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A FLEXIBLE CONSTITUTION: THE 4TH AMENDMENT TO THE HUNGARIAN FUNDAMENTAL LAW – PART I

Posted on 20 Marzo 2013 by ***Katalin Kelemen***

- Shortly after the last elections in Hungary (2010) it became clear that the new government would have used its two-thirds majority in the legislature to make a new constitution. The idea of drafting a new constitution has been an issue for a long time in Hungary, since the country left behind its totalitarian past. It was, however, not expected that a government would have been able to draft it alone. The old constitution required only a two-thirds majority vote for constitutional amendments, which allowed the right-wing government to draft its own constitution. Even if we consider the so called "national consultation" process, consisting of sending (by post) a questionnaire to every Hungarian elector, who could give their opinion on twelve selected constitutional issues, and a few other attempts to involve the citizens in the constitution-making process through online forums (see for example this website), it cannot be affirmed that the Fundamental Law would be the result of a broad consultation and debate, and it was not subject to a referendum. (About the constitution-making process more in detail see a previous post on this blog.)

It became even clearer after the entering into force of the new Fundamental Law (1 January 2012) that the government did not treat the constitution-making process differently from ordinary law-making. In fact, the procedure followed for the adoption of the first four amendments resembles the ordinary law-making procedure. They were adopted upon a proposal by a member or more members of the Parliament (MP), following a parliamentary debate. The only difference between a constitutional amendment and a cardinal law is that the former requires the two-thirds majority of all MPs, while the latter requires the two-thirds majority of the voting MPs. It means that if a government holds two-thirds majority in Parliament, and party discipline is strong in the governing coalition, as it is currently the case, the boundary between constitution-making and legislation is blurred.

The Hungarian 4th Amendment is a 14 pages long document, incorporating the Transitional Provisions into the main body of the Fundamental Law and modifying or supplementing several of its articles. A few changes were made in the text of the proposal during the parliamentary debate and the discussions in the constitutional affairs committee. The Parliament finally adopted it on 11 March with 265 votes in favour and 11 against. The remaining 109 MPs abstained from voting or were not present in the House at all. None of the members of the governing coalition parties (*Fidesz* and *KDNP*, the Young Democrats and the Christian Democrats) voted against the Amendment, and only one of them was absent (detailed results of the voting here), which proves the strong party discipline mentioned above.

The 4th Amendment introduces smaller or bigger changes into 27 articles of the Fundamental Law, inserts a new Article U in the first part entitled 'Foundation' (*Alapvetés*) and an almost completely new 'Closing and Miscellaneous Provisions'. The explanatory notes attached to the proposal (the English translation of the first proposal is available here, the original Hungarian version here) state that the Amendment's goal is to incorporate the Transitional Provisions into

the Fundamental Law after that in December the Constitutional Court declared them invalid (Decision no. 45/2012 AB) on the ground that they were enacted in excess of the constitutional delegation of power to enact transitional provisions, as they contained also substantive and not temporary rules . Consequently, the Amendment builds in the substantive rules of the Transitional Provisions into the main text of the Fundamental Law, and incorporates the rest in the final provisions renamed 'Closing and Miscellaneous Provisions' for the purpose . (The text of the uniform proposal finally voted by the Parliament is available for the moment only in Hungarian here.)

The explanatory notes mention expressly also other three Constitutional Court decisions to which the Amendment is a response . *First*, in response to Decision no. 43/2012 (XII. 20.) AB, it adds a new sentence to Article L, par. 1, in order to elevate the basis for the concept of family to the constitutional level. Article L, which already defined marriage as “the union of a man and a woman” and the family as “the basis of the nation's survival”, now also specifies that “the basis of the family is marriage and the parent-child relationship”. This definition of family was provided by a cardinal law (art. 7 of Act no. CCXI of 2011 on the protection of families) declared unconstitutional by the Constitutional Court on the ground that it defined family too restrictively.

