



The Third Wave – the New Constitution of Hungary

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In their current, third analysis on the legislative work of the Hungarian Parliament,¹ the Eötvös Károly Policy Institute, the Hungarian Civil Liberties Union (HCLU) and the Hungarian Helsinki Committee (HHC) examine whether the constitution-making process in Hungary meets the requirements deriving from the principle of the rule of law and compares the draft “Fundamental Law” (i.e. the draft of the new Constitution) submitted to the Parliament on 14 March 2011 with the present constitutional system.

The draft Fundamental Law undermines democratic political competition and makes political change more difficult by transforming institutional structures, weakens the system of checks and balances and alters the framework of the political community by extending the right to vote. The draft Fundamental Law decreases the level of protection of fundamental rights and significantly limits the enforceability of these rights through curbing the Constitutional Court’s powers. Since there is no information available on the planned content of the so-called cardinal acts (i.e. acts of Parliament requiring a two-third majority), it may be stated that the adoption of the Fundamental Law will be only the beginning of the constitution-making process, not the end of it.

1. The constitution-making process does not meet the requirements deriving from the principle of the rule of law.

¹ In July 2010 the three NGOs above assessed the method and pace of the legislative work of the Hungarian Parliament elected in April 2010, and voiced their criticisms regarding the provisions deemed as violating the principle of the rule of law. (See: <http://tasz.hu/en/hirek/assessing-first-wave-legislation-hungarys-new-parliament>) In their analysis published in December 2010 they focused on those elements of the system of checks and balances which were eliminated or significantly weakened by the decisions of the Government. (See: http://tasz.hu/files/tasz/imce/Hungarian_NGOs_legislation_2wave.pdf.) According to the NGOs’ statements published in March 2011 the constitution-making process has not met the requirements deriving from the principle of the rule of law, the new Constitution of Hungary will be the product of one political party. Furthermore, there is no political, professional or social consensus on the need for and the content of the new Constitution and on the method of the constitution-making process. (See: <http://tasz.hu/en/freedom-of-speech/hclu-criticise-constitution-writing-process>.)

The need for a new Constitution was not supported by clear and conclusive reasons, the aims of creating a new Constitution remained unknown and the political community had no chance to declare whether it wants a new Constitution or not. The Fundamental Law has been prepared in secret and the names of those drafting the Fundamental Law were not disclosed. The Concept Paper prepared by the Parliamentary Ad-Hoc Committee – the only political body officially vested with the task of preparing the new Constitution – had no impact on the draft Fundamental Law, while the politicians framing the draft in reality had no democratic legitimacy for that task. In the absence of a thorough debate the draft Fundamental Law may not become a stable constitution in the long run. The constitution-making process failed to institute any substantial professional or open public debate. Furthermore, the pace of the constitution-making process is so fast that substantively discussing the draft Fundamental Law is impossible: the parliamentary debate on the draft began on 14 March 2011 and the Fundamental Law will be adopted on 18 April 2011. The one-month timeframe and the net nine-day long parliamentary debate leave no chance for any kind of in-depth debate.

The Fundamental Law of Hungary is the product of one political party, since the only party substantively participating in the process is the Fidesz-KDNP. Opposition parties devoted to democratic values found the process unacceptable and decided not to take part in the parliamentary debate. Under these circumstances the Fundamental Law may not become a document that is widely accepted by every member of the political community. Thus, the Fundamental Law starts off with a severe lack of legitimacy.

The Venice Commission of the Council of Europe voiced basically the same criticism in its opinion dated 28 March 2011, compiled upon the request of the Hungarian Government. (See: <http://www.venice.coe.int/docs/2011/CDL-AD%282011%29001-e.pdf>.)

2. Adopting the Fundamental Law will be only the beginning of the constitution-making process, not the end of it.

A range of issues are not regulated clearly by the draft Fundamental Law, thus a series of cardinal acts will amend the existing fundamental democratic by re-arranging the system of elections, the scope of those entitled to vote, the administration of the judiciary and the provisions on fundamental rights. There is no available information concerning the planned content of these cardinal acts or the date envisaged for their adoption, so it will remain unknown even after the Fundamental Law is adopted how fundamental institutions will operate and what content fundamental rights will have in the future.

