HUNGARIAN REVIEW

VOLUME XII., NO. 1.

14 March 2014

István Stumpf

THE FUNDAMENTAL LAW OF HUNGARY

WHY DID HUNGARY NEED A NEW CONSTITUTION?

The regime change from communism took place in terms of constitutional law via the modification of the old communist Constitution, that is the 20th Act of 1949, and by the adoption of a few cornerstone laws (like the Act on the Constitutional Court). The changes were negotiated over by the ruling Hungarian Socialist Workers' Party and the Opposition Round Table during the so-called "Round Table Talks" of summer 1989 and were then enacted by the last communist Parliament.

The new democratic system was a product of a set of compromises and political bargains, and while the regime change gave birth to new political elites, the old communist political and economic elite was still able to at least partially hold on to its advantages and privileges.

The text of the modified Constitution in 1989 was totally different from its 1949 counterpart however, and had nothing to do at all with the communist regime's dogmas. Nevertheless, the preamble of the new text clearly considered the modified Constitution as temporary or provisional only and foresaw the adoption of the new and final constitution sometime after the transition.

It stated:
"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."

Since the regime change there has always been a consensus in the Hungarian political community that a new constitution was needed. This was the consensus opinion in 1989 when the preamble of the amendment of the temporary Constitution was drawn up; and it remained so in 1995 when the Parliament adopted a resolution on the preparation of the new constitution. Between 1990 and 2009 the Constitution was modified twenty-five times; however, a political consensus broad and lasting enough to draft and adopt a new constitution was never reached.

The deadlock ended when, at the 2010 parliamentary elections, the Fidesz– KDNP coalition won a two-thirds majority in the Parliament – enabling it to modify it or to adopt a new one according to the stipulations of the Constitution.

The major partner in the government coalition, Fidesz (*Fiatal Demokraták Szövetsége*, i.e. Alliance of Young Democrats) was originally founded in 1988, as a youthful libertarian, anti-communist party. By the time of the 2010 elections two decades later, the party had moved in a conservative direction, its leaders were committed to "completing the regime change" in political, symbolic, legal and economic terms; and where necessary, destroying old institutional structures and building new ones.

In this context, the adoption of a new constitution seemed politically rational, if not inevitable. The Constitution still had its old label, the "20th Act of 1949"; thus to begin with, many felt a historical or symbolic urge to replace the document, the original of which was signed by the dictator Mátyás Rákosi. The Constitution of the People's Republic of Hungary declared the citizens' right to personal liberty and security, although during the Rákosi era hundreds were executed, while tens of thousands were imprisoned on political grounds without a fair trial – to mention but a few trespasses. Thus, the original 1949 Constitution, while a symbol of rights on paper, was brutally infringed in reality.

According to most constitutional scholars, the structure of the Constitution was outdated. There were also several errors in its text related to its hasty preparation as well as the numerous modifications it underwent over its half century of existence. The adoption of a new constitution hence brought an end to the transitional period mentioned in the preamble of the former document, and became a symbol of a new beginning after the social and political struggles of the previous 20 years.

CONSTITUTION-MAKING

The official preparation of the new constitution began in September 2010 at the newly created Parliamentary Constitution Drafting Committee. Government organs, nongovernmental organisations (NGOs) and the academic community were called to submit their suggestions for the concept and framework of the new constitution. Working groups of the Drafting Committee prepared frame work proposals, based on which the Committee debated and elaborated a Draft Resolution,(1)and submitted it to the plenary of the Parliament. In February 2011, József Szájer (a

Member of the European Parliament) formed a "National Consultation Committee" and launched a campaign to inform citizens about the constitution-making process and collect their opinion on certain topics. A week later, the parliamentary factions of the governing parties formed a constitution drafting committee, which Szájer was elected to lead.

After the governing majority in the Parliament adopted a resolution accepting the "Governing Principles of the Hungarian Constitution" as the starting point for the constitution-drafting process and enabled each of the parliamentary factions to introduce their respective draft constitutions (to be debated simultaneously in Parliament), the governing majority factions introduced their bill on the Draft Constitution to the Parliament in March 2011. The parliamentary debate took about one month, with the participation of only one opposition party faction; the final text of the bill was adopted by the governing majority factions.(2)

On 25 April 2011 the new constitution – the "Fundamental Law of Hungary" – was promulgated in the official gazette.

RESOURCES, CONSTITUTIONAL CULTURE

The temporary 1989 Constitution's philosophical foundations and the objectives of the text did not undergo as much discussion or description in the text as occurred during the ratification debates in the United States. The institutions of the temporary Constitution were instead more influenced by the institutions of pre-communist Hungarian public law, contemporary European – mostly German – constitutional law, and international conventions on human rights.(3)

It was the decisions of the then-established Constitutional Court that evolved the actual normative content of the Constitution's text during the next two decades; these interpretations influenced and became part of modern Hungary's constitutional culture.

