

Memorandum

Remarks of the Government of Hungary on the Report of the European Parliament on the Situation of Fundamental Rights in Hungary

The European Parliament is scheduled to vote on its report on the situation of fundamental rights: standards and practices in Hungary (the “Report”) on 4 July 2013. The Hungarian Government believes that the approach, the content and the conclusions of the Report essentially question the founding principles of the European Union, the balance between the Member States and the institutions of the Union, as well as the relationships among the various bodies of the EU. The possible repercussions of the Report therefore hold significance not only for Hungary. Especially as the Report, once adopted, can be used in the future as a justification for the European Parliament to place under “tutelage”, in an arbitrary way, any Member State without any authorisation to do so.

In view of the above, the Hungarian Government feels compelled to summarise its most important remarks on the Report.

Respect for fundamental values and the law of the European Union

One of the key conclusions of the Report is that the new laws adopted in Hungary in the past three years run counter to fundamental European values, such as the respect for human dignity, freedom, democracy, equality, the rule of law and the protection of minorities. In addition, Hungary violates the principle of loyal cooperation within the Union.

Yet, the Report fails to mention a single, identifiable example where Hungary has indeed acted in contravention of European values or European Union law. Instead, it hints trends, amplifies false perceptions and draws conclusions that are out of proportion with the facts.

Hungary has consistently demonstrated its commitment to the values of the European Union. The Hungarian Government has always fully cooperated with the EU institutions and international organisations. By way of example the following must be recalled:

- It was the Government that requested the Venice Commission to evaluate the new Fundamental Law of Hungary, a series of cardinal legislation as well as the fourth amendment of the Fundamental Law. The various opinions of the Venice Commission have led to several amendments to the particular laws concerned.
- In the field of media legislation the Government held a series of constructive exchanges of views with the European Commission and the Secretary General of the

Council of Europe over the past three years, leading to three major amendments of the Hungarian legislative framework on the media.

- The Government is in a constructive and objective dialogue with the European Commission on all EU legal issues that have emerged in the context of the fourth amendment of the Fundamental Law. As a result, the Hungarian Government has already tabled to Parliament an amendment of the Fundamental Law that eliminates the transfer of court cases from the Hungarian legal system as well as the possibility to introduce a special tax to follow up the judgements of the European Court of Justice with budgetary implications. In addition, the Government has informed the Commission of its readiness to allow free-of-charge political advertising in commercial broadcasting services during election times.
- On all other EU-related matters raised in the past two years, the Government has either reached an agreement with the European Commission or, where the case was eventually referred to the European Court of Justice, it has fully implemented the judgement of the Court.

Hungary's compliance with European values has been eloquently confirmed by the vote of the Parliamentary Assembly of the Council of Europe on 25 June 2013 that rejected, by an overwhelming majority, the proposal to initiate a monitoring procedure against Hungary.

Racism, anti-Semitism, persecution of the Roma, criminalisation of the homeless

An equally serious charge against Hungary is that it grossly and systematically violates fundamental human rights. In complete ignorance of the facts, the Report pictures Hungary as a land of racism, anti-Semitism, the persecution of the Roma and the criminalisation of the homeless. This is manifested not only in a series of unfounded statements, but also in an underlying narrative that while Hungary once used to be an inclusive and tolerant society, today's public life is dominated by racist crimes and anti-Semitic discourse, all that with the active support of the Government.

These are the most dangerous statements against the reputation of a country; such allegations call for a detailed repudiation.

Despite the various written comments submitted, the Report still holds the current Government responsible for all human rights violations that took place in the country before 2010 (i.e. before this Government took office). It does so in spite of the fact that today's Government did more than any of its predecessors to correct and control the racist tendencies prevalent in Hungarian society and public life.

The Report fails to recognise the following facts, repeatedly communicated to the rapporteur by the Hungarian Government:

- It is this Government that introduced criminal sanctions against the marches of extreme right paramilitary groups that generate public fear.

