

# The piquancy of the Fundamental Law of Hungary

## Cechy swoiste węgierskiej Ustawy Zasadniczej

### Streszczenie

Artykuł przedstawia niektóre części nowej konstytucji Węgier z kwietnia 2011 roku. Przed jej uchwaleniem, a także później była ona przedmiotem szerokich naukowych i politycznych dyskusji, zarówno w kraju, jak i za granicą. Jako część tej dyskusji pewna liczba komentarzy została sformułowana odnośnie do procesu przyjęcia i zawartości ustawy zasadniczej. Wiele z tych uwag krytycznych było opartych na fałszywej interpretacji lub niezrozumieniu. W ostatnim pięcioleciu liczne znaczące zmiany ustawodawcze zostały dokonane w węgierskim systemie prawnym.

Mimo że rząd podjął wiele prób celem wyjaśnienia zewnętrznemu światu sensu dokonanej rewolucji prawodawczej, było to niezmiernie trudnym zadaniem. Brak zrozumienia oraz nieobiektywne nadinterpretacje niektórych części ustawy zasadniczej zaszkodziły jej właściwej ocenie. Liczne znaczące kwestie zostały zniekształcone czy wręcz wypaczone jak na przykład sposób uchwalenia ustawy zasadniczej, odwołania się do chrześcijaństwa, instytucja małżeństwa, ochrona życia poczętego, odpowiedzialność państwa za Węgrów żyjących za granicą. Celem opracowania Szabolcsa Nagy'ego jest wyjaśnienie tych kwestii oraz umożliwienie zrozumienia znaczenia, w tym przyczyn, które spowodowały te przeobrażenia.

### Słowa kluczowe

Parlament Europejski, Rząd Węgier, Węgiersko europejskie prawo fundamentalne do ochrony płodu, Komisja Sądu Konstytucyjnego Węgier dla Demokracji poprzez Prawo

### Abstract

The paper is entitled to give a brief interpretation for some segment of the new Fundamental Law of Hungary. Before the adoption and also later on it was a subject of an extensive academic and political discourse both on the domestic and on the international level. As a part of this debate a number of comments were formulated in regard to the process of adoption and the content of the text. Many of these criticism were based on wrong interpretation or misunderstanding. In those days the Hungarian legal system went through many significant changes and countless new or amended acts were adopted. Despite all attempts, in this legislative revolution it was extremely hard for the government to communicate everything properly to the outside world. The lack of communication and the wilful misinterpretations of some sections hindered the appreciation of the Fundamental Law. Many significant issues are paraphrased in the text like: creation of the Fundamental Law, references to Christianity, the institution of marriage, protection of foetal life and the state's responsibility for the Hungarians living beyond the border. The aim of this work is to clarify those judged sections and help the understanding of the meanings and the reasons behind the relevant changes.

### Key words

European Parliament, Fundamental Law of Hungary European Protection of foetal life, Hungarian Government, Hungarian Constitutional Court Commission for Democracy through Law

## Introduction

The Hungarian Parliament adopted the new Fundamental Law of Hungary on 18 April 2011 and proclaimed it on 25 April in the same year. It came into force on 1st January 2012. The Fundamental Law was a subject of an extensive academic and political discourse both on the domestic and on the international level. As a part of this debate a number of comments were formulated in regard to the process of adoption and the content of the text. Considering the comments, I came to the conclusion many (or we could say most) of them were based on misunderstanding or wrong interpretation.

The purpose of this paper is to give a possible “proper” interpretation of those sections which were criticised sometimes in a hasty and unfounded fashion. This paper brings into focus several points of the Fundamental Law but a precise and a thorough commentary would transcend the extent of this work. I am only going to talk about the parts that received the sharpest criticism. As a part of this short summary, I took into account the opinion of the Hungarian and the foreign constitutional scholars as well as the decisions of the Hungarian Constitutional Court. Furthermore, I also examined the opinion of the Venice Commission<sup>1</sup> the European Parliament and other international organizations as well. Last but not least, I took into consideration the response of the Hungarian Government for the comments voiced on the international level.

