Institutiones Administrationis – Journal of Administrative Sciences Vol. 5 (2025) No. 2, 37–53
DOI: 10.54201/iajas.153

Some Constitutional Dimensions of Legislation with Supermajority in an Illiberal Context

What might be Learnt from the Case of Hungary?

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Abstract

The main goal of this article is to draw attention to the potential tools of the Hungarian Constitutional Court in the shaping of the future of cardinal law. The three main dilemmas around which the relevant HCC practice can be grouped are the legal rank of cardinal laws, ordinary and cardinal provisions occurring in the same laws, and the vertical scope of the cardinal regulation. The science of constitutional law and legal practice must focus on these three main issues in connection with supermajority legislation. Of course, many other sub-problems can be identified, which are important in themselves, but all of them can be classified into one of the aforementioned three areas. If these issues can be settled satisfactorily, a predictable jurisprudence may develop in the long term, which would greatly promote the effectiveness of the entire concept of cardinality. A wide-ranging professional dialogue from this would serve not only the interests of the Hungarian constitutional framework, but might also be an important point of reference for other countries operating with supermajority legislation.

Keywords

cardinal law; supermajority; hierarchy of legal sources; two-thirds parliamentary majority; competence principle; hierarchical principle; cardinality clause

1 Introduction

The present study fits into the strand of the international legal scholarship, reviewing the jurisprudence related to supermajority legislation, and it thematizes, in an international context, the decisions taken by the Hungarian Constitutional Court (HCC), which are related to supermajority legislation in the last three decades. In doing so, I kept in mind the already known case law of the HCC, as well as the possible perspectives that can be observed in the field. Consequently, my hypothesis also points in these two directions. On the one hand, I assumed that the HCC has played a crucial role in initiating model changes related to supermajority laws in Hungary. This is in contrast to the generally observable phenomenon that the activity of the HCC follows rather than causes legislative developments. On the other hand, I believe that this

Published online: 02 October 2025

body, at least in principle, could play a significant role in the search for solutions that preserve the advantages of the current cardinality concept, but eliminate its disadvantages, even without any substantive changes to the constitutional and legislative environment, simply by applying the tools of legal interpretation.

From these two basic assumptions, it follows that I provide a comprehensive picture of the decisions regarding the Hungarian cardinal laws of the last three decades, and the related trend-like attitudes, without analyzing each relevant decision in detail. This may provide orientations for further progress, in connection with which, in my opinion, we should take into account at least three aspects. First, the legal rank of supermajority laws should be clarified. Second, I suggest reconsidering the situation when simple and supermajority provisions coexist in the same law. Finally, the development of a depth test could lead to a consistent delimitation of the vertical scope of supermajority legislation. In my study, I formulate possible answers to such and similar questions.

This contribution aims to demonstrate that a Constitutional Court with a more activist attitude and less political engagement (Drinóczi & Bień-Kacała, 2019) could considerably tighten the arena of supermajority legislation, which could broaden the margin of movement of any future government without a two-thirds parliamentary majority. The main findings of this article might also be noteworthy for other constitutional courts facing with constitutional implications of supermajority legislation; at least certain elements of the suggested interpretive tools might also be implemented into the constitutional practices of several other countries as well, as will be illustrated later.

Apart from this, the outcome of the present research may entail far-reaching practical implications. Although the fact that the Venice Commission also referred in its report on the Fundamental Law of Hungary to the extensive use of cardinal laws during 2011 and 2012 as a factor of potentially undermining the rule of law,[1] this aspect of rising illiberal constitutionalism (Szente, 2023; Drinóczi & Cormacain, 2021) has still been somewhat neglected. Most of the authors focusing on the available instruments of overturning illiberal tendencies have dealt with the possible revision or amendment of the Current Fundamental Law without a two-thirds parliamentary majority (Bakó, 2021). However, less attention has been paid to those interpretive methods, which could reconsider and narrow the scope of current cardinal laws imposing a two-thirds parliamentary majority requirement for the amendment of the most important acts. Furthermore, these interpretive techniques might also be of great use for other constitutional courts dealing with supermajority legislation, since inherently similar constitutional concerns have been raised wherever supermajority law has been introduced.

2 Methodology

For the sake of this contribution, all HCC cases related to supermajority legislation have been collected from 1990 to 2024, and then the main issues raised and the most important tendencies have been identified. Instead of a detailed overview of the decisions concerned, I will identify the main principles on which the relevant arguments are based, which can serve as starting points for further analyses. At first, the definition of supermajority law will be given; moreover, a brief international overview will be provided of the various versions of supermajority law

[1] Venice Commission, opinion no. 621/2011 on the new Constitution of Hungary, sections 22–27, online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e

around the world. What might be learned from the cardinal law concept, as the Hungarian form of supermajority, legislation might be understood just in the light of this comparative insight. Apart from this, a terminological clarification will also be needed to properly distinguish the terms of supermajority, cardinal, organic, two-thirds, and constitutional law. The article will continue with the research on the main findings of the HCC on the dogmatic bases of supermajority legislation until the entry into force of the Fundamental Law in 2012. In the last subsections of my work, the latest developments of the cardinality concept will be discussed; finally, the question will be asked whether the HCC can remedy the shortcomings of the current cardinal law concepts by simply changing the jurisprudence, without explicit constitutional or legislative amendment. If the answer to this question is in the affirmative, then the main possible directions for further progress should be advised.

