

Understanding Hungary's Constitutional Revolution

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SINCE ITS ELECTION in 2010, the Fidesz government in Hungary has created a constitutional frenzy. It won two-thirds of the seats in the Parliament in a system where a single two-thirds vote is enough to change the constitution. Twelve times in its first year in office, it amended the Constitution it inherited. Those amendments removed most of the institutional checks that could have stopped what the government did next—which was to install a new constitution. The new Fidesz Constitution was drafted in secret, presented to the Parliament with only one month for debate, passed by the votes of only the Fidesz parliamentary bloc, and signed by a President that Fidesz had named. Neither the opposition parties nor civil society organisations nor the general public had any influence in the constitutional process. There was no popular ratification. The Fidesz Constitution went into effect on 1 January 2012.

With this new Constitution, the current Hungarian government felled the tree of democratic constitutionalism that Hungary planted in 1989.

While the government claims it was given a mandate to make major changes, the general Hungarian public thinks otherwise. During the election campaign in 2010, Fidesz never said it would change the whole constitutional system, so it is difficult to claim that the election was a referendum on a new constitution. Once the Fidesz governing programme became clear after the party came to power, the popularity of Fidesz plummeted, even more so after the government undertook to replace the Constitution. In the year when the constitutional plan was announced and enacted, the governing party's popularity fell to only 15 per cent in the opinion polls.

Even though the government pushed through a one-party constitution without support from any other political fraction, except its own party list partner, the Christian Democrats, this didn't stop the constitutional juggernaut. The

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government amended its new Constitution four times in the first 15 months of the new Constitution's life. Each time, the government did so with the votes of only its own political bloc, rejecting all proposals from the political opposition or from civil society groups. The current Hungarian Constitution remains a one-party constitution.

In March 2013, the Fidesz government passed a 15-page amendment to the new 45-page Constitution. László Sólyom, the Conservative former President of both the Constitutional Court and the Republic of Hungary, said in a public statement at the time that the 'Fourth Amendment' removed the last traces of separation of powers from the Hungarian constitutional system. Under the Constitution as amended, no institution has the legal right to check many of the key powers of the one-party government.

The Fourth Amendment nullified more than 20 years of rights-protecting case law that the Hungarian Constitutional Court had developed before the new Constitution went into effect. This left a giant gap where firm legal protection of basic rights once stood. The Fourth Amendment specifically overturned nearly all of the decisions that the Constitutional Court made in the previous year striking down controversial new laws the Fidesz government had passed. The Fourth Amendment removed the Court's power to evaluate on substantive grounds any new constitutional amendments, a move which allowed the government to escape review by inserting any controversial new proposal directly into the Constitution. The Fourth Amendment entrenched political control of the judiciary and gave the government new tools to prevent the opposition from coming to power. The Fourth Amendment reversed many of the concessions Hungary made in the first year of the new Constitution when the European Union, the Council of Europe and the US State Department criticised fundamental aspects of that Constitution.

Under cover of constitutional reform, the Fidesz government gave itself a practically unlimited power. It now has discretion to do virtually anything it wants, even if civil society, the general public and all other political parties are opposed.

How could Hungary have fallen so far so fast from the family of stable constitutional democracies? The answer lies in the Achilles' heel of the old constitutional system: a disproportionate election law combined with an easy constitutional amendment rule.

Hungary's 1990 election law gave disproportionate numbers of seats to the winner of an election, a feature that was designed to help plurality parties form stable governments. When Fidesz got 53 per cent of the vote in the 2010 election, the election law converted this victory into 68 per cent of the seats in the Parliament. While Fidesz won this vote in a joint party list with the Christian Democrats (KDNP), the Christian Democrats barely have an independent existence apart from Fidesz and its members vote in a bloc with Fidesz on every issue.

