János Mécs

Constitutional framework of electoral system change

Eötvös Loránd University, Faculty of Law

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Supervisor: Dr. Eszter Bodnár

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1. Short summary of the research plan

There is a structural risk encoded in the DNA of modern democracies, a risk related to the fact that rules of the political process are determined by those who are subject to them and receive their power from that very process. Fundamental policy decisions are settled by national assemblies, and in most cases, the framework of electoral politics is no exception. Legislatures, however, are not neutral entities, but rather assemblies of political actors who might adopt not only rule-following but rule-changing strategies as well, thus distorting the 'political market' and violating core concepts of democracy, equality, and the rule of law.

Due to the phenomenon of the constitutionalization of democratic politics, which has gained momentum in the past several decades, judicial bodies are increasingly involved in electoral politics. In the United States, the Supreme Court ('SCOTUS') entered the political arena in the 1960s with its *'reapportionment revolution'*, forcing the redraw of constituency boundaries, and the Court has since decided on the constitutionality of various legislation related to the political process, which in U.S. terminology is the law of democracy. In Europe, the German Federal Constitutional Court ('FCC') has developed case law on virtually every aspect of the law of democracy, ranging from the right to vote to political party and campaign finance cases Moreover, the key guarantees, most notably the right to vote, are enshrined in international and regional human rights instruments. As a result, several aspects of the law of democracy, and more closely, the regulation of elections, are protected and constitutionally bound, therefore less room remains for manipulation.

However, considerable challenges persist regarding electoral systems. These institutions are to a large degree underdetermined by constitutional theory, international and regional documents, and often by constitutions as well. Namely, it is ruled out that through electoral reform an actor can disenfranchise a group in the polity—say, Party A's voters—to gain political advantage. Nevertheless, it seems a more challenging task to rule out that, by increasing the electoral threshold, Party A is squeezed out of the parliament, although the result is, in many senses, the same. While some aspects of the right to vote (e.g., its personal scope) are more settled, other aspects, such as how votes are transformed into seats, are left to legislators to decide, in some instances virtually without any legal constraints. This is the more problematic since electoral systems are vulnerable institutions as demonstrated by historical and more recent examples. Indeed, political actors are in fact inclined to change the electoral scheme if it is beneficial to them.

Yet electoral systems have not been in the forefront of the discourse on constitutional law, especially in Hungary. Electoral politics in Hungary since 1989, particularly involving the 2011 reforms, has been widely analyzed by political scientists, and some changes have been criticized in the legal literature as well. However, to date, the discussions have been rather sparse regarding the role of the constitutional framework and, most notably, of the Constitutional Court in protecting the electoral legislation from manipulation. The topic calls for a thorough examination since by fine-tuning the electoral legislation, a political actor might manufacture (and has manufactured) not just an absolute majority, but even a two-thirds majority, providing in the current Hungarian constitutional system a constitution-amending majority, a kind of 'constitutional singularity'. This might lead to grave consequences, especially in populist-illiberal regimes where this fabricated majority and putative democratic legitimacy are referenced to support the unfolding populist constitutional politics, leading to the demise of classic liberal constitutional institutions.

Despite its constitutional underdetermined nature, in the past decade, there have been examples in Europe of courts involving themselves in electoral politics, most notably, the German FCC in 2012 and the Italian Constitutional Court ('ItCC') in 2014 and 2017, when both annulled parts of their domestic electoral systems. This line of jurisprudence—through the global discourse on constitutionalism—could influence the Hungarian jurisprudence in the future, as well as the case law of the European Court of Human Rights ('ECtHR').

It follows from the above, that the question of a constitutional framework's role in an electoral system change requires a complex inquiry. The structural risk needs to be kept in mind as well

as the topic's constitutionally underdetermined nature, which brings questions of legitimacy to the forefront. Moreover, the complex web of legal frameworks, including international documents and domestic constitutional backgrounds, needs to be considered. Electoral institutions are context-sensitive vehicles, therefore any inquiry should consider the electoral history of the given country. Moreover, the institutionalization of constitutional review also affects the possibilities for judicial intervention. These aspects should also be part of the examination if we are to answer how the constitutional framework can most effectively prevent manipulative electoral changes.

2. Scope, research questions, structure and applied methods

The scope of my work covers the electoral system in the narrow sense. This scope includes the choice of electoral formula, namely, how votes are transformed into seats (e.g., plurality, first-past-the-post 'FPTP' systems, proportional representation 'PR' systems, single transferable vote 'STV' systems, along with their specific features, such as electoral thresholds); the ballot structure (whether voters cast ballots for single candidates or party lists); district magnitude (the number of representatives elected from the constituencies); and the question of boundary delimitation. Electoral systems in the narrow sense thus cover the elements that most directly determine how votes are transformed into seats.

This means that I do not discuss legislation related to the right to vote 'in the narrow sense', that is, who is eligible to vote and run for elections, or how the ballot is exercised (e.g., voting rights of inmates or special voting arrangements, such as postal voting). Likewise, I do not discuss contextual subjects, such as campaign and party finance, political advertisements, or electoral administration. Moreover, as the aforementioned structural risk prevails to the greatest degree if the legislator decides on the rules of his/her own elections, I focus on electoral systems of the national assemblies, which exercise the primary legislative function in the given country.