## 1. Creation of the Fundamental Law

Several critics were triggered about the adoption of the new Hungarian Fundamental Law. In 2010 Fidesz - KDNP<sup>2</sup> won the parliamentary election – held on 11 and 25 April 2010 – and achieved a two-third majority to modify major laws and the constitution of the country. Exactly one year later the new Fundamental Law of Hungary was proclaimed. During this year the process of adoption was blamed because of its speed, one-sidedness, legality and because of the lack of consultation. This part is intended to show a clear picture of the creation of the Fundamental Law.

### 1.1. Necessity of the New Constitution

After the democratic transition in 1989 Hungary was the only country which did not adopt an entirely new Constitution. The National Roundtable wanted to avoid that a parliament which was not elected based on the principle of free elections adopt the new democratic constitution. “With the enactment of the Act XXXI of 1989 it was decided

---

<sup>1</sup> European Commission for Democracy through Law.

<sup>2</sup> Fidesz – Magyar Polgári Szövetség – Keresztény Demokrata Néppárt (Fidesz – Hungarian Civic Union – Christian Democratic People’s Party).

to amend the 1949 Constitution. The constitutional amendment of 1989 came into force as a result of a compromise between the former and the new political elite and this compromise assured that a parliamentary democracy was established in Hungary with the head of the executive branch being the Prime Minister.”<sup>3</sup> The indispensable amendment to declare free elections was adopted and the further amendments could then be left to the new democratically mandated Parliament. The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force as a temporary one, until the adoption of a new Constitution. „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.”<sup>4</sup>

Since 1989 all the political powers had agreed that it was necessary to adopt a new constitution. Nothing can prove this fact better, than the numerous attempts at constitution-making since the transition. As argued in 2010, one of the purposes of making a new constitution was to remedy the difficulties that originated from a powerful political economical and moral crisis that emerged between 2006 and 2010. Another purpose might have been the perception that the former Constitution did not define the national identity. The Constitution is not only a legal document but also a symbolic one. The apparent political and moral crisis situation required changes to symbolism as well, in the perception of the political elite.

## **1.2. Procedure of Drafting**

“The Venice Commission criticized the procedure of drafting, deliberating and adopting the new Constitution for its tight time-limits and restricted possibilities of debate of the draft by the political forces, within the media and civil society.”<sup>5</sup>

It is a fact that the draft of the Fundamental Law was published on 14 March 2011 and it was then adopted approximately one month later on 18 April 2011. This might seem quick and problematic from the point of view of an outsider observer. Before we jump to the conclusion that the whole constitutional process was only one month long, it is indispensable to carry out a more in-depth analysis of the process to get a better and much more objective perspective.

---

<sup>3</sup> See also: L. Csink & B. Schanda § A. Zs. Varga. *The Basic Law of Hungary*, Clarus Press Ltd, Dublin: 2012, p. 34-35.

<sup>4</sup> Act XX of 1949 amended by Act XXXI of 1989, *A Magyar Köztársaság Alkotmánya* (The Constitution of the Republic of Hungary).

<sup>5</sup> See also: CDL-AD(2011)016 *Opinion on the new constitution of Hungary*, 17-18 June 2011, § 11.

In the year of the Constitutional process, and even in the year before, several conferences publications and consultations were held that enabled the society to deliver their visions of the emergent constitution. In 2010 after the election the Ad Hoc Drafting Committee was set up on 29 June 2010 “by a parliamentary resolution with active participation of the five parliamentary groups of forty-five parliamentary representatives.”<sup>6</sup> Think-tank dealing with fundamental rights issues, eminent academics, lawyers and members of the civil society as well as advocacy organizations and legal-aid offices could represent their points of view in the work of the committee, which presented its draft constitutional text on 20 December 2010. The Parliament adopted the text on 7 March 2011. The government wanted to develop the broadest possible social dialogue in terms of the constitutional subject matter. A twelve-item questionnaire – entitled National Consultation – was prepared for this purpose, containing questions concerning the future constitution. The input resulting from the National Consultation is noticeable in the text.