Armed with its two-thirds supermajority, the Fidesz government has been able to make use of the old Constitution's amendment rule, dating to the communist

Constitution of 1949, which permitted the Constitution to be changed with a single two-thirds vote of the Parliament. This 'magic two-thirds' has enabled Fidesz to make all of its constitutional changes in a formally legal manner. Only one barrier remained: in 1995, under a prior two-thirds government, the old Constitution was amended to require a four-fifths vote of the Parliament before any new constitutional drafting process could begin. One month into its term, Fidesz used its two-thirds vote to amend the Constitution to remove the four-fifths requirement.

Many of the laws, including the Constitution itself, many of the constitutional amendments and most of the cardinal laws, were introduced through the parliamentary procedure of a 'private member's Bill', which bypasses the stage of public consultation required of all government Bills. That, combined with the fact that the Parliament instituted a new rule through which a two-thirds vote could cut off parliamentary debate on any topic, meant that most of these new laws received very little public discussion. It has not been uncommon for a constitutional amendment to go from first proposal to final enactment in just a few weeks.

Taken over the first three years of the Fidesz government, the constitutional changes are complicated, detailed and spread out across a new Constitution, four major constitutional amendments, dozens of 'cardinal' (supermajority) laws, and thousands of pages of ordinary laws that were all passed in a giant legislative blur, sometimes in the middle of the night. I strongly suspect that most Hungarians do not understand the details of this new constitutional system. Even Hungarian lawyers are not able to keep up with the total revolution in the law. In what follows, I will try to explain how the new system of Hungarian government is structured (as of March 2013) taking all of this new law into account.

I will call this whole new legal structure the 'Fidesz Constitution' even though not everything is in the single constitutional text or its amendments. Many elements of the system I describe are in two-thirds 'cardinal' laws that are almost as entrenched as the Constitution itself, which is why I don't make fine distinctions here except where they are crucial for understanding how the system works.

In this testimony, I will focus on the system of divided and checked powers necessary for a government to remain both constitutional and democratic. History tells us that a government that has no limits on what it can do and that concentrates all powers in a single party will soon cease to be either constitutional or democratic.

The importance of checked and limited powers was an insight very familiar to the American constitutional framers. The Philadelphia Convention did not even include a Bill of Rights in the US Constitution because the framers believed that the most effective protection for rights was a government that was limited by law. While American history has taught us that a Bill of Rights matters—and the ratification process of the US Constitution insisted on including one—we have also learned much from James Madison, who wrote: 'The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one,

a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny'.¹

By James Madison's definition, Hungary is on the verge of tyranny. In what follows, I will show that the Fidesz political party has gathered all of the powers of the Hungarian government into its own hands, without checks from any other political quarter and without any limits on what it can do.

We should start with the basics: Hungary has a unicameral parliamentary system of government. A unicameral Parliament has no upper house to check what the lower house does, no 'Senate' to complicate life for the 'House of Representatives' and vice versa. A parliamentary system means that the most powerful executive, the Prime Minister, is elected by the Parliament rather than directly by the people. As a result, the Prime Minister in Hungary is virtually guaranteed a majority for all of his legislative initiatives because that legislative majority put him into his job. Not surprisingly, the legislative-executive cooperation guaranteed in Hungary's unicameral parliamentary system dates back to the communist Constitution of 1949.²

In 1989, however, major constitutional changes in Hungary added a number of checks to this basic framework. A Constitutional Court was created as the primary watchdog on the majoritarian dangers of a unicameral parliamentary system. Unlike a Supreme Court, which is the highest court of appeal in the legal system (something we are familiar with in the United States), a Constitutional Court is the only court that is allowed to hear and decide constitutional questions—and it does nothing else besides rule on constitutional matters. Because the Hungarian Constitutional Court conducts the primary oversight in a system that has little formal separation of legislative and executive power, it is even more important than the Supreme Court in the American separation-of-powers system.

Given such weighty responsibility in the 1989 constitutional design, the Constitutional Court was made highly accessible to the new democratic public in Hungary. Literally, anyone could ask the Constitutional Court to review a law for constitutionality using a so-called *actio popularis* petition. As a result, virtually every law was challenged. From the time it opened in January 1990, the active Constitutional Court kept each new government under constitutional constraint regardless of the political leanings of the government. Opinion polls showed that the Constitutional Court was consistently the most highly respected political institution in Hungary.