My project is aspirational in the sense that I focus on Hungary and aim to contribute to the Hungarian academic discourse and doctrine first and foremost. I argue in this thesis that the judicial oversight of electoral system change is still to a great extent a constitutional blind spot in Hungary, and this has had grave consequences in the past and might have in the future as well.

As such, my research questions are the following:

1. *From a theoretical point of view, are courts justified when reviewing electoral system changes, and if they are, on what grounds might they do so regarding the underdetermined nature of the subject?*
2. *In a general/global sense, how are the legal requirements constituting the frameworks of electoral reform structured (e.g., rights-based or structuralist; procedural or substantive; international or domestic; hard law or soft law), and what are the implications of this structure in terms of constitutional doctrine?*
3. *In what institutional context and using what kind of doctrine did the FCC and the ItCC become key actors in shaping the electoral system in the past decade in a constitutionally underdetermined context? What role do the European soft law and hard law legal bodies, most notably the ECtHR, play in this regard? How might these foreign and regional examples affect Hungarian jurisprudence?*
4. *What role has the Hungarian Constitutional Court ('HCC') played in electoral politics related to the electoral system in the narrow sense since the 1989–90 period, considering the answers to the questions above, especially to research question (1)? What have been the institutional and doctrinal contexts in which the Court has functioned, and how have they contributed to the efficiency of judicial review?*
5. *What solutions in terms of the institutionalization of judicial review, doctrine, and constitutional text can be promoted to protect against manipulative changes?*

I develop my argumentation in three parts. Research questions (1) and (2) are discussed in Part I. There, I first examine the question of the justifiability of judicial review in electoral system cases from an abstract theoretical viewpoint (Chapter I). The theoretical inquiry requires, on the one hand, argumentation that is embedded in the discourse of constitutional theory, applying analytical arguments on the justifiability of judicial review. On the other hand, in my view, the justifiability of judicial review is a mixed theoretical/analytical and empirical question. Therefore, it is also relevant from an empirical standpoint how exposed electoral systems are (and have been in the past), and which theories are available to explain electoral system changes based on empirical data. Part I also involves a discussion of Research question (2) that revolves around the structure of the legal requirements of electoral systems (Chapter II). There, the inquiry is partly analytical and partly comparative. Through an analytical examination and the brief description of comparative examples, this chapter helps to systematize the requirements

to create a conceptual framework through which domestic constitutional orders might be better understood, and it also helps to understand in which 'doctrinal context' courts operate.

Part II discusses research question (3) and involves case studies from Germany and Italy, as well as a brief discussion of the ECtHR's related jurisprudence. The German and Italian case studies were chosen because their constitutional courts have each found at least some features of the underlying electoral system unconstitutional in a constitutionally underdetermined nature, and thus it is illustrative to review the circumstances and doctrinal lines in which these decisions were made (Chapters III and IV). Lastly, the case law of the ECtHR is examined (Chapter V).

Part III focuses on Hungary and tackles research question (5). First, applying a historical method and the descriptive method of political science, the former electoral system adopted in 1989 as well as the new system adopted in 2011 and their changes are described (Chapter VI). Second, I provide an overview of the constitutional framework of the Hungarian electoral system and its reforms from an analytical-doctrinal perspective (Chapter VII). Third, I describe the most important characteristics of judicial review and its various modifications (Chapter VIII). Finally, from an analytical-doctrinal viewpoint, I analyze what factors contributed to the HCC's inability to effectively protect the electoral system from manipulative changes, highlighting the 'doctrinal seeds' that might be of help if a more effective jurisprudence is to be established (Chapter 10).

3. Summary of findings and conclusions

Research Question (1) – Justifiability of court intervention in electoral system changes

Conclusion (1a): Courts are justified and required to review electoral legislation partly because there is no other channel that might provide a remedy, and partly because factually there is a tendency on behalf of the political actors to manipulate the legislation.

The justifiability of enhanced judicial review in the case of electoral legislation might rest on two main arguments. First, cases involving electoral systems are conceptually distinct from those not affecting the political process in such a direct way. For instance, in other cases, the ultimate argument against judicial review is that the government that is violating fundamental rights or other constitutional provisions might be voted out; therefore, the political process itself provides a remedy. Nevertheless, if the very process that is supposed to provide a remedy is interfered with, then this argument does not hold water or at least loses some of its force. Thus,

if voters are dissatisfied with electoral politics, they might not be able vote out the government since the problem lies with that very process in the first place. This was one of the fundamental insights articulated in Footnote 4 of SCOTUS's *Carolene Products* decision and in John Hart Ely's influential representation-reinforcing theory. Although other claims and aspects of this theory might be debated, even proponents of a weak judicial review agree that if the political process itself malfunctions, then judicial review is called for. Manipulative electoral reforms fall within the scope of such malfunctions.