3 Supermajority legislation: an international overview

As a preliminary consideration, the exact meaning of the term of supermajority law should be given. In the different constitutional systems, various interpretations of supermajority law have been developed, yet the common features that are the characteristics of all relevant national legal institutions may still be identified. The term of supermajority law describes a constitutionally defined subcategory of laws, which includes, at least in principle, the most important legislative subjects, and which is associated with stricter procedural guarantees than the general legislative process (Camby, 1998; Szentgáli-Tóth, 2022b).

In national constitutional systems, multiple expressions have been elaborated for naming supermajority laws. Although terminology issues usually have less significance than the substantial analysis, in this case, it might still be advisable to devote them considerable weight, since terminology closely correlates with the main functions assigned to supermajority legislation. In addition to the constitutional, the political (Szabó, 2024, 66), historical, and sovereignty-centered conceptualizations are also noteworthy. The terminology of organic law appears, amongst others, in the French,[2] the Spanish,[3] the Romanian,[4] the Moldovan,[5] the Croatian,[6] and the Georgian[7] constitutions, where emphasis is given to the distinction between supermajority and ordinary laws. In Spain, these laws form part of the constitutional bloc (Chofre Sirvent, 1994, 99–202); supermajority laws might also be invoked in other countries as points of reference during the constitutional review of ordinary laws (Troper & Chagnollaud, 2012, 346).[8]

[2] Art. 46. of the Constitution of France [October 4, 1958], online: https://www.conseil-constitutionnel.fr/le-bloc-de-constitutionnalite/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur

[3] Art. 81. (1) of the Constitution of Spain [December 7, 1978], online: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf

[4] Art. 72. (3) and 74. (1) of the Constitution of Romania [November 21, 1991], online: https://www.constituteproject.org/constitution/Romania_2003

[5] Art. 72. (3) and 74. (1) of the Constitution of Moldova [July 29, 1994], online: https://www.constcourt.md/public/files/file/Actele%20Curtii/acte_en/MDA_Constitution_EN.pdf

[6] Art. 82. (1) of the Constitution of Croatia [December 22, 1990], online: https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text

[7] Art. 66. (2) of the Constitution of Georgia [August 24, 1995], online: https://sos.ga.gov/sites/default/files/2022-02/state_constitution.pdf

[8] Décision n° 66–28 DC du 8 juillet 1966 (Rec., p. 15).

The category of constitutional law was introduced in Italy shortly after WW II,[9] and later was also implemented in several Central- and East-European and Central-Asian countries during the democratic transition, such as Azerbaijan,[10] Kazakhstan,[11] Kyrgyzstan,[12] Russia,[13] Slovakia,[14] and Tajikistan.[15] According to this concept, supermajority laws were placed at the same level as the constitution in the hierarchy of legal sources (Kilényi, 1994). The "two-thirds law" formula was used in Hungary during the two decades between 1990 and 2011. This wording prioritized the political role of supermajority: a broad consensus was needed to amend these laws instead of a simple majority. The Fundamental Law of Hungary reinstated an old terminology, creating the category of cardinal law,[16] with very similar content to the former two-thirds laws. This symbolic step was in conformity with the rhetoric of the Fundamental Law, relying on legal historical traditions (Küpper, 2014, 2–5).

France, Spain, and Hungary represent three significant models of supermajority legislation. However, supermajority law does not only affect these three countries, but also many other legal systems. Although the initial logic of supermajority law can already be seen in certain aspects of the English historical constitutional development (Leyland, 2012, 25–42), the modern history of supermajority laws begins in 1958, with the Constitution of the Fifth French Republic.[17]

After the decolonization of Africa, following the French model, organic laws were included in the constitutions of many francophone African countries (René, 1964, 477). Currently, organic laws have been introduced into the constitutions of Algeria,[18] Senegal,[19] and Tunisia,[20] and other countries from all around the continent.

The second wave of the spread of supermajority laws is related to the fall of the Spanish and Portuguese nationalist dictatorships.[21] Supermajority laws have been incorporated into the

[9] Art. 137. and 138. of the Constitution of Italy [December 22, 1947], online: https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

[10] Art. 94. (1) and (2) of the Constitution of Azerbaijan [November 12, 1995], online: https://www.globalhealthrights.org/wp-content/uploads/2013/09/Azerbaijan-Constitution-English.pdf

[11] Art. 61. (4) and (5) of the Constitution of Kazakhstan [August 30, 1995], online: https://www.akorda.kz/en/official_documents/constitution

[12] Art. 86. (5) of the Constitution of Kyrgyzstan [April 11, 2021], online: https://constsot.kg/wp-content/uploads/2022/06/constitution-of-the-kyrgyz-republic.pdf

[13] Art. 76. of the Constitution of the Russian Federation [December 25, 1993], online: http://www.constitution.ru/en/10003000-01.htm

[14] Art. 93. (1) of the Constitution of Slovakia [September 3, 1992], online: https://www.prezident.sk/upload-files/46422.pdf

[15] Art. 61. of the Constitution of Tajikistan [November 30, 1994], online: https://mfa.tj/uploads/berlin/2020/08/constitutsion-The-Repablik-of-Tajikistan.pdf

[16] Art. *T)* (4) of the Fundamental Law of Hungary [April 25, 2011], online: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808--ee03d6fb8178

[17] Art. 46. of the Constitution of France [October 4, 1958].