The procedure for electing judges to the Constitutional Court before 2010 prevented the Court from being captured by any one political fraction. Because each judicial nominee to the Constitutional Court had first to be approved by a majority of parliamentary parties before then being elected to the Court by a two-thirds

¹ J Madison, 'Separation of Powers' *Federalist No 47* (30 January 1788) 323–31.

² From the mid-nineteenth to the mid-twentieth centuries, Hungary had a bicameral Parliament.

vote of the Parliament, the Court always had a balance of different political views represented on the bench.

Other changes made to the constitutional system in 1989 provided more checks on Hungary's unicameral parliamentary government. Revamped parliamentary procedure required extensive consultation with both civil society and opposition parties before government Bills could be put to a vote. Important issues of constitutional concern required a two-thirds vote of the Parliament. As we have seen, however, the private member's Bill procedure allowed the consultation stage for legislation to be bypassed and the two-thirds laws could cease to be a real check on power when the government had two-thirds of the parliamentary seats, something the disproportionate election law made quite likely.

Four ombudsmen added after 1989 to the system of rights protection. Other independent institutions (the Central Bank, State Audit Office, Prosecutor General's Office, National Election Commission and Media Council) provided both expertise and additional checkpoints. For example, both the National Election Commission and the Media Council were structured to ensure representation from across the political spectrum. An independent self-governing judiciary ensured that the laws were fairly applied.

There were so many different checks instituted after 1989 on the power of the Prime Minister and his parliamentary majority that the post-1989 constitutional system worked reliably to ensure that the operation of majoritarian political power guaranteed by the unicameral parliamentary system didn't ride roughshod over democratic guarantees and constitutional limitations.

By contrast with this robust system of complementary powers, the new Fidesz Constitution removes virtually all of the checks added to the prior communist Constitution after 1989. I will detail the major reversals here.

Under the Fidesz Constitution, the Constitutional Court's power and independence have been compromised in multiple ways. The system for electing constitutional judges was changed so that now a single two-thirds vote of the Parliament is sufficient to put a judge on the Court, abolishing the multiparty agreement that was once necessary for nomination. The Fidesz Constitution also expanded the number of judges on the Court from 11 to 15, giving the governing party four more judges to name immediately.

Between changing the process for electing judges and expanding the number of judges to be elected, the Fidesz government has been able to select nine of the 15 judges on the Court in its first three years in office. The Fidesz parliamentary bloc, voting in unison as it always does, put these judges onto the Court without multiparty support, though a few of the new judges were able to garner some votes from the far-right Jobbik party. The new constitutional judges have almost always voted for the Fidesz government position in each case. Some of the new judges have just voted for the government's position without even giving reasons.

Even if the Court is in Fidesz-friendly hands, however, a powerful Court might still be dangerous to a government that shuns checks on its freedom of action. This may explain why the jurisdiction of the Court has been cut. The Court no

longer has the power to review laws based on *actio popularis* petitions, which are petitions that anyone can file. Now, the only individuals who can challenge laws must show that they have been concretely injured by the application of a potentially unconstitutional law and that they have exhausted their remedies in the ordinary courts. If the Constitutional Court can only hear cases that have concrete victims, it is hard for the Court to rule on matters pertaining to separation of powers and the structure of democratic institutions. Individuals rarely get ‘standing’ to challenge a law that creates a new system for judicial appointments or a law that gives a government agency the power to issue decrees without parliamentary oversight, both laws that have been passed since Fidesz came to power. Some elements of ‘abstract review’ remain with the Constitutional Court, but these, too, have been restricted.

