

Rescuing Hungary's Institutions from Autocratic Legalism

Article by Zoltán Fleck

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If the current Hungarian opposition succeeds in the national election on 3 April, one of its greatest challenges will be to rebuild democracy and its checks and balances. The law professor Zoltán Fleck is leading a group of experts who will advise the new government in this effort. The task will not be easy, as Orbán's administration ensured that its allies remain influential, even after a change in government.

Green European Journal: How can you begin restoring the rule of law in Hungary?

Zoltán Fleck: We believe that to restore the rule of law, an analysis of the nature of the Orbán system and the current constitutional system is an inevitable first step. Since 2010, the Orbán government has followed a deliberate timetable to dismantle the rule of law.

The Constitutional Court played a pivotal role after Fidesz packed it with its loyalists, changing the nomination process from party-based to majority-based. The governing party also changed the powers of judges and passed constitutional amendments to guard against criticism of the government in case there was a dissenting or uncomfortable ruling by the court. The president of the republic can also send any bill to the Constitutional Court. The Constitutional Court could then stall or find some sections in the Fundamental Law (the Orbán-era constitution) that allows them to declare the law unconstitutional. In this case, the parliament has no legislative power.

These institutional changes were put in place roughly up until 2014. Since then, we can say that there has been no substantial counterweight to the executive. As such, a so-called electoral autocracy has emerged that understands it could lose the election but is not willing to give up control over institutions.

Power remains in the hands of a few companies and individuals around Fidesz and Viktor Orbán. This is true not only for the legal system, but also in culture, higher education, and the media. A lot of public and private money went to buying media outlets, destroying them, and then forcing them into a public foundation called KESMA. Universities were stripped of their independence as former and current ministers as well as other political figures were appointed to boards of trustees.

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What does it mean that power remains in the hands of Fidesz?

Without two-thirds of seats in parliament, the opposition can't change much even if it wins the election. The question is not just whether the opposition can change the laws requiring a two-thirds (qualified) majority, but whether it can legislate at all and implement its program.

There are roughly 320 laws that require a two-thirds majority. Originally, the logic of two-thirds laws was to protect the constitutional order and fundamental rights, but in practice, many of these laws protect policy decisions that are ideologically and financially important to Fidesz. An example is the law on agricultural land, which prevents foreigners from acquiring land in Hungary.

In other cases, laws by the Orban administration protect the people running institutions. A lot of things can be changed, but the attorney general cannot be replaced. The chief prosecutor, the budget council, the Constitutional Court and the ombudsperson are all in the hands of Fidesz, and these people cannot be touched by the next parliament. Until roughly 2026, the majority of the Constitutional Court will be Fidesz nominees.

How can laws be passed if there is resistance?

We have come up with some scenarios – but I must stress that they are mainly strategic considerations not proposals on institutional reforms. We did not make specific recommendations on what to do with constitutional judges or the Constitutional Court for example.

We understand that a simple parliamentary majority needs a strong basis of legitimacy to be able to make constitutional changes. One source of legitimacy is the fact that people would have voted for a new government and majority thus paralysing it would be anti-democratic.

From a political point of view, the opposition must first try to govern for as long as possible via simple majority. As soon as we encounter serious obstacles to democratic governance, a response must be made.

This approach would require the opposition to reach a compromise with Fidesz as a new opposition. We must try to negotiate with the president of the republic to sign laws. But if all fails, it should be emphasised that the government has tried to reach a compromise. If the new opposition hinders the passing of simple-majority legislation it can be argued that the government can go on and pass these laws regardless of hindrances from the old government and the institutions it still controls.

Such steps are justified by Hungary's rule of law obligations in the European Union or by the Hungarian constitutional tradition. Still, it does not hurt to be constantly in contact with European institutions when taking those steps.

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the election.

It seems a prerequisite of success is that the opposition stays united.

There are indeed conditions for success. There must be a political unity that will remain intact until the end of the term. That is, not a single seat is lost in the meantime, every member of the governing coalition wants the same thing, every political party says the same and does the same. It is also important that they work to a very high professional level, show a willingness to compromise, and negotiate with the opposition on an ongoing basis. They need to be politically and legally adept, very well prepared, and also credible.

There is no precedent to refer to. We cannot look at other countries and copy what they did five or 10 years ago. The type of autocratic legalism that has exploited the suicidal tendencies of the formal rule of law (that is, the ability of an autocratic power to use the democratic institutional system as a means to create an authoritarian one that still looks good on paper) is new and not well understood. Some legal experts say such a system cannot be changed without a two-thirds majority. But it is not likely that there is going to be a qualified majority for this task, so we have to look for alternatives.

Who do you work with in your expert committee?

I work with people who have theoretical and political knowledge and people who are experienced with codification. Many are currently working as lawyers or even working in the bureaucracy, so they would prefer not to be named at this point. If we are working to dismantle an autocratic system, while it is not at all certain that Fidesz will continue to stay in power in May, I can decide to risk my own position at the university, but I cannot ask to jeopardise their jobs.

The committee also cooperates with legal experts from opposition parties. We hold joint meetings and make decisions in consensus with the legal experts of the opposition parties. We have produced a 75-pager, which we discussed twice, rewrote, edited and now there is virtually a professional consensus on it. Now we are planning to introduce the document to the leaders of the parties. Although the parties are still busy with the campaign, preparations for governing cannot be spared in the current situation. In addition, the campaign itself can benefit from incorporating elements of our plan.

Will there be a new constitution as well?