[18] Art. 145. of the Constitution of Algeria [November 1, 2020], online: https://www.constituteproject.org/constitution/Algeria_2020

[19] Art. 78. of the Constitution of Senegal [January 7, 2001], online: https://adsdatabase.ohchr.org/IssueLibrary/SENEGAL_Constitution.pdf

[20] Art. 65. of the Constitution of Tunisia [January 26, 2014], online: https://www.constituteproject.org/constitution/Tunisia_2014

[21] Art. 81. (1) of the Constitution of Spain [December 7, 1978]; art. 278. of the Constitution of Portugal [April 2, 1976], online: https://www.constituteproject.org/constitution/Portugal_2005

constitutions of both countries (Conversi, 2002), and this was also followed by certain Latin-American countries, such as Ecuador[22] or Venezuela,[23] to mention but two examples.[24]

Finally, as the third phase of the rise of supermajority laws, after the collapse of the Central European socialist systems, this solution was included, amongst others, in the Hungarian, Romanian,[25] and the Moldovan[26] constitutional systems.

4 Thematizing the main interpretive challenges related to supermajority laws in Hungary

First of all, I will address the most important dilemmas that the HCC has faced from the very beginning, and which, in terms of essence, have not been reconsidered despite successive model changes (Tóth, 2016). However, this constancy can be observed not only in time, but also in space: foreign constitutional courts have usually found themselves faced with similar difficulties, and their answers are mostly not consistent either (Szentgáli-Tóth, 2022a).

One of the typical topics of the relevant HCC rulings is the question of the rank of supermajority laws in the hierarchy of legal sources (Jakab & Cserne, 2001). Two answers might be provided to this: one is based on the competence principle, and the other is based on the hierarchical principle (Camby, 1989, 1401). According to the principle of competence, supermajority laws are placed on the same level as ordinary laws, so we cannot speak of any subordination between these two legal categories.[27] The ordinary rules can even override the cardinal provisions if the given provision does not belong to the reserved regulatory terrain of the cardinal law. This can be contrasted with the hierarchical principle, which assumes that supermajority laws are placed above ordinary laws in the hierarchy of legal sources, so the constitutional protection of the two categories may differ considerably. During the constitutional review of ordinary laws, supermajority laws can also be invoked, as lower-level legislation, as, according to the hierarchy of legal sources,[28] they ought to substantially comply with superior norms.[29] The provisions adopted by a two-thirds majority can no longer be amended by a simple majority, regardless of whether the supermajority is justified according to their subject matter (Jakab & Cserne, 2001).

In practice, these two principles are never clearly enforced; hierarchical and egalitarian elements coexist. In principle, the Fundamental Law names supermajority laws as a special subcategory of laws, which may contain a kind of answer to this problem, though the priority between the competence and the hierarchical principle is not clear even today. Another aspect

[22] Art. 133. of the Constitution of Ecuador [September 28, 2008], online: https://www.constituteproject.org/constitution/Ecuador_2008

[23] Art. 203. of the Constitution of Venezuela [December 20, 1999], online: https://www.constituteproject.org/constitution/Venezuela_2009

[24] Art. 195. of the Constitution of the Dominican Republic [June 13, 2015], online: https://faolex.fao.org/docs/pdf/dom187716Eng.pdf; art. 151. and 152. of the Constitution of Colombia [July 4, 1991], online: https://www.constituteproject.org/constitution/Colombia_2015; art. 165. of the Constitution of Panama [October 11, 1972], online: https://www.constituteproject.org/constitution/Panama_2004; art. 106. of the Constitution of Peru [December 31, 1993], online: https://www.constituteproject.org/constitution/Peru_2021

[25] Art. 73. (3) of the Constitution of Romania [December 8, 1991].

[26] Art. 72. (3) and 74. (1) of the Constitution of Moldova [July 29, 1994].

[27] 4/1993. (II. 12.) HCC, ABH 1993, 48, 60; SJCC. no. 236/2007.

[28] 19/2005. (V. 12.) HCC, ABH 2005, 644; 193/2010. (XII. 8.) HCC, ABH 2010, 997.

[29] 43/1992. (VII. 16.) HCC, ABH 1992, 374.

of this problem sets the relationship between cardinal laws and the Fundamental Law,[30] which has less relevance in the current context. In the period of the democratic transition, the quasi-constitutional nature of constitutional laws could arise reasonably (MacDonnell, 2016), the HCC also highlighted that their main function was to extend the Constitution. Today, there seems to be a consensus that cardinal laws cannot be endowed with any constitutional character.[31]

Another direction of the relevant HCC practice, but not independent from the previous one, is the simultaneous presence of cardinal and ordinary statutory rules within the same law. This construction appeared already in the mid-1990s, when the legislator wanted to amend two-thirds laws with a simple majority on the basis that the provisions to be amended were not essential elements of the regulatory concept. The HCC finally established that legislation subject to a supermajority requirement can only be amended with a two-thirds majority, so the terrain of the supermajority might be expanded, but not narrowed. Jakab and Cserne called this mechanism a "one-way street" (Jakab & Cserne, 2001).

The presence of rules subject to different majorities in the same law is a well-known phenomenon also in other countries,[32] but in Hungary, this was considered exceptional until the adoption of the Fundamental Law. The Fundamental Law institutionalized the so-called cardinal clauses, which enumerate which sections of each law require a two-thirds vote to be adopted or amended. Still, the Fundamental Law serves as the primary source of the heightened majority requirement, so the HCC can still decide on the question of whether the legislator adopted certain legal rules in accordance with the constitutional orientations by a simple or two-thirds majority. At first glance, this system may serve clarification by providing the list of cardinal provisions, but in reality, as we will see later, it generates more constitutional problems than it can manage.

