

A NEW CONSTITUTION FOR HUNGARY*

Some delicate issues

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I. Constitutional traditions

Hungary used to have no tradition of a written constitution. Until the communist takeover the constitution of Hungary was composed of a set of acts passed by parliament during the centuries, as well as of constitutional customs. The highly traditional structure of the Hungarian legal system has meant that with collapse of the communist system there was no way back to pre-war settlements (unlike e. g. in Latvia, where the mid-war constitution was set in force again).

The first written constitution, codified in a single document was passed in 1949 and was modeled after the Soviet constitution of 1936. During the four decades of communist rule the constitution had merely a declarative-political character but no real legal impact.

II. Remaining framework – now content: the Constitution after 1989

With the transition to democracy under the rule of law a set of amendments were adopted, following political negotiations between the governing communist party and the emerging opposition in 1989.¹ These have made Constitution in fact a new one: the principles of popular sovereignty, democracy, rule of law, separation of powers were implemented, a number of new organs were set up (Constitutional Court, State Audit Office, ombudsmen, local self-governments etc), and a comprehensive chapter

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¹ For transition issues: KIRÁLY, BÉLA K. (Ed.): *Lawful Revolution in Hungary*. New York: Distributed by Columbia University Press, 1995.

on fundamental rights was incorporated to the Constitution. Although the preamble called for a new constitution the necessary consensus for this did not come up for two decades. Meanwhile the Constitution has become “real law” due to the extensive jurisprudence of the Constitutional Court on the one hand, on the other hand the Constitution did not emerge to be an identity-building factor of the nation: after a period when it had a merely declarative-political character.

Hungary’s system of government has become a parliamentary democracy (the traditions of the parliamentary form of government date back to 1848, whereas the strong position of the parliament as the legislator has medieval traditions in Hungary).

The Hungarian constitutional system was based on a number of leading principles. Rule of law is of decisive impact. All state actions impairing the rights of the people must have a basis in parliamentary law, and the judiciary must be independent and effective. The principle of legal certainty is inherent to the rule of law. Legal certainty requires the law to be stable, foreseeable, and accessible, so that those obligated by the law can learn of the obligations they are supposed to observe.

Further structural principles are implicitly contained in the Constitution, such as ideological-religious neutrality. The Constitution commits Hungary to respect international law, and renounces war as a means of solving disputes between nations. By constitutional law, Hungary is obliged to international cooperation, to European integration, and to a responsibility for ethnic Hungarians living abroad (primarily national minorities cut off by the post World War I border arrangements). The Constitution contains a comprehensive bill of rights, including not only civil and political rights and freedoms, but also ‘second generation’ economic, social and cultural rights. The environment is protected by the acknowledgement of a right to a healthy environment.

Changing the Constitution is relatively easy, requiring only the votes of two-thirds of the Members of the Parliament. Only the proportion of required votes makes a constitutional amendment different from any other law, but the lack of political consensus on the one hand, and the moral respect of the Constitution as a value on the other, prevents too frequent changes. In case of an amendment of the Constitution, the President of the Republic has no right to refer the amendment to the Constitutional Court for preliminary review, as the Constitutional Court itself had no jurisdiction over the Constitution itself.

The revision of the Constitution in 1989 has in fact resulted in a new constitution concerning the content. The framework, however, has not been changed: formally the 1949 constitution remained in force and attempts to adopt a new constitution have been repeatedly coming up for two decades. The preamble of the revised text called for a new constitution with the wording: “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.”²

² The constitution between 1989 and 2011 is an interim constitution in this sense: VARGA, ANDRÁS ZS.: Nation and Constitutional Values. GERENCSÉR, BALÁZS – TAKÁCS, PÉTER: *Ratio legis – ratio iuris. Ünnepi*

III. The Fundamental Law of 2011

1. *The constitution-making process*

As a consequence of the landslide victory of the center-to-right coalition that got over 2/3rd of the mandates at the parliamentary elections in 2010, the adoption of a new constitution could become a realistic – in a paradoxical way finding arguments for not adopting a new constitution would have been more difficult than taking the challenge. The drafting process had two phases: a parliamentary commission had elaborated a concept by December 2010, followed by a draft elaborated by the Government and a drafting committee of three MPs.³ Whereas in the first part a wide range of experts and institutions were consulted with, the final draft was made by a small group of experts. Sensitive changes to the draft came up even in the last days before the final vote.

