



Hungarian Helsinki Committee



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Comments

on the Process of Framing the New Constitution of Hungary

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The adoption of the new Hungarian Constitution will be, in all likelihood, the most influential domestic legislative act in the field of public law in the first half of 2011. The constitution writing process would be deemed a success if it would result in a substantial fundamental law providing a solid basis for the political community. However, when one takes into consideration the manner in which the new Constitution is being framed, it becomes increasingly difficult to conclude that it will be a success. The minimum requirement for creating a stable Constitution is that the fundamental law is adopted in a process which entails the possibility of the law being accepted by the overwhelming majority of society. The current, highly unusual way of designing the Constitution makes one doubt whether this document will be worthy of being called the Constitution of Hungary.

In order to support the statements above, we submit the following critical assessment regarding the process of framing the new Constitution of Hungary.

1. The need for a new Constitution was not supported by clear and conclusive reasons.

Not much time was devoted in the political discourse to the reasons for repudiating the Constitution in force. Those urging the adoption of a new Constitution usually raise two main arguments. The first one is that the Hungarian Constitution is a Communist (Socialist) heritage; its title refers to the year 1949 as the date of adoption. The second reason is that the Constitution in force was not adopted by a freely elected Parliament. Furthermore, it was claimed that the words “until our country’s new Constitution is adopted” included in the preamble alludes to the temporariness of the Constitution. However, these are not arguments of substance. During the transition of 1989 the new Constitution was created as a denial of the old regime and it does not in any way reflect the former system. The one-party system was replaced by a pluralist state based on the rule of law, popular sovereignty and the division of powers, respecting the freedom and equal dignity of individuals.

As to the second argument: the lack of legitimacy in 1989 was remedied by several subsequent constitutional amendments adopted after the first free elections and by twenty years of constitutional practice, in the light of which the Constitution may no longer be regarded as provisional in nature. For the past twenty years, no need for denying the system created by the Constitution adopted in 1989–1990 (hereafter referred to as: the 1989 Constitution) has emerged.

In fact, the Constitution has properly served the state based on the rule of law for the past 20 years. Therefore there is no pressing need for framing a new Constitution. Adopting a new one is therefore unjustified. The only reason which may be put forward in favour of a change is that the Constitution in force is not perfect, which may be claimed about any of the fundamental laws. One of the biggest imperfections of the Constitution is that it is too easy to amend according to daily political interests, and that it is unable to defend itself against a two-thirds parliamentary majority. However, this imperfection may be a reason for the strengthening of the Constitution already in force, but not its replacement. Its deficiencies may be corrected in a prudent and thorough debate of professionals, but that is not what is currently happening.

2. The most important aims of creating a new Constitution remained unknown in the course of the constitution-making process.

It remains unknown whether the real aim of creating a new Constitution is the replacement of the complete constitutional system established in 1989, or only its refinement. The Prime Minister announced that Hungary will have a new Constitution in the near future only in May 2010, after the landslide victory of the party alliance who are now arguing for adopting a new Constitution: “The new Parliament is more than the 6th freely elected Parliament of Hungary; the new Parliament is a constitutional assembly and a Parliament establishing a regime.”¹ Furthermore, it is stated in the Declaration of National Cooperation, adopted as a political declaration of the Parliament, that “at the end of the first decade of the 21st century (...) after two troubled decades of transition, Hungary has regained its right to and capability of self-determination.”² This revolutionary rhetoric is used to support the making of a new Constitution, suggesting that a new system should be created while denying the constitutional regime established in 1989 as a result of the democratic transition. Meanwhile, if we look at what may be known about the prospective contents, we can see that in contrast to this rhetoric, the stabilization and development of the 1989 Constitution seems to be prepared: from the scarce information available on the merits of the changes, it seems that the organization of the state would remain basically the same and that there is – appropriately – no intention at all to revise the catalogue of fundamental rights on its merits. However, the preconditions of a consolidated constitution making process, such as political, professional and public debate and the seeking of wide social consensus, are totally absent from the on-going constitution-making process.

