A New Chapter in the Hungarian Government's Crusade Against LGBTQI People

Eszter Polgári & Tamás Dombos

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On 10 November 2020, the National Assembly passed the Enabling Act authorizing the Government to govern by decree for 90 days in the state of danger. That same evening, the Minister of Justice submitted a whole package of legislative reforms, including the Ninth Amendment to the Fundamental Law of Hungary. In a separate post last week, Viktor Kazai framed the amendments in the context of Hungary's descent into permanent electoral authoritarianism. We focus on the two provisions, in particular, which would detrimentally affect the rights of the LGBTQI community:

First, a new sentence will be added to Article L declaring that "*(t)he mother is a woman, the father is a man*". Second, Article XVI (1) will be complemented by the following provision: "*Hungary protects children's right to their identity in line with their birth sex, and their right to education according to our country's constitutional identity and system of values based on Christian culture*".

We argue that it will be extremely difficult to deconstruct the institutionalized trans- and homophobia, which the above amendments would further entrench.

The Hungarian Government's long game

The Government's conservative stance on families is well-known and has been subject to criticism since 2011. We have argued elsewhere that the restrictive definition of families introduced by the cardinal law on the Protection of Families, limiting families to marriage based unions only, while excluding same-sex unions (both civil and registered partnerships), was in clear contradiction with European human rights standards and the interpretation of the European Court of Human Rights (ECtHR). The above definition was quashed by the Constitutional Court, partly because it excluded marriage-like institutions that only same-sex partners had access to.

A slightly more moderate version of the quashed definition was incorporated into Article L (1) – that already expressly limited marriage to men and women – through the Fourth Amendment to the Fundamental Law in 2013. The current version reads as follows: "*Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children.*" The Ninth Amendment will define parents' gender as mother and father, female and male, at the end of the quote.

Implicitly anti-LGBTQI

Although this addition does not seem to be an LGBTQI-related norm at first sight – apart from the gender affiliated with motherhood and fatherhood – the explanatory memorandum of the proposal makes it unquestionably clear: In order to ensure children's upbringing in dignity, it is necessary to entrench the ruling parties' belief based on the inalterability of the birth sex, and hence declare that the mother is female and the father is male.

This reasoning is not surprising, bearing in mind that legal gender recognition – the process allowing individuals to change their first name and gender marker in administrative records – was made impossible in May when the act on registry procedures was amended. Instead of 'sex', the law now contains 'sex at birth', which is defined as 'the biological sex based on primary sex characteristics and chromosomes'. This provision does not only go against the standards set with regard to legal gender recognition by the ECtHR,

but also contradicts a recent decision of the Constitutional Court in the case of a recognized trans refugee in Hungary. The Court called on the legislature to pass rules on legal gender recognition for those legally resident in Hungary. The Ninth Amendment and its explanatory memorandum send a clear message to the trans community – its primary target: The hope to reintroduce legal gender recognition anytime soon are slim.

The devil in the details

The obtuse wording's real repercussions may only be understood in light of the Omnibus Bill submitted at the same time, amending – among others – the Civil Code and Child Protection Act. The Government's recent rhetoric has foreshadowed restrictions on becoming an adoptive parent as a single person, in particular for those living with their same-sex partner.

Since October 2020, adoption by single individuals is only possible if no married couple in the country is willing to adopt that child. The newly proposed provisions, as a general rule, explicitly limit adoption to married couples, and it is the minister responsible for family policy who can personally grant exemption for single persons.

The reasoning does not even seek to hide the real reasons for the change. As expressed in the Fundamental Law, marriage-based families are perceived as the desirable formation for a child and this understanding resonates well with the pronouncement of the gender of the parents. In order to be sure that same-sex couples do not sneak in through the back door offered by single-parent adoption, a further control is introduced over the renitent decision-makers in child protection services who – in the best interest of the child – allowed persons living with their same-sex partner to adopt individually.

Discrimination

The legislative changes on adoption raise a number of concerns. First, if single individuals were excluded with reference to their sexual orientation, or such a pattern is discernible, this would be a clear violation of Article 14 in conjunction with Article 8 of the European Convention on Human Rights (ECHR). The Grand Chamber of the ECtHR in *E.B. v. France* held that the sexual orientation of the person cannot be the sole ground for refusing the authorization of adoption, unless the state can provide particularly convincing and weighty reasons. Second, the Government's move contradicts the vast amount of research about same-sex parenting that provides undisputable evidence as to their capability to be equally good parents as their different-sex counterparts. Third, it ostracizes – at least on the level of public discourse – hundreds if not thousands of same-sex couples that already provide a healthy and loving environment for their children in Hungary. Finally, it does not serve the interests of children awaiting adoption either. If no married couple is ready to adopt them, instead of trying to find an unmarried parent for them in the country, they are likely to be adopted abroad or kept endlessly in state care.

