

Constitutional Court under fire

In revolutionary Hungary, the guns are fortunately silent. If all goes to plan, the inconvenient Constitutional Court will be, too.

It appears that the announcement by Fidesz parliamentary leader János Lázár that the governing parties would seek to amend the constitution to remove from the Constitutional Court's purview all those issues that may not be the subject of a referendum (e.g. issues impacting the budget) caught considerable portions of the commentariat off guard.

With a few exceptions everyone was flabbergasted, and many commentators were scathingly critical. Even the doggedly impartial political analyst Gábor Török noted that Fidesz had "truly crossed a line" that responsible politicians of all stripes had more or less comprehensively respected since regime transition. Some parts of the right-wing press also protested, which is a highly unusual occurrence in itself.

Yet, though we respect many of those who expressed their surprise, we do not entirely share their astonishment. Two reasons explain Fidesz' crass move to curb judicial oversight and neither was unforeseeable. Firstly, other crucial but questionable measures, such as the government's withholding of private pension contributions, will also be reviewed by the Court, and if these get struck down that might upset the entire budget for next year.

Second, Fidesz has evinced little sympathy for the notion of independent oversight of the "revolutionary" government, and putting the Court in its place could also be interpreted as an organic extension of the logic applied to other theoretically independent oversight institutions, such as State Audit Office or the President of the Republic (see Week 33 newsletter).

The Jenga budget on trial

For those not familiar with Jenga, it is a game wherein players take turns removing building blocks from a wooden tower until said construct collapses, either when a player is clumsy or one too many piece has been taken out. For years, Hungarian budgets have borne an uncanny resemblance to Jenga towers in an advanced state of the game.

The government took a bold step by fulfilling its promise of radical tax cuts, but since the EU's financial policy czars refused to accept a higher deficit to finance the experiment, the cabinet had no choice but to prop up the faltering tower with hastily conceived stopgap measures, most importantly the temporary diversion of private pension fund contributions and the Robin Hood taxes analysed last week (Week 44).

The measure that now ran afoul of the Court – a 98% tax on severance payments over 2 million HUF for state employees – was relatively trivial in terms of its budgetary impact. Since the measure would apply retroactively to the beginning of this year, the Court could not but rule it unconstitutional.

It is not clear whether Fidesz anticipated that the Court would give it a free pass on this issue. Such an expectation would not have been completely unreasonable, given that many jurists allege that the Court had basically done just that when in 2007 it had allowed the Fidesz' proposed referendum on the previous government's tuition, GP and hospital fees to go forward even though the Constitution forbids referenda on issues related to the budget.

For the government the real issue was not the tax on severance payments, but – foremost among several considerations – the upcoming decisions on the constitutionality of the Robin Hood taxes and especially the more dubious diversion of private pension contributions. If the Court nixes either of these, then it removes a critical piece from the Jenga tower that is the budget.

Given that the budget is very late as it is and in light of how difficult it is to find solutions that reduce the deficit without upsetting large segments of popular opinion (see Week 44), a negative ruling by the Court would prove disastrous. Amending the Constitution to preempt this risk seems a safer route than scrambling after the last minute for hundreds of billions of forints to meet the EU's budget requirements or delaying the new flat tax, the government's only major economic policy measure thus far.

If the budget were to fall apart towards the end of the year, it would take a massive toll on both, the government's credibility – it would likely have to replace the lost funds by cutting services or raising taxes on the public, which it has harshly denounced previously – and also the perception that it is more competent than its predecessor.

Doing the wrong thing on a high horse

With regard to the budget, much of what the government has done is improvised and often inconsistent. Moreover, Fidesz sometimes acts in contravention of its own prior, grandiose pronouncements, for instance on respecting the Constitutional Court's decisions or the Robin Hood tax.

This does not imply, however, that the government fails to proffer an ideological justification for what it does. And while one may view the reasons themselves critically, they must be taken seriously since these reasons purport to delineate the thin line between arbitrary and principled action.

The government's attack on the Court's jurisdiction rests on two further interrelated pillars as well. It says that important as the rule of law may be, it should not be an instrument for circumventing the popular will as embodied by the government that received such an

overwhelming mandate from the people. Furthermore, Orbán claims that a constitution that is so deeply flawed and on its way out should not be allowed to interfere with the current government's efforts to rectify some of the ills perpetrated by the previous government.