Secondly, the thesis presupposes that the justifiability of constitutional review is a mixed theoretical-empirical question. Empirical studies underscore that electoral systems are indeed often subject to partisan changes. It is argued in the constitutional law and theory literature that there is undeniably a structural risk if those who adopt the rules are elected under the very same rules and that the legislator adopting the rules should be viewed what it really is; the assembly of political actors. The rational choice strand of the political science literature supports this claim, demonstrating that self-interested actors did in fact and will change the rules along partisan interests if they can do so. Nevertheless, in another strand, historical institutionalism stresses that reform processes are complex, and if political actors lose control, then it is less likely that the reform will be manipulative. This emphasizes that the threat of manipulation is contingent upon the quality of the process in which the legislation was adopted. Nevertheless, if political actors retain control, then there is a real risk of partisan change, which is exacerbated because changes of electoral systems are complicated to communicate and thus might fly under the radar of voters. These call for an enhanced judicial review.

> **Conclusion (1b): If the substance of electoral systems is left open by constitutions, when courts examine electoral system changes, they should engage in a review that focuses on the adoption procedure.**

From Conclusion (1a), it follows that courts are justified and required to review electoral system changes. However, the question arises as to the grounds on which courts may intervene. Critics of the representation-reinforcement theory have pointed out that the political process is not value-free, and courts cannot avoid making substantive value judgments when protecting the law of democracy. This is especially true regarding electoral systems that are underdetermined by political philosophy and constitutional theory, meaning that mainstream theories demand little more of electoral systems to be in line with democratic ideals, apart from the one-person, one-vote principle and its implications for districting. Also, due to the global cacophony of electoral institutions, international and regional documents as well as the related judicial bodies

understandably refrain from narrowing the scope of acceptable institutions. Moreover, constitutions themselves are often silent on the issue, providing no substantive standard that the court might use to rule out certain features.

Consequently, courts might find themselves in a trap. Specifically, they might interpret the open-ended clauses of constitutions in a way that, in terms of substance, narrows down the institutional scope. However, if they do so, then they decide on matters that arguably (and often explicitly in terms of constitutional text) belong to the parliaments to decide. Or they might rule that the constitution does not settle this question, and therefore a wide margin of appreciation applies, but in this instance they leave the electoral system unprotected—that is, they leave the *'foxes posted at the henhouse door'* as Samuel Issacharoff puts it.

Nevertheless, although electoral systems might be underdetermined in terms of substance, I argue that if they are changed in a manipulative way, then those changes violate some core values of any plausible conception of democracy. The thesis defines manipulative reform as an action that aims to enhance the reformers' seat share by not adapting to the voters' preferences, but the other way around, by tailoring the institutional setting to their partisan interests. Such a change violates accountability, as it protects (at least to some degree) the manipulator from the shift in the popular vote. It also violates equality since it does not treat different voters and political actors as equals, and it violates the rule of law, as it instrumentalizes law and subordinates it to political will. I argue that accountability, equality, and the rule of law provide a firm ground, both theoretically and constitutionally, on which courts might rule without overstepping the boundaries of their competences.

I argue that manipulative reforms defined as such can be best grasped through a more proceduralist, that is, semiprocedural review. Semiprocedural review is a method of examination where the court considers the quality of the process in which the legislation was adopted, namely its rationality (whether it is supported by sound arguments based on empirical data) and democratic nature (whether key stakeholders are meaningfully involved). The definition of manipulation used in this thesis relies on the reformers' intention, which is impossible to detect directly. However, some characteristics of the process might be used as indicators for manipulation, such as the dearth or low quality of reasoning behind the reform; the absence of relevant stakeholders; the proximity of elections and the lack of a veil-of-ignorance type of procedural requirement; and the low quality of the legislative process itself (e.g., lack of transparency). Courts can use these indicators to infer the substantive (un)constitutionality of a piece of legislation or to establish a more thorough scrutiny, even if

there are no clear substantive standards. The thesis also argues that semiprocedural review is more suitable than traditional procedural review for tackling the enigma of the review of electoral system change. Although the latter clearly offers manageable standards (e.g., a majority to be met), this is also a disadvantage because if reformers abide by the black-letter law requirement, they are given free hands, even if manipulation takes place. Compared to this traditional approach, semiprocedural requirements are more malleable, and on the one hand, this provides courts with more space to react to manipulative changes, and on the other, it might incentivize the reformers to abide not just by the black-letter law requirement, but by what they think is the requirement for a 'fair' reform.

Research Question (2) – Structure of the legal requirements of electoral system change

Conclusion (2): Substantive, procedural, and semiprocedural requirements can be distinguished. In terms of substance, the choice of electoral system can be constrained by (i) a certain principle of representation or by the entrenchment of a specific system; (ii) the right to vote or by principles of elections; or (iii) the legislator's choice as elevated to a quasi-constitutional status (package approach). These types also set the framework for review, as in this case the basis of the review is the right to vote, therefore a rights approach is applied. Procedural requirements might be effective in preventing some types of manipulative reform. They are seldom incorporated in the constitutions; however, there are good practices that might be implemented *de lege ferenda*, and some of them might be read into the open clauses of constitutions. Semiprocedural requirements are not explicitly mentioned in constitutions, but they might be inferred from general provisions.

