



Hungarian Helsinki Committee



EÖTVÖS KÁROLY
POLICY INSTITUTE



HUNGARIAN CIVIL LIBERTIES UNION

The second wave of legislation by Hungary's new Parliament – Violating the rule of law

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In July 2010 three NGOs, the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee assessed the method and pace of the legislative work of the newly elected Hungarian Parliament, and voiced their criticisms regarding the provisions deemed as violating the principle of the rule of law.¹

In the recent document the three NGOs above focus on those elements of the system of checks and balances which were eliminated or significantly weakened by the decisions of the Government. Unconstitutional legislative changes, adopted since September, are also addressed.

I. Disrupting the system of checks and balances

The division of powers between different branches of government is an essential feature of a state based on the rule of law. The division of powers and the system of checks and balances are fundamental institutional and operational requirements of a constitutional state. Fundamental rights may be protected and the multi-party system may operate only if the decisions of state institutions are overseen by independent institutions. If there is a lack of independent control, constitutionality may not prevail. Whether the country may be governed effectively, depends on whether the Government bears the confidence and support of the Parliament. Thus it is of utmost importance that institutions independent of both the legislative and executive branch of power may operate as checks and balances as opposed to the will of the current political majority, in order to protect constitutional values.

In the last six months the Hungarian Government has decreased the powers of independent institutions and has adopted a range of decisions violating the rule of law.

The Parliament in Hungary is unicameral, and the parliamentary democratic system prevails. The Government operates with the support of the parliamentary majority, thus there is a strong link between the legislative and executive branch of power. This fusion of powers, a genuine feature of parliamentary systems, gives a lot of weight to institutions independent from governmental authority. The Parliamentary opposition has limited tools to control the Government and its supporting majority beyond the publicity the Parliament guarantees to political parties. As far as

¹ Available at:

http://helsinki.hu/dokumentum/Hungarian_NGOs_assessing_legislation_July2010.pdf,
<http://tasz.hu/en/hirek/assessing-first-wave-legislation-hungarys-new-parliament>

legislation is concerned, the most important procedural brake is the fact that certain Acts of Parliament require two-thirds majority. The requirement of a two-thirds majority, created during the transition in 1989-1990, was intended to ensure that none of the political parties dominate in certain important questions such as basic constitutional rights and rules concerning independent constitutional institutions. Until May 2010 the requirement of two-thirds majority functioned as an actual control over the governing majority in power in the Parliament. Until 2010 it happened only once, between 1994 and 1998, that the Government had two-thirds of the seats in the Parliament. Even though on a number of issues the ruling parties failed to seek the consent of the opposition regarding certain Bills requiring a two-thirds majority in the term mentioned above, they also expressed their intent to cooperate with the opposition. For example, they set out that the Parliament shall decide on the new Constitution by a four-fifths majority.

In the Hungarian constitutional system the independent institutions such as the Constitutional Court, the National Bank of Hungary and the judicial system constitute the most important constitutional controls. The President of Hungary may also be regarded as another such control, as the President has the power to ask for the constitutional review of Bills adopted by the Parliament before promulgating them, thus preventing the Bills from coming into force.

The Constitutional Court has the most important role among the constitutional checks, since it may annul any law that it deems unconstitutional. Anybody may initiate the constitutional review of any law, consequently, the Constitutional Court may review practically all legal rules. However, there is no deadline for decisions by the Constitutional Court. By interpreting the provisions of the Constitution, the Constitutional Court has played an active role in establishing the rule of law from the transition onward.

See also:

Hungarian Civil Liberties Union (TASZ)

<http://tasz.hu/en/freedom-of-speech/hclu-criticise-constitution-writing-process>

1. The procedure of framing the new Constitution

After the transition, the Hungarian Constitution was completely renewed. The Constitution in force is based on the principle of democracy and the rule of law, and reasons for amending it may be only symbolic. In the European context the Hungarian Constitution is easy to amend, since it requires only the votes of two-thirds of MPs.

