



# **Constitutional Amendments in Hungary: The Government's Struggle against the Constitutional Court**

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## **Introduction**

In 2010, the Fidesz-KDNP coalition led by Viktor Orban won a 2/3 majority in the Hungarian Parliament and thus gained the ability to amend and recreate the Constitution. Though Fidesz did not request authorization for this and even denied its ambitions of constitutionalization during the electoral campaign, the governing party amended the Constitution twelve times between 2010 and 2011 and finally proceeded to pass the new *Fundamental Law* on April 18, 2011.

The legitimacy of this new basic law is dubious. It was not approved through the electorate or by a referendum, and it was passed in a politically unilateral fashion despite heated protests from civil society and the opposition - a unique feature in East-Central Europe. However, the new constitution was accepted by the governing party in a legally sound manner. The Fundamental Law draws heavily on the previous Constitution and the Charter of Fundamental Rights of the European Union. However, it does sport several risky passages. The document starts with a socially divisive conservative Preamble which contains incorrect interpretations of Hungarian history, legally uninterpretable components, and elements of radical right-wing imagery.

Conspicuously, though the Fundamental Law lifts several selections almost word for word from the EU Charter of Fundamental Rights, it omits parts on discrimination based on sexual orientation. In addition to thirty other areas of legislation, the new basic law records the necessity of cardinal laws in regulating pensions and taxation. As such, future governments will be unable to alter these fields and will thus be rendered incapable of economic governance. Similarly questionable is the considerable limitation of the Constitutional Court's powers. In its new configuration, the body will only be able to strike down budgetary and tax laws if those violate fundamental rights. The decision to enact such alterations was not inspired by principles. It simply serves to allow Fidesz to bypass the Court when passing unconstitutional economic legislations.

When the Fundamental Law was enacted and Viktor Orban declared that his administration created a "foundation as solid as granite," economic actors, NGOs, and politically conscious citizens rightfully expected the document to be, despite its shortcomings, a source of legal certainty and predictability in Hungary. Instead, the basic law paradoxically became a tool to combat the Constitutional Court in the past year.

## **The Temporary Provisions**

A month before the Fundamental Law took effect, the first amendment package saw the light of day. It was named *The Temporary Provisions*. Its justification explains that the title refers to the notion that the provisions deal with the transition from communism to democracy and are intended to regulate the transition from the Constitution to the Fundamental Law. In reality, Fidesz tried to mask that the document was simply a collection of constitutional amendments intended to alter a basic law which did not even take effect yet.

The Temporary Provisions aim to provide some form of accountability for the country's communist past, an endeavor previously neglected. The document discusses at length communism's crimes against humanity, the lack of a statute of limitations for these, and the punishability of persons who operated the communist system.

However, the Provisions also state that the legal successor to the communist party, the Hungarian Socialist Party (MSZP), an organization which has operated completely democratically for the past 22 years, shares responsibility for these crimes. In effect, the governing party included the criminality of the largest opposition party in the constitution.

The Temporary Provisions state the premature dismissal of the leaders of several independent institutions. With this Fidesz ‘legally’ got rid of the chairs of the Supreme Court and the National Judicial Council (OIT) and the data protection ombudsman – elements which were not necessarily loyal to the governing party. Fidesz tried to seize the opportunity to dismiss the president of the Hungarian National Bank as well, but this effort was thwarted by international pressure. Consequently Fidesz abandoned this initiative in its proposal for *The First Amendment of the Fundamental Law*.

The amendment package introduced the concept of the government’s being able to collect penalties imposed by the European Court of Justice or the Constitutional Court as taxes. This means that the government might be able to constitutionally use these courts as scapegoats for increased taxation.

Political Event	Reaction
<b>The radical right-wing Jobbik party demands holding top communist leaders accountable and decreasing their pensions.</b>	The Temporary Provisions state that crimes committed in the name of the single-party state but not prosecuted for political reasons do not expire. Communist ex-leaders may be held accountable and their pensions may be withheld.
<b>Fidesz wishes to appoint officials deemed loyal to head the judiciary.</b>	The Temporary Provisions state that the mandates of the chairs of the Supreme Court and the National Judicial Council along with that of the privacy ombudsman are terminated with the Fundamental Law entering into force.
<b>The European Commission initiates infringement proceedings, primarily due to special taxes on large foreign companies.</b>	The Temporary Provisions state that if a payment obligation arises due to a verdict by the European Court of Justice or the Constitutional Court, the subsequent expenses can be collected as taxes.

In December 2012, the Constitutional Court struck down the Temporary Provisions based on the legislative procedures leading to their acceptance: as the provisions lacked a temporary character, the Court overturned them. At the same time, we must note that the Court did not examine the contents of the provisions. This allowed Fidesz to reintroduce the provisions to the National Assembly as amendments to the Fundamental Law.

**The First Amendment**

Though the Temporary Provisions were themselves technically amendments, the first official amendments were only passed in June 2012, six months after the unilaterally accepted Fundamental Law became the law of the land. The amendment, which contained three alterations and was meant to facilitate bypassing the Constitutional Court, declared that the Temporary Provisions were part of the Fundamental Law.

