

THE DIFFICULTIES OF SOCIO-LEGAL TRANSITION: CONSTITUTIONAL EFFORTS IN HUNGARY

András Sajó*

I. Preliminaries

In 1949, reflecting the geopolitical circumstances following the Second World War, a people's democracy was established in Hungary. Patterned after the Soviet model, all major industries were nationalized and single party rule was institutionalized in the constitution. A popular uprising against the regime was crushed in 1956 and this event still plays a decisive role in the Hungarian political culture. The post-1956 regime under Communist Party secretary Janos Kadar gradually modified totalitarianism and, from 1968 onward, an economic policy that harmonized state planning and market development was introduced which resulted in one of the highest standards of living in the region and in some tolerance in the intellectual spheres.

Since the mid-1980s changes in the Soviet Union and Eastern Europe have taken place at a phenomenal rate. Due to growing economic difficulties, internal Communist Party rivalries and the changes in the U.S.S.R. under President Mikhail Gorbachev, the Hungarian Socialist Workers Party, the Communists, undertook internal political reforms which included the legalization of political opposition. In a quickening pace of political changes, in September 1989, the Communist Government permitted more than 25,000 East German refugees to cross its borders into the West. In October 1989, the Communist Party dropped its name and ideology and dubbed itself the "Hungarian Socialist Party." Its new political program was indistinguishable from that of most political parties in the West on issues of political, civil and human rights. The Party Congress that effected these radical changes is widely regarded as having self-liquidated the Communist movement. The party which once had a membership of 850,000 now has a membership of 50,000 people and it most probably gave up all direct control over government policies and political domination. This was reflected most profoundly in the Constitution adopted on October 18, 1989.

G.W.F. Hegel's belief that an object is nothing else but the history of its making is particularly true in the case of the Hungarian Constitution. The drafting committees were originally a strange combination of experts, scholars and communist politicians. The text of the document, known as the Amendment, was prepared in such a hurry that three weeks before the enactment, experts were forced to make fundamental changes in the wording although they had no say as to the whole text. Moreover, technical considerations were generally considered legalistic trifles. The whole centre of constitution-making was shifted from the committees to the Ministry of Justice and then to a so-called round-table confer-

*Professor, Institute of Political and Legal Sciences, Hungarian Academy of Sciences.

ence where representatives of opposition groups discussed the crucial issues of a peaceful power transition between the Communist Party and other groups. Some agreements were reached but in the confusion created by the rapid dissolution of the Communist Party, it became more urgent to pass necessary amendments instead of waiting for the completion of a new constitution. The Government thought it necessary to turn Hungary into a Republic and to abolish the open constitutional commitment to communism by October 23, 1989. That date is the commemorative day of the 1956 revolution and mass demonstrations were feared. The Parliament accepted the amendments in a few hours.

II. Basic Features of the Present Constitution

Before addressing some of the problems of the transition to constitutionalism in a country lacking a longstanding democratic tradition, it seems necessary to give a short description of the Constitution in force.

The Constitution reflects paramount concerns about the separation of powers. Given the historical experiences with Soviet-type socialist government, it is small wonder that the desire for checks and balances both between and within the distinct branches of government prevails. Mistrust in government has resulted in the fear of a strong executive. Parliamentary supremacy was therefore introduced with some restricted presidential powers. For example, the president's qualified veto power might be overridden by the Parliament. Popular sovereignty also plays a considerable role and not only through free elections. Both the law and the constitution endows voters with the powers of referendum and initiative. Except for fiscal matters, taxation and foreign policy, all subjects of legislation could be decided by referenda.

The Government is elected from Parliament, removed by the Parliament and it is responsible to Parliament. The governmental structure in the Hungarian Constitution resembles to some extent the West German parliamentary majority-based system both regarding elections and government formation. The electoral system is not settled in the Constitution because the *Election Act* reflects the considerations of the parties as they conceived their electoral possibilities in the Fall of 1989. The system as it stands therefore is a mixture of individual electoral boroughs and party lists with modifications for electoral imbalances caused by the winner-take-all and proportional representation schemes.