3. The political community had no chance to declare whether it wants a new Constitution or not.

As to the legitimacy of the new Constitution, the biggest deficiency is that it is being drafted without asking the opinion of the political nation in an appropriate way. The governing party alliance did not in any way declare its intention to adopt a new Constitution before the elections in 2010: it was not indicated in its electoral program, nor was the issue raised during the electoral campaign. Consequently, the idea of framing a new Constitution was not debated as an issue in the campaign. According to currently available information, the parties framing the new Constitution have no intention to validate it by popular referendum or by requiring the consent of a newly elected Parliament for its coming into force. The chair of the Parliamentary Ad-Hoc Committee (hereafter referred to as: Ad-Hoc Committee) responsible for preparing the concept paper for the new Constitution refused the possibility of a popular referendum, claiming that the

¹ Program of the National Cooperation [A Nemzeti Együttműködés Programja] (governmental program), II.

² Political declaration of the Parliament 1/2010. (VI. 16.).

Constitution in force does not allow for a referendum like that,³ although the Constitutional Court concluded in a 1999 decision that “A constitutional amendment adopted by the Parliament may be consolidated by a binding referendum.”⁴

4. The pace of the constitution-making process is so fast that discussing the draft Constitution is impossible.

The pace of the constitution writing process is extremely fast, making it impossible to discuss the Constitution, which results in a deficit of legitimacy. The year long period devoted initially after the elections to elaborate the “fundamental principles” of the Constitution was decreased to a few months by the Parliament, based on a motion filed by one of the governing party MPs. As a result of this change, the deadline for preparing the concept paper became 31 December 2010 instead of the originally planned 30 June 2011. The Ad-Hoc Committee responsible for preparing the Constitution compiled the unified text of the concept paper by 30 November and then discussed it within six days, between 10 and 15 December. The concept paper of the Constitution was discussed by the plenary session of the Parliament during the next parliamentary session, in February 2011. The general debate was concluded within two days, with the debate about the details lasting less than five hours.⁵ In the end it was decided that the document as prepared is not seen as determining the direction of framing the Constitution, but serves merely as a “support-material for the MPs’ constitution-making work”.⁶ Thus, the concept paper was put aside, meaning that even the short time that has so far been devoted to framing the Constitution has been mostly wasted. The greatest concern is that ideas regarding the content of the Constitution are still unknown. The proposed text of the new Constitution will be available only in Mid-March 2011, and the plan is to adopt it on 18 April. Thus in the governing parties’ view approximately one month should be enough for discussing, finalizing and adopting the Constitution. In reality this means eleven days in session according to the schedule of the 2011 spring parliamentary session.⁷ Rushed speed usually characterizes constitution-making processes inspired by revolutionary circumstances or other crisis situations, when the intention is to eliminate the previous regime and establish a new social system rapidly, as a response to the pressure from the political community. However, hastiness is irreconcilable with the intention of improving constitutional rules and bringing them to perfection. The latter kind of constitution-making requires expertise and circumspection and it is in the least as sensitive and risky as surgery. A text prepared with great care requires multiple readings and a wide public debate. There is no possibility for this within one month, with such a tight schedule.

5. The new Constitution has been prepared in secret.

The only information the public received about the content of the Constitution came from unofficial leaks and rumors. The public was deprived of the opportunity to openly discuss the underlying philosophy of the new Constitution, and the reasons behind the new measures. Instead of open public debate, the public was left to argue about the self-contradicting statements coming from unofficial sources. Six weeks before the affirmed date of adoption, the draft-text of the Constitution and its core concept is unknown to the citizenry and to independent

³ Statement of László Salamon, MTI, 2 December 2010.

⁴ Decision of the Constitutional Court 25/1999. (VII. 7.) AB.

⁵ Source: www.parlament.hu.

⁶ Parliamentary resolution 9/2011. (III. 9.) OGY, point 2.

⁷ The standpoint of House Committee the on the schedule of the 2011 spring parliamentary session, http://www.mkogy.hu/efutar/munkarend_2011_tavas.pdf.

constitutional experts. The names of experts and lawyers who are working on the text of the Constitution and their mandate are not disclosed by the government. The effect of this has made it completely impossible to conduct a substantive public debate.

If the goal is to provide the political community with a constitution that the community recognizes as its own basic law, the constitution writing process must fulfill several conditions, the most important one being transparency. If the procedure itself is not transparent, the mere opportunity for the public to give opinions on certain ideas (via blogs or questionnaires) that randomly emerge in the public sphere falls far short of providing the Constitution with a democratic legitimacy.

