





## Instrumentalizing Constitutionalism for Regime Preservation in Hungary

In December 2023, the Hungarian Parliament [passed](#) a law establishing a Sovereign Protection Office—a state administration which now [possesses](#) unfettered access to personal data to find and sanction supposed foreign agents among the Hungarian populace. This office [operates](#) at will and without oversight, [offers](#) no avenue for legal redress, and [wields](#) prison time upwards of three years. It was [founded](#) “in the interest of protecting constitutional identity,” “for the purpose of implementing the Fundamental Law,” and “on the basis of... the Fundamental Law.” EU institutions have taken various steps to address this law which directly violates Article 2 TEU values. In recent weeks, the European Commission [launched](#) an infringement proceeding over the law, and the European Parliament [called](#) on the European Council to consider Article 7(2) procedures.

### Executing a constitutional coup

While these developments in Brussels are welcome, the Sovereign Protection Office is merely the tip of the iceberg of Article 2 TEU breaches in Hungary. In actuality, this office represents the downstream effect and long-term culmination of politically-instrumentalized constitutionalism for ruling party preservation. To understand the full nature of Article 2 TEU infractions by Fidesz, one must turn to the development of Hungary’s current constitutional regime in 2011. EU responses to Hungary’s rule of law derogations with the Sovereign Protection Office are entirely moot without due consideration of Hungary’s Fundamental Law. That is to say that even if Fidesz adjusts course over the Sovereign Protection Office, the constitutional regime of 2011 leaves the Hungarian government in continued violation of basic rule of law principles. As such, the Sovereign Protection Office

raises the ever-present specter of the (il)legitimacy of the Fundamental Law in Hungary.

The current Fundamental Law of Hungary is a young, manufactured institution—established by the ruling Fidesz Party in 2011. In the 2010 parliamentary elections, Fidesz won a free and fair two-thirds majority which granted them constitution-amending powers—powers [untouched](#) by previous two-thirds majorities but soon-to-be unhesitatingly taken advantage of by Fidesz. The ruling party [produced](#) the Fundamental Law of Hungary on Easter Sunday 2011. This [new constitution](#) was drafted in secret, singularly passed by the ruling party, incorporated no input from opposition parties or civil society, and received no popular ratification. In the 2010 parliamentary campaign, Fidesz [never ran](#) on a platform of transforming the Hungarian constitutional order nor indicated any intention to do so. The development of the Fundamental Law was, in effect, a “[constitutional coup](#).” In short, this constitutional order was conceived in undeniably political circumstances for politically instrumentalist ends. Constitutional scholars have and will continue to parse through various elements of the Fundamental Law. For the sake of brevity, this piece will elucidate the transformation of the Constitutional Court and the judicial system writ large.

## Transforming the Constitutional Court

In the development of Hungary’s Fundamental Law, Fidesz transformed the Constitutional Court in both competencies and composition. After 1989, the Constitutional Court served as the key check on Hungary’s unicameral legislative body—a robustly independent [judicial organ](#) and [counterbalance](#) to a majoritarian governance structure. The Court was highly accessible to and popular with the public; any citizen could petition the Court to constitutionally review laws via *actio popularis* [petitions](#). These constitutional petitions served as a key avenue for post-communist civil engagement. For example, the death penalty

was [abolished](#) via *actio popularis* appeals to the Court. However, with the changes in 2010, Hungary [underwent](#) a clear transition from legal constitutionalism to political constitutionalism. Imre Vörös—a former judge on the Hungarian Constitutional Court from 1990 to 1999—[described](#) this constitutional revisionism in 2010 as “an overthrow of the state using the instruments of constitutional law, under the cover of the constitution, through constitutional legislation, and a series of constitutional amendments: an unconstitutional coup d’état.” The repurposing of the Constitutional Court as a political tool symbolizes this break most clearly.

Regarding the Court’s competencies, Amendment 4 Article 19 § 2 of the Fundamental Law [blanket swept away](#) all standing Constitutional Court precedent, shirking the constitutional heritage that Fidesz so adamantly [upholds](#) today. Alongside this deletion of judicial precedent by legislative fiat, the Court [lost oversight capacities](#) on questions of financial laws—such as judicial review of tax laws or the budget. Furthermore, individuals were [no longer able](#) to directly petition the Constitutional Court with *actio popularis* requests. With Fidesz reducing the purview of the Constitutional Court to questions strictly pertaining to the Fundamental Law, the Court’s hallmark autonomy and widespread access to civil society atrophied. The effects compounded with changes to the make-up of the Court.

