

Final dissertation

The Hungarian Fundamental Law



Name: Brigitte Willems
Student number: 08031010
Class: ES4-E
Supervisor: P.G. Nixon
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School of European Studies
The Hague University of Applied Sciences

Executive Summary

Since 14 May 2010 Fidesz and KDNP form the Hungarian Parliament. Together, they gained 263 seats: a two-third majority. Viktor Orbán, who leads Fidesz, became the Prime Minister of Hungary. Orbán and his large majority triggered a so called ‘national revolution’. Several controversial bills have been introduced, like the new media law, the central bank law and the Fundamental Law itself. The introduction of these laws have been heavily criticized by various European and international institutions. According to those institution, the Hungarian laws are incompatible with European law, standards, and values. This dissertation focuses on the question: “How should Europe deal with the introduction of the Fundamental Law of Hungary?”

In the light of answering this question, it is important to know whether there was a need for a new constitution. In practice, the former constitution, together with its amendments, was functioning satisfactory. However, in theory, there was indeed a necessity for a new constitution because the former constitution, Act No. XX of 1949, was a temporary one.

It is also important to be aware of the exact reason why the Fundamental Law has been criticized and if the points of criticism are well-founded. The criticism on the Fundamental Law can be divided into criticism on the creation and criticism on the content of the Fundamental Law. The biggest bottleneck regarding the creation of the Fundamental Law is the time span. It was created in less than a year, which means that only a minimum of time was arranged for the creation, discussions, and improvements. It also seems that actions undertaken during this period, like the consultation of Hungarian institution by the ad hoc parliamentary commission, the creation of the personal advisory committee of Orbán, and the use of the questionnaire, are more or less a show. The criticism on the content of the Fundamental Law is based on the use of symbolism, the way sentences are formulated, the apparent influence of the Catholic church, the step back in social security, the independence of the Hungarian Central Bank, judiciary, and the data protection supervisor, and the cardinal acts.

When it comes to the response to the questionable time span of the creation of the Fundamental Law, Europe could and can only criticize it. When a law is created according to the country’s democratic rules, and theoretically the Fundamental Law is, one cannot undertake action against the creation. However, concerning the criticism on the content, Europe can and should act towards Hungary. Naturally, Europe is already active in the Hungarian situation. On 8 June 2011, the European Parliament already held a debate about the, at that time, Fundamental Law in the making.

In December 2011, the International Monetary Fund and the European Union stopped negotiations about financial help for Hungary. Only a month later the European Commission started three infringement procedures. Three letters were sent to Orbán, explaining him that Hungary had to adapt its legislation concerning the independence of the central bank, the judiciary, and the supervising authority of data protection. The first infringement proceeding has been dropped by now, because the European Commission was satisfied by the promise that Hungary would adapt the central bank law. However, the other two infringement procedures are still in progress. In my opinion, the European Commission should continue its infringement procedures and when it eventually does seem necessary, it should also impose a fine or penalty, based on Article III-265. Sanctions by the European Union are another response possibility for Europe, but I would rather advise in favor of using Article 7 of the TEU. Based on this article, the European Union can decide to suspend certain rights which Hungary, as a member state of the European Union, normally has. Besides the European Union and the European Commission, the Council of Europe should be part of the response towards Hungary as well. When Hungary became a member of the Council of Europe, it signed the Convention for Protection of Human Rights and Fundamental Freedoms. Consequently, Hungary is obliged to respect the rights and freedom laid down in this convention. Any citizen who believes that Hungary lacks this respect, can test this by means of the convention in the European Court of Justice.

Finally, Europe should stay privy in the Hungarian situation. The Fundamental Law is only a framework and 39 other domains are waiting to be regulated in cardinal acts. In case of any further lack of respect towards democratic and European values, the European institutions should act again.

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Preface

As a student of European Studies at the Hague University of Applied Sciences, I went on exchange for one semester. My exchange took place in the fall semester of 2010, which lasted from September 2010 until January 2011. I chose to spend my semester abroad in Budapest, Hungary. I chose this country, because Hungary, or any other eastern European country, is not really included in the material of European Studies. I was intrigued to know the differences between my life in the “Western European” Holland and a life in the “Eastern European” Hungary. The daily life, going to school, living in a city, living in a place with a completely different history, it all interested me. During my exchange I followed several interesting courses. Among those courses were, for example, Hungarian culture and history, and Hungarian language. I followed these courses because I wanted to become more acquainted with Hungary. Besides these two courses there was another fairly interesting course: Law and Ethics of Advertising. The teacher of this course told us a lot about the, at that time, proposed new media law. This new media law would enter into force on the 1st of January 2011. I wanted to know more about this subject and started to search for information about it on the Internet. I found out that there was a lot of criticism on this new law and that protests had been held. However, I also learned that the new media law was not an isolated situation, but that it is part of the ‘national revolution’ of Viktor Orbán. In the spring of 2010 elections were held. Since then, there is a two-third right-wing majority in the Hungarian parliament, with Viktor Orbán as Prime Minister. This parliament is known for the enormous changes it made to the Hungarian legislation. They introduced the earlier mentioned media law, a central bank law and even an entirely new constitution. These new laws have been criticized heavily. Most of these concerns are regarding the creation and the characteristics of this Fundamental Law.

Nonetheless, there is not so much information in the Netherlands about the concerns with regard to the Fundamental Law. Perhaps, it seems a bit distant for the average Dutch citizen, but I do think it is important to know the answer to questions like:

- How did the process of creating the Fundamental Law evolve?
- Why is this process being criticized?
- Which points of the content of the Fundamental Law are being criticized?

- And what is the reason for that criticism?

I believe that especially in a European context this is important. We are also part of the European Union and the Council of Europe. Therefore, we should not ignore developments in other European countries. Actually, it is even necessary for Europe to respond to the current developments in Hungary.

Introduction

In April 2010 Hungary had free parliamentary elections for the sixth time in its history. The turnout this year was approximately 64%. The right-wing Fidesz claimed an extreme victory: Fidesz won 227 of the 386 seats in the “*Országház*”. Besides Fidesz, MSZP and the far-right Jobbik won quite a lot of seats as well: MSZP won 59 seats and the far-right Jobbik 47. However, Fidesz chose to form a parliament with KDNP. With the 36 seats won by KDNP a two-third majority had been reached. On 14 May 2010, the sixth Hungarian National Assembly was established and since this date Viktor Orbán has been the Prime Minister of Hungary.

Under his leadership several controversial bills have been introduced. For example, the central bank law, the Fundamental Law of Hungary, which came into force on 1 January 2012 and the media law, which came into force a year earlier. One day after the actual introduction of the Fundamental Law, Hungarian citizens demonstrated in Budapest. Besides the growing protests of Hungarian citizens, there is also a lot of international criticism. Amongst others, the European Union, the European Parliament, the International Monetary Fund, the Organization for Security and Cooperation in Europe, and the Council of Europe sharply criticized the current situation in Hungary. At the end of 2011, the President of the European Commission, Jose Manuel Barroso, wrote a letter to the Hungarian Prime Minister in which he politely asked not to present certain bills for voting in the Parliament. Viktor Orbán chose not to listen to this request. As a consequence, the European Commission decided to start infringement procedures in January. These infringement procedures against Hungary are concerning the independence of the Central Bank, the data protection authority, and the judiciary.

However, are those infringement procedures the best way to deal with this so called ‘national revolution’? Or should Europe deal with the legal development differently? Or perhaps choose for a combination of those procedures and other measures? Since the introduction of the Fundamental Law plays a tremendously great role within this national revolution of Fidesz, the focus will be on the creation and characteristics of the Fundamental Law. That leaves us with the question: “How should Europe deal with the introduction of the Fundamental Law of Hungary?”

The sub-questions that will lead to the answer of this question are the following: “Which parties form the parliament? Who is the Prime Minister?”, “Was there a need for a new constitution?”, “Why is the creation of the Fundamental Law criticized?”, “Why is the content of the Fundamental Law criticized?”, and “What are the response possibilities for Europe?”.

Method of working

To answer the main question and sub-questions of my dissertation I conducted a research based on both desk and field research.

My research began on the Internet. A lot of European newspapers paid attention to the developments in Hungary. Because of that, many articles on this subject could be found. Many of them, however, had more or less the same content. Because of that, I made a selection based on the reliability. The vast majority of newspaper-articles used, are from the collection of articles from Presseurop. Besides those articles, the Fundamental Law itself, relevant European legislation, the former constitution, and information about the Prime Minister, the leading parties, and the creation of the Fundamental Law were available on the Internet.

Another important part of my desk research consisted of the e-book “The Basic Law of Hungary, a first commentary” and two articles which I found in the Peace Palace library in The Hague. The first article comes from “The Lawyer quarterly” and is about the creation and characteristics of the Fundamental Law. The second one is about the constitutional transformation, which can be found in the European constitutional law review.

Because imposing sanctions is one of the possibilities for Europe to react to Hungary, I used Austria and the sanctions that were imposed on this country by the European Union as a case study. This case enabled me to evaluate the effect of direct sanctions.

Besides the desk research, two interviews were conducted. Firstly, an interview with Dr. Krisztina Baranyi, who graduated as a lawyer and who currently teaches Law at the Budapest Business School. The second interview was with Mr. Maarten van Munster. He teaches European Law at the Hague University

With the information retrieved by means of the desk and field research I could evaluate the situation in Hungary, and the creation and the content of the Fundamental Law. This evaluation and the response possibilities of Europe will firstly lead to the answer of the sub-questions and finally also to the answer of my main question.

Which parties form the current parliament?

The governing majority in the Hungarian parliament

In April 2010 parliamentary elections were held in Hungary. Fidesz became the great winner by gaining 227 seats. Two other parties which won a lot of seats were the MSZP, which won 59 seats and the far-right Jobbik, 47 seats. However, the current parliament consists of Fidesz and the KDNP. With the 36 seats of the KDNP a two-third majority was reached and a governing majority had been established.

Fidesz was founded on 30 March 1988. It started as a libertarian, anti-communist party. It was a youth party: it was founded by young democrats and most of them were still students. Fidesz used to be liberal, but in 1993 it became a conservative party. The initial name of the party was **Fiatl Demokraták Szövetsége**. Translated into English this means “Alliance of Young Democrats”. In 1996 this changed to Fidesz - Magyar Polgári Párt. Fidesz is an abbreviation of the initial name. Magyar Polgári Párt means Hungarian Civic Party. In 2003 the name changed again. This time the name became Fidesz – Magyar Polgári Szövetség. The last part means Hungarian Civic Union. Nowadays, this is still the correct and full name. However, the party is mostly just called Fidesz., which is just a shorter version of the official name. Until 1998 Fidesz was always in the opposition, but in 1998 it won 148 seats (EuropaNU, n.d.). and it became part of the government for four years, together with the Hungarian Democratic Forum and the Independent Smallholders’ Party. From 2002 until 2010 Fidesz was part of the opposition again and, as mentioned before, in 2010 Fidesz became part of the parliament again by winning 227 seats, which is about 52% of all seats in total.

The KDNP, the Christian Democratic People’s Party, which was an offshoot of KSzN, the Catholic Social Folk Movement, was founded on October 13th 1944. When World War II came to its end, the post-war authorities would not legalize the party. It could not take part in the elections and therefore it could not operate any further. In 1989, when the communist era ended, the party was re-founded. Between 1990 and 1994 KDNP was part of the parliament as well. KDNP is closely associated with Fidesz. In 2005 the two parties even made an agreement on election cooperation.

Who is the Prime Minister?

Viktor Orbán as Prime Minister

After the parliamentary elections of April 2010, which were won by the Fidesz party, the National Assembly elected Viktor Orbán as Prime Minister of Hungary. Orbán was born on 31 May 1963. According to his own website, (Orbán Viktor, 2012) he has a quite impressive résumé. He started his study at the Faculty of law at the Eötvös Loránd University in 1981 and he successfully graduated in 1987. During his study he was also active in other areas. He created, for example, a journal of social sciences, called Századvég and he was one of the founding members of Bibó College. After completing his studies, he became a member of the Central-Eastern Europe study group and from 1989 until January 1990, thanks to a scholarship from the Soros Foundation, he could also study the history of British liberal political philosophy at the Pembroke College, in Oxford.

Furthermore, he has over twenty years of political experience. He was becoming, as his CV would have it, "a politician well-known throughout the Western world for his commitment to an independent and democratic Hungary free of privileges". (BBC News, 2012) Orbán is one of the founding members of Fidesz and has been a member of parliament since 1990, the year of the first free elections in Hungary. In May 1993, Orbán became chairman of Fidesz. Since this year the party's direction changed. The radical youth movement was replaced by a centre-right civic people party. In 2002 he was elected vice-chairman of the European People's Party and one year later he became chairman of Fidesz again.

Actually, it is also not the first time that Viktor Orbán is the Prime Minister of Hungary. From 1998 until 2002 he was Hungary's Prime Minister as well. Back at that time there was, however, a centre-right coalition in Hungary, instead of the current two-third majority of the Fidesz party.

In 1989, when Viktor Orbán was only a young lawyer, he attracted a lot of attention, because of his call for free election and his speech, which publicly demanded the Soviet forces to withdraw from Hungary. However, nowadays, he has come under strong attack for his 'national revolution'. (Guardian, 2012) It is insinuated that he is becoming a bit of a dictator and protestors already derisively call him 'Viktator'.

Was there a need for a new constitution?

The necessity of a new constitution

Between 1990 and 2010 the necessity of the adoption of a formally new constitution had been, from time to time and with varying intensity, a recurring topic (Csink, Schanda, Varga, 2011). However, during those 20 years, the parliaments never succeeded in creating a new constitution. The reason for this can probably be found in the composition of earlier parliaments. Since 1990 Hungary has had eight parliaments. Until 2010, the highest number of seats gained by one party, was 209. This means there was never a party who had a two-third majority. Therefore, it seems that the main cause of starting up the constitutional process must probably be looked for in the two-third majority of Fidesz. This majority both theoretically and practically allowed the winning parties to adopt a Fundamental Law corresponding to their values and political priorities (Halász, 2011).

One important fact which could be mentioned as a justification for the need of a new constitution is the history of the Hungarian constitutional system. Basically, there was no written Hungarian constitution until 1945. Before this year Hungary had ancient “organic” constitutional traditions with its roots in the Middle Ages. The historical constitutional system of Hungary consisted of more documents which were created at a very different time (Halász, 2011). Therefore, Act No. XX of 1949 was, in principle, the first written constitution of Hungary. This constitution was adopted on 20 August 1949, by the communist parliament. After the fall of the communism this constitution was heavily amended. In fact, only the name and, more or less, the structure were preserved. This new version of the constitution was adopted on 23 October 1989. The problem with this constitution is that it had been amended by a parliament which had not yet been chosen by means of free elections, since the first free elections did not take place until May 1990. Therefore, the constitution was seen as a transitional wording. The authors themselves also considered this constitution to be temporary (Csink, Schanda, Varga, 2011): it is even referred to in its preamble. Act No. XX of 1949 literally states: “In order to facilitate a peaceful political transition to a constitutional state, establish a multi-party system, parliamentary democracy and a social market economy, the Parliament of the Republic of Hungary hereby establishes the following text as the Constitution of the Republic of Hungary, until the country’s new constitution is adopted.”

On the other hand, a majority of acknowledged constitution lawyers believed there was no need for a new constitution, because Act No. XX of 1949, together with various constitutional amendments conducted by freely elected parliaments, was functioning satisfactorily. Besides that, among the Hungarian citizens, there was no demand, nor expectation for a new constitution (Kovács & Gábor, 2011)

Obviously, the question whether there was a need for a new constitution cannot be simply answered by yes or no. When you consider that Act No. XX of 1949 initially was seen as a temporary document, there was indeed a need for a new constitution. However, Act No. XX of 1949 was also seen as functioning well and as quite satisfactory, and that decreases the so-called need for a new constitution enormously.

