

Benedek Molnár, Márton Németh, and Péter Tóth (eds)
Placing the Fundamental Law on the Scales –
Collected Interviews on the New Hungarian Constitution
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1. THE FUNDAMENTAL LAW IN FOCUS

The fundamental importance of the constitution as the legal norm, at the summit of the law sources hierarchy is highlighted by István Bibó's authoritative thoughts: “ [...] The community order which regulates human relations is to a certain extent, usually a large extent, open to debate, to the game of powers, to change, and to the amendment of regulation; certain, usually a smaller number, but more important rules are unchangeable, they are to be respected by all and stand above rivalries, party politics and debate. Within the domestic legal order, these rules are usually collectively called the constitution or the fundamental law and although, as a result of political considerations or the work of pedantic lawyers much that could safely be changed is included in these so-called constitutions, while others that indeed require stability are left out.”¹ An immense tension is palpable within the sentence with the contrast between stability and change. The title of the paper suggests that this collection of interviews unpacks this conflict of values and it is our (Hungarian) Fundamental law being balanced on the scales.

This paper presents disparate opinions of well-known constitutional lawyers who share common views on certain issues, but who, by approaching topics from completely different perspectives, reach varied conclusions. The heterogeneity of opinions suggest varied world views. In some cases, the contradictory answers are confusing, especially with respect to the questions which seem to have only one possible answer. This wide range of perspectives reflects the magnificence of the (legal) sciences and is an evidence of dynamism and progress that ensures the constant grind