



**Another Hungarian Constitutional Amendment:
Smoke and Mirrors for the World**

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Introduction

Though the contents of the new Hungarian Fundamental Law have been controversial both internationally and domestically, the amendments adopted since its ratification have unequivocally angered Western democracies. In past months, the year and a half old Fundamental Law was rewritten to a considerable degree by the Fidesz administration, and its modifications have often clearly been enacted for presently relevant political aims or political communicational goals. Among these we will find the criminalization of the governing party's political opponents, the limitation of the Constitutional Court's powers and the annulment of its decisions, the appointment of PM Orbán loyalists to leading positions in independent institutions, the denial of certain provisions of the European Convention on Human Rights, and the identification of the European Union as a scapegoat, too. The so-called Fourth Amendment to the Fundamental Law of Hungary was accepted by the Hungarian Parliament on March 11, 2013. Since then, the legislation has been criticized harshly by, in addition to the Hungarian opposition and domestic NGOs, the President of the European Commission, the President of the European Parliament, the Secretary General of the Council of Europe, the UN High Commissioner, the Chancellor of Germany, and the spokesperson for the US Department of State.

In the paper below, we will examine different criticisms which were presented during the past months by various international organizations and the Hungarian government's reactions to these. Our analysis will focus on how the Hungarian government uses the Fundamental Law as a political instrument, and how it depicts critics negatively in Hungarian public discourse.

The Council of Europe: Closely Following the Hungarian Situation

Though the position of the Council of Europe and its legal advisory body, the Venice Commission is not legally binding for Hungary, the institution's opinion is still relevant, because it can serve as a reference point for EU procedures against Hungary. In its June 17, 2013 opinion on the Fourth Amendment, the Venice Commission highlighted that the governing majority views the constitution as a political instrument. “[T]he Fourth Amendment is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics,” while its provisions are contrary to the principles of fundamental rights and European norms.¹ The document considers the curbing of the Constitutional Court's powers, the political recognition of churches, and the limitation of political campaigns as the amendment's most disturbing dimensions. The Orbán administration declared the opinion as biased and unfounded in a letter.² Meanwhile the Parliamentary Assembly of the Council of Europe placed Hungary under observation, which was a more relaxed measure than the originally expected monitoring procedure. The initiation of this latter process would have been a first for a Member State of the European Union.

1. <http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e>

2. http://www.kormany.hu/download/d/5c/e0000/HUresponse_VenCom_DraftOp_20130611%28FINALfin%29.pdf

The Council of Europe's dilemma is a fine illustration of the peculiar nature of Hungarian democracy. Since there have been no violations like those occurring in certain countries of Eastern Europe or Central Asia, the Council cannot treat Hungary similarly either. At the same time, Hungary went from being one of the best pupils of democracy to the bottom of the class. The Fourth Amendment allowed the Orbán administration the possibility to enact measures which are undemocratic and go against the principle of rule of law, though the government has only made practice out of these theoretical possibilities to a minimal degree.

The European Commission: The Good Cop

Since the Hungarian Parliament's passage of the Fourth Amendment, EU institutions, in addition to the Council of Europe, have been constant critics of the Orbán administration. In a joint statement issued on the day of the amendment's acceptance,³ the President of the European Commission, José Manuel Barroso, and the President of Council of Europe, Thorbjørn Jagland, have criticized the legislation as being disharmonious with the requirements of the rule of law, the *acquis communautaire*, and the standards of the Council of Europe. Shortly after this, the President of the European Commission assigned the matter to his personal competency and addressed three areas of concern in a letter to Viktor Orbán.⁴ One of Barroso's issues was with the provision which allows the state to levy taxes with the names of the Court of Justice of the European Union or the Hungarian Constitutional Court if the punitive or annulling measures of these organs result in additional expenses for the state. This means that the Hungarian people can be made to believe that the cause of their taxation is the European Court in a constitutionally regulated manner. The President also criticized the provision which allowed the head of the National Judicial Office (OBH), the wife of a Fidesz MEP, to assign court cases to the courts of her choice. Mr. Barroso also protested the constitutional regulation of political campaigns. The currently applicable legislation disallowed political advertisements from highly popular commercial media and thus restricted the right to informational freedom.

The critique offered by the President of the European Commission shows the limitations of the institution's power and/or commitment to handle the democratic problems of Member States. The most important issues presented by the Fundamental Law - namely the *de facto* abolishment of the system of checks and balances, the constitutional reintroduction of provisions previously overruled by the Constitutional Court, and the limitation of the Constitutional Court's powers – were not addressed by President Barroso's assessment. Though the review offered by European Commissioner for Justice, Fundamental Rights and Citizenship, Viviane Reding, was harsher than that delivered by President Barroso and even recommended the suspension of Hungary's voting rights according to the Treaty of European Union's Article 7, the execution of this measure is highly unlikely due to the distant possibility of 4/5 member state and 2/3 European Parliament consensuses.

