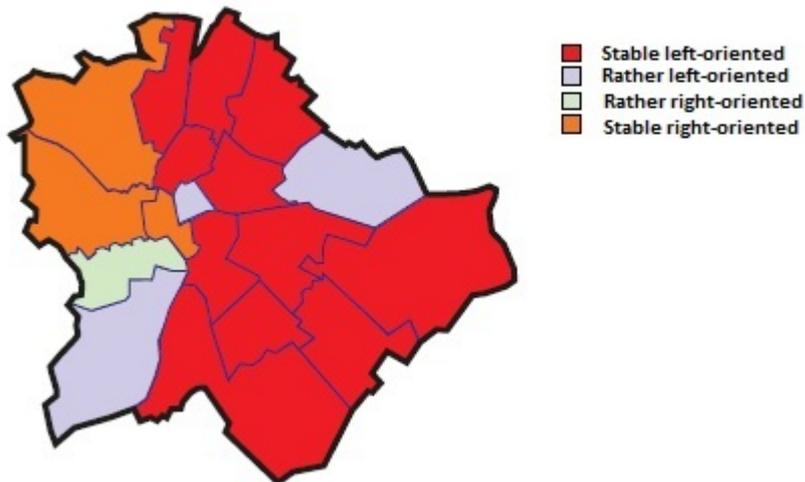
<sup>15</sup> Whether the fact that in the new system a voter can recommend more candidates/parties at once and so on her or his political preferences cannot be explored explicitly, has any effect on secret ballot or not was still not investigated by the Constitutional Court.

<sup>16</sup> <http://www.valasztasirendszer.hu/?p=1940499> It has to be mentioned that this purely mathematical comparison hides the differences between the roles of the national level party list in the two different election systems and between the proportions of mandates within the whole election system which can be won on them.

Although the creation of a simpler election system was one of the most important discursive arguments of Fidesz, the final balance in this dimension is not without ambiguity. Concerning the aggregation of votes to mandates, the outcome is at least questionable. In the constituencies, the two-round absolute majority system became simpler and cheaper with the introduction of the one round relative majority rule. But the proportional part became more complicated, not so much from the perspective of the voters, but with regard to transparency and predictability. In the new election system, the national-level list is comparable to an ordinary proportional list and a compensation list in one, because the votes given for party list and the compensation votes are accumulated, and only after this step are they transformed into mandates. This fact, together with the unique compensation method of the winner in the constituencies makes it difficult to draft any model-scenarios. Compensation lists, as tools for proportionality in electoral systems, are used worldwide. The mainstream mechanism – as it was also used by the earlier and partially by the new Hungarian election law, too – is the following: The votes, which were ineffective in the election districts, e.g. because they were given for the candidates on the second or third place, will be gathered on the compensation list and can be transformed into compensation mandates. But the new Hungarian legislation introduced also the “compensation of the winner” in the constituencies. It means that not only the ineffective votes are counted on the compensation list, but also the difference between the number of votes given for the first and the second place candidate in the electoral district will be transferred to the compensation list for the party of the winning candidate. This is an absolutely unique solution, which weakens the compensation principle since a part of the compensation mandates is secured this way for the winner parties in the single mandate districts. In a country where no deep territorial-political cleavages currently exist and the same party would probably win nearly all constituencies, except perhaps the northeast Hungarian bastions of the right-wing party Jobbik, such a method can have only one aim: maximizing the chance that the current strongest party shall receive the absolute majority of mandates required to a second cycle of calm and smooth government.