Second, in response to Decision no. 1/2013 (I. 7.) AB, the Amendment inserts three new paragraphs into Article XI. Paragraph 3 now provides that “political advertising can be broadcasted in the media only free of charge in order to guarantee the conditions for the formation of a democratic public opinion and equal opportunities”, and during the electoral campaign only the public media service providers are allowed to broadcast political advertising. New paragraphs 4 and 5 inserted in the same Article aim at laying the foundations for the criminalisation of hate speech. The explanatory notes state clearly that it is also a response to the Constitutional Court’s case-law. Indeed, the Court struck down such criminalisation as an unnecessary and disproportionate restriction of the freedom of

speech already in 1992 (see Decision no. 30/1992 AB). The Amendment lays the emphasis on human dignity, and provides that the exercise of the right to free speech cannot be aimed at violating another person's human dignity (Article IX, par. 4). Paragraph 5 specifies that the exercise of the right to free speech cannot be aimed at violating the dignity of the Hungarian nation or of other national, ethnic, racial, or religious communities, adding also that a person belonging to such a community has the right to bring a claim to court against hate speech. The explanatory notes clarify that this claim means a civil claim for compensation. According to the proponents of the Amendment the uniform practice of the national courts has held that a violation of individual rights is established only if the injured party, as an individual, can be identified, directly or indirectly, through the behaviour of the offender, thus if the victims of hate speech cannot be identified as an individual in the offending expression, they lose the right to bring a claim under civil law. Therefore, the Amendment aims at offering a remedy to these persons.

Third, in response to Decision no. 38/2012 (XI. 14.) AB, the Amendment modifies Article XXII on the right to housing and access to public services, inserting a provision that constitutes – according to the proponents – a "requisite defence against improper use of public places" . Besides stating that "the state and local governments shall strive to guarantee housing for every homeless person in order to create the conditions for housing with human dignity", Article XXII, par. 3, now also provides that a "law or local government decree may outlaw the use of certain public space for habitation in order to preserve public order, public safety, public health and cultural values". The explanatory notes emphasise that a finding of unlawfulness may only be used in the interest of achieving the specific objectives, and may only be applied to a specific part of the public area .

The Amendment is a response to the practice of the Constitutional Court in several other aspects as well, even if it is not always explicitly declared by the proponents in the explanatory notes. Article VII, par. 2, now provides that the Parliament has the power to recognise religious organisations as churches in order to collaborate with them for the public interest. Even if it adds that constitutional complaints can be presented against the cardinal law on the recognition of churches, it is clearly a response to the (four) constitutional complaints brought to the Constitutional Court against Act no. CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities. The Ombudsman also challenged the Act in August 2012. The Court delivered its decision during the parliamentary debate of the Amendment, on 1 March (Decision no. 6/2013 (III. 1.) AB), retroactively invalidating several provisions of the Act (the decision is also a classic example of plurality opinion, five judges dissented and four wrote or joined a concurring opinion). The Act was examined also by the Venice Commission which found that it "sets a range of requirements that are excessive and based on arbitrary criteria with regard to the recognition of a church" (see Opinion no. 664/2012, par. 108).

Moreover, the Amendment modifies Article XI on the right to education, and adds a new paragraph providing that: "Law may set as a condition for receiving financial aid at a higher educational institution the participation in, for a defined period, employment or enterprise that is regulated by Hungarian law." The explanatory notes justify the provision by emphasising that state higher education institutions are "part of the state organisational framework and their operations are funded out of the central budget" . The notes make it clear that the new paragraph "makes it possible for the law to place conditions on material support for participation as a student in higher education (state funding for studies)" . The proponents explain that "there are two components of this condition: the existence of work which creates value within the meaning of

Article M (1) of the Fundamental Law; and that it should serve the interests of the communities of Hungary", specifying that it means work in a legal relationship under Hungarian jurisdiction, not necessarily completed within the territory of Hungary. The required period and eventual exemptions are to be determined by the legislator. It has already been done by Act no. CCIV of 2011, delegating this task to the government, but this attempt was struck down by the Constitutional Court last year (Decision no. 32/2012 (VII. 4.) AB, a short summary in English here), which found it to be an *ultra vires* delegation of power. A week after the decision of the Constitutional Court, the government modified the Act including a provision requiring students to work for a Hungarian employer under Hungarian jurisdiction for a period double of the length of study financed by the state (art. 48/A) in the twenty years following graduation. Now a constitutional foundation is provided for this rule in Article XI of the Fundamental Law.

Part II of the post will be published soon.

Timeline:

- 8 February 2013: Proposal no. T/9929 submitted to the Parliament by the governing parties' MPs
- 19 February: the parliamentary debate starts
- 6 March: the uniform proposal (*egységes javaslat*) (T/9929/55) is submitted to the Parliament for the final vote
- 11 March: voting in the Hungarian Parliament (265 in favour, 11 against, 109 not present or abstained)
- 11 March: Joint statement by European Commission President and Council of Europe Secretary General