Abstract review allows the Court to hear challenges to laws without a concrete dispute before it. With the exception of the Parliamentary Commissioner for Human Rights,³ the Constitution gives the power to challenge laws abstractly only to particular offices that are currently occupied by people affiliated with Fidesz. One might guess that Fidesz appointees do not have a strong incentive to limit the power of their own government. While one-quarter of the Parliament is also given the power to challenge a law at the Constitutional Court, the one-third of the seats in the current Parliament that are not held by the governing party are divided between parties of the centre-left and a party of the far-right, who would have to agree on a challenge, something that is not very likely. As a result, many laws have been effectively insulated from constitutional challenge by the way that abstract review power has been designed.

Even with the limitations on access to the Constitutional Court that were built into the Fidesz Constitution, the system of judicial review in Hungary may seem broader than the system in the United States. Therefore, the dangers of the new system in Hungary may not be apparent to an American eye. Limiting the power to initiate judicial review only to those who have been directly injured and only to officials who owe their jobs to this government limits the ability of the Court to reach constitutional violations that it used to be able to reach. The US Supreme Court cannot reach all constitutional violations either, but the United States has a bicameral Congress, a separately elected President, a vigilant and active civil society, and federalism, which adds state governments and state courts as additional checks on the power of temporary majorities. Hungary has none of those checking institutions and so relies on the Constitutional Court to carry more weight in the constitutional system. Making it difficult for this Court to reach all constitutional violations creates blind spots in which unconstrained political discretion can override constitutional values.

³ The Parliamentary Commissioner for Human Rights, inherited when the Fidesz government came to power, was replaced later in 2013. The new ombudsman has not actively challenged Fidesz legislation before the Constitutional Court for review as the prior ombudsman did.

In addition to limiting access to the Court, the Fidesz Constitution restricted the jurisdiction of the Court in other ways as well. The Court may no longer review any law that deals with taxes or budgets when those laws are passed at a time when the national debt is more than 50 per cent of GDP. Under the Fourth Amendment passed in March 2013, the Court will never have the power to review budget and tax laws that were passed under these circumstances. As a result, if a tax law passed in 2013 infringes an individual's constitutionally guaranteed property rights or if such a tax is applied selectively to particular minority groups, there is nothing that the Constitutional Court can do—in perpetuity. This opens up a space for the government to violate many personal rights without any constitutional oversight.

The Fourth Amendment has also banned the Court from reviewing constitutional amendments for substantive conflicts with constitutional principles. As a result, if the Constitution promises freedom of religion but a constitutional amendment requires a two-thirds parliamentary vote before a church is officially recognised (a provision that was added to the Constitution with the Fourth Amendment), the Court can do nothing about this. Or if the Constitution says anyone may freely express her opinion but an amendment says that no one may defame the Hungarian nation (a provision that was also added to the Constitution with the Fourth Amendment), there is nothing the Court can do. These examples show that the government can now directly amend the Constitution any time it thinks the Constitutional Court might strike down some policy that the government wants to enact, regardless of how much these new amendments violate principles that have been guaranteed elsewhere in the Constitution. In fact, the Fourth Amendment already inserted into the Constitution all but one of the laws that the Constitutional Court had already struck down as unconstitutional once before under the new Constitution.

To make matters worse, the Fourth Amendment also nullified all decisions made by the Constitutional Court before the new Constitution took effect. At one level, this makes sense: old Constitution/old decisions and new Constitution/new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that 'in those cases where the language of the old and new constitutions was substantially the same', the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new Constitution was substantially different from the old one, the previous decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new Constitutions—which means that, practically speaking, the Fourth Amendment annulled primarily the cases that defined and protected constitutional rights. With those decisions gone, no one can say for certain whether Hungarian law protects free speech, freedom of religion, equality of all Hungarians before the law, property rights, and virtually every other right in precisely the way that everyone in Hungary had come to take for granted.

What other checks on Fidesz's untrammelled power were also removed in the Fidesz Constitution? The independence of the ordinary judicial system has taken

a big hit. In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10 per cent of the judiciary, including 20 per cent of the Supreme Court judges and more than half of the appeals court Presidents. Both the Hungarian Constitutional Court and the Court of Justice of the European Union (CJEU) found that the sudden change in the judicial retirement age was illegal.