An additional aspect connected to this might fundamentally raise in itself the need to reconsider the current cardinality concept. Both the previous Constitution and the current Fundamental Law operate with two-thirds or cardinal laws, rather than such statutory provisions. Compared to this, from the beginning, legal interpretation has often taken a position on the cardinality of certain legal norms, rather than entire legislation, or the lack thereof. Should be taken seriously, this shortcoming can call into question the constitutionality of the entire cardinal legislation. Neither from the previous Constitution, nor from the Fundamental Law can it be deduced that two types of provisions could exist within a given law. How this can be prevented in practice constitutes another question. At the same time, it must also be taken into account that the recognition of two separate categories within each law entails numerous, almost irresolvable, dogmatic and practical contradictions.

As the third aspect in connection with cardinal laws, the HCC regularly faces with the expected and justified depth of cardinal regulation within each cardinal subject area.[33] The Fundamental Law provides a list of cardinal legislative subjects with paramount importance, so it provides clear guidance in this regard. However, it has already remained questionable to what degree of detail the regulations for each of the specified subject areas must be enacted with a supermajority. In this regard, the previous Constitution did not contain any guidelines, it merely stated that the specified legislative areas should be covered by a two-thirds law. Based on this,

[30] 55/2010. (V. 5.) HCC, ABH 2010, 366.
[31] 43/2012. (XII. 20.) HCC, ABH 2012, 296.
[32] Décision n° 99–419 DC du 9 novembre 1999.
[33] 4/1993. (II. 12.) HCC, ABH 1993, 48; décision n° 84–177 DC du 30 aout 1984.

the HCC, especially in the early 1990s, dealt with the question multiple times, where to draw the line between two-thirds and ordinary legislation.[34]

This question also appears in the case law within a new context since 2012, when the Fundamental Law chiselled the constitutional orientation regarding the scope of cardinality. In certain cases, especially in the case of public policy subjects such as the pension or tax system, the supermajority requirement covers just the basic rules of the given area. On the other hand, in the case of the most cardinal subject areas, cardinality is related to the detailed, not the basic, rules. In this situation, the task of the HCC may be to define criteria on the basis of which it can be decided whether a specific provision, for example in the area of citizenship, falls within the domain of the cardinal or the ordinary law.[35] This task shows extreme complexity, as the thirty or so cardinal subjects show huge diversity, and the regulatory structure of each subject also differs significantly. A depth test should take this diversity into account, but also should provide a framework that can always be called upon for such problems (Acquaviva, 2021, 200–201).[36] This brings us back to the two previous aspects: what will be the legal consequences if the two-thirds majority expands beyond its constitutionally designated scope, and if the ordinary majority intervenes in the sphere of the two-thirds.

5 Developments during the democratic transition and the subsequent two decades

Before analyzing the specific case law, those developments should be briefly outlined that fundamentally influenced the legal practice related to two-thirds laws in this period (Bozóki, 2002). The introduction of supermajority legislation arose in 1989, during the so-called round table negotiations, based partly on domestic legal historical traditions and partly on foreign models. At that time, the democratic transition was surrounded by significant uncertainty: huge fears were expressed that the future government would intend to use the acquired power to silence its opposition, so tools were needed that ensured as many political actors as possible the meaningful participation in decision-making (Chronowski et al., 2013). Constitutional laws, which had to be voted for by two-thirds of all parliamentarians in the same way as amendments to the Constitution, seemed suitable for this purpose (Kukorelli, 1994). In addition, the scope of the supermajority was unreasonably wide: all provisions relating to fundamental rights and obligations had to be included in such legislation (Szabó, 2023, 285). The MDF-SZDSZ pact sought to resolve this situation in the spring of 1990: a compromise between the two dominant political parties of the first freely elected Parliament created the system of two-thirds laws.[37] The vote of two-thirds of the deputies present was enough to enact or amend them, while the list of supermajority subject areas was also narrowed down similarly to the Spanish model,[38] thanks to the specific naming of the fundamental rights that belong to it (Chronowski et al., 2013).

The HCC was created in the midst of these rapid changes, and almost immediately faced the constitutional and dogmatic disputes raised by the presence of supermajority legislation in the Hungarian legal system.[39] In relation to the legal hierarchy, it initially seemed to be a bigger

[34] 1260/B/1997. HCC, ABH 1998, 816.
[35] 64/1991. (XII. 17.) HCC, ABH 1991, 297-300.
[36] Décision n° 98–401 DC du 10 juin 1998.
[37] 66/1997. (XII. 29.) HCC, ABH 1997, 397.
[38] SJCC 76/1983, of 5 August, LC 2.
[39] 4/1993. (II. 12.) HCC, ABH 1993, 48.

challenge to separate the constitutional laws from the Constitution, since these norms arose as extensions of the Constitution in the justification of the relevant decisions (Petrétei, 1999, 109). This position causes additional dogmatic issues, as it stretches the uniform and coherent structure of the Constitution and assigns a quasi-constitutional role to legislation that, despite the supermajority requirement, was basically created as law.[40]

The interpretation of the relationship between the ordinary and two-thirds laws caused even greater difficulties in the two decades following the democratic transition.[41] The HCC clearly stated that no hierarchy can be observed between the two categories of laws, and thus took a clear position on the issue.[42]

At the same time, in its decisions, the HCC did not consistently apply this approach. It was stated that the supermajority sets the substantive requirement of the supermajority legislative procedure, the disregard of which presupposes a substantive constitutional violation[43] and would cause invalidity.[44] In addition, the hierarchy is also strengthened by the phenomenon that the HCC has, on several occasions, annulled provisions that were created with a simple majority instead of a supermajority, but we do not see an example of the opposite. We must once again refer back to the phenomenon often referred to as a"one-way street", which reinforces the primacy of supermajority law presupposing some kind of hierarchy over ordinary laws. By contrast, it would follow from the competence principle, i.e., from the acceptance of the equality of the two legislative categories, that the regulatory terrains of ordinary and two-thirds laws are entitled to the same constitutional protection.

