

Constitutional Complaint as Orbán's Tool

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The re-regulation of the ex-post review competence and the introduction of the “full” constitutional complaint in 2012 provided a good justification for the Hungarian Constitutional Court to shift its focus from the control of the legislature dominated by the illiberal Fidesz government to the supervision of the judiciary. However, the justices have not remained simply deferential. They proactively helped to repurpose the constitutional complaint and convert a fundamental rights protection mechanism into a tool reinforcing the government's interests.

One of the novelties of the Orbán constitution in 2011 was the introduction of a “German-type” or “full” constitutional complaint which allows individuals and private organizations to challenge not only legislative acts but also judicial decisions. On the face of it, this seemed like a positive change, contributing to the enhancement of the protection of fundamental rights by extending the scope of review. The Venice Commission [noted](#) “with satisfaction that the individual constitutional complaint has been introduced into the constitutional review system.”

The VC failed to realize, however, that this move was part of a broader strategy. To cut this long and complicated [story](#) short, by the significant re-regulation of the ex-post review competence and the introduction of the “full” constitutional complaint the Fidesz government successfully weakened the constitutional control over the political branches and pushed the Constitutional Court toward the supervision of ordinary courts.

With a little help from the Justices

Several scholars have [observed](#) that after many court-packing measures the justices have become very deferential to the governing majority. This self-restraint usually is manifest in politically salient cases in the refusal to invalidate important legislative acts and the use of “[soft instruments](#)” (e.g. the declaration of a constitutional requirement or a legislative omission) – even if the unconstitutionality of the law is alleged on very solid grounds. But this is not the only maneuver in the Constitutional Court's strategy.

In certain cases, the justices proactively help the Fidesz government to achieve its aims. An excellent example are the so-called “[constitutional identity](#)” decisions which provide ample ammunition for the government's verbal combat against the European Union. But this is exactly what happened in the following case as well, which has received much less attention among foreign scholars.

The story begins in 2015 with a huge [scandal](#): three brokerage houses lost hundreds of millions of EUR worth of assets, causing damage to tens of thousands of depositors and investors. The Hungarian National Bank withdrew the licence of the brokerage houses, started their liquidation and imposed penalties on them.

The companies challenged the financial penalties, and the case went all the way up to the Supreme Court. The central question concerned the interpretation of a legal provision authorizing the vice-president of the Hungarian National Bank “to issue” the contested decisions. The Supreme Court [concluded](#) that the vice-president had not been entitled to decide on the penalties himself. He would have been allowed only to sign the decision made by the Financial Stability Council of the National Bank.

This judgment caused great inconvenience to the National Bank headed by the former minister of economy of the Orbán government, György Matolcsy. So, the National Bank decided to file a constitutional complaint to restore its prestige and to avoid the potential avalanche of legal proceedings brought against similar decisions issued by the vice-president.

In its decision no. [23/2018](#), the Constitutional Court invalidated the Supreme Court’s judgment. There are two very obvious signs in the decision showing the Constitutional Court’s eagerness to come to the rescue of the National Bank and the governing majority.

A state organ’s fundamental rights

The first sign is that the constitutional complaint was found admissible despite the fact that it had been submitted by a state organ. The National Bank alleged the violation of its right to a fair trial and to an effective remedy. Without spilling too much ink on whether a state organ can invoke its fundamental rights or not, the justices simply acknowledged the National Bank’s standing based on its significance in the national financial sector and its mandate to (indirectly) represent the interests of the individuals and private organizations affected by the case. This was a radical break with the previous case law and a very “activist” interpretation of the rules on standing without any detailed justification.

The potential implication of this admissibility decision was enormous: it practically entitled the state organs to challenge unfavorable judicial decisions before the packed Constitutional Court by alleging the infringement of their “rights”. Fidesz quickly codified this judicial “innovation” into law by Act CXVII of 2019. Coincidentally or not, this was exactly the same [omnibus legislation](#) which amended several legislative acts in order to yield similar results as the original and very controversial (but seemingly abandoned) administrative court reform would have produced. The [consequence](#) was the further erosion of judicial independence, most importantly the capture of the Supreme Court.

Mandatory subjective teleological interpretation

The second sign of the Constitutional Court's government-favoring attitude was the reason of the annulment of the Supreme Court's judgment. It was found that the Supreme Court violated Article 28 of the Fundamental Law because it failed to interpret the legal provision in accordance with the law's explanatory memorandum explicitly allowing the delegation of decision-making competence to the vice-president of the National Bank.