The main resource in the process of making the new constitution was the text of the temporary Constitution – as modified during the years – and the practice of the Constitutional Court based on that text. The text of the new Fundamental Law generally followed the text of the temporary Constitution – refined in line with the past twenty years' practice of the Constitutional Court – , but substantial alterations were also made where divergence was intended. The second part of the new Fundamental Law, entitled "Freedom and Responsibility" reflected the catalogue of rights in the Charter of Fundamental Rights of the European Union.

CHARACTERISTICS OF THE NEW FUNDAMENTAL LAW(4)

One could spend a long time analysing and comparing the old and new rules and institutions in Hungary's new Fundamental Law, but let me reflect here instead on a few aspects that are related to basic concepts in German constitutional law and may have relevance for the German constitutional dialogue.

STRONG SYMBOLISM AND VALUE-ORIENTATION

The text of the temporary Constitution of 1989 was quite technical, it did not even have a conceptual reference to the source of power like "We the people", but stated only in its brief preamble the fact that it was the "Parliament of the Republic of Hungary" who thereby adopted the document. In contrast, the lengthy preamble of the new Fundamental Law, the so-called "Avowal of National Faith" makes its declarations in the name of "We the Members of the Hungarian Nation".

The drafters of the Fundamental Law understood that the constitution is not simply a legal document, but it is also a document that binds a nation together emotionally – as the preamble states: "Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future. It is a living framework expressing the nation's will and the form in which we wish to live."

The change of the name from Constitution to Fundamental Law reflects the idea that during its history, Hungary has had a "historical constitution", that is a set of written laws and unwritten public law traditions. The preamble of the Fundamental Law confirms this declaring that "We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation".

The change of the name itself has no legal relevance, but has a symbolic meaning rather: the Fundamental Law places itself in this legal tradition. What really counts is the rule within the Fundamental Law that defines its position within the legal system and influences its interpretation – I will elaborate that topic a little later on.

There were intentions among the governing majority leaders to create a more abstract, more concise constitution than the temporary one of 1989; however, finally not only basic institutional rules and basic rights were enacted, but many value declarations and state objectives. As the text adopted in 1989 reflected the identity, the visions and fears of the people of the regime change, provisions in the new Fundamental Law were born in an atmosphere of economic crisis, increasing state debt, declining population and the concern for sustainability.

SEPARATION OF POWERS

The temporary Constitution already declared that Hungary was a "State under the rule of law". From this principle – and from the detailed constitutional rules on government institutions – the early Constitutional Court deduced the principle of the separation of powers. Later, in the new Fundamental Law that important principle was explicitly recognised.(5)

As a fact, the separation of powers has never been introduced to Hungarian legal order in the strict and classical sense – that is, that the executive, legislative and judiciary powers should constitute three independent branches. Long ago, the executive power was subjected to the monarch; during more democratic periods of Hungary however the executive was responsible to the Parliament. This latter model was upheld by the Fundamental Law: the Parliament elects the Prime Minister, who is the head of the executive (what we call "Government"), and can also terminate the Prime Minister's mandate by adopting a motion of no-confidence. The Prime Minister and other Ministers may be Members of Parliament at the same time.

Since Hungary is not a federal, but a centralised, unitary state, not only is the "horizontal" division of powers weak, but also the "vertical" separation of powers. The Hungarian Parliament has a general power to "adopt Acts", i.e. legislative power over everything and anything – so far as it is not contrary to the Fundamental Law.

However, the Fundamental Law may not be always able to prevent the legislature from enacting whatever policy it so desires, for the separation of the legislative power and the power to modify the constitution is also thin: a simple majority in the Parliament is required to legislate, while a two-thirds majority can modify the Constitution. Hence, when the governing party factions have a two-thirds majority in Parliament, the executive, the legislative and the constitution- modifying powers are in fact intertwined.

Who has the power then to protect the Fundamental Law? In a strict sense, only the Constitutional Court: in Hungary, ordinary courts are not granted the power of judicial review.

In such a government structure, the only significant check in the system balancing the legislature is the Constitutional Court, which – according to the Basic Law – "shall be the principal organ for the protection of the Fundamental Law". The preamble of the Act on the Constitutional Court furthermore specifies that "enforcing the principle of the separation of powers" is one of the main functions of the Court. One might think that this would be only a theoretical function, but reality presents us with several cases:

Under the previous act on religious freedom, the registration of churches was done by courts. Last year, the Parliament adopted a new Act on Churches, which aimed to remove the beneficial legal status of recognition as a church from so-called "business churches". On the one hand, the act stipulated the criteria of being a recognised church, on the other hand, it prescribed that the Parliament should decide in each case – with a two-thirds majority – whether an applicant fits the criteria. If the Parliament considers the applicant organisation to meet the criteria, it amends the annex of the act containing the list of recognised churches; if not, it declines recognition in a resolution, against which there is no legal remedy. The annex as originally adopted contained 14 recognised churches, and in early 2013 another 13 were recognised by the Parliament. Recognition was denied to another 66 churches, which were then forced to transform into associations. A few months ago the Commissioner for Fundamental Rights initiated a review of the Act at the Constitutional Court stating that it infringes the principle of separation of powers because the same body who made the law is entitled to apply it to individual organisations. It is now the responsibility of the Constitutional Court to decide what separate powers as a legal reality means and demands.

