

# Winning by Losing

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2021-03-05T20:40:38

Hooray! Fidesz and EPP will part ways from now on, and that is undoubtedly great news. Of course, these glad tidings would have given me even more pleasure in [2020](#) or [2019](#) or, for that matter, [2011](#). Now, the EU budget has been passed and the rule of law conditionality has been suspended in a manner most contrary to the rule of law, and Viktor Orbán and his friends can line their pockets in peace. Angela Merkel's and Ursula von der Leyen's CDU/CSU, on the other hand, are about to face the electorate soon, at which moment they are overcome by the abrupt realisation of what an unbridgeable gulf separates them from Fidesz, all things considered. But that's okay, better late than never, so let's stop the whinge and let bygones be bygones and look forward to the future.

And what do we see there?

I have talked to some friends from Hungary today. They see one date in particular, and that is the Hungarian parliamentary elections in spring 2022, and the actual possibility that Fidesz will lose them.

This is in fact a real possibility this time, not just, as usual, a theoretical one. The opposition, so fragmented up to now, has formed an electoral alliance with a common platform and common candidates, and it is anything but impossible that it will thus be able to cross the majority line on election day. Fidesz has always benefited from the fact that electoral law in Hungary [disproportionately favours](#) large parties. Now it is no longer the only large party. Now it has competition.

As of now, Fidesz is not doing very well. The pandemic has [hit the country hard](#), with almost as many deaths relative to the population as in the US, and a mortality rate of 3.5%, surpassed in the EU only by Bulgaria. The Fidesz government's strategy of going it alone with Chinese and Russian vaccines seems to be meeting with resistance: Many distrust the Chinese vaccine, especially since it will not allow free movement because the other EU states do not recognise it, not even Poland.

So who knows: perhaps in a little over a year there will be a new government. Of course, it's still a lot more likely that there won't. Orbán's campaign machinery is as well-oiled as ever. The government, following the Polish example, is just warming up to building up the LGBTQI community as its next bogeyman to scare conservatives into submission after Soros and migrants have run their course in that role. And thanks to the EU's recovery billions he has enough money to make sure he is liked wherever he isn't. But still: a possibility, a real possibility! In a few months, the voters in Hungary will decide in a primary election who will be the leading candidate. Spring is approaching in the Carpathian Basin at last. Who would have thought!

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## Call for Applications



Democratic values and the rule of law are increasingly put under pressure in the EU, and the ways and means of upholding them have become much-discussed legal, political and social issues. In light of these challenges, re:constitution fosters exchange and analysis on democracy and the rule of law in Europe.

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What if the possibility materialises? What if the united opposition is no longer the opposition, but actually the government? It has promised not only a transitional government for a democratic reset, but a real government for a whole legislative period. The coalition includes the former neo-Nazis of the Jobbik party as well as the heirs of the post-communist gangsters whose rule made the rise of Fidesz possible in the first place. Even if they all manage to mobilise their voters where their own candidates are not running – the question whether and how such a disparate coalition can actually govern for four years is not entirely trivial to answer. In neighbouring Slovakia, the four-party coalition that started out to clean up the SMER mafia state is, after one year in office, pretty much in shambles by now.

Most of all, the coalition would come up against a state that Orbán, in ten years of Fidesz rule, has systematically prepared for the eventuality of losing power, in order to make it as unlikely as possible for the new government to govern successfully. Essential parts of the legislation are laid down in so-called cardinal laws, which can only be changed with a two-thirds majority. In all sorts of places, Orbán's constitution provides for offices that can also only be filled with a two-thirds majority, and on top of that with extremely long terms of office, so that the new government would have to work for years with people who will still receive their orders from Viktor Orbán.

## Double bind

How is the new government supposed to govern successfully if it doesn't at least get rid of Attorney General Péter Polt? As long as he is in office, the [corruption networks of the Fidesz party will have very little to fear indeed](#). Polt was confirmed for a new term only in 2019, and that term is no less than 9 years. Of course, the government could set up a parallel anti-corruption agency, as they have successfully done in Romania. But there would still be the Constitutional Court to make sure that can't happen, also packed with loyal Orbán friends and collaborators. The coalition would be surrounded by institutions that would give them hardly any room for manoeuvre: the judiciary, the central bank, the state audit office (which watches over the party finances, very practical!), plus the fabulous new "foundations" into whose hands Fidesz has "privatised", or wants to, the media and public universities.

Unless the opposition wins a landslide and captures a two-thirds majority (at least a theoretical possibility in the Hungarian electoral system; Fidesz did after all), the new government will have little choice if it wants to achieve anything in the four years for which it was elected: it will have to bend, if not break, the rules. It will have to go into conflict with the rule of law. Ignore constitutional court rulings. Fire incumbents without legal basis. Things like that.

And in Brussels, they will have to decide whether to unleash the rule of law mechanism – which will by then finally be implemented – on the new government. Or whether they would prefer to look the other way. Either way, Orbán would have a blast.

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Die Dissertationspreise für NachwuchswissenschaftlerInnen werden dieses Jahr an Dr. Maria Monnheimer (Hermann-Mosler-Preis) und Dr. Adrian Hemler (Gerhard-Kegel-Preis) verliehen.