It has to be acknowledged, that this law is the first structured constitution of Hungary which was passed by a democratically elected parliament. Parliament has passed the new constitution on 18 April, 2011, with the votes of the governing coalition (two opposition parties did not cast their ballot, whereas one opposition party voted against the bill, but did not endanger the comfortable majority of the center-to-right coalition). The new constitution shall enter into force on January 1, 2012.

2. *New format*

The new constitution bears the title “Basic Law”, according to the official translation⁴: “Fundamental Law”. Whereas the post-war constitution of Germany got this title to express a kind of provisory character, with us the new wording suggests that the constitution should be something more than just a special law. The wording also suggests that besides the Fundamental Law a set of organic laws and the constitutional tradition make out the Constitution, that is beyond the Fundamental Law.

The Fundamental Law also got a format that has been unusual in Hungary, as it is composed from articles instead of sections, and all chapters have a different numbering (using letters of the alphabet, Latin and Arabic numbers).

A remarkable change is related to symbolic step: in the future the name of the country (Hungary) shall be the name of the state too. Since 1989 the official name of the state has been “Republic of Hungary” (literally: Hungarian Republic, during the communist period Peoples’ Republic of Hungary) whereas in the future the name of the state will be simply Hungary. The change does not suggest the consideration of re-establishing of the monarchy but rather aims at narrowing the gap between the country and the state. Patriotism in Hungary means that most Hungarians have an

tanulmányok Tamás András tiszteletére 70. születésnapja alkalmából. Budapest: Szent István Társulat, 2011, 551–559.

³ For a summary by the head of the drafting committee: SALAMON, LÁSZLÓ: Debates Surrounding the Concepts of the New Constitution. *Hungarian Review*, 2011 May, 15–22.

⁴ An English version of the text is available at the website of the Parliament: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

emotional tie to the country, whereas it does not mean that they had any kind of relation to the state. The new wording opens for stronger connections between country and state: one cannot be a good patriot without being a good citizen. A number of institutions also got new names, referring to their national character, including somewhat unpopular institutions like the taxation authority (National Tax and Customs Administration instead of Tax and Financial Control Administration).

3. *New content*

The structure of government is not subject of far reaching changes. Changes, however, relate to a number of issues, this way the constitution making cannot be seen as a merely formal procedure.

An incomplete list of important changes would embrace the Constitutional Court, the ombudsmen and to the judiciary (judges in the future have to retire at the general age of pension (currently 62 years, that will be raised to 65 years step by step) instead of 70 years that has been the general rule for more than hundred years).

As a new competence the Constitutional Court will have to deal with constitutional complaints – a competence desired by the Court since its conception.⁵ Until now a complaint was only possible in cases when the alleged violation of a fundamental right has happened with the application of an unconstitutional law. In the future it will be possible to challenge court judgments also in cases when the law applied is uncontested but the procedure constitutes an alleged violation.

On the other hand the jurisdiction of the Court remains limited. Until the national debt is over 50% of the BNP the Court shall have no competence to scrutinize laws on taxes and fees as well, as on the budget, save on the basis of some essential rights (the right to life and dignity, the right to the protection of personal data, the freedom of religion or citizenship). This is in a way a financial state of emergency. The role of the preliminary norm control of acts passed by Parliament (but not yet promulgated) seems to get more importance. On the other hand the *actio popularis* for ex post facto norm control will be abolished. The Constitutional Court will be composed from 15 instead of 11 justices elected for a term of 12 instead of 9 years (on the other hand the possibility of reelection will be abolished). The president of the Court will be elected by Parliament instead of the judges themselves.⁶

The structure of the ombudsmen will be changed as in the future the parliamentary commissioner for fundamental rights will be more than just a *primus inter pares* of other ombudsmen. The ombudsmen for the rights of future generations, as well as for the rights of national and ethnic minorities living in Hungary will only be deputy

⁵ BRUNNER, GEORG: Structure and Proceedings of the Hungarian Constitutional Judiciary. In SÓLYOM, LÁSZLÓ – BRUNNER, GEORG: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press, 2000, 65, 84.

