

Power Grab in Times of Emergency

Viktor Z. Kazai

2020-11-12T15:40:24

On 4 November, the Hungarian Government [declared](#) a state of danger again. The introduction of the special legal order was followed by severe restrictive [measures](#) put in place to contain the spread of the coronavirus, such as a curfew between 8 pm – 5 am and a general ban on all kinds of gatherings (including political demonstrations). In the late hours on 10 November, the National Assembly adopted an [Enabling Act](#) authorizing the Orbán cabinet to govern by decree for 90 days, even though the executive already had very broad legislative power due to the [introduction](#) of the [medical state of emergency](#). The ink was barely dry on the approval of the delegation of extraordinary legislative power to the government, when the Minister of Justice [introduced](#) several bills on important legislative reforms, such as the Ninth Amendment to the Fundamental Law and changes to the electoral system.

This step illustrates very well that even in times of emergency, the primary aim of the Orbán government is to further entrench its power. It is also a powerful reminder that due to the major legislative, political and economic reforms implemented since 2010, the Orbán regime has put the future of Hungary on a dangerous path: the country is more and more likely to degenerate into permanent electoral authoritarianism from which the peaceful transition of power will be incredibly difficult if not impossible.

Major reforms in a state of danger

Most of the legislation necessary to implement the extraordinary measures prompted by the pandemic are published in the official gazette only hours (sometimes minutes) before their entry into force, which gives the impression that the public administration is extremely busy nowadays. Yet, the Government somehow found enough time to prepare important legislative reforms in the last few weeks.

First of all, the Minister of Justice thought that a state of danger would be the ideal time to surprise the opposition parties and society with a constitutional amendment. It is true that the proposal aims to rationalize the chaotic system of the different types of special legal order. The current constitutional regulation is very complicated and needs to be simplified – we can agree on that. Whether the specific rules of the amendment and the implementing legislation would move in the right direction is not yet evident. What we can see, however, is that the National Assembly's control function would be more limited in times of a special legal order if the amendment is adopted. What is even more concerning is that the amendment does not seem to remedy the problem already faced in Spring, when the Government declared a state of danger without a clear constitutional basis, due to the lack of constitutional rules specifically applicable to a pandemic. Thus, the re-regulation of the special legal orders is the only proposal which can be considered rationally justified at first glance.

All the other provisions in the draft constitutional amendment serve the purpose of solidifying the Orbán government's power and cementing its ideology on the constitutional level.

Firstly, the proposal would introduce a definition of 'public funds': the income, expenditure and claims of the state. According to the explanatory memorandum: "the proposal defines the term 'public funds' in order to ensure a uniform application of the law". In reality, this clarification is necessary for the government to influence the jurisprudence of courts. Several scandals concerning the misuse of public funds – such as the enormous [endowment](#) provided by the National Bank to its foundations or the [loans](#) provided to government allies by a state-owned bank to purchase media outlets – eventually led to litigation. The courts have tended to adopt a reasonably broad interpretation of 'public funds' to guarantee the transparency of public spending. The new restrictive definition sends a clear message to judges, to keep their hands off government-orchestrated corruption.

Secondly, another provision stipulates that the rules on the establishment and the operation of public asset management foundations shall be regulated by a so-called cardinal act the adoption of which requires a qualified two-thirds majority of MPs. The big fat reality is that this measure is nothing but another strategy of the Fidesz government to indirectly control the spending of public funds in the field of science and higher education, as illustrated very well by the recent "[privatization](#)" of the University for Theater and Films Arts which prompted the resignation of its leadership and several professors and the students' resistance movement.

The logic behind this rule is very simple: The first step is to establish a foundation and fill its board with [Fidesz allies](#). The second step is to put the research centers and higher education institutions under the control of this foundation, which is authorized – among other powers – to adopt their budget, to approve their internal regulation and to exercise decisive influence on the selection of their leadership. The third step is to transfer public funds to the foundations to subsidize the operation of the "[privatized](#)" public institutions.

The qualified majority requirement is necessary to cement the influence of Fidesz over the management of research centers and higher education institutions, even if the opposition wins the next elections. A future government having a different political affiliation will not be able to reverse this reform if it does not have a qualified majority of MPs in the Parliament.

Thirdly, let me mention that the draft constitutional amendment contains some very specific [rules](#) expressing the Government's Christian-conservative ideology. My colleagues will give a detailed analysis of these provisions in a separate blogpost, so I will not address this issue here.

Yet another manipulation of the electoral system

The constitutional amendment was not the only surprise prepared by the Minister of Justice. She also submitted a bill on the modification of the electoral rules. The most

important change proposed is the increase of the minimum number of individual candidates necessary for a party to have a national list, from 27 to 50. Hungary has a mixed electoral system: 106 MPs are elected in single-member districts and the remaining 93 MPs are selected from party lists. Political parties can only have a national party list if they put forward a minimum number of individual candidates in the electoral districts.