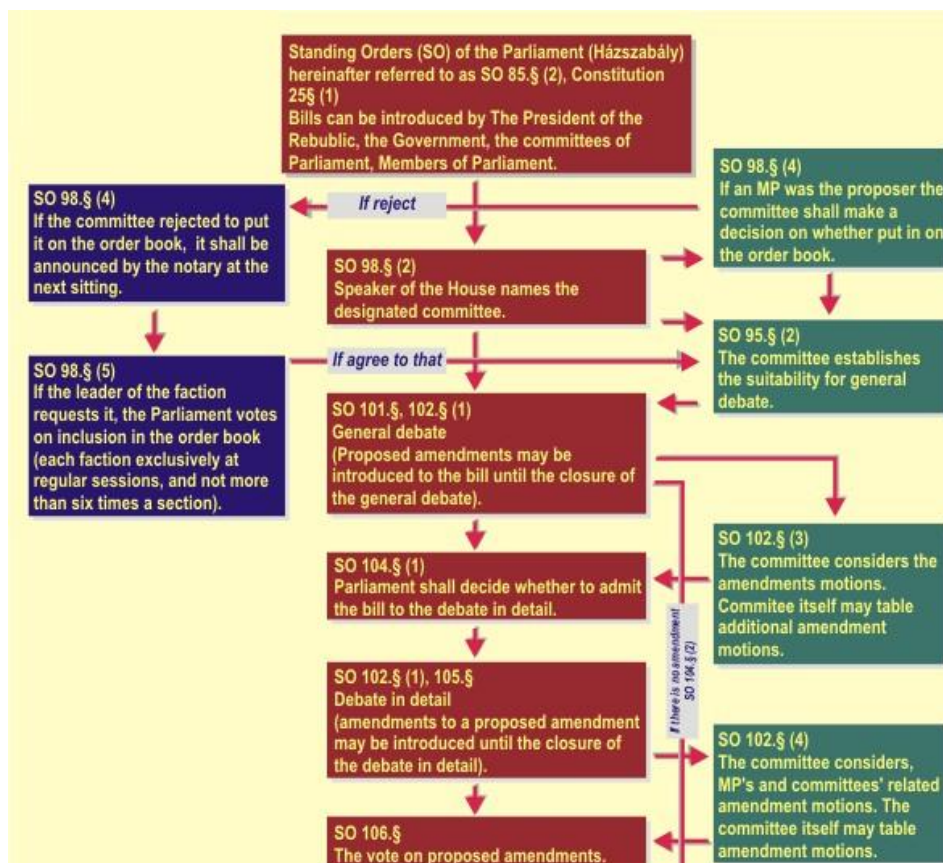
Why is the creation of the Fundamental Law criticized?

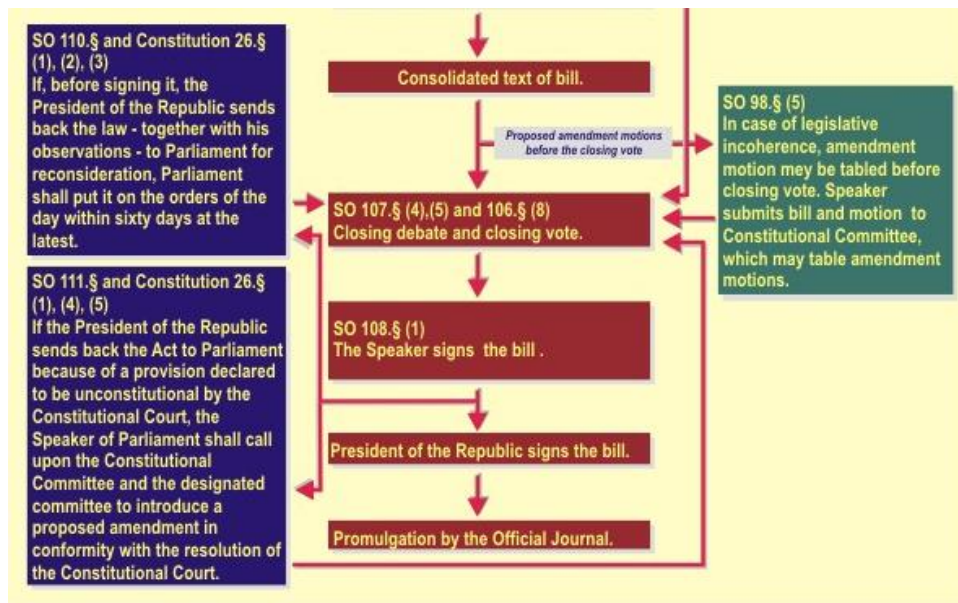
Usual procedure of proposing a law in Hungary

In Hungary there are a Prime Minister and a President. Viktor Orbán, who is the Prime Minister, is the head of government. The President, Janos Ader, has a more ceremonial role, he represents the head of state.

In Hungary, the Parliament is the legislative power. It is a unicameral Parliament, which is called the National Assembly. The Parliament contains 386 Members of Parliament, who are elected every four years. Exercising its rights based on the sovereignty of the people, the Parliament ensures the constitutional order of society and defines the organization, orientation and conditions of Government. The Parliament holds two regular sessions. Those sessions are from 1 February until 15 June and from 1 September until 15 December. During these periods, the Parliament holds weekly sittings.

In Hungary, the steps of the legislative process can differ, depending on who proposes a bill. Proposing a bill can be done by the Government, President of the Republic, parliamentary committees or any Member of Parliament. This is done in the form of a written document which should be sent to the National Assembly.





(parlament.hu, 2012)

Because those so called bills are mostly submitted by the Government, which consists of all Ministers and the Prime Minister together, we will follow this procedure. The National Assembly is obliged to debate submitted bills. At first, there will be a plenary phase, which consists of a general debate and a detailed debate. The first debate is on the principles, the totality, necessity and the purpose of the bill and can last several weeks. Until the closure of the general debate, draft amendments can be submitted by a committee or any Member of Parliament. This cannot be done by the Government. The detailed debate is a debate on those draft amendments: it covers details and changes. The detailed debate ends with a plenary sitting. The plenary phase is followed by the voting phase. During this voting phase a voting on each draft amendment is conducted. Finally, a closing debate on the amendments and a final vote on the improved amendments and the bill as a whole are conducted (Gyenisze, 2010). To pass or amend a law, a two-third majority is always needed. According to article S in the Fundamental Law (2011), this legislative procedure is also applicable to potential future amendments to the new constitution.

The creation of the Fundamental Law

As you can understand from the text above, creating a new law, let alone creating a complete new constitution, is a time-demanding process. However, the Fundamental Law was created in a period of less than a year. The preparation started in the summer of 2010. On Monday 18 April 2011 the Fundamental Law was adopted by the parliament.

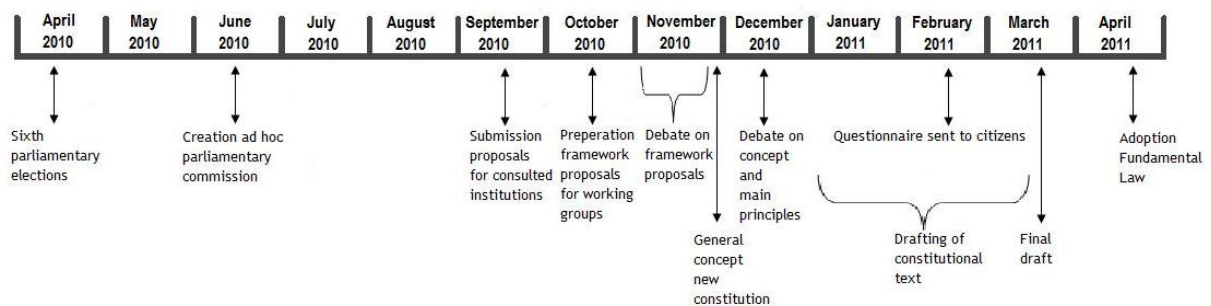
In the summer of 2010, the parliament created an ad hoc parliamentary commission. The commission's task was to create a concept version of the Fundamental Law. To be able to do so, the commission asked various professional workplaces, as well as representatives of national and ethnic minorities, and churches what their opinion was on what should be included in the Fundamental Law. The institutions which were asked for their opinion could submit their suggestions and proposals until the end of September 2010. However, the commission did not provide for any instructions in advance and did not prepare any preliminary concept of the proposal for a new constitution (Halász, 2011).

Next to the ad hoc parliamentary commission, an advisory committee was created by Viktor Orbán himself. The Prime Minister personally invited several persons. Among those persons were Péter Boross, József Pálincás, and Imre Pozsgay. Péter Boross was Prime Minister of Hungary from 1993 until 1994 and was Orbán's advisor from 1998 until 2002. József Pálincás is a well-known scientific researcher, President of the Hungarian Academy of Sciences and from 1998 until 2002 he served as Secretary of State and as Cabinet Minister of Education in the government. Imre Pozsgay, who is an ex-communist, played an important role in the period of transition from communism to a democratic country.

The month of October in 2010 was scheduled for working groups to prepare framework proposals relevant to their respective topic. The ad hoc parliamentary commission debated those concept papers in November 2010. In this month a general concept of the new constitution was prepared as well. This concept and its main principles were debated by the Parliamentary Draft Committee in December 2010. After that, in the months of January, February and March the drafting of the constitutional text took place. (Common Sense Society, 2010).

During those three months, a so-called National Consultancy Board was set up as well. By creating this board, the parliament tried to increase the social and intellectual basis and avoid the creation of a politically one-color document. This board created a questionnaire to ask all Hungarian adult citizens for their opinion on social and economic issues. The citizens also had to write down what

they did not like and what they thought was important to put in the constitution. Approximately 900,000 citizens completed and returned the questionnaire. With this questionnaire, the parliament partially compensated the lack of the ratification referendum, which made the whole constitutional process legitimate (Halász, 2011). The writing of the concept version of the Fundamental Law was finished on 14 March 2011. This concept was discussed another month and ultimately the Fundamental Law was adopted on 18 April 2011. On the first day of January 2012 the Fundamental Law was officially launched.



Criticism on the time span and creation of the Fundamental Law

In the previous chapter you could see in which amount of time the Fundamental Law was created. The creation of the Fundamental Law was completed within a period even shorter than a year. This is a really short time for creating a complete constitution (van Munster, 2012). Normally, the creation of a new law is accompanied by a lot of debating, feedback and adjusting it, until it is ready to be introduced. If you consider this, less than a year is absolutely too short to create a whole new constitution. Especially because the national constitution is the most important legal and political document of a country (Csink, Schanda, Varga, 2011). There was only a minimum of time arranged for the complex discussion and debates of concept versions.

Another issue raised is the creation of the ad hoc parliamentary commission, which was created to collect the opinion of Hungarian organizations and institutions about what should be included in the new constitution. The commission never provided instructions in advance and at that time there was not even a first conceptual version for the institutions to look into. This creates the impression that the commission is only a show and that the opinions expressed are not really considered after all. Also remarkable is the fact that, when the commission was founded, it had 45 members, representing every political party in Hungary. However, the opposition parties withdrew themselves from the commission and never resumed their work. It is unclear why the two opposition factions, the Hungarian Socialist Party and the LMP, made the decision not to take part in the drafting, debating and voting.

It is worth saying that the tasks of the advisory committee, created by Viktor Orbán, were not completely clear because its role was never really explained. The only clarification that was given was that the Prime Minister invited six acknowledged personalities to form a body, the consulting body of the Prime Minister, working along the Prime Minister to help the elaboration of the new constitution's concept (Consulate General of Hungary, 2011).

Also, the use of the questionnaire has two striking elements. Firstly, the choice to send the questionnaire in February 2011. This is only a month before the last concept version was finished and approximately two months before the final version of the Fundamental Law was adopted. Even though 900,000 citizens did reply, one should ask themselves, were the answers of the citizens really of importance or was the National Consultancy Board pretending to listen to the citizens? Even though József Szájer stated that every citizen should have a say in the process of creating the Fundamental Law and indeed every adult citizen received the questionnaire of the National Consultancy Board, it appears rather optimistic to say that 900,000 answers can be processed and

taken into account within a month and that the opinion of the citizens is actually reflected in last concept version. The other striking part is that the questionnaire falls within January, February, and March 2011, the months of final drafting. Logically, the results of the results of the questionnaire should have been processed before the 3 months of final drafting. Another important remark about this questionnaire is that according to Halász (2011) the questions were prepared, more or less, tententiously and the citizens mostly answered as the government wanted. For example, question 4 says: “Some suggest that parents with underage children should in some way be entitled to vote in the name of their children. What do you think?” The way of formulating gives the question a suggestive nature.

A final questionable element of the creation of the Fundamental Law is the place of the parties in the political spectrum. Only Jobbik, a radical right-wing party from the opposition, participated in the discussions about the Fundamental Law which were held by the parliament and the parliamentary committees. Even though it principally refused an adoption of a new constitution, the deputies of Jobbik did not leave the parliamentary sessions. In fact, they even submitted some amendments with regard to the constitution in the making. With this participation, the Fundamental Law basically cannot be called a one-party document. Nevertheless, it is still one-colored, since all three parties find themselves on the right side of the political spectrum.

Nevertheless, when a law, or in this case the Fundamental Law, is created according to the democratic rules of a country, the criticism can be well founded, but expressing this criticism is the only thing you can actually do.

Why is the content of the Fundamental Law criticized?

Points of criticism on the content of the Fundamental Law

Not only the time span and the creation of the Fundamental Law have been criticized, also the content of the new constitution caused alarming headlines in international papers and criticism from various (European) institutions. When it comes to the content of the constitution, most criticism expressed is concerning symbolism, how sentences are formulated, the apparent influence of the Catholic church, social security, the independence of the Hungarian Central Bank, judiciary, and the data protection supervisor, and the cardinal acts.

A lot of the criticism can be related to symbolism and the way sentences are formulated. In the preamble you can read the sentence *“May there be peace, freedom and concord.”*. This sentence is the slogan of Fidesz. This increases the degree of probability that the Fundamental Law is, for the greater part, an one-party document, while, according to van Munster (2012) a document which serves as a constitution should be the least politically colored as possible. Because of the sentence *“We honor the achievements of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and the unity of the nation.”* it seems that the Holy Crown, and therefore not human dignity, is the basis of the new constitution. It might not be the most problematic issue of all, but in some countries it actually can be read as offending. In fact, in the German paper Zeitung, Andreas Zielke already speaks of a European scandal. Then there is this sentence *“We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships.”*. This is one of the sentences which is formulated in such a way that it can be interpreted in various ways. Due to this, the concern for a possible witch hunt twenty years after the communism has been expressed. On the other hand, it is necessary to mention that this part is stated in the preamble. Consequently, it is no statutory provision on which you can base a prosecution (van Munster, 2012).

Besides the symbolism used in the constitution and the sometimes strange way of formulating, there are comments on the apparent influence of the catholic church on the content of the constitution. Some believe that, because of the sentence *“The life of the foetus shall be protected from the moment of conception.”*, the constitution initiates the possibility to introduce an anti-abortion bill. Also questionable is the sentence *“Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent.”*,

while the European Court made the decision that marriage can no longer be limited to people of opposite sexes. Both the sentences are in contrast with the idea of the separation of state and church and the latter is also in contrast with European values.

One part in the Fundamental Law seems like a step back: *“Hungary shall strive to provide social security to all of its citizens.”* At first, it sounds like a good value, but when you compare it to the previous constitution, it really is not. In the former constitution social security was not something they were aiming for, it was an obligation. Perhaps this has something to do with the former constitution being based on a document created on a communist ideology. However, that does not make the step back any smaller.

Also, the independence of the Hungarian Central Bank, the judiciary, and the data protection supervisor seem to be endangered.

The new legislation gives the prime minister the right to appoint all vice-presidents of the bank, when previously the president of the central bank initiated the nominations process himself (Krugman, 2012). This is incompatible with article 130 TFEU, which establishes the principle of central bank independence and Article 14 of the Statute of the European System of Central Banks and of the European Central Bank (European Commission, 2012).

The concerns raised with regard to the independence of the judiciary is based on three aspects: the reduction of the retirement ages of judges, prosecutors and notaries, the power vested in the president of Hungary's National Judicial Office, and the possibility of a transfer of judges without their consent. The reduction of the retirement ages is quite sudden. It reduces the retirement age from 70 to 62 years. This measure will lead to the early retirement of 236 judges in 2012 already. This is approximately 10% of all current judges. With the new constitution, the president of Hungary's National Judicial Office is responsible for naming all new judges. The fact that such power is vested in one single person is even more questionable because the president of Hungary's National Judicial Office is nominated by the government for nine years (CoE, 2012). And indeed, this government consists of only Fidesz and KDNP. Finally, the European Commission (2012) is concerned that the possibility to transfer judges without their consent will affect the effective application of Union law in Hungary and the fundamental rights of citizens and businesses to an effective remedy by an independent court in Union law cases.

