A Suggestion for a Democratic Transition

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How to Set Aside Hungarian Cardinal Laws

The anti-Fidesz coalition could win the next Hungarian elections. That, however, is only one step on a long path back to a full democracy. Fidesz has skilfully entrenched its power, personnel, and policies. The so-called cardinal laws are a central instrument for this entrenchment, as their amendment requires a two-thirds majority of members present in parliament (Article T (4) of the Fundamental Law). An important example are the rules governing political transition, such as the electoral laws, which are at odds with European standards.Reducing the number of cardinal laws and changing the electoral system is key to the opposition's programme (see 1.2).

Why is it key to change the rules governing political transition if the opposition has won? One reason is that the new majority would be a very heterogeneous coalition. It would unite almost all opposition parties with very different profiles except for their opposition to Viktor Orbán. Therefore, a new government might find it hard to agree on many issues and could easily fall apart, leading to Fidesz' triumphant return. Another reason is that the current system is construed in a way that favours Fidesz. The current electoral system allowed the Fidesz-KDNP alliance to transform a 49 % majority of popular votes into a constitutional supermajority of seats in parliament (see the ODHIR Report, p. 25). For these and other reasons, changing the electoral rules is imperative in a democratic transition.

How could a new majority overcome these laws, align the Hungarian legal order with European standards, and allow for democratic governability? The way provided by the Fundamental Law (amending these laws with a two-thirds majority), seems unfeasible given that Fidesz is likely to prevent their adoption. Against this backdrop, we propose to operationalize EU law and, more precisely, the values of Article 2 TEU and their primacy. They allow – in fact, even require – the new Hungarian government to set aside those cardinal laws that violate these values. A very similar idea has been previously suggested by

Kim Lane Scheppele. Her proposal, however, concentrates on how the Hungarian Fundamental Law could permit disregarding those cardinal laws that violate EU law. We focus on EU law.

Is this legal science fiction? We are certainly confronted with a historically new situation. In the past, a country's transition to democracy occurred in a legal setting that was almost exclusively domestic. International standards, if any, were vague, embattled, and hardly institutionally embedded. Hungary's transition, by contrast, will occur in a thick European legal order that is thickening further precisely on the issue of the democratic rule of law. Whatever happens in Hungary will meet the lively interest of the rest of Europe, not only for legal reasons, but also because it touches on the essentials of the entire union.

We elaborate our proposal in four steps. First, we briefly recall that Article 2 TEU contains legal obligations for the Member States. Second, we argue that national governments are under an obligation to set aside national laws that violate EU values, even before a court has established such a violation. As such a move may provoke fierce criticism, we sketch how a new Hungarian government could request support from European institutions. Finally, we discuss how to avoid the legal vacuum that setting aside a cardinal law might create.

I. Article 2 TEU Contains Justiciable Obligations

The Union's values in Article 2 TEU serve as a standard for the legality of Hungarian cardinal laws. These values constitute *legal obligations for the Member States*. The captured Polish Constitutional Tribunal, which asserts that these values are merely of "axiological significance", stands rather alone in holding this opinion, joined only by the Polish and Hungarian governments (*Hungary v Parliament and Council*, paras. 205, 222, 240). The legal nature of these values is well-established by now. The Court of Justice has reiterated their legal nature in the actions of annulment brought by Poland and Hungary against the rule of law conditionality regulation. The Court has confirmed that "Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which (…) are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States" (*Hungary v Parliament and Council*, para. 232).

These values are *justiciable before the courts*. Although these values, as most constitutional principles, are vague and open, they have gained contours in the Court's jurisprudence. This is especially true for judicial independence and the rule of law. The Court has operationalised these values by combining them with more specific Treaty provisions. While such a nexus had been initially established between Article 19 TEU, Article 47 of the Charter, and the value of the rule of law, the Court's judgments on the rule of law conditionality regulation indicate further links. The Court has noted that Articles 6, 10 to 13, 15, 16, 20, 21, and 23 of the Charter of Fundamental Rights define the scope of the values of human dignity, freedom,

equality, and respect for human rights, while Articles 8, 10, 19(1), 153(1), and 157(1) TFEU substantiate the values of equality, non-discrimination, and equality between women and men (*Hungary v Parliament and Council*, paras. 157 f.).