⁶ Former President of the Republic, Professor Ferenc Mádl who passed away on 29 May 2011 regarded the changes reshaping the role of the Constitutional Court as a remedy of an imbalance of powers: MÁDL, FERENC: Hungary – on a New Path. *Hungarian Review*. 2011 May, 11–14.

ombudsmen. The commissioner for data protection is not mentioned – his office will probably be restructured.

Minor changes relate to a number of issues. Validity of national referenda will be bound to a 50% participation (at present lower participation is sufficient if the “yes” or “no” responses constitute more than 25% of all citizens having the right to vote).

A comprehensive chapter deals with public finances aiming at reducing the national dept. Emergencies get a more transparent regulation.

4. Some sensitive issues

A set of sensitive moral issues were debated in the drafting process. The text suggests a conservative vision on the person (every person shall be responsible for his or herself – Article O), the family (grown up children shall look after their parents if they are in need – Article XVI), the community and the nation, but in fact does not bring radical changes to the present legal situation.

The passage on the right to life explicitly refers to the fetus that’s life is to be protected (Article II). This is not a novelty as such, as the Constitutional Court already stated the requirement in its first decision on abortion.⁷ The protection of the fetus, however does not mean that the fetus had a right to life. Mentioning life before birth in the constitution is a novelty, but does not bring changes to the regulation of abortion that recognizes the right to seek abortion in case of a personal crisis (de facto on demand).

With regard to marriage the requirement becomes explicit that marriage can only be a bond between a man and a woman. The Constitutional Court already stated in 1995 that homosexual relations cannot qualify as a marriage.⁸ Same-sex partnerships are acknowledged by law, but they shall not arrive to an equal legal footing as marriage.

Marriage is protected with regard to its contribution to the reproduction of the nation. The institution of the family becomes into focus in many ways, from the solemn acknowledgement of its value to the very practical provision prescribing that taxation of persons raising children shall be determined in consideration of the costs thereof.

The Fundamental Law begins and ends with mentioning God, but this is done in a peculiar way. The very first words of the preamble is a quote of the national anthem (“God bless the Hungarians”), a poem from 1823 that has been the anthem even during the communist time. Certainly the anthem is also sung sometimes at the end of church services, and in this context it bears a religious content. At soccer games or at other public events probably many Hungarians singing it (or listening to it) do not

⁷ Decision 64/1991. (XII. 17.) AB, in English: SÓLYOM, LÁSZLÓ – BRUNNER, GEORG: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press 2000, 179–199.

⁸ Decision 14/1995. (III. 15.) AB, in English: SÓLYOM, LÁSZLÓ – BRUNNER, GEORG: *Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court*, The University of Michigan Press, 2000, 316–321.

have religious feelings. This way the national anthem is the manifestation of patriotism, with a text that is deeply rooted in the national culture.

At the very end of the Law there is a solemn declaration reminding to the wording of the preamble of the Basic Law of Germany, referring to the awareness of the members of parliament passing the Fundamental Law to their Responsibility before God and man.

The preamble (“national avowal”) contains an acknowledgement of the role of Christianity in upholding the nation. This is on the one hand the acknowledgement of a historical fact, on the other hand it is not the religious content of Christianity that is endorsed, but its role in forming the nation – the declaration is descriptive, not prescriptive. The preamble also provides for respect to the various religious traditions of the country. (“We recognize the role of Christianity in preserving nationhood. We value the various religious traditions of our country.”)

IV. Conclusion

As all products of codification the Fundamental Law can be subject of criticism. Some targets of criticism relate to the format: may be less artificial archaism would be more. Criticism, however, shall not oversee the most important fact about the Fundamental Law: this is the first structured constitution of Hungary adopted as such by a freely elected parliament. The constitutional culture of the country will serve as a solid basis for its interpretation.