For the sake of the clarity of some of the arguments herein, it is necessary to take a look at the decisions of the Constitutional Court in the last twenty years. “The Constitutional Court played a key role in keeping the institutional system operational for two decades. In its resolutions the Court has interpreted the 1989 constitution at a high standard and many of these resolutions are recognizably present in the text of the new Constitution.”<sup>7</sup>

“The adoption of the Fundamental Law took place in a legitimate legal framework.”<sup>8</sup> The opposition parties and other voices from foreign politics and media deplored the absence of a referendum “legitimizing”, “reinforcing” the constitutional process and the constitutional text. However, if we take a look around in Europe and we investigate the creation of European constitutions we can find plenty of well-functioning democracies who did not have their constitutions confirmed through a referendum. There is no common standard to adopt a new constitution, therefore it should not be expected necessarily to have a referendum on the ground that there is a referendum elsewhere. “The acceptance of the Constitution is not based on the conditions of formation, not the mere text and least of all the propaganda but it is based on the actual enforcement of the Constitution.”<sup>9</sup> In conclusion, constitutional legitimacy can only be judged in a long term, once the letter of the constitution has adequate time to unfold and become practice.

---

<sup>6</sup> 47/2010. (VI. 29.) OGY (Decision of the Hungarian Parliament).

<sup>7</sup> See also: B. Ablonczy, *Conversations on the Fundamental Law of Hungary*, Electromédia, Budapest: 2012, p. 11.

<sup>8</sup> See also: L. Trócsányi & B. Schanda, *Bevezetés az alkotmányjogba (Introduction to Constitutional Law)* HVG-ORAC, Budapest: 2012, p. 54.

<sup>9</sup> See generally: B. Molnár & M. Németh & P. Tóth, *Mérlegen az Alaptörvény (Balance sheet of the Fundamental Law)*, HVG-ORAC, Budapest: 2013, p. 19.

## 2. References to Christianity

The religious references in the Fundamental Law received heavy criticism. The best way to explain the context of these religious references is checking out some foreign examples. If we take a look at the constitutions of the European countries we can discover several religious references in many of them.

For example:

“In the name of the Holy and Consubstantial and Indivisible Trinity”<sup>10</sup> (Greece)

“In the Name of the Most Holy Trinity, from Whom is all authority and to Whom; as our final end, all actions both of men and States must be referred.

Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial.”<sup>11</sup> (Ireland);

“Conscious of their responsibility before God and man, Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.”<sup>12</sup> (Germany);

“Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources.”<sup>13</sup> (Poland).

Historically these countries are bound up with Christianity. Without interpreting the above mentioned references they seem to have a symbolic meaning to express their insistence to Christianity. After all, these constitutions still guarantee the freedom of thought, conscience, religion and faith as well as the Hungarian Fundamental Law does.

Hungary:

*God bless the Hungarians!* – says the first sentence of the Fundamental Law. However, it does not have any religious significance because it is the first sentence of the Hungarian anthem. (As a symbol of national sovereignty, the national anthem is otherwise regulated under paragraph (3), Article I).

*We are proud that our king Saint Stephen built the Hungarian State on solid ground and made our country a part of Christian Europe one thousand years ago.*

*We recognise the role of Christianity in preserving nationhood. We value the various religious traditions of our country.*

---

<sup>10</sup> Constitution of the Hellenic Republic (Greece), [https://www.constituteproject.org/constitution/Greece\\_2008](https://www.constituteproject.org/constitution/Greece_2008) accessed 15 August 2014.

<sup>11</sup> Constitution of Ireland, [https://www.constituteproject.org/constitution/Ireland\\_2012](https://www.constituteproject.org/constitution/Ireland_2012) accessed 15 August 2014.

<sup>12</sup> The Basic Law of the Federal Republic of Germany, [https://www.constituteproject.org/constitution/Ireland\\_2012](https://www.constituteproject.org/constitution/Ireland_2012) accessed 15 August 2014.

<sup>13</sup> Constitution of the Republic of Poland, [https://www.constituteproject.org/constitution/Poland\\_1997](https://www.constituteproject.org/constitution/Poland_1997) accessed 15 August 2014.