The HCC failed to find a satisfactory answer to these questions until the adoption of the Fundamental Law, and this confusion raised a completely new constitutional dilemma: whether ordinary and two-thirds legal provisions could constitutionally occur within a given law due to their subject matter or importance. In this regard, the Constitution did not provide any guidelines, so the HCC had to form its own position on how to handle this situation (Szentgáli-Tóth, 2023). Quoting from the reasoning of the HCC: "Legislative consensus compulsion arising from the substantive rules of the Constitution – as a condition for the validity of the legislative procedure – represents a constitutional limit determining the formal validity of the legislative procedure against even the reasonable aspirations of a simple majority."[45] In other words, the two-thirds vote, which has already been validated as a constitutional requirement, can no longer be ignored, even if otherwise relevant substantive arguments can be put forward for the sake of a simple majority. The HCC gave priority to practical aspects when, ignoring constitutional concerns, it decided to adapt to the situation and give the green light to the solution of including provisions subject to different majorities in the same law.

It would have been a dogmatically obvious and well-justified decision to declare the ordinary provisions contained in the two-thirds law invalid, but this would have been in contrast to the often asserted, but at least questionable, principle of the equality between the two types of legislation. The opposite has a greater chance; we can find numerous examples of this in the Hungarian case law: the annulment of supermajority provisions enacted by a simple majority.[46]

[40] 4/1990. (III. 4.) HCC, ABH. 1990, 28–30.
[41] 66/1997. (XII. 29.) HCC, ABH 1997, 397.
[42] 4/1993. (II. 12.) HCC, ABH 1993, 48.
[43] 1/1999. (II. 24.) HCC, ABH 1999, 25.
[44] 53/1995. (IX. 15.) HCC, ABH 1995, 238; 1/2017. (I. 17.) HCC, ABH 2017, 3.
[45] 1/1999. (II. 24.) HCC, ABH 1999, 25.
[46] 4/1993. (II. 12.) HCC, ABH 1993, 48; 1260/B/1997. HCC, ABH 1998, 816.

At this point, we can clearly perceive the controversial and unequal application of the principles of hierarchy and competence in the arguments of the HCC.[47] If we consider the competence approach to be the guiding principle, a provision is deemed to be constitutional if and only if it was adopted by the relevant majority, or it can be amended later accordingly.[48] It would therefore not be possible to apply the supermajority requirement to otherwise ordinary provisions, starting from the assumed higher level of guarantee, since we are not talking about an expanded interpretation of a constitutional guarantee, but about the replacement of a constitutionally fixed legislative procedure by another, equal equivalent, without a proper legal basis.[49]

In the absence of a specific designation within each law, the HCC had to consider on a case-by-case basis which provisions might be subject to a two-thirds majority.[50] This could be evaluated as a significant factor of uncertainty, and clearly shows the already indicated difficulty that, prior to the adoption of the Fundamental Law, the delimitation of the ordinary and two-thirds statutory provisions had been rather inconsistent.

Nevertheless, the key question of the consolidation following the democratic transition was not the above-discussed problem, but the extent to which each cardinal subject area named in the Constitution needs to be regulated by a supermajority. The first, rather undifferentiated answer to this was given by the autumn 1989 amendment to the Constitution, which stated that the rules regarding fundamental rights and obligations must be laid down in constitutional laws. The HCC, established in January 1990, faced as one of its first greater tasks to point out the disadvantages of this situation, that as a result of such a concept, all rules affecting fundamental rights and obligations can only be adopted with the vote of two-thirds of all parliamentarians.[51] What was explained by the HCC at the time significantly contributed to convincing the leading political parties of that period of the unsustainability of the original constitutional law model.

In the period after 1990, the relevant case law had to deal with the depth of the two-thirds regulation several times. The HCC pointed out, in a manner similar to the Spanish model, which highlights a reserved constitutional domain for organic law, that in the case of fundamental rights, the two-thirds requirement encompasses both the essential content of the fundamental right and its substantive guarantees.[52] For the two-thirds regulation, it is sufficient to settle the conceptual issues of the given subject area with a two-thirds majority, but this requirement shall not apply to detailed rules.[53] However, even the detailed rules, once placed at the two-thirds level, cannot be amended later with a simple majority.[54]

To conclude, until the adoption of the Fundamental Law, the HCC was mostly able to contribute constructively to the settlement of legal interpretation issues related to two-thirds laws during the democratic transition and in the years immediately following. The case law played a meaningful role in replacing constitutional laws with two-thirds laws; moreover, important decisions discussed the depth of the two-thirds regulation, even if the body did not set

47 3/1997. (I. 22.) HCC, ABH 1997, 33.
48 31/2001. (VII. 11.) HCC, ABH 2001, 258.
49 1/1999. (II. 24.) HCC, ABH 1999, 25; 27/2008. (III. 12.) HCC, ABH 2008, 289.
50 1/1999. (II. 24.) HCC, ABH 1999, 25.
51 4/1990. (III. 4.) HCC, ABH. 1990, 28–30; 5/1990. (IV. 9.) HCC, ABH 1990, 32.
52 4/1993. (II. 12.) HCC, ABH 1993, 48; 54/1996. (XI. 30.) HCC, ABH 1996/173; 47/2001. (XI. 22.) HCC, ABH 2001, 308.
53 4/1993. (II. 12.) HCC, ABH 1993, 48.
54 1/1999. (II. 24.) HCC, ABH 1999, 25; 55/2010. (V. 5.) HCC, ABH 2010, 366.

coherent standards in this regard. Nevertheless, the relationship between provisions of different ranks in the same law had not been satisfactorily resolved, while the position of two-thirds laws in the legal hierarchy remained controversial.