The independence of data protection authorities is also explicitly required by Article 16 TFEU and Article 8 of the EU Charter of Fundamental Rights (European Commission, 2012). However, the

European Commission believes that Hungary violates this independence, because, with the creation of the National Agency for Data Protection, the term of office of the former Data Protection Commission ended two years and nine months earlier than it was supposed to.

On top of that, the Fundamental Law is really just a framework. A lot of things are left open. According to the Fundamental Law, another 39 domains have to be regulated by means of cardinal acts. Those 39 domains concern for example matters like press freedom, family policy, pension system, taxes etcetera. Because of this, it remains to be seen what the constitution will look like in a few years. Besides that, the Helsinki Committee expresses the fear that the cardinal acts will not fall under the constitutional testing (AMS, 2011).

To see if all those concerns are justified, I asked for the opinion of the Hungarian Krisztina Baranyi, professor in Law. She explained that most of the criticism is based on the lack of knowledge foreigners have about the Hungarian history and legal system. For example, according to Baranyi the sentence “*May there be peace, freedom and concord.*” is not solely the slogan of Fidesz, it is a general idea applied in almost every national constitution. Also, the fact that the Holy Crown is seen as the highest value of national unity does not necessarily mean that human dignity is valued less. Then there is also the criticism that too many matters are left open. Baranyi points out that not one constitution regulates all legal issues. Furthermore, she believes that there is no need to fear that the cardinal acts will not be subjected to constitutional testing. Finally, she states: “I do not think that just because Fidesz has a majority in parliament we are in the position to judge in advance future constitutionality.”

Something truly striking is the tremendous difference in views on the potential flaws of the Fundamental Law. The international media speaks about a ‘national revolution’ and ‘the Viktorator’, while professor Baranyi and the Hungarian authors of *The Basic Law of Hungary, a first commentary* have a milder and far less suspicious attitude towards Viktor Orbán, the government and the Fundamental Law. After considering both sides, it seems like there is indeed good reason to continue the infringement procedures and to closely follow the developments of the constitution and creation of cardinal acts. Some elements of the content do clash with European values, like the respect of human rights, and some events do point out that Fidesz is increasing its powers. On the other hand, there is no need to assume the worst already. The constitution is legitimate and it is a framework. This means it is still in progress. We have to wait and judge the cardinal acts before we can actually say that the Fundamental Law is inadequate.

What are the response possibilities for Europe?

Many European media, like Le Monde, Der Standard, NRC, and BBC gave attention to the legislative developments in Hungary. The amount of attention given by the media as well as by European institutions, shows that the Hungarian situation is one to follow closely. Maybe even to follow with suspicion. And this is exactly what Europe does. However, it should be questioned whether staying privy to the situation is enough or that Europe should interfere as well. When one talks about Europe, people usually automatically think of the European Union. However, Europe comprises more than only the European Union. The Council of Europe is another important international organization. The Council of Europe should not be confused with the European Council, which actually is an institution of the European Union. Since Hungary is a member of both the European Union and the Council of Europe, the legislative development surely are of Europe's concern. Therefore, it is not sufficient enough to only observe what is going on. Subsequently, this leaves us with another question: What are the response possibilities for Europe?

The question what the response possibilities for Europe are, can be answered in three parts. Firstly, one should look at how Europe has reacted and handled so far. Secondly, one should consider the power that the European Union has to impose sanctions. Those sanctions can vary in the strength of their effect and influence. Imposing sanctions on a Member State has once happened before. In 2000, the European Union imposed sanction against Austria. Thirdly, since Hungary is also member state of the Council of Europe, one should also take into account the obligations of the Convention for the Protection of Human Rights and Fundamental Freedoms.

What has Europe done so far?

Naturally, Europe has not been inactive with regard to the developments in Hungary. From the very first moment that Hungary started with the process of creating the Fundamental Law, Europe has used political pressure on Hungary. On 8 June 2011 the European Parliament held a debate on, amongst others, the Fundamental Law in the making. During the debate bottlenecks of the content of the Fundamental Law were discussed. The European Parliament discussed the fact that the ideals of Fidesz can be found throughout the document: large families will get extra voting rights, the Catholic faith is set as national religion and there is a lack of provisions making discrimination against homosexuals prosecutable (Presseurop, 2011). Several Members of the European Parliament expressed deep concerns regarding these points. However, at that time, Vivian Reding, EU Commissioner for Justice, Citizenship and Fundamental Rights, stressed that the European

Commission would only interfere after the introduction of the Fundamental Law, and only if it would be conflicting with European values.

In December 2011 the International Monetary Fund and the European Union decided to stop negotiations about financial help for Hungary. This reaction is quite essential in the list of Europe's actions in relation to the developments in Hungary, because it was the first real sanction that has been imposed against Hungary. This interruption of negotiations is caused by the central bank law. Both institutions think that the reform of the bank endangers the independence of the central bank. In this month, José Manuel Barroso also wrote a letter to Viktor Orbán. In this letter he strongly advised the Prime Minister to withdraw certain bills. Barroso gave this advice, because the bills contain provisions which could be in contradiction with EU law. By now we know that Orbán chose not to listen to the request.

In January 2012, the European Commission has initiated infringement procedures. An infringement proceeding always consists of three phases: notification, administrative phase and finally the juridical phase. The last phase is only necessary when the specific country lacked to adapt its law accordingly. In this juridical phase, the European Commission summons a country to court. Should it come to a conviction, then the Commission shall ensure compliance with the judgment. If the country does not keep itself to the judgment, a penalty can be imposed. Such a procedure is not necessarily special, however, in Hungary's case, the infringement procedures are unique: The Commission initiated three infringement procedures at the same time and the procedures are not towards just an average law. According to the Volkskrant (2012), the fundamental values of Europe are challenged. Hungary has to adapt its legislation concerning the independence of the central bank, the judiciary, and the supervising authority of data protection. Besides that, the infringement procedures were accelerated. On 17 January 2012, three letters were sent to the Hungarian government, a letter for each change Hungary has to make. The government was given one month to adapt its legislation. When Orbán would not react, he would risk fines which can be imposed by the European Court of Justice. In March, the European Commission decided to take further steps, because Hungary had not put effort into adapting the law on this three points. The Commission sent two reasoned opinions, concerning the independence of the data protection authority and the measure regarding the reduction of retirement ages. It also sent two administrative letters, asking for clarifications concerning the independence of the judiciary and the central bank. In June, the procedure concerning the independence of the national central bank has been dropped, because the Hungarian government would adapt the law, in order to be

compatible with EU-legislation. However, Orbán lacked to meet the requests of the European Commission in the other two cases. So, in June 2012 the juridical phase started for two of the infringement procedures. This phase is still in progress, while such a phase can take almost entire 2012 (NRC, 2012).

In February 2012, after a plenary sitting of the European Parliament, the European Parliament was prepared to initiate a research on the Hungarian compliance with European values (EuropaNU, 2012). Based on the outcomes of this report the Parliament could decide to conduct a further investigation. However, the majority of the Members of Parliament were positive about the negotiations between Hungary and the European Commission. Nevertheless, another research has been conducted. This research on the Hungarian legislation was conducted by the commission of Venice. This commission is an advisory body of the Council of Europe and consists of constitutional jurists. The report of the research concludes that laws on jurisdiction and religion conflict with the European standards. According to the report the independence of the judiciary is threatened and the freedom of religion is endangered, because the catholic faith is recognized as the national religion. The commission of Venice believes that Hungary has to change these concerning parts of the Hungarian legislation.

When looking at the reaction of Hungary, it appears that the social pressure so far has not really had the desired effect. Thus, it seems that no larger or more serious social pressure will have effect. Even though imposing sanctions is a very last measure, according to van Munster (2012), sanctions can be a good alternative to convince Hungary to amend laws and elements of the Fundamental Law according to the European standards.

Further response possibilities

Continuation of the infringement procedures

As mentioned before, an infringement proceeding has three phases. The European Commission still has the last phase left. This means that it can summon Hungary to the European Court of Justice. Depending on the judgment that the Court passes, the European Commission supervises the country and the adaptations it carries through. If Hungary still decides not to follow the judgment of the Court, another infringement proceeding can be initiated. On the base of Article III-265, the European Commission can appeal to the European Court of Justice. With this appeal the European Commission can impose a fine or penalty. The imposition of a fine is intended as reprimand, whereas a penalty has correct interpretation of the European law as goal. Article III-267

would be the basis for the decision on the height of the fine or penalty. In the case of a penalty, Hungary has to pay a sum every time a certain period (a day, or a week) passes.

Sanctions

Another possibility for the European Union is to impose diplomatic sanctions. The European Union has a great variety of sanctions it could possibly impose:

- Boycotting sport events or cultural events – for example, soccer championships, the Olympics or a festival;
- Diplomatic restrictive measures – the expulsion of diplomats, freezing or even cutting of diplomatic relationships, suspending official visits;
- Restrictive measures on trade – arms embargo, sanctions on import or export;
- Flight bans;
- Restriction on admission;
- Financial restrictive measures – interdiction on financial transactions, suppression on export credits or investment, freezing of funds and other economic resources. (European Commission, 2008)

In case of an implementation of a restrictive measure it is important that it is done in accordance with international law and that it is targeted as closely as possible on the concerning country. The applied sanction should have the least effect as possible on third parties.

However, the effect of such sanctions is questionable. The very first time that the European Union imposed sanction on a member state was in 2000. In February that year, the European Union decided to impose diplomatic sanctions on Austria. Those sanctions lasted for approximately eight months. They were lifted no later than September 2000 (NRC, 2000).

In October 1999 parliamentary elections were held in Austria. The SPÖ, Sozialdemokratische Partei Österreichs or Social Democratic Party of Austria gained the most seats. The extreme right FPÖ Freiheitliche Partei Österreichs or Austrian Freedom Party was the second largest party closely followed by the conservative ÖVP Österreichische Volkspartei or Austrian People's party. The SPÖ did not want to form a coalition with the FPÖ nor the ÖVP and tried to form a minority government. In the mean time, however, FPÖ and ÖVP approached each other and on 4 February

2000 they signed an agreement and formed a coalition. The formation of this coalition and thus the entrance of the extreme right FPÖ was for the European Union the reason to impose sanctions on a member state for the first time in its history. Back in 2000, the European Union consisted of fifteen member states. The fourteen other countries within the European Union froze the bilateral relations with Austria. This meant that there were no more contacts, ambassadorial meetings at an inter-governmental level and that Austrian candidates were not supported when EU international offices were assigned (Schwarz, 2000) Like in every political development, there were people who were against or in favor. More importantly, however, is that a report written by advisers to the European Union already ended the sanctions nine months later. In September 2000, the sanctions on Austria were lifted. One important reason to stop the sanctions was that the sanctions could strengthen Austrians' national feelings and the result for which the European Union had hoped for, the FPÖ to step out of the government, was not being reached.

Article 7 of the Treaty on the European Union

The European Union can also appeal to Article 7 of the TEU. Article 7 is designed to apply to breaches which concern more systematic problems. Article 2 of the TEU establishes the common values of the European Union. All member states have to respect these principles. By means of Article 7 of the Treaty on the European Union and Article 354 of the Treaty on the Functioning of the European Union, the Union ensures that all member states actually do so. In Hungary's case, when it is ascertained that Hungary seriously infringes the European values, it can decide to suspend rights, which Hungary, as a member state, normally has. For example, Hungary can lose its voting right in the meetings of EU-ministers.

The Convention for the Protection of Human Rights and Fundamental Freedoms

The Council of Europe was founded in 1949 by 10 European countries. The Council is active in the area of human rights. Currently, 47 countries are member of the Council. Every country which is now member of the Council of Europe had to sign the Convention for the Protection of Human Rights and Fundamental Freedoms. This convention was established on 4 November 1950. It is an European agreement in which the human and civil rights of all citizens of the member countries are laid down. The convention creates both rights and obligations for the countries who joined the Council of Europe. According to the Council of Europe (2010), the fundamental rights and freedoms which are listed in the convention are right to life, prohibition of torture, prohibition of slavery and forced labor, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion,

freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination. Any country which joined the Council has to secure the before mentioned fundamental rights to everyone within their jurisdiction. Therefore, this convention is really significant when it comes to the current situation in Hungary.

With the current developments in Hungary some of the rights and freedoms stated in the Convention for the Protection of Human Rights and Fundamental Freedoms (2010) seem to be endangered. On the 1st of January 2011 a new media law was introduced. This law creates an authority which judges the content of media. Under this new law, people can complain about media anonymously. Media channels can be fined for prejudiced or unbalanced news. The criteria are unclearly defined though and all five examiners are appointed by Fidesz (GroenLinks, 2012). This element of the ‘national revolution’ seems to be in contrast with article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms: the freedom of expression. Also the Fundamental Law itself seems to conflict with this convention. One of the criticism on the constitution is, for example, the influence of the catholic church. This could put pressure on the freedom of religion, which is mentioned as a fundamental freedom in article 9. Besides that, in the Fundamental Law in article L, marriage is described as an institution between man and woman. This is discriminating homosexual men and women who would like to marry as well. Consequently, the prohibition of discrimination described in article 14, is not respected.

To secure that member countries do respect the rights, the Council of Europe set up the European Court of Human rights. When citizens of any member country wants to test whether the country’s government respects their rights or not, they can institute proceedings at the European Court of Human Rights. Yet this proceedings can only be instituted after the citizen used all the possibilities at national courts. The court also creates the possibility for member countries to institute a proceeding against another country. This power, however, is rarely used in practice.

How should Europe deal with the introduction of the Fundamental Law of Hungary?

Conclusion

To answer the question “How should Europe deal with the introduction of the Fundamental Law of Hungary?” it is important to know the answer to two other questions as well.

The first question is whether there was a need for a new constitution or not. Hungary had no written constitution until 1945 and after that the constitution was a communistic one. When Hungary changed from a communistic country into a democratic state, the communistic constitution was heavily amended. This version was adopted before the free elections took place in 1990 and it was seen as a temporary one. Even the preamble referred to its own temporariness. Until 2010, the idea of an adoption of a formally new constitution came up several times. With the two-third majority of Fidesz, there was finally an excellent opportunity to execute this idea. Remarkable is, however, that acknowledged constitution lawyers believed that the previous constitution, Act No. XX of 1949, together with the constitutional amendments, was functioning well and among the citizens there was no demand, nor expectation for a new constitution. So, in theory there was indeed a need for a new constitution, but in practice this need was actually not that strong.

The second question is whether the criticism is well-founded. The criticism can be divided into two types: criticism on the creation and criticism on the content. The most heard criticism on the creation of the Fundamental Law is the time span. This is definitely well-founded. Three months after Fidesz won the elections, the process of the creation already started and the process itself only took months. Further points of criticism are the lack of instructions the ad hoc parliamentary commission should have provided before collecting the opinion of Hungarian organizations and institutions, the unclear task of the advisory committee of Viktor Orbán, and the questionnaire which was sent only a month before the final concept version was finished and that it, consequently, fell in the period in which the drafting already took place. On top of the criticism on the creation, there is also quite a lot of criticism on the content. A small selection comprises the following points:

- The slogan of Fidesz is used in the preamble, which increases the probability that the Fundamental Law is mostly an one-party document;

- Not human dignity, but the Holy Crown seems to be the basis of the constitution;
- Sometimes sentences are formulated in such a manner that it can be interpreted in various ways;
- It is probable that the catholic church has had a great influence on the document. The norms and values of this church shine through in the text;
- The Fundamental Law is more of a framework than a complete constitution: 39 other domains are still waiting to be regulated in so called cardinal acts.

Also, the independence of the Hungarian Central Bank, the judiciary, and the data protection supervisor seem to be endangered.

These points of criticism are well-founded as well. They are conflicting with fundamental freedoms and the democratic and European standards. Obviously, this must be rectified, since Hungary is a democratic country, which is a member state of the European Union and a member of the Council of Europe.

