

Fundamental Law: feet of clay

Hungary's new constitutional regime is proving far less stable than its creators had promised. Even before it entered into effect last January, the governing parties had added a number of provisions to the Fundamental Law, some of which the Constitutional Court quashed on formal grounds. With the Court throwing out a number of other important laws, too, the government appears to have had enough: the impending, fourth amendment of the Fundamental Law will impose another straitjacket on the Constitutional Court, in addition to elevating previously quashed laws to constitutional rank.

The Fundamental Law was supposed to be the epitome of stability in politically and economically turbulent times, a rock solid foundation for the new Hungary. Yet Fidesz is discovering daily that the notion of solidity conflicts with something more fundamental than constitutional stability: its own ideological and political interests. Despite the initial promises of stability, the governing party has found the need to draft and adopt a number of amendments since it passed the new constitution in April 2011. Another slate of significant changes is before Parliament right now.

Temporary failure

The first amendments were the so-called Temporary Provisions, a fairly substantial text including 28 articles on almost eight typed pages. Though their exact legal status was hazy - and this lack of clarity was part of their ultimate demise before the Constitutional Court -, the Temporary Provisions, which were adopted even before the new constitution entered into effect on 1 January 2012, were theoretically presented as provisional stipulations meant to apply only in the context of the transition from communist dictatorship to capitalist democracy. To critics, this kind of rhetorical packaging was only an attempt to rationalise the fact that the governing party needed to remedy a number of errors and omissions in the Fundamental Law.

The Constitutional Court agreed with this interpretation, arguing in a late December 2012 decision that the nature of several provisions was such that they could not be considered provisional. As a result, the Court threw out a number of articles on formal grounds, without examining the substantial constitutionality of individual provisions. As a consequence, Fidesz lost some key amendments, including the provision that would have served as the constitutional basis for the subsequently scrapped voluntary voter registration scheme. The Court also quashed the Temporary Provisions' preamble, which essentially held the post-communist opposition party responsible for the crimes committed by its de jure predecessor, the Hungarian Socialist Workers' Party, aka communist party.

Battle ready

Fidesz subsequently adopted amendments two and three, which included, among other things, provisions protecting the pension remuneration of former President Pál Schmitt, who had to resign under the cloud of a plagiarism scandal, and a stipulation that all future amendments of the act on the distribution of land must be adopted by a so-called cardinal law, that is a law requiring a supermajority of two-thirds present (rather than two-thirds of

all MPs, which is the constitutional supermajority). The latter provision was especially controversial in light of the scandals surrounding Fidesz' process of land distribution, which the party's own point man on land issues, József Ángyán, had excoriated as a massively corrupted scheme intended to deliver valuable estates to Fidesz' cronies rather than the small landholders Ángyán had wanted to favour. Ángyán has since gone on a confrontation course with his own party, with the result that at a recent meeting of the party caucus the PM attacked him personally for his "betrayal".

More problematically for Fidesz, however, despite all its efforts at reining in the Constitutional Court, the highest judicial body has nixed several key reforms in the past months, leading to increasingly open verbal attacks by representatives of the government. The odd situation is that only four of the present 15 Constitutional Court judges were nominated by the opposition, though it is also true that "only" six began their term since Fidesz entered into office in 2010. For the most part, the pre-2010 Fidesz nominees - whom MSZP could have vetoed - tend to be more inclined to reject Fidesz' laws than the newly appointed judges, with the notable exception of István Stumpf, Orbán's former minister of the chancellery, who has penned some of the opinions that were most grating for Fidesz.

An amendment to end all amendments

Despite having nominated 10 of the 15 judges on the Court, Fidesz has apparently decided that it must further limit the possibility of its laws being thrown out by what some government figures have referred to as a "politicised Court". Ultimately, the point is that the government can't rely on the Constitutional Court to do its bidding. In fact, even the substantial limitations on the Court's power of constitutional review instituted by the government in 2010 are not enough, so the next step - the fourth amendment of the Fundamental Law - is designed to keep the Court in check for good.

The lengthy amendment (14 pages typed) would elevate several previously quashed regulations to the constitutional level, such as clauses allowing the penalisation of homeless persons for staying in designated "homeless-free" (our words) public areas and an antiquated interpretation of what the term family means legally (while it is primarily designed to exclude homosexuals, it will affect many other non-traditional partnership relations as well). Some of the quashed provisions of the electoral law discussed here previously will also be integrated into the constitution. The amendment would further lay the foundation for the controversial idea that those former students who received their higher education free of charge but decide to move abroad early in their careers must pay tuition fees retroactively.

Can't touch this

Most importantly, however, the amendment seeks to ensure that the Court will not quash constitutional amendments that contain provisions which it has already deemed unconstitutional: the Fundamental Law's new article 24 (5) would provide that the Court can only review the constitution and its amendment in terms of whether their adoption complied with the respective formal requirements. In terms of substance, however, the Court cannot quash an amendment even if it blatantly contradicts other, potentially more important constitutional clauses (as some of the amendments now proposed obviously do).

Finally, the amendment would also erase the constitutional jurisprudence of the past two decades. The Court will be barred from citing any decision from the pre-Fundamental Law era, as it has done on occasion over the past year, to the great irritation of Fidesz. While the new provisions may lead to a constitutional document with massive internal contradictions, they will probably make the Fundamental Law more coherent in terms of its primary function: serving the needs of the governing party.