

Constitutional Revenge

Kim Lane Scheppele

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One year ago, Hungary's slide from a multiparty democracy into a one-party state was [all over the headlines](#). The European Union [responded](#), threatening sanctions. The Council of Europe (keeper of the European Convention on Human Rights) repeatedly [rapped Hungary's knuckles](#) for violating European norms on democracy and the rule of law. The United States [expressed concern](#). The forint (Hungary's currency) dramatically weakened, even against the weakening Euro.

One year is a long time in politics and the current one-party Fidesz government has simply waited out the storm. Sure enough, the European Union has gone back to business as usual, even [increasing Hungary's budget allocation](#). The Council of Europe [recently certified](#) that Hungary is now compliant with a number of European standards. The US is still concerned, but [more quietly](#). And the forint has started to recover from its late 2011 spike against the Euro. It appears that Hungary is once again a normal country – or at least a tolerated one.

The world has relaxed because the Hungarian government appeared to modify some of the most offending reforms after pressure from the European Union, particularly with regard to the appointment of judges and media regulation. It also seemed that the Hungarian Constitutional Court was doing its job to keep the government in line. Contrary to all predictions (including mine), the Constitutional Court has spent the last several months striking down many of the most worrisome laws passed by the Fidesz government.

The Court declared unconstitutional the law that arbitrarily lowered [the retirement age of judges](#). The Court nullified the law that made it [a crime to be homeless in Hungary](#). The Court quashed the requirement that students on state-provided financial aid [remain in the country after graduation](#). The Court voided on technical grounds an earlier constitutional amendment that handed power to the head of the National Judicial Office and to the chief public prosecutor to assign any case to any court, extended the old statutes of limitations for communist-era crimes, and established a new voter registration scheme. And then the Court declared [the voter registration scheme](#) substantively unconstitutional as well. Just this week, the Court declared unconstitutional the law that [banned display of extremist symbols](#) including the red star and the swastika, following prior decisions from the European Court of Human Rights. And the Court [declared unconstitutional](#) parts of the law that removed the official legal status from more than 300 churches.

Even though the government had cut the jurisdiction of the Constitutional Court, changed the system for electing judges, expanded the bench and packed it with party loyalists, Court President Péter Paczolay has been able to skillfully mobilize bare majorities to hand setbacks to the government. These strong decisions have honored basic rights and defended important constitutional principles, often agreeing with petitions sent to the Court by the surprisingly active Ombudsman Máté Szabó.

But the government is now seeking revenge for the various defeats it has suffered by introducing into the Parliament a 15-page constitutional amendment that reverses its losses. The [mega-amendment](#) is a toxic waste dump of bad constitutional ideas, many of which were introduced before and nullified by the Constitutional Court or changed at the insistence of European bodies. The new constitutional amendment (again) kills off the independence of the judiciary, brings universities under (even more) governmental control, opens the door to political prosecutions, criminalizes homelessness, makes the recognition of religious groups dependent on their cooperation with the government and weakens human rights guarantees across the board. Moreover, the constitution will now buffer the government from further financial sanctions by permitting it to take all fines for noncompliance with the constitution or with European law and pass them on to the Hungarian population as special taxes, not payable by the normal state budget.

For good measure, the mega-amendment adds a new and nasty twist. It annuls *all* of the decisions made by the Court before 1 January 2012 so that they have no legal effect. Now, no one in the country – not the Constitutional Court, not the ordinary courts, not human rights groups or ordinary citizens – can rely any longer on the Court’s proud string of rights-protecting decisions.

At one level, the nullification of all prior decisions of the Constitutional Court makes sense: old constitution, old decisions/new constitution, new decisions. But the current Constitutional Court had already worked out a sensible new rule for 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. Otherwise, where the new constitution was substantially different from the old one, the previous decisions would no longer be used.

As a result, the mega-amendment primarily vaporizes the cases that defined and protected constitutional rights. Yes, the new constitution has a long list of rights; most are the same in the new constitution as in the old constitution. But the *precise meanings* of those rights were specified in the Court’s decisions before 2012. With those decisions gone, the same extensive protection of rights is no longer guaranteed.

What is now up for grabs?

The abolition of the death penalty was accomplished by a Court decision and is not explicitly prohibited by the new constitution. A single personal identifier number that could link all government records on a person was banned by a Court decision but is not explicitly banned in the new constitution. The right to criticize public officials was protected by a Court decision and is not explicitly included in the new constitution’s right to free speech. Political neutrality of public broadcasting was ensured through a Court decision but the new constitution does not overtly guarantee it. Equal recognition of same-sex civil unions was accomplished by a Court decision, but now the constitution says that marriage must be the union of a man and a woman (Constitution, Art. L). What happens to currently recognized same-sex civil unions?

Only a future Court decision will say. Access to abortion was limited under an old Court decision but the Court said that women’s rights had to be weighed in

the balance. Under the new constitution, fetal life is protected from conception (Constitution, Art. II) but women's reproductive rights are not explicitly guaranteed. The freedom to create new churches was guaranteed by Court decisions under the old constitution but is no longer ensured in the new constitution. The right to receive a public pension after a lifetime of mandatory contributions was guaranteed by a Court decision, but it is not explicitly guarded under the new constitution. A decision of the old Court required that the victims of both fascism and communism be treated equally in all reparations schemes. That, too, is gone. And there is much, much more.