The answers to the first two questions show that the Fundamental Law calls for a European response. Naturally, Europe has not been inactive until now. The European Union has initiated three infringement procedures, concerning the independence of the Hungarian Central Bank, the judiciary and the data protection supervisor. The bottlenecks of the Fundamental Law already have been discussed in European Parliament and several members have expressed their concerns towards the Fundamental Law. Thus, political pressure has been put on Hungary already. However, no actual sanctions have followed yet.

So, how should Europe respond? This differs per institution.

The European Commission should continue its two infringement procedures and summon Hungary to court. Hopefully Hungary will make the changes to the Fundamental Law that the European Court of Justice will instruct them to. If not, the European Commission should start another infringement proceeding, so that the European Court of Justice can impose a fine or penalty. Might it come to this point, a penalty is more likely to be imposed, because a penalty has correct interpretation of the European law as a goal.

The European Union could impose diplomatic sanctions against Hungary. However, I would advise against this measure. The imposed sanctions against Austria in 2000 show that the effect is rather questionable. It can strengthen the national feelings of the Hungarians and it has happened before that the goal of the European Union is not reached by means of the sanctions. Nevertheless, there is still something the European Union can and should do. I recommend that the European Union appeals to article 7 of the TEU. It is clear that Hungary breaches European values and as long as they do so, the European Union can suspend rights, which come with the membership of the European Union, of Hungary.

There is also an important role for the Council of Europe. The council's most important convention is important for Hungarian citizens. Even though the citizens should first appeal to all national courts, it can test the Fundamental Law on respecting their fundamental rights and freedoms in the European Court of Justice. I believe this is a good option, because Hungary is a member of the Council of Europe and every member is obliged to secure the rights and freedoms mentioned in the Convention for the Protection of Human Rights and Fundamental Freedoms.

Finally, one last thing that should be kept in mind is that the Fundamental Law is, so far, only a framework. Europe should continue to closely follow the developments of cardinal acts and act again in case of any further lack of respect towards democratic and European values.

Definitions

Act No. XX of 1949: This document was the first written constitution of a democratic Hungary.

Article III-265: If the European Commission believes that a member state does not fulfill its obligation, it can summon a country to the European Court of Justice with this article.

Article III-267: With this article, the European Court of Justice can impose a fine or penalty in case a member state does not follow the judgment made by the Court based on Article III-265.

Convention for the Protection of Human Rights and Fundamental Freedoms: International treaty established by the Council of Europe. Its goal is to protect human rights and fundamental freedoms.

Council of Europe (CoE): European institution, based in Strasbourg. The Council of Europe tries to develop common and democratic principles in Europe based on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Commission of Venice: Advisory body of the Council of Europe. The commission consists of experts on constitutional law.

Europe: In the context of this dissertation Europe stands for: European Union, European Parliament, European Commission, Council of Europe. In this case it is not referring to the more known continent Europe.

European Commission (EC): An institution of the European Union which checks whether the member states of the European Union apply the EU-legislation accordingly.

European Court of Justice (ECJ): The court of the European Union who has to make sure that the EU-laws are applied correctly.

European Parliament (EP): The parliamentary institution of the European Union which can be seen as the representative of the EU-citizens.

European Union (EU): The EU is a political and economical Union with 27 member states. A part of its competences are distributed among the European Commission, European Court of Justice and European Parliament.

Fidesz: Hungarian Political Party, founded in 1988. It is the party of Viktor Orbán, the current Prime Minister of Hungary. Fidesz is a right-wing party.

Fundamental Law: The new Hungarian constitution which came into force on 1 January 2012.

International Monetary Fund (IMF): International organization which has as goal to establish global monetary cooperation, economic growth, and financial stability.

Jobbik: Hungarian political party, founded in 2003, which is seen as extreme-right.

Kereszténydemokrata Néppárt (KDNP): Hungarian political party, founded in 1943 and refounded in 1949. It closely cooperates with Fidesz.

Magyar Szocialista Párt (MSzP): Hungarian political party, founded in 1988, which can be found on the centre-left side of the political spectrum.

Organization for Security and Cooperation in Europe: Intergovernmental Organization for regional security.

Treaty on the European Union (TEU): One of the two main treaties on which the European Union is based.

Treaty on the Functioning of the European Union (TFEU): One of the two main treaties on which the European Union is based.

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Appendices

Interview Mrs. Baranyi

20 August 2012

Brigitte Willems: The basic law of Hungary, which entered into force on the 1st of January 2012, has been criticized by various European organizations. I would like to know how you feel about this criticism. To make this a bit more concrete I used several points of criticism. If you feel that you should add or comment anything after the questions, please do not hesitate to do so!

The constitution starts with the first sentence of the national anthem: "God bless the Hungarians" and ends with "May there be peace, freedom and concord" - the slogan of the Fidesz-party. Some see this as a proof that the constitution is a document only created by one party. Do you agree on that? And how do you feel about the fact that it is seen as a "one-party-document"?

Mrs. Baranyi: The first sentence "God bless the Hungarians" is the first line of our national anthem, therefore refers back to that sung by the Hungarians for over 200 years, in all times. The first line therefore heavily aims to express a historical unity, and aims to refer back to the times before the Communist regime. The last sentence expresses a general idea applied in all Constitutions around the world, I do not think this is a slogan of the Fidesz party only. This also aims to create a historical frame for the Constitution. Peace, freedom, concord are ideas appearing in all historical Constitutions, in Europe and beyond Europe as well. This also takes reference to the historical constitution and also tries to express a demarcation from the values of the Communist regime. I feel there is a great deal of exaggeration and distortion to say that one party created the new basic law of Hungary. It is a fact that the leading party Fidesz has a majority in Parliament, therefore those laws which are fully supported by them, will most probably be voted by Parliament. We must bear in mind though, that they acquired their majority positions in the elections based on the votes of the citizens, so their majority is acquired as a result of legally held elections.

I would like to add just one more thing. This basic law is the first democratic basic law of Hungary, as our first Constitution accepted in 1949 was created under the Communist regime, it was called as Stalin Constitution as a nickname with the specific aim to copy and create a Soviet-style communist state organization. Even at creation, it was designated to operate for only a short period of time. That "short period" after all meant over 60 years. It had a lot of deficiencies due to the age and regime it was created in, it did not include a lot of basic human and political rights that a normal historical constitution – includes, also it fully lacked the freedom of enterprise. It was amended 34 times throughout the 60 years, consequently interpretation problems risen as law became more diverse. To create a new, proper Constitution for Hungary is a tendency for over 20 years in Hungary.

Brigitte Willems: In the preamble you can read the following sentence: "We honor the achievements of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and the unity of the nation." Andreas Zielke from the *Süddeutsche Zeitung* called this a European scandal: he says that not human dignity, but the crown, forms the highest value of national unity. What do you think about this point of criticism?

Mrs. Baranyi: The crown for every nation, in Hungary too, is one of the state symbols (others are ex.: flag, scepter etc.) The Holy Crown of Hungary truly embodies the unity of the nation, at least in the thinking of everyday people, this is a reference to that. I do not think that human dignity would be less important or less emphasized because of the positioning of the Holy Crown as a central element, it also aims to refer back to our history before the Communist regime. The Holy Crown in Hungarian history is the symbol of our first independent King who formed the country in the Carpatian Basin. Therefore the Crown has a very important message of national unity and freedom and independence of our country. Bear in mind that there is a Holy Crown theory among historians based on the specific relevance of the Holy Crown in Hungarian history. For better understanding, I advise you to read about this theory.

Brigitte Willems: Furthermore, the preambles states “We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships.” This sentence seems vague and sinister to me. I wonder, doesn’t this set the door open for a “witch hunt”?

Mrs. Baranyi: I do not think so. This line refers to applying the general regulations of the statute of limitations of criminal liability. It aims to express that even if a new basic law was accepted, this does not mean that criminal liability for crimes committed during the Communist regime cease- ex.: bear in mind that people were sentenced to death based on trumped-up charges/false accusations. The liability period for such crimes according to our criminal Code is around 50 years or can be even unlimited, so legal prosecution if the liability period did not cease can be initiated against the participants. Bear also in mind that documents of these unlawfull sentences were encrypted „for reasons of national security,, as the Communist regime indicated these documents were sealed and stored at secret locations, and were only found partly and made available to public in the recent years, the inhuman and illegal procedures can only be checked up therefore only if the relevant documents are found.

Brigitte Willems: Because of the part “the life of the foetus shall be protected from the moment of conception.” which implies an initiative of the abolishment of the abortion law and because of the sentence “Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent.” it is said that the Catholic church has had an influence on the content of the law. This would be in conflict with the separation of church and state. What is your opinion on this?

Mrs. Baranyi: Firstly, I think it is inaccurate to state that the Catholic church had the influence on such regulations as for ex.: the Calvinist and Lutheran Church also views marriage as being among only man and women. If we talk about influence at all, it is more proper to say that this is a strong tradition in the Christian religion.

Secondly, the reference to catholic influence would be accurate if for ex.: only marriages in a catholic church would be accepted as creating marriage, however this is absolutely not the case. In fact, only wedding in front of the state (unanimous declaration of the will by both parties at the local council) is creating marriage, church weddings do not legally create marriage.

Thirdly, it is true that in Hungary marriage in the legal meaning can be among people of different sex. Among the same sex people Hungary accepts the so called Registered Civil Partnership, where the members take an oath in front of the notary public, sign the documents of such in front of the notary, however the legal regulations for their community property/ inheritance etc. provides the same rights as if they were married. They cannot get married in a catholic church, neither in many other type of churches. As the state provides them possibility to unite with the almost the

same rights as married couples, I think the division of state and church is not infringed, and Christian influence is rather felt than specifically Catholic.

Brigitte Willems: Secondly, the European Court recently decided that marriage cannot longer be limited to people from the opposite sex. This is in contrast with “Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman based on their independent consent.” Therefore it seems to me that this part is not appropriate in a constitution. I wonder what your view on this is?

I feel that the question is mixing several things. There is no such decree with the content of the above indicated valid generally for all Member countries. If there is, please indicate it. The European Charter Article 6 – not directive or a decree but the basic document with enforceable power- states that it is a Member State competence whether to recognize a same-sex marriage in the specific country or not! There is no central EU decree on how to define marriage in a specific country, this issue is left to be decided in the free competence of the Member States! However, at the same time of providing such right to Member countries, the Article also declares in the second paragraph that no matter how a country decides to regulate marriage, the main rule to be kept are 1. discrimination is prohibited based on sex and 2. same-sex couples shall be provided equal treatment regarding EU law matters with different-sex couples, like for freedom of movement and residence, asylum the same rights and possibilities shall be provided etc. There were some directives issued on free movement which dealt with some aspects of marriage, however none states – cannot state based on the Charter - that marriage can only be among different- sex couples. For ex.: 2004/34. directive declares that EU citizens under certain conditions can freely move and reside with their spouse or partner within the EU. If the host state accepts marriage the same way as registered partnership!!! than a registered partner acquires the same rights as a spouse. All in all, and my answer here applies to your earlier questions regarding marriage, I can say that the fact that Hungary does only accept marriage to be between opposite- sex people does not infringe any kind of law, neither the EU law, neither domestic law. States are free to decide how they regulate this matter.

Brigitte Willems: The following sentence worries some people: "Hungary shall strive to provide social security to all of its citizen," At first, this seems positive. However, in the former constitution Hungary was obligated to provide this social security. Should we see this as a step back? Or are we making a too big deal out of it?

Mrs. Baranyi: On one hand, to protect such rights is not just the obligation of the country but the EU as a unity is also responsible for that, therefore the wording is not incorrect. Bear in mind that in the age of the Communist Regime the state was the top defence agency which in the war period had to defend its citizens, there were no other organizations to do so. Nowadays, this is not the case, The EU, international organizations also carry this responsibility. Bear in mind that citizenship was granted to people living in the neighbouring countries last year, so if - due to historical reasons- they met certain conditions ex.: their parents were Hungarians and lived in the territory of Big Hungary(Hungary before Trianon), therefore these Romanian, Slovakian etc. people have also the nationality of their own country and usually live there, so protecting them is not so easy. International law, EU law also has a relevance here.

Brigitte Willems: With the new basic law, life sentence without appeal is possible. Amnesty International heavily criticized this. What do you think about this?

Mrs. Baranyi: Where and how is this stated? I do not see this anywhere declared in the basic law.

Brigitte Willems: A lot of things are left open in the constitution (like press freedom, family policy, pension system, taxes, and the voting right of Hungarians living outside Hungary). This will be taken care of in so called cardinal acts. The Helsinki Committee complained about this because it is afraid that these acts will not fall under the constitutional testing. How worried should we be about the fact that those acts have to be approved by two-third of the Parliament (which is exactly how big the Fidesz party is)?

Mrs. Baranyi: Firstly, a Constitution is a so called “ frame law” based on the theoretical categorization of laws, it is normal - and the formal Constitution also declared issues - to be dealt with in a separate law. I see no problems with that. If you look around in Europe and outside Europe no Constitution of a nation includes all issues. As the Basic Law nominates more than 30 topics to be regulated by the so called cardinal acts (new type of act created!!) I agree with the general opinion of the notable law professors in Hungary, that we need to see and wait what content these cardinal acts will have. When these are made, we will be able to judge whether they were created constitutionally or not, whether the content is meeting the general constitutional requirements or not. I do not think that just because Fidesz has a majority in Parliament we are in the position to judge in advance future constitutionality. The general control system - see below- remained in the Basic Law! The Basic Law kept the earlier check up system, which means that after the voting in Parliament the President has the competence to either send the law back to reconsideration and if it is voted for in the second round then he has to sign the law, or to send it to the Constitutional Court for a constitutional review! or as a third possibility national referendum can decide on the acceptance of the law. This way- on general basis- the control functions. My concern regarding constitutionality is- I share the same opinion as notable Hungarian law professors have - that the power of the Constitutional Court was restricted by the Basic Law, this provides an area where the Constitutional Court as our main check and balance organ does not have any power. The constitutional review was general earlier, all laws and regulations could be examined and consequently changed/abolished by the Constitutional Court. This provided a fair check and balance system in legislation. However according to the Basic Law at present the Constitutional court cannot examine and abolish laws on- listed in Article 37.- budgetary issues and the enforcement decrees in connection to that, taxes, duties, fees, charges, local taxes, only if they violate basic human rights (right to life and human dignity, freedom of conscience and religion etc.) These limitations shall be in force until the state debt exceeds 50% of our GDP. By this provision fiscal policy is entirely in the command of the Government with a very narrow possibility for a review or change. The Government is required to achieve a fiscal result - based on Article 36. and 37. - to reduce the state debt. From this aspect all or laws connected to fiscal policy fall out of the control of the Constitutional Court unless they harm the basic human rights. So how worried we should be? Regarding exceptional out-of-competence issues I am concerned.

Brigitte Willems: From what I have read on Internet and in books, Fidesz started to introduce a lot of new bills and that if there was a problem or it did not correspond to the constitution, they simply changed the constitution with the two-third majority they have in the Parliament.

Mrs. Baranyi: The statement this way is inappropriate. Firstly, by changing Hungary's official name in the Basic Law, all - and literally ALL - our laws are to be changed, if nothing else than the name of the country is changed in them. Logically if there is a change due to the new official name of the country than - taking advantage of the situation - other issues attached to that can be changed as well, therefore at the moment I could list all the prevailing regulations in Hungary that are changed partly or fully. Daily - literally daily - at least 7-8 amended laws are promulgated in the Hungarian Gazette. It is extremely difficult for even lawyers to read - not to mention to understand and to be able to apply - the new regulations. Secondly, it is incorrect to say that the Basic Law was amended subsequently the promulgation of a law and accordingly to the new bills, so that on general basis a vice - versa legislation is functioning at the moment in Hungary. I only know 2 examples for the latest, but these are results of the EU pressure, from political and economical view it might be said that it is a verified step from Parliament. The European Commission initiated an infringement procedure against Hungary in January 2012, and rejected the transitional provisions of the Basic Law which allowed the merger of the Hungarian National Bank (MNB), and the Financial Supervisory Authority (PSZÁF) and the content of the new Act on the Central Bank. As the change of the content of the abovementioned were the conditions for Hungary to be granted the state loan in the IMF negotiations, and the state loan was crucial from economical reasons, Hungary met the requirements of the EU and changed the content of the laws - Central Bank Act on Special Bank Taxes - and also consequently to that amended the Constitution to correspond with the expectations and the content of these laws. As a result the merger possibility of MNB and PSZÁF were abolished, the transitional provisions of the Constitution were declared to become part of the Constitution (from the wording it was obscure earlier whether they are part of the Constitution or not - if not then they are lower in the hierarchy of laws which is crucial from the point of view of enforcement and regulation possibility - and regarding their content they contained law regulations rather than technical regulations like: the Hungarian Socialist Party is the successor of the Hungarian Socialist Worker's Party (party functioning under the communist regime), and therefore shares the liability for crimes committed under the Communist regime!!! this is a very serious liability if we think about criminal liability...etc.) I am not aware of any other vice-versa legislation apart from the above. Bear in mind that since the Basic law entered into force only 1 amendment was made - the above.