The thesis systematizes the constitutional requirements of electoral system change. These requirementsmight be divided into three categories, namely substantive, procedural, and semiprocedural. The first affects the outcome of electoral legislation, prohibiting some features as they are, irrespective of the procedure in which they were adopted. The second affects, by clear and manageable standards, how (i.e., in what process) electoral legislation is to be adopted. The third is a 'grey zone' between substantive and procedural requirements, and it might rule out legislation that is otherwise acceptable in substance, and its adoption meets the black-letter procedural requirements.

One set of substantive criteria that can be identified is the constitutional entrenchment of a principle of representation, a specific electoral system, or one of the latter's features. As to the

first category, in some countries, PR is set out on the constitutional level, thus narrowing down institutional options (e.g., Czechia). Regarding second category, some constitutions contain provisions for a specific electoral system (e.g., Ireland). Substantive entrenchment provide enhanced protection and elevate the question of manipulative change to the theoretical field of constitutional change and the possibility of unconstitutional constitutional amendments. However, it also renders the system more rigid, and in case the constitution is hard to amend, the political community can be deprived of the chance to experiment with different kinds of democratic institutions.

Another set of substantive requirements includes the fundamental right to vote and the principles of elections. Electoral systems are mostly restricted by the equal right to vote, which might have a moderate reading, demanding only that each voter has the same number of votes, and votes have roughly the same weight. As to the latter, this requires that abstract elements of the system, or in the terminology of the FCC's and HCC's case law, elements that prevail before the elections, do not discriminate among the voters. Moreover, a strict reading is conceivable that demands outcome equality, meaning that in retrospect all votes have the same value, which in fact prescribes a proportional electoral system. Electoral systems are also restricted by the direct nature of the right to vote, which might have implications for ballot structures.

There is an intricate relationship between the right to vote and electoral systems. The right to vote is a fundamental right, and this entails that it could be restricted for very specific reasons and that the electoral system is viewed from an individualistic perspective. In legal systems that apply categorical approaches to the restriction of fundamental rights, like that of the United States, this means that if a court expands the scope of the right, it might create a very rigid requirement, insensitive to the fact that electoral systems are tools embedded in the State's organization. However, in other systems, where a balancing test is applied, extending the right to vote might not have such grave consequences, as it might be restricted with reference to legitimate aims embodying systemic values.

Lastly, an argumentative strategy of the courts regarding substantive requirements is what I label a 'package approach' (in the German doctrine, *Reinheitsgebot*). Under this doctrine, although the constitution leaves the electoral system open, if the legislator chooses a system, then s/he is bound by the inherent logic of the chosen option. This way, the legislator's choice is elevated to a quasi-constitutional status.

The second group of normative requirements are procedural requirements. These determine who are involved in the process; electoral systems are adopted by parliaments, but referenda, expert committees (especially with regard to district boundaries), and citizens' assemblies can be involved. Referenda can be beneficial insofar as they enable bottom-up initiatives to change the system, which might ease the structural risk; however, this tool is a double-edged sword, as politicians might use referendums to promote partisan goals and to circumvent other requirements. Expert committees and citizens' assemblies are beneficial, as they insulate decisions from those primarily interested in them, but they are often not institutionalized, or their opinions can simply be ignored.

On the other hand, there are requirements that are related to the procedure of adopting electoral systems specifically. These might be veil-of-ignorance-type requirements that decrease the reformers' ability to foresee the exact consequences of their policy choices. These are the freezing period (as the Venice Commission recommends) or the delayed application of the reform (where the new system is inapplicable to the upcoming elections). These kinds of requirements are very rarely entrenched at the constitutional level, although courts might read them into the open-ended clauses of the constitution, as the Polish Constitutional Tribunal did with a six-month freezing period. Moreover, electoral systems might be protected by enhanced majority requirements. These necessitate the inclusion of other stakeholders, namely, parliamentary parties, although their effectiveness is contingent on the proportionality of the electoral system, and they do not protect extra-parliamentary actors from the cartels of parliamentary parties. Finally, as electoral systems are adopted as legislation, the ordinary requirements of lawmaking apply as well.

Procedural requirements are effective in some cases to prevent manipulative reforms, and they offer clearly manageable standards. If the legislator does change the system within an exact freezing period, then the court can intervene without significant interpretive efforts and without legitimacy constraints. However, these types of requirements do not rule out all kinds of manipulations, as the example of the enhanced majority shows. Their manageable nature is their disadvantage as well—that is, if reformers abide by the black-letter requirement (e.g., they change the system just before the freezing period starts), then courts cannot plausibly intervene. Nevertheless, veil-of-ignorance-type criteria are effective tools that might be explicitly entrenched on the constitutional level or deduced by courts.

Finally, as argued above, a 'grey zone' can be identified between procedural and semiprocedural requirements. In other words, a certain change might be acceptable in abstract

terms (e.g., a 5 percent threshold), and it could have been adopted with the application of black-letter procedural requirements (e.g., a two-thirds majority in the parliament). Nevertheless, based on the overall circumstances, courts might conclude that it served partisan purposes (e.g., the threshold was raised from 4 percent to squeeze out smaller competitors). It is argued in the thesis that such kinds of semiprocedural frameworks are underdeveloped in terms of both constitutional text and doctrine, but the stability of elections is a normative basis that the Venice Commission has vigorously recommended on which courts might build a semiprocedural doctrine.