In essence then, the government boils the issue down to an age-old debate about the undemocratic nature of judicial decision-making, arguing that when the law and the administration of justice stray too far from the people's sense of decency and/or their elected representatives' manifest will, then they must be reined in too become more reflective of the aforementioned.

The measure now adopted is clearly an assault on the rule of law and no post-transition government had attempted anything akin to the proposed measure – though it is also true that the only government that ever held a two-thirds majority (the MSZP-SZDSZ coalition between 1994-98) was considerably more divided than the current ruling parties, whose separate existence often appears to be an artificial construction.

Pressuring the judiciary or influencing the administration of justice is something that is more typical of authoritarian governments. Yet, it is also true – and also relentlessly emphasised by the government – that it is rather exceptional in a democracy for a government to receive such overwhelming power from the people. President Franklin Delano Roosevelt, whose popular mandate was similarly overwhelming and crucial parts of whose New Deal programme were also undermined by the Supreme Court (which, unlike the current Hungarian Court was politically opposed to the president) entertained notions of “packing” the high court, that is adding new members sympathetic to his administration and its policies. Ultimately, the Supreme Court gave in, thereby making the plan redundant.

Nevertheless, while attempts at swaying a judicial body's political orientation are unfortunately not unprecedented in democracies (neither are biased courts, sadly), the notion of doing away with judicial review is a very different ballgame.

Though we have tried our best to make the case for the government, ultimately the point is that it acknowledges the unconstitutionality of the law it proposed and rather than redressing it, it seeks to leave the unconstitutional provisions in place and generally abolish the power to review potentially unconstitutional acts in key areas of policy-making. In spite of the justification advanced by the government, this nevertheless strikes us as bizarre.

Yet it makes sense in more ways than one

When it comes to independent oversight of the government, Fidesz' hasn't been too keen on upholding the spirit of the law in any case. As noted previously, it has appointed a party loyalist to head the National Audit Office; another one to the presidency who rejects his constitutionally prescribed role as a democratic guardian; it has abolished opposition input in the media oversight body and practically in the nomination of Constitutional Court judges as

well; and it has added a Fidesz politician/political scientist with hardly any background in law to the Court itself.

Though it is true that if indeed realised the most recent act will mark the most striking move against the democratic system of checks and balances, it is nevertheless not a measure that marks a radical departure from the course charted up until now, but is in fact an organic extension of the same thinking about the exercise of power that Fidesz has applied since ascending to the government in May.

If a new system has to be established because the old one lacks legitimacy, then it makes little sense to accept the constraints imposed by the old system when it comes to designing the cornerstones of the new system, or so Fidesz' reasoning suggest.

Ultimately, the urgent threat facing the budget – among other considerations – may have necessitated an early move to reduce judicial oversight. Based on the government's actions described above, however, it looked likely that in some shape or form judicial oversight would be curtailed or reined in. The most likely option, using the two-thirds majority to fill the Court with government loyalists, is still very likely to happen.

The question now is only what type of checks and balances the new constitution will feature. If the judicial check on legislative/executive power will remain weak, then Fidesz might wreak permanent damage regardless of how long the party itself stays in power, since bolstering judicial oversight won't be possible without the support of whoever controls a parliamentary majority and the government in the future. And in light of the political elite's attitude towards independent oversight even before the current term, it is unlikely that any future government would willingly limit its own powers.

Apparently, the talk about revolution was not a mere slogan or a decoration for public buildings, but at least in part a serious promise that the government seeks to back up with deeds.

If the authors of the new revolutionary regime are looking for guidance on what pillars the constitutional structure should be based on, they need look no further than a recent essay entitled "It's time to restore democratic norms!" by deputy prime minister Tibor Navracsics, who wrote the following in a Fidesz campaign publication (the original source is still available online): "The universal premise must be that the state itself respect the law. Following norms is not incumbent on citizens only - it is also a fundamental requirement vis-à-vis those exercising power. Within the framework of the rule of law it is unacceptable that a government would use its parliamentary majority to pass a whole series of unconstitutional laws..."