Political analysts are still discussing the potential consequences of this amendment, but it is likely that the Government's intention was to further undermine the fairness of the parliamentary elections. The Hungarian opposition is not only fragmented but also very diverse in ideology and political agenda. Six opposition parties have a serious political profile, five of which decided to join forces over the summer and to coordinate their individual candidates in the single-member districts. The 2013 [electoral reform](#) replaced the two-round system with a single-round majoritarian model in the electoral districts in which a candidate needs to win only the plurality of votes to get the mandate. These rules favor Fidesz, which only has a relative majority in most of the districts. That is why the opposition parties' coordination is absolutely necessary: it is their only way to show that together they are more popular than Fidesz and to have a chance at the next parliamentary elections.

The strength of a unified opposition was manifested in the results of the 2019 [local elections](#). This success gave the opposition parties some hope that they may win the parliamentary elections in 2022, despite all the hurdles posed by the electoral system already re-regulated unilaterally by the Orbán government. The present legislative proposal would make the coordination of individual candidates at the parliamentary elections much more difficult for the opposition parties. It would even discourage their cooperation, by giving additional financial incentives to register their own individual candidates, instead of supporting the candidate of another opposition party.

Hungary's future: chaos or permanent electoral authoritarianism?

The recently introduced draft constitutional amendment and the other legislative proposals are not only clear signs of the Fidesz government's endless hunger for power, but also foreshadow very dangerous political developments. The governing majority has always been very obedient, so we have no reason to doubt that the proposals will be enacted by the National Assembly. The power of the current governing majority is so entrenched that the Orbán regime may turn into permanent electoral authoritarianism. The "consent" of the people is still the most powerful legitimizing force, so elections will surely be held in the future as well. However, the electoral system has been [manipulated](#) so many times since 2013 that the chance of changing the government by free and fair elections is rapidly decreasing. And even if the opposition can win the upcoming elections in 2022, it will be incredibly difficult to avoid political chaos.

Chaos scenario no. 1: paralysis

Fidesz used, or to be more precise misused, its two-thirds parliamentary majority in order (i) to render the system of checks and balances ineffective, (ii) to position its allies at the top of the most important organs of the state, (iii) to cement its ideological preferences and political agenda on the constitutional level and (iv) to convert its political power into economic capital. The essential guarantees of the status quo are all codified either in the constitution itself or in cardinal acts which can only be amended or replaced by a two-thirds majority of MPs.

Let us assume that by some miracle the current opposition would be able to obtain the majority of parliamentary seats in 2022. Our happiness would soon fade away when we realize that the new government will have a very difficult time to implement any significant reform. Without a qualified majority, the regime-changing government would not be able to adopt any new regulation on the most important constitutional organs, to erase the ideology of Fidesz from the constitution, to implement its own policy program in many policy areas or to effectively investigate corruption. Not to mention that all the institutions of the system of checks and balances led by Fidesz allies together with the Fidesz oligarchs will work against the new government. This situation may easily turn into a political paralysis.

Chaos scenario no. 2: constitutional revolution

Assuming again that the opposition was able to obtain a majority in 2022, the enactment of a new constitution may seem a logical solution to get rid of all the constraints left behind by the Orbán regime. However, this would be a rough ride as well for the regime-changing government for at least the following two reasons.

Firstly, the Fundamental Law provides that it can only be replaced with a new constitution adopted by the two-thirds majority of MPs and the Constitutional Court has the competence to review the enactment process. Of course, anyone specialized in constitutional theory can come up with a billion reasons why the constitution currently in force cannot regulate the creation of a future constitution. The absurdity of such and similar provisions is illustrated by the Fundamental Law itself: while its preamble declares the “1949 communist constitution” invalid, its closing provisions clearly say that it was adopted on the basis of the old constitution containing a similar two-thirds majority rule. But can constitutional theory overrule black letter law in real life? I mean in a political system, which is not as manifestly authoritarian as the dictatorships of the 20th century were.

Secondly, a constitution-making process can have a strong legitimacy if its democratic, transparent, inclusive and assisted by experts. All the things that the [enactment](#) of the Fundamental Law in 2011 was short of. We still cannot ignore the enormous difficulties that the regime-changing government would face to generate sufficient popular support for a constitutional revolution, on the one hand, and to ward off the political attacks of Fidesz, on the other. Keep in mind that even if Fidesz loses the elections, it still has an incredibly well-organized and active group of voters who can be easily mobilized. Not to mention that the regime-changing government would be a coalition comprised of five (or maybe six) parties having very different ideological profiles. Guaranteeing the effective coordination of the government's

activities in such a “rainbow” coalition would be a particularly burdensome task even in peaceful times.

Getting prepared for permanent electoral authoritarianism

“Alright, so we will live here.” – says the mother left behind with two children by his husband when the man flees Hungary after the 1956 revolution in one of the most iconic Hungarian movies ([Time Stands Still](#), 1982). This phrase has become the slogan of all the opposition parties and individuals who feel themselves betrayed by the national and European protection mechanisms which were supposed to guarantee that authoritarianism will never return to Hungary. We sure will live here. As long as we can.