Research Question (3) – Comparative examples: Germany, Italy, and the ECtHR

> **Conclusion (3a): European constitutional courts in the past decade have reviewed electoral systems and held substantial parts unconstitutional, demonstrating that the constitutionalization of democratic politics has also reached this part of the electoral legislation. The examples from Germany and Italy show that courts securing firm authority can review specific features of electoral systems on substantive grounds—especially with reference to the equal right to vote—even in a constitutionally underdetermined context, overcoming doctrinal and institutional barriers. The German jurisprudence underscores that courts might effectively conceptualize the structural risk and might develop a more proceduralist jurisprudence as well as a case law that is able to grasp passive manipulation. The Italian case emphasizes that if a court is willing to intervene, it might surmount long-lasting barriers in terms of accessibility.**

In the past decade, both the FCC and the ItCC have reviewed specific features of the electoral system in a constitutionally underdetermined context. Neither the Italian nor the German Constitution prescribes a principle of representation or includes the specificities of the electoral system.The subject is explicitly referred to the national assemblies to decide, and no specific procedural requirements are in place. Nevertheless, the courts interpreted the constitutional backgrounds in a way that enabled the review of rather specific features, such as overhang seats or winner bonuses.

In Germany, the FCC is in a favorable institutional setting in terms of accessibility and powers, and it reviewed parts of the electoral system as early as 1952; therefore, it had the chance to craft an expansive interpretation of electoral legislation, something that was helped by the Court's conscious authority-building activity. As to the substantive requirements, the Court

applied a package approach early on, stating that while the legislator might choose from a broad range of electoral systems, including pure FPTP, the German MMP system, as chosen by the legislator, is based on PR, and the inherent logic of that system binds the legislator. Although it was emphasized that different conceptions of equality are to be applied to different (single constituency and list) branches of the electoral system, the Court demanded that the results not compromise the basic PR character of the system. Moreover, regarding electoral thresholds, the Court also established a duty to monitor and review electoral legislation in terms of whether a change of the underlying circumstances calls for a legislative change. Finally, it is notable that the FCC grasped the structural risk on the doctrinal level, stating that if the legislator decides 'on her/his own case' (i.e., on the rules of her/his own election), then a strict scrutiny is called for.

The FCC's 2012 decision on overhang seats *(Überhangmandaten)* illustrates the depth of the Court's involvement in shaping the electoral system. In the German system, voters cast ballots for individual candidates and party lists, and parties are entitled to the proportion of seats according to their share of party-list votes. However, if in a given *Land,* a party wins more single seats than it would be entitled to per its list-vote share, then it might keep the seats, thus gaining additional (i.e., overhang) seats. In a 1997 decision, the Court upheld the legislation, arguing that as the phenomenon belonged to the FPTP part, a moderate reading of equality prevailed, and that was not interfered with. Afterwards, pursuant to a 2008 FCC decision, the electoral system had to be reviewed for other reasons, and a reform was implemented in 2011, which was adopted only with the government parties votes and without eliminating overhang seats. As a result, the legislation was brought before the Court, which now held overhang seats unconstitutional. The FCC switched gears and argued that a strict reading of equality prevailed, and the interference with it was only permissible within certain limits. The FCC set a very exact limit, indicating that the number of overhang seats could not exceed fifteen, a number that was somewhat arbitrary, as the Court even acknowledged.

It is noteworthy, however, that besides substantive requirements, the FCC has developed a case law that recognizes the structural risk through the *eigener Sache* doctrine, which is understood not in a formalistic sense, but rather in situations where the legislator decides on her/his own case in a political sense. This has triggered enhanced scrutiny and led to the legislator's narrowed margin of appreciation. A key normative element in this regard, besides the right to vote, is the equal chances of the parties. The threshold jurisprudence shows that more demanding standards can be set, and the legislator can be incentivized to submit not just abstract

arguments but also those based on a more solid factual basis. Moreover, this jurisprudence has allowed the Court to determine a ‘duty to review’, which is highly effective if manipulation happens passively.

In Italy, the ItCC had long been for long considered to be barred from reviewing electoral legislation due to the peculiarities of the Italian referral system. All the Court could do was enter a dialogue with the legislator when deciding on the admissibility of referendums on the matter of electoral systems. Moreover, since a moderate reading of the equal right to vote prevailed, the Court had not been viewed as a possible key actor in terms of the electoral system. Nevertheless, the Court as an institution, and constitutional justice as an idea, had secured firm authority, and after the partisan modification of the Italian electoral system in 2006, which transpired just months prior to the elections, the ItCC had the chance to decide on a system that did not have substantial political support.

In 2014, the ItCC made a surprisingly activist decision, overstepping long-lasting admissibility barriers and annulling the winner-bonus (referring to the equal right to vote) and closed lists (referring to the direct nature of the vote). It is remarkable that in terms of suffrage, the Court explicitly referred to the 2012 German verdict and applied a package approach, thus elevating the legislator’s choice to a quasi-constitutional level. Moreover, the Court introduced a clear four-pronged balancing test, articulated explicitly for the first time in Italian constitutional jurisprudence. In 2017, this activism was repeated when the ItCC annulled the revised electoral system, most notably the runoff part of its winner-bonus scheme.