The Government intends to adopt a new Constitution within the next few months (according to certain statements, as soon as in March 2011). The pace of the procedure for framing the new Constitution, recalling times of revolutions, excludes the possibility of public discussion: the procedure began in September, and basic principles were already laid down by the beginning of December. Due to the lack of time to draft certain important constitutional elements, the Government plans to simply omit them, and intends to instead regulate these topics in separate, special Acts. This method would endanger the stability of the constitutional system for a number of reasons. First of all, it is not known when the Parliament intends to adopt the separate Acts referred to above. Furthermore, the guarantees aimed at protecting the Constitution and ensuring the stability of it will not be applicable in case of these special Acts, meaning that rules concerning fundamental constitutional institutions may be amended easily. Besides, there has still been no real political discourse about the necessity of a new Constitution. The cornerstones of the Constitution were agreed upon by the parties in 1989 – that is why it may have been the base of the Hungarian democratic discourse. The Constitution serves as the standard of rights and the

operation of the state and it always means more than its pure text. The passage of time in itself strengthens the legitimacy of the Constitution, and as time goes by the Constitution gains new layers of interpretation and practice. Currently, opposition parties do not take part in the preparation of the new Constitution. Since the planned Constitution triggers a political battle, it may be doubted whether it could fulfil its integrative function.

See also:

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<http://tasz.hu/en/freedom-of-speech/hclu-criticise-constitution-writing-process>

2. Branches of power – decreasing the power of institutions

2.1. Restricting the powers of the Constitutional Court

The powers of the Constitutional Court have been restricted so that it may review the constitutionality of Acts and Bills on state budget and central state taxes only in certain cases. The Constitutional Court may not assess these legal provisions with regard to the rule of law, the principle of the proportionality of burden-sharing, and the prevalence of the right to property.

Amending the Constitution in a way that decreases the scope of legal rules which may be reviewed by the Constitutional Court is of utmost seriousness, since the Constitution may limit state powers, guarantee the rights of individuals and fulfil its role as the basic norm of a legal system only if there are means to ensure that the rules enshrined in it prevail. If the Parliament excludes the possibility of a constitutional review regarding certain topics, then there will be no consequences for violating the Constitution in those areas.

See also:

Hungarian Civil Liberties Union (TASZ)

<http://tasz.hu/en/news/five-ngos-joint-letter-venice-commission-european-council>

<http://tasz.hu/en/news/let-s-protect-rule-law-hclu-action-against-modification-constitution>

Hungarian Helsinki Committee

http://www.helsinki.hu/dokumentum/CoE_const_court_en.pdf

2.2. Administration of justice

a) Dismissal without justification and its proposed extension to all civil servants

According to the reasoning of the relevant Act of Parliament, the dismissal of certain civil servants without justification was necessary because the state as an employer may dismiss civil servants only if the dismissal is supported by real and rational reasoning, only in certain cases and only on special grounds (i.e. unsuitability), but the current practice of judicial review of dismissals does not leave much space for applying these rules. Thus, in the Parliament's view, courts do not perform their tasks adequately and have established an inappropriate practice, consequently, it is necessary to grant the Government the right to dismiss its employees without justification. This means that the governance has eliminated effective remedy and the possibility for a judicial review as far as dismissals are concerned. In addition to all this, the possibility of dismissal without justification may be extended to all civil servants in the near future.

b) Chief Public Prosecutor

The governance has carried out significant changes also with regard to the constitutional status of the public prosecutor's office. It has to be highlighted that in the future the Parliament will elect the Chief Public Prosecutor by two-thirds majority instead of a simple one; the term of the mandate has increased to 9 years from 6, and MPs may no longer pose interpellations to the Chief Public Prosecutor. According to the reasoning of the relevant Bill, the changes above were intended to reinforce the independence of the public prosecutor's office. However, the means applied by the governing majority do not strengthen the independence of the institution, but further decrease its legal and political responsibility. The extension of its term strengthens the Chief Public Prosecutor, whereas eliminating the possibility of interpellations abolishes democratic control and responsibility of the institution, being independent mainly from a legal point of view. If the governance had actually wanted to strengthen the independence of the public prosecutor's office, certain guarantees should have been established, such as excluding the possibility of re-election for the Chief Public Prosecutor, along with the introduction of rules ensuring transparency. However, no changes along these lines have been carried out.