Brigitte Willems: Do you know some examples of these new bills?

Mrs. Baranyi: Law on the Central National Bank of Hungary, Law on taxes, Penal Code, Civil Code, law on the administrative division boundaries (Hungary's administrative system so the size and number of the counties were fully altered!), law on the local government system, Law on Courts, Law on the Status of Judges etc.

Brigitte Willems All the above points are mainly regarded as alarming because of the firm grip the Fidesz-party has and will have on the power in Hungary. I make this remark because of the following situations:

- Apparently, the power of the Constitutional Court has been limited by the constitution. Could you explain how it is that the power is limited?

Mrs. Baranyi: Generally the powers, jurisdiction, who may initiate a proceeding

- new: by way of a constitutional complaint the consistency of judicial decisions - made in a specific case - with the Basic Law can also be reviewed

- preliminary norm control may be initiated by Parliament as well, not just by the President
- posterior norm control became restricted: private citizens cannot claim such a procedure, only the Government, 1/4th MPs and the President. This meant unfortunately that the ongoing procedures had to be concluded without a final decision, so ex: the examination of the law on the nationalization of private pension funds had to be concluded. I found the latter a bit worrying.
- number of the Members of the Constitutional Court changed, all members are elected by Parliament
- certain issues cannot be constitutionally examined - see earlier as mentioned.

Brigitte Willems: From now on the chief justice is appointed for 12 instead of 3 years. Why do you think they made such a tremendous change concerning the period of time of appointment?

Mrs. Baranyi: This is a very complex question, I do not think I am in the position to give proper answer on it, only what you can find on internet yourself.

12 years? I see 9 years in the Basic Law paragraph 26 subsection 3. , if we talk about the Head of the normal court system here- Head of the Curia. From 2012 1 st January the central administration of courts - the administrative powers (including the senior judicial appointments, judicial examination of job applications, budget, personnel management powers, etc. of the Chief Justice - are discharged by the Head of the National Court Registry (OBH).

The Head of OBH above is entitled to the administrative tasks that the Chief Justice had earlier. In other words the Head of administration regarding courts is divided from now on from the Curia, which is only responsible for professional leadership.

According to the Comment part of Act No. 162. Year 2011. , the change of the regulations on judges generally were necessary on one hand because the Basic law came into force and the Basic Law changed their position and court system as a whole, on the other hand because the administrative border lines and the whole administrative structure of the country was changed. The Comment emphasizes that the existing values of the earlier law shall be kept.

No specific explanation is given to any year change.

Brigitte Willems: And could you briefly tell what the chief justice is/does?

Mrs. Baranyi: Act No. 162. Year 2011. includes the relevant provisions for judges, both the rules for the Head of OBH and the Head of the Curia can be found there.

Brigitte Willems: I have read that the current president of the Hungarian National Bank has to resign in 2013. After that the Fidesz-government holds this position in hands for 6 years. To me this seems like a conflict of interests. What is your opinion on this matter?

Mrs. Baranyi: The new Act on the National Bank of Hungary entered into force pro futuro, therefore previous mandates which were given years ago for a fixed term, are not affected. The

present Head of MNB Mr. Simor András's mandate ends in 2013, therefore his mandate terminates when it was originally indicated.

The 6 year rule in the Basic Law Article 41. subsection 2. refers to future mandates.

The general prohibition of retroactive force of laws is a general rule in legislation. Therefore I see no conflict of interest.

The change in the number of ombudsman's happened earlier too, however the number of them was never so low.

Brigitte Willems: I understood that there used to be four ombudsmen which are now replaced by a commissioner of fundamental rights. This person is appointed by two-third majority of the Parliament (again, the size of the Fidesz-party). It is said that those ombudsmen were a problem in Orbán's eyes.

Do you know why Orbán would see it that way? And could this replacement be linked to a desire to obtain power?

Between 1995- 2001 we had 4 ombudsman's, from 2001- 2007: we had 3 (but no Ombudsman of Citizen's rights) and from 2008 a new type was created: Ombudsman of Future Generations, so from 2008- 2011 we had 3 + the general Ombudsman.

The new system left the general ombudsman's position as "The Ombudsman" in one person called as "Ombudsman of Fundamental Rights" – a new name was created. As a deputy of the Ombudsman, a so called "special commissioner" position for the earlier Ombudsman of Minority Rights, and for the Ombudsman of Future Generations was created. The special commissioners are the Ombudsman's alternates and work in the Office of the Ombudsman with almost the same power.

The reasons to have only one ombudsman according to the Comment of the Law (on No. 111. Year 2011.) the Ombudsman of Fundamental Rights is, that : 1. self- monitoring mechanism functions less effectively with 4 Ombudsmen, also 2. it is easier for Parliament to exercise its general supervision function regarding the lawful operation over one Ombudsman. The distinction regarding special areas of law remain, but are dealt with within the Ombudsman's Office. As a representative of the whole institution, one person shall be in charge.

Bear in mind though that the number and the procedures and the rights of the Ombudsman, so generally its position. did not changed.

So all in all, according to the official explanation the number change is due to technical issues only

Brigitte Willems: For the appointment of the chief prosecutor after Péter Polt retires, again a two-third majority is needed, which seems to give more power to the Fidesz-party. Could you tell me more on this point?

Mrs. Baranyi: The Chief prosecutor according to the Basic Law Article 29. is elected for 9 years, the candidate is proposed by the President and Parliament shall elect him with 2/3 majority.

I think I have to clarify something here:

The voting ratio required by the Basic Law - this entirely follows our constitutional traditions- can

be generally 3 type: general majority (51%), 2/3 which is (75%) and unanimous. The general voting ratio - as earlier - is 51%. If a voting ratio of 2/3 is required to a certain issue, it indicates that the topic is more "weighty" than usually. There are more than 30 topics in the Basic Law which must be voted for with 2/3 majority indicating simply that this is important. In the former Constitution, the voting ratio was determined this way too, and mostly the topics referred to a 2/3 majority, remained unchanged in the Basic Law as well. The person of the Chief executor had been elected by 2/3 of Parliament as well (Constitution Article 51) earlier!! I do find it ill-considered and also I think it reflects the lack of knowledge on Hungary's law system to draw a parallel between a 2/3 majority ratio and gaining more power by Fidesz. If Fidesz wants to create hidden dictatorship, then the logical thing would have been to amend the ratio of the required amount of votes to 51% only in the Basic Law, this way it would be certain that all issues are comfortably voted for even by only the Fidesz MPs. By requiring 2/3 all –and literally all MPs of Fidesz must participate on the sitting when the law is voted for.

Brigitte Willems: From what I have read, Orbán firstly wanted to fire all judges who worked during the communistic period in Hungary, but this was too unrealistic. Now the retirement age has dropped from 70 to 62. This affects 7% of the judges, of which a lot in high functions. Do you think we should look at this situation with suspicion?

Mrs. Baranyi: Definitely not. The age of retirement for judges now is the normal age as for all other citizen, 62 year old generally. Indeed, they had an unduly privileged position so far. It was absolutely illogical to apply a higher age limit for them than for other professions, this was negative discrimination fully.

The courts function with a fix number of posts, therefore many times young and talented candidates with higher results and potentials, had to be refused or put on the queue because the old judges kept their posts, even though they already reached or were far beyond the pension age.

Brigitte Willems: During a three day trip to Hungary the Secretary of State of the UN stated "I would therefore welcome the Government's willingness to seek advice and recommendations on some of these issues from others in Hungary as well as from the Council of Europe and the United Nations."

Do you agree with him? And why?

Mrs. Baranyi: Just because a country is part of the EU, according to the general membership agreement at least, it keeps its sovereignty, the remark above fully injures the idea of the before mentioned.

Brigitte Willems: Currently I don't know that much about Hungary's prime minister and his party. I understood that Fidesz merged with the christian-democrats. Is it correct that this party was called KDNP? And what does KDNP stand for? When did this merge take place? Do you know a reliable source which provides information about the elections of 2010?

Mrs. Baranyi: I wrote in the name of FIDESZ in Google, and I found a link to wikipedia, I think it gives a proper and exhaustive explanation to your questions and it contains sources at the end too.

Brigitte Willems: Because of this concerns several actions have been realized. For example, José Manuel Barroso, the president of the European Commission, sent a letter to Orbán in December 2011 to ask not to continue with several bills, and Hungary is risking fines which can be given by

the European Court of Justice. I wonder what your opinion is on what should happen in the future:

- Should the European Union take action in this situation? And if so how?
- Or do you think it should be taken care of nationally? How do you think this could be taken care of within Hungary?
- Or do believe that there is no problem and any social pressure, fine or sanction (nationally or on European level) is unnecessary

Mrs. Baranyi: I do not know, the questions are too general. I think that the cases must be examined specifically and decided whether EU interference is legitimate or not.

Interview Mr. van Munster

27 August 2012

Brigitte Willems: Oke, nou hij kan 26 uur opnemen, dus dat moet lukken.

Mr. van Munster: Ja dat is wel een goede vraag. Hoelang gaat het duren ongeveer?

Brigitte Willems: Ik had gehoopt op iets minder dan een uur, zelf.

Mr. van Munster: OK

Brigitte Willems: Dus, ja het ligt er ook aan wat u zelf als antwoord heeft, natuurlijk. De vragen zijn eigenlijk gebaseerd op de inhoud. Nou ja, daar gaf je zelf al aan: daar weet ik niet zo heel veel van. Dus misschien dat we daar wat sneller door heen gaan. En het andere gedeelte gaat eigenlijk over het proces. Daar heb ik ook een paar vragen over. Wat u er nou van vindt. Ja, ik lees ze voor. En dan eigenlijk ehh, wat u er van vindt.

Mr. van Munster: Want je had al een ander interview gedaan met die docent uit Hongarije?

Brigitte Willems: Ja, dat is een professor die in Hongarije ook woont. En dat hebben we dan uiteindelijk via de e-mail gedaan. Dat was in eerste instantie dat ik dacht "Oke, daar ga ik mee akkoord." Maar daardoor heeft het wel heel lang geduurd voordat ik antwoord kreeg.

Mr. van Munster: Had je wel goede antwoorden? Want die weet waarschijnlijk veel meer over de inhoud

Brigitte Willems: Ja, daar heb ik hele goede antwoorden op gekregen. Daar kan ik heel veel mee. Dat is meer nationaal gezien. Zij komt natuurlijk uit Hongarije. En u bent van Europees recht. En dat geeft u ook. En daarom ben ik heel erg benieuwd naar uw mening. Dus zo steekt het in elkaar. Mijn eerste vraag gaat over een aantal zinnen die in het begin van de grondwet staan. Die eerste zin is van het volkslied, maar de laatste zin is echt van die partij die op dit moment die 2/3^e meerderheid heeft in het parlement. En dat is "May there be peace, freedom and concord." In dat artikel wat ik daarover heb gelezen, die zeg maar kritiek uit op de inhoud, zegt: "Je kan het zien als een éénpartij-document." Ik ben nog heel erg onbekend op dit gebied. En vroeg me af wat u daarvan denkt.

Mr. van Munster: Nou ja kijk, het is natuurlijk bij grondwetten altijd wel de bedoeling om een document te maken dat voor alle burgers geldt. Dus voor alle inwoners van het land. En dat niet te veel, of eigenlijk het liefst helemaal niet, politiek gekleurd is. En ik heb me daar natuurlijk wel een beetje in verdiept. Dat is hier natuurlijk heel duidelijk wel zo. Want die Fidesz partij heet het geloof ik he?

Brigitte Willems: Ja, klopt.

Mr. van Munster: Die hebben natuurlijk gewoon zelf documenten in elkaar gezet, omdat ze die macht hebben. Dat is natuurlijk altijd een gevaar, dat een partij zoveel macht heeft, dat ze dat kunnen doen. En ja, dat is niet fraai inderdaad. Of het daarmee ook gelijk gevaarlijk is, of niet goed, dat is denk ik een andere vraag. Dan zou je toch meer moeten kijken naar wat er nog meer in

staat. Er staan andere dingen in, daar heb je het denk ik straks over. Die denk ik ook wat gevaarlijker zijn. Maar het is in ieder geval zo dat je met zo een duidelijk, ja, éénpartij-document, want dat is het toch wel, dat je heel veel mensen van je vervreemt. En ook politieke tegenstanders zullen niet geneigd zijn om zich achter zo een document te scharen. Dus het is niet iets wat goed is voor de nationale eenheid. Wat zo een document per definitie juist wel probeert te beschermen.

Brigitte Willems: Want de professor uit Hongarije zelf, die zei “Ja, het is eigenlijk een soort concept, die zin, wat in meerdere grondwetten wordt gebruikt, dus er moet eigenlijk niks achter gezocht worden.”

Mr. van Munster: Ja, nee dat kan. Die weet dat natuurlijk beter. Als dat al eerder zo was. Kijk, dat is wel interessante informatie. Betekent dat dan ook dat die Fidesz partij dat heeft overgenomen uit de grondwet als het ware? Dat het omgekeerd ligt?

Brigitte Willems: Dat weet ik niet helemaal zeker. Daar zou ik dan inderdaad even naar moeten kijken. Zoals zij het zei is van “Ja, het komt vanuit die partij, die heeft dat als slogan.” Ik weet niet hoe dat dan slogan is geworden.

Mr. van Munster: Ja, want als het in eerdere grondwetten stond al, dan krijg je de vraag “is dit nou iets wat dusdanig geassocieerd kan worden met die partij, dat het gezien kan worden als een partij document?” Snap je wat ik zeg? Dan blijf je met hetzelfde probleem zitten. Als dat echt gezien kan worden als iets dat er los van staat, dan heb je dat probleem niet. Maar dat kan ik dus niet helemaal beoordelen.

Brigitte Willems: Van te voren is er heel lang geen echt geschreven grondwet geweest. Het is meer dat er vervolgens documenten bijkwamen. Zo is het een hele tijd geweest. En na de tweede wereldoorlog, tijdens het communisme, toen is eigenlijk de eerste grondwet tot stand gekomen. Dat was dan gebaseerd op Rusland. En daarna is er in 1989 een officieel document gekomen wat dan de grondwet was. Maar dat werd eigenlijk gezien als iets tijdelijks, want dat werd toen ook gemaakt door een tijdelijk parlement. Die waren nog niet door de vrije verkiezingen gekozen. Dus ik ga die grondwet even doorspitten.

Mr. van Munster: Ik zou er even naar kijken, want als dat, ik denk dat die. Want dat vind ik sowieso bij deze hele discussie van belang, dat je heel goed moet afvragen, want veel van die uitspraken, we komen er zo nog op terug, zijn niet per se gevaarlijk. Kan wel, maar het hoeft niet. Als alles in samenhang, zeg maar, gezien wordt, kan dit er toe bijdragen dat je zegt: “Ja, het is echt een éénpartij-document.” En die afspraak, en de voorstellen en de verwijzingen naar het communistische verleden. Dat het als totaalpakket wel iets krijgt waarvan je zegt. Dus mijn eerste reactie zou zijn “Ja, dat klopt.” Kan me heel goed voorstellen dat het geen eenheid smeedt. Dat het teveel een partij document is. Maar gezien wat je net zegt, hoeft dat niet zo te zijn.