6 The concept of cardinality and the relevant case law under the Fundamental Law

The entry into force of the Fundamental Law of Hungary in 2012 entailed changes of paramount importance also in the field of supermajority legislation.[55] In harmony with its historicizing rhetoric, the Fundamental Law revived the terminology of the cardinal law before 1945, albeit with a changed content compared to the original concept (von Bogdandy & Spieker, 2022). By contrast, the concept of the previous two-thirds laws was predominantly incorporated into the Fundamental Law, which the HCC confirmed when it ruled that the relevant findings regarding previous two-thirds laws can be referred to in decisions related to the Fundamental Law, despite the repeal of previous HCC decisions.[56] In addition, the HCC had to face challenges similar to the previous ones, but under changed circumstances, so a certain shift can be perceived in the decisions of recent years compared to relevant argumentations based on the previous Constitution.[57]

Regarding the legal rank of cardinal laws, the Fundamental Law stipulates that cardinal law constitutes a subcategory of the law, which is distinguished from ordinary laws only by the majority required for its adoption.[58] Accordingly, the HCC continues to reject the hierarchical principle and considers cardinal and ordinary laws as two categories of equal rank. The HCC illustrated this when it ruled in favor of the latter based on the principle of *lex posteriori derogat legi priori* between the provisions of the cardinal law on the protection of families and the provisions of the Civil Code as an ordinary law regulating the same subject matter.[59] However, this approach seems to be even more difficult to maintain than the previous one, since in such a situation it could be deduced from the principle of competence that the appropriate level, rather than the temporal factor, should be the decisive factor. In my opinion, one may draw a well-founded conclusion[60] about the lack of differentiation between the two legislative categories from the equal rank of the two levels: both must be provided with the same constitutional protection in their reserved regulatory areas.

In connection with the presence of rules of different characters within the same act, the Fundamental Law brought considerable innovation, which, however, has not led to the resolution of the disputed issues. The so-called cardinal clauses appeared in the laws containing cardinal provisions, expressly enumerating which sections of the given law must be adopted by a supermajority (Bodnár & Módos, 2012, 33–34). These provisions just implement the relevant provisions of the Fundamental Law introducing the supermajority, but they do so in a way that conflicts with the Fundamental Law itself in multiple aspects. Since the Fundamental Law speaks of cardinal laws rather than cardinal subject matters, there would be no need for such sections if the delineation of the two categories worked properly in compliance with constitutional standards. In addition, the cardinal clauses do not declare themselves as cardinal provisions, so

[55] Art. *T.* (4) of the Fundamental Law of Hungary [April 25, 2011].
[56] 17/2013. (VI. 26.) HCC, ABH 2013, 583.
[57] 24/2016. (XII. 12.) HCC, ABH 2016, 560.
[58] Art. *T.* (4) of the Fundamental Law of Hungary [April 25, 2011].
[59] 43/2012. (XII. 20.) HCC, ABH 2012, 296.
[60] Like the French Constitutional Council did: décision n° 87–234 DC du 7 janvier 1988 (Rec., p. 2).

the legislator could, in principle, modify the scope of the rules subject to the two-thirds vote ratio with a simple majority. This would make the supermajority requirement worthless, which the incumbent government could easily circumvent. The HCC also recognized this regulatory anomaly and ruled that even the cardinal clauses can only be amended with a supermajority.[61] The HCC was therefore able to consolidate this aspect through the interpretation of the constitutional rules. The French Constitutional Council also highlighted the confusion between organic and ordinary provisions: each law should provide its character; ordinary provisions may be included in organic laws, but should be declassified. By contrast, despite the formal equality of the two legislative categories, even declassified organic laws might not be incorporated into ordinary laws.[62]

However, it remained an open question whether the cardinal clauses really designate the scope of the cardinal provisions within the given law in accordance with the respective sections of the Fundamental Law. In this regard, the HCC still has the right to pronounce the final word; therefore, the cardinal clauses cannot be regarded as anything other than the legislator's opinion on which statutory rules should be cardinal and which should be ordinary.[63] Nevertheless, this expression of opinion, which potentially conflicts with the Fundamental Law, can even determine the character of the relevant legislation for years, since a constitutionality review procedure can last for a longer period. This should also be emphasized because, since 2012, the HCC, which has been operating with a partially renewed profile, can reach far fewer norm controls than before (Barna & Szentgáli-Tóth, 2013). The conclusion can be drawn from this that the practice of the HCC under the Fundamental Law has been unable to eliminate most of the constitutional uncertainties that arise in connection with the appropriate legal classification of statutory provisions. A primary goal of the rewamped cardinal law model was undoubtfully to remedy the dilemmas uncovered by the HCC under the previous Constitution, but in this regard it did not achieve its intended purpose, while due to the renewed profile and attitude of the HCC, the elimination of systemic malpractices has been more difficult than it was before (Sólyom, 2020).

In relation to the depth of the cardinal regulation, the practice of recent years has not brought a decisive breakthrough, but here, too, we have to reckon with a new phenomenon, whose thorough analysis the HCC has so far remained indebted to. The previous Constitution usually stated that a given subject area needed to be regulated by a two-thirds law. By contrast, the Fundamental Law provides somewhat more specific guidelines regarding the vertical scope of the cardinal regulation, which, of course, still does not mean any kind of standard that can be followed in the long term. In the case of cardinal legislative subjects, such as citizenship, the Fundamental Law stipulates that the relevant detailed rules must be covered by cardinal law.[64] This wording is particularly informative in comparison with other clauses, especially concerning public policy subjects, where the Fundamental Law refers to the basic provisions of a particular legislative subject area. This can be seen in connection with the tax system

[61] 16/2015. (VI. 5.) HCC, ABH 2015, 363.