Map 1 - New electoral districts in Hungary with estimated political orientation based on the parliamentary election outcomes in 2006<sup>17</sup>



Map 2 - New electoral districts in Budapest with estimated political orientation based on the parliamentary election outcomes in 2006

<sup>17</sup> The parliamentary elections in 2010 showing the overwhelming victory of Fidesz can be evaluated either as an exception, so that the last elections represent somehow the 'normal' political-territorial stratification of Hungarian society are from 2006. On the other hand estimations based on the election outcomes from 2006 have a huge weakness: they can hardly take the changes in the party system, e.g. the emergence of Jobbik and LMP, into consideration. Source of the maps and methodology: [http://www.hazaeshaladas.hu/ftp/hesh\\_evk\\_elemzes\\_tordelt\\_v5\\_\\_1\\_.pdf](http://www.hazaeshaladas.hu/ftp/hesh_evk_elemzes_tordelt_v5__1_.pdf)

Although the “compensation of the winner” is to some extent a unique and unknown method, it can be hardly judged as undemocratic or unconstitutional. A stable government is an aim and value of electoral systems as important as the proportional representation of parties and social interest structures. As long as the democratic change of the government is possible, a simple “first past the post” majoritarian system is just as democratic as a pure proportional one. And as long as a clear majoritarian election system cannot be criticised theoretically, it is also problematic to criticize a mixed system with a softened compensation mechanism.

Concerning the allocation of the mandates, the Republikon Institute in Hungary presents a methodologically well-founded model of the new electoral system, based on different periodical surveys in every month.<sup>18</sup> They work with two different political scenarios, which cover a full, left-liberal cooperation among the Socialist Party (MSZP), the Democratic Coalition (DK) and Politics Can Be Different (LMP), on the one hand, and the independent participation of these parties in the elections, on the other.<sup>19</sup> Currently, the probability of such cooperation is very low, at least from the part of LMP, although it could be enforced at the last minute among the oppositional parties (including “Together 2014” and “Dialogue for Hungary”<sup>20</sup> (PM)) by the electoral system itself. Nevertheless, it is difficult to construct another scenario where they could have the chance to reach relative majority status and beat Fidesz in the constituencies. The outcomes of the models of the Republikon Institute fully support the above statements. The electoral system allows Fidesz, currently the country’s greatest political power in relative terms, which would collect 35-41 % of the votes of people with stable party identification and 19-22% of all voters<sup>21</sup>, to win more than half of the mandates, creating a stable governing majority. Nevertheless Fidesz is obliged to maintain this support. If any oppositional party or conglomerate, such as “Together 2014” can achieve even a tiny advantage over Fidesz, the electoral system will swing in their favour.

## **Minority Representation at Home and Abroad – Unpredictable Outcomes?**

Since the amendment of the Hungarian citizenship law in June 2010 and the introduction of the post-territorial phenomenon<sup>22</sup> into the citizenship legislation, huge international attention has been paid to the question of whether Hungarians abroad would become eligible to vote and if so, how they could influence the outcome of the next parliamentary elections held

<sup>18</sup> <http://www.republikon.hu/news.php?id=273>

<sup>19</sup> Unfortunately their model was not modified until now after the born of the Movement “Together 2014” (Együtt 2014 Mozgalom) of Gordon Bajnai.

<sup>20</sup> Newly founded oppositional party of the LMP dissidents since November 2012.

<sup>21</sup> <http://www.ipsos.hu/site/befagyott-er-viszonyok/>

<sup>22</sup> Francesco Ragazzi – Kristina Balalovska: Diaspora Politics and Post-territorial Citizenship in Croatia, Serbia and Macedonia In. CITSEE Working Paper Series 2011/18

in 2014. The possible representation of national and ethnic minorities in the legislature has raised nearly no awareness, despite the fact that Hungary was until now often criticised by neighbours and by the competent monitoring bodies of the Council of Europe for the lack of such measures. Now, the new election law closed a nearly two decade-long nonfeasant violation of the constitution.

