

RESTORING THE RULE OF LAW IN HUNGARY. AN OVERVIEW OF THE
POSSIBLE SCENARIOS

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Sommario

1. Introduction. – 2. The necessity of a change of regime in 2022. – 2.1. Constraints imposed by Fidesz on the new governing majority. – 2.2. The significance of a symbolic rupture with the Orbán regime. – 3. The non-applicability of the procedural rules in force – 3.1. Legal basis: theoretical arguments. – 3.1.1. Invalidity of the Fundamental Law on procedural grounds. – 3.1.2. *The ius resistendi argument*. – 3.1.3. Institutionalized authoritarianism as an exemption from the adherence to formal rules. – 3.1.4. Regime-changing constitution-making. – 3.1.5. Popular authorization through elections. – 3.2. Fear from chaos and instability: practical considerations. – 4. Specific scenarios. – 4.1. The invalidation of the Fundamental Law. – 4.2. Progressive or two-step constitution-making process. – 4.3. Enactment of a new constitution. – 5. Conclusion.

Abstract

It seems to be a reasonable assumption that the systemic violation of the rule of law in Hungary that has been strongly criticized by the European Union can only be remedied by a new ruling majority after the (potential) fall of the Orbán government. However, the question is whether the new governing coalition formed by the current opposition parties can put in place any significant changes in case it does not have a constitutional majority in the National Assembly. This article aims to summarize the most pertinent views voiced by Hungarian lawyers on this topic by focusing on the following three issues: (i) the desirability or the necessity of a potential change of regime after the 2022 elections, (ii) the possible legal bases of deviating from the written rules on the constitution amending and constitution-making process and finally, (iii) the specific scenarios of implementing constitutional changes.

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1. Introduction

We are eight and a half years after the adoption of the Tavares Report by the European Parliament in 2013 which provided for the first time a comprehensive overview of all the problematic measures concerning the rule of law, democracy and fundamental rights put in place by the Fidesz government since its entry into office in 2010.¹ Since then the situation has deteriorated to the extent that many scholars do not consider Hungary to be a constitutional democracy anymore. Instead, it is often labelled as a sort of illiberal regime showing the signs of authoritarianism.² The European Union was forced to react to this negative trend and therefore activated some of its existing rule of law mechanisms, on the one hand, and expanded its rule of law toolbox on the other. These mechanisms and their use by the European institutions have been thoroughly criticized by scholars.³ The author of this article does not wish to repeat these criticisms. What needs to be clearly stated, however, is that the European Union has failed so far to halt, let alone reverse, the rule of law backsliding in Hungary.

Unfortunately, domestic constitutional organs – including the Constitutional Court, the Supreme Court, the Chief Prosecutor’s Office, the Ombudsman’s Office and so on – are incapable of restoring the rule of law. It is partly because the Fidesz dominated National Assembly has adopted a large number of legal measures restricting the competencies and limiting the autonomy of these institutions, and partly because all of them have been politically captured and filled with people who are extremely deferential to, if not expressly supportive of the Fidesz-government.⁴ Under the present circumstances it is

¹ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))

² G. HALMAI, *The making of “illiberal constitutionalism” with or without a new constitution: the case of Hungary and Poland*, in D. LANDAU, H. LERNER (eds), *Comparative Constitution Making*, Edward Elgar, Cheltenham, 2019, 302 ss.; T. DRINÓCZI, A. BIEŃ-KACAŁA, *Illiberal constitutionalism—the case of Hungary and Poland*, in *German Law Journal*, 2019, 1140 ss.; L. PECH, K.L. SCHEPPELE, *Illiberalism Within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, 3 ss.; R. UITZ, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, in *International Journal of Constitutional Law*, 2015, 279 ss.

³ For a comprehensive overview of the relevant literature and a detailed analysis of the most significant shortcoming of the EU’s rule of law mechanisms see P. BÁRD, B. GRABOWSKA-MOROZ (eds.), *The strategies and mechanisms used by national authorities to systematically undermine the Rule of Law and possible EU responses*, RECONNECT Deliverable 8.2, available at: www.reconnect.europe.eu, 31 December 2020.

⁴ Particularly important and quite illustrative is how the Constitutional Court, a previously strong and independent institution, has become subservient to the wishes of the Fidesz government. See e.g. Z. SZENTE, *The Decline of Constitutional Review in Hungary –Towards a Partisan Constitutional Court?*, in Z. SZENTE, F. MANDÁK, Zs. FEJES (eds.), *Challenges and Pitfalls in the Recent Hungarian*

completely unrealistic to expect the domestic system of checks and balances to start exercising effective control over current the governing majority.

If neither the European institutions, nor the domestic constitutional organs can remedy the systemic violation of the rule of law in Hungary, who else may be charged with this task? The answer seems to be obvious: a new governing majority. What is much less evident, however, is whether the Fidesz government can be changed through elections, and if so, whether the new political force in power could actually implement the necessary legal and political measures.

As to the first question, it is undoubted that in 2010 the Fidesz government entered into office with a two-thirds (constitutional) parliamentary majority as a result of a free and fair election. However, shortly after its electoral victory the Fidesz government started to unilaterally re-regulate the fundamental rules of the political competition, such as the rules on the electoral system, the electoral procedure, political advertising, campaign financing and so on.⁵ In addition, the government has taken several steps to restrict of the freedom of the media.⁶ All these changes put together created a tilted playing field thus made the competition for the opposition parties much more difficult.⁷ It is reasonable to say to the last parliamentary elections in 2018 may have been free, but definitely not fair in light of the concerns voiced by the Office for Democratic Institutions and Human Rights, such as the exclusion of paid political ads from public television channels, the biased coverage of candidates in the public media, the lack of distinction between government communication and the campaign of the governing parties (as candidate organizations), the shrinking possibilities for opposition parties to reach out to the voters and so on.⁸

The other reason of Fidesz's dominance in the political arena was a

Constitutional Development, L'Harmattan, Budapest, 2015, 183 ss.; Z. SZENTE, *The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014*, in *Constitutional Studies*, 2016, 123 ss.; P. LÁNCOS, *Passivist Strategies Available to the Hungarian Constitutional Court*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2019, 971 ss.

⁵ VENICE COMMISSION - OSCE/ODIHR, *Joint Opinion on the Act on the Elections of Members of Parliament of Hungary*, CDL-AD(2012)012; VENICE COMMISSION, *Opinion on Act CCIII of 2011 on the Elections of Members of Parliament of Hungary as of 3 March 2014*, CDL-REF(2014)037; VENICE COMMISSION - OSCE/ODIHR, *Joint Opinion of the on the 2020 amendments to electoral legislation*, CDL-AD(2021)039-e.

⁶ P. BAJOMI-LÁZÁR, *The Party Colonisation of the Media The Case of Hungary*, in *East European Politics and Societies and Cultures*, 2013, 69 ss.; G. POLYÁK, *Media in Hungary. Three Pillars of an Illiberal Democracy*, in E. POŁOŃSKA, C. BECKETT (eds.) *Public Service Broadcasting and Media Systems in TROUBLED European Democracies*, Palgrave MacMillan, Cham, 2019, 279 ss.

⁷ R. VÁRNAGY, G. ILONSZKI, *The conflict of partisan interests and normative expectations in electoral system change. Hungary in 2014*, in *Covinus Journal of Sociology and Social Policy*, 2017, 3 ss.

