

Referendum on the refugee quotas in Hungary – protection of sovereignty or much ado about nothing?

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The migration crisis has stirred up political debates within the EU and its member states regarding not only possible solutions, but also about the future of the organisation. The first shock has come in the form of the Brexit referendum, the second one could have been the referendum in Hungary “against the quota system”, as the initiating government has calculated. The current analysis gives information about the referendum, and examines its possible effects in the near future.

The path leading to the referendum

The intent to hold the referendum was [communicated by the government](#) after the adoption of the [EU's Emergency Response Mechanism](#) in September 2015, under which 160,000 of migrants who had previously arrived into Europe and their asylum proceedings are to be shared out between member states according to pre-settled quotas. The decision has been adopted by the Council of Ministers by majority vote, with four member states voting against: the Czech Republic, Hungary, Romania and Slovakia.

After the failure to block the decision from being adopted, Hungary and Slovakia have initiated an [annulment procedure](#) against it in front of the European Court of Justice, the main judicial body of the EU, having the capacity to act as its “constitutional court”, and to strike down union legislation that is contrary to the Founding Treaties. The proceeding is currently going on, it will decide whether the EU has the necessary competence to make law on this matter at the first place.

The question to be decided

The question put to the referendum has raised serious debates since its publication. While many arguments have been raised related to its conformity with the current relevant provisions of Hungarian law by [numerous experts](#) (including [myself, the author of the current Reflection](#)) and representatives of opposition parties, finally it has been approved by the relevant authorities, and the pro-government majority of the Parliament has ordered the referendum.

The question's official Hungarian version has been translated to English in more versions. According to the [website of the National Election Office](#), the English version is the following:

“Do you want the EU to prescribe the mandatory settlement of non-Hungarian citizens to Hungary without the approval of the Hungarian Parliament?”

The version published on the [website of the Government](#) is slightly different:

“Do you agree that the European Union should have the power to impose the compulsory settlement of non-Hungarian citizens in Hungary without the consent of the National Assembly of Hungary?”

The latter version reflects the original Hungarian text much better, so it will be used for the further analysis.

What are the legal problems with the question? First of all, the message behind it is false from many aspects and is capable of misinforming and deceiving the voters. The use of the word “settlement” instead of “relocation” creates a false understanding about the idea behind the quota system, as it paints the image of settlement of foreign individuals into the country instead of the simple burden sharing of the asylum proceedings among member states. The wording “without the consent of the National Assembly” projects the image of the Hungarian Parliament not having any role, while all founding treaties and relevant EU legislation regarding asylum had been implemented into Hungarian domestic law by the Parliament, so their application is already consented by it. If the EU has the competence to adopt a quota system via its legislative procedure, based on the founding treaties, consented to by the Parliament, this statement is clearly false. This is an important legal question: does the EU have such competence, and can such legislation be valid? As we have mentioned earlier, the Hungarian government has challenged this question in front of the European Court of Justice with its action for annulment, the answer will be given presumably in this November.

Current Hungarian law requires that a question being put to a referendum shall be clear on the obligation it poses on the Parliament. The government has initiated this action after the adoption of the Council decision in September 2015, leaving the question opened, if it is targeted against that one, or any other future EU legislative act, imposing a similar – or different – quota system.

As Hungarian law also prohibits referenda with possibly bringing a result, which is contrary to any existing obligation of Hungary deriving from an international treaty (Article 8 (3) d) of the [Fundamental Law of Hungary](#)), the question should have been denied if it targets EU legislation already in force. Pieces of union legislation are legally binding on Hungary by virtue of the EU founding treaties, thus they constitute “obligations deriving from an international treaty”.