“It can be observed that the references to religious symbols in most cases are embedded in the country’s historical and cultural traditions, or appear in the circle of the constitutional responsibility. Christian references in the basic law arise in the form of a reference to the European Christian tradition. As we can see there is no exact position in Europe about the religious references moreover decisions on these issues should be taken by each State itself.”<sup>14</sup>

“It is a general rule that the preamble is used as a guideline for interpretation. This means it does not have binding power its own. Therefore the spirit of the preamble has no legal consequences.”<sup>15</sup>

### 3. Protection of the Institution of Marriage

*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 and/or the relationship between parents and children.*

This article was said to be homophobic and exclusionist, however this concern is completely groundless. As I mentioned earlier, the resolutions of the Constitutional Court are recognizably present in the text of the Constitution. “According to the practise of the Constitutional Court the constitutional definition of marriage means union between man and woman.”<sup>16</sup> It does not imply a ban on the institution of registered civil partnerships which – in turn – enjoy legal protection in Hungary since 2009.

If we take a glance at the opinion of the Venice Commission on the new Constitution of Hungary “the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator and, as such, it does not appear to prohibit unions between same sex persons (although such unions cannot enjoy protection under the institute of marriage).”<sup>17</sup>

The second sentence of Article L became the part of the first paragraph by the fourth amendment of the Fundamental Law.<sup>18</sup> “It does not contain a legal definition of the notion of the family. Instead it merely declares that the basis of family ties is marriage or relationship between parents and children. Consequently, this provision cannot

<sup>14</sup> See also: L. Csink & J. Fröhlich, *Egy alkotmány margójára (Margin of the Constitution)* Gondolat, Budapest: 2012, p. 111-120.

<sup>15</sup> E.g.: A. Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei (Genesis of the new Fundamental Law and its practical implication)* HVG-ORAC, Budapest: 2011, p. 182.

<sup>16</sup> See: 154/2008. (XII: 17.) AB határozat (Decision of the Hungarian Constitutional Court).

<sup>17</sup> See also: CDL-AD(2011)016 *Opinion on the new constitution of Hungary*, 17-18 June 2011 § 50.

<sup>18</sup> Supplemented by Article 1 of the Fourth Amendment to the Fundamental Law (25 March 2013).

be regarded as an exclusive definition and it does not preclude the statutory protection of family relations in a wider sense.”<sup>19</sup>

#### **4. Protection of Foetal Life**

*Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.*

The problematic part in this article is that it might be the first step towards the significant tightening of the rules of the abortion. This was the main concern of international attention. The protection of foetal life expressed in the text only makes the relevant practise of the Constitutional Court part of the Fundamental Law. According to the practise this article does not attribute the right to life to the foetus but protects it as a constitutional value. (Certain fundamental rights may be limited in the protection of constitutional values, in accordance with Article I (3) on the limitation of fundamental rights.)

Furthermore, the UN Convention on the Human Rights of the Child – ratified by Hungary – states in its preamble that “the child by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.”<sup>20</sup>

As the conclusion of the Venice Commission pointed out this article does not imply an obligation for the Hungarian state to penalise abortion.<sup>21</sup> Also the Government of Hungary stated that the issue of abortion is regulated by Act LXXXIX of 1992, which is still in force and there is no intention of abolishing or amending it.<sup>22</sup>

#### **5. Responsibility for the Fate of Hungarians Living beyond Hungary’s Borders**

*Article D: Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, shall facilitate the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, the effective use of their individual and*

---

<sup>19</sup> CDL-REF(2013)034 *Comment of the government of Hungary on the draft opinion on the fourth amendment to the fundamental law of Hungary*, 14 June 2013.

<sup>20</sup> United Nations Convention on the Right of the Child, New York, 20 November 1989.

<sup>21</sup> „Article II of the Hungarian Constitution cannot be read as considering the life of the unborn child to be higher value than the life of the mother and does not necessarily imply an obligation for the Hungarian State to penalise abortion.” CDL-AD (2011)016 *Opinion on the new constitution of Hungary* 66. §

<sup>22</sup> CDL-REF(2013)034 *Comment of the government of Hungary on the draft opinion on the fourth amendment to the fundamental law of Hungary*.

*collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.*

Serious concern emerged about this article of the Fundamental Law, namely that it could have extraterritorial effect. This is not the situation, however. No action of the state may result from this article that would violate the sovereignty of other states.

After the World War I, Hungary lost two-thirds of its territory and more than three million Hungarians ended up on the other side of the redefined borders. Ever since the horrors of the two world wars, this situation has been a delicate question of this region. During the communist times the status of the Hungarians beyond the borders was a taboo, forbidden to bring into political discourse or to manage with legal/political means.