It is characteristic of constitutional democracies that different majority rules are established for adopting fundamental acts and for amending the Constitution. However, the draft Fundamental Law upholds a constitutional deficiency in this regard: according to the draft, the majority necessary for amending the Constitution and for adopting acts requiring a qualified majority remains the same, and – additionally – this currently coincides with the governing majority. Thus, the provisions required for adopting and amending the Constitution and the cardinal acts do not contain safeguards requiring the consensus of the Government and the opposition.

It seems that when deciding on which acts of Parliament will require a two-third majority in the future and which can be adopted with a simple majority, the makers of the draft Fundamental Law were driven by political power considerations instead of professional arguments. Some acts of Parliament on fundamental rights, such as acts concerning the protection of personal data, freedom of information or the freedom of assembly and association have lost their high-level

legislative protection [i.e. no two-third majority will be required for their passing] without any articulated reason. At the same time acts concerning a number of matters unusual in this respect will require a qualified majority, such as acts on national assets, the protection of the family, tax laws and pension system. The latter issues are typically decided on by the governing majority, thus by requiring a two-thirds majority for adopting provisions related to these issues, the draft Fundamental Law narrows the scope of action of a future Government having a simple majority.

3. The draft Fundamental Law alters the accepted definition of the political community.

The draft Fundamental Law will bring along a significant change in the definition of the source of state power. In the current constitutional system, the people residing on the territory of Hungary constitute the source of power. As opposed to the Constitution in force, the draft Fundamental Law mentions replaces “people” with the “nation” as the subject of the constitution-making process („we, the members of the Hungarian nation”) and the right to participate in the elections is granted not only to persons residing in Hungary. Thus even though the draft Fundamental Law does not define the notion of the nation, it follows from its provisions that Hungarians living abroad may also have the possibility to take part in the parliamentary elections, even though they do not fall under the scope of the acts adopted by the Parliament, thus they do not take the consequences of the political decisions.

4. The National Avowal of Faith is more than a solemn declaration, since the Fundamental Law declares that fundamental rights shall be interpreted in accordance with the National Avowal of Faith.

Preambles usually set out the aim of the given law and its most important general principles – in the Hungarian law and public law tradition preambles do not have normative force. The draft Fundamental Law begins with the National Avowal of Faith, which, if it is considered a preamble, is only a solemn declaration, without any enforceable provisions.

However, the National Avowal of Faith is severely problematic from two aspects. Firstly, it does not meet the requirement of ideological neutrality expected from modern democratic constitutions and does not follow the idea of a secular state, thus not all persons falling under its scope may reckon the Fundamental Law as their own. That is to say that the National Avowal of Faith represents a Christian-nationalistic worldview and imposes this concept on everyone. By way of example, the Fundamental Law says that “We acknowledge the role that Christianity has played in preserving our nation.” and that “We proclaim that the family and the nation provide the fundamental framework for the community, in which the pre-eminent values are loyalty, faith and love.” The National Avowal of Faith does not refer at all to the secular, non-religious cultural tradition.

Secondly, the National Avowal of Faith is not simply a declarative preamble. According to Article Q Paragraph (3) of the draft Fundamental Law the National Avowal of Faith contains normative elements, since according to this provision the Fundamental Law shall be interpreted in accordance with National Avowal of Faith. This nevertheless means that the catalogue of fundamental rights, such as the freedom of speech or the right to human dignity shall be interpreted and may be restricted on the basis of such values as faith, loyalty or the prominent role of Christianity.

5. The draft Fundamental Law puts in doubt the basic human rights' basic status. The citizens shall be entitled for weaker protection.

The draft Fundamental Law abandons the principle that all human beings are entitled to human rights because they are human beings. Persons hold these rights without regard to the fulfilment of their duties, their personal merits or their social usefulness. Not only for the enjoyment of certain basic rights does the draft Fundamental Law set explicit conditions – this approach imbues the whole draft Fundamental Law.

The draft Fundamental Law goes beyond merely setting the limits of state power and ordering positive state action to guarantee the protection of fundamental rights. Instead of limiting the power of the state to interfere with citizens' life and with citizens' relations with each other, the draft Fundamental Law seeks to definitively influence the private sphere and the relations of citizens with each other. The draft Fundamental Law is dominated by a powerful right-wing Christian ideology that lays emphasis on the nation-preserving role of Christianity, on values such as family, nation, loyalty, faith and love. According to the text of the draft these are "pre-eminent values" that provide the "fundamental framework for community". Those who refuse to accept these ideologically selected values as the pre-eminent values of the community and seek to pursue their personal happiness in different ways, are deprived of the possibility to enjoy their basic rights as full member of the community. The draft Fundamental Law deprives the citizens of the right to define on their own what is important in life. Hence, the draft Fundamental Law will become the instrument of restricting freedom instead of being the basic source for human rights.