On the other hand, if it aims to target any future EU legislation, I would argue that it shall be allowed, as in my opinion, the Parliament has the right to direct the foreign policy of the government, including its voting in the Council of the European Union, as constitutionally Hungary is a parliamentary republic. It has to be noted, that according to [some other experts on constitutional law](#), this argument may be wrong, as the Parliament has to respect that foreign policy is the competence of the government. These opinions conclude, that the question should have been rejected on this ground. Based on my more permissive position (from the

aspect of competences between Hungarian constitutional organs), I argue that the question should have been rejected not because of this, but because of its uncertain nature: as the question does not qualify its target properly, the Parliament is not able to decide about what it shall prohibit at the end. Still, in this case, the result of the referendum and any domestic legislation can only have the possible effect of influencing the actions of the Hungarian government. EU institutions are not bound by the result of a referendum of any member state, consequently EU legislation will still be legally binding to Hungary.

Unfortunately, the [judgment rendered by Kúria](#), the supreme court of Hungary, has completely missed these questions, with a set of extremely low quality legal arguments. Since the adoption of the Fundamental Law, this judicial body is responsible for proceedings related to referenda, not the Constitutional Court. More applicants have contested the legitimacy of the question, which have been rejected by the Kúria, seemingly having the main goal of only trying to argue for the position of the government. We will not analyse it here in more details, but an all-time low level has definitely been hit by the judicial body, when it has made an arbitrary, legally unfounded distinction between “bilateral international treaties” and “European Union treaties” (Paragraph 32 of the judgment) just to be able to consider the latter not being an obstacle to the government-initiated referendum.

The politics behind the referendum

The government has tried to make the referendum a vast triumph for its favoured “No” vote. Large billboards with texts like “Have You known that Brussels is planning to settle a town’s worth of illegal immigrants in Hungary?” have swarmed all over the country, completely ignoring the fact that under the current legal provisions asylum seekers are not to be considered illegal immigrants, and the current quota assigned to Hungary means only the proceedings of 1,294 asylum seekers. Millions of leaflets have been directly sent to voters' homes, stating that migration have resulted in the creation of numerous so-called “no-go zones” in various Western European cities, like London, Brussels and Berlin, which statements have immediately stirred protest and ridicule in the respective states. Absurdly, the costs of only the pro-government campaign have exceeded the overall costs of both sides of the Brexit campaign earlier this year in the United Kingdom.

While the polls have constantly predicted a comfortable majority of the “No” votes, the political weight was more than simply just winning. Even if “No” prevails, many have argued that an invalid result could be seen as a failure for the Government and personally for Viktor Orbán. For this reason, opposition parties have developed different strategies and political messages towards voters, but none of them has really engaged in the campaign, mostly for the reason that a “Yes” answer presumably would not be popular with the voters, even those who otherwise oppose the politics of the government on many other issues. So most of them have called for voters to abstain, hoping that the validity threshold will not be passed. Strangely, the organisation most actively engaged in the campaign was the joke party called “[Two-Tailed Dog Party](#)” and a number of NGOs who usually do not participate in political debates, like the [Hungarian Helsinki Committee](#). They have called for the citizens to vote invalidly, while have used new campaign technique, like for example satirising the government’s “Have You known?” campaign with absurd messages, like “Have You known? The average Hungarian is more likely to see a UFO than a refugee in his lifetime”, and employing crowdfunding to finance the campaign.

The results of the referendum

The intense campaign by the government preparing the referendum has failed to produce a result, even if 92% of valid votes are “no”, and only 2% are “yes”, so the government’s position – although only from a particular point of view – can be seen as being victorious.

At the same time, according to the numbers published by the [National Election Office](#), voter turnout has been around 43%, which is far below the validity threshold, being 50% plus one vote of all eligible for voting. Additionally, less than 41% of the electorate has casted a valid vote, which means that the number of invalid votes has been much higher than the 0.5-2.0% of all ballots of previous referenda and elections. This means that the campaign of the “Two-Tailed Dog Party” and other NGOs have found their audience, making them the only “political force” actively engaging and having some results against the pro-government propaganda.