Brigitte Willems: Ok. Nou, dan kan ik denk door naar de volgende vraag. In het begin van die grondwet staat dan ook: “We honour the achievement of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and the unity of the nation” nou is het dan iemand anders die daar dan al kritiek op heeft geuit. Die man heet Andreas Zielke en hij bestempelt het als een schandaal dat de kroon en niet de menselijke waardigheid de hoogste waarde van de nationale eenheid vormt.

Mr. van Munster: Nou ja, kijk, in Duitsland is dat zo he.. In Duitsland is een van de eerste artikelen van de grondwet, dat gaat over de menselijke waardigheid, dat is ook een artikel dat onwijzigbaar

is. Wat heel uniek is. Er zijn maar weinig grondwetten in de wereld die dat hebben. Waarbij je zeg maar, waar bepaalde dingen onwijzigbaar zijn. Ook niet met een meerderheid van 2/3^e. Dus dat verklaart misschien dat de Duitse auteur, dat die dat zo belangrijk vindt. En het is natuurlijk ook zo, in het algemeen bij grondwetten, dat meestal de belangrijkste punten in het begin gezet worden. In Nederland bijvoorbeeld ook, de grondrechten staan in het begin. Dus de echte mensen rechten. En dan later krijg je het koningshuis, regering en andere dingen. Maar ik persoonlijk, ook daarvan dacht ik, nou ja, ik vind het niet helemaal, alleen op basis daarvan, vind ik niet dat je dat kan zeggen. Dat het belangrijker gevonden wordt dan menselijke waardigheid. Er wordt wel iets mee aangegeven. Dat het heel er belangrijk gevonden wordt. Dus daarom staat het ook in het begin.

Brigitte Willems: Ja, in de geschiedenis van Hongarije zelf, zeg maar echt als dat gedeelte, waar ze zijn gevestigd uiteindelijk, is het heel erg belangrijk, die holy crown. Dus het staat wel voor de nationale eenheid.

Mr. van Munster: Ja, nou ja, dat is natuurlijk ook het grote argument voor de monarchie, in het algemeen, ook in Nederland. Het is natuurlijk een monarchie, een erfelijke monarchie, maar dat is eigenlijk per definitie zo, is natuurlijk altijd, ook per definitie, niet democratisch. En democratie en rechtsstaat, en de grondwet is echt een uiting van de rechtsstaat. En ook vaak van de democratie. En dat staat daar natuurlijk enorm mee op gespannen voet. Maar tegelijkertijd, en dat is ook de reden waarom wij het hier in Nederland nog hebben denk ik, en in sommige andere landen die toch wel democratisch en rechtsstatelijk zijn, is het wel iets dat eenheid ook geeft. En voor veel mensen belangrijk is. Dus ik vind ook dat niet iets waarvan ik meteen zeg van ja, daar zet je meteen de menselijke waardigheid als minder belangrijk weg. Dat zou alleen blijken als dan inderdaad alleen mensenrechten worden uitgekleeft.

Brigitte Willems: Dat is exact wat zij zei. Dat valt me dan wel op. Dat dat dan in ieder geval wel éénsgestemd is.

Mr. van Munster: Nou gelukkig.

Brigitte Willems: Ja, dat is goed om te horen. Hehe. Nou, nog iets wat in de grondwet wordt gezegd, is "We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships." In dat artikel wat ik dan weer gelezen heb, wordt gesuggereerd dat dit de deur open doet voor een heksenjacht. Ik had daar sowieso een aantal vraagtekens bij. Ik ben benieuwd wat u vindt van zo een reactie.

Mr. van Munster: Maar wat betekent dit artikel volgens jou precies?

Brigitte Willems: Nou dit is niet een artikel, dat is nog uit de preamble. Uh nou ja, zodra jij iets heb gedaan, zeg maar, in strijd met Hongarije, om het maar even zo te zeggen, dat ze je dan gelijk kunnen achtervolgen. En dat ze niet echt een gegronde reden nodig hebben. Zo komt het in eerste instantie over.

Mr. van Munster: Dat is wat de auteur zegt?

Brigitte Willems: Ja

Mr. van Munster: Hij zegt twee belangrijke dingen denk ik. Ja, ik stel je even een wedervraag.

Brigitte Willems: Nou, dat mag! Dat is goed!

Mr. van Munster: Nou één ding staat in de preambule. De preambule staat niet in een officieel artikel. Een preambule is een soort inleiding op een grondwet. Dus dat is zeg maar. Nou ja, daarmee geef je aan waarom die grondwet er is. Wat de historische achtergronden zijn. Dat is ook bij de Verenigde Naties bijvoorbeeld. Belangrijkste mensenrechtendocument. Universele verklaring voor de rechten van de mens, zit ook een preambule. Verwijzen ze naar de oorlogen en hoe belangrijk het is dat mensenrechten worden gehandhaafd enzo. Dus dat is niet een wetbepaling op basis waarvan je kan vervolgen. Daar heb je een wet voor nodig. En als die grondwet ruimte biedt aan het maken van een wet om mensen te vervolgen, dan wordt het pas interessant, dan kan je pas zien waar die grenzen liggen namelijk. Ander interessant punt, denk ik, is dat dit raakt ook de discussie van zogenaamde “transitional justice” dat is een heel gebied, een studiegebied zeg maar, dat gaat over dit soort vraagstukken. Namelijk: “Wat gebeurt er nadat een maatschappij van een bepaald systeem, in dit geval het communisme, met veel onderdrukking, naar democratie overgaat?” “Wat doe je dan met al die mensen die in zo een systeem hebben meegewerkt? Die voor de geheime politie werkten. Die mensen hebben gemarteld. Die, noemen het allemaal maar op.” Er zijn grofweg twee mogelijkheden. Allemaal vervolgen. Bijna niet mogelijk, want er zijn zoveel mensen die ehh. Bovendien is het vaak niet mogelijk, omdat die mensen, als zij de macht overdragen, amnestie vragen. Dus vragen om niet vervolgd te worden. En dat ook op papier hebben. De andere kant is dat je zegt: “We gaan een nieuwe start maken. We vergeven iedereen.” Meestal zit het ergens daar tussen in. En daar kan je allerlei interessante voorbeelden van noemen. Het einde van de tweede wereldoorlog had je Nürnbergtribunaal, die de nazikopstukken allemaal vervolgt. Maar ook alleen de kopstukken en de lagere mensen werden niet door Nürnberg vervolgd. Vaak wel weer door andere tribunaal, want. Ja, hierbij denk ik ook weer van “Ja, op zichzelf, kijk, ‘a crime against the Hungarian nation’ vind ik heel erg vaag.” Dan vraag ik me af: “Wat is dat?” Dus dat zou dan duidelijk moeten worden.

Brigitte Willems: Ja, dat was inderdaad bij ons ook het punt. Wat zegt dat?

Mr. van Munster: Ja, dus dat klinkt in mijn oren op dit moment meer als retoriek. Als woorden die stoer klinken, maar dan denk ik: “Ja, dat moet dan uitgewerkt worden.” Op het moment dat dat uitgewerkt wordt, kan dat inderdaad gevaarlijk zijn. Hangt er vanaf hoe dat uitgewerkt wordt. Maar ook dat weet je op dit moment niet. En in het algemeen denk ik wel dat er niet zo veel op tegen is om te zeggen dat bepaalde dingen die gedaan zijn, bijvoorbeeld martelingen, daar gaan we geen ‘limitations’ op toelaten in de wet. Ik denk dat daar heel veel voor is te zeggen. Dus ook dit vind ik niet perse iets wat tot per se een heksenjacht leidt. Het kan misschien wel, maar het hoeft dus niet.

Brigitte Willems: Twee andere zinnen die nogal opvielen is, de eerste is “the life of the foetus shall be protected from the moment of conception” en de volgende zin is “Hungary shall protect the institution of marriage, understood to be the conjugal Union of a man and a woman based on the fact that marriage is a union of a man and a woman” oh er is hier iets fout gegaan, maar waar het op neerkomt, is dat het lijkt alsof de katholieke kerk daar veel invloed op heeft gegaan, want ja, dat je geen abortus zou mogen plegen, en dat er echt wordt gezegd van een huwelijk tussen man en vrouw. En ja, dit gaat natuurlijk in tegen de scheiding van kerk en staat. Vindt u dat het er op lijkt dat die katholieke kerk daar invloed op heeft gehad of ..?

Mr. van Munster: Ja, dat lijkt me heel erg duidelijk hier. Aan deze zinnen. Alleen wat heel interessant is, scheiding tussen kerk en staat, want dat hoor je heel vaak in het nieuws en discussies, is dat het vaak niet zo goed gescheiden is en dat het niet perse heel erg is, denk ik persoonlijk. Kijk bijvoorbeeld naar de Verenigde Staten. Ik weet niet of je wel eens kijkt naar een

speech van Obama of iemand anders. De laatste zin die ze uitspreken is altijd “May god bless the United States of America.” Dus God wordt er altijd bijgehaald. Ook op andere terreinen zie je dat, dat dat invloed heeft. Dat heeft er mee te maken dat het natuurlijk een beetje geforceerd is om die dingen te scheiden, voor, laten we zeggen, de gemiddelde mens. Of in ieder geval zeker in de landen waar het geloof nog heel sterk is, is dat lastig, omdat politiek gaat over maatschappij, waar willen we heen met de samenleving, maar religie gaat daar ook vaak over. En het idee van scheiden van kerk en staat is dat religie privaat is en dat je dat achter de deur van je huis doet en dat de staat is. Maar in de werkelijkheid is dat lastig. Ik denk zelf persoonlijk wel dat het belangrijk is dat het in hoge mate gescheiden is en dat er een bepaalde minimumwaarborgen moet zijn in de grondwet, die individuele ruimte van burgers bepalen. En dat staat ook in verdragen bijvoorbeeld. Het Europees Verdrag van de Rechten van de Mens waar Hongarije ook bij hoort. Dat is niet de Europese Unie maar wel een heel belangrijk mensenrechteninstituut. Die hebben ook die uitspraak gedaan waar je ook nog iets over had. Dus daar moet het wel inpassen. En op het moment dat het daar niet inpast, dan is het in principe vrij eenvoudig. Dan heeft ie die regel, die zou dan geen toepassing moeten vinden.

Brigitte Willems: En die laatste zin, over dat het huwelijk tussen man en vrouw is. Ik heb gelezen dat het European Court de beslissing heeft genomen dat het huwelijk niet alleen meer tussen man en vrouw is. En ik vraag me dan af: “Is het niet heel erg ongepast om die zin in de grondwet, echt zo een belangrijk document, te zetten?”

Mr. van Munster: Ja, emm, ongepast is een kwestie van smaak he. Dat is iets wat je, waar je verschillende antwoorden op krijgt als je het aan verschillende mensen vraagt. Ik weet, misschien is het überhaupt interessant om te peilen of te meten hoe de gemiddelde Hongaar daar over denkt. Maar als jurist kijk je meer naar wat is legaal en wat is niet legaal. Wat mag en wat mag niet. En in principe is het systeem van het Europees Verdrag van de Rechten van de mens zo dat de staten die erbij horen, dat zijn er inmiddels 47 als ik me niet vergis, misschien is er weer een bij gekomen maar, het is een enorm systeem van staten wat daaronder valt. Die moeten die uitspraken van dat hof respecteren. Dus dit zou daarmee in strijd zijn. Dat zou betekenen, in de praktijk, dat het niet gevolgd hoeft te worden. Ja. Is dat dan ongepast? Dat is dus meer een persoonlijke vraag. Van wat vind je daar nou van? Ik persoonlijk ben niet tegen huwelijk voor mensen van hetzelfde geslacht. Maar ja, dat is mijn persoonlijke mening. Maar het is natuurlijk een moeilijk onderwerp. Het speelt overal, in allerlei maatschappijen. De Verenigde Staten. Kijk bij ons is het ook pas, wat zal het zijn? 20 jaar pas ofzo? Misschien wel minder.

Brigitte Willems: Nou hebben we een stuk dat is al weer, dan zijn we verder alweer echt bij de artikelen zelf. Daar staat een zin: “Hungary shall strive to provide social security to all of its citizens.” Dat klinkt in eerste instantie heel positief. Maar in dan die grondwet die ze hiervoor hadden, die in 1989 is gemaakt, was het nog een plicht om die zekerheid te leveren. In het artikel wat ik heb gelezen zeggen ze: “Dit is een stap terug.” De vrouw die ik heb geïnterviewd zegt: “Nou, ik vind dat er teveel achter wordt gezocht, want voorheen was er natuurlijk communisme, dus dan moest het ook. Dus er wordt eigenlijk teveel heisa om gemaakt. Wat vindt u daarvan?”

Mr. van Munster: Nou, met heel veel van waarover we het nu hebben geldt, dus ik wil niet steeds hetzelfde zeggen hier, maar het is toch een beetje de vraag “Hoe wordt dit nou uitgewerkt?” Want kijk, social security is breed. Wat is dat? Is dat kinderbijslag? Is dat een uitkering als je je baant verliest? Is dat een pensioen? Er zit heel veel onder. Ziektekosten misschien zelfs.

Brigitte Willems: Nee en dat is niet gedefinieerd.

Mr. van Munster: En dat maakt het natuurlijk heel lastig. Maar ik denk in het algemeen. Kijk, je kunt puur. Als je het zeg maar puur naar de letter leest, lijkt het me heel duidelijk dat het een stap achteruit is, want het was een plicht en nu is het een inspanningsverplichting, zoals dat heet. Dat is natuurlijk minder sterk. Maar tegelijkertijd denk ik dat ik het wel eens ben met die professor uit Hongarije dat je ook misschien je kunt afvragen of het wel een plicht kan zijn. Maar het begint al met het probleem dat je niet weet waar je het over hebt. Dat moet je eerst duidelijk hebben. Maar, in het algemeen is er wel over dit te zeggen. Dus sociaal economisch recht, je hebt twee categorieën mensenrechten zeg maar in het systeem van mensenrechten. Dat zijn de burgerlijke politieke rechten en dat zijn de sociaal economisch en culturele rechten. Die hebben allemaal een heel systeem van hoe dat werkt zeg maar. Dit valt in die tweede categorie. Sociaal economische rechten. En een kenmerk daarvan is dat ze minder hard zijn dan die andere. Dus met andere woorden, dat het vaak zo is dat het gaat om een inspanningsverplichting. Bijvoorbeeld in Afrika, zijn heel veel landen die zeggen: "Ja, jullie moet je mensenrechten. Wij moeten iedereen onderwijs geven. We hebben helemaal geen leraren, we hebben geen schoolgebouwen, we hebben geen geld. Dus hoe moeten we dat doen?" Kan nooit een verplichting zijn. Dat is een inspanningsverplichting. Dus onze plicht is om te proberen dat te verbeteren.

Brigitte Willems: Een poging daar toe te doen.

Mr. van Munster: En ik zou denken dat dat hier ook geldt. Dus ik vind het hier ook weer niet een heel dramatisch punt ofzo.

Brigitte Willems: Vraag 7 die wil ik eigenlijk nog even openlaten. Want daar wees die professor uit Hongarije mij op. Die zin wordt genoemd in dat artikel en dat Amnesty International daar veel kritiek op heeft. Maar zij zegt: "Ik kan dat hele stuk niet in de grondwet vinden, ik weet niet wat je bedoelt." Dus ik ben nou in contact met diegene die dat artikel heeft geschreven om te vragen van "Hoe zit dat?" En ik wil eigenlijk dat antwoord even afwachten. Dus misschien, als u het goed vindt, zou ik die vraag later nog willen mailen. Dat is één vraag die dan nu wordt overgeslagen.

Mr. van Munster: Ja dat is goed, maar kun je het nog eens voorlezen? Want ik weet wel dat ik dacht van..

Brigitte Willems: Dat is dan het punt waar Amnesty International veel kritiek op heeft geuit: "A person may be deprived of his or her freedom definitively only for committing a criminal offence and only on the basis of a final judgement." Volgens die schrijfster, zij heet Kati Piri. Zij zegt van "Eigenlijk betekent dat, dat er een levenslange gevangenisstraf kan worden opgelegd, zonder dat je nog in beroep kan gaan."

