

Hungary's new constitution strengthens the rule of law and embraces democracy

Important facts on Hungarian Constitution

- **The competence of the Constitutional Court**

The European Commission for Democracy Through Law (Venice Commission) in its Opinion no. 614/2011, issued on 28 March 2011, stated regarding the issue of *ex ante* review by Constitutional Courts that *there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an a priori review and who should have the right to initiate it.* The new Fundamental Law, however, has extended the personal scope of possible applicants, making it easier to apply for a review to the Constitutional Court before the promulgation of individual legislative acts. In connection with the narrowing of *actio popularis* the Venice Commission has also stated that *“the availability of an actio popularis in matters of constitutionality cannot be regarded as a European standard.”*

According to the new Fundamental Law until the level of national debt decreases below 50 % of the GDP, the Constitutional Court may only assess the constitutionality of acts, related to the central budget, central taxes, stamp duties and contributions and customs duties, exclusively in connection with the enforcement of the right to life and human dignity, the right to the protection of personal data, the right to freedom of thought, conscience and religion or with the rights related to Hungarian citizenship. In this regard the Venice Commission stated that *„it should be pointed out that a sufficiently large scale of competences is essential to ensure that the (Constitutional) Court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights”*. The current wording of the Fundamental Law fulfils this requirement since the Court has the power to annul the acts related to the budget and taxes in case of violation of the above mentioned fundamental rights (e.g. life, human dignity, etc.).

In addition, the Fundamental Law widened the competences of the Constitutional Court by extending the possibility of constitutional scrutiny to judicial decisions and granted to the Ombudsman the possibility of initiating a constitutional examination procedure. (Article 24, Paragraph (2) points d and e)

- **Retirement age of judges**

The new Fundamental Law does not define a specific retirement age for judges. It stipulates in paragraph (2) of Article 26 that the retirement age for judges (with the exception of the Chief Justice of the Supreme Court) is the general retirement age. This applies to prosecutors as well.

- **Prohibition of retroactivity**

European constitutions, when they do so, refer to the prohibition of retroactivity of laws in very general terms and with the indication that in exceptional circumstances the prohibition is not applicable.

The core element of the prohibition of retroactivity, however, is to prevent that one bears responsibility for acts that, at the time they were committed, were not deemed to be an offence

by law. The fundamental rights section, Article XXVIII of the new Hungarian Fundamental Law reflects this fundamental principle of law by spelling out that *“no person shall be found guilty or be punished for an act which was not an offence under Hungarian law, or, in a scope defined by an international treaty or a legal act of the European Union, under the law of another state, at the time of perpetration”*. In addition Article 2 of Act CXXX of 2010 on legislation states that one of the fundamental principles of legislation is the following: *“Laws can neither establish obligations for the time period before their entry into force, nor expand or augment existing obligations, nor can they restrict or revoke existing rights, nor declare conducts illicit.”* A number of sectorial acts also contain similar provisions. Moreover, the Constitutional Court has, in its jurisprudence (in more than 100 resolutions), unequivocally reaffirmed the prohibition of retroactivity. The prohibition of retroactivity is also laid down in the Charter of Fundamental Rights of the European Union, which has the same legal value as the Treaties by virtue of Article 6 of the Treaty on European Union as amended by the Lisbon Treaty and which has been incorporated into Hungarian law as well.

- **Two-thirds majority requirement for the modification of the fundamental basis of the tax and pension systems**

Article 40 of the Fundamental Law stipulates that *“For the purpose of a foreseeable contribution to the common needs and the social security of the elderly, the fundamental rules of taxation and the pension system shall be established by an organic act”*. One of the most remarkable features of the new Fundamental Law is its ambition to stabilize public finances. Stable public finances and a predictable tax and social security system are the cornerstones of the sustainable operation of the national economy. This premise is especially true in times of economic crisis when a stable tax and social security regulatory system is indispensable for long-term economic growth. The article of the Fundamental Law cited above, provides a solid legal basis for achieving these goals and lays down the centrepiece of a predictable regulatory environment for the benefit of Hungarian citizens and legal entities, as well as foreign investors. It is especially important after the unfavourable experience with the rapidly changing tax and social security regulation of the last decades, having caused great legal uncertainty and having jeopardised Hungary’s economic development.