6. The committees that work on the new Constitution have dubious democratic legitimacy.

First and foremost, as of March, 2011 we are not aware of the persons who are in reality framing the new Constitution for Hungary. According to recent news a group of three politicians are currently working on the new text (József Szájer, the leader of the group, MEP PPP - Fidesz, László Salamon, MP KDNP, Gergely Gulyás, MP Fidesz). It is clear that the codification of the law is done by experts and not politicians, but their identity is kept in secret. The only political body that has had a democratic legitimacy in this matter is the Parliamentary Ad-Hoc Committee, which was vested with the responsibility to prepare the Constitution. The Ad-Hoc Committee officially stopped its work at the end of 2010. However, the document that the Ad-Hoc Committee subsequently prepared was labeled as a “working document,” in sharp contrast with the original mission of the Ad-Hoc Committee.⁸ The mission and the competences of another committee that was set up personally by the Prime Minister were and still remain unclear. (Its members: Péter Boross, József Pálincás, József Szájer, György Schöpflin, Imre Pozsgay, and previously István Stumpf.) The committee is without any legal basis and the Parliament, the only constitutional body that theoretically could have mandated them (due to its constitutional competence to amend and modify the Constitution) did not do so.

This was also the case with the National Consultation Body. According to the news, this Body was set up by the MEP József Szájer. Its members are: Zsigmond Járαι, chief of the Supervisory Body of the Hungarian National Bank, János Csák, Ambassador of Hungary to the United Kingdom, József Pálincás, President of the Hungarian Academy of Sciences and Katalin Szili, independent MP. The Body’s mission was to send a questionnaire, composed of 12 questions, to each and every citizen of Hungary.

The Hungarian Parliament, the only legal body that can amend and adopt the Constitution, has never given any mandate to the Government to work on the text of the new Constitution. Instead, the Parliament, via a decree, invited every member of the Parliament on 7th March to introduce a draft Constitution by 15th March. The decree only requested the government to provide the MPs with assistance in their work.

7. The new Constitution of Hungary will be the product of one political party.

The new Constitution is being prepared exclusively by the ruling political parties. Neither on the need for, nor on the content of the new Constitution has consensus emerged among legal experts and the society at large. There has not been one moment in the procedure where the

⁸ Parliamentary resolution 9/2011. (III. 9.) OGY.

government, composed of the ruling parties, has shown their intent to treat the opposition political parties as equals. The very first step of the government was to get rid of Article 24 (5) of the Constitution – without any reason provided – which was meant to force the cooperation of the ruling parties with the opposition. This Article previously required a 4/5 majority of MPs to adopt the procedural rules for the preparation of the new Constitution. The government has remained uninterested in cooperating with the opposition parties, blocking the chance of a dignified inclusive democratic process. This was most clearly demonstrated by the composition of the Parliamentary Ad-Hoc Committee. The ruling party had the legal basis, in the Rules of the Parliament, to appoint MPs to the Ad-Hoc Committee on an equal basis: one half could have been nominated by the ruling parties, and one by the opposition. However the ruling parties did not wish to do so. 30 MPs were nominated from the government supporting party alliance, and 15 MPs from the opposition parties – that reflects their share of seats in the Parliament. Under these circumstances the only reasonable option for the opposition parties was to refrain from taking part in the process. If they chose to take part in the process, they would legitimize a Constitution that they were unable to have the slightest impact on – due to the political maneuvers of the ruling parties.

The success of a constitution does not solely depend on its content. The one-party procedure is doomed to failure precisely because it has been conducted in a one-sided way. This process will lead to the adoption of a constitution that a large part of the society is disconnected from and therefore unable to morally accept. Moreover, many will regard this constitution as something that was imposed upon them. National consensus about adopting a new constitution does not inevitably lead to a good constitution, though it provides the constitution with democratic legitimacy. As a matter of fact the ‘Constitution debate’ has become the most divisive partisan issue following the general election. Under these circumstances, there is little chance that the new constitution will fulfill its integrative role; it simply will not be the common product of the political community.