The unicameral parliament has all legislative powers including the right to pass so-called constitutional laws which require two-third majority. A constitutional Court with extreme powers of constitutional review has been established by the Parliament. The Government's powers as well as those of the Parliament are further restrained by a broad constitutionally guaranteed local autonomy. Locally elected councils are self-governing and are entitled to constitutionally recognized property. It should be noted that the relevant legislation has not yet been passed and it is undecided to which extent local public administration will be controlled by the self-government.

The Government consists of the Council of Ministers which is composed of the Prime Minister and the ministers, not necessarily heads of ministries. Ministers are elected by the Parliament on the suggestion of the Prime Minister. The Council of Ministers acts as a collective body under the presidency of the Prime Minister. The Council of Ministers has jurisdiction over the supervision of the ministries, the supervision of the legality of local councils' activities, the realization of socio-economic plans and the management of the social system. Lastly, but most importantly, the Constitution provides for the protection of human rights, which substantially parallel those enumerated in the 1948 United Nations *Universal Declaration of Human Rights* and the 1966 UN Conventions.

III. Some Shortcomings

(a) **Constitutional Court.** The Constitution provides for the establishment of a Constitutional Court to supervise the constitutionality of legal rules including acts of Parliament. The members of the Court are to be elected by Parliament for nine years and they shall not be members of any party. Non-partisanship in the public sphere is obviously a very common requirement in all post Party-state transitory systems. The first five members of the Court were elected by the pre-free election Parliament while the new Parliament will elect five others. The *Act on Constitutional Court* provides that the members should not be leading party members or higher civil servants at least for four years before being elected; this rule does not apply, however, for the next five years. The law recognizes that in some extraordinary cases the Constitutional Court may itself initiate a case, and, as a matter of fact, the first case ever discussed was initiated by the Court on the constitutionality of wire-tapping regulations. The second case heard by the Court concerned the legal force of popular referendum and this case indicates the unstable nature of sovereignty.

(b) **Referendum.** During the late years of communist rule, there was only one major mass movement against the government, an environmental issue. The Government started to build a major dam on the Danube River. There was increasing public concern about the project because of the related ecological risks. A mass movement collected petitions against the project and asked for public referendum which was a recognized institution according to the 1971 Amendment to the Hungarian Constitution. There was, however, no specific legislation to that effect and, therefore, the Parliament refused a referendum motion. A law on referendum was passed a few months later but, by that time, the Government decided not to continue the dam project.

The referendum law is very generous: a referendum can take place in all matters except the budget and international treaties and with 100,000 signatures, the referendum has to take place. Using this device, some of the more radical opposition parties called for a referendum on the electoral system to be used for the election of the President. The Constitution provided that the first president has to be elected by popular referendum and all other presidents shall be elected by the Parliament. This arrangement reflected the balance of power before the dissolution of the Communist Party when the communists hoped to maintain some control through the President.

The powers of the President of the Republic were curtailed in the Constitution but by the time the signatures for the referendum were collected, this was not obvious and even afterwards the hard liner opposition parties feared that a communist will be elected by direct ballot. They managed to have the referendum and, with a small majority, the provision of the Constitution on the pre-parliamentary presidential elections was refuted.

The Constitutional Court, however, ruled that the referendum was not of binding force and Parliament has the right to amend the Constitution and provide for a directly elected president. This is partly related to the loose wording of the *Constitutional Court Act* and the *Referendum Act*. Because of the loose wording, it became possible already that a "clarification" was added by the Parliament to the question to be voted and than, on this basis, the outcome of the referendum was interpreted as restricted to the time of the presidential election (whether it is to be held before or after the parliamentary elections) and not as a choice concerning the method of election. The Constitutional Amendment expressly stated that direct presidential elections take place only if the President is elected before the parliamentary general elections. The wording of the referendum question was interpreted as if it concerned the timing but not the way of the presidential election.