- It is this Government that established a civil law claims mechanism against hate speech.
- It is the new Criminal Code adopted under this Government that renders Holocaust denial, the use of Nazi symbols, violence and incitement against the Jewish or the Roma community a crime.
- It is this Government that introduced the compulsory education of the Holocaust and Roma history in public schools as well as declared 2014 Holocaust Memorial Year.
- This Government actively supports Jewish revival in Hungary.
- Government It is this Government that elevated Roma integration to an absolute national and EU political priority.
- It is this Parliament that created a constitutional obligation on the state and municipalities to provide appropriate accommodation for homeless people.

It is a fact that the Prime Minister of this Government has been the target of attacks by anti-Semitic and racist groups for years. Therefore, it is all the more regrettable that the Report fails to take account of the fact that the leaders of Hungary have in the past rejected any public statement or incident of a racist motive with zero tolerance and will do so in the future. Thus, based on a selective and biased recollection of a small number of regretful, but isolated incidents that have no connection to the Government whatsoever, the Report creates a grossly detrimental image of Hungary.

Reform of the constitutional system of Hungary

Another important conclusion of the Report is that, abusing its two-third majority in Parliament, the Hungarian Government practices a quasi “constitutional dictatorship”. In the evaluation of the Report the governing majority has, in an act of constitutional “coup”, adopted a new Fundamental Law without popular consultation and against the will of the opposition. Subsequently, the governing coalition, in a matter of few weeks, has ossified its own power structure through so-called cardinal laws (acts requiring two-third majority in Parliament).

The Report thus identifies a “systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames” that seriously jeopardises the rule of law, a core principle of European integration.

The historic context is the following: the last time a new constitution was formally adopted in Hungary prior to the 2011 Fundamental Law was in 1949, shortly after the communist takeover of the country by force. The 1949 constitution was substantially amended by the last communist Parliament in 1989, just before the first democratic elections. The text adopted was thus meant to be provisional even by its own preamble. The socialist-liberal coalition of 1994-1998, that also enjoyed a two-third majority, chose to shape the constitutional system of the country by constitutional amendments and the adoption of a large number of cardinal laws. Among the countries of the former Soviet bloc Hungary was the only one where no new democratic constitution was adopted after 1990. The approval of the new Fundamental Law in

2011 must therefore be seen as the fulfilment of a 20 year old promise, the symbolic conclusion of the political changes of 1990.

As regards the circumstances of the adoption of the Fundamental Law, the Report fails to mention a number of critical facts that have been communicated to the rapporteur by the Hungarian Government. Thus, the Report ignores the fact that the preparation of the Fundamental Law took place over a year through a large number of political, policy and popular fora and events. Over one million citizens participated in a written form in the national consultation process launched by the Government on the main features of the new constitution. The Hungarian Parliament dedicated all its sittings at the 2011 spring term to debating the Fundamental Law, no other legislation was discussed at that time. Against that background it is grossly misleading to claim, as the Report does, that the new Hungarian constitution was concluded over merely 35 days. The rules of adopting the constitution have always required two-thirds of the votes of the Members of Parliament. The fact that two of the opposition parties called off from the preparatory process based on their own political choice does not influence the legitimacy of the process and the text adopted.

The description in the Report of the fourth amendment to the Fundamental Law (adopted in March 2012) is also false. The fourth amendment served a single purpose: to create a clear constitutional situation following a decision of the Constitutional Court on the status of the so-called Transitional Provisions of the Fundamental Law. In that judgement the Court concluded that the some of the Transitional Provisions were indeed permanent in nature and for the formal reason it annulled them. It also called on the legislator to integrate all such provisions into the Fundamental Law itself.

The finding of the Report that the fourth amendment elevated provisions into the Fundamental Law that had been previously found unconstitutional is also seriously misleading. The Venice Commission itself concluded in its opinion, adopted on 14 June 2013 on the fourth amendment of the Fundamental Law at the request of the Hungarian Government, that the fourth amendment did not overrule the decisions of the Constitutional Court (CDL-AD(2013)012). Instead, in reaction to the various decisions of the Court, the legislator introduced into the Fundamental Law new legal institutions that take account of the relevant rulings of the Court.