⁸ ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE: *Hungary, Parliamentary Elections of 8 April 2018 - Final Report*, available at: <https://www.osce.org/files/f/documents/0/9/385959.pdf>, 27 June 2018

fragmented opposition.⁹ Opposition parties, in and outside of parliament, were deeply divided on so many issues that they were unable to overcome their differences in order to become an effective counterbalance to the governing majority. Therefore, the Fidesz party did not have any significant political rival for many years.

The political landscape seems to be changing. Six opposition parties – namely the Democratic Coalition (Demokratikus Koalíció), Movement for a Better Hungary (Jobbik), Politics Can Be Different (LMP), Movement for Hungary (Momentum), Hungarian Socialist Party (MSZP) and Dialogue (Párbeszéd) – have joined their forces to create an alliance (hereinafter: Opposition Alliance). The members of the Opposition Alliance agreed to cooperate in the electoral competition for strategic reasons and to form a coalition government in case they win the majority of the seats in the National Assembly. As part of their preparations, they also organized pre-elections to select their candidates in the individual districts and to find a candidate for Prime Minister. Not only that the opposition parties are more united than ever before, but their alliance is also led by the candidate for Prime Minister, Péter Márki-Zay, who is the textbook example of the European Christian-conservative statesman: a practising Catholic 49-year-old father of seven who is an ardent supporter of liberal capitalism, has a soft spot for Western economic and political ideologies and who has not been involved of any major political scandal since its entry into politics as mayor of a small-town, Hódmezővásárhely, which used to be a Fidesz stronghold for a long time.¹⁰ He is probably the worst rival that PM Orbán could think of. In light of these developments and the results of recent surveys, it is not unreasonable to expect a change of government after the 2022 general election.

However, even if the Opposition Alliance wins the election, it does not seem likely that the new governing coalition would have a two-thirds (constitutional) majority in the unicameral National Assembly. The reason why it can be a problem is that a large number of measures violating the rule of law principle, and thus criticized by the EU, are protected by two-thirds majority rules. On the one hand, several legal provisions are cemented in the Fundamental Law or in so-called cardinal acts that can be adopted and amended only by the two-thirds of the MPs. On the other, the Fidesz used its qualified parliamentary majority to unilaterally select the members and leaders of all the important constitutional organs.

⁹ For a comprehensive analysis of the Hungarian opposition's situation in Hungary since 2010 see P. SUSÁNSZKY, A. UNGER, Á. KOPPER, *Hungary's Over-powerful Government Party and the Desperate Opposition*, in *European Review*, 2020, 761 ss.

¹⁰ J. HENLEY, *Hungary: anti-Orbán alliance leads ruling party in 2022 election poll*, in *The Guardian*, available at: www.theguardian.com, 28 October 2021.

Let me give you a specific example to illustrate this difficulty. The European Commission's 2021 Rule of Law report raised serious concerns about several decisions made by the National Assembly concerning the independence of the judiciary.¹¹ Due to a recently adopted piece of legislation the Chief Justice has received additional powers in organizing the work of the Supreme Court (Kúria), and a limited precedent system has been introduced to better ensure the uniform application of the law throughout the country. The reason why it is deeply problematic is that the parliament also amended the rules on the eligibility criteria for the Chief Justice and elected Zsolt András Varga to this position whose nomination was almost unanimously rejected by the National Judicial Council (NJC), the representative body of judges having a purely consultative role.¹² The NJC noted:

“The nomination of Dr. Zsolt András Varga was made possible by two recent legislative amendments which go against the constitutional requirement of placing someone at the top of the judiciary who meets the criterion of the appearance of independence from the other branches of power.”¹³

As a result, the new Chief Justice whose independence from the governing Fidesz party is highly questionable can exercise significantly more influence both on the functioning of the highest ordinary court and on the application of the law by lower instance judges. It is very unlikely that the Opposition Alliance once in government could reverse any of these decisions without a two-thirds parliamentary majority.

Therefore, the question is whether the new government formed by the Opposition Alliance can implement its political program and remedy the systemic violation of the rule of law in case it does not have a constitutional majority in the National Assembly after the 2022 elections. This is not a purely political issue; it also has a legal aspect which prompted many scholars and practicing lawyers specialized in constitutional law to express their opinion on the room of maneuver of the Opposition Alliance in case of an electoral victory.

These experts have published many short pieces in daily newspapers, magazines or blog sites and they have also frequently given interviews to journalists

¹¹ EUROPEAN COMMISSION, *2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary*, SWD(2021) 714 final, 2–6.

¹² V. Z. KAZAI, Á. KOVÁCS, *The Last Days of the Independent Supreme Court of Hungary?*, *Verfassungsblog*, available at: www.verfassungsblog.de, 13 October 2020.

¹³ The opinion of the National Judicial Council on the nomination of Zsolt András Varga for Chief Justice, available at: <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/?fbclid=IwAR2W2n7UWwwKVdHl6oJKyTnUxmLwpzWV6xJ79mI7vn6qO1VeRIU-FYXJwkZM>, 9 October 2020.

in the last few months. Given that this debate has taken place so far mainly in Hungarian, it has probably escaped the attention of foreign scholars.¹⁴ However, as the previous few pages have (hopefully) convinced the readers, it is a very important and highly topical discussion that is directly relevant to the resolution of the rule of law crisis in the European Union. Therefore, this article aims to summarize the most pertinent views voiced by Hungarian lawyers.

The compilation of a comprehensive summary was not easy because the participants of this debate obviously have not followed the rules of academic research and writing which made the comparison and the structuring of the various opinions challenging. In the following pages I attempt to provide an overview by focusing on the following three issues: (i) the desirability or the necessity of a potential regime change after the 2022 elections, (ii) the possible legal bases of deviating from the written rules on the constitution amending and constitution-making process and finally, (iii) the specific scenarios of implementing constitutional changes.

2. The necessity of a change of regime in 2022

When it comes to the desirability or rather the necessity of a regime change following the potential electoral victory of the Opposition Alliance in 2022 – even without receiving the qualified majority of the mandates –, the constitutional lawyers are mainly divided mainly on two issues. The first one concerns the governability of the country. Those who are rather pessimistic argue that numerous legal measures put in place by Fidesz will clip the wings of the incoming government whose members will have no other choice but to wait for their inevitable failure. The more optimistic lawyers acknowledge that the future government will face many difficulties, but they opine that it will still be able to implement the lion's share of its political program.

The other dividing issue is much less practical; it is related to the moral aspect of the potential regime change. On the one hand, some see the symbolic rupture with the Fundamental Law as the legal basis of an authoritarian regime necessary. On the other, the pragmatists put much more emphasis on the practical questions of governance and tend to ignore the moral or symbolic aspect of this issue.

2.1 Constraints imposed by Fidesz on the new governing majority

It is a widely shared opinion among the pessimists that the Fidesz government has built a political regime which is impossible to change by winning the

¹⁴ Though it may change in the near future due to an open letter published by Andrew Arató and András Sajó on Verfassungsblog. A Arató, A. Sajó, *Restoring Constitutionalism. An Open Letter*, available at: www.verfassungsblog.de, 17 November 2021.

parliamentary elections with a simple majority. The primary reason of their skepticism is that the Orbán government has cemented the most important elements of its illiberal agenda in the Fundamental Law and in qualified majority laws, and every actor of the system of checks and balances has been politically conquered. As a result, even if the Opposition Alliance will get the opportunity to form a government in 2022, it will be prevented from implementing its political program.

