

Gergely Gulyas' open letter

Dear Professor Scheppele,

Having heard you live at the Helsinki Commission's recent hearing on Hungary and read your extensive statement for the record afterwards, I must respond to your unfounded allegations and factual mistakes because academic freedom – which I respect to its fullest – does not equal freedom from facts.

I am surprised that after having spent four years in Hungary partly as an advisor to the Constitutional Drafting Committee under the socialist-liberal government, and having immersed yourself in the intricate details of Hungarian politics, egregious mistakes still creep into your writings on the constitutional changes in Hungary. I must say that this is not only misleading to the general public but also to well-intentioned opinion-makers such as Mr. Paul Krugman, who, were he fully aware of the extent of these distortions, would surely object to your using him in such ways.

I understand that Hungary's newly adopted Fundamental Law is not to your taste. The reasons for this may be partly professional but, as far as I can see, are mostly personal and political. The Parliament's intent in crafting a new Constitution was to express the will of the millions of Hungarians who elected its members into office. Prior to the elections, Viktor Orbán repeatedly said, on public television and various public forums, that Hungary needs a new, permanent constitution, a respectable constitution which expresses the unity of our nation. Frankly, I am surprised that you deny this fact of life.

I am even more surprised that you still regard the unprecedented mandate of the Hungarian Government and the proportionality of our previous electoral law as some kind of unfair advantage Fidesz gained at the elections in 2010. – Allow me to get some things straight here. The Fidesz-KDNP party list gained 2.7 million votes in 2010. No other party list received so many votes in the past 22 years. Second, if you think Fidesz was unduly favored by getting 68% percent of the mandates with 53% of the votes, what would you say about the Socialist Party's victory in 1994 where it received only 33% of the votes but 54% of the parliamentary mandates? Six democratic elections have been held since 1990 but I do not remember any reasonable observer raising serious concerns regarding the outcomes. We should – and have – debated whether this system needs an overhaul 20 years after its inception. That's a fair point. But I must object to any retroactive questioning of the Government's legitimacy.

But first, let us look at the issue of the Constitution having been “drafted in secret” and your allegation that “neither opposition parties nor civil society organizations nor the general public had any influence in the constitutional process”. The truth is, the Fundamental Law did go through an open drafting process, which you yourself could have followed – along with many others who did – by attending the public meetings of the committee or via the constitutional drafting committee's website, which published the almost two hundred written inputs received from civil society organizations and others (ombudsmen, ethnic communities, academia, private individuals, churches, green groups, etc.). The drafting committee asked every single party to solicit the opinion of whichever civil society organizations they deemed fit. Every single party used this opportunity and in the end opinions of more than fifty non-profit organizations, individuals and public officials were submitted and more than a hundred and forty additional, unsolicited written suggestions were submitted voluntarily. In addition to these efforts, a questionnaire was sent to each citizen in Hungary about some of the outstanding national issues that had been undecided at that point. Close to one million people returned the forms with their comments. Their responses were taken into account (e.g. voting rights of minors, protection of the family, reference to Hungarians across the borders, protection of the country's natural resources, etc.) when we considered the final draft. The parliamentary groups of every single party in Parliament, as well as every independent MP,

were requested to submit a proposed draft constitution, but such a draft was only received from the governing parties – Fidesz and KDNP – and one independent Member of Parliament, Ms. Katalin Szili (the former Socialist Speaker of the Parliament). The opposition parties, alas, decided to withdraw themselves from the process on political grounds by walking out of the committee with the possible expectation that it would undermine the legitimacy of the entire process. In other words, they refused to contribute to the nation’s first democratically adopted constitution. I find it unfair in the extreme to blame Fidesz for the opposition’s behavior.

Second, you try to make the case that “under the new constitution as amended, no institution has the legal right to check many of the key powers of the one-party government”. But then you argue later that in the unlikely event of a government change, the alleged Fidesz loyalist ombudsman, Media Council, National Office for the Judiciary, Curia, Constitutional Court, National Bank, etc. would all make it impossible for the new socialist or liberal government to do its job. Putting aside your unwarranted comment that Hungary is a “one-party” state, how would all these public institutions all of a sudden become so powerful next year if they are not today? Do they or do they not have the power to be a check on the government? Or are you saying that none of these office holders have any professional standards, dignity, or moral code whatsoever?

As a legal scholar, you surely know the difference between a “one party government” and a government lead by two parties, which is Hungary’s case. Fidesz and KDNP might stand on similar political principles but they have independent party leadership and political platform. So I respectfully ask you, out of respect for the constituency of the Christian Democrats to stop labeling the current government for what it is not.