8. The Constitution writing process failed to institute any debate of experts.

The professional background of the process was provided, or suggested by the invitation of expert groups and NGOs to submit proposals to the Ad-Hoc Committee about what they wish to see in the text. The result was a senseless rainfall of ideas, with very diverse qualities. The Ad-Hoc Committee used some ideas from these proposals. Then, the government downgraded the work of the Ad-Hoc Committee and labeled its final product a “working document”, which means that it will not be binding in the ongoing constitution-writing process. By this change, the ideas of the invited groups, albeit at times bizarre, were nonetheless deprived of any relevance. In late 2010, early 2011 numerous conferences addressed the subject of the Constitution and constitutionality. However, without any substantive and coherent proposal from the government, those debates were not about the goals and the principles of the ongoing procedure and a meaningful debate could not take place. The unprecedented speed should also be viewed as a substantial obstacle to a debate by constitutional experts. The only contribution that experts and other jurists can provide is to highlight the mistakes committed during this process.

9. The open public debate of the new Constitution will be missed completely.

The public debate within the society on the Constitution was conducted by two deceptive tools. The first was the creation of a website that provided the opportunity for everyone to make her or his opinion heard on the matter. This was meant to render the whole constitution-writing process

a “common-cause”. The purpose of the “Constitution blog”, created by people linked and loyal to the government, was to set up a forum for “innovative dialogue” upon certain questions related to the state, family, order, peace and the procedure of Constitution framing.

The second substitute of a real open debate was the 12-question questionnaire mentioned above in Section 6. The questions were about 1) the relation between basic rights and obligations; 2) the restriction of the public debt; 3) whether the constitution should enhance the role of the family, public order, labor and the health; 4) the need for a family voting system; 5) whether the state should ban the levying of taxes on the expenses related to child rearing; 6) the protection of future generations; 7) the conditions of public procurements; 8) the togetherness of Hungarians across frontiers; 9) the protection of natural diversity and national treasures; 10) the protection of the land and water; 11) whether the life imprisonment sentence in Hungary should be in the Criminal Code; 12) the obligation to testify before a Parliamentary Commission if a person is summoned. Some of the questions are loosely related to the constitution-writing process; however, others are a populist wish-list. The questionnaire does not cover the important questions that surface and must be answered in a constitution-writing process. The questionnaire also ignores those questions that have already emerged as dilemmas in the ongoing process: e.g. whether the term “God” should be in the Constitution, the separation of church and the state; the powers of the Constitutional Court. Consequently, important dividing symbolic and substantive questions about the constitutional structure and the basic rights remain unanswered during this so called national consultation.

The democratic legitimacy of the new Constitution has not been increased by these measures. Neither the lonely blogger on the Constitution blog, nor the citizen who replies to the questionnaire in a conscientious manner, can be deemed to be a real contributor. As a matter of fact, no one knows what purpose the blog posts will serve, moreover it is unclear whether the answers will be processed, and if yes, how and who will be charged with the process, and what impact it is meant to have on the overall process. There is no deadline attached to the questionnaire, but the government proposal’s deadline is the 15th March.

Involving large numbers of citizens into defining the general principles of the Constitution or its drafting does not automatically transform the process into a democratic constitution writing process. In fact, participation through the tools provided by the Hungarian government is more likely to render the entire process more chaotic and it is simply incompatible with the concept of modern constitutional democracy. In the process laid down by the government, there is no guarantee that each citizen has an equal impact on the outcome and on the substantive questions of the Constitution – contrary to free elections where the conditions for this purpose are met. Secondly, under these circumstances only the process is dominated by the majority: the largest number of answers should prevail. The history of constitutional law shows, that this premise is often in conflict with basic human rights of individuals and groups. For example in issues such as capital punishment, abortion, euthanasia and the protection of ethnic and national minorities, the rights of the concerned should sometimes be protected against majority will. Furthermore, the protection of individual dignity is a clear restriction on the majoritarian premise, and even against popular sovereignty.

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If public objections and reasonable arguments do not stop the constitution writing process, a new constitution will be adopted in spring 2011. A constitution is the basic, legally binding document of a political community. Due to the way the constitution writing process has been constructed, it is simply impossible that the end result will be a better or more legitimate constitution for the Republic of Hungary.