Andrew Arató and Gábor Halmai summarized this problem as follows:

It is clear, that even if Fidesz loses a national election, and a new government will be formed, the latter will not be able to function whether in the legal, economic or cultural domains. On the foundation of the Fundamental Law, a great deal of power will remain in the hands of its present holders or those near to them. The new government would not be able to really govern; all or most of its measures can be sabotaged by state officials, among them constitutional judges who cannot be removed or replaced under the Fundamental Law, during the next parliamentary term.¹⁵

András Sajó opines that the real power of Fidesz lies in its “apparatchiks” (*káderek*), i.e. its loyal political appointees, who lead and operate the main constitutional organs.¹⁶ So, he argues that the state institutions will most probably sabotage those legal measures adopted by the new governing majority which would attempt to dismantle the Orbán regime. Therefore, he concludes that the new government will have no other choice but to wait for its inevitable failure if it is not willing to depart from the rules of the Fundamental Law.

Zoltán Fleck has a very similar argumentation. What he points out explicitly in addition is that the Fidesz government has deliberately assembled a political system in which the elections have lost their democratic value: regardless of the outcome of the electoral race the pillars of the Orbán regime cannot be altered.¹⁷ The *status quo* will be preserved by the political appointees of the current government. Fleck also warns us that the very same actors of the system of check and balances that are extremely deferential to, if not expressly supportive of, the Fidesz government will ‘activate’ themselves after the 2022 elections and will use their powers to paralyze the new governing majority. One of

¹⁵ A. ARATÓ, G. HALMAI, *So that the Name Hungarian Regain its Dignity. Strategy for the Making of a New Constitution*, in *Verfassungsblog*, available at: www.verfassungsblog.de, 2 July 2021.

¹⁶ A. SAJÓ, „Alkotmányozz a Fideszsel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), in *Magyar Narancs*, available at: www.magynarancs.hu, 20 October 2021.

¹⁷ Z. FLECK, *Demokráciát! (Democracy!)*, in *Élet és Irodalom*, available at: www.es.hu, 16 April 2021.

his examples illustrating his point is the Constitutional Court: it is very likely that the justices who have been elected almost exclusively by the MPs of Fidesz will annul several important legislative acts enacted by new parliamentary majority upon the petition of the President of the Republic elected by the Fidesz-dominated National Assembly or the MPs of Fidesz.¹⁸

Fleck is of the view that one cannot realistically expect the institutions filled by Fidesz appointees to carry out their functions in a politically neutral manner because they have never enjoyed autonomy; they were put in place to facilitate the Orbán government's exercise of power and to prevent the effective governance of any other political force.¹⁹ He acknowledges that if Fidesz collapses due to a major political defeat after the 2022 elections, the political power structure would change radically and the state organs would probably adopt a less obstructive behavior.²⁰ But even in this case, he continues, the Fidesz appointees would not be able to perform their duties adequately because they were selected on political, not on professional grounds.

Imre Vörös is also very skeptical about the governability of the country under a new parliamentary majority. Although he does not elaborate on this specific issue very much, he brings up the example of the Budget Council several times to substantiate his fears.²¹ This council has three members, two of them (the president of the National Bank and the president of the State Audit Office) selected by Fidesz. Vörös points out that the Council has the power to veto the budget proposed by the government. He argues that this situation can easily lead to the dissolution of the National Assembly by the President of the Republic.

Contrary to the pessimists, several lawyers think that the Opposition Alliance having a simple majority in the National Assembly is not doomed to fail despite the traps left behind by the Orbán government. They acknowledge the existence of several serious difficulties, but in general they opine that the new governing coalition will still have enough room of maneuver to realize a big chunk of its political agenda. Some also argue that the behavior of the constitutional organs after the 2022 elections is not predictable.

¹⁸ Z. FLECK, *Kik a jogállam valódi ellenségei? (Who are the real enemies of the rule of law?)*, in HVG, available at: www.hvg.hu, 29 September 2020.

¹⁹ Z. FLECK, *Demokráciát! (Democracy!)*, cit.

²⁰ B. BAGI, *Fleck Zoltán: Itt is lehet – már volt – Washington (Zoltán Fleck: Washington could be – have already been – here)*, in *Civil Bázis*, available at: www.civilbazis.hu, 29 July 2021.

²¹ Z. LAKNER, *Mesterterv és slamperáj a különleges jogrend világa. Vörös Imre: Ki lehet iktatni a kétharmados törvényeket (The special legal order is a masterplan and disorder. Imre Vörös: The two-thirds majority laws can be abrogated)*, in *Jelen*, available at: www.jelen.media, 1 March 2021; Z. FARKAS, *Vörös Imre jogtudós, egykori alkotmánybíró: Az államcsíny lopakodó módon bekövetkezett (Imre Vörös legal scholar, former constitutional judge: The coup d'état has already happened in disguise)*, in HVG, available at: www.hvg.hu, 19 June 2021.

András Jakab is of the view that the character of the Orbán regime is not determined primarily by its legal structure; it operates very often contrary to its own laws.²² The characteristics of this system are influenced by informational rules and practices which are not carved into law: “*The heart of the current regime is the politically biased application of the law which could be quickly changed by a new parliamentary majority even without adopting a new constitution.*”²³ His point is that one cannot predict how the state institutions will act after the 2022 elections: “*History teaches that if independent institutions are filled with people based on their loyalty to the party, it works only in a given power structure.*”²⁴ This is why Jakab thinks that first of all we have to formulate some expectations and see whether the actors of the system of check and balances live up to these requirements or not. He argues that if state institutions attempt to sabotage the work of the new government, they can only do it by infringing the law.²⁵ If the Fidesz appointees violate the rules first, this will create a different situation.

Dániel Karsai has a similar opinion insofar as he does not take it for granted that the operation of the new government will be paralyzed by the state institutions. He argues that a total obstruction would actually be dangerous for Fidesz, especially after an electoral defeat, because the strategy of creating chaos in the country may backfire and destroy the party for good.²⁶ He thinks it is much more likely that the ‘guardians’ of the Orbán regime will try to make the efficient governance very difficult, but not completely impossible. He adds that the new government will have several means to defend itself against these attempts, such as the initiation of criminal investigations and the restoration of media freedom.

Lastly, Tibor Sepsi and Balázs M Tóth admit that Fidesz has hidden numerous land mines in the legal system that can be activated to incapacitate the new government.²⁷ However, they argue that demining does not necessarily require

²² D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket* (Interview with András Jakab), in Jelen, available at: www.jelen.media, 20 May 2020.

²³ Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrásal* (Interview with András Jakab), in Telex, available at: www.telex.hu, 17 October 2021.

²⁴ D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket* (Interview with András Jakab), cit.

²⁵ Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrásal* (Interview with András Jakab), cit.

²⁶ D. KARSAI, *A feles alkotmányozás paradoxona* (The paradox of constitution-making with simple majority), in 444, available at: www.444.hu, 25 October 2021.

²⁷ T. SEPSI, B. M. TÓTH, *A feles alkotmányozás másnapján, avagy a káosz forgatókönyve* (After the adoption of a constitution with a simple majority, or the scenario of chaos), in *Igy íránk mi*, available at: www.igyirankmi.atlatszo.hu, 9 November 2021.

the adoption of constitutional changes. They show that for example the criminalization of homelessness and freedom of information problems – two concerns voiced by the advocates of a more radical regime change – can be remedied by simple legal measures.