Protection of embryonic life

According to the new Fundamental Law, life is protected even prior to birth. Article II declares: *„Every human being has a right to life and human dignity, the life of embryo is protected from the moment of conception.”* This is in compliance with several European Union member states’ constitution (SK, IE). The fact that the life of the embryo is protected from the moment of conception and that it appears in the Fundamental Law will not result in banning abortion or emergency contraception pills. All that the rule means is that the protection of the embryo’s life is an obligation for the State but it is not identical to the life of a live human being. Abortion is regulated by Act LXXIX of 1992 on the protection of embryonic life, which is still in force and there is no intention of abolishing or amending it. Moreover, the Constitutional Court has ruled on many occasions (e.g. in its resolutions 64/1991 and 48/1998) that the current legislation on the protection of embryonic life and the rules of abortion allowing it in case of the woman’s grave crisis are constitutional.

- **Social rights**

The new Fundamental Law stipulates that Hungary strives to create the opportunity to enter in gainful employment for everyone who is able and willing to work. (Article XII Par. 2.) In addition to this general obligation, the new Fundamental Law also contains the social protection of labour (trade unions, strike, working conditions, free time and regular paid vacation) in Article XVII., fully in line with the European Union's Charter of Fundamental Rights.¹

The protection of private property is explicitly guaranteed in Article XIII., Article 17 of the European Union's Charter of Fundamental Rights² contains an identical provision.

The new Fundamental Law also states that Hungary provides means of support for the elderly by maintaining a unified state pension system and by allowing the operation of voluntarily established social institutions. This provision is in accordance with Article 34 of the Charter of Fundamental Rights.³

All of the provisions of the Fundamental Law mentioned above are fully in line with the European Union's Charter of Fundamental Rights. In addition, the increased level of environmental protection foreseen by Article XXI of the new Fundamental Law (*A person who causes damage to the environment, must restore it or bear the costs of restoration, as defined by law.*) goes beyond the level of protection defined in the relevant provisions of the Charter of Fundamental Rights.⁴

- **Definition of the family**

Article L) point (1) of the Fundamental Law states that "*Hungary the institution of marriage, as a union of man and woman established by their free consent, as well as the family as the basis of the preservation*

¹ Article 28 - **Right of collective bargaining and action:** Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.; Article 31 - **Fair and just working conditions:** 1. Every worker has the right to working conditions which respect his or her health, safety and dignity. 2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

² Article 17 - **Right to property:** 1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.;

³ Article 34 - **Social security and social assistance:** 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices. 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices. 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

⁴ Article 37 - **Environmental protection:** A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

of the Nation.” A similar definition can be found in constitutions of several European Union member states (BG, PL). The concept that marriage is established between a man and a woman has always been a well-recognised constitutional right, confirmed also by a number of Constitutional Court decisions. For same-sex couples a special legal institution was created in Hungarian law, guaranteeing equivalent rights to those that benefit couples in a heterosexual marriage. The Hungarian Constitution is in no way unique in Europe in its non-recognition of same-sex marriage. No single-parent families or cohabiting couples will be discriminated as the Fundamental Law also stipulates that Hungary supports the upbringing of children, and that the protection of families is regulated by law. The definition of the family is not included in the Fundamental Law, therefore, on this basis no conclusion can be drawn as to what form of family would be accepted and protected by the State. Article L point (1) simply declares that the State recognizes the above mentioned form of a union as marriage but it leaves to society to determine what it considers to be a family. It is also important to point out Article XVI of the Fundamental Law which determines the basic rights of children by stipulating that “*every child has a right to protection and care for the appropriate physical, mental and moral development*” regardless of the form of family. It has to be noted, furthermore, that Article 9 of the Charter of Fundamental Rights clearly states that issues in connection with marriage and family are to be governed by means of national legislation.