Furthermore, the conclusion of the Report that the governing coalition regulates a wide range of issues of the daily life of its citizens in cardinal laws, thus compromising any future Government's room of manoeuvre to act, also fails the test of reality. It must be pointed out that the system of cardinal laws in Hungary is the heritage of the 1989 constitutional amendment. The range of issues to be covered by cardinal legislation has remained more or less the same since 1990. In this context the Report also fails to mention that cardinal laws come under the full review of the Constitutional Court.

With regard to the "extensive" use of cardinal laws, it also deserves mention that the socialist-liberal coalition that governed Hungary with a two-third majority between 1994 and 1998

amended the constitution six times, adopted 20 completely new cardinal laws and 19 cardinal law amendments, irrespective of the opinion of the opposition. This exceeds the legislative activism – criticised strongly by the Report – of the current Parliament in the aftermath of the adoption of the Fundamental Law.

To conclude, it must be underlined that the comprehensive reform of the Hungarian constitutional system is over. What happens today is merely the fine-tuning of the new constitutional framework. The past two years have shown that the Fundamental Law and the new cardinal laws provide a suitable framework for the transformation of Hungary into a modern and successful country.

The Constitutional Court

The Report contains a large number of critical remarks on the newly introduced limits on the powers of the Constitutional Court (concerning budgetary laws, repeal of previous jurisprudence, review of the content of the constitutional amendments) as well as the system of election of the judges of the Constitutional Court.

Under the previous system, any person could trigger the annulment of any legislation without having to demonstrate any legal interest whatsoever. The Court itself confirmed that such an open-ended *actio popularis* has created an unmanageable caseload.

Following the 2011 reform, the Hungarian Constitutional Court still remains one of the most powerful institutions of its kind worldwide. By way of reducing the range of statutory applicants and replacing the *actio popularis* with a tailor-made constitutional complaint, the legislator has created a system where only those with a genuine legal interest can seek the annulment of legislation. Moreover, the *ex post* review of legislation with implications on the fiscal status of the state has been provisionally limited (except where fundamental rights are implied). This limitation was necessitated by the serious indebtedness of the Hungarian state and remains in place until the state debt drops below 50% of the GDP. The consistency of the new statute of the Court with the requirements of the rule of law has also been confirmed by the Venice Commission in its opinion delivered on the subject at the request of the Hungarian Government (CDL-AD(2012)009).

The fourth amendment of the Fundamental Law declared that the decisions of the Constitutional Court adopted under the previous constitution were no longer in force, while it explicitly maintained the legal effects of those decisions. This does not mean however, as the Report suggests, that the Constitutional Court is barred from referring to its earlier jurisprudence under the new Fundamental Law, so long as it does not conflict the Fundamental Law itself.

The statement contained in the Report that under the previous regime the election of the members of the Constitutional Court required consensus in Parliament is factually erroneous. The same quorum applies today as earlier: it takes the support of two-thirds of the Members of Parliament to become a judge of the Constitutional Court.

The proposal of the Report to restore the right of the Court to adjudicate the substance of constitutional amendments is absurd. The Constitutional Court never held the right to substantive review of constitutional amendments in Hungary. Consequently, no such right can be restored. If such review powers were bestowed on the Court, this would deprive representative democracy of any meaning as it would elevate the Constitutional Court into the status of a political body whose activity falls beyond the control of the elected representatives of the people.

Independence of the judiciary

The comments of the Report on the independence of the judiciary are unfounded. The report suggests that the independence of the judiciary is in grave peril in Hungary as a result of the premature termination of the office of the president of the Supreme Court, the broad discretion enjoyed by the president of the National Judicial Office in the transfer of court cases and the incomplete reinstatement of the judges that had been unlawfully dismissed. The former president of the Supreme Court has lost his office before the original expiry of his tenure, because the position as such ceased to exist in its original form. This was due to the separation of two completely unrelated functions, previously held by the head of the former Supreme Court: the chief justice of the country as well as the head of the national judicial administration. As a result of the separation, the president of the Curia (the former Supreme Court) now only holds purely judicial responsibilities. On the other hand, the former National Judicial Council (also headed by the president of the Supreme Court under the previous regime) has been replaced by an independent new institution: the National Judicial Office. The organ administers the Hungarian judiciary under the supervision of a new president. In view of these special circumstances, the Constitutional Court has acknowledged that the premature termination of the office of the former president of the Supreme Court was a constitutionally necessary consequence.