2.2 The significance of a symbolic rupture with the Orbán regime

Many lawyers think that the new National Assembly will have to break with the Orbán regime not only in terms of practical legal and political measures, but also symbolically. This opinion is probably best expressed by László Majtényi who envisages the declaration of the “Fourth Hungarian Republic”: “*The primary goal of the new coalition can only be the establishment of a free and democratic Hungary, because its existence cannot be justified on any other grounds.*”²⁸ According to him the achievement of this goal necessitates the enactment of a new constitution.

Many lawyers share the opinion that the Fundamental Law is the constitution of an illiberal or authoritarian regime and as such does not deserve protection. Halmai and Arató say:

[A]lready during its initial enactment the Fundamental Law was proudly declared as an »illiberal« constitution, that has since, as a result of nine amendments, become increasingly autocratic. It cannot thus be the foundation of a constitutional democracy of the future. [It] does not satisfy European requirements with respect to democracy, the rule of law, and protection of fundamental rights.²⁹

Fleck argues that the Fundamental Law constitutes a rupture with the Hungarian tradition of democratic governance based on the separation of power; it is the legal basis of the institutionalized form of the exercise of authoritarian power.³⁰ He also adds that the current constitution is not suitable to express the general will of the Hungarian people and thus to unite the nation because it is built on an exclusionary, discriminatory ideology which negates the neutrality of the state. This is the reason why, he concludes, the new governing majority cannot accept the Fundamental Law as the basis of the Hungarian

²⁸ László MAJTÉNYI, *Szabad ország – szabad emberek. A Kis Rendszerváltás nagy gondjai*, (Free country - free people. The big problems of the Small Change of Regime), in *Élet és Irodalom*, available at: www.es.hu, 29 October 2021.

²⁹ A. ARATÓ, G. HALMAI, *So that the Name Hungarian Regain its Dignity. Strategy for the Making of a New Constitution*, cit.

³⁰ Z. FLECK, *Demokráciát! (Democracy!)*, cit.

polity. Balázs Majtényi largely concurs with Fleck on this point.³¹ On the contrary, Sajó adopts a more pragmatic stance when he says:

The Fundamental Law is not particularly problematic (aside from a couple of ideological principles and the lack of certain constitutional guarantees), one could live with this text in a democracy. The power of the [Orbán regime] lies in the *apparatchiks* loyal to Fidesz who are protected by [...] the Fundamental Law....³²

There seems to be another difference of opinion between Fleck and Sajó. Fleck is of the view that the implementation of constitutional changes is necessary in order to avoid “bricolage” (*barkácsolás*).³³ By bricolage he means the application of shady legal and political maneuvers with the aim of circumventing the constraints imposed on the government by the Fundamental Law and the qualified majority acts and exercising pressure on the Fidesz appointees.³⁴ He argues that this practice will eventually render the new political majority similar to the leaders of the Orbán regime. In contrast, Sajó opines that the adoption of constitutional measures in a legally dubious manner would be the continuation of the unethical practices of governance exercised by Fidesz.³⁵ For example, he notes, if the Kúria (i.e. Supreme Court) was renamed and the current Chief Justice was dismissed for this reason, it would comply with the relevant decision of the Hungarian Constitutional Court,³⁶ but would still constitute a violation of the rule of law.

3. The non-applicability of the procedural rules in force

Even if one accepts that the implementation of constitutional changes is necessary after the potential victory of the Opposition Alliance in 2022, it still needs to be answered whether it is possible to deviate from the rules of the Fundamental Law if the new governing coalition does not get the two-thirds

³¹ B. MAJTÉNYI, *Akarunk-e egyáltalán alkotmányos demokráciát? (Do we want democracy at all?)*, in Telex, available at: www.telex.hu, 7 November 2021.

³² A. SAJÓ, „Alkotmányozz a Fidesszel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), cit.

³³ Z. FLECK, *Demokráciát! (Democracy!)*, cit.

³⁴ Z. LAKNER, *Új alkotmány kell, aminek széles társadalmi részvétel biztosíthat legitimitációt. Interjú Fleck Zoltánnal (Interview with Zoltán Fleck)*, in Jelen, available at: www.jelen.media, 15 May 2021.

³⁵ A. SAJÓ, „Alkotmányozz a Fidesszel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), cit.

³⁶ András Baka, former Chief Justice was removed from his position by Fidesz. The European Court of Human Rights concluded that his removal violated Article 6 § 1 (right of access to a court) and Article 10 (freedom of expression) of the Convention. See European Court of Human Rights (GC), *Baka v. Hungary*, Appl. no. 20261/12, Judgment of 23 June 2016.

of the parliamentary mandates. The debate on this issue has two levels: a theoretical one (whether it is theoretically justifiable), and a practical one (whether it would be a good decision in light of the potential consequences).

3.1 Legal basis – Theoretical arguments

There are currently five justifications circulating in the debate for deviating from the rules of the Fundamental Law to implement constitutional changes. The authors usually rely on more than one of them in different combinations to substantiate their arguments. So, the following few pages provide a map or a sort of typology of the possible justifications and their criticism.

3.1.1 Invalidity of the Fundamental Law on procedural grounds

Let us start with the justification which is arguably the easiest to understand. Many lawyers argue that the Fundamental Law could be declared invalid on the grounds that it was not adopted in a legally correct manner. Vörös points out that the drafters violated the written rules of the law-making process which can render the enacted piece of legislation unconstitutional on formal grounds according to the well-established case-law of the Constitutional Court.³⁷ Fleck agrees with this opinion and adds that the constitution-making process in 2011 suffered from several serious shortcomings: there was no public consultation, experts were not invited to submit their opinions, the adoption of a new constitution was not part of Fidesz's political program before the 2010 elections, therefore the explicit electoral authorization was missing.³⁸ According to him, nothing but the sheer two-thirds parliamentary majority of Fidesz was the basis of the Fundamental Law's enactment. Gábor Attila Tóth argues on somewhat different grounds when he highlights the following two defects of the drafting process: first, the Fidesz dominated National Assembly abolished the constitutional rule which prescribed the adoption of the detailed rules of the constitution-making process (not the adoption of the new constitution itself!) by the four-fifth majority of the MPs,³⁹ and second, the Fundamental Law itself declares the previous Constitution invalid⁴⁰ on the basis of which it was

³⁷ I. VÖRÖS, *A jogállami alkotmányosság helyreállítása. Vitaanyag – a „Civil Bázis” csoport felkérésére a 2021. március 13-án tartott előadás alapján* (*The restoration of the rule of law. The transcript of a presentation held on 13 March 2021*), in Civil Bázis, available at: www.civilbazis.hu, 13 March 2021.

³⁸ Z. FLECK, *Demokráciát!* (*Democracy!*), cit.