> **Conclusion (3b): Based on the ECtHR’s jurisprudence, while its substantive angle does not constitute meaningful protection, a more proceduralist stance is detectable, which might evolve into a more robust case law in the future that effectively handles some groups of partisan changes.**

Electoral systems fall under the purview of the European Convention on Human Rights (ECHR), as the right to free elections is enshrined in Article 3 of Protocol 1. However, under the ECtHR’s case law no specific electoral system is implied by the article and states enjoy a wide margin of appreciation on the matter. In this vein, the Court has upheld a broad range of institutions, including the Italian winner-bonus and the excessively high Turkish threshold. Considering the diversity of electoral systems within the member states and the exacerbated legitimacy obstacles the Court faces, it is neither expected nor required that the Court take on a more activist stance in terms of substance.

However, the ECtHR has taken a more activist and procedural position in some cases, indicating that it might meaningfully review or consider the process in which the legislation was adopted. On the one hand, regarding the stability of the electoral legislation and the timing of reforms, the Court relied on the Venice Commission's one-year freezing period recommendation and established a violation of the ECHR in *Ekoglasnost,* as the changes that were deemed unobjectionable by the Court from a substantive viewpoint occurred within that period. On the other hand, in *Animal Defenders International*, the Court applied a semiprocedural review, considering that experts involved in the legislative process were in favor; that the government offered detailed reasons for keeping the legislation; and that the law was enacted with cross-party support and without any dissenting votes. Although the Court decided on a ban of political advertisement, that is, not on the electoral system, the case shows that the ECtHR might apply a semiprocedural review, which if applied 'the other way around', might establish a violation if the above-mentioned qualities of the process are not present. Therefore, there are 'doctrinal seeds' in the ECtHR's case law where a semiprocedural review might be applicable to the highly underdetermined subject of electoral systems.

Research Question (4) – Review of electoral system changes in Hungary

> **Conclusion (4a): The Hungarian electoral system was fairly stable between 1989 and 2011. However, there was a partisan change that increased the threshold in 1994. In 2011, the system was reformed in a process with serious deficits in terms of rationality and democratic character, and its substance was changed along partisan lines. It is argued that the Court could not protect the integrity of electoral legislation since (i) a two-thirds majority being the only procedural requirement and its ensuing interplay with the disproportional electoral system; (ii) barriers in terms of how constitutional justice is institutionalized; (iii) doctrinal shortcomings; and (iv) challenges in terms of the Court's independence. It is argued that there are 'doctrinal seeds' on which a more proceduralist case law might be built, which would effectively prevent manipulative changes.**

The history of the Hungarian electoral system since 1989 is not free of manipulative changes. Although the former electoral system proved to be stable, the 4 percent threshold was raised to 5, only months before elections and this was arguably fueled by partisan interests blocking smaller parties from the parliament. In 2011, a new electoral system was adopted; however, as emphasized in the literature, the adoption process exhibited serious deficits on the one hand, and, on the other hand, regarding its substance it is also argued that the reform was fueled not

by normative but by partisan purposes. As to the former aspect, the system—proposed as a single MP initiative—was adopted without meaningful public debate or negotiations with the relevant stakeholders, and it was approved only with the government majority's votes. As to the latter, substantive aspects, the literature has argued that the adoption served partisan purposes. Specifically, it helped the leading political actor , irrespective of who it might be, on the one hand (by abolishing the runoff or rendering the system more disproportionate, most notably by awarding winner-surplus votes), and benefiting the right-wing political actors outright (through malapportionment and gerrymandering). The Court upheld these features (the increase of the threshold, winner-surplus votes), or they were not litigated at all.

The thesis argues that there are multiple reasons for this. First, although there is a rather high quorum (two-thirds majority), since the previous system was prone to disproportionality, this requirement is not hard to meet in certain political contexts (when there is a substantial nationwide difference between the leading political actor and the runner-up). A two-thirds majority is a clearly manageable standard that had prevented some types of manipulative reforms before 2010, however, with one actor securing this kind of majority, the electoral system became unprotected. Moreover, as the subject of the electoral system is prohibited in terms of referendum, no other actor could plausibly intervene. Second, with the Fundamental Law ('FL') entering into force in 2012, the Court became more difficult to access. This was mostly due to the abolition of *actio popularis*, that resulted in the requirement of one-fourth of the MPs to initiate abstract review, which in some cases constituted an insurmountable obstacle. That left constitutional complaint as a viable route to the Court; however, the complaint involves enhanced admissibility criteria and implies a rights-based review in which systemic principles enshrined in the FL can be referenced only to a limited degree. Third, under Article 233 of the Electoral Procedure Act (EPA), special rules apply to constitutional complaints alleging unconstitutionality of the electoral law in proceedings before the ordinary court, and further, the HCC itself has exceedingly short deadlines, and it may not hear either the petitioner or the legislator. Finally, there is growing pressure on the Court, stemming from the two-thirds constitutional majority, which is eroding the HCC's authority through instrumental constitutional amendments. The Court's changing composition has also thwarted effective review.