The act Nr. 1993/LXXVII, on the rights of national and ethnic minorities, recognised 13 minority groups in Hungary and set forth their right to parliamentary representation. For various reasons, such as a lack of political interest, fears about the voting behaviour of the 13 minority representatives, etc., the environment necessary for the implementation and enjoyment of this right was never created, even though, as mentioned above, Hungary was repeatedly criticized for this lapse. The political pressure from the minority groups themselves, their international partners and other organisations was simply never high enough to initiate fundamental changes in the electoral and constitutional system of the country. From this perspective it is only too welcome that the new election law regulates and simplifies the process of gaining mandates for minorities, even if the mandatory representation is not assured. It means that first of all the 5% threshold is not valid for minority lists, which can be established by the minority self-governments existing in the country, and secondly, that they can earn the first mandate with fewer votes, the so called minority quorum. To calculate the minority quorum, all votes given for party lists have to be divided by the number of proportional mandates (93). That figure represents the hypothetical number of votes required to a mandate (quorum).<sup>23</sup> To get the minority quorum, this number has again to be divided by four. By this procedure, minorities can essentially earn the first mandate required with the symbolical representation of a quarter of the votes that are hypothetically needed.

To avoid both the often criticised phenomenon of “ethno-business” and the intervention of the majority society in the internal issue of minority representation, only those persons, who enrolled in the appropriate minority register according to the rules of the minority self-governments’ election, can vote for minority lists.<sup>24</sup> Voting for the minority list does not allow an extra vote for persons belonging to minorities. The registered persons are only able to choose whether they would like to vote for the party list or for the appropriate minority list. The mandates filled with the help of the minority quorum do not increase the number of seats in the parliament, because the mandates of the proportional list have to be decreased by their number. For the establishment of a minority list the recommendation of 1% of the persons represented in the minority register is required, but this figure cannot be higher than 1,500.

<sup>23</sup> This quorum is not used by the allocation of mandates from the national level proportional list, which uses d’Hondt system for this purpose (a system, in which to every mandate belongs a different amount of votes), only to the calculation of the minority quorum.

<sup>24</sup> Act Nr. 2011/CLXXIX.

Which minorities have a chance to win mandates this way? If calculated with an average participation of 64.2%, like in the case of the last parliamentary elections in 2010 and theoretically with 8.4 million persons eligible to vote<sup>25</sup>, the minority quorum will lay at 14,497 votes. Based on the demographic weight of the communities and the number of voters who can be mobilised for ethnic voting it can be stated that the emergence of 1-3 minority mandates is possible. For the Roma self-government, or even for one of the large Roma political organisations, it would not be an impossible challenge to bring 15,000 voters to the elections. From a demographic point of view, reaching this threshold also would not be impossible for the German and Slovak minorities, although their attitudes towards supporting ethnic mobilisation and voting are much weaker, so it is not evident that they will reach the minority quorum. In a parliament of 199 seats, where 1-3 seats are occupied by minority representatives, minorities will only control around 1% of the parliament seats. On one hand, this reflects the fact that the system only eases the earning of mandates for minorities; it does not create an appropriate or proportional representation. The level of minority political representation will still be far from their demographic weight in Hungarian society. On the other hand, 1-3 members of the parliament, perhaps behaving in an unpredictable way from the perspective of party politics, cannot endanger a government majority. Therefore, they are more compatible with the parliamentary system based on party representation and can be more widely accepted by the politicians of the ethnic majority. All in all, this regulation filled an important constitutional and international legal gap in the field of the Hungarian State's obligations with regards to minority protection without a greater political effect. Finally, the argument that the eased earning of minority mandates could undermine the stability of the Hungarian parliamentary system or could lead to unpredictable, surprising election outcomes, is shown to be completely unfounded.

More international attention was paid to the possible influence of Hungarians abroad on the governing majority. Permanent residence in Hungary ceased to be a prerequisite of naturalisation with the June 2010<sup>26</sup> amendment to the citizenship law, which allows Hungarian minorities in neighbouring states to acquire Hungarian citizenship without living in the territory of the country ("dual citizenship policy"). Though partially regulated by the act on election procedure, which was adopted by the parliament on November 26<sup>th</sup>, 2012, it was further restricted by the Constitutional Court on January 4<sup>th</sup>, 2013. It seems to be more or less clear that citizens without permanent address or residency in Hungary can only vote for party lists and will be not eligible to vote in constituencies.<sup>27</sup>

<sup>25</sup> This hypothetical figure is based on a conservative estimation, which calculates with the same demographical amount of voters like in 2010 and with approximately 400.000 possible new Hungarian voters from abroad as consequence of the government's dual citizenship policy.