(c) **Problems of Majority and "Acts of Constitutional Force."** In order to protect inalienable human rights and to increase the stability of the legal institutions, the Constitution provides that in some areas the law cannot be changed without a qualified majority, two-thirds majority - the quorum rules are missing from the Constitution, though the Standing Orders require that two-thirds of all MPs should vote in favour. Section 8(2)(3) states:

Rules affecting fundamental rights and duties shall not be provided by legal rules other than Acts of constitutional force. The exercise of a fundamental right shall be subject only to a restriction defined in an Act of constitutional force and indispensable for State security, domestic order, public safety, public health, public morality or for the protection of fundamental rights and liberties of others.¹

Without discussing the substantial constitutionalism of the above rules, namely whether public morality should prevail against fundamental rights, it is the wording again that reflects the difficulties of transition. There are many unsolved or unanticipated problems: is it constitutional to restrict fundamental rights by referendum (there is no provision prohibiting it)? Some of the fundamental rights are exempt from suspension during emergency. Is this a sign of an absolute protection or are they still subject to restriction under the ordinary circumstances of restriction, for example public safety?² There is a chapter in the Constitution

¹Some of the fundamental rights, especially human rights as freedom and personal security, religious freedom, national minority (cultural) rights receive special protection: they cannot be restricted even in case of a state of emergency.

²The powers of the President during emergency concern only law-making by presidential decree and they do not concern substantive matters.

dealing with fundamental rights. Is this chapter a complete list of particularly protected fundamental rights? Property is not a fundamental right although the right to free entrepreneurship can be limited by an act of constitutional force only.

Judicial interpretation will help in many of these cases, but some difficulties are already apparent. As a matter of fact, every second draft of law results in a stalemate in the Parliament because there is total confusion as to whether the act requires the super majority. The Constitutional Court is giving opinions every other week under such pressure. On the other hand, obviously decisive problems, for example the election law, is not subject to this qualification.

The Amendment has not established what will happen to existing laws which contain provisions concerning fundamental rights or are otherwise subject to the qualified majority rule. All the acts in force concerning fundamental rights were passed in the last quarter of century unanimously. Do they qualify as acts of constitutional force? Whatever the case, an amendment to these acts which reflect the restrictive thinking of the *ancien regime*, requires a two-thirds majority. As a result, because of a technical rule (the two-third majority), the spirit of the constitution will not prevail. Even if the Constitutional Court will declare void some of the existing laws created during the communist rule, there will be no quorum to pass laws which would match the constitutional requirements. The problem will become particularly acute once one realizes that the Amendment will protect some of the most undemocratic institutions of the communist regime. For example state prosecution once used to be the stronghold of "socialist legality" and, in practical terms, a most stubborn persecutor of dissidents. The prosecution still maintains its centralized para-military structure and there were no changes in the Prosecutor's Office personnel. The Amendment requires that norms concerning the "Procuratura," as it was originally called in the Soviet Union, shall be passed by a two-third majority. If one is unhappy with the Amendment because it blocks the way to necessary changes, he will be even more unhappy with the flexibility of constitutional changes.

It was obvious in the communist period that one of the major shortcomings of the all communist constitutions is that they are "paper tigers," one can change constitutional provisions with a stroke of pen. There were special rules of amendment in some of the countries but there was always a majority ready to vote the requested amendments. The present Hungarian Constitution states that it is enough to have a two-third majority in order to change the Constitution. The *Referendum Act* provides that a referendum is needed for a new constitution only. In the case of the present Amendment, there was no referendum as about four per cent of the original rules remained in force, even the name of the State has been changed from People's Republic to Republic. As all changes in the Constitution can be carried out step by step, there will be no serious constitutional stability.

Of course, one can say that given the unfinished nature of the transition to democracy, the openness and flexibility of the Constitution is at least understandable. One would not feel particularly happy about a society which wishes to become constitutionally based but fails to institutionalize the privileged position of its own Constitution.

IV. Conclusions

Constitutions are made for future generations and are intended to be constant limits and guiding principles for legislators. The Hungarian Constitution (Amendment) of 1989 is perhaps only a means to constitutionality. Hungary's unique problem is that it is dangerous to use a constitution as a constitution-building device instead of accepting it as a "real" definitive constitution. The present unfinished constitution may further decrease the respect for constitutionalism in the country as constant changes of the text as well as the impediments to democratic changes built into the Amendment will subvert its integrity.

It is a task for future historians to evaluate the present situation and to determine to what extent are these shortcomings due to inexperience, political manipulations, short-sighted compromise and other phenomena related to the transition process. The technical imperfections of the Amendment and in other related pieces of legislation are perhaps the price the Hungarians had to pay for their peaceful transformation. Only the future will decide whether this was a fair price.