As regards the transfer of court cases, the Report fails to recognise the fact that the Hungarian Government has already agreed with the European Commission on the elimination of the transfer mechanism in its entirety from the Hungarian legal system. Any criticism to that effect is redundant.

Similarly, the claim that Hungary fails to fully reinstate the judges that had been unlawfully dismissed is unfounded. Hungary has repeatedly confirmed its commitment to comply with the November 2012 judgement of the European Court of Justice that found that the early retirement of certain judges violated the anti-discrimination directive. Reinstatement of the judges is in progress in accordance with a scheme drawn up in consultation with the European Commission.

The new electoral system

The Report strongly criticises the new Hungarian electoral system on the basis of the fact that its adoption has not been supported by the Parliamentary opposition and that, in its own view,

the new regime does not guarantee the proportionality and the independence of the National Electoral Committee, a body that oversees the transparency of the elections.

The fact that opposition parties did not vote in favour of the new electoral law does not in any way render the electoral system illegitimate or undemocratic. Nobody questioned the electoral laws adopted by the socialist-liberal coalition governing with two-thirds majority in 1997.

The introduction of the new electoral regime was necessitated by a drastic reduction in the number of MPs from 2014 (from 386 to 199). Preparation of the new system took place in a parity-based Parliamentary committee. The new system contains a number of concessions requested by opposition parties, such as relaxing the conditions of candidacy, the positive discrimination of smaller parties.

The critical remarks of the Report on the National Electoral Committee are also completely unfounded. Under the previous legislation of 1997, selection of the members of the National Electoral Committee was a matter of pure party politics. Members were nominated by the minister of interior and endorsed by simple majority in Parliament. In comparison, the new system introduces a number of guarantees strengthening the independence of the institution. E.g. members of the Electoral Committee are nominated by the President of the Republic, Parliament endorses the selection with two-third majority. Proportionality is ensured in the same way as before: Parliamentary parties nominate ad hoc members during the election period with a view to supervising the impartial operation of the Committee.

Upon the request of the Hungarian Government the Venice Commission and the OSCE/ODIHR evaluated the new electoral law in 2012. In their joint opinion (CDL-AD(2012)012) the two institutions concluded that the revised legislative regime “on elections of members of Parliament of Hungary as from 2014 is a good basis for the conduct of genuine and democratic Parliamentary elections”.

In view of the foregoing any suggestion in the Report questioning the transparency of the 2014 Parliamentary elections must be seen completely unfounded.

Pluralism of the media, electoral advertisements

The Report contains general comments on media pluralism in Hungary. It is also critical of the restrictions on electoral advertisements in commercial audio-visual media.

As a result of extensive consultations with the European Commission, the Council of Europe and the OSCE over the past three years, the Hungarian Parliament has adopted three major amendments to the media legislation so far. These modifications have been acknowledged by the Secretary General of the Council of Europe.

With regards to political advertising, the findings of the Report are based on a serious misconception. Political propaganda is not constrained in print and internet press in Hungary. Equally, billboard advertising, distribution of flyers or any other means of direct political

marketing can be employed freely. Moreover, political analyses, talk-shows can feature in any broadcasting programme, internet forums, etc. before and during election times. Limitations only apply to dedicated political advertisements in TV and radio programmes during the electoral campaign. During such period the national public broadcasters allocate proportionate air-time free of charge for all political parties. Such restrictions exist in several Member States. Their aim is to ward off disproportionate influence by powerful economic actors on the election results.

Nevertheless, the Hungarian Government agreed to the request of the European Commission to extend free-of-charge political advertising during the election campaign to commercial media as well.