The obligations contained in Article 2 TEU apply to the entirety of domestic law, including areas that remain within the exclusive competence of the Member States. While the Member States are free to exercise these competences, they are required to do so in compliance with EU law – including the values in Article 2 TEU (*Repubblika*, para. 48; *Commission v Poland (Disciplinary regime for judges)*, para. 56; *Poland v Parliament and Council*, para. 269). As such, these obligations apply to the Member States' constitutional structures as well as cardinal laws. Importantly, these obligations take precedence over the Member States' national identities (*Hungary v Parliament and Council*, para. 233).

The obligations in Article 2 TEU have a substantive as well as a procedural dimension. As regards the procedural obligations, Article 2 (a) of Regulation 2020/2092 provides that the European rule of law under Article 2 TEU requires "a transparent, accountable, democratic and pluralistic law-making process". It should not be difficult to establish that many cardinal laws were adopted in breach of these requirements. One such example is that of Act CLXVII of 2020, which amended the Hungarian electoral laws in a "fast track process" without any public consultation and during a state of emergency. Both the Venice Commission and the OSCE considered this cardinal law to preclude fair elections and an "accountable, democratic and pluralistic law-making process".

II. Why the New Government Can Rely on Article 2 TEU

A government must disapply national laws that violate EU law. A long line of jurisprudence establishes that the primacy of EU law requires not only national courts but *all* Member State bodies to give full effect to EU rules (see e.g. the judgment in *Garda Síochána*). Accordingly, all organs of the State must disapply national legislation that is contrary to EU law. This applies to constitutional provisions as well (*Internationale Handelsgesellschaft*, para. 3; *Euro Box Promotion and Others*, para. 251; *RS (Effet des arrêts d'une cour constitutionnelle)*, para. 51).

Certainly, such an EU obligation sits uneasily with the principles of legality and legal certainty, both of which are important components of the rule of law as well. The principle of legality requires the supremacy of and compliance with the law. While this is true, it is also the case that conflicts among norms are a regular feature in legal orders. Maintaining legality and legal certainty then depends on respecting the rules governing conflicts of laws. The primacy of EU law constitutes such a rule that requires all public authorities to set aside conflicting national law.

There are very few exceptions to this rule. The Court of Justice has accepted that "overriding considerations of legal certainty" may, in some cases, allow a temporary suspension of the ousting effect of a rule of EU law with respect to contrary national law (*A and Others (Wind turbines at Aalter and Nevele*), para. 84; *Winner Wetten*, para. 67). If, however, a violation of Article 2 TEU is established, it would be difficult to argue that considerations of legal certainty could prevail. Further, this exception requires the respective Member State to take steps to remedy the illegality. Due to the required two-thirds majority, the new Hungarian government can do so only with the help of EU law. It must, therefore, set aside such laws on its own motion.

III. How Can European Institutions Support a New Hungarian Government?

How could a new Hungarian government proceed? It could start by identifying the most problematic cardinal laws and assessing their compatibility with Article 2 TEU. This assessment should be as transparent as possible and made accessible to the public. To that end, it could rely on decisions and reports by numerous European, international, and academic institutions. Following this assessment, the government could issue a reasoned decision declaring its intention to no longer apply the identified cardinal laws.

In parallel, the new Hungarian government could tap into the legitimating potential of involving European institutions. First, it could request the Venice Commission to adopt an opinion regarding those cardinal laws that it considers to be violating European values. Though the Venice Commission cannot establish a violation of Article 2 TEU, it is accepted as a constitutional standard setter in Europe. Pursuant to Article 1 of its Statute, its mission is to spread the "fundamental values of the rule of law, human rights and democracy". Moreover, its assessments are not only a "useful source of information" in the EU law context. They also have an immediate bearing on the interpretation of Article 2 TEU. The Union's common values must be interpreted on the basis of the Member States' common constitutional traditions. Opinions of the Venice Commission help identifying these traditions. From a practical perspective, the Venice Commission has proven to react extremely quickly.

Second, the new Hungarian government could ask the European Commission to initiate infringement proceedings against its own country. In the recent infringement proceedings against the Hungarian LGBTIQ laws, the Commission relies – due to the "gravity of these violations" – on Article 2 TEU itself. At first sight, such an invitation might sound rather counter-intuitive. Usually, the infringement procedure under Article 258 TFEU is an adversarial procedure between the Commission on the one hand and a Member State government on the other. Here, both the Commission and the Hungarian government would represent the *same* side.