³⁹ Article 24(5) of the previous Constitution said: „*The parliamentary resolution on the detailed rules of constitution-making process shall be adopted by the four-fifth majority of MPs.*”

⁴⁰ The preamble of the Fundamental Law provides: “*We do not acknowledge the 1949 communist constitution, because it was the basis of a despotic regime, therefore we declare it invalid.*” Point 2 of the final provisions of the Fundamental Law provides: “*This Fundamental Law was enacted by the National Assembly on the basis of Article 19 (3) a) and Article 24 (3) of Act no. XX of 1949 [i.e. the 1949 Constitution].*”

adopted.⁴¹ Halmai does not state explicitly that the Fundamental Law is invalid on procedural grounds but acknowledges that in this case it would be easy to get rid of it.⁴²

Jakab contests the previous arguments and emphasizes the difference between the legality and the legitimacy of the Fundamental Law.⁴³ On the one hand, he notes that the Fundamental Law was adopted in compliance with the rules of the constitution-making process. His opinion is that the allegation of the violation of the fourth-fifth majority rule is not well-founded because this requirement was no longer in force in 2011.⁴⁴ On the other, he admits that the Fundamental Law enjoys a low level of legitimacy due to the shortcomings of the drafting process, but he argues that it does not make the current constitution invalid. Karsai adds another counterargument. He says the even if the Fundamental Law declared the previous Constitution invalid when it entered into force on 1 January 2012, this declaration does not have any impact on the former's legality because at the time of the adoption of the Fundamental Law in April 2011 the Constitution was still valid, therefore it was enacted on a valid legal basis.⁴⁵

3.1.2 *The ius resistendi argument*

The justification presented by Vörös is based primarily on the constitutional principle of *ius resistendi*. Article C (2) of the Fundamental law provides that “No one shall engage in activities aimed at the acquisition or exercise of power by force or at the exclusive possession of power. Everyone shall have the right and obligation to resist such attempts by lawful means.” Vörös opines that this rule, which also figured in the previous Constitution, is not simply one of the many provisions of the Fundamental Law, but a constitutional principle of

⁴¹ G. A. TÓTH, *Az alaptörvény eltörlése (The abolition of the Fundamental Law)*, in 444, available at: www.444.hu, 23 October 2021.

⁴² B. VÁRKONYI: *A leválthatatlan batalom nem legitim. Interjú Halmai Gáborral*, in *Élet és Irodalom*, available at: www.es.hu, 30 April 2021.

⁴³ D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket (Interview with András Jakab)*, cit.

⁴⁴ The four-fifth majority rule (see also footnote 39) was enacted when the National Assembly attempted to enact a new constitution under the socialist-liberal coalition government between 1994 and 1998. The constitution-making process eventually failed. Many lawyers argue that the four-fifth majority rule was supposed to be abrogated automatically at the end of the 1994-1998 parliamentary term, but it remained in the Constitution due to a codification error. After the entry into force of the Fidesz government in 2010 the two-thirds majority of the National Assembly amended the Constitution and abolished this special qualified majority requirement.

⁴⁵ D. KARSAI, *A feles alkotmányozás paradoxona (The paradox of constitution-making with simple majority)*, cit.

fundamental significance which underlies every article of the constitutional text.⁴⁶

Vörös notes that the Fidesz government has already acquired the exclusive possession of power and thus created an autocratic regime by violating Article C (2). Following his logic, the infringement of the prohibition of the exclusive exercise of power renders the Fundamental Law invalid. It also means that the provisions of the Fundamental Law on the constitutional amendment process and the enactment of a new constitution are not applicable. Therefore, a new governing majority coming into power after the 2022 elections would be allowed to implement constitutional changes even without a two-thirds parliamentary majority.

Sajó does not explicitly endorse this idea, but he does acknowledge that the partial suspension of the Fundamental Law and the qualified majority acts “*would not be unjustifiable*” based on Vörös’s argument.⁴⁷ He adds that several international organizations and the European Parliament have already observed the systemic violation of the rule of law in Hungary and he also notes that the resistance to despotic power is one of the fundamental principles of constitutionalism.

Jakab, on the contrary, does not find the *ius resistendi* argument well-founded. He submits two main objections.⁴⁸ First, he points out that the *ius resistendi* principle (introduced by the Golden Bull in 1222)⁴⁹ ceased to be part of the Hungarian constitutional tradition after 1687 when the Hungarian parliament renounced this right. When this principle was inserted in the constitutional text during the 1989/90 change of regime, it was primarily inspired by the German Basic Law. Jakab argues that this provision is a rather symbolic rule which has no normative force based on which constitutional provisions or even the Fundamental Law as a whole could be annulled. Secondly, he also opines that in fact it would be the new governing coalition who would engage in activities aimed at the exclusive exercise of power by invalidating the Fundamental Law and adopting a new constitution without a two-thirds parliamentary majority with the aim of dissolving the Constitutional Court and dismissing the Chief Prosecutor. Halmai and Arató do not elaborate on the

⁴⁶ I. VÖRÖS, *A jogállami alkotmányosság helyreállítása. Vitaanyag – a „Civil Bázis” csoport felkérésére a 2021. március 13-án tartott előadás alapján* (*The restoration of the rule of law. The transcript of a presentation held on 13 March 2021*), cit.

⁴⁷ A. SAJÓ, *„Alkotmányozz a Fidesszel!” (turáni átok)* (*May you enact a constitution with Fidesz! The curse of Turan*), cit.

⁴⁸ Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrással* (*Interview with András Jakab*), cit.

⁴⁹ The Golden Bull was a charter granted by King Andrew II in 1222 which stated the basic rights and privileges of the Hungarian nobility and clergymen and the limits of the monarch’s powers. It was similar to the 1215 Magna Carta.

reasons why, but they are also not convinced that the removal of the Fundamental Law can be based on the right of resistance.⁵⁰

3.1.3 Institutionalized authoritarianism as an exemption from the adherence to formal rules

Some lawyers draw more general theoretical conclusions from the argument that Hungary has become some sort of an authoritarian regime. Fleck points out that contemporary authoritarian regimes often pretend to respect the rules and principles of constitutional democracy, but in reality they just hide behind the formal requirements of the law to justify their legal measures that are actually undermining the rule of law.⁵¹ He opines that Hungary has become a model of how to relativize the rule of law principle, because the Orbán regime constitutes in fact an institutionalized form of exercising authoritarian power which still looks like a constitutional democracy on the surface. This is why Fleck argues that we have to leave behind the “*fake formalism*” and dismantle the authoritarian regime by democratic means even if they do not comply with the formal requirements of the rule of law.

In a similar vein, Gábor Attila Tóth also criticizes the formalistic logic that claims that the Fundamental Law can only be amended or replaced by following the written procedural rules. He accuses the formalists of ignoring the fact that the enactment process of the Fundamental Law suffered from many shortcomings, that a large part of the constitutional text was adopted by the Fidesz-dominated National Assembly after the 2014 and the 2018 elections which were considered by international organizations as unfair, and that many provisions of the Fundamental Law are contrary to the separation of power principle and the protection of fundamental rights.⁵² Tóth opines that the essence of the rule of law is the preservation of freedom and the prevention of despotism. Therefore, he continues: “*The laws and the constitution that were created in an uncivilized manner to serve uncivilized goals and that perpetuate legal insecurity and institutionalize arbitrariness do not deserve to be protected. The unconditional adherence to these laws has no value.*”⁵³

Tóth adds that modern authoritarian regimes have to allow the organization of parliamentary elections to maintain the illusion of democracy, but it does not mean that these regimes could be changed by simply winning the elections because the formal rules put in place by the authoritarians make it impossible. He further criticizes the formalists for disregarding the substantive values of

⁵⁰ A. ARATÓ, G. HALMAI, *So that the Name Hungarian Regain its Dignity. Strategy for the Making of a New Constitution*, cit.

⁵¹ Z. FLECK, *Kik a jogállam valódi ellenségei? (Who are the real enemies of the rule of law?)*, cit.

⁵² G. A. TÓTH, *Az alaptörvény eltörlése (The abolition of the Fundamental Law)*, cit.