On the composition of the Court, the ruling party utilized the Fundamental Law to introduce a highly partisan process to judge selection and to craft a judicial system favorable to Fidesz. [Before 2010](#), nominees to the Court were selected by a committee comprised of a representative from each party in Parliament; eleven justices sat on the Court. [Article 24 § 8](#) of the Fundamental Law expanded the number to fifteen justices, extended their tenure from nine to twelve years, and removed the requirement for opposition consensus in the selection process. A two-thirds majority vote—which Fidesz has consistently held since 2010 largely thanks to [gerrymandering](#)—would suffice for appointment to the Court.

Furthermore, the President of the Constitutional Court would no longer be selected by his or her peer justices but by a two-thirds, partisan vote in the Parliament. By 2013, the [majority of justices](#) on the Constitutional Court were hand-picked by Fidesz. Most controversially, [Article 26 § 2](#) of the Fundamental Law—eventually repealed after significant pushback—would have [lowered](#) the retirement age for ordinary judges from 70 to 62—forcing 274 judges or one-tenth of all Hungarian judges into early retirement at once. This is the judicial system and Constitutional Court that Fidesz [touts](#) as the paragon of the rule of law and national constitutional tradition.

## Manufacturing constitutional identity

With this context, one perhaps might reduce this political saga to a pithy question: How does Fidesz legitimize a partisan, manufactured, and novel constitutional milieu? The answer lies in the *ex post facto* apotheosis of the Fundamental Law as the nonpartisan embodiment of national sovereignty and a thousand-year history. The drafters of the Fundamental Law implemented this strategy by interspersing the [document](#) with frequent references to Hungary's ancient traditions and ethno-religious heritage. However, nothing about the Fundamental Law is ancient nor neutral; such a political move does not hold against scrutiny.

With the renewed focus on the ruling party's leadership in Hungary—a leadership that now promises to double down on instrumentalizing constitutional sovereignty claims for regime preservation—European Union leadership and anyone else interested in preserving liberal democratic mores would be wise to pay attention. Utter [political forbearance](#) over derogations under the Juncker Commission and the *pávatónc* of frozen then unfrozen [EU funds](#) under the Von der Leyen Commission have failed to address the entrenchment of the Fundamental Law and this retroactively manufactured constitutional heritage for which Fidesz leadership [waxes](#) so nostalgic. The consequences of the 2010 pivot

from legal constitutionalism to political constitutionalism are manifest—exponentially rippling throughout civil society. There exist countless other instances where [journalists](#), [NGOs](#), [LGBT individuals](#), and [universities](#) have faced material sanctions under the auspices of constitutional sovereignty claims. Fidesz justifies these laws through the guise of national constitutional sovereignty—even if there is no possible connection to constitutional competencies. This instrumentalization of constitutional identity is a particularly savvy political approach because Article 4 TEU squarely [delegates](#) constitutional questions to Member States. When critics raise concerns about the development of the Fundamental Law, they are [caricatured](#) as biased political actors encroaching on Hungarian sovereignty. The Hungarian government has adeptly and retroactively created a sort of constitutional *kulturkampf* to cover for, distract from, and cry “woe is me” over blatant Article 2 breaches. The reality is that claims of long-standing and neutral national constitutional praxis only carry precedential sway if that constitutional framework has endured through time and different ruling parties. For Hungary’s Fundamental Law today, that is not the case. And in the intervening period of necrotic political will in Brussels, we have arrived at the ultimate culmination of more than a decade of political constitutionalism—the Sovereign Protection Office.

## Ensuring the return of liberal democracy

For the sanctity of the treaties, the EU Commission must take action over these clear and persistent breaches of Article 2 values in a Member State. The Rule of Law Conditionality mechanism is not a panacea, but it remains the most potent tool in the EU’s Rule of Law Toolbox for ensuring the return of liberal democracy to Hungary. Hungary historically has been the largest net [recipient](#) of EU funds per capita. Continuing to withhold some 20 billion euros and expanding—rather than [diminishing](#)—that sum sends a strong signal that the European Union is a *sui generis* political community that will no longer entertain demonstrable

contraventions from the EU's *acquis*. Perhaps such a commitment will then bring an end to the political instrumentalization of constitutionalism in Hungary.