<sup>26</sup> Act Nr. 2010/XLIV

<sup>27</sup> <http://www.valasztasirendszer.hu/?p=1941185> and Art. 12 of the act on the parliamen-

This regulation can be justified on political grounds, e.g. lack of a stable link with the territory of any electoral districts, but from a legal perspective, it affects the principle of equal ballot and seems to be very problematic.<sup>28</sup> Moreover, little information or few empirically well-founded surveys were published about the political preferences or participation level of Hungarians living abroad. One of the few surveys in this field was made in Transylvania in January 2012.<sup>29</sup> It showed that the support of Fidesz among Hungarians abroad is still higher than in Hungary itself (at that time around 55%). According to official data of the Hungarian government approximately 270,000 naturalisation processes were completed by October 2012 and a further 50,000 were still in progress.<sup>30</sup> Based on that figure 400-500,000 new citizens can be estimated by 2014. It is hard to estimate how many of them would like to participate in the elections. According to the survey referred to above, 90% of the Hungarians in Transylvania with Hungarian citizenship would like to vote. In other regions, e.g. in Vojvodina, both the participation level and the support of Fidesz can be assumed to be lower. International examples show that a participation level of 25-35% is common in diasporas, even in the case of a politically very active and conscious group, like the Croats in Bosnia-Herzegovina.<sup>31</sup> But theoretically it can be allowed to count with the higher figures in the case of Hungary. Because Hungarians abroad can only vote for party lists, and the national-level list unites the proportional and compensation characteristics in itself, even 400,000 voters from abroad will have a marginal effect on the allocation of mandates. Based on the above figures of 8 million persons eligible to vote in Hungary, where 62,4% of them will choose to do so (participation level) and approximately 60% of votes, which will return as compensation vote, there will be in total 7,987,200 votes in the national-level list. In this case, the votes of the Hungarians living abroad would represent around 5% of all votes in the list and could influence the fate of 3-4 mandates in the d'Hondt system. However, as already mentioned, this calculation uses an implausibly high number of votes from abroad. If we use more modest figures, it is obvious that the dual citizenship policy and Hungarians abroad can only have a very narrow effect on the outcomes of the next parliamentary elections in 2014 and could influence the composition of the government only in an extremely balanced situation where the difference between Fidesz and its main future competitor is less than 5%.

tary elections. This regulation does not affect citizens with permanent residency, but without concrete address in a constituency, e.g. homeless people.

<sup>28</sup> Jakab András: A külföldön élő magyar állampolgárok választójoga egyenlőségének kérdése a választási törvény koncepciójában In. [http://www.valasztasirendszer.hu/wp-content/uploads/JakabAndras\\_AKulfoldonEloMagyarAllampolgarokValasztojoga.pdf](http://www.valasztasirendszer.hu/wp-content/uploads/JakabAndras_AKulfoldonEloMagyarAllampolgarokValasztojoga.pdf)

<sup>29</sup> <http://www.valasztasirendszer.hu/?p=1940445>

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[http://www.hirado.hu/Hirek/2012/10/10/07/Semjen\\_fontos\\_hogy\\_ne\\_legyen\\_magyarellenes\\_osszeallas.aspx](http://www.hirado.hu/Hirek/2012/10/10/07/Semjen_fontos_hogy_ne_legyen_magyarellenes_osszeallas.aspx)

<sup>31</sup> Francesco Ragazzi – Kristina Balalovska: Diaspora Politics and Post-territorial Citizenship in Croatia, Serbia and Macedonia In. CITSEE Working Paper Series 2011/18