Mr. van Munster: Ja, dat, dat. Zo lees ik het helemaal niet. Vind ik heel bijzonder, want er staat volgens mij het omgekeerde. Er staat maar he, ik heb verder de context niet gelezen, maar wat er staat is: je kunt alleen levenslang veroordeeld worden als jij zeg maar een voldoende ernstig misdrijf pleegt en alleen als er een definitieve uitspraak is. Maar meestal, final judgment, laatste oordeel, meestal betekent dat, dat je dan verschillende beroepen hebt gedaan. Zelfs tot Straatsburg, het Europees hof van de rechten van de mens. Wat de hoogste rechter is in Europa. Dat zou het final judgement zijn. Dus ik snap niet hoe iemand dat inleest. Maar misschien heeft dat te maken met een toelichting daarop. Ik ben heel benieuwd.

Brigitte Willems: Ja ik ga dan nog even achter aan. Ik zou in september, begin september, een mailtje daarover krijgen. Dus dan stuur ik het dan nog even door.

Mr. van Munster: Want dit is heel er gebruikelijk zo geformuleerd.

Brigitte Willems: Ja, oke. Eh, even kijken. De volgende vraag. Verschillende zaken, nou ja, die worden opgelaten, gezinsbeleid, persvrijheid en dergelijke. Dit wordt dan later verwerkt in zogenoemde cardinal acts die door tweederde van het parlement dan ook weer worden vastgesteld. Dan heb je het Helsinki Committee, die is bang dat deze acts dan niet onder de constitutionele toetsing zullen vallen.

Mr. van Munster: Ja, dat kan, ja. Dat vind ik wel echt apart, ja. Maar wat is de reden dat het niet in de grondwet is opgenomen?

Brigitte Willems: Ja, nou ja, dat heb ik dan ook aan haar gevraagd en zij zegt van “Ja, het is eigenlijk een framework en het is normaal dat dat dan later nog wordt uitgewerkt.” Dat is wat zij als uitleg gaf.

Mr. van Munster: In Hongarije gaat dat zo? Ja, dat kan.

Brigitte Willems: Dat is wat zij mij vertelde, ja. Ik heb het er expres bijgezet, van wat zij heeft geantwoord. Ze zegt bijna letterlijk: “Het is normaal dat de grondwet alleen als frame wordt gebruikt en dat veel zaken later worden toegevoegd. Pas dan kan gekeken worden of de acts niet onder constitutionele toetsing vallen. Het is niet nodig om hier van te voren al bij te gaan stilstaan.

Mr. van Munster: Ja, dat heeft dus weer iets te maken met de wetgevingstechniek in Hongarije. Kijk, de Verenigde Staten hebben ook een grondwet in amendementen op de constitutie gemaakt. Daar hebben ze de First amendment, de second amendment. Dat zijn eigenlijk wijzigingen die later. Dus dat lijkt hier een beetje op denk ik. In Nederland werkt dat niet zo he. In Nederland heb je gewoon de grondrechten, die staan gewoon in de grondwet. En ook de persvrijheid en vrijheid van meningsuiting staan daar gewoon in. Maar wij hebben trouwens geen constitutionele toetsing in Nederland, dus dat is ook interessant, misschien, voor jou om te weten. Een van de weinige landen die dat niet hebben. Wat heel raar is, maar goed. We hebben wel een toetsing via Europa weer. Dus, dat geldt trouwens hier ook denk ik hoor. Dat moet je wel altijd realiseren, dat Hongarije hoort gewoon bij het systeem van het Europees Verdrag van de Rechten van de Mens. Stel dat zij geen persvrijheid in een grondwettelijke toetsing hebben, dan kan het nog steeds via het EVRM getoetst worden. Dat staat namelijk ook in het EVRM. Er staat dat er persvrijheid moet zijn, in het Europees Verdrag van de Rechten van de Mens. Dus het is eigenlijk een dubbele check op dit soort mensenrechten. Ja het EVRM is een heel belangrijk verdrag. Want er staan heel veel mensenrechten in. Een soort minimum catalogus aan mensenrechten, die altijd moet worden gegarandeerd. En als jij die dus niet je grondwet garandeert, dan zijn ze via Europa alsnog gegarandeerd. Dus daar kun je niet onderuit komen.

Brigitte Willems: Dat is voor mij wel even belangrijk.

Mr. van Munster: Ja, dat is bijvoorbeeld ook in discussies over dat Wilders bijvoorbeeld artikel 1 van onze grondwet wilde afschaffen. Ik weet niet of je je dat nog herinnert. Het discriminatieverbod. Dat staat ook gewoon in het EVRM. Een zelfde soort discussie, als je daar vanaf wilt, van die grondwet, dan moet je en je grondwet wijzigen en uit het EVRM stappen. En ook nog vaak uit het Verenigde Naties verdragen. Dus dat is heel moeilijk. Maar de wetstechnische status van dat soort, hoe noem je dat? Legal acts? Of wat was het?

Brigitte Willems: Cardinal acts.

Mr. van Munster: Cardinal acts. Cardinal zegt wel dat het heel belangrijk is. Dat weet ik niet, wat voor status dat heeft. Die mevrouw zegt ook: “Het kan evengoed nog onder constitutionele toetsing vallen.” Dus..

Brigitte Willems: Ja, oke. Nou gaan we eigenlijk verder met het procesgedeelte. Dat waren alle twee acht vragen. Zoals ik al zei dat voor de tweede wereldoorlog hadden ze nog geen geschreven grondwet. Toen met het communisme kwam de eerste tot stand en in 1989 kwam zeg maar degene voor die van 2012 tot stand. En eigenlijk was er in principe geen nieuwe grondwet nodig zeiden ze. Je had bijvoorbeeld een meerderheid van erkende constitutionele advocaten in Hongarije die vonden het niet nodig en de inwoners verwachtten het ook niet, want die grondwet werd eigenlijk zeg maar, samen met de amendementen, werd het gezien als eigenlijk, ja, toch wel zeer bevredigend. Zo noemde ze het dan. Vindt u dat dat in 2012 nog een grondwet dan nodig zou zijn, ook al hebben ze sinds 1989 een grondwet met amendementen.

Mr. van Munster: Ja, wie ben ik om de constitutionele experts van Hongarije tegen te spreken, zonder dat ik het systeem ken. Maar ik denk dat je in principe, ja ik ben misschien heel formeel en legalistisch zoals dat dan heet bij dit soort dingen. Als het systeem zo is dat er een vertegenwoordigend parlement is, dat gekozen is, dat met tweederde meerderheid kan besluiten om een grondwet te wijzigen, ja dan kunnen ze dat doen. En dat is een feit. En daarom is een tweederde meerderheid ook gevaarlijk. Omdat er weinig tegenkrachten nog zijn he. Dat was in Zuid-Afrika bijvoorbeeld ook lang zo. Het ANC heeft daar tweederde meerderheid sinds een tijd en die kunnen ook wanneer ze dat willen dingen wijzigen en in principe kunnen ze natuurlijk altijd zeggen: “We zijn democratisch gelegitimeerd, want wij hebben tweederde van de stemmen gekregen. Wij vertegenwoordigen het volk. Wij zijn volksvertegenwoordigers. En dat die constitutionele experts dat niet nodig vinden, ja, dat is leuk voor ze, maar wij zijn democratisch gelegitimeerd, wij kunnen dan beslissen.” Dus ja ik denk, als zij dat zeggen, ik neem aan dat die mensen gewoon kijken naar de wetstechnische punten, staan er voldoende rechten in, is het duidelijk hoe de procedures zijn, en op basis daarvan is het niet nodig, ja dat kan, maar er kan nog steeds zo een partij beslissen. Wat ik daar verder van vindt? Ik zou geneigd zijn om te zeggen van “Nou, waarschijnlijk hebben die mensen gelijk, maar ja, democratie werkt nou eenmaal zo.”

Brigitte Willems: Ja, oke. Even kijken. Tijdens, zeg maar, dat ze die grondwet gingen maken, hebben ze een parlementaire commissie ingesteld en die vroeg dan advies bij rechtfaculteiten, onderzoeksinstituten, maar ook bij kerken zelfs bij vertegenwoordigers van nationale en etnische minderheden binnen Hongarije en ja ze vroegen dan eigenlijk gewoon wat de mening van de grondwet was. Wat zij er van vonden. Maar, zij hebben niet van tevoren een concept versie gemaakt en die laten zien. Ja, bij mij komt dat over alsof het eigenlijk meer, zeg maar, een soort show is, van “Nou, we vragen wel om een mening, maar eigenlijk kunnen ze niet daadwerkelijk zich voorbereiden en echt punten aangeven van “Nou, we vinden dit of dat ervan.””

Mr. van Munster: Ja, dat kan ja, maar de katholieke kerk heeft kennelijk. Daar is goed naar geluisterd, kennelijk. Ja, het is natuurlijk niet gebruikelijk om het zo te doen. Ik weet niet of je. Hoe is dat wetgevingsproces in, hoe is dat gegaan zeg maar? Hoeveel lezingen zijn er? Weet je dat?

Brigitte Willems: Nee, nou, hoe ik het heb begrepen, is dat er, ze zijn in het najaar van 2010 ermee begonnen. Toen hebben ze gewoon advies gevraagd, maar niet, zeg maar, met een conceptversie, maar eigenlijk gewoon advies van wat vind je ervan. Om vervolgens, de grondwet te gaan maken en aan te gaan passen. En dan hebben ze uiteindelijk, geloof ik, ergens in maart, hebben ze een conceptversie laten zien. Maar vervolgens nog een maand later hebben ze gezegd: “Nou, dit is de

grondwet.” Dat was op 18 april 2011 en in 2012 is ie gelijk van kracht gegaan.

Mr. van Munster: Ja, dat is niet netjes ook, denk ik. Maar de vraag is, he: “Wat vind je, zeg maar, een moreel bijna. Wat vind je er op dat punt van? Vind je het ethisch, hoe ze het doen? Mag het? Kan het? Volgens de procedures die gelden.” En ik ben bang dat het laatste wel het geval is. Dat ze wel de procedures hebben gevolgd. En dan kom je toch weer op het punt waar ik het net ook over had: als jij die macht hebt in het parlement om dat zo te doen, dan, ja, dan kun je dat in principe doen. En dan kun je er wel van zeggen, kijk, normaal is met dit soort dingen, wordt inderdaad uitgebreide consultatie gedaan, feedback vaak ook. Kijk eens hoe de Europese Unie zijn regelgeving maakt: white paper, green paper. Dus er worden voorstellen gedaan, die worden dan weer aangepast, nieuw concept. Maar ja, als dat niet volgens de huidige wet daar op dat moment nodig was en ze hadden die macht, dan kun je er inderdaad moreel allerlei oordelen over hebben, maar dat is toch dan hoe het gaat.

Brigitte Willems: Dan hebben we eigenlijk ook bijna mijn volgende vraag al beantwoord, want ja, technisch gezien, oke, het mag, het is democratisch, het is geoorloofd, maar die tijdsspan, het is nog geen jaar geweest nadat ie is gemaakt. Heeft u daar eigenlijk een soort van mening bij, dat je denkt van “Ook al mag het technisch gezien wel, het is veel te kort?” Sowieso omdat je dan niet meer die feedback en dergelijke kan gebruiken.

Mr. van Munster: Ja, nou ja, kijk, het is, er staan gewoon procedures voor hoe je dat moet doen. In Nederland moet je dan verkiezingen, dan moet het opnieuw tweederde meerderheid, dan moet er opnieuw een meerderheid voor gestemd worden. Dus dat ligt vast al in de huidige grondwet, hoe dat, hoe je dat moet wijzigen. En dan heb je dus de verkiezingen die er tussen zitten. Dus vaak doen ze die wijzigingen ook als er verkiezingen aankomen. Hoe dat daar is weet ik niet, maar ja, het is vrij snel. Maar aan de andere kant, het is een geheel nieuwe grondwet he?

Brigitte Willems: Ja.

Mr. van Munster: Ja, dat is wel heel snel voor zo een grondwet.

Brigitte Willems: En het stond niet in de vorige grondwet van hoe de procedure zou zijn van, ja wel van er moet een tweederde meerderheid voor zijn, maar verder niet als in van, zoals je bijvoorbeeld net zei, dat het in Nederland in de grondwet staat, van hoe dat moet verlopen.

Mr. van Munster: Nee, ja, dat is heel snel. Er zit natuurlijk een luchtje aan dit hele gebeuren. Dat is heel duidelijk, he. Dus bepaalde dingen, er stond ook iets in over volgens mij de benoemingstermijn van rechters, dat die veel korter geloof ik, of juist veel langer en de bevoegheid lang dan bij mensen van die partij, ofzo.

Brigitte Willems: Klopt, ja.

Mr. van Munster: Kijk, dat zijn echt gevaarlijke dingen. Dan kom je echt in de problemen met onafhankelijkheid en onpartijdigheid van rechten. Dat zijn belangrijke principes. Dat zijn echt hele gevaarlijke dingen.

Brigitte Willems: En dat zijn ook die nieuwe wetten die er onlangs zijn gekomen. Daar heb ik ook dan naar gekeken. Eentje van de mediawet. Dat er zeg maar een comité is opgericht met mensen dichtbij die partij die dan in het comité zitten om te besluiten van of het wel of niet goede reclame is, of het wel of niet legitiem is, en dergelijke. Dan was er ook nog zo iets met een bankenwet en

dat soort wetten worden er nu allemaal gemaakt.

Mr. van Munster: Ja, wat daar heel interessant aan is, is. Kijk, censuur vooraf is heel gevaarlijk. Dat is. Dat gebeurt bijna niet in, laten we zeggen, goed functionerende democratie. Achteraf heb je het ook vaak wel. Dat er dan boetes komen, of dat dingen gerectificeerd moeten worden. Dat je vooraf zegt, toetst, dit mag wel of niet uitgezonden worden, dan moet je altijd heel erg gaan oppassen. Maar het tweede wat ik me daar heel erg bij afvraag, is dat, in principe, en dat is ook hoe het Europees hof dit toetst, dus ik denk dat je nog wel eens goed moet kijken naar het systeem van het Europees Verdrag van de Rechten van de Mens, want dat is wel interessant hierbij. Er zijn twee criteria die het Europees hof hanteert bij dit soort wetten. Een is: is er een wet voor? En is die wet ook nodig in een democratische samenleving? He, dus de wet kijkt dus

Brigitte Willems: Dat is de wet nationaal?

Mr. van Munster: Ja, de nationale wet. Dus dan kijken ze “nou, er is een mediawet.” Het eerste wat ze dan doen is kijken “is er een bevoegdheid om die wet te maken in de grondwet?” Je moet altijd, als je een wet maakt, als parlement, moet je een bevoegdheid hebben. Dus dan moet er ergens in de grondwet staan: de regering en het parlement stellen een mediawet samen, blablabla of je moet dat kunnen.. Nou, net zei je dat er nog geen amendementen waren, of geen cardinal acts waarover.. Dus dat verbaast me dan. Maar kennelijk hebben ze een bevoegdheid daarvoor. Als dit niet is, in principe, dan kan het niet.

Brigitte Willems: Oke.

Mr. van Munster: Het tweede punt is misschien nog wel belangrijker. Ze kijken niet alleen technisch “is er een wet, dus een bevoegdheid?” maar “is die ook nodig?” En daar denk ik dat je heel veel problemen krijg met censuur. Of nou ja, dat weet ik eigenlijk wel zeker. Er zijn heel veel uitspraken van het Europees Verdrag van de Rechten van de Mens die daarover gaan. Ik heb nu even geen namen paraat, maar als je zelf even zoekt. Of ik kan eventueel kan ik dat ook wel voor je doen. Dan kan je vinden wat daar de criteria voor zijn. Dus dat lijkt me een heel moeilijk geval. Ook in strijd dus met EVRM.

Brigitte Willems: Ja, ja, oke. Even kijken hoor. Voordat die grondwet werd gemaakt, dus zeg maar, ze werden gekozen in het voorjaar 2010 en ze begonnen met die grondwet in najaar 2010, voor die tijd werden er ook al 10 amendementen doorgevoerd op de voorgaande grondwet. En zo mocht bijvoorbeeld het Constitutional Court die in Hongarije zit, die mocht niet meer gaan beslissen over belastingzaken. Dat is dan zeg maar één voorbeeld, maar wat vindt u er van dat ze dan, je hebt die eerste grondwet, ze zijn bezig met die amendementen en vervolgens gaan ze een nieuwe grondwet maken.