The second component overruled the integration of the Hungarian National Bank into another institution thus preserving the body's independence. The third element reacted to current events. Since President of the Republic Pal Schmitt was forced to resign due to a plagiarism scandal, Fidesz had to ensure that the ex-head of state received satisfactory benefits. To achieve this, the governing party constitutionalized the notion that modifications to a former president's allowance required a 2/3 parliamentary majority.

Political Event	Reaction
<b>Experts opine that since the Temporary Provisions do not constitute part of the Fundamental Law, the Court can overturn them.</b>	The First Amendment states that the Temporary Provisions are part of the Fundamental Law.
<b>The European Commission wishes to initiate infringement proceedings due to violations of the Hungarian National Bank's independence.</b>	The First Amendment eliminates the passage which was meant to integrate the Hungarian National Bank into another institution.
<b>Pal Schmitt has to resign due to allegations of plagiarism.</b>	The First Amendment records that a 2/3 majority is needed to alter the sums received by former presidents from the government throughout their lifetimes.

## The Second Amendment

The November 2012 *Second Amendment of the Fundamental Law* modified The Temporary Provisions. According to its text, one's participation in the election hinges on a request to record his or her name in an electoral roll.

In order to legalize voter registration, Fidesz included this criteria in the Fundamental Law. Considering that Hungary has had a functional electoral roll since the democratic transition, this new addition would have clearly been an effort to limit the right to vote. To increase the severity of this restriction, Fidesz went as far as to determine the method of registration (it was allowed on the Internet or in person, but not through mail). Once again, experts raised their voice against the violation of this fundamental right, and the governing coalition responded by including the passages in the basic law.

Since Fidesz included this restriction in the Temporary Provisions and not in the Fundamental Law, the Court threw this component out along with the rest of the Provisions. Fidesz then gave up on voter registration.

Political Event	Reaction
<b>Fidesz's support among voters drops by 50%. Half of the population is unsure about who to support. Political apathy is growing.</b>	The Second Amendment holds that the right to vote depends on a requested registration into an electoral roll.
<b>Experts signal that removing the option to answer by mail could be unconstitutional.</b>	The Second Amendment includes personal or electronic registration only.

## The Third Amendment

This amendment states that laws on the Hungarian agriculture require a 2/3 support in the National Assembly. This raises the number of 2/3 cardinal laws to 33, while Fidesz consequently disabled future governments.

Political Event	Reaction
<b>A row of scandals unfold due to Fidesz's agricultural reforms. State Secretary for Rural Development Jozsef Angyan resigns because he is unable to stop Fidesz-favored oligarchs from obtaining lands.</b>	The Third Amendment states that creating and amending regulations on the use and purchase of agricultural fields and forests must be regulated by a 2/3 cardinal law.

## The Fourth Amendment

Though currently the 4<sup>th</sup> amendment only exists as a bill before the Parliament, the radical changes this modification will deliver are already visible. The most important changes will affect the Constitutional Court, which will have its powers curbed once again.

One of the alterations holds that the Court cannot review the Fundamental Law and its amendments from in terms of constitutionality. From this point on, international treaties will be the only tools of constitutional checks and balances. Furthermore, the Constitutional Court will be barred from referring its former decisions. As such, 20 years of practice could be lost.

The amendment will define familial relations as those based on marriage and the parent-child relationship. This restriction, which rules out civil partnership as a possible element of family, was already declared unconstitutional by the Court in the past.

Another sign of struggle against the Court involves constitutionally obligating students who have received state financed university educations to stay in the country for a number of years after they have obtained a diploma.

Finally, the amendment legally bans the homeless from public spaces. For years, Hungary debated whether freedom of speech or the right to human dignity weighs more prominently as a constitutional right. The governing party opposes the Court's stance on this issue as well when it chooses to limit freedom of speech in favor of human dignity in this amendment.

A similar situation exists when it comes to electoral campaigns. While the Constitutional Court declared a ban on political ads in commercial media, Fidesz was interested in limiting the opposition's publicity efforts. The 4<sup>th</sup> Amendment provides for this too.

Political Event	Reaction
<b>The Constitutional Court declares the following to be unconstitutional</b> <ol style="list-style-type: none"><li><b>1) The enactment of the Temporary Provisions</b></li><li><b>2) Certain parts of the electoral law</b></li><li><b>3) Certain parts of the law on the protection of families</b></li></ol>	The 4 <sup>th</sup> Amendment takes away the power of reviewing the basic law and its amendments from the Constitutional Court by enshrining this configuration in the Fundamental Law. It then proceeds to include unconstitutional measures in the Fundamental Law.

- 4) **Certain parts of the law regulating the homeless in public areas**
- 5) **Certain parts of the law prohibiting hate speech**
- 6) **Certain parts of the law on higher education**

The governing party modified its own constitution five times in the last two years. The amendments are almost exclusively Fidesz's legal and communicational reactions to current political issues. Fidesz included severe limitations on the Constitutional Court's powers and on the legislative abilities of future governments. If the Parliament votes favorably on the Fourth Amendment, by 2013 - a year before the elections - all constitutional checks and balances will be eliminated in Viktor Orbán's Hungary.

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