3. http://europa.eu/rapid/press-release_MEMO-13-201_en.htm

4. <http://www.aedh.eu/plugins/fckeditor/userfiles/file/Démocratie%20et%20citoyenneté/communiqué%20de%20la%20commission%20européenne%20sur%20le%204e%20amendement%20à%20la%20constitution%20hongroise.pdf>

The European Parliament: The Bad Cop

While the hands of the European Commission are tied when it comes to Hungarian constitutional amendments, the European Parliament is visibly trying to expand its own and, consequently, the European Union's array of instruments for the investigation of the democratic configuration of its Member States. As a part of this initiative, MEP Rui Tavares submitted a report detailing the situation of fundamental rights in Hungary.⁵ Though the report examined not only the Fundamental Law of Hungary but also the broader qualities of the country's democracy, most of its concerns were centered on the Fourth Amendment and the basic law. The report voiced sharp criticism for the manner of the Fundamental Law's acceptance: the lack of transparency, the insufficient involvement of the opposition and NGOs, and the inclusion of provisions which were previously deemed unconstitutional by the Constitutional Court. The Tavares Report states that the Fundamental Law regulates areas which could be better controlled through lower level legislation and as such, the basic law's goal is simply to radically limit the maneuvering abilities of future governments. In its conclusion, the report is surprisingly outspoken by European diplomatic standards, and it holds the possibility of the Hungarian government's violating the values recorded in Article 2 of the Treaty of European Union to be quite distinct. Based on these observations, it recommends a procedure according to Article 7, and consequently, for the first time in its history, the European Council could determine that a Member State violated the EU's most basic principles.

The Tavares Report, the acceptance of which is expected in July, shows the obvious commitment of European political forces to reverse the anti-democratic strides of the Orbán administration. This is swimmingly illustrated by the fact that the decisive majority of Fidesz's amendments aimed at the pacification of the report remained unapproved even by Fidesz's own family of parties, the European People's Party. Step by step and in small increments, the EPP is distancing itself from Fidesz. Since the European conservatives are still very far from cutting the party off completely, Fidesz can fight its European battles with confidence - for now. However, this does not mean that the EU does in fact have the tools to force the Hungarian government into radical changes, because for Article 7 to take effect, the support of 4/5 of all Member States is necessary. Currently, this is a highly unlikely outcome. Furthermore, the Hungarian government is still very adept at systematically styling the Tavares Report and criticism by the European Commission and other international organizations as part of a war against Hungary; one which is solely aimed at "diminishing the government's ability to combat big business".

The Hungarian Opposition: Increasingly Limited Options

The dilemma of the Hungarian opposition has remained unchanged since the election of Viktor Orbán. Since the country's legal security and the governance's violation of democratic principles only enrages a narrow segment of society, the opposition is unable to gain votes by keeping the issue on the agenda. Still, the major opposition party, the Hungarian Socialist Party has demanded that the government abolish its antidemocratic practices and return to the rule of

5 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0229+0+DOC+XML+V0//EN&language=hu>

law, while ex-PM Gordon Bajnai's party turned to the ombudsman. Even the far-right Jobbik party criticized the Fourth Amendment, though they eventually abstained from voting because they agreed with the heterosexual definition of families included in the bill. However, the opposition's domestic leverage has been limited considerably. The government does not include opposition initiatives on the parliamentary agenda, most independent democratic institutions are now controlled by those loyal to the administration, and opposition media have been visibly reduced. Due to the limited domestic voter enthusiasm and maneuvering room, the Orbán cabinet only alters the Fundamental Law based on foreign criticism.

The Fifth Amendment: Smoke and Mirrors for the World

While domestic criticisms have been ignored by the Hungarian government, it responded to foreign criticism on two levels: on legal level and on communication level. Though in their diplomatic communication Viktor Orbán indicated to President Barroso that he will heed his warnings,⁶ the entire Hungarian right-wing press machine commenced a mudslinging campaign against José Manuel Barroso, Viviane Reding, and the European Commission in general.⁷ To supplement this effort, the Prime Minister has stated that the Commission is attacking Hungary to “deter it from the political and economic path which [it] currently represent[s].” He added that Viviane Reding “was not delegated to the European Commission to offend nation states and European nations, like the Hungarians, but to serve us.”⁸

Despite everything, the administration did consider two out of the EC's three points, and as a result, it intends to remove the CJEU as a possible scapegoat from the Fundamental Law and disallows the head of the National Judicial Office the right to assign cases to courts through the so-called Fifth Amendment, a legislation awaiting passage.⁹ The administration retained its stance on the regulation of political advertisements. Politically, it is “unnecessary” for them to budge, because the 2014 EP and parliamentary elections will be over by the time the CJEU has an opportunity to bring an unfavorable decision in the matter. Moreover, the administration's war against the EU surfaced in a communication panel inserted into the legislative justification of the Fifth Amendment: “the abolishment of case reassignment [forced on Hungary by the EU] will cost the Hungarian taxpayer at least six billion forints in the next five years.”¹⁰

This kind of behavior will presumably continue to characterize the Orbán government. In fields where an infringement procedure can be forced through, it will make apparent concessions to the European Union. At the same time, it will not resist in all other areas where the EC or other international organizations have no effective instruments. Because the greatest issue with the Fourth Amendment was the practical removal of oversight from Fidesz and the Orbán cabinet, partially remedying the issues posed by certain provisions through the Fifth Amendment will not be sufficient to resolve the dilemma. PM Orbán will only show a desire for consensus if the

6 <http://www.kormany.hu/download/e/39/d0000/barroso20130412.pdf>

7 See: <http://hungarianspectrum.wordpress.com/2013/06/22/viviane-reding-is-the-target-in-the-hungarian-war-of-independence/comment-page-1/>

8 <http://www.vg.hu/gazdasag/gazdasagpolitika/orban-elfogadom-barroso-hibas-allasponjtjat-401990>

9 <http://www.parlament.hu/irom39/11545/11545.pdf>

10 <http://www.parlament.hu/irom39/11545/11545.pdf>

denial of a retreat will present the threat of negative economic consequences or a drop in domestic popularity. The Hungarian and international oppositions can only affect the administration in questions of democracy when they consider these factors.

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