Doctrinal shortcomings have also played a paramount role, as demonstrated by the Court's inability to handle manipulative changes as early as 1994, in a more favorable institutional and political context. Neither the previous constitution nor the FL contains a principle of

representation or specifics about the electoral system. The HCC can rely only on the right to vote and the four (and now five) principles of elections. The Court employed a moderate reading of the equal right to vote, which could handle such questions as the substantial difference between the constituencies (held unconstitutional in 2005 and 2010). But apart from this, in a substantive sense, the electoral system was left open, granting a wide margin of appreciation to the legislator. Moreover, the relationship between the right to vote as a fundamental right and the principles of elections (most notably, equal suffrage) is rather muddled. While in the mainstream, a legal understanding of the interference with suffrage establishes a necessity-proportionality test, interference with the principles does not, as they are not treated as fundamental rights, but rather principles of the state's structure. As a result, in many cases, the Court has not applied the balancing test coherently—the 2014 winner-surplus decision being the most notable example.

The HCC, moreover, has not established a more proceduralist approach, which would be more suitable for protecting electoral legislation. The decision on the 1994 threshold increase of the threshold is restricted to substantive scrutiny, referring to the 1991 decision and employing very abstract arguments without examining whether sufficient empirical data was presented to justify the increase and whether all relevant stakeholders were involved. The 2014 decision on the winner-surplus votes also remains on abstract grounds, emphasizing the wide margin of appreciation and accepting the possible justifications without further inquiries as to their empirical soundness.

However, the overview of the constitutional background and the HCC's case law show that there is room for a more proceduralist stance. First, the HCC emphasized the importance of the stability of electoral legislation in its landmark 2005 decision, noting that even minor divergences between constituencies are unconstitutional if they are the product of manipulation. Stability of electoral law might be read into the right to vote as enshrined in Article XXIII (1) of the FL. Moreover, although not in the electoral context, but regarding other aspect of the law of democracy, the Court emphasized in 2008 that the legislator should remain neutral when s/he adopts rules on the political process. This decision underscores that stability might be derived from the systemic principle of democracy and the rule of law [Article B) (1)] as well as from the general prohibition of discrimination [Article XV (1) and (2)]. Second, more specific procedural requirements might be derived from the FL. As Justice Stumpf argued in one of his dissenting opinions, a freezing period follows from the general provision establishing the rule of law. Furthermore, the literature has argued that the two-thirds majority could be interpreted

along a 'substantive concept' of supermajority, which not only requires a numerical majority but also a broader consensus. Finally, general requirements of the legislative process, such as public consultation and the performance of an impact assessment, might be interpreted in a stricter way in cases involving electoral legislation.

Conclusion (4b): It is demonstrated through the example of winner-surplus votes that the integrity of electoral legislation is best protected by a semiprocedural approach.

The thesis demonstrates through a thought experiment and the HCC's 2014 decision on winner-surplus votes that even though a feature might be handled on substantive grounds, the core of the problem is better grasped through a review that focuses more on the procedural aspects of the reform. The constitutional complaint in the case argued that the regulation of winner-surplus votes did not serve a legitimate aim because it did not compensate votes, and moreover, the system served governability sufficiently without them. The regulation therefore constituted an unconstitutional interference with the equal right to vote.

The thesis argues that although in the given case this argumentation was correct, this line of reasoning applies a substantive approach, and therefore it might not grasp the core problem of circumventing accountability. A hypothetical was introduced. Suppose that in the future a party secures a two-thirds majority through the current electoral system, and it reshapes the constitutional order. However, before the upcoming elections, the polls suggest that the party's popularity has dropped dramatically and that the opposition might gain a two-thirds majority. To prevent this, the political actor that still securely holds a two-thirds majority in parliament unilaterally changes the system and eliminates winner-surplus votes and thus prevents the opposition from winning by a constitutional majority. In this instance, accountability was clearly violated; however, from a substantive angle, it is extremely difficult to argue against the change, as a feature was eliminated that arguably served no legitimate aim. Substantive approaches therefore might help to prevent the circumvention of accountability by rendering the system more disproportionate; they cannot, however, if the same is achieved through the implementation of a more proportional system.

Research Question (5) – De lege ferenda

Conclusion (5a): Both the doctrine and the constitutional text could be developed in terms of procedural requirements. The Court could consider the disproportionality of the electoral system when examining the fulfilment of the two-thirds requirement. Veil-of-ignorance-type requirements could be entrenched at the constitutional level. A

possible candidate is the delayed application of the changes. A freezing period could be included explicitly, however, it can also be read into the FL's open-ended clauses without the Court overstepping its competences. On the statutory level, an expert committee could be formed dedicated to boundary delimitation, and citizens' assemblies could also be constituted.

The experience with the previous and current electoral systems shows that if the system is disproportional, the two-thirds procedural requirement is not sufficient to prevent manipulative changes. On the one hand, it would not be farfetched to suggest that the HCC consider the disproportionality of the system in general and the previous election in particular, when assessing if the two-thirds requirement has been met. As Zoltán Pozsár-Szentmiklósy suggests, the Court could take a more substantive approach towards the two-thirds majority, and disproportionality could be a factor.

