

Dismantling direct democracy: Referenda in Hungary¹

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In populist or, rather, in illiberal systems, after the conquest of independent institutions, referenda and other tools of direct democracy (such as civic disobedience, protests, strikes) become even more important as units of the diminishing set of instruments used to assert people's interests against those in power. Since 2010, the Hungarian government has been successful at preventing any unwanted referendum to take place. Even more concerning is the fact that with the anti-quota referendum, one of the gravest dangers of illiberal politics seems to be materialising: the leadership's reaction is making the tools of direct democracy (besides those of representative democracy) meaningless.

The prelude to this was the reformulation of the legal environment for referenda in a way that it became significantly harder to initiate a referendum and to conclude it successfully. Although the theoretical chance for this is still there, referenda could continue to be the strongest tool outside of Parliament to balance the government's politics, however, this device is much harder to access.

The changes in the legal environment of referenda since 2010

In 2011, Parliament agreed to a new Fundamental Law, which was only supported by the supermajority of the parties in government. In 2013, a new Act on Initiating Referendums, the European Citizens' Initiative and Referendum Procedure was promulgated (Act CCXXXVIII. of 2013, afterwards: Referenda Law). The framework of referenda is provided by this piece of legislation.

- Similarly to the situation before the new law, the requirement for holding a legally binding referendum is still the collection of the signatures of 200 thousand Hungarian citizens. By keeping this precondition the same, Fidesz did show some self-restraint, probably not independently of the fact that there has been no party besides Fidesz to be able to successfully initiate a legally binding referendum in opposition since 1990.
- The most important alteration is that the Fundamental Law reverted to the pre-1997 requirement for validating the referendum, necessitating the participation of over half of eligible voters in the referendum. (Decisiveness is almost given in case of a valid referendum, since the vote would only be indecisive if both possible options gained 50 per cent of support.)

¹ This is the summarised version of Political Capital's study in Hungarian. The original one is available [here](#).

- Non-binding referenda are not included in the Fundamental Law and national popular initiatives were abolished as well. The latter obliged Parliament to discuss problems found important by 50 thousand voters. During the first two decades after the transition, these options did not become significant instruments of the opposition, NGOs or individuals to pressure those in power, which had something to do with the fact that these instruments did not oblige Parliament to legislate. Despite that, another two not politically irrelevant tools are missing from the inventory of the opposition against the government in power.
- Another aim of the legislator was not to allow for hindering the work of the electoral institutions with “not serious” questions. The Referenda Law tries to achieve this by requiring the person initiating the referendum to collect between 20 and 30 signatures to even start the authentication process. In addition to this administrative barrier, officials may now refuse questions containing “obscene” or in any way “shocking” statements without a meaningful inspection. This might be an even more subjective category than “not serious”, which opens the gate to arbitrary processes.

Lack of regulation for the referendum campaign

Since the 2003 EU-referendum, the topic of financing for the referendum campaign comes up again and again. Undoubtedly, because of the lack of regulation, the government, which can basically promote its stance without limits, has a significant advantage.

The Referenda Law only deals with the topic in one paragraph, which cannot be seen as more than a declaration of principle: *“69. During a national referendum campaign period, political advertisements may be published by the organisers of the initiative and by political parties not involved in the organisation of the initiative but having their respective groups in Parliament. As to the publishing of political advertisements, the rules governing the election of Members of the European Parliament shall apply.”*

It is practically unexplainable what the constitutional justification is for only allowing parties having a parliamentary group to publish political advertisements besides the organisers (this is implicitly criticised by the justification of resolution 1/2013 of the Constitutional Court). The financing of the campaign is not regulated by any law, thus there is no assurance that different views have an equal or, in fact, any chance to reach voters. As a result of this defect, referendum is a significantly less competent institution to fulfil its role as a counterbalance to those in power.

Handling initiatives on the same topic, the main barrier to referenda by the opposition

Before 2010, the most anomalies were caused by the lack of preparedness of the regulation to handle initiatives on the same topic. The law remained silent on what happens if two or more questions on

the same topic arrive to the National Election Office (afterwards: NVI). It is not politically negligible how the question asked is formulated.

The Referenda Law of 2013 solved the problem with the introduction of a *moratorium on parallel questions on the same topic*, which meant that among questions on the same issue, the first one to arrive was prioritised. The law defines initiatives on the same topic as those which partially or fully match or would oblige Parliament to accept contradictory legislation. The goal is legitimate, but the restriction was disproportional.

The moratorium introduced in 2013 (which was in effect until 20 May 2016) drastically hindered the chance for the certification of referendum questions in topics uncomfortable to the government. This rule set a barrier at the point of handing in the initiative: the gathering of signatures could not start for more than one question covering the same topic. According to the law in effect at the time, from the moment a question arrived to the electoral authorities, no other initiative covering the same topic could be started until the previous one was rejected in a legally binding decision. This process could take up to 4-5 months. At the moment when the Curia (Hungary's Supreme Court) published its legally binding resolution to reject the question, the limitation was lifted, and a new one could be delivered to the authorities. This was why in these moments citizens ready to act were always waiting in the NVI's assembly hall and the consequence of this was more and more bizarre scenes after every single decision taken by the Curia: the opposing sides waited for the Curia's resolution and then started to compete in childish ways to be the first to validate their own referendum question.