⁵³ G. A. TÓTH, *Az alaptörvény eltörlése (The abolition of the Fundamental Law)*, cit.

the rule of law, democracy and constitutionalism, all the ethical values that could justify the departure from the formal rules. Tóth argues that even a constitution-making process that does not comply with the formal procedural rules can be justified on the grounds of significant ethical and legal reasons (i.e. normative legitimacy), an overwhelming social support and the approval of international organizations.⁵⁴

By contrast, Jakab sides with those who claim that amending and replacing the Fundamental Law is possible only with a two-thirds majority in the National Assembly, simply because this is what the relevant constitutional provisions have always prescribed ever since the enactment of the previous Constitution in 1949.⁵⁵ He thinks that any departure from the formal rules of law could only be justified based on revolutionary natural law arguments. However, he notes that in general these are used after wars or the fall of dictatorships when the legal order is full of deeply unethical and antidemocratic laws. Hungary is somewhere between a democracy and a dictatorship, he continues, which does not justify the application of revolutionary natural law theories. What is more, he also opines that natural law is a highly subjective category, so its requirements cannot be identified unequivocally.

Karsai presents a very similar argument. He explicitly says, however, that the non-compliance of constitutional rules with substantive moral and ethical values is not a legal issue, because there is no higher legal norm based on which the provisions of the Fundamental Law could be evaluated and (potentially) invalidated.⁵⁶ He proposes just one way of remedying the substantive shortcomings of the Fundamental Law without a two-thirds parliamentary majority: revolution.

Sepsi and M. Tóth reply to one of the arguments formulated by Gábor Attila Tóth by saying that the sign of an overwhelming popular support for dismantling the authoritarian structure of the Orbán regime would be the Opposition Alliance's landslide electoral victory with a two-thirds majority of the mandates.⁵⁷ In this case, however, there is no need to deviate from the procedural rules in force. They also submit that even if the formalists are wrong, it does not change anything in practice. Most Hungarian lawyers have been socialized in a professional community which values formalism and therefore they would not find it acceptable to invalidate or replace the Fundamental Law in a legally

⁵⁴ G. A. TÓTH, *Az alaptörvény eltörlése (The abolition of the Fundamental Law)*, cit.

⁵⁵ Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrásal (Interview with András Jakab)*, cit.

⁵⁶ D. KARSAI, *A feles alkotmányozás paradoxona (The paradox of constitution-making with simple majority)*, cit.

⁵⁷ T. SEPSI, B. M. TÓTH, *A feles alkotmányozás másnapján, avagy a káosz forgatókönyve (After the adoption of a constitution with a simple majority, or the scenario of chaos)*, cit.

defective process.

3.1.4 Regime-changing constitution-making

Very similar to the ones summarized in the previous section, but not exactly identical to them are those arguments which contemplate the possibility of deviating from the written procedural rules based on the qualification of the implementation of constitutional measures as a form of revolutionary or regime-changing act. Let us mention Sajó first who points out that in case of a revolutionary or regime-changing law-making process, constitutions are often adopted contrary to the rules of the previous regime.⁵⁸ He notes that the Opposition Alliance's potential victory at the 2022 elections yielding a simple parliamentary majority would not qualify as a revolution. Nevertheless, he does admit that under certain circumstances a sort of "*revolution by law*" (*jogi forradalom*) can be justified:

This revolutionary law-making is moderate, thus probably acceptable, if it is used only in those fields where it is absolutely necessary in order to remedy the most serious violations of the rule of law, if the basic principles of the rule of law and of civilization are respected (no defendants wearing chains in the television!); if it does not serve the interests of those in power and it categorically excludes the possibility of acquiring exclusive power. In addition, during the constitution-making process, throughout the transitional period, the system of checks and balances must work, even if the [already existing mechanisms need to be replaced temporarily by new ones].⁵⁹

Halmai does not explicitly advocate a constitutional revolution but admits that it would not necessarily imply violence: it would be enough if the new democratically elected parliament declared the previous political regime illegitimate.⁶⁰ He opines that the legitimacy of a constitutional convention could be justified in such a revolutionary situation on the grounds that the previous regime is unreplaceable. The new government could argue, he continues, that in order to make the country governable it has to abrogate the constitution in force and start from scratch.

László Majtényi sympathizes with the regime-changing arguments, and he

⁵⁸ A. SAJÓ, „Alkotmányozz a Fidesszel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), cit..

⁵⁹ A. SAJÓ, „Alkotmányozz a Fidesszel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), cit.

⁶⁰ B. VÁRKONYI: *A leválthatatlan hatalom nem legitim. Interjú Halmai Gáborral*, cit.

also believes that the Orbán regime can only be abolished once and for all by a new constitution.⁶¹ However, he stresses the point that a potential change of government after the 2022 elections can be labeled any sort of revolution (even just a moderate one) only symbolically. Therefore, it would not authorize the new governing coalition to implement constitutional changes without the necessary two-thirds majority.

Jakab rejects the idea of a revolution (or rather the qualification of the political events as a revolution) altogether because it can potentially lead to the disruption of legal continuity.⁶² He warns that this scenario would be very dangerous because it would result in serious political conflicts and polarization.⁶³ (See also his arguments summarized in the previous section.)

3.1.5 Popular authorization through elections

There is one more theoretical argument which may potentially justify the deviation from the formal rules of the constitutional amendment and constitution-making process by conceptualizing the 2022 elections as a form of special popular authorization. Fleck argues that the implementation of constitutional changes by the simple majority of the new National Assembly would be acceptable if the parties of the Opposition Alliance agreed on the necessity of replacing the Fundamental Law and they communicated their intention unequivocally to the electorate.⁶⁴ The members of the current opposition have to make it clear that the enactment of a new constitution is necessary for the efficient governance of the country and therefore they ask the people to give their authorization through the ballot. He adds that it should also be promised that the constitution-making process would be an inclusive procedure providing ample room for popular participation.⁶⁵ This whole project needs to be regarded as a sort of social transformation, a means to integrate the society by making it an active participant of the process which requires the use of many innovative and courageous ideas that may not be part of the Hungarian legal

⁶¹ László MAJTÉNYI, *Szabad ország – szabad emberek. A Kis Rendszerváltás nagy gondjai*, (Free country - free people. The big problems of the Small Change of Regime), cit.

⁶² D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket* (Interview with András Jakab), cit.

⁶³ D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket* (Interview with András Jakab), cit.

⁶⁴ Z. LAKNER, *Új alkotmány kell, aminek széles társadalmi részvétel biztosíthat legitimitást. Interjú Fleck Zoltánnal* (Interview with Zoltán Fleck), cit.

⁶⁵ Z. LAKNER, *Új alkotmány kell, aminek széles társadalmi részvétel biztosíthat legitimitást. Interjú Fleck Zoltánnal* (Interview with Zoltán Fleck), cit.; P. NÉMETH, *Fleck Zoltán: az alaptörvénytől azonnal meg kell szabadulni (2.)* (Interview with Zoltán Fleck), in *HírKlikk*, available at: www.hirklikk.hu, 2 May 2021.

tradition.⁶⁶

Jakab objects to this argument by saying that the Opposition Alliance will receive the necessary authorization to implement constitutional changes only if it obtains a two-thirds majority in the National Assembly as the result of the elections. *“It would be the denial of the idea of constitutionalism if [the new governing coalition] initiated a constitution-making process with a simple majority.”*⁶⁷ Sepsi and M. Tóth concur with this opinion and note that due to the rules of the current electoral system, the unified opposition will get two-thirds of the parliamentary mandates even if only 55 % of the electors vote on their party list.⁶⁸ Achieving this result is probably easier than garnering the support of the overwhelming majority of the society in a constitution-making process.

