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A FLEXIBLE CONSTITUTION: THE 4TH AMENDMENT TO THE HUNGARIAN FUNDAMENTAL LAW – PART II

Posted on 25 Marzo 2013 by [Katalin Kelemen](#)

See Part I of this post [here](#).

The text of the proposed Amendment was changed in certain respects during the parliamentary debate and in the constitutional affairs committee. A significant example is art. 19 of the Amendment aiming to modify the Fundamental Law's (FL) Closing Provisions. The proposal's original wording aimed at prohibiting any consideration of previous case-law of the Constitutional Court for interpreting the new FL. It was again a clear response to the Constitutional Court which continued to rely on its previous case-law, i.e. on decisions adopted under the old Constitution. Soon after the entering into force of the new FL, the Hungarian Constitutional Court in the reasoning of [Decision no. 22/2012 \(V. 11.\) AB](#) (available in English) clarified that in cases using the new FL as a basis for review it may anyway use the arguments included in its previous decisions, if the new constitutional provision has the same or similar content as the old constitutional provision. The Court added that it cannot, however, lead to a mechanical application of the previous case-law, but a careful comparison of the relevant provisions of the old and the new constitution is always required (see the reasoning of Decision

22/2012, par. 40-41).

Notwithstanding the Constitutional Court's reasonable approach to transition from the old to the new constitution, which would allow continuity of Hungarian constitutional tradition without contradicting the new constitutional framework, the government decided to declare expressly ineffective all previous decisions of the Constitutional Court based on the old Constitution. Even if the wording of the provision was modified during the parliamentary debate, its message did not change. The new provision (point 5 of the Closing and Miscellaneous Provisions) also contains a second sentence specifying that the legal effects of the old Constitutional Court decisions remain intact. However, it only means that previously annulled legislation will not come into effect again. Thus, it is difficult to interpret the new wording differently from the old version: it seems clear that if previous Constitutional Court decisions lose their force, as the new provision states (*hatályukat veszti*, in Hungarian), they cannot be taken into consideration in new cases. The Venice Commission expressed concerns already two years ago in its opinion on the new FL in relation to the proclamation of invalidity of the old Constitution included in the Preamble. According to the Venice Commission, if this proclamation "is meant to have legal consequences, it can only be read as *ex tunc* nullity", and "it may be used as an argument for ignoring the rich case-law of the Hungarian Constitutional Court which (...) has played an important role in Hungary's development towards a democratic state governed by the rule of law" (see [Opinion no. 621/2011](#), par. 35). At that time the Hungarian government assured the Venice Commission that the above-mentioned proclamation of invalidity is to be understood as a political statement, having no legal consequences (see par. 37). The new provision introduced by the 4th Amendment seems to contradict this statement, and is difficult to interpret. What does it mean exactly that previous decisions lose their force when at the same time it is also provided that their legal effects remain intact? It seems clear the new version of the provision leads to the same result: the Constitutional Court cannot take into consideration its previous case-law. The Amendment's clear message

is that there should be no continuity in constitutional justice with the period between the regime change (1989-1990) and the adoption of the new FL (2011).

The list of provisions addressed to the Hungarian Constitutional Court does not end here. The Amendment also aims at preventing the Court from annulling constitutional amendments on substantive grounds. Article 24, par. 5, now provides that the Court may only review the conformity of the FL and an amendment with the procedural requirements of the FL pertaining to the adoption of the FL or its amendments. Furthermore, Art. 9 of the FL on the President of the Republic has also been amended in order to restrict his power to refer a constitutional amendment to the Constitutional Court to cases of incompliance with procedural rules (Art. 9, par. 3). It is a clear response to [Decision no. 45/2012 \(XII. 29.\) AB](#) of the Constitutional Court (available also in English). With this decision the Court in last December annulled a large part of the FL's Transitional Provisions on the ground that they were enacted in excess of the constitutional delegation of power to enact transitional provisions, as they contained also substantive and non-temporary rules. However, in its reasoning the Court also stated that "it would be irreconcilable with the idea of a democratic State under the rule of law if the contents of the FL were becoming constantly disputable, thus making the contents of the FL, as the Constitutional Court's standard, uncertain". The argument goes on by underlining that constitutional legality has not only procedural requirements, but also substantial ones, and the constitutional criteria of a democratic state are at the same time constitutional values, principles and fundamental freedoms enshrined in international treaties. Consequently, the Constitutional Court may even examine the constitutionalization of the substantial requirements, guarantees and values of democratic states under the rule of law (see section IV/7 of the reasoning, par. 116-118). The Hungarian government has not respected the Constitutional Court's standpoint, and decided to intervene in order to prevent the Court from any substantial review of constitutional amendments.