Furthermore, veil-of-ignorance-type requirements could be included, as the Venice Commission has suggested. Delayed application of the changes to the system is also a suitable solution; the changes would be applied not to the upcoming elections but to those that follow. Another improvement could be the inclusion of a one-year (or possibly two-year) freezing period. Both should be applicable only to substantial (i.e., not 'technical') changes, and it should be left to the court to further elaborate on this aspect. Moreover, while delayed application could be deemed a bit farfetched to read into the current text, the freezing period, as Justice Stumpf's concurring opinion shows, could be derived from the open-ended clauses of the FL, most notably from Article B) (1), stipulating the rule of law and democracy.

I will not repeat here the recommendations of international soft law bodies, most notably the Venice Commission's, but suffice it to note that on the statutory level an expert commission should be included on the delimitation of constituency boundaries. Furthermore, based on foreign experiences, in particular those of Canada and the Netherlands, citizens' assemblies should be included in the reform process. The assemblies' opinions could either bind the legislator, or they might serve to offer opinions without legal force but with significant political pressure attached. Moreover, in the process of citizens' assemblies, a referendum could be included to enhance the legitimacy of their decisions. This, however, requires an amendment to article 8 (3) c) of the FL, which prohibits referendums on electoral matters.

Conclusion (5b): The relationship between the equal right to vote and the principle of equality of elections should be settled by constitutional doctrine. The necessity-

proportionality test should be applied in a consistent manner. As to the intensity of review, the HCC should consider that the legislator decides on her/his own case. In this instance, the Court could apply a semiprocedural review.

As shown by the winner-surplus decision, the muddled relationship between the right and the principle causes disturbances and incoherence. In my view, the best option would be to expand the scope of the right to effective equality as Benedek Varsányi proposes. This, however, would only be a suitable option if the HCC accepts a broad range of legitimate aims (e.g., government stability) for restricting the right. This way, no PR system would be necessitated by the expansive reading of the right, but the Court's reasoning would be structured to reflect the prongs of the balancing test. Specifically, the Court would be compelled, in terms of the argumentation's structure, to examine whether there are actual factors that underscore the necessity of the legislation and whether there is a factual connection between the legislation and the promoted legitimate aim.

Moreover, as to the intensity of the review, the HCC could adopt a doctrine similar to the German *eigener Sache* doctrine. Thus, when the legislator decides on her/his own case or *quasi* on her/his own case, the Court would apply a high-intensity review.

This, in turn, could trigger a semiprocedural review in which the Court examines whether the legislation is rational (i.e., supported by sound reasoning based on evidence), and whether it is democratic (i.e., the relevant stakeholders are involved, and a meaningful deliberation takes place). In the electoral context, this kind of review could be based on the existing doctrinal seeds of stability of electoral legislation and state neutrality.

Conclusion (5c): The current institutionalization of constitutional justice does not promote the effective protection of the electoral system. The possibility of abstract review should be broadened, while the applicability of special rules in terms of constitutional complaints under EPA 233 should be reviewed.

The constitutional complaint offers rights-based protection, but in some cases, manipulation is better grasped within a structuralist framework—that is, along systemic values that are hard to maintain within the scope of any individual right. The solution could be to broaden the range of actors (e.g., any political party) that have the power to initiate abstract review, or for the Court to broaden the range of constitutional provisions on which a constitutional complaint is based [e.g., including Article B)]. The first solution requires a constitutional amendment, but it

is preferable insofar as it solves not only the rights-based problem but also the issue of strict admissibility criteria.

Furthermore, the special rules for the constitutional complaint in electoral matters under Article 233 of the EPA should be reviewed. The current legislation precludes expert opinions, *amicus curiae* briefs, and the participation of the wider public and the legislator, and most importantly, it sets an extremely short timetable for the Court to consider the case. This is necessary in many cases, as there is a constitutional interest in settling electoral matters as quickly as possible. However, in some cases, such urgency is unwarranted, or at least a thirty-day period would not cause more harm and trump the benefits of having ample time to review electoral legislation.

4. Publications on topics covered by the thesis

- Mécs, J., 2020. Az állami szervek kommunikációs semlegessége a kampányban – egy eltűnő alapelv? *MTA LAW WORKING PAPERS*, 7(29), pp.1–17.
- Mécs, J., 2020. Választások. In *Internetes Jogtudományi Enciklopédia*. pp. 1–26.
- Bodnár, E. & Mécs, J., 2018. A választójog védelme az Alkotmánybíróság legújabb gyakorlatában. *FUNDAMENTUM*, 2018(2–3), pp.17–27.
- Mécs, J., 2017. Reform of electoral system in Canada and in Hungary – Towards a more proportional electoral system? *ELTE LAW JOURNAL*, (2), pp.83–101.
- Mécs, J., 2016. Development of the electoral system in Hungary since 1991. In *Development of Electoral Systems in Central and Eastern Europe since 1991*. pp. 134–144.
- Mécs, J., 2015. A győzteskompenzáció alkotmányosságáról – a pozitív töredékszavazatok megítélése az egyenlő választójog tükrében. In. *Tudományos Diákköri Dolgozatok 2015, Bibó István Szakkollégium*