The government's first reaction was to defy both courts' judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. Few of them actually returned, however, because the government offered them generous compensation packages if they did not return to work. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year. One court leader who could not have been replaced in this manner (because he was too young) was the then-President of the Supreme Court, András Baka. He was removed from office formally by a transitional law, but in practice by a new requirement, effective immediately, that judges must have five years of judicial experience in Hungary before being named to the Supreme Court (newly renamed the *Kúria*). President Baka's 16 years of experience as a judge on the European Court of Human Rights did not count and he therefore became ineligible to remain a judge on the highest ordinary court in Hungary.

How were the new judges named? The new President of the Supreme Court (*Kúria*) was elected by a two-thirds vote of the Fidesz Parliament. Beyond that, a new institution was created to oversee the appointment of all other judges as well as the administration of the judiciary: the National Judicial Office (NJO). This office replaced a system of judicial self-government. The President of the NJO, elected by two-thirds of the Parliament, received the power to hire, fire, promote, demote and discipline all judges in the system without any substantive oversight from any other institution. The national President must countersign in cases where a judge is appointed for the first time in the system, but it is not clear that he could refuse to do so. The new leadership of the ordinary courts has thus been replaced by judges who owe their careers to an official elected by the 'magic two-thirds' of the Fidesz Parliament.

The Council of Europe's Commission on Democracy through Law (Venice Commission) sharply criticised the extraordinary powers of and general lack of legal standards governing the President of the National Judicial Office. The US State Department has also raised questions about the independence of the judiciary under this system. In a concession to criticism, the Fidesz government agreed to limit the powers of the President of the NJO in legislation passed in summer 2012. But the Fourth Amendment reinstated these outsized powers of the President of the NJO without constitutionalising the checks included in the legislation. The Constitution therefore entrenched the NJO, whose President has the constitutional power to 'manage the central administrative affairs of the

courts', a set of responsibilities in which the judges merely 'participate'. None of the other constraints that the Fidesz government agreed to under international pressure—requiring a significant role for the judges in their own self-government, establishing legal standards for the President of the NJO to use in managing the judiciary, and no longer allowing the President of the NJO to stay in office until her successor was elected—were introduced into the Constitution itself, they were only included in a cardinal law governing the judiciary that might have been determined to be unconstitutional because absolute powers were given to the President of the NJO in the Constitution.⁴

In another move that has attracted universal criticism, the Fidesz government gave the President of the NJO the power to take any case in the entire court system and move it to a court different from the one to which normal procedure would assign it. So, for example, if a political corruption case against members of the main opposition party would normally be assigned to the trial-level court in Pest, the President of the NJO can move the case to Kecskemét. In fact, this is not a hypothetical; that very example happened. The rationale given for this extraordinary power to move cases is that the courts are overcrowded and case resolution can be speeded up by moving cases to less crowded courts.⁵

But the rationale for the President of the NJO to have this power was belied by the facts: from public sources, I kept track of the movement of cases in the first year that the President of the NJO had this power. She moved only a few dozen cases away from courts that had thousands of backlogged cases. And she moved the cases not to the least crowded courts in the countryside but to other courts that also had backlogs. She moved some of the highest-profile political cases in which the political opposition had a stake, leading the opposition to charge the government with picking the judges, particularly in cases that have strong political overtones. While my statistics cannot reveal the motivation of the government, they can show that the government was not moving a substantial enough number of cases to make a difference in waiting times and it was not moving cases from the most to the least crowded courts.

The Constitutional Court and the ordinary judiciary have suffered a severe blow under the Fidesz Constitution. Other independent institutions have fared no better.

The ombudsman system, which once comprised four independent ombudsmen with independent jurisdictions, has now been folded into one office with a much smaller staff. The former data protection ombudsman was fired and the office has been absorbed directly into the government, something that has generated an

⁴ After the international outcry, a Fifth Amendment to the Constitution, passed in September 2013 after this testimony was given, reinserted into the constitutional text some role for judicial councils to participate in the selection of judges.