Die Veranstaltung wird über den Völkerrechtsblog gestreamt. Der Link sowie weiterführende Informationen sind auf <http://www.dgfir.de> zu

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Some believe that Fidesz is even hoping for such an electoral defeat. Then it would be for the opposition to clean up the havoc wrought by the pandemic, strapped for cash since the EU billions will be largely planned or spent by then, short of qualified personnel, lacking resources. Look, they will say, this is what happens when you elect those losers. They could silence all critics who keep carping about the state of democracy in Hungary: Look, they could say, it's perfect, peaceful change of power is absolutely possible here, this is a squeaky-clean democracy as fine as you have ever seen one! They could send the rule-of-law mechanism of the EU into a double-bind maze from which it would not find its way out again so quickly. And ultimately, after two, three, four years at the latest, they could triumphantly return to power, and this time for good.

Nevertheless: removing Orbán from power, even if only for a few years, would still be worth a lot. Among the things the new government could do, for example, is to join the enhanced cooperation for the European Public Prosecutor's Office, which can take action against cases of fraud against the EU budget. Orbán was very much against it, so far. I suppose he would be, wouldn't he?

*Many thanks to Viktor Kazai, Petra Bard, Csaba Györy and Márta Pardavi for valuable input!*

## The week on Verfassungsblog

In the case of *Xhoxhaj v Albania*, the European Court of Human Rights has dismissed the case of a former judge of the Albanian Constitutional Court against her dismissal. As [TILMANN HOPPE](#) reports, the ECtHR has given clear priority to the **fight against corruption**.

**Georgia** is sliding into authoritarianism and EU Council President Charles Michel has gone there to mediate. As [DAVIT ZEDELASHVILI](#) notes, the EU seems to have more influence on neighbouring countries than on its own member states.

This week, the ECJ handed down an important ruling on the subjugation of the judiciary in **Poland**: it concerns the National Judicial Council, which selects nominees for judgeships. The fact that there is no legal remedy against nominations of judges to the Supreme Court is against EU law. I talk about this and the far-reaching implications of this ruling in our crisis podcast with [WOJCIECH SADURSKI](#).

5231 judges and public prosecutors have written an open letter to the **EU Commission** asking it to finally become more active against the Polish government's judicial policies. [JOHN MORIJN](#) is furious about the response.

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the Verfassungsblog team*

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Two cases concerning the **Muslim headscarf** are currently pending before the ECJ. Advocate General Athanasios Rantos has delivered Opinions on these cases which, in the opinion of [MARTIJN VAN DEN BRINK](#), are seriously flawed.

In the UK, as reported last week, the Supreme Court handed down its judgment in the case of **Shamima Begum**, a young British woman who joined the IS in Syria at the age of 15 and was subsequently stripped of her British citizenship. She wanted to appeal against this, but cannot because she is not allowed to enter the United Kingdom. The Supreme Court found this to be in order. [DEVYANI PRABHAT](#) puts the ruling in context.

In the dispute over prioritisation in **Covid vaccination** in Germany, [LINO MUNARETTO](#) points to the imperative to effectively utilise vaccination capacity.

In **Norway**, the government had proposed to legislate a curfew during the pandemic. This did not go down well at all with the public. On 17 February 2021, the proposal was shelved in the face of strong opposition. [KRISTIN BERGTORA SANDVIK](#), [HANS PETTER GRAVER](#) and [PETER SCHARFF SMITH](#) report on what this case says about the trust between the authorities and the public in Norway.

In the **Netherlands**, it has emerged on appeal that the Covid curfew imposed by the government is legal after all. [KYRA WIGARD](#) and [ARTHUR DYEVRÉ](#) see the Dutch judiciary growing in confidence to interfere in highly political matters.

In **Denmark**, the parliament has initiated impeachment proceedings against a former minister for immigration. She had enforced a decree that all couples should be separated unconditionally if one of the spouses was a minor. [PERNILLE BOYE KOCH](#) shows the relevance of the case in the field of tension between Danish migration policy and human rights obligations.

In **Chile**, a new constitutional assembly will be elected in April 2021 to replace the current constitution, which dates back to the military dictatorship, with a new one. The integration of social rights is a central demand of the Chilean population. [ERNESTO VARGAS WEIL](#) explains what the Assembly can learn from German constitutional history in this respect.

Is **Palestine** a state? In early February, a Pre-Trial Chamber of the International Criminal Court has issued a decision on this, which [KAI AMBOS](#) analyses in detail.

The EU's **Digital Services Act** (DSA) was supposed to overhaul the 20-year-old e-commerce directive, but in its first draft, the DSA reproduces many of the intricacies of its predecessor. [JOAN BARATA](#) explains how this will affect the moderation of online content by platforms.

In the German Bundestag, the Left Party recently proposed to improve the **readability of draft laws** through synopses, which [FELIX HERBERT](#) thinks is a very good idea.

Our big-time **COVID-19 symposium** this week has included reports from [Luxembourg](#), [Malaysia](#), [Mexico](#), [Portugal](#), [Russia](#), [Singapore](#), [Spain](#), [Sweden](#), [Switzerland](#), [Thailand](#) and [Ukraine](#). Next week, reports from Belgium, Estonia, Iceland, Iran, Italy, Canada, Lebanon, Slovakia, South Africa and Hungary will follow.

That's all for now. All the best to you, good health and may your [Verfassungsblog coffee mug](#) always be well and fragrantly filled!

Thanks for reading, and see you next week,

Max Steinbeis

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