Institutionalized phobia

The trans- and homophobia behind the Ninth Amendment is most obvious in the new wording of Article XVI (1): Gender identity is based on sex at birth, and education shall reflect Hungary's constitutional identity and Christian values. It can only be understood as an immediate reaction to the recent controversy around a children's book featuring well-known tales, reframed to represent minority and marginalized groups, such LGBTQI persons, the Roma, the elderly, people with disabilities or refugees. A leading politician from the far-right *Mi Hazánk Mozgalom* (Our Country Movement) destroyed a copy of the book, claiming that it was 'homosexual propaganda'. Joining the discussion, the Prime Minister demanded: 'Leave our children alone'. Against this background, the Ninth Amendment is unsurprising. With Article XVI (1), the ruling majority wishes to make LGBTQI sensitization programs' access to schools impossible. It entrenches an educational embargo in the Fundamental Law: no discussion about sexual and gender minorities is welcome.

Christian culture and constitutional identity

Looking at the Ninth Amendment through a non-LGBTQI lens, it neatly complements Article R (4) of the Fundamental Law, that was added by the Seventh Amendment in 2018: "*(t)he protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State*." In the field of education, it is translated as an objective state duty to provide for education in a Christian spirit. This new provision has to be read together with Article XVI (2) and Article 2 of Protocol No. 1 of the ECHR. The former only recognizes the parents' right to choose the upbringing to be given to their children, while the latter contains a more specific duty of the state, i.e. to "*respect the right of the parents to ensure such education and teaching in conformity with their own religious and philosophical convictions*". Textually, the new wording of Article XVI (1) would not create an immediate violation of the right of the parents to choose how they wish to educate their children. However, it unequivocally proclaims a strong state preference as to the content of instruction, and its chilling effect will prevent schools from giving room to non-conforming views. In the understanding of the ECtHR, rights in the ECHR are counter-majoritarian and in a democracy, based on the rule of law, states have to comply with the sui generis duty of neutrality (e.g. *Barankevich v. Russia*, par. 30).

Undermining independent oversight

Lastly, on 10 November, the Parliament's Justice Committee presented a bill that would abolish the Hungarian Equal Treatment Authority (ETA), subsuming its activities under the Hungarian Commissioner for Fundamental Rights. The merger is primarily justified with the need to provide a more efficient institutional structure; bundling competences with the Commissioner would create a procedure that could address discrimination claims in a more comprehensive manner. In a 'normal' democracy, this move might even be appreciated. However, Hungary is not a 'normal' democracy and the Ombudsman is not an independent actor.

In recent years, the ETA has by far been the most successful body addressing claims on LGBTQI discrimination. In April 2020, the ETA was the only state body that criticized the proposal to ban legal gender recognition, whereas the Commissioner has not made any public statement, nor did he petition the Constitutional Court for constitutional review. We can only speculate about the driving force behind the elimination of the ETA. However, it is important to note that this body has an explicit mandate to address the types of discriminatory practices which the new rules on adoption may result in, as well as the openly homophobic efforts of local authorities to limit freedom of expression of LGBTQI persons that they construe as 'homosexual propaganda'. While the mandate will not be severed, it will be subordinated by to the Commissioner, who has not shown any interest in protecting the rights of LGBTQI persons.

Final thoughts

The pending legislative amendments hit the LGBTQI community hard and – as it was observed in the previous post on the other changes the Ninth Amendment will bring about – it will be extremely hard to deconstruct the institutionalized trans- and homophobia. And if the proposals are passed, the Government will need to open a new front in their freedom fight against the EU: the EU LGBTQI Equality Strategy 2020-2025 (adopted just two days after the amendments had been tabled) is committed to enhance the protection of cross-border rainbow families and the availability of legal gender recognition.

ABOUT THE AUTHORS

Eszter Polgári
Eszter Polgári is the director of the Legal Program at Háttér Society.
Tamás Dombos
Tamás Dombos is a project coordinator at Háttér Society, currently on sabbatical.Tamás Dombos is a project coordinator at Háttér Society, currently on sabbatical.



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