

Constituting the Revolutionary Republic

Even though Fidesz has moved relatively swiftly in presenting its draft of the constitution, in light of the fact that it wants to have it passed by the end of April it does not leave much time for actually debating it. And there appears to be plenty to debate: even beyond the pronounced right-wing rhetoric in the preamble, which the left just will have to learn to live with, there are some major substantial issues pertaining for example to Hungary's self-understanding as a social state, as well as issues regarding checks and balances and quality of democracy.

Once Fidesz had completely abandoned its hope that the opposition would rejoin the process of drawing up a constitution, it moved with stunning speed to present its own draft. From early on Fidesz had set an ambitious deadline for completing the constitution, which also explains why the draft was published posthaste. As things stand now, the opposition will have no input in the wording of the final draft.

According to the vice-chairman of the parliamentary ad hoc committee responsible for the constitution, Gergely Gulyás, their absence from the process will be a mere “footnote” in the process of adopting the constitution. While that may turn out to be true, it begs the question why such tough talk was so conspicuously absent while the Fidesz-leadership was actively courting the opposition – especially LMP –, trying to entice it to return to the process.

Have the cake and eat it too

For Fidesz was facing two dilemmas, one of which it has solved reasonably well; the other remains to be seen. The latter, as of yet unresolved paradoxical goal, was to make sure that while the new constitution would predominantly or exclusively bear the mark of Fidesz, it would not be popularly perceived as a Fidesz-constitution, for such an impression might compromise the legitimacy of the basic laws. Had Fidesz managed to keep both LMP and Jobbik involved somehow, then the absence of MSZP would probably have been beneficial for the governing party, since it generally wants to avoid any type of legitimising interaction with its political nemesis.

Yet, it is unclear whether in the long-run the opposition's stubborn absence – which in addition to political posturing also appears to stem from a genuine frustration of having been belittled at first, and then only being offered concessions when Fidesz suddenly realised that doing it all by itself is not that great after all – will truly have any delegitimising effects. As long as Fidesz can hold on to at least a third of parliamentary seats, which it ought to for a fairly long time, its constitution will be safe. And time will indeed most likely make the current stance of the opposition seem like a footnote (which at this point it is not). Over years and decades the acceptance of the constitution and hence its legitimacy will grow.

The other challenge was to create a constitution that would please the base without either mobilising the lethargic opposition or have the European partners “call for UN intervention”. This was similar to Orbán's Strasbourg/Brussels dilemma, outlined in Politics In-Depth

2011/4. This is where the government appears to have succeeded already: while the left is certainly not happy about the constitution, there is little in the document to trigger a full-scale political rebellion. Foreign observers might come to a similar conclusion.

The winner takes it all

If the Orbán-government harbours far-reaching anti-democratic designs, as its critics allege, then the planned constitution is not going to be the main tool for realising these objectives. The draft does promise some further damage to judicial review and it redistributes and centralises power away from the already weak local governments towards the central government.

Ideologically speaking, this is certainly not a big tent constitution. It does not offer any soothing reassurances to the – still relatively small and politically largely dazed – left and liberal segments of the population. Given the deep internal divisions in Hungary, any constitution seeking acceptability among all or most political viewpoints would inevitably have been a drab and neutral document. Much like the Constitution in force, in fact.

A right-wing constitution

This draft, on the other hand, features lots of fiery language designed to please the right-wing hearts, and there is little to nothing in it to do the same for the left-wing and liberal citizens. Most of the obligatory rhetorical and symbolic issues of the Hungarian right made it into the draft: references to the Holy Crown, Christianity, the definition of marriage as the union of a man and a woman, the sanctity and importance of the family and the commitment to Hungarians across the borders are all there.

Not all of this is rhetoric – gays, for instance, will be genuinely affected by these provisions –, but much of it is, and the constitution will leave the legislator plenty of leeway to formulate laws that reflect little of the flaming conservatism apparent in the verbiage. Which is not to say that that is necessarily what it'll want to do.

Winter's coming

Where the gap between rhetoric and substance is striking, on the other hand, are social rights. In what might be (naively) construed as a sop either to Fidesz' social populism or to leftist sentiments, the draft constitution oozes social rhetoric. There is talk of solidarity, of the commitment and obligation towards community, and – reminiscent of Marx' famous "from each according to his ability" dictum – of everyone's duty to contribute to the common needs based on his/her capacities. Furthermore, the draft elevates to constitutional rank the rights of the deaf and dumb and also includes a hazy commitment to "strive" to ensure decent housing for all.

If one looks at substantive changes, however, an Anglo-Saxon type of conservatism shines through. In what may be the most important instance, the "right to social security" (Art.

70/E (1)) turns into the state's "aspiration to ensure social security" (Art. XVIII (1) – a guarantee is thus abolished. Furthermore, the right of the elderly to the level of support "necessary for their livelihood" (Art. 70/E (1)) turns into a nebulous commitment: "Hungary facilitates" the livelihood of the elderly (Art. XVIII (4)). By explicitly allowing for tying both the type and amount of aid to persons in need to their willingness to undertake assigned work, Fidesz entrenches constitutionally the trend – began already under Gyurcsány – of distinguishing between deserving and undeserving poor.

Not a boon for democracy

There are several issues in the draft constitution pertaining to the quality of democracy. None of these issues rises to the level as to render Hungary undemocratic. Taken individually, however, they each contribute damages of various strengths to the fabric of democracy already weakened substantially over the past couple of months. It is certainly true that these do not affect Hungary's status as a bona fide democracy, but they do weaken the quality of Hungarian democracy and that, too, is a legitimate concern: the problems do not begin (or end) with authoritarianism.

For reasons of space we will address only one such issue below: the Constitutional Court. Most disappointing for those concerned about the rule of law is Fidesz' decision to retain the earlier limitation it had imposed on the Constitutional Court's power of judicial review. The Constitutional Court still will not be able to review a vast array of crucial issues.

A political tool

In fact, Fidesz apparently takes a further drastic step by eliminating the possibility of turning to the Court with the request to invalidate unconstitutional acts of Parliament. Judicial review will apparently only be possible in the context of a specific case, i.e. when an unconstitutional statute was applied or when it was applied in an unconstitutional manner.

For those from Anglo-Saxon countries, this might not seem terribly relevant: for the US Supreme Court, for instance, this is standard practice. But in a country where checks and balances were weak to begin with and where the government has been intensely engaged in neutralising all institutions that could thwart its omnipotence or at least criticise its dealings, this is another piece of the Hungarian rule of law mosaic that we will miss. The state of Hungarian democracy would necessitate stronger checks and balances than those common in Western Europe or the US, rather than an assortment of the weakest protections available in the western world.

Used responsibly, the broader possibility to request preliminary judicial review (i.e. reviewing the constitutionality of acts prior to their official enactment), may be a good tool. But it nevertheless does not serve to enhance judicial review per se. If anything, it provides the incumbent government with a useful research tool to prevent potential embarrassments when its bills get struck down by the Constitutional Court. Like many of the other changes that the new constitution will bring, this too is primarily intended to benefit those who proposed the change.