Mr. van Munster: Ja, nou ja. Kijk de vraag is even. Nog even voor de verduidelijking gaan. Wat is de reden dat ze niet meer met belastingzaken bezig moeten. Is dat wettelijk specifiek akkoord..?

Brigitte Willems: Dat weet ik dan verder niet. Het ging me eigenlijk om dat dat op mij vreemd over kwam en ik dacht van “Ben benieuwd wat u daarvan vindt.”

Mr. van Munster: Nou, dat hoeft niet per se, denk ik. Kijk, in Nederland heb je ook meerdere hoogste rechters. Je hebt drie eigenlijk, of vier, maar de Hoge Raad is heel bekend. De Raad van State is er ook één. College van Beroep voor het bedrijfsleven. Centrale Raad van Beroep. Dus je hebt meerdere hoogste rechters. Ik twijfelde even of ze, nou goed. (...) Dus het kan zo zijn dat ze

gewoon hebben bedacht van “Die Hoge Raad gaat niet meer over de belastingzaken, dat komt in een belastingstribunaal.” Nou, dat kan prima zijn. Omdat je daar experts voor nodig hebt, die veel technische kennis hebben op het gebied van belasting. Dan hoeft dat helemaal niet verkeerd te zijn. Ook niet dat je dat met een amendement doet. Misschien was het heel erg nodig, omdat het niet goed ging, moest er een noodingreep gedaan worden. Ondertussen werd het fundamenteel beter geregeld in de grondwet. Dat kan. Dus ik vind dat niet per se niet goed ofzo.

Brigitte Willems: Oke. Die volgende vraag is, nou ja, oke, de meerderheid bestond dus uit Fidesz en een klein gedeelte van KDNP. Zijn alle twee rechtse partijen. Als het een rechtse en een linkse partij was geweest, had u dan zoiets gehad van “Dat is een minder groot probleem.” Want nu zeggen ze “Ja, het is een eenkleurig document, want er zijn alleen maar rechtse partijen op dat moment in het parlement geweest.” Was dat minder een probleem geweest als die KDNP dan een linkse partij was geweest.

Mr. van Munster: Nou, ik denk dat je niet zozeer moet kijken naar rechts of links, maar meer naar hoe schadelijk zijn de voorstellen of de veranderingen die ze teweeg brengen. Kijk, de kans dat een linkse partij en een rechtse partij, extreem laten we zeggen, de SP en de PVV bijvoorbeeld in Nederland, dat die samengaan en een document maken, is bijna nul. Dus dat komt bijna niet voor. Maar zowel een aantal dingen die de, dit is mijn persoonlijke mening hoor, die de SP wil, kunnen heel erg schadelijk zijn, denk ik, voor de economie. En dat geldt ook voor de PVV. Op mensenrechtengebied denk ik dat het gevaarlijker is om op de PVV te stemmen. Dus ik denk niet dat je daar per se naar moet kijken. Ik denk dat je altijd moet kijken naar wat staat er, wat willen ze en hoe verhoudt tot elementaire mensenrechten. En of het dan rechts of links, kijk links populisme en rechts populisme kan allebei gevaarlijk zijn.

Brigitte Willems: Ja, oke. Even kijken. Nou we zijn al bijna op het eind. De Fidesz partij heeft een national consultancy board opgericht en die heeft dan een enquête gemaakt met 12 vragen over wat zij belangrijk vonden en wat er wel en niet in de grondwet moest worden opgenomen en dat werd dan naar de bewoners, de inwoners van Hongarije, gestuurd. Uiteindelijk hebben ook 900.000 Hongaarse volwassenen daarop gereageerd. Maar ik vraag me af wat u van dit middel vindt.

Mr. van Munster: Kan je het nog één keer uitleggen, want..

Brigitte Willems: Nou, ze hebben een enquête opgesteld met 12 vragen van “Wat vind je belangrijk? Wat moet er wel en niet in de grondwet komen?”

Mr. van Munster: Oke, dus dat was voordat ie er was?

Brigitte Willems: Ja. Dat hebben ze naar de Hongaarse inwoners gestuurd. En gewoon met de vraag om die vragen te beantwoorden en terug te sturen. En ik vraag me af wat u van dat middel vindt.

Mr. van Munster: Ja.. Hoeveel mensen waren het in totaal?

Brigitte Willems: Die terug hebben gestuurd, 900.000.

Mr. van Munster: Het is toch wel interessant. Want je zei net dat ze. Ze hebben dus wel een soort concept gemaakt? Waar ze op konden reageren.

Brigitte Willems: Maar dat is later, dat is ongeveer een maand, dat is 14 maart namelijk gedaan.

Dat is mijn volgende vraag. Ze hebben een maand van tevoren hebben ze dat concept publiekelijk gemaakt.

Mr. van Munster: Ja, en daarna werd ie vastgesteld?

Brigitte Willems: Ja.

Mr. van Munster: Ja, nee, dan is het duidelijk dat ze daar, dat dat show is. Dus dat dat window dressing is. Maar niet zo slim gedaan ook denk ik. Ik vind het eigenlijk een beetje gek, want daar kijkt iedereen natuurlijk doorheen, lijkt mij. Iedereen weet natuurlijk dat dat voor Jan met de korte achternaam is gedaan. Dus ik begrijp het niet zo goed. Hoe hebben mensen daar op gereageerd? Al die 900.000 mensen die daarop hebben gereageerd, vonden die dat niet raar? Dat ze een mening wordt gevraagd en dat een maand later al alles al definitief is.

Brigitte Willems: Ik heb geen idee. Maar, laat ik het zo zeggen, stel dat ze een jaar voordat de grondwet zou komen, dat ze een conceptversie hebben gemaakt, en toen die enquête hadden gestuurd. Wat had u er dan van gevonden?

Mr. van Munster: Nou, op zich heel goed. Kijk, we leven tegenwoordig in tijden waarin er steeds meer gevraagd wordt van communicatiekracht van de instituties. En die staan ook heel erg onder druk, omdat er steeds meer van ze gevraagd wordt. Tegenwoordig heb je het programma de rechtbank. Ik weet niet of je dat kent? Maar dan volgen ze een rechtbank. En dan zie je mensen allemaal hun uitspraken doen. Dat doen die mensen bij de rechtbank, omdat ze ook voelen dat er steeds meer kritiek komt op dat zulk soort instituties gesloten zijn. En wij verwachten allemaal, je merkt het als docent ook, studenten willen weten waarom ze een bepaald cijfer hebben, uitleg. Vroeger was dat allemaal anders. Instituties werden gerespecteerd en nu. Dus het heeft goede kanten en slechte kanten. Ik denk dat het voor een moderne overheid heel belangrijk is om te communiceren de burgers en ze serieus te nemen. Dat hebben ze in dit geval helemaal niet gedaan, door die maand. Maar als je me vraagt “Als het een jaar daarvoor was geweest?” dan denk ik dat het heel erg past in deze tijd om de mening, om mensen serieus te nemen, de mening te vragen. En dan daar ook op te reageren. Daar is het natuurlijk fout gegaan. Kijk, als je 900.000 mensen iets vraagt, of die sturen wat terug, en 800.000 hebben duidelijk problemen met, laten we zeggen, het abortuspunt, ja, dan vraagt dat om een zekere reactie. Maar dan moet je dat er ook wel bij doen. Op zichzelf is het geen slechte methode, denk.

Brigitte Willems: Maar er is sowieso geen tijd hiervoor geweest als je bedenkt dat het najaar 2010 sowieso, dat ze toen pas er mee begonnen. Dus zelfs als ze aan het begin hadden gestuurd, hadden ze geen tijd gehad om dat te verwerken.

Mr. van Munster: Nee, dus eigenlijk is je vraag over van is dit middel, wat vind je ervan? Heel erg goed, denk ik. Maar het gebruik van het middel, in dit geval, is heel erg slecht. Eigenlijk zo slecht als je maar kan bedenken. Dus op zich leuk, dat ze iets kunnen zeggen over zo een voorstel.

Brigitte Willems: Ja. Nou ja, ik kom nu eigenlijk bij mijn laatste vraag. We hadden het er wel al over dat heel veel punten waar kritiek op wordt geuit, dat je daar eigenlijk nog niet veel mee kan, want je moet kijken hoe dat in de loop van de tijd inderdaad uitwerkt. Maar stel dat het uiteindelijk, zeg maar, in strijd is met bepaalde dingen, zeg maar, met de Europese Unie, vindt u dan ook dat de Europese Unie zich daarin moet gaan mengen? En sancties moet gaan opleggen? Want ik heb begrepen dat dat in Zwitserland een keer is gedaan, maar dat die eigenlijk vrij weinig effect hadden. En ja, de vraag is mij een beetje van “Moet de Europese Unie hier dan, of het, omdat we

het ook de hele tijd over het EVRM hebben gehad, dat de Europese Unie zich er echt in moet gaan mengen met sancties? Of dat het nationaal gedaan moet worden?

Mr. van Munster: Ja, nou, kijk, nationaal dat kan denk ik niet, omdat die partij daar aan de macht is. Dus dat houdt meteen op. Misschien civil society. Je hebt in Rusland ook steeds meer verzet tegen Poetin enzo. Dat ook mensen uit de maatschappij dingen doen. Maar ja, kijk het is natuurlijk wel zo, zo een land heeft zich verbonden aan de Europese Unie en aan het Europese Verdrag van de Rechten van de Mens. En daar staan gewoon hele duidelijke normen in. Daar moet je aan voldoen. En kijk, het EVRM is een iets andere organisatie. Daar is vooral het hof heel belangrijk. Dus als er mensen, individuen, komen en laten we zeggen iemand die heeft een documentaire gemaakt in Hongarije en die moet naar dat comité toe gelijk en die zegt dat mag niet. Die kan dan naar het EVRM gaan. Eerst moet ie dan door het nationale systeem, maar daarna kun je een uitspraak krijgen van het EVRM. Van dat systeem “Dat mag niet” en dan moeten ze dat respecteren. Maar sancties. Ja, dat is echt een aller- aller- allerlaatste stap. Zoals je al zei, dat is toen gedaan met die minaretten, met het minarettenreferendum in Zwitserland. En dat, ja, het heeft vaak weinig effect en het kan ook averechts werken he. Het wekt ook veel wrevel en verzet, dus het is altijd, in dat soort diplomatieke verhoudingen, is het belangrijk om stapsgewijs zo een land in het gareel te krijgen. Dat is niet handig, om het zo te doen.

Brigitte Willems: En mocht, ik noem het gewoon echt even Hongarije, maar mocht Hongarije besluiten van “Wij gaan toch echt niet aanpassen aan wat de Europese Unie wil.” Hebben ze dan nog die mogelijkheid om er uit te stappen? Uit de EU?

Mr. van Munster: Ja, dan kunnen ze er uit gaan. Of ja.

Brigitte Willems: Het is wel een doemscenario natuurlijk, maar dat is wel een mogelijkheid.

Mr. van Munster: Maar dat is ook, ook dat is een scenario dat bijvoorbeeld bij het EVRM is gebeurd, in de jaren '70. Griekenland, die hadden toen een kolonelsregime, dat is nog wel even een stap verder, maar, overigens wel één van de redenen waarom Griekenland zo slecht er aan toe is, maar, Portugal trouwens ook, maar goed. Maar die hadden toen een soort dictatorship daar. Die zijn toen uiteraard van Europa gestapt, zelf. Maar eigenlijk bijna eruit gegooid. Ze wisten dat.. Ja, wat heb je daar nou aan? Daar heb je niks aan eigenlijk, want dan is zo een land helemaal niet meer gebonden aan iets, snap je? Dus het idee is eigenlijk om zoveel mogelijk, zo lang mogelijk een land er bij te houden. En via de mechanismes die er zijn, vergaderingen, bijeenkomsten van het parlement, ministers, staatsbezoeken, zo een land proberen te helpen. Zeg maar, te verbeteren. Want als ze er uit zijn, ja..

Brigitte Willems: Eigenlijk door diplomatiek druk te leggen?

Mr. van Munster: Ja. Het is heel frustrerend en het is heel langzaam en het is heel.. Mensen worden er gek van. Kijk maar naar Syrië. Helemaal een ramp natuurlijk. Maar de vraag is wel, is het beter als zo een land eruit is?

Brigitte Willems: Ja, want ik weet wel bijvoorbeeld dat al voordat de grondwet daadwerkelijk van kracht ging, had José Manuel Barroso, die heeft toen een brief gestuurd naar Viktor Orbán, van Hongarije dan, om te vragen van “Ga daar niet mee door.” Nou, daar is dus geen gehoor aan gegeven.

Mr. van Munster: Het is wel een belangrijk signaal als de voorzitter van de Commissie dat laat

zien. Of dat toont. Ja, dan is dat wel iets waar je serieus rekening mee moet houden. Maar het is natuurlijk heel lastig, zeker in deze tijd, want landen zijn heel nationalistisch gericht. De EU wordt vaak gezien als inmenging van buiten. Dat is in Nederland ook zo.

Brigitte Willems: Ja, dat is in Nederland heel vaak onze reactie.

Mr. van Munster: Ja, en het gaat natuurlijk allemaal over de economie tegenwoordig. De vraag is ook: is dit wel prioriteit? Het zou het wel moeten zijn, wellicht. Het gaat over mensenrechten, maar goed. Dus in de praktijk denk ik ook niet dat het zo een vaart zal lopen. Maar ja, diplomatieke druk, dat is het belangrijkste.

Brigitte Willems: En ja, de meest voorkomende voorbeelden, ik heb nu dan bijvoorbeeld die brief, jij had het over vergaderingen, staatsbezoeken. Wat zouden ze nog meer kunnen gebruiken?

Mr. van Munster: Nou ja, resoluties van het Europees Parlement, die worden daar vaak over aangenomen. Je hebt bij de Raad van Europa, heeft zijn hele eigen organisatie, dus die hebben ook een parlement en een raad van ministers. En die nemen ook vaak verklaringen aan en die nodigen mensen uit en die schrijven rapporten. Er is een mensenrechteninspecteur, van de Raad van Europa, die schrijft ook rapporten daar over. Die worden ook, zeg maar, publiek gemaakt door Amnesty International en andere organisaties gebruiken dat ook weer. Dus al die druk bij elkaar lijkt er vaak vaak al toe dat landen..

Brigitte Willems: .. toch zwichten?

Mr. van Munster: Ja, die zijn dan toch geïsoleerd. En merken dat ze een beetje internationaal paria worden. En vaak heeft dat wel effecten. Binnen Europa tenminste nog wel. Maar ja dat is een beetje, denk ik ook, dat dan, sancties, ja.

Brigitte Willems: Die sancties, wat moet ik me daar bij voorstellen? Wat voor sanctie kunnen ze opleggen?

Mr. van Munster: Ja, sancties zijn natuurlijk vaak, gaat vaak over handel, dus bepaalde, nou ja, producten niet meer wil toelaten. Of eh, ik weet niet, goulash of zo. Noem maar wat, is het enige wat ik ken uit Hongarije. Maar goed, dat is, we hebben natuurlijk vrij verkeer van goederen in Europa, wat een heel sterk verankerd recht is. Dus dat zul je niet zomaar opzij kunnen zetten.

Brigitte Willems: Nee

Mr. van Munster: Ja, bepaalde tegoeden van mensen die in de politiek zitten he, waarvan niet duidelijk is hoe hun geld, dat zie je vaak in Afrika en andere landen, dat wordt dan bevroren. Zimbabwe bijvoorbeeld. Dat was dan in Zwitserland, dat is geen EU land natuurlijk, maar dat werd dan bevroren. Kadhafi hebben ze het ook mee gedaan. Maar binnen Europa is het toch wat softer. En dat is ook wel goed denk ik.

Brigitte Willems: Ja. Oke. Nou, dat was mijn laatste vraag eigenlijk.

Mr. van Munster: Oke. Nou, had je er wat aan?

Brigitte Willems. Zeker, absoluut.