Yet, insights from the Latin American context support such an approach. A few governments have asked the Inter-American Court of Human Rights to issue decisions to bolster their policies. In May 2016, the government of Costa Rica submitted a request for an advisory opinion on the issue of same-sex marriage with a view to allowing it against a hesitant legislature. The Court issued a ground-breaking opinion in 2017 by holding that same-sex couples should enjoy all rights, including marriage, without discrimination, and establishing standards on the self-determination of gender identity. Another example is the *Barrios Altos* case, although it was not the government that formally initiated the procedure. The decision goes against an amnesty law that was enacted on the initiative of President Alberto Fujimori that shielded him and his henchmen after the so-called "auto-coup" of 1992. When the proceedings reached the Inter-American Court, Fujimori's regime had fallen, and the new democratic government pleaded before the IACtHR to establish the illegality of that law in order to support the Peruvian democratic transition. The Court did so by declaring that the law lacked legal effects.

IV. How to Fill the "Legal Vacuum"

What happens when primacy bites? Take again the new Hungarian electoral laws. If these cardinal laws are found to violate Article 2 TEU, a new Hungarian government must set them aside. How then can a government organise an election without a proper election legislation in place? A legal vacuum is to be avoided (identifying this problem, see here). We see two ways to deal with the issue.

First, one could argue that the effects of primacy go beyond the disapplication of the respective laws. Primacy could require the "resurrection" of former laws. It would exert not only a negative effect but also a positive one. The Court of Justice has applied this logic in cases concerning the jurisdiction of the notorious disciplinary chamber at the Polish Supreme Court. In *A.K. and Others*, the CJEU was faced with a reference from a Supreme Court chamber that essentially asked whether or not it should assume its previous jurisdiction over cases that were – under the new legislation – assigned to the disciplinary chamber. As the disciplinary chamber does not meet the EU requirements of judicial independence, the CJEU ascertained that the formerly competent chamber should reassume its jurisdiction. In this sense, the primacy of EU law prevents Polish courts from applying those provisions that confer jurisdiction to the disciplinary chamber and leads to a resurrection of the former law.

The situation of Hungarian electoral laws is certainly different. These laws have been amended multiple times since Fidesz came to power. Which laws should "resurrect"? To identify this legislation would be the new government's task. Still, it would be important to publish the identified former legislation as, for instance, an annex to the decision expressing the government's intention to disapply the respective cardinal law.

Another way to address the problem is to set aside the constitutional requirement of a qualified majority for new legislation. The argument is that the constitutional provision that requires the qualified majority violates EU values. After all, in democratic states and, in particular, in unitary states, the default rule for democratic decision-making is a simple or absolute majority. Qualified majorities are the exception and require special justification. A comparison of EU Member State constitutions demonstrates that supermajority requirements are extremely rare. Even in the case of "special laws", such as the "lois organiques" under Article 46 of the French Constitution, the "ley organica" in Article 81 of the Spanish Constitution, or the "lege organică" pursuant to Article 73(3) of the Romanian Constitution, only an absolute parliamentary majority is required.

A two-thirds majority is usually reserved to constitutional amendments. In its opinion of 20 June 2011 on the new Hungarian constitution, the Venice Commission specifically pointed to these issues. It stressed that parliaments should act in a flexible manner in order to adapt to new conditions and challenges. The more policy issues are transferred beyond the powers of simple majority, the less significance future elections will have, and the more possibilities a two-thirds majority has of cementing its political preferences in the country's legal order. In Austria, where this has often happened, such laws have cemented agreements between the two main political camps of the country. This is certainly not the case in Hungary.

Qualified majority requirements are especially at odds with European standards if their main purpose is to secure the ruling party's victory. In this case, a violation of Article 2 TEU can be easily established, with the consequence of setting aside the two-thirds requirement. In consequence, the general rule for decision-making under the Hungarian Fundamental Law steps in. The new majority can enact a new election law with a simple majority (Article 5 (6) of the Fundamental Law).

V. Outlook

Is all this legal science fiction? It is certainly not legal practice yet. However, EU law has been a dynamic legal order since 1963 by having responded to the challenges of the time, often by creative lawyering. Any state that acceded to the European Union accepted its dynamic legal order. Along that path, the Court of Justice has established the applicability of EU values in 2018 to protect the Union's normative essence. This step has found overwhelming support from many sides. Our proposal is simply another step along that path.

In this contribution, we argued for the legal feasibility of this step only. Being just lawyers, moreover from another country, we do not see ourselves in a position to make recommendations. Any such decision would need to consider several other issues, including its political feasibility. At the same time, we strongly believe that the newly elected government, and not EU institutions, must decide on whether to embark on that path.

Although the developments in Hungary concern all European citizens, the basic decisions on how to walk back to full democracy are for those European citizens who are also Hungarians.

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