Recognition of churches, freedom of religion

With regards to the freedom of religion, the Report ignores the information provided by the Government.

In view of the fact that the Constitutional Court, in February 2013, quashed the previous legislative regime, the Government, in April 2013, submitted to Parliament a comprehensively revised new bill on the recognition of churches along the following lines:

- As under the previous rules, any religious community may freely profess and manifest its faith.
- Any religious community may freely call itself a “church”.
- The state may enter into a privileged relationship with certain religious communities. Such privileges mainly comprise financial and legal benefits for the church at issue. In consideration, the church at issue takes an active role in the implementation of community goals recognised by the state.
- Such privileged status is granted by Parliament by the two-thirds of the votes at the end of a recognition process.
- The recognition process is composed of an administrative and a Parliamentary phase. Under the new legislation the applicants may have recourse to a review process in both phases.

The institutional proposals of the Report

The unfounded conclusions and the political bias of the Report remain a concern mainly for Hungary. On the other hand, however, the Report makes a large number of institutional proposals that, as they apply to all Member States, implies a comprehensive overhaul of the current architecture of the European Union that is based on the strict interpretation of the Treaties.

First, the Report calls on every Member State to respect the fundamental values of the Union. To follow up that appeal the Report requires Member States to take part in a so-called “Article 2 Trilogue” that is designed to monitor the performance of Hungary. Moreover, the

Report condemns the European Council for not having properly addressed the “issue of Hungary” and calls on its president to carry out its own evaluation of the situation in Hungary.

Second, the Report instructs the Commission to assume tasks well beyond its statutory competences. Thus, it calls on the Commission to investigate not only the actual implementation of EU law, but also to review large scale systemic changes in the legal systems of Member States. On top, the Report expects the establishment of a high-level “alarm” mechanism to oversee the compliance by Member States with fundamental rights. A key component of that mechanism would be a requirement placed on the Commission to block negotiations in absolutely unrelated fields of EU policy against a “suspected” Member State.

As for Hungary, the Report would oblige the Government to undertake a large number of concrete measures and to report continuously on their implementation. Non-compliance with these new obligations would trigger the Article 7 procedure.

All these new obligations and procedures would come under the watch of a new, inter-institutional formation: the “Article 2 Trilogue”. Such new body – unknown under the EU Treaties – would comprise the rapporteurs of the European Parliament, the representatives of the Council and of the Commission. Its main task would be the supervision of the implementation of the recommendations of the European Parliament by Hungary. Hungary (or any other Member State) would remain under monitoring so long as this body finds it necessary. The “Article 2 Trilogue” would operate in complete legal vacuum. It follows no pre-established procedures or criteria of evaluation, its decisions cannot be challenged in any forum.

Conclusions

The Hungarian Government believes that the adoption of the Report would pose a serious danger to the future evolution of European integration. The Report ignores the competences of the European Parliament, the division of responsibilities among the various EU institutions as well as the sophisticated legally defined system of balances between the EU and its Member States. The Report also disregards the Treaty obligation on the mutual respect for the constitutional traditions and identities of Member States. The Report introduces, in an arbitrary fashion, new mandatory requirements, procedures and institutions in contravention of the Union’s operational order that is based on a strict observance of the Treaties.

In the firm opinion of the Hungarian Government the Report is based on unfounded findings and projects politically biased conclusions. On the one hand it ignores evident facts, while, on the other hand, it depicts standard practices in other Member States as an attack on the rule of law by Hungary. The Report thus draws disproportionate conclusions from an instable factual background. Its recommendations are vague, un-implementable and are completely out of touch with the institutional, legal and political circumstances of the country. In summary, the Report, that applies double standards openly, amounts to an abuse of power by the European

Parliament that is deeply unjust with Hungary and the Hungarian nation. As a consequence, the Hungarian Government rejects the Report in its entirety.

The Hungarian Government is convinced that the relationship between Hungary and the European Parliament must stay within the framework provided by the Treaties, the procedures provided must be followed, and it must be exactly the same as the practice followed in relation to all other Member States of the European Union.