The most serious episode of this was the "skinhead scandal", which led to basically no consequences, when a group of muscular young men waiting in the assembly hall of NVI used physical force to block the opposition Hungarian Socialist Party (afterwards: MSZP) from initiating a referendum on the mandatory Sunday closure of shops. On this day, on 23 February 2016, legislation proved inadequate to stop a referendum initiative of the opposition: on this day, governance by physical force won. Despite obvious evidence, the National Election Committee – mainly made up of pro-government members – was unable to redress the issue, although the Curia did so weeks after the scandal erupted: in the end, they certified the question of the MSZP. The stakes of this were lower at this point, because the government had already been working on plan B, preparing for lifting the ban on shops opening on Sundays, meaning that they were also working on stopping the opposition's referendum, in which they were successful.

The only positive consequence of the shameful skinhead scandal was Viktor Orbán's statement the following day, announcing that the Referenda Law needs to be amended. This had been crystal clear for everyone before that, but the political decision to modify the law was made only after the scandal.

The most important part of the amendment package that was put on the desk of MPs in April 2016 and promulgated a month later – a modification in line with experts' criticism and the previous recommendations of the NVI – is that it abolished the moratorium on parallel questions on the same topic. According to the new regulation, election authorities may certify more than one question on the same topic and the organisers are allowed to compete with each other in collecting the signatures.

The first question supported by the signatures of 200 thousand people “wins”, it is the one a referendum must be held on. This certainly prevents scenes seen previously in the assembly hall of NVI to happen again in the future.

Despite all this, opinions on the new solution are divided, the Hungarian Civil Liberties Union (afterwards: HCLU) and the Eötvös Károly Institute (afterwards: Ekint) voiced their concerns that the competition between initiatives on the same issue might fragment voter support. They will have the right to support more than one initiative, but the fact that they can do so might easily confuse them, while, in addition, they will need way more information to decide which one they want to support. Political Capital’s opinion is that the concern is legitimate, however, the solution is undoubtedly better than the previous one and the specific communication problem does not seem to be insurmountable: the organisers of the referendum could give some unique flyer to those who signed their sheet.

The government’s anti-quota referendum

On 24 February 2016, the day after the skinhead scandal, Viktor Orbán also announced that the government would initiate a referendum against mandatory relocation quotas. The question is the following: *“Do you want to allow the European Union to mandate the resettlement of non-Hungarian citizens to Hungary without the approval of the National Assembly?”*

Although the question made it through Hungarian authorities with ease, Political Capital, in a joint opinion paper written together with three civil organisations (HCLU, Ekint, and the Hungarian Helsinki Committee), indicated that in their view the government’s question is against regulations in place at the time, thus the Curia should have refused it for the following reasons:

1. *The referendum question’s topic is not the competence of the National Assembly*
 - a. *A nation-wide referendum may only be held if the topic of it is the competence of the National Assembly. The government’s referendum initiative falsely suggests that the referendum might lead to a decision taken by the National Assembly, which would overwrite the jointly accepted EU regulations and decisions.*
 - b. *The stance represented by the government on the EU level with regards to the relocation system is formulated by the government, the National Assembly’s views does not bind the government in any way. Thus, the National Assembly does not have the mandate to decide how the quota regulation of the EU should look like. In the European Union, the rules of making decisions jointly with other member states have their own guidelines, which Hungary already accepted by joining the union.*
 - c. *Contrary to this, the Curia believes that the government’s referendum does not aim at overwriting the EU’s quota regulation, but at something else, in which the National Assembly is certainly competent to legislate. It cannot be pointed out based on the Curia’s decision what the referendum on mandatory relocation does aim to achieve.*
2. *The referendum question is not unambiguous*

- a. *The Curia's resolution might state that the question is unambiguous, but it still can be unclear to the electorate what the object of the government's referendum is – similarly to how it is possible that it is obscure to the National Assembly what obligation to legislate they will have as a result of the people's decision. It is futile to talk about a legitimate referendum if the electorate votes on a question with no defined meaning, while the National Assembly is able to interpret the result as a carte blanche mandate.*

All these arguments counted for nothing, the institutional system could not repulse the government's desires. The case of the mandatory closure of shops on Sunday proved to be stoppable for 15 months by fake questions (and a physical demonstration of force in the last stage) and when the situation turned untenable, the government found the adequate way to escape – and, at the same time, raised the stakes and took over the stance of those initiating the referendum as well. The weight of the decision of the Curia regarding Sunday closure declined and then it reached a resolution favourable to the government in the case of the quota-referendum, which had become the more prominent question anyway.

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