The numbers also show some interesting facts: voters in Budapest have been the least enthusiastic. While voter turnout in the capital has traditionally been high in previous referenda, this time it has only been 34.74%, with very high number of invalid ballots, between 8-15% in the various districts. The larger cities of Hungary (Debrecen, Pécs and Szeged) have produced somewhat higher voter turnout, but also a higher number of invalid ballots than the national average.

The effects and consequences of the referendum result

The most important question is the possible effects of the referendum. As indicated above, the most important legal problem is the uncertain nature of the question itself. Thus, it has never been possible to foresee any exact obligation of the Parliament deriving from the result.

Before the referendum, the government’s communication messages have not been too exact. They have been concentrated around [the possible influence](#) it could have on any future EU legislative procedures, even blocking a possible proposal of the European Commission, if it tries to aim on introduction of a compulsory quota system.

While many critics of the government argue that the referendum has failed, the turnout of more than 3.58 million voters is still seems to be an impressive result, especially – as the government has [immediately pointed out](#) – compared to the Hungarian referendum about joining the EU in 2003, which has also generated around 45% turnout and only around 83% voting in favour, meaning a little bit less than now. This argument is surely going to be used in the future intensely by Viktor Orbán, already tying his position to an anti-EU sentiment.

As indicated above, the result of the referendum will not have a direct effect on EU legislation. Viktor Orbán has announced right after the referendum, that an amendment to the Fundamental Law is going to take place, the text of which is not published yet. On a [press conference on the 4 October](#), the contents of which – strangely – was not immediately made available in English, only in Hungarian, he has indicated some elements of this text. Without details, he has mentioned, that four parts of the Fundamental Law will be

amended, pointing out Article XIV, which deals with extradition and asylum matters, where an additional text shall be inserted. It would prohibit the settlement of groups of individuals not having the right to freedom of movement within the EU into Hungary. It would only be possible as a result of an individual application, by the individual decision of the Hungarian authorities, based on rules adopted by the Hungarian parliament. While it is too early to draw any conclusions based on these vague textual elements, they seemingly do not make a quota system completely impossible, for example if it is based on directives, which are to be implemented into Hungarian law by the Parliament. Of course, a more detailed analysis is only possible, if we see the text, which – according to the communication of the prime minister and the leader of the governing Fidesz party's parliamentary group also present at the press conference – will be drafted and presented to the Parliament on 10 October, and may enter into force in the middle of November.

Whatever the text may be (possibly combined with any other domestic legal provisions), EU institutions and legislation will not be bound of it. Similarly, under the current union legal practice, domestic legal provisions, including those on the level of member states constitutions are not capable of escaping binding force of pieces of EU legislation. Additionally, the prime minister has made a reference to “constitutional identities” of member states that has to be respected by the European Union, something that can be derived from Article 4, paragraph 2 of the Treaty on European Union, arguing that this provides for provisions of member states' constitutions prevailing over union law. This is a very weak argument, especially that the proposed amendment has nothing to do with Hungarian history, culture, especially nothing with its constitutional traditions, what's more, Hungary has traditionally been an integrating country through history – which is much more of a constitutional identical element, than the current amendment, driven by actual political interests.

Currently it seems, that all the government's planned actions still rather serve as a political message and have political relevance, both on the level of the EU, but even more in the domestic era: the announcement of a “new unity” on the 4 October press conference, which explains the lack of English translation, as this is obviously meant for domestic political use, once again. This “new unity” is “a new unity organised above the level of political parties, with the aim of protecting the national sovereignty”, as the prime minister has defined it. While the introduction of any quota system seems to be less and less realistic on EU level, the Hungarian government will presumably have no battles to face alone in the Council, meaning that any domestic legislation is practically pointless, but at the same time, it will probably not lead into direct danger of violation of EU law. At the same time, Viktor Orbán can still maintain the image of the strong leader of this “new unity”, protector of the country and a serious influent of European politics in the eyes of domestic voters.

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