- **Voting right for citizens without a permanent address in Hungary**

European constitutions usually regulate the suffrage in either the fundamental rights section or in the section on parliamentary systems. Most constitutions, as countries normally have special laws on election procedure, restrict themselves to stating that all citizens who have reached the age of eighteen shall have universal and equal suffrage,. Even in the case of countries where dual citizenship is accepted and acquisition of nationality without permanent residence is open to special groups (such is the case of Romania or Slovakia) only the basic principle of the universality of suffrage is contained in the Constitution. The new Hungarian Fundamental Law goes further and includes also the basic principles of direct voting and secret ballot.

The Fundamental Law gives the power to Parliament to regulate the electoral procedure in a cardinal act (2/3 majority is required for its adoption). The question of voting rights for citizens without a permanent residence in Hungary will be addressed in the course of the upcoming parliamentary debate on the Act on Electoral Procedure. Any criticism directed at this issue is premature.

- **Respecting other countries’ territorial integrity**

In Article Q paragraph (1), the new Fundamental Law stipulates that “*in order to realize and maintain peace and security, and the sustainable development of mankind Hungary endeavours to cooperate with every nation and country of the world*”. Paragraphs (2)-(3) of the same article state that in order to fulfil its international obligations Hungary ensures the conformity between international and internal law, and also declares that Hungary accepts the universally recognised principles of international law. These provisions of the Fundamental Law ensure that Hungary will uphold all of its international obligations, especially those that are enshrined in international treaties. The borders of Hungary are clearly defined by peace treaties, and have been reaffirmed in bilateral treaties concluded with all neighbouring countries. In addition, most significant multilateral international treaties, including the Charter of the United Nations and the Helsinki Final Act to which

Hungary is a State party, protect the territorial integrity of States.. The above mentioned provisions of the new Fundamental Law and Hungary's international obligations make it self-evident that Hungary respects the territorial integrity of every country in the world and in addition respects all other rights of states, as guaranteed by international law (e.g. non-interference in matters of domestic jurisdiction, sovereign equality, etc.).

- **The Preamble's reference to Christianity**

The preamble of the new Fundamental Law refers to the nation-building power of Christianity. It is not uncommon in constitutional preambles to refer to religious and cultural heritage or historic events. The preamble of the Polish Constitution for example mentions the Christian heritage of the Polish Nation while the preamble of the constitution of Ireland declares the following: "*Humbly acknowledging all our obligations to our Divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial*". The constitution of Greece was elaborated in the name of the Holy and Consubstantial and Indivisible Trinity, and the German people also adopted the Basic Law conscious of their responsibility before God and men.

The statement, that the religion of Malta is the Roman Catholic Apostolic Religion is not in the Preamble but in the text of their Constitution. The provisions concerning the relation of Church and State, the Greek Constitution declares the following: "*The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ.*"

The new Fundamental Law refers to Christianity in general terms in its Preamble but in the operative text it guarantees the freedom of religion. Article VII states that everyone shall have the right to freedom of thought, conscience and religion. This right shall include the free choice or change of a religion or conscious conviction, either alone or in community with others, in public or in private, to manifest his/her religion or belief in religious acts and observances or in other ways, to refrain from its manifestation, to practice and to teach it. The separation of Church and State is declared in Paragraph 2 of Article VII.

- **European Union membership, international obligations**

Last but not least, as a rebuttal of the fears that the new Fundamental Law does not include any reference to Hungary's international obligations and European commitment, it is to be recalled that the Fundamental Law contains clear provisions on international law (Article Q), European values (Article E) and rules on the effective functioning of Hungary as a member state of the European Union (Articles XXIII, XXVIII, and Articles 8., 9., 19.).

Source: *Government Offices*