Third, regarding the Fourth Amendment you say that it “specifically overturns nearly all of the decisions the Constitutional Court made in the last year striking down controversial new laws the Fidesz government had passed”. I am sure you have read all the hundreds of pages of the Court’s relevant decisions, their legal reasoning, and nuanced arguments, which makes it all the more perplexing that, yet again, you disregard the facts here. The Court in almost all of its major decisions you referenced (religion law, Transitory Provisions, use of public areas, etc.) specifically mandated the Parliament to create laws in order to clear up the regulatory situation based on the guidelines it provided and the legal vacuum created by the annulled provisions or law. Parliament had a constitutional responsibility to re-regulate these matters, otherwise an *ex lex* situation would have created complete legal uncertainty. Now the fact that the Parliament decided to lay down the basic principles of these important social matters in the Basic Law is a matter of choice. Just like it is a matter of choice for Californians to regulate the use of sales taxes of motor vehicles, for Arizonians to regulate the office of their state’s mine inspector, for Alaskans to regulate fishing and navigable water rights, for Georgians to regulate lotteries and bingo games, or for Floridians to regulate cruel and inhumane confinement of pigs during pregnancy in their State Constitutions.

Fourth, you keep referring back to the issue of *actio popularis*, a right by which any citizen in Hungary could petition the Constitutional Court against any law even if he or she was not affected by that law, as sort of a litmus test of the Court’s powers. I understand that some cherish this concept, which I fully accept, but the Constitutional Court begs to disagree. I quote the President of the Constitutional Court’s letter submitted to the drafting committee: “The regulation would be clearer if the Constitution did not include the possibility of *actio popularis* and the circle of petitioners would be defined by law and would be related to a legal interest.”

Fifth, you write that “Giving the power to the president of the NJO (National Office for the Judiciary) to select which court handles individual cases outside the rules of ordinary legal procedure is for many – myself included – the end of rule of law in Hungary.” Not so fast.

You fail to mention in your bold statement that the entire procedure of moving a court case can only be started if the court handling the case originally initiates it. It is not a top-down, but a bottom-up process. Also, in the new constitutional provision, not individual cases, but only groups of cases – to be defined by a cardinal Act – may be moved to a different court.

You also fail to mention that the head of the National Office for the Judiciary can only decide to move cases upon the recommendation of the 15-member National Judicial Council, and if the parties are dissatisfied, there is an appeals process against their decision. This section, by the way, was part of the Act on the Judiciary and has been rewritten with the specific purpose of addressing comments from the US and the EU. Out of the over one million new cases that the Hungarian courts received last year, only 41 cases were moved, and 31 of those were economic cases. The reason is that most economic cases fall under the jurisdiction of the Budapest Court, which has to adjudicate 78% of all such court cases, an extremely large burden that explains why it was not uncommon for such trials to take 3-5 or even more years to be decided. In contrast, half of the cases that were moved last year were adjudicated within the same year and the other half were placed with courts which have a comparatively lower caseload in the respective field at the respective time – a nuance which you also fail to take into account when presenting your statistics.

Sixth, you make a serious mistake in discussing the National Budget Council when you say that it “has the power to veto any future budget that adds to the national debt”. The actual legislation refers to debt-to-GDP ratio, which is very different from a nominal increase in the public debt because if the economy grows at a normal pace, even this clause allows for the increase of debt. The new fiscal policy framework of the EU actually declares that if the national public debt of a member state is higher than 60% of GDP and the annual debt reduction target of 1/20 of debt has not been achieved over the last three years, the country may be put under an excessive deficit procedure. In the middle of an economic crisis, let us not hold it against the Parliament that they make it possible to veto budgets that would continue to bankrupt future generations of Hungarians.

I obviously cannot cover all the issues you have raised in your lengthy testimony, so I attach to this letter a technical note explaining the detailed legal reasoning and the background of all the major sections of the amendment, which I hope you will study as closely as you have other sources.

Dear Ms. Scheppele,

Your continued efforts to paint Hungary as a tyrannical “Frankenstein” leads me to believe that your academic assessments are colored by personal preferences, political or otherwise. You are of course free to interpret events in Hungary any way you wish, but you must accept that the Hungarian people, represented by a freely elected Parliament, are the ultimate arbiters of questions about self-governance – their values and their traditions. This is a principle we have fought very hard for and will continue to defend in the future.

Your campaign against Hungary based on distortions of facts and the free use of unsubstantiated opinions will not deter us from doing what we think is right for Hungary and the Hungarian people who gave us the mandate to act.

Gergely Gulyas, Member of Parliament