⁵ The Fifth Amendment to the Constitution also removed this power from the President of the NJO but did not restore the cases already moved to the courts to which they had been assigned by law.

infringement action launched by the European Commission against Hungary at the CJEU because EU law requires an independent data privacy officer.

In March 2013, after many public battles with the governor of the Central Bank that the Fidesz government had inherited, the government was finally able to replace him with one of their own ministers. Before he moved to the Bank, however, he used his ministerial power to unilaterally change the rules in the Charter of the Central Bank. Without the need for parliamentary approval or Court review, then, György Matolcsy, as the Fidesz Economics Minister, gave the office of György Matolcsy, the new Central Bank governor, dramatically increased powers just before he moved from one job to the next.

The new Media Council has a chair appointed directly by the Prime Minister and a membership that consists exclusively of members elected by the Fidesz parliamentary two-thirds, all for nine-year terms. The Media Council has draconian powers to levy bankrupting fines based on a review of the content of both public and private media, including broadcast, print and Internet. A Constitutional Court decision freed the print media from some of these constraints, but the Fidesz government could still easily amend the Constitution to bring the print media back under control and the Constitutional Court could say nothing further about it.

The Election Commission has been revamped and now consists exclusively of members who have been elected by the Fidesz parliamentary two-thirds majority, all for terms of nine years. While each party with a national list in the next election, scheduled for April 2014, will have a temporary member on the Commission during the campaign, opposition parties will easily be outvoted by the Fidesz majority.

The legal framework for the 2014 election was still in flux one year before the polling was to occur.⁶ Early on, however, the Fidesz parliamentary two-thirds enacted two election laws over vociferous protest from opposition parties, creating an even more disproportionate system than the one it replaced. One law gerrymandered the districts for the next election in such a way that it would be very difficult for the opposition to win. The law even fixed the exact boundaries of election districts in a cardinal law that requires a two-thirds vote of the Parliament to change. This law also eliminated the second round of voting for single-member districts so that someone without majority support in a district can enter Parliament, which was not previously the case.

The government passed a second cardinal law on elections that instituted a system of voter registration, even though the country had conducted more than 20 years of elections with an excellent 'civil list' that never produced any complaints of irregularity. The Constitutional Court struck down voter registration as

⁶ Effective 18 April 2013, Law XXXVI of 2013 (2013. évi XXXVI. törvény a választási eljárásról) regulated many features of the election, but changes in the election framework were still occurring through 2014. There is no guarantee, as I update this testimony in January 2014, that the election rules will not be changed again before the spring election. In fact, the government pledged in January 2014 that it would legislate to alter the way that minority voters can register to vote for nationality parties.

unconstitutional, and the governing party seems to have given up on this idea. But with its parliamentary two-thirds vote, the government has the power to override the Constitutional Court by simply adding voter registration to the Constitution at any point. The government may also change other important features of the election system right up until the election takes place. For example, one year before the election, no rules had yet been devised for making and verifying voter lists for ethnic Hungarians in the neighbouring states who recently became eligible for citizenship as the result of constitutional changes.

The Fourth Amendment added new electoral rules in March 2013. The amendment created a constitutional ban on political advertising during the election campaign in any venue other than in the public broadcast media, which is controlled by the all-Fidesz media board. Moreover, only parties with national party lists could advertise at all in the national media, which potentially excluded smaller and newer parties. These restrictions had been previously declared unconstitutional by the Constitutional Court, so the government amended the Constitution to override that decision. And since these provisions are now in the Constitution itself, the Constitutional Court cannot review them again.

But suppose that, despite all of the obstacles that the current governing party put in the way of the political opposition, an opposition coalition manages to win an election anyway. The Fidesz Constitution created a trap that can be snapped shut in just such a case. The Constitution created a National Budget Council with the power to veto any future budget that adds to the national debt, which any foreseeable budget will do. The members of the Budget Council have been chosen by the Fidesz two-thirds majority for terms of six or 12 years and can be replaced only if two-thirds of the Parliament can agree on their successors when their terms are over. Not only does this mean that, for three election cycles out, any future government must follow a budgetary course agreed on by a council where all of the members were elected by the Fidesz government, but this Budget Council has even more power than that.