<p align="center"><b>“old electoral system“</b> regulated by Act Nr. 1989/XXXIV</p>	<p align="center"><b>“new electoral system“</b> regulated by Act Nr. 2011/CCIII</p>
<p align="center">mixed electoral system with a majoritarian and two proportional elements, altogether 386 mandates</p>	<p align="center">mixed electoral system with a majoritarian and a proportional element, altogether 199 mandates</p>
<p align="center">majoritarian part - 176 electoral districts with absolute majority rule and with two elections rounds, if needed</p>	<p align="center">majoritarian part - 106 electoral districts with relative majority rule in one election round (“first past the post”)</p>
<p align="center">Proportional part I. - 20 territorial party lists with 152 mandates overall (Hagenbach-Bischoff system)</p>	<p align="center">Proportional part - National-level party AND compensation list IN ONE with 93 mandates (d’Hondt system)</p>
<p align="center">Proportional part II. - One national-level compensation list with 58 mandates (d’Hondt system)</p>	
<p align="center">no unique features</p>	<p align="center">unique features: “compensation of the winner”. eased earning of mandates for nationalities by the minority quorum. right to vote for “Hungarians abroad”, but only on party list</p>

**Table 1 – Summary and comparison of the “old” and “new” electoral systems in Hungary**

### **The Election Procedure Act and the Question of “Voter’s Registration”**

The complementary legislation of the act on parliamentary election, which regulates all questions related to election procedure (affecting the local elections, the elections of the European Parliament, referenda, etc.), was officially initiated by some individual members of parliament<sup>32</sup> on September 18<sup>th</sup>, 2012, but was preceded by six months of debate about its new core component, the compulsory registration of voters to implement the right to vote. Although arguments of both sides, supporting or opposing registration, could be honestly taken into consideration, it was clear from the very beginning that a comprehensive judgment would only

<sup>32</sup> A tactic very often used by the party Fidesz to avoid the compulsory public consultation in the case of government proposals.

possible once the precise details of the registration procedure were revealed.

According to the government side, the registration does not necessarily restrict the right to vote. On the contrary, it assures and supports it, because the residence registration system of the state, in which the registration of the citizens and their disposition in the constituencies was based until now, is inaccurate and incomplete. On the other hand, it also contributes to the development of an active and self-conscious political culture and accompanying voting behaviour. The opposition parties shared the opinion that the compulsory registration of voters was not an appropriate solution to the deficiencies of the residence registration system. The institution of voters' registration exists mainly in countries with no residence registration and/or with intensive immigration flows, such as the Anglo-Saxon countries. Meanwhile, the existing Hungarian residence registration program has ensured unquestioned, stable and fair elections in the past. Thus the introduction of a new mechanism, which would create another administrative burden for voters and so possibly decreases their election participation, is unjustifiable. According to the opposition, the Fidesz government only aims at preventing many uncertain citizens, who are more easily overwhelmed by anti-government attitudes, from voting and capitalising on its advantage among persons with stable party identification, severely undermining the free election principle.

The act was adopted by the Hungarian parliament on November 26<sup>th</sup>, 2012, and contained the following final regulation of voter registration: "A new "central registry", to be established for the purpose of elections, into which the citizens can sign up until the 15<sup>th</sup> day before the elections" (sections 82 and 87). If someone misses the deadline, he or she would not be able to register later and, consequently, would not be able participate in the elections. Thus the legislation narrows the citizens' space and time of consideration concerning their political participation. Moreover, the act prescribed highly inconsistent rules of registration for different groups of the population. Persons with permanent addresses in Hungary, who live in Hungary and intend to vote in Hungary would have to register either personally by the assigned notary or via the official e-governance system (section 88). There was no possibility to register via official letter, although it was clear that personal registration could become a disproportionately heavy burden on significant parts of Hungarian society, especially those with lower educational and financial background, who would not have an e-governance account and/or internet access, making their participation even more difficult. A similar situation can be identified in the case of citizens living in Hungary without a permanent address (mainly homeless persons or people at the periphery of the society). In their case, the act excludes the possibility of personal registration; it offers only registration via letter or the e-governance system (section 92). It can be seen in both cases that non-reflected restrictions and differences in the rules aim at increasing and not decreasing the administrative burden for given social

groups with regard to fundamental political rights.