After the democratic transition there were a number of attempts to deal with this issue. As a first step in 1989 by the amendment of the constitution it was stipulated that: “The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.”<sup>23</sup> Article D of the present Fundamental Law determines the content of the above mentioned responsibility. The content of Article D does not establish a new practise of supporting the Hungarian minorities living in other (and not just neighbouring) countries.

Since 2001 Hungary has given assistance “in order to ensure that Hungarian living in neighbouring countries form part of the Hungarian nation as a whole and to promote and preserve their well-being and awareness of identity within their home country.”<sup>24</sup> According to the Report on the Preferential Treatment of the National Minorities by their Kin-State adopted by the Venice Commission these kinds of commitments of the Kin-State “are compatible with the standards of the Council of Europe and with the principles of international law.”<sup>25</sup> “Hungary fully accepts the principle that primary responsibility for national minorities should be assumed by the State on whose territory the given minority lives but there should be room for Hungary too as a kin-State to bear responsibility for its kin-minority.”<sup>26</sup>

It is extremely important that the Fundamental Law should not be interpreted sentence by sentence, but it should be examined in the context of the whole text and

---

<sup>23</sup> Act XX of 1949 amended by Act XXXI of 1989, The Constitution of the Republic of Hungary 6. § (3).

<sup>24</sup> Act LXXI of 2001 A szomszédos államokban élő magyarokról (On Hungarians living in neighbouring countries).

<sup>25</sup> See: CDL-INF (2001) 19 Report on the Preferential Treatment of the National Minorities by their Kin-State.

<sup>26</sup> CDL-REF(2013)034 Comment of the government of Hungary on the draft opinion on the fourth amendment to the fundamental law of Hungary.



based on the intent of the constitutional legislator, which is reflected in prior legislation as well.

Article Q lays down that:

*(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.*

*(2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.*

Every action which is taken in the field of foreign policy shall respect and comply with Article Q.

In 2010 the Parliament amended the Act on the Hungarian Citizenship. Since 1 January 2011 Hungary grants citizenship to the Hungarians beyond her borders on the basis of a fast-track naturalisation procedure. Individuals shall prove to have ancestry of Hungarian citizenship or of probable origin of Hungary and demonstrate a proper command of the Hungarian language. Applicants shall meet two further requirements: firstly, a clean criminal record under Hungarian law and lack of indictment in any criminal proceedings before a Hungarian court; secondly, his/her naturalisation must not be considered a threat to the public order or national security of Hungary.<sup>27</sup>

Taking “the bearing of responsibility” to the next level, and as a necessary corollary of extending the naturalisation rules, Hungary decided to grant voting rights to the Hungarian citizens without permanent residence in Hungary. Paragraph (4) of Article XXIII of the Fundamental Law sets forth up that: “*A cardinal Act may provide that the right to vote and to be voted for, or its completeness shall be subject to residence in Hungary, and the eligibility to be voted for shall be subject to additional criteria.*” In accordance with this Article the cardinal law on the Elections of Members of Parliament stipulates: “*Voters without residence in Hungary may vote for one party list.*”<sup>28</sup>

All in all, these actions of the Hungarian State are in line with international law and this article of the Fundamental Law cannot be accused having extraterritorial effect.

## **Conclusion**

“*Vera virtus actibus exhibetur – The real virtue manifests itself in action*”, goes the ancient saying.

---

<sup>27</sup> See also: Act LV of 1993 amended by Act XLIV of 2010, A magyar állampolgárságról (On the Hungarian Citizenship).

<sup>28</sup> Act CCIII of 2011, Az országgyűlési képviselők választásáról (On the Election of the Members of the Parliament).

As I mentioned earlier, the constitutional legitimacy of the Fundamental Law of Hungary and the public legal framework created thereby can be judged in a long run. The success of the Fundamental Law depends greatly on how it will manifest in practice, and on how it is able to provide suitable basis for building a successful country. Nevertheless, the Fundamental Law is only able to give a good impetus to achieve this goal, but the success of the country is basically based on corresponding decisions of the government and the successful practical implementation of these decisions. Furthermore, a proper communication is very important for the country's development both inward and outward. Many disputes were based on misunderstanding which could be prevented by an appropriate communication.