Despite concentrating power at the Parliament, the Fundamental Law set up two institutions that limit the power of the legislation and the executive in special areas.

The adoption of the Act on the central budget by the Parliament needs the prior approval of the Budget Council which consists of three members – the Governor of the National Bank, the President of the State Audit Office and a member appointed for six years by the President of the Republic. The Budget Council may deny its approval if the budget fails to provide for state debt reduction in proportion to the GDP.(6)

The Fundamental Law has also introduced the institution-type "autonomous regulatory organ", an organ established in a cardinal (two-thirds majority) act by the Parliament for the performance of certain tasks and the exercise of certain competences belonging to the executive branch. The head of an autonomous regulatory organ can issue decrees within its competence.

JUDICIAL REVIEW

The temporary Constitution granted the Constitutional Court judicial review over rules of law (for example Acts of Parliament, Decrees of Government); judicial decision in individual cases could be only contested on the basis of a constitutional complaint by claiming that an unconstitutional law had been applied in that particular case.

The Fundamental Law extended the competence of the Constitutional Court over judicial decisions: on the one hand, it prescribed that "in the course of the application of law, courts shall interpret the text of rules of law primarily in accordance with their purposes and with the Fundamental Law". On the other hand, it empowered the Constitutional Court to review the rules of law referred to by the constitutional complaints, as well as the relevant judicial decision (that is the conformity of the judicial interpretation with the Fundamental Law).

RULES OF INTERPRETATION

What is the proper way to interpret the Fundamental Law? The document itself prescribes interpretation rules in two separate Articles, the first valid only for the Fundamental Law, the second also for other rules of law, saying:(7)

"The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith contained therein, and with the achievements of our historical constitution", and "when interpreting the Fundamental Law or rules of law, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good".

The rule invoking the "achievements of our historical constitution" is somewhat problematic, because the expression "historical constitution" traditionally used to refer to a thesaurus of major laws and legal concepts from the last thousand years of Hungarian history. There is no generally accepted theory or clear practice what an "achievement" of a historical constitution can be considered, so until now the Court has used this interpretation method scarcely, but when it did, references were chosen to reinforce other arguments.

What is more surprising for me is that despite the clear command of the Fundamental Law, the Court has not yet tuned itself to seriously consider the arguments to interpret provisions of the Fundamental Law and of the Act on the Constitutional Court in accordance with their purposes and the common sense; instead, what prevailed so far were strict constructionism and the semi-automatic adaptation of the practice based on the temporary Constitution of 1989 and on the previous Act on the Constitutional Court. On this point I have to say that I agree with Justice Antonin Scalia who emphasised that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means".(8)

In my firm opinion, the use of the right interpretation methods is a key factor in solidifying the long-term legitimacy of the Fundamental Law and of the Constitutional Court – so I hope that we shall see development in this field.

CLOSING REMARKS

As we can see, the new Fundamental Law of Hungary follows the Continental European constitutional model considerably tightly. This is mainly due to different legal traditions and the fact that Hungarian legal scholars and practitioners have developed much stronger ties with European academia – as mentioned above, the German influence is particularly strong. It is for the benefit of American academia to study from time to time how the concepts and institutions of American constitutionalism flourish or face difficulties in other countries.

Presentation for the Conference of CEPC "Constitutionalism – American and European Ways, Fundamental Rights and Values in Anglo-Saxon and Continental Models", Budapest, 24–26 September 2013.

1 "Draft Resolution H/2057 on the Governing Principles of the Hungarian Constitution to the Parliament" (H/2057 Magyarország Alkotmányának szabályozási elveiről).
2 The Hungarian Socialist Party (MSZP) and Politics Can Be Different (LMP), agreen liberal party refused to take part in the parliamentary debates of the Bill on the new constitution. Jobbik, Movement for a Better Hungary, a radical nationalist party participated in the debate, but its MPs voted against its adoption.
3 UN conventions, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights were referred as a model in the explanation of the 31st Act of 1989 that modified the Communist Constitution (20th Act of 1949).
4 See the official English translation of the Fundamental Law on the website of the Constitutional Court: http://www.mkab.hu/rules/fundamental-law
5 Article (C) section (1): The functioning of the Hungarian State shall be based on the principle of the separation of powers.
6 For detailed rules see: paragraph (3) of Article 44 and paragraphs (4) and (5) of Article 36 of the Fundamental Law. Exception: paragraph (6) of Article 36.
7 See Article (R) paragraph (3) and Article 28.
8 Scalia, "A Matter of Interpretation", Princeton Univ. Press, 1998.

HUNGARIAN REVIEW is published
by BL Nonprofit Kft. It is an affiliate
of the bi-monthly journal *Magyar Szemle*,
published since 1991

Editor-in-Chief: Tamás Magyarics
Deputy Editor-in Chief: István Kiss
Associate Editors: Gyula Kodolányi, John O'Sullivan
Managing Editor: Ildikó Geiger

Editorial office: Budapest, 1067, Eötvös u. 24., HUNGARY
E-mail: hungarianreview@hungarianreview.com
Online edition: www.hungarianreview.com