[62] Décision n° 75–62 DC du 28 janvier 1976; décision n° 87–228 DC du 26 juin 1987; décision n° 88–242 DC du 10 mars 1988; décision n° 86–217 DC du 18 septembre 1986.

[63] 22/2012. (V. 11.) HCC, ABH 2012, 10; 13/2013. (VI. 17.) HCC, ABH 2013, 440.

[64] Art. *G)* (4) of the Fundamental Law of Hungary [April 25, 2011], online: https://www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178; act LV. of 1993. on the Hungarian citizenship, online: https://njt.hu/jogszabaly/en/1993-55-00-00

and the pension system,[65] where by the basic provisions we may understand the norms of a fundamental nature that affect the entire field of expertise. However, for now, this makes only an assumption (Szentgáli-Tóth, 2014). Until now, the HCC has not dealt with the consequences of this ambiguity, so the only thing that can be ascertained is that the new concept on the vertical scope of the cardinal regulation should lead to a duplication of the standard that matured before 2012.[66] Such differentiation amongst organic law has been also experienced in France: organic law on public finances as well organic laws related tot he Senate have special rank over other organic laws.[67]

In my opinion, the relevant decisions of the HCC under the previous Constitution should be interpreted in the current situation within the scope of "detailed regulation", and in comparison, the narrower range of norms that are considered fundamental within a given subject area should be defined. One may consider whether the given provision describes a specific legal institution, or whether it lays down principles that are generally applicable requirements in the given sector. Since this apparently abstract legal discussion currently affects such important areas as the tax or pension system, it would be advisable to place more emphasis on the conceptualization of this problem in the literature, either in Hungary or elsewhere. This would later be a point of reference also for constitutional courts to take a position on this issue.

In the practice of the HCC, the attitude of considering cardinality as exceptional compared to the general rule of ordinary legislative procedure and following a strict interpretation on this basis has strengthened.[68] It relies on the ambiguity that accompanies the entire Hungarian history of supermajority legislation: on the one hand, this legal institution has always appeared as a guarantee, on the other hand, huge fears have been also associated with it, because in certain circumstances it can lead to the excessive strengthening of a strong government majority, while in other cases it can become a barrier to effective governance by distorting the original logic of parliamentarism.[69] Keeping these points in mind, in the following, I will discuss through what interpretive steps and conceptual changes the HCC could contribute to the rationalization of the current Hungarian cardinality concept without explicitly changing the constitutional and legal framework.

7 Interpretive tools to be exploited: margin of movement of the HCC to precise and narrow the scope of supermajority legislation

In my opinion, the HCC could achieve major breakthroughs without any explicit constitutional amendment in at least three respects: firstly, by clarifying the legal rank of cardinal laws, secondly, by eliminating the inclusion of two types of provisions in the same law, and thirdly, by elaborating a depth test.

In my view, the HCC should expressly provide that the cardinal laws are placed above the ordinary laws, but below the Fundamental Law in the hierarchy of legal sources (Mazza, 2013). With this, a supermajority would form, undoubtedly not only a substantive constitutional

[65] 40/2012. (XII. 6.) HCC, ABH 2012, 229.
[66] 29/2017. (X. 31.) HCC, ABH 2017, 633.
[67] Décision n° 85–195 DC du 10 juillet 1985.
[68] 27/2017. (X. 25.) HCC, ABH 2017, 567.
[69] 66/1997. (XII. 29.) HCC, ABH 1997, 397; 55/2010. (V. 5.) HCC, ABH 2010, 366.

requirement, embodying the need for a broad consensus,[70] but a category essentially different from ordinary law. In principle, the most important regulatory subjects are included here, with particular regard to the main institutions of the state, since fundamental rights were removed from the list of cardinal matters. Clarifying the legal rank of cardinal laws could consolidate a series of dogmatic debates by creating a transparent relationship between ordinary and cardinal laws, as well as cardinal laws and the Fundamental Law.

To abolish the practice of incorporating two types of provisions within the same act would go even further. As we have seen, many uncertainties stem from the coexistence of fundamental and ordinary provisions within a given act;[71] moreover, these can never be separated from each other on completely objective grounds.[72] In my opinion, the most appropriate solution to resolving this dogmatic tension would be for the HCC to state that only cardinal or only ordinary provisions can be included in a given law, and that the title of each statute should specify its classification. As a general rule, a cardinal law would be linked to a cardinal subject area named in the Fundamental Law, and would also refer in its preamble to the article of the fundamental law that forms the basis of cardinality, and would include all essential safeguards belonging to the given subject area. If ordinary provisions are included in a cardinal law, or if the opposite were to occur, the HCC would annul the relevant provisions due to invalidity. The final word would remain with the HCC, but the situation would be much clearer, and it would also eliminate the current unconstitutional practice of the legislator linking cardinality to legislative subjects. The HCC has not dealt with this issue until now, even though it constitutes not only a formal violation of the Fundamental Law, but also generates many substantive disputes regarding the delimitation of cardinal and ordinary statutory norms.