Moreover, the Amendment extends the restriction of the Constitutional Court's power in reviewing budgetary legislation (the central budget and its implementation, tax laws, pension and health care contributions, customs). A new paragraph inserted in Article 37 (par. 5) now provides that in the case of statutory provisions which entered into force during the period when the state debt exceeded half of the GDP, the restriction shall also apply if the state debt no longer exceeds half of the GDP, even if only in respect of this period. Paragraph 4 has provided (and it remained unchanged) that the Constitutional Court cannot review the constitutionality of budgetary legislation as long as the state debt exceeds half of the GDP, if not for the violation of certain constitutional rights expressly named by the same provision (right to life, human dignity, right to protection of personal data, freedom of thought, freedom of conscience and religion, and citizenship rights). As several observers have pointed out, the list does not contain the right to property. The Venice Commission has also condemned this unprecedented restriction of a constitutional court's powers (see [Opinion 621/2011](#), para. 98), and expressed serious concerns about the extension of this restriction, already done by the Transitional Provisions now incorporated in the FL (see [Opinion no. 665/2012](#), para. 38).

The Constitutional Court's competences and procedure are subject to changes also in some other aspects. The 4th Amendment modifies Article 24 on the Constitutional Court in several parts. One is the above-mentioned restriction on reviewing constitutional amendments. Another modification imposes a 30-day time-limit for the incidenter review decisions in order to prevent further delays in the cases of the referring ordinary courts (par. 2). Another important novelty is that the right to initiate *ex post* abstract review is extended to the President of the Curia (the supreme court) and the Chief Prosecutor (see Art. 24, par. 2). Moreover, a provision of the [Constitutional Court Act](#) (art. 53, par. 3) is elevated to the constitutional level: "The Constitutional Court shall examine or render null and void the provisions of any piece of legislation for which a review has not been requested only if its content is closely

linked to that provision for which a review was requested.” It seems that this constitutional provision will lead to the elimination of the other condition determined by the CC Act, namely if failure to examine and annul the given provisions would entail infringement of legal certainty. As this additional criterion has given more liberty to the Constitutional Court to extend its review to norms not expressly challenged by the petitioner, it is likely that with the constitutionalization of the first part of the CC Act's provision the Amendment aims at restricting this liberty.

The Amendment is now waiting for the signature of President Áder who announced already two days after its adoption that he would have not sent it to the Constitutional Court for preventive review. (The announcement, stating also the reasons, is available [here](#), in Hungarian.) The promulgation of the Amendment is expected in these days.

Facts and materials

- The finally adopted version of the text of the 4th Amendment is available in English on the official website of the Hungarian government [here](#). For an alternative unofficial translation see [here](#). For the original Hungarian text see [here](#).
- Even if the amendment has been already approved by the Parliament, the Hungarian Minister of Foreign Affairs [requested](#) an opinion from the Venice Commission, with regard to the international commitments deriving from Hungary's membership in the Council of Europe.
- On 19 March the [U.S. Helsinki Commission](#) held a hearing on the 4th Amendment titled "*The Trajectory of Democracy: Why Hungary Matters*", in which also a representative of the Hungarian government (József Szájer, one of the authors of the FL) testified. The video of the whole hearing is available [here](#).
- [Joint Opinion](#) of the [Hungarian Helsinki Committee](#), the [Eötvös Károly](#)

[Policy Institute](#) and the [Hungarian Civil Liberties Union](#) entitled "*Main concerns regarding the Fourth Amendment to the Hungarian Fundamental Law*", published on 13 March.