We have articulated that this is a two-step process, the first stage of which is the so-called transitional legal state. This is a system based on the existing constitutional and consensual principles, but it does not mean giving up governance, restoring democratic institutions, and complying with the European Union's obligations. As described earlier, the opposition will be able to govern in this transitional situation in such a way that it will be forced to violate only one component of the rule of law: the formal rule that laws requiring a two-thirds majority must be changed by a qualified majority. Apart from this, the new government adheres strictly to all substantive principles of the rule of law.

The period is temporary because this whole intermediate situation must be closed by a new constitution, which will be adopted by referendum. There is a debate among experts about

how long it will take to draft this new constitution and exactly how to do it. Our suggestion is that this can only be done with the widest possible societal participation.

The constitution as the product of two-thirds of the parliament is a big flaw of the Hungarian system since 1990s. This provided a tremendous opportunity to build an authoritarian system that made the political and legal will of two-thirds of parliamentarians essentially unlimited. The only way out of this is to push the level of legitimacy higher, closer to the direct realisation of popular sovereignty, and use in this process some elements that are not entirely unprecedented in Europe: social rallies, Constituent Assemblies, and so on. Something that involves the direct involvement of people and civil society. Of course, this has to be done in a moderated way. We can look at techniques for community meetings in Germany, Scandinavia and Ireland, or the current constitution-making in Chile.

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Has the country's EU membership managed to shelter parts of the democratic system?

I would rather say that the development of the Orbán system was financed by the European Union. While the EU has constrained Orbán somewhat from the outside, I can give very few examples where the government has really stepped back from its plans. Let me give you a simple example: in response to European criticism, the government has retracted from setting up a new administrative higher court [which was said to give the justice minister too much influence over the judicial system]. At the same time, the same goal has now been achieved with different means: The President of the Curia (Supreme Court) has been replaced and an administrative system has been established within the Curia that can achieve the same politicised goal. All the decisions of the Venice Commission, all the infringement proceedings, all the decisions of the Strasbourg and Luxembourg courts could not prevent the creation of an autocratic system. The Article 7 procedure has remained essentially a political tool, but it does not work. By the time the Strasbourg court ruled in the CEU case, the university had moved out of the country, and by the time the European Court ruled that the forced retirement system for Hungarian judges was illegal, the judges had lost their offices. Although the judges received compensation, the government achieved its political goal: it could nominate new people to mid-level positions. While these problems were happening, an unprecedented amount of money came to Hungary from abroad.

Hasn't the situation changed in recent years?

I think the situation has improved somewhat in the last few years. Today, the European public knows much more about the essence of the system. The European Parliament and the European Commission see Hungary very differently than before. However, Fidesz has

also taken advantage of the fact that the courts are the most important of the European institutions. There is a formal logic in them that Orbán was prepared for, when he created a legalist system where everything was on paper, everything was codified in law. Pro forma it is very difficult to deal with this system, as the case law of the European courts is typically formalistic. Judicial independence, for example, is such a strong principle that a very strong justification is required to replace a judge. So far, we know of only one such justification, namely that the election to the position was illegal. In the case of the President of the Curia, this is indeed the case, because it is a personalised position based on an *ad hominem* law. But it will be very difficult to make arguments about the Constitutional Court.

Are there any steps that can be taken to ensure that a future illiberal government with two-thirds majority cannot harm the institutions?

Yes, the most important thing is to pass a new constitution within the four-year cycle. In this new constitution, all this can be prevented, as it can include rules on how the constitution can be amended. There are many ways to stabilise the constitution. We can look at the German constitution which makes changes very difficult. We can include immutability clauses, we can prescribe changes that will only be possible by a four-fifth majority, or an obligation to hold a referendum.

In addition, I would like to emphasise the need for a constitutional law that does not contain statements on values on which Hungarian society is divided (because there is definitely a division of values) and does not contain ideological elements. We should create a real constitution which covers only public and fundamental rights, as well as makes the system of separation of powers and the rule of law clear. Nothing else.

Is it possible to hold Orbán and his cronies to account? For example, can we recover the assets that were stolen from taxpayers through different corrupt schemes?

The situation is relatively simple because the government and its allies can only be held accountable for acts that were illegal under current law. Thus, cases of economic crime can be accounted for, for example, in the case of Orbán's son-in-law [István Tiborcz was investigated for irregularities in numerous public lighting projects that were co-financed by the European Cohesion Fund], OLAF and other bodies already have collected the necessary material, only one element is missing: the prosecution, which is hindered by the Chief Prosecutor Péter Polt. There are also plans to set up an Anti-Corruption Office under the leadership of Ákos Hadházy [an independent parliamentarian who was formerly co-president of the Green party LMP] who has uncovered quite a few corruption cases in recent years. It is not certain that most of the European money can be recovered, and neither is it certain that anything can be done with most of the wealth of Lőrinc Mészáros [Orbán's childhood friend and alleged frontman, who is currently the richest Hungarian with a wealth exceeding 1 billion euros]. But that is not the primary goal either. Rather, we must strive to create the guarantees of a more transparent, corruption-free governance.

[The interview was conducted on 25 February 2022.]



Zoltán Fleck is a Professor of Law and Sociology at the Eötvös Loránd University (ELTE) of Budapest. His research interests include law enforcement institutions, the legal profession, legal culture, and the social enforcement of norms. He deals with judicial enforcement, but has also published studies on social prejudice and research on the functioning of the rule of law, the social composition of lawyers, the sociology of law enforcement, and the mechanism of prejudice. He has also previously clashed with Hungarian court leaders because of his scientific work.

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