The term of cardinal law does not describe precisely the current regulatory concept, since supermajority is in reality always linked to specific statutory provisions enumerated by the cardinal clauses with reference to the constitutional articles on the background. However, while the distinction within the given law was supposed to be the exception before 2012, today it must be considered the general rule. In this situation, the consistent separation of cardinal and ordinary laws would seriously serve the predictability of the system in the long term, although HCC may only be able to stimulate rather than complete this process. The HCC's role here could be somewhat similar to the one it played in the spring of 1990 in connection with the introduction of the two-thirds laws. If, in the case of a suitable motion, it would be pointed out that the incompleteness of the regulation would cause conflict with the Basic Law, a violation of the Basic Law manifested in an omission could be established, which would impose a legislative obligation on the Parliament. I do not consider the consistent separation of cardinal and ordinary laws to be feasible without legislative intervention, but the HCC could be the actor giving the initial step, as it has already done in other cases. Another way could only arise if the HCC were to filter out and annul the cardinal provisions contained in ordinary laws, but this would be an extremely slow process and could only happen in the case of appropriate norm control motions. The viable and realistic way can therefore be to establish a violation of the Fundamental Law manifested in an omission.

The third and the most complex challenge that the HCC may face is the issue of the depth test. It should be added that no other similar body has yet been able to elaborate such a tool, but it would produce significant added value in terms of legislation and law enforcement. In this

[70] 1/1999. (II. 24.) HCC, ABH 1999, 25.
[71] 1/1999. (II. 24.) HCC, ABH 1999, 25.
[72] 4/1993. (II. 12.) HCC, ABH 1993, 48.

study, some considerations are highlighted that may help further thinking about this. The depth test must simultaneously reflect on the specificities of the cardinal law as a legal institution, as well as on the regulatory structure of each cardinal subject area. Currently, around thirty cardinal subjects exist in Hungary, and as can already be seen from the practice of the 1990s HCC, the structure of a fundamental right and an institutional field differ considerably; therefore, the boundaries of the supermajority requirement must be drawn in a differentiated manner.

Taking these factors into account, it is not deemed possible to create the depth test focusing solely on cardinal law as a legal institution; a thorough examination of each cardinal subject area, as well as expertise in these fields of legislation, might also be needed. Therefore, a broader research group consisting of several members could deal with this issue, in which experts of legislation with supermajority, as well as experts in each cardinal subject area, could take part. Only in this way can it be hoped that an in-depth test truly applicable and meaningfully reflecting the diversity of the cardinal regulation could be developed.

In addition, the two aforementioned levels of supermajority regulation must also be taken into account: a separate standard must be set for the detailed regulation and another for the basic regulation as well. It is hardly possible to formulate anything more precise than the current guidelines at the constitutional level. However, the envisaged depth test does not require legislative intervention: it may be the task of the HCC to elaborate this framework. In addition to the above, many other proposals can, of course, be formulated, for example, narrowing the range of cardinal laws. However, this is primarily a constitution-making and legislative competence; the HCC can contribute to this by strictly interpreting the terrain of the cardinal regulation, but this has already been essentially implemented.

Therefore, the HCC alone cannot be able to reinterpret the concept of cardinal laws, but it can significantly contribute to the search for better and more effective alternatives than the current one. Until now, the HCC has actively participated in shaping the framework of cardinal legislation. If this attitude were to meet with a greater level of engagement and consciousness, the HCC may still have serious perspectives in this area.

8 Conclusions

At least three different Hungarian models of supermajority law have been experienced in three decades (Jakab & Szilágyi, 2014). When the regulatory environment is so unpredictable, even at the constitutional level, the institutions responsible for protecting the constitution are of particular importance (Halmai, 2023). For this reason, particular attention must be paid to the margin of movement available to the HCC for influencing the legal surroundings. In exploiting these instruments, the HCC cannot take over the tasks of the legislator, but it can extensively use the tools of legal interpretation (Szentgáli-Tóth, 2018). In my present work, I have given examples that only with the help of these can serious changes be achieved without any amendment of the constitutional framework.

I attempted to provide a comprehensive picture of the constitutional dilemmas that the HCC continuously faced in the past three decades in connection with supermajority legislation, and one may see from this that the current concept of cardinal law is mostly inherited from the previous Constitution; however, the relevant issues might be aggravated by the long-term presence of a two-thirds parliamentary majority (Schweitzer, 2013). Although these concerns, cardinal laws constitute frequently contested, but in my opinion, valuable elements of the Hungarian constitutional system, as I have previously explained in more detail elsewhere (Szentgáli-Tóth, 2017). Therefore, it is

advisable to preserve this legal institution, but at the same time, we must look for solutions that can serve to eliminate the obvious errors of the current concept. This contribution, which focused on the practice of the HCC, aims to make a significant step in this direction not only in Hungary but also elsewhere, where supermajority legislation has been implemented, raising similar issues to those in Hungary. The specialty of the Hungarian model is caused by the frequent changes of the framework itself, by the extensive use of a two-thirds majority requirement for legislative purposes, and by the long-term existence of a two-thirds parliamentary majority behind the government.

In my opinion, regarding cardinal laws, it would be necessary to put more emphasis on international comparison as well as interdisciplinary and broad perspectives than before, since there are still many unclear and disputed details concerning the main dilemmas. We have seen that the legal rank of cardinal laws, and even the scope of the cardinal legislation itself, is extremely uncertain, so in the first instance, we have to revisit the conceptual questions. This study also intended to contribute to this, offering a new approach to at least some of the key issues related to cardinal laws. I did not attempt to formulate definitive answers, but rather to outline alternative tools of interpretation.

As a concluding remark, one should keep in mind that my proposals would not be relevant for the current HCC, comprised exclusively of members elected by the two-thirds parliamentary majority. Nevertheless, it must be underlined that important tools of legal interpretation would stand at the disposal of a future HCC or the constitutional courts of other countries with a less deferential attitude and more willingness to conduct effective constitutional review.

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