The draft Fundamental Law rephrases the part of the Constitution that has until now served as the foundation of basic rights: the Constitution obliged the state to respect and protect basic rights. According to the draft Fundamental Law, basic rights shall be "respected" [but it is not defined by whom, so the state's obligation to respect these rights is not expressly stated], and only their protection appears as the duty of the state. Besides the citizens' duties toward the state, such as the military service or the duty to pay taxes, the draft Fundamental Law prescribes a number of duties that are only relevant in the citizens' relations with each other. An example is the adult off-springs' duty to "provide care for their parents if they are in need of such care", and the provision prescribing that employees and employers shall cooperate in a way that "takes community goals into consideration".

Another form of the relativisation of basic human rights is that the draft Fundamental Law expands the list of the citizens' obligation, which results in a shift of emphasis from the obligations of the state toward the citizens to the obligations of the citizens toward the community. In this spirit the draft prescribes that "everyone shall [...] contribute to the performance of state and community tasks", and that "everyone shall contribute to the enrichment of the community through work performed according to his or her abilities and possibilities".

The proposed test to assess the constitutionality of the restriction of basic rights also makes the enforcement of these rights relative. The draft seemingly adopts the strict test that has been applied by the Constitutional Court for two decades, when it states: "a fundamental right may only be restricted in order to enforce another fundamental right or to protect a constitutional value". However, this generally accepted test is wholly transformed by the ideological engagement of the draft Fundamental Law: by making the National Avowal of Faith a framework of legal interpretation, it attributes a constitutional quality to certain values – belonging to the right-wing conservative ideology – that may not serve as a legitimate basis for the restriction of basic rights in a democratic rule of law. In the future, "loyalty, faith and love" may in principle

serve as the basis for restriction of basic rights. It means that restrictions are made possible on the basis of values that are not shared by a significant part of the political community.

The draft Fundamental Law also has a negative impact on the institutions that are set up to guarantee the protection of basic human rights. The unprecedented restriction of the Constitutional Court's powers will give a licence to the Parliament to adopt laws that breach fundamental human rights. The draft seemingly strengthens the protection of basic rights by allowing for the Constitutional Court's review of unconstitutional court decisions, but the price to pay for this reform is the elimination of the right to *actio popularis* petitions for the constitutional review of the laws – a procedure that has become part of the Hungarian legal culture in the past twenty years. So far there have been four ombudspersons that will be replaced by only one. At best, his or her deputies will be vested with the task to specifically supervise the protection of certain rights. The independent personal data and freedom of information ombudsman will be replaced by an authority. This authority and the deputy ombudspersons will not be able to guarantee the same level of protection as the current independent ombudsperson system.

The draft Fundamental Law decreases the level of protection in relation to certain specific fundamental rights. The draft seeks to justify some serious restrictions that are being debated on the political as well as on the professional level by gravating them into the Fundamental Law. Consequently, the Constitutional Court will not be allowed to review those controversial rights restrictions. Lifelong imprisonment without parole will be expressly allowed in the Fundamental Law without regard to the fact that this criminal sanction has been criticised by several international organizations. Without any regard to international tendencies, the draft narrows the definition of the marriage and family. Although the provision that the foetus shall be protected from the moment of conception does not restrict directly the right to abortion, it creates the basis for restricting women's reproductive rights in the future.

The right to social security is degraded to the level of an abstract state objective. While according to the current Constitution, citizens have the right to social protection, in the draft Fundamental Law the state only "strives to provide social security". While on the basis of the current Constitution the right to social services guaranteeing a minimum subsistence was enforceable in case of illness, old age, disability, orphanage or involuntarily unemployment, the draft Fundamental Law will eliminate the reference to the minimally required level of services. The article stating that the nature and extent of social measures may be made dependent on the individual's activities that are useful for the community denies the equal dignity principle.