Another essential regulatory field of the act is political behaviour within the campaign. Also in regard to this aspect, controversial and non-reflected rules were introduced. Although it abolished the institutions of the earlier 24-hours pre-election campaign silence and the financial ceiling of the campaign (1 Million HUF, approximately 3,450 Euro per candidate), thus opening the door to further political corruption,<sup>33</sup> it contained different restrictive legislative measures aimed officially at reducing the costs of campaigning and strengthening the purity of the political campaign. The act prohibited political advertising in commercial media and allowed it in limited frames only in public television and radio broadcasting (section 151). It also forbid advertising in cinemas (section 152 (5)), an interesting step with little political relevance. It would not be fruitful to enter into a discussion of the reasons of the financial cuts in the electronic media, given that the total costs of the campaign are no longer limited. The real political background of these restrictive measures, together with the shorter, 50-day campaign period (section 143) and the prohibition on publishing political surveys during elections week (section 154), could be the goal of a less intensive election campaign which would allow for Fidesz to take further advantage from the current governmental position. Parties, program elements, and politicians in government are generally more widely known in the society than their counterparts in the opposition. Electronic media broadcasting offers the most effective toolkit to reach nearly the whole society with political messages and to be present in the political consciousness of the citizens. When the access to this campaign environment is limited – even on equal basis for all parties –, it will mean an advantage for the governmental side, except the scenario of a massive protest-voting. Furthermore, the Hungarian public media is today effectively controlled by Fidesz as consequence of the many years long internationally criticised media legislation. However, its positions are weaker in the commercial sector, where the Socialist Party has maintained some influence.

The Head of State, János Áder, initiated the preliminary norm control of the act by the Hungarian Constitutional Court on December 6<sup>th</sup>, 2012, underlining his constitutional concerns, inter alia, with regard to procedural details of the voters' registration and the above mentioned questions of campaign regulation.<sup>34</sup> His motivation to create a clear situation and general recognition around the debated law through the involvement of the Constitutional Court can be seen both as logical and acceptable. Albeit his application was built in many ways on the comments and proposals of the opposition parties, he asked only for the supervision of some details of the registration. He had no reason to fear that the Constitutional Court could abolish the voters' registration, because, in the meantime, it had

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[http://www.transparency.hu/Tiszta\\_kampanyszabalyokat\\_surget\\_a\\_TI?bind\\_info=index&bind\\_id=0](http://www.transparency.hu/Tiszta_kampanyszabalyokat_surget_a_TI?bind_info=index&bind_id=0)

<sup>34</sup> [http://www.keh.hu/pic/upload/20121206\\_ab\\_inditvany\\_vej.pdf](http://www.keh.hu/pic/upload/20121206_ab_inditvany_vej.pdf)

become part of the Basic Law's Transitional Provisions on November 9<sup>th</sup>, 2012, through the second amendment of the Basic Law. It was on this point the lawyers of Fidesz made a great mistake. The Ombudsman Máté Szabó initiated a procedure of norm control aimed at abolishing the Transitional Provisions much earlier, on March 13<sup>th</sup>, 2012. He argued that the Transitional Provisions undermine legal certainty and constitutionality because they contain not only transitional, but also other political and legal provisions, making them part of the basic law and undermining the competencies of the Constitutional Court. Furthermore, the existence of the Transitional Provisions, as well as possible amendments to them, makes it uncertain, which is the valid text of the Basic Law, and thus increases constitutional uncertainty.