3.2 Fear from chaos and instability – practical considerations

We discussed the theoretical arguments in the previous section, but the participants of this debate also rely on several practical considerations to substantiate their opinion. Jakab, Karsai, Sepsi and M. Tóth raise more or less the same objections and they all envisage a chaotic situation.⁶⁹ Firstly, they argue that the constitutional organs (more precisely the members and the leaders of these institutions selected by Fidesz) would not acknowledge the legality of the constitutional measures adopted by the new National Assembly contrary to the procedural rules. Most probably all of these legislative acts (i.e. the annulment or the revision of the Fundamental Law, a new constitution, the amendments to qualified majority laws) enacted in a formally defective process would be annulled by the Constitutional Court upon the petition of the President of the Republic or the parliamentary opposition. The only solution would be the abolition of the Constitutional Court or the replacement of its members with new justices, but it would lead to a very uncertain situation because many lawyers would not accept the new court as a legitimate institution. Even if the newly adopted legislative measures could somehow enter into force, ordinary judges, public administration officers and other lawyers, who have been trained to

⁶⁶ Z. LAKNER, *Új alkotmány kell, aminek széles társadalmi részvétel biztosíthat legitimitációt. Interjú Fleck Zoltánnal (Interview with Zoltán Fleck)*, cit.; Z. FLECK, *Demokráciát! (Democracy!)*, cit.

⁶⁷ Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrással (Interview with András Jakab)*, cit.

⁶⁸ T. SEPSI, B. M. TÓTH, *A feles alkotmányozás másnapján, avagy a káosz forgatókönyve (After the adoption of a constitution with a simple majority, or the scenario of chaos)*, cit.

⁶⁹ D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket (Interview with András Jakab)*, cit.; Sz. DULL, *A NER-nek kétharmaddal se, az ellenzéknek sima többséggel is? Ez abszurdum! Interjú Jakab Andrással (Interview with András Jakab)*, cit.; D. KARSAI, *A feles alkotmányozás paradoxona (The paradox of constitution-making with simple majority)*, cit.; T. SEPSI, B. M. TÓTH, *A feles alkotmányozás másnapján, avagy a káosz forgatókönyve (After the adoption of a constitution with a simple majority, or the scenario of chaos)*, cit.

respect formalism, would be divided on the applicability of the formally defective laws.

Secondly, it is very likely that massive demonstrations organized throughout the country would lead to a civil war-like situation that could only be repressed by force. Thirdly, this sort of revolutionary law-making could perpetuate and be repeated after every change of government following a parliamentary election. Nothing would prevent another governing party or coalition in the future from following this example and implementing constitutional changes with a simple majority of the parliamentary mandates. Finally, Sepsi and M Tóth also mention that the European Union would probably consider the adoption of constitutional measures in a formally defective procedure as a violation of the rule of law and therefore would not approve of these decisions made by the new government.

Fleck replies to the practical objections as follows. Firstly, he thinks that the arguments concerning the perpetuation of regime changes are not well-founded because the dismantling of an authoritarian system (such as the Orbán regime) is more than just a simple change of government and also because the Hungarian democracy cannot be consolidated without a new constitution.⁷⁰ This new constitution could introduce several means to protect the stability of the freshly established system and, what is more, it would be legitimized by the electorate through public participation in the drafting process and a referendum. Secondly, he also opines that the Orbán regime is characterized by the systemic violation of the rule of law. Therefore, its formal rules cannot be used to prevent the restoration of the rule of law by a new governing majority regardless of the number of its parliamentary seats.

Balázs Majtényi acknowledges the relevance of practical considerations, but he thinks that the enactment of the new constitutional text in a legally correct manner has secondary importance.⁷¹ Strongly emphasizing the legality of decisions can have a legitimizing function in a system which cannot be justified based on constitutional principles. What is more significant, Majtényi continues, is whether the values enshrined in a new constitution would enjoy social support.

4. Specific scenarios

Those lawyers who argue in favor of deviating from the formal rules of the constitutional amendment and constitution-making process are often labelled by their critics as the advocates of constitution-making with simple majority.

⁷⁰ Z. FLECK, *Demokráciát! (Democracy!)*, cit.

⁷¹ B. MAJTÉNYI, *Akarunk-e egyáltalán alkotmányos demokráciát? (Do we want democracy at all?)*, cit.

However, this generalization is inaccurate. As we will see in the following pages, the ideas on the table show a much more complex picture.

4.1 The invalidation of the Fundamental Law

The idea presented by Vörös is arguably the most unorthodox, so let us start with that one. He says that the new National Assembly should pass two resolutions at its inaugural session.⁷² The first resolution should declare the Fundamental Law and certain statutory provisions invalid based on their non-compliance with the prohibition of the exclusive possession of power enshrined in Article C (2) of the Fundamental Law (the *ius resistendi* principle). Vörös is of the view that the Fidesz governing majority adopted a large number of legislative acts which as a whole constituted an engagement in activities aimed at the exclusive possession of power. In 2013 two individuals challenged these acts in a constitutional review procedure, but the Constitutional Court found the petition inadmissible on the grounds of the applicant's lack of standing.⁷³ Vörös argues that by this decision the Constitutional Court refused to halt the unconstitutional activities of the government and thus abdicated its role as guardian of the constitutional order. This is why the National Assembly, as the creator of the Constitutional Court, has the right to reclaim the competence of constitutional review. So, according to Vörös when the National Assembly declares the Fundamental Law and certain statutory provisions invalid, it would act as the Constitutional Court. And since the Court decides cases with the simple majority of its members, the same procedural rules would apply to the decision-making of the National Assembly. The first resolution would contain an exhaustive list of all those statutory provisions which obviously serve the exclusive possession of power by Fidesz, such as the media laws, the acts on the judiciary and the prosecutorial service, the electoral regulation etc. Vörös adds that the National Assembly should decide on the specific legal consequences of the invalidations very carefully to guarantee legal security. The second parliamentary resolution would order the comprehensive monitoring of the legal system to identify those legislative provisions which would block the restoration of the rule of law.

4.2 Progressive or two-step constitution-making process

Some lawyers advocate a progressive or two-step constitution-making process: the annulment or the suspension of the Fundamental Law would be followed

⁷² I. VÖRÖS, *A jogállami alkotmányosság helyreállítása. Vitaanyag – a „Civil Bázis” csoport felkérésére a 2021. március 13-án tartott előadás alapján* (*The restoration of the rule of law. The transcript of a presentation held on 13 March 2021*), cit.

⁷³ Resolution no. 3012/2012 (VI. 21.) of the Constitutional Court of Hungary.

by the enactment of a new constitution. Gábor Attila Tóth argues that the first step should be a temporary “negative” constitution-making aimed at the restoration of the minimal requirements of the rule of law by invalidating the legislative acts which constitute the basis of the authoritarian regime.⁷⁴ He opines that these decisions should be made by the simple majority of MPs only if even the minimal conditions of cooperation with the then opposition (Fidesz) is missing. The second step would be the termination of the transitional period by the enactment of a new constitution. For this constitution to last long, Tóth opines, it has to be drafted and adopted in an inclusive process based on the cooperation of all the political forces and the active participation of the people. Therefore, what is important is the quality of the process, not the two-thirds majority rule.