The Constitution requires the Parliament to pass a budget by 31 March of each year. If the Parliament fails to do so, the President of the country can dissolve the Parliament and call new elections. When this provision is put together with the powers of the budgetary council, the constraints on any future government are clear. If a new non-Fidesz government passes a budget that adds to the debt, that budget can be vetoed by the all-Fidesz Budgetary Council at any time, including on the eve of the budget deadline given in the Constitution. The Parliament would then miss the deadline and the President (also named by Fidesz and serving through 2017) could call new elections. And this process can be repeated until an acceptable government is voted back into power.

The Fidesz government may have created this unfortunate interaction of constitutional provisions inadvertently in an earnest attempt to create a binding mechanism to achieve budget discipline. But it would be easy for the Fidesz government to achieve fiscal discipline without creating this anti-democratic trap. The Fidesz government could amend the Constitution to require that the Budget

Council veto the budget by a deadline that would give the Parliament time to pass a new budget before the President gains the power to dissolve it. I have personally suggested this to high-level members of Fidesz, but an amendment to this effect has so far not appeared.

There is more that could be said about the new Fidesz Constitution. I have only mentioned what I take to be the biggest obstacles posed to constitutionalism and democracy by this new constitutional framework.

What can be done about the Fidesz consolidation of power by the United States, the US Helsinki Commission, and by the Organization for Security and Cooperation in Europe?

First, of course, Hungarian democracy must be created and maintained by Hungarians themselves. But a democratic public must be an educated public and Hungarians themselves need to learn what has happened to their own Constitution over the last three years. Most have no idea, and not because they could not or would not understand.

The government celebrated its new Constitution with great fanfare. They set up ‘constitutional tables’ at every town hall where people could sign up to receive their very own copy of the Constitution. In June 2012, the government presented to every secondary school graduate a coffee-table book with the words of the new Constitution illustrated with historic and specially commissioned paintings. But much of what I have mentioned above is not contained in the text that the government has distributed.

Hungary’s friends, including the United States, could assist financially with a programme to educate citizens, lawyers and judges in Hungary about the new constitutional framework in Hungary. A public education campaign about the new constitutional structure, conducted by Hungarian constitutional experts from the government, from the opposition and from academia, may assist in giving Hungarians better information about their new constitutional system. Such a campaign would be especially effective if it could be conducted through the broadcast media in Hungary, though since the government functionally controls the broadcast media through its Media Council, some monitoring system would have to be put in place to ensure that both the government and opposition voices are heard. Having read thousands of petitions that ordinary Hungarians sent to the Constitutional Court in the 1990s, I am confident that Hungarians themselves will rise to the defence of both democracy and constitutionalism once they see the dangers of a flawed constitutional design.

Secondly, the Hungarian government vociferously claims that it is still a democracy because political parties may still freely organize and contest the election. But its critics are concerned that the government presently controls the media landscape, has enacted a number of legal provisions that disadvantage opposition parties, and continues to change the electoral rules. In fact, nothing prohibits the government from changing important elements of the electoral framework at the last minute. With the election coming up, it is important to get the rules of the game fixed—fairly—as soon as possible.

The Organization for Security and Cooperation in Europe (OSCE) has expertise in monitoring elections to ensure that they are free and fair. The OSCE should insist that the electoral rules be settled far enough ahead of the election so that all who want to contest the election have a reasonable amount of time to organise themselves accordingly.