The Constitutional Court accepted the arguments of the ombudsman in its judgement of December 28<sup>th</sup>, 2012, abrogated the non-transitional articles of the Transitional Provisions and in this way annihilated the constitutional anchor of the voters' registration.<sup>35</sup> In its next decision, on January 4<sup>th</sup>, 2013, by capitalising the constitutional environment which the Court itself had created with its prior judgement, the Constitutional Court declared, inter alia, the institution of voters' registration for citizens residing in Hungary and the above mentioned articles of the election procedure act related to campaign rules unconstitutional.<sup>36</sup> The Constitutional Court emphasised that there is currently no legitimate reason justifying a narrowing of the right to vote by the obligation to register for citizens residing in Hungary. The judgement underlined that the new "central registry" cannot combat the shortcomings of the residency registration, and, to the contrary, the registration law itself recognizes the usefulness of the latter by using it as an important database for the purpose of the "central registry". In summary, the Court ruled that the election procedure shall support, rather than hinder the right to vote. Therefore the Constitutional Court abrogated the obligation of registration for voters residing in Hungary. Conversely, it maintained that registration is a necessary condition for effective participation of citizens residing abroad or intending to vote for a minority list. The result is that registration will exist, not for all citizens, but for those groups mentioned above for whom it is a necessary precondition of participation. The articles narrowing the freedom of speech among the campaign regulations, e.g. the limitation of the media campaign to the sphere of public broadcasting or the prohibition on publishing political surveys during election week, were also declared unconstitutional.

The two above mentioned judgements of the Constitutional Court caused serious political and legal debates, even within the Court itself, clearly reflected in the dissenting opinions. It is true that the abolishment of voter registration was only possible because a few days before the Court destroyed its constitutional anchor, the Transitional Provisions, acting in a

<sup>35</sup> Resolution of the Constitutional Court 45/2012 (XII. 29.)

<sup>36</sup> Resolution of the Constitutional Court 1/2013 (I. 7.)

self-created constitutional environment, without giving the constituent power the time or possibility to regulate the question in an appropriate way or for the head of state to amend or modify his initiative under the changed circumstances. It is also true that the judgement abolishing the Transitional Provisions vindicated new instruments: One of them is the partial control of Basic Law amendments by the Constitutional Court. This action was justified with the argument that the Basic Law cannot contain internal contradictions or regulations, which were previously declared unconstitutional by Court. Obviously, regulations, which were banned by the Court as unconstitutional, cannot get constitutional power only because they were simply added to the text of the Basic Law. Nevertheless this self-made broadening of competencies purely through legal interpretation and without empowerment by the legislative can also be questioned. Still, it has to be considered within the context of the enormous changes in the constitutional environment and culture of Hungary, which the judgements of the Constitutional Court also emphasize. This did not happen as consequence of the new Basic Law, but rather in response to the behaviour of the constituent power, which used its 2/3 majority in Parliament to codify different regulatory and political issues as part of the Basic Law, in this way excluding the norm control by the Constitutional Court. Constitutional amendments became part of regular political business, a phenomenon of purely political constitutional engineering, which recognizes only political goals and interests, but not the procedural and substantial norms and values of the rule of law, legal certainty and constitutionality. Under these circumstances, the changes in the Constitutional Court's understanding of its role can be easily appreciated. It is perhaps the last ditch in Hungary in defence of a constitutional institution for the preservation of "Rechtsstaatlichkeit" (rule of law) and the separation and balance of powers. In this situation one can be worried about the possibility that the Constitutional Court and not the parliamentary majority will undermine the principle of separation of powers. This can be an absolutely clear and understandable political position, but an odd legal and moral one.