c) Judges summoned by a parliamentary committee

The subcommittee of the Human Rights Committee of the Parliament established to investigate rights violations committed between 2002 and 2010 intended to bring several judges to account for infringements committed in Autumn 2006, with special regard to first instance decisions ordering pre-trial detention, most of which were repealed by the second instance courts. Máriusz Révész, MP of the governing party, said that judges who have made wrong decisions do not have the right to be part of the judiciary. However, no parliamentary subcommittee has the right to review judicial decisions, or to call any judge to account because of a judicial decision. To oblige judges to show up in front of the subcommittee seriously violated the constitutional principles of judicial independence and the separation of powers, even if the judges decided not to give accounts of individual cases.

2. 3. Economy-related questions: the Fiscal Council

With the support of the ruling parties, the Parliament adopted a Bill aiming to revoke the 835,5 million HUF budget of the Fiscal Council. This modification is equal to the dissolution of the Council.

The Fiscal Council was set up in 2008 with an independent status vis-à-vis the Government. The Fiscal Council was entrusted with the task of promoting the transparency and sustainability of Hungary's public finances through analysis, surveillance, and communication. Its functioning is based upon professional guidelines, which made the Fiscal Council similar to the British fiscal council that has been set up recently.

The dissolution of the Fiscal Council deprives the public of an independent, non-partisan organ that could provide the public with reliable information. Shutting down the Fiscal Council means that the asymmetric information relationship between Government and the public will no longer be rebalanced.

Furthermore, according to a recent proposal, the Fiscal Council will be replaced by a new agency, charged with similar mission. This agency would consist of the President of the Audit Office of Hungary, the President of the National Bank of Hungary, and an expert nominated by the President of the Republic. The new agency would not be provided with appropriate group of

experts. Without the formal dissolution of the Fiscal Council, the relationship between the hypothetical new agency and the Fiscal Council remains unclear.

3. Weakening independent institutions

3.1. The current President of Hungary

Pál Schmitt, former European and Hungarian MP of the Fidesz and former deputy chair of the Fidesz was elected to President of Hungary by the Parliament. The powers of the Hungarian President are weak in an international context, but still, they may provide an important balance to the legislative branch, since the President may initiate that the Constitutional Court reviews Bills adopted by the Parliament before they are promulgated or may send Bills back to the Parliament for reconsideration. Furthermore, the President initiates the appointment of the heads of independent institutions (e.g. Ombudsmen, head of the Supreme Court) and may issue political statements aimed at drawing public attention to flagrant discrepancies as far as the democratic functioning of state machinery is concerned. These means were often used by the former President László Sólyom.

However, the new President has already declared at his hearing in Parliament that he will be the engine of legislation instead of an obstacle to it. Today there is no such link as „Motions for a constitutional review” on the website of the President. Thus, the parliamentary majority elected a person to the most important state position who had promised to his party in public beforehand that he will not use any of his constitutional powers which may mean a control over the party’s parliamentary majority.

3.2. Media Council

With the implementation of the new media law, the Government will have an increased influence over the telecommunication and media sectors. Only Fidesz nominees were elected to the Media Council, meaning that no places were left for the opposition or the Fidesz alliance (KDNP) party. It is very unlikely that professional assessments will overcome backroom political deals on crucial questions concerning the distribution of TV and radio frequencies, public resources, or guidelines of public media.