When the case was decided, Article 28 provided that "courts shall interpret the laws in accordance with their aim and in harmony with the Fundamental Law. It shall be presumed that the Fundamental Law and the laws serve moral and economic purposes which are in accordance with common sense and the public good." This provision said nothing about the mandatory application of the subjective teleological interpretation, let alone the judges' obligation to decide cases on the basis of explanatory memoranda. In addition, the Supreme Court explicitly [mentioned](#) that the application of Article 28 was not necessary because the meaning of the legislative provision was sufficiently clear. Nevertheless, the Supreme Court's reasoning was qualified "arbitrary" and thus unconstitutional because it ignored the legislator's original aim.

One may wonder whether the Constitutional Court was influenced by the Seventh Amendment to the Fundamental Law adopted by the National Assembly when the case was still pending which (among other very [controversial measures](#)) inserted the following sentence in Article 28: "The preamble of the laws and their explanatory memoranda shall be taken into consideration to determine the legislative aim." Even though this modified version of the provision was not applicable in the case, it is really difficult not to see this amendment as an indirect legislative intervention in a specific judicial proceeding to which the members of the Constitutional Court willfully assisted.

Smooth cooperation

The dangerous consequences of this sort of cooperation between the Fidesz government and the Constitutional Court are well illustrated by a recent example concerning a referendum question on the availability of gender affirming treatments to minors. The Hungarian government has a long track record of targeting sexual and gender minorities. In the summer of 2021 the National Assembly adopted a [legislative act](#) bearing a striking resemblance to the Russian anti-LGBTQI propaganda law of 2013 even though it is consistently framed as a child protection measure. The fundamental rights violation was so obvious that the European Commission almost immediately started an [infringement procedure](#) against Hungary.

To show the Hungarians' resistance to the EU institutions' "*rude and anti-democratic attacks against Hungary*" (as the government put it in its [resolution](#)), PM Orbán decided to [abolish the general ban](#) on organizing referenda during the state of emergency and invite the electors to decide on five questions.

Unsurprisingly, every question passed through the National Election Committee like a hot knife in butter, but the decisions were challenged in court. According to the [Hungarian Helsinki Committee](#), the Supreme Court – headed by Chief Justice Varga who was elected by the parliament in 2019 despite the [objection of judges](#) – deviated from the default rules of case allocation when the review of the National Election Committee’s decisions was requested. It does not seem to be a far-fetched assumption that this maneuver had an impact on the outcome of these cases: 4 of the 5 questions were approved. Only the following question was [found unlawful](#) “Do you support the availability of sex reassignment surgeries [correctly: gender affirming treatment] to minors?” on the grounds that both a positive answer (the unconditional availability to all minors) and a negative response (a complete ban) would lead to an unconstitutional outcome.

In the beginning of November, the government filed a constitutional complaint alleging the infringement of its right to fair trial on the grounds that the Supreme Court interpreted the question too broadly. Eight prominent Hungarian NGOs urged the Constitutional Court in an [amicus curiae](#) submission to reject the petition. But in mid-December the Constitutional Court [concluded](#) that the judgment was contrary to the Fundamental Law and therefore annulled it. It was found that the Supreme Court failed to interpret the question in accordance with Article 28 of the Fundamental Law (quoted above) and thus infringed the government’s right to a fair trial.

The irony in this story is that the government did not wait for the final outcome of the case even though the Court opted for an accelerated procedure without any legal obligation to do so. Instead, the government went ahead with the remaining four questions because due to a recently enacted legislative amendment the referendum could be organized in a way to coincide with the April 2022 parliamentary election. The clock was ticking, so the National Assembly officially [called](#) a referendum on the four questions at the end of November. Therefore, by the time it delivered its judgment the Constitutional Court was not even under a strong and imminent political pressure but decided to back the government anyway.

Conclusion

It is often argued that the lack of independence of the Hungarian Constitutional Court is not so apparent because it does not show its support for the government so manifestly as its Polish counterpart. However, if we dig into the case law and we are willing to analyze the judgments with a context-sensitive approach, we can actually find pretty evident signs of the Court’s political bias. As the previously described cases illustrate, the Constitutional Court is not only extremely deferential to the political branches in sensitive cases, but it also proactively helps the government to achieve its aims.