During January there was the impression that a cease-fire could be reached on the front of constitutional engineering. Antal Rogán, speaker of the Fidesz parliamentary group stated, after the judgements, that the party will not insert voter registration into the text of the Basic law and thus force the Constitutional Court to accept it.<sup>37</sup> The optimistic observer could think that Fidesz perhaps realized that many of the seriously debated constitutional and legal institutions and instruments were already established to exclusively serve the party's and the government's political interests. Now it would be time to change the image, to capitalize on the acquired advantages and to show a calm and moderate image to the society and the rest of the world. Nevertheless, this scenario would be logical and also in favour of Fidesz, but the political routines dictated a

<sup>37</sup> [http://hvg.hu/itthon/20130104\\_Rogan\\_regisztracio\\_Alkotmanybirosag](http://hvg.hu/itthon/20130104_Rogan_regisztracio_Alkotmanybirosag)

different behaviour. After a week of rumours, a constitutional amendment was initiated in the Parliament on February 8<sup>th</sup>, 2013. The motion aimed at the incorporation of all regulations, both from the Transitional Provisions and the election procedure act, which were banned by the Constitutional Court in its judgements during December and January, except for voter registration, into the Basic Law.<sup>38</sup> In addition, it seeks to ban the Constitutional Court from using its former case law (judgements and explanatory statements) in the future, which were adopted before the Basic Law came into force (January 1<sup>st</sup>, 2012).<sup>39</sup> This provision seems to be both non-executable and very dangerous. First of all, it would enable a re-opening of all fundamental questions ever regulated by the Court (e.g. capital punishment, abortion, fundamental rights, etc.), which would cause serious legal and constitutional uncertainty. It would also allow for a new majority of judges in the Court nominated and elected by the Fidesz party to give a new direction to constitutional interpretation and legal development; a new, but undoubtedly more illiberal direction. Despite the grave concerns communicated by international partners and the political demonstrations in Hungary, the motion was adopted by the parliament on March 11<sup>th</sup>, 2013, and came into force on the 1<sup>st</sup> of April, pushing Hungary into its greatest period of international political isolation since its democratic transition in 1989-1990.

## Summary

The way of the Hungarian electoral system reform was paved by grave political conflicts and concerns. At the beginning, with the act on parliamentary elections, concerns included the quality of democracy and the question of whether the political advantages acquired by Fidesz by this element of constitutional engineering would not undermine the possibility of democratic change in power. The political struggle later became a more and more constitutional one, between the Constitutional Court and the parliamentary majority, with constitutional power, first of all with regard to the voters' registration. Eventually, constitutional control became partially independent from the issue of election procedure and culminated in a life-or-death struggle over the competencies and functions of the Constitutional Court, or, in a broader sense, over the shape and quality of the Hungarian constitutional system.

One can conclude that the new Hungarian election law and electoral system contains some questionable solutions, such as the "compensation of the winner" in the constituencies, and has also left open some constitutional questions, such as the use of recommendation letters for candidacy. Although it undoubtedly secures the governing majority of Fidesz, until it will be the strongest party in relative terms in the country, the new

<sup>38</sup> Motion T/9929 In. <http://www.parlament.hu/irom39/09929/09929.pdf>

<sup>39</sup> Article 19 of T/9929 "Judgements and explanatory statements adopted by the Constitutional Court prior to the coming into force of the Basic Law cannot be taken into consideration by the interpretation of the Basic Law."

election law nevertheless conforms to the most important principles of democratic elections. The fears surrounding the political mobilisation and great influence of the Hungarians abroad are rooted in superficial analysis and a lack of information both about their political preferences and the functioning of the election system. It will always be possible, even within this new system, to change the government through elections. Undoubtedly, the democratic will of the Hungarian people will be able to decide that. The possibility of a strong cooperation among oppositional parties cannot be excluded at this point and may become reality in the 2014 elections.

Nevertheless the long debates surrounding voter registration and the steps towards anchoring regulations of campaign behaviour in the text of the Basic Law, which were earlier declared unconstitutional by the Constitutional Court, show us that there is still a strong governmental desire to secure further political advantages through constitutional engineering. Last but not least, the decline in the number of voices criticizing the quality of democracy during 2012 was undoubtedly interpreted by the Hungarian Government as a sign of decreasing international attention and in this way contributed to the opening of further fronts in the field of the rule of law.