Yes, some of these rights are elaborated in decisions of the European Court of Human Rights (ECHR). But the Hungarian Parliament has expressed its disagreement with decisions of the Strasbourg court before and last summer even [passed a resolution](#) to defy the Court's judgment in a recent case.

Of course, nothing prevents the new Constitutional Court from issuing the very same decisions again, without relying on their cases from prior years. But this is politically unlikely. The government will have named nine of the fifteen judges of the Constitutional Court by April 2014, so we can guess how that Fidesz-loyal majority will decide. So far, with the exception of Justice Stumpf on some important issues, the new Fidesz judges have virtually always supported the government's position in constitutional matters. If the government decides that the new constitution means something different from what the old Constitutional Court said it did, we can expect the new Court to follow the government.

There's more in the mega-amendment than the obliteration of the prior jurisprudence of the Constitutional Court. The mega-amendment also restores policies that the Court previously invalidated or that Hungary told Europe it had changed.

The independence of courts takes a beating (again) in the mega-amendment. The head of the National Judicial Office (Art. 14) is given the constitutionally entrenched power to take any legal case and move it to a new court for decision. Yes, readers of my [prior posts](#) know that the government tried this before. The European Commission for Democracy through Law (the Venice Commission) criticized the practice and the Hungarian government modified the law on the judiciary to reduce the powers of the head of the National Judicial Office. Now political case assignment is back, but this time it is *in* the constitution, without the legal limitations [that the Hungarian government agreed to](#) in order to satisfy the Venice Commission.

The mega-amendment also empowers the head of the National Judicial Office in ways that Hungary appeared to forswear in its negotiations with European bodies.

The mega-amendment (Art. 13) not only entrenches the position of the head of the National Judicial Office in the constitution itself, but gives this office the power to "manage the central administrative affairs of the courts," a set of responsibilities in which the judges merely "participate." Europe had required real involvement of judges in their own self-government and the current phrasing of this power might make judicial self-government unconstitutional because the power is assigned to someone else.

The lack of judicial independence had been criticized by European bodies and the Hungarian government had appeared to back down. Now we see compromise was temporary and the bulked-up powers of the head of the National Judicial Office are being added to the constitution without the limitations that had reassured Europe.

The Council of Europe just gave Hungary a clean bill of health on media regulation, but the mega-amendment adds more media restrictions. The mega-amendment says that during an election campaign, public media must give free time to political advertisements. So far, so good. But, a cardinal law may restrict political advertising in all other venues. Free speech protections are usually at their strongest when used in the exercise of democratic rights, and this amendment permits the limitation of free expression precisely during electoral campaigns.

The mega-amendment kills off the independence of universities. Almost all universities in Hungary are public (as is true in most of Europe) but they largely self-govern. With the mega-amendment (Art. 6), the universities come under direct political control as their financial management passes to the government. Combine this with the provision in the new constitution (dating back to communist times) that gave the President of the Republic the power to appoint both university presidents and professors (Constitution Art 9(4)), and universities can easily and constitutionally be put under political control.

The freedom of students to move after university graduation is also blocked under the mega-amendment. A Constitutional Court decision from last year overturned the government's policy of requiring students who received state grants for their university education to stay in Hungary after graduation. But that is now explicitly overruled in the mega-amendment (Art. 7).

Homeless people fare badly in the mega-amendment. Last year, the Constitutional Court ruled that the government's first attempt to criminalize homelessness violated the human dignity of the homeless. But now (Art. 8), the mega-amendment says that homelessness may be criminalized "in order to preserve the public order, public safety, public health and cultural values."

Churches and other religious organizations, too, suffer under the mega-amendment.

Last year, the government cancelled the legal status of more than 300 churches, leaving them in a legal limbo. The churches that attempted to recover their legal status [were routinely refused registration](#) as ordinary civic organizations and one has even had its property confiscated for now being illegal. Just this week the Constitutional Court declared parts of the church law unconstitutional because it denied aspirant churches a fair registration process. We don't yet know how the government will react to this but it would not be surprising if the government just amended the constitution to overrule the Court.

Under the mega-amendment, however, a new form of religious organization is established, neither an official church nor a pure civic organization, but instead an organization with a religious mission that collaborates with the government in the public interest. What happens to the churches that do not collaborate with the government is not yet clear.

And that's not all. Once again, the government has lifted the statute of limitations so that it can begin prosecutions for crimes committed during the communist period that were not prosecuted for political reasons. The Constitutional Court struck this down once before – but now it's back. The amendment also announces as a constitutional fact that the communist party and its associated groups were “criminal organizations.” Those who were associated with them are now responsible for a long list of offenses including maintaining the regime, betraying the nation, ending freedom of property, putting the country into debt, depriving citizens of human rights, and undermining national identity. Though these offenses are not defined as crimes, it is unclear just what the government plans to do with this new demonization of old communists. The mega-amendment states that the legal successors to the communist party share responsibility as the inheritors of the wealth of the communist party. So parties currently in opposition – surely the Socialists but perhaps others as well – are in the crosshairs of this provision, with the details yet to come.

Why does the government need a 15-page amendment to a 45-page constitution that came into force only a little over a year ago? The amendment reverses virtually all of the concessions that the government has been forced to make over the last year, and it provides further evidence that Prime Minister Viktor Orbán recognizes no limits on his power. When Europe tells him no and when his country's own Constitutional Court hands him defeats, he waits until Hungary is out of the spotlight, and then he adjusts the constitution to make all those unpleasant restrictions go away.

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