Sajó describes a similar scenario in which the Fundamental Law and certain qualified majority laws would be suspended first.⁷⁵ This ‘revolutionary law-making’ would be legitimate only to the extent that it aims to remedy the most serious violations of the rule of law, it respects the basic principles of the rule of law and of civilization, it does not serve the interests of those in power, and it guarantees that the system of check and balances works even during the transitional period. The next phase would start with the convocation of a constitutional convention charged with the exclusive task of drafting and adopting a new constitution. Its convocation may be preceded by a referendum on whether the electorate wishes to have a new constitution. Sajó recommends electing the members of the convention on the basis of proportional representation and excluding party politicians or MPs from the electoral race. He emphasizes that the constitution-making process should be very inclusive providing ample opportunity for public participation. Such a democratic decision-making could potentially guarantee the social legitimacy of the new constitution, provided that it does not contain very divisive provisions. This is why Sajó suggests the adoption of a minimal constitution and the organization of referendums to decide on the more controversial issues, such as marriage equality.

4.3 Enactment of a new constitution

Some lawyers do not explicitly mention the invalidation or suspension of the Fundamental Law but focus instead on the enactment of a new constitution. They present somewhat different scenarios, but they all advocate the reconceptualization of the constitution-making process (thus a deviation from the formal rules currently in force) and emphasize the importance of public

⁷⁴ G. A. TÓTH, *Az alaptörvény eltörlése (The abolition of the Fundamental Law)*, cit.

⁷⁵ A. SAJÓ, „Alkotmányozz a Fidesszel!” (*turáni átok*) (*May you enact a constitution with Fidesz! The curse of Turan*), cit.

participation as the source of popular legitimacy. Fleck argues that the problems posed by authoritarian constitutionalism can only be solved by the means of popular constitutionalism.⁷⁶ He admits that a certain tension exists between constitutionalism and populism, but opines that if popular sovereignty is taken seriously, it can be used to restore the rule of law. He adds that public participation is necessary not to compensate for the legitimacy deficit stemming from the adoption of a new constitution without a qualified parliamentary majority, but to stabilize democracy. This constitution-making process proposed by Fleck contains three elements:

Firstly, the democratic opposition must make the intention and the method of constitution-making part of the electoral programme, to be able to start preparing this process in the absence of a two-thirds majority. Secondly, the text of a new constitution, after proper preparation, must be legitimized by a referendum. Thirdly (this is where we need to step out of our comfort zones), the best form of preparation is to ensure that the constitutional dilemmas, the institutional solutions – the actual process of constitution-making – is as open as possible, with the widest possible participation.⁷⁷

Halmai and Arató explicitly rejects the idea of amending or replacing the Fundamental Law by the simple majority of MPs.⁷⁸ Instead, they propose a new constitution-making process which is different from the one regulated by the Fundamental Law. As a very first step, they argue, the current opposition parties must clearly communicate to the electorate during the campaign their intention to replace the Fundamental Law with a “*constitutional constitution*” the preparation of which would begin shortly after the 2022 elections. For the preparation of the new constitution Halmai and Arató recommend initiating a “round table”⁷⁹ (a deliberative forum) composed of the representatives of political parties and civil society organizations, and charged with the task of working out the composition and the electoral rules of a constitutional convention and submitting it to the National Assembly.

⁷⁶ Z. FLECK, *Demokráciát! (Democracy!)*, cit.

⁷⁷ Z. FLECK: *After Orbán. A democratically-established constitution could solve the crises of the rule of law*, in *Verfassungsblog*, available at: www.verfassungsblog.de, 29 April 2021.

⁷⁸ A. ARATÓ, G. HALMAI, *So that the Name Hungarian Regain its Dignity. Strategy for the Making of a New Constitution*, cit.

⁷⁹ This expression refers to the “round table negotiations” between the representatives of the Hungarian Socialist Workers’ Party, several opposition parties and civil society organizations on the constitutional reform during the change of regime in 1989.

If the 2/3 majority for their proposal clearly cannot be attained, they should further propose either a new rule for the formation of a constitutional assembly, based on majority vote of parliament followed by a democratic and participatory referendum in the whole country, or, to propose the dissolution of parliament. The first option should lead to the election of a constitutional assembly, concerned with one and only one task: the drafting of a constitution. The second option would mean new parliamentary elections where the main stake would be the creation of a constitutional assembly according to the round table constitutional proposal. We leave open the possibility that the round table would leave exactly this choice to the parliament itself.⁸⁰

According to László Majtényi the first task of the new National Assembly should be the adoption of a solemn declaration expressing the governing majority's most important political goals: the establishment of the Fourth Republic, the reinforcement of the protection of fundamental rights and the restoration of the independence of the constitutional organs responsible for the protection of the rule of law.⁸¹ However, the parliament should refrain from amending or replacing the Fundamental Law and qualified majority laws contrary to the procedural rules. Instead, it should initiate an original constitution-making process relying heavily on public engagement. The final draft of the constitution would be enacted by the parliament or a constitutional assembly with the qualified majority of the votes. The constitution would enter into force once approved by the people through a referendum.

The least specific scenario is presented by Balázs Majtényi who stresses the point that the constitution-making can only be the final stage of a long process aimed to restore constitutionalism in Hungary.⁸² He is of the view that the enactment of a new constitutional text should be preceded by a thorough preparation and broad public participation. Instead of elaborating on the concrete stages of this process, he emphasizes the importance of the identification and dissemination of values which can unite the political community.

Although Jakab is in favor of the enactment of a new constitution in the future, he does not go into procedural details – probably because he does not

⁸⁰ A. ARATÓ, G. HALMAI, *So that the Name Hungarian Regain its Dignity. Strategy for the Making of a New Constitution*, cit.

⁸¹ László MAJTÉNYI, *Szabad ország – szabad emberek. A Kis Rendszerváltás nagy gondjai, (Free country - free people. The big problems of the Small Change of Regime)*, cit.

⁸² B. MAJTÉNYI, *Akarunk-e egyáltalán alkotmányos demokráciát? (Do we want democracy at all?)*, cit.

approve of the deviation from the Fundamental Law at all.⁸³ He does, however, argue that a referendum cannot compensate for the procedural deficiency stemming from the adoption of a new constitution without two-thirds majority. A referendum is not more or better than the enactment of the constitution by the parliament, it is simply different. He admits that a referendum can be useful as a symbolic act, but only if it is a solemn ritual, not a part of a political competition.

5. Conclusion

Legal scholars and practicing lawyers are divided on many issues concerning the implementation of constitutional changes after the potential victory of the Opposition Alliance in the 2022 elections. However, the candidate of the opposition parties for Prime Minister, Péter Márki-Zay is determined to replace the Fundamental Law as quickly as possible after his entry into office even if the new government will have only a simple majority in the National Assembly.⁸⁴ The question is how the European Union would react in this situation. On the one hand, the Opposition Alliance promises to remedy the rule of law violations heavily criticized by many European institutions in the last few years. A new Hungarian government's active contribution to the reversal of the rule of law backsliding should be a relief for the EU. However, the adoption of constitutional changes by the simple majority of MPs in a formally defective process can be characterized as a violation of the rule of law as well. Would the EU turn a blind eye on the procedural irregularities, or would it initiate proceedings against the new Hungarian government for infringing EU values?

⁸³ D. ÓNODY-MOLNÁR, *Ne borítsuk föl az asztalt előre, rizikós dolog a jogállami forradalom. Jakab András: Az alkotmányjogi megoldások önmagukban nem fogják megoldani a kérdéseket (Interview with András Jakab)*, cit.

⁸⁴ E. ZALAN, *New Hungarian opposition head seeks Orbán 'regime change'*, in *Euobserver*, available at: www.euobserver.com, 11 November 2021.