II. Other highly debated issues of the last months

1. Private pension

According to the relevant legal provisions, the membership of those who joined private pension funds will cease and their assets in the funds will be automatically shifted to the state-run pension system, unless they expressly and personally declare otherwise. Those keeping their membership in private pension funds will not accrue any services from the state-run system in the future, even though they will contribute to the state-run pension system to the same extent as those who join it.

The Constitutional Court of Hungary declared in 2003 that amounts paid to the private pension funds should be protected as the property of those paying it. The legal provisions above violate the right to property, because persons who are members of private pension funds for more than a decade have no real chance to consider their possibilities, since keeping their membership in private pension funds goes hand in hand with losing their future state pension. Accordingly,

joining the state-run pension system will not be a voluntary decision, but instead a forced occurrence. Furthermore, the provisions violate the requirement of equal treatment, since they discriminate between persons contributing to the state-run system to the same extent when deciding on future pension claims.

2. Retroactive legislation

The ruling parties breached the fundamental principle of the prohibition of *retroactive legislation*. Due to the eighth constitutional amendment of this term any income from public funds (from pensions to education grants) can be taxed retroactively up to five years. The protection of private property is seriously undermined by this amendment. The only constitutional hurdle is not to revoke the totality of the income, but 99% is constitutional under these new circumstances.

The Constitutional Court struck down the law on 98% extra tax on certain revenues. In its decision, the Constitutional Court declared the law unconstitutional on its face unanimously, because of the violation of the prohibition of retroactive legislation. Afterwards, the ruling parties voted again for the extra tax on certain revenues. The new law states that those in certain positions from 2005 on, are obliged to pay extra taxes on the severance payments that are above the 2 million HUF threshold. This law severely contradicts, again, basic constitutional principles, such as the prohibition on retroactive legislation, violates the right to private property and the principle of equal contribution to public finances.

In our opinion the Constitutional Court has the possibility to rule on the issue even after the constitutional amendment restricting its jurisdiction regarding central tax-related Acts, since those tax-related Acts that would violate the principle of human dignity could be declared unconstitutional. In terms of the extra tax, the Act differentiates between e.g. a local notary and a civil servant working for the local government. Since there is no underlying reasonable principle for this differentiation, the Act violates the requirement of equal treatment, derived from human dignity.

3. Media regulation

The Parliament has debated three Bills concerning the media since summer: one relating to content regulation of the media, one relating to new media authority and regulatory power, and one concerning procedures and sanctions. All of them were submitted by MPs, not the Government. This ensured that the “media-package” will not be disclosed to public consultation. Also, no detailed study underlying the need for the regulation will be published prior to parliamentary discussion – only Government plans have to meet these requirements in advance.

The Parliament adopted the Act on content regulation of media in November. The basic approach of this Act is to place all media in the same regulatory basket: television, radio, online and printed press (including professional blogs). They will have to meet the same content regulation standard. The Act will seriously endanger freedom of the press for several reasons. First, media content providers should not hurt the „public morality”, sensibility of churches and of the majority. Finally, journalists’ source protection will be entirely taken away.

The latest Bill concerning the media, introduced on the 22nd November, and likely to enter into force on 1st January 2011, contains sanctions for breaching content regulation, rules on competition, and media pluralism. The mission of the new media authority will be described in detail by this new law.

Moreover, the Bill will enact a compulsory registration system for all content providers. The maximum amount of fines for national television broadcaster is set to 200 million HUF, and to 25 million HUF for national printed and online newspapers (including blogs with banners and advertisements). The media authority will have the power to suspend or even shut down Internet websites that does not meet the requirements. The Bill will establish legal responsibility beyond the press for intermediary providers. This shift would be in sharp contrast with EU regulation. According to the original plans, decisions of the authority may be subject to judicial review, but submitting a motion to the court would not have any suspending effect as far as the execution of sentences is concerned.

See also:

Hungarian Civil Liberties Union (TASZ)

<http://tasz.hu/en/freedom-of-speech/statement-hclu-regarding-new-amendment-proposals-presented-relation-media-law>

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