Enough questions have been raised about the willingness of the current Hungarian government to recognise the political opposition that the OSCE/Office for Democratic Institutions and Human Rights (ODIHR) should also fully monitor the 2014 Hungarian parliamentary elections. This should include not just an election-day mission. The comprehensively changed new constitutional framework warrants an early Assessment Mission from OSCE/ODIHR, one that can fully review the effects of all the new provisions. It should focus on the ability of political parties to organise and to get their message out, access to the media, and the fairness of the basic election framework including the creation of electoral districts and the compatibility of both the content and timing of the new electoral rules with the principles of free and fair elections.

Thirdly, the US government should press the Hungarian government to live up to its international commitments to democracy, constitutionalism, the rule of law and robust rights protection. The United States should be vigilant in monitoring backsliding from the high level of constitutional democratic protections that Hungary had achieved after 1989, and the United States should cooperate with the Venice Commission, the Council of Europe Parliamentary Assembly Monitoring Committee, and the European Union (for example, the LIBE Committee of the European Parliament), all of which have ongoing monitoring processes in place.

But the US government should also be aware that, under pressure, the Fidesz government has in the past promised minor changes to its comprehensive framework and then has discarded those changes when the pressure lifted. Moreover, the changes that the Fidesz government has previously offered to make do not really address the key problems of the system. The Fidesz constitutional framework is a highly redundant system that must be understood as a whole. Each individual legal rule cannot be evaluated by itself because one must understand the function of that rule in the larger system. Changing a number of small features of this constitutional order may not in fact address the most serious problem, which is the concentration of political power in the hands of one party. In deciding whether the Hungarian government has been responsive to international and domestic criticism, Hungary's allies need to examine whether proposed changes really alter the way this complex and integrated system works as a whole.

The United States should resist entering the battle of competing checklists of constitutional features. The Hungarian government often insists that some other European country has the same individual rule that its friends criticise. Perhaps we should remember Frankenstein's monster, who was stitched together from perfectly normal bits of other once-living things, but who was, nonetheless, a monster. No other constitutional democracy in the world, let alone in Europe, has the combination of constitutional features that Hungary now has. In evaluating

Hungary for its compliance with international standards, its international friends must look at the whole constitutional system and not just at individual pieces as it assesses whether Hungary still belongs to the family of constitutional democracies.

Finally, Hungary is a small country in Europe. It may be hard to see why the United States should spend any of its political capital to address what former Secretary of State Hillary Clinton called Hungary's backsliding from constitutional democracy. There are two main reasons why the United States should care, apart from the fact that it is painful to see any country retreat from democracy and one should always be concerned about the people adversely affected.

Hungary is a partner with the United States not only in the OSCE, but also in NATO. OSCE commits its member states to the protection of human rights as defined under the Helsinki Final Act of 1975, and long experience shows that human rights receive their best protection from the maintenance of a constitutional and democratic government, both of which are now in doubt in Hungary. The NATO Charter creates a union of states 'determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law'. But these commitments are also being challenged by the concentration of power in Hungary under its new constitutional framework. Both the OSCE and NATO commit its member states to good behaviour and good government, which these organisations should be able to monitor.

In addition, other countries in Hungary's neighbourhood are looking with great interest at what Hungary is doing. They can see that the European Union, the Council of Europe, the OSCE, NATO and the United States have limited influence and ability to induce a national government to change its domestic laws. Hungary's neighbours understand that Hungary is getting away with consolidating all political power in the hands of one party, and many find that enticing. Troubling recent developments in Romania, Bulgaria and Slovenia show that the Hungarian problem of overly concentrated power could spread if the United States and its European allies do not stand up for their values in the Hungarian case. The United States should therefore treat constitutional problems in Hungary with a sense of urgency, both because of the speed with which this system is being locked in and because of the likelihood that the Hungarian constitutional disease could spread around the neighbourhood.

In closing then, I strongly urge the United States, the US Helsinki Commission and the OSCE to take Hungary seriously, engage with the Hungarian government on matters of constitutional reform, and work toward ensuring that the channels of democratic participation remain open in Hungary so that the Hungarian people retain the capacity to determine the sort of government under which they will live. The legal changes I have described pose a real danger to fundamental democratic and constitutional values, and Hungary's friends need to sound the alarm.