Based on the draft Fundamental Law, it may be concluded that Hungary will not join those countries that strive to eliminate discrimination based on sexual orientation. If the draft Fundamental Law is adopted, marriage will be defined as the conjugal union of a man and a woman, which excludes the possibility of the legalization of same sex marriages. The anti-discrimination part of the draft conveys the same message, when sexual orientation is not explicitly mentioned as a protected ground, whereas the non-discrimination clause of the Charter of Fundamental Rights of the European Union expressly lists this ground. Through these and other articles, the draft Fundamental Law expresses a preference for an explicitly defined family model, a certain way of life and conveys the message that it does not wish to become the constitution of those who wish to pursue a different way of life.

6. The draft Fundamental Law weakens the balances of the governing majority.

The maintenance of the rule of law requires the system of checks and balances, the independence, autonomy and authority of the Constitutional Court, the regular courts and the ombudsmen. The draft Fundamental Law weakens the authority of the independent bodies acting as balances of the executive power.

The draft Fundamental Law does not include any provision concerning the nomination of members of the Constitutional Court, which jeopardizes the body's independence. Due to the lack of any provision in the Constitution in this regard, the government – having a two-third majority – can adopt rules that make nomination possible without the government having to seek the consensus of the parliamentary opposition. Consequently, the government can nominate and appoint the new judges of the Constitutional Court without taking the opinion of the opposition into consideration. Independence is endangered also by the fact that the draft Fundamental Law does not exclude the possibility of the reelection of the Constitutional Court judges. It may bring a significant change in the functioning of the Constitutional Court that according to the draft Fundamental Law the President of the judicial body shall be appointed by the two-third majority of the Parliament, which will inevitably diminish the autonomy of the Constitutional Court. (In the past 22 years, the President of the Constitutional Court has been appointed by and from its own members.)

The draft Fundamental Law maintains the restriction of the jurisdiction of the Constitutional Court related to laws on the central budget and taxes. In this way, it eliminates the constitutional review over decisions adopted by public authorities on these subject matters. As a consequence, the Constitutional Court can annul rules ordering for instance the expropriation of private property or retroactive taxes only if the relevant law violates the right to life and human dignity, to the protection of personal data, to the freedom of thought, conscience and religion, or the rights related to Hungarian citizenship.

While the Constitution in force protects the autonomy of the administration of the judiciary, the draft Fundamental Law does not regulate the issue. Therefore, this significant aspect of the independence of the judiciary will not enjoy constitutional protection. Moreover, the decrease of the compulsory pension age limit of judges makes it possible for the governing majority to change practically the entire leadership of the judiciary through replacing the retired judges with persons who are in its confidence.

According to the draft Fundamental Law, one parliamentary commissioner is sufficient for the protection of fundamental rights. Apparently, the constitution-maker does not deem it necessary to have a separate ombudsman for the national and ethnic minorities, the rights of future generations or the protection of personal data. Under the draft Fundamental Law, the commissioner for the protection of personal data and freedom of information will be replaced by a public authority. Consequently, the independent institutional protection of these rights will cease to exist.

7. The draft Fundamental Law undermines democratic political competition and political change.

The draft Fundamental Law diverges from the model of parliamentarism even though it declares that the Parliament is the supreme body of popular representation. Its specific provisions are inconsistent with the principle of the supremacy of the parliament. By setting the condition that the prior approval of the Budgetary Council (composed of members delegated by state leaders) is needed for the adoption of the Act of Parliament on the central budget, the draft Fundamental

Law deprives future parliaments of their right to adopt the central budget. This precondition splits the authority to adopt the central budget between the Parliament and the Budgetary Council. In case the prior approval of the Council is not given, and therefore the central budget is not adopted by March 31 of the respective year, the Head of the State may dissolve the Parliament. This gravely restricts the enforcement of the principle of popular sovereignty which requires that the supreme depository of power shall be the Parliament consisting of representatives elected by the people. The draft Fundamental Law declares that subject matters, such as family policy, the pension system or the acts on taxes, which have been within the authority of the government in power, shall be regulated by cardinal acts, i.e. acts adopted by the two-third of the Parliament. In the case of a Parliament where the government does not hold two-third majority, this rule can lead to a state of ungovernability. At the same time, this rule makes it possible for the recent government to ensure the long-lasting force of their family, pension and tax policies, expanding their effect even into the period when other political forces will hold governing responsibility. The draft Fundamental Law deprives the political force replacing the current governing majority of the possibility to realize its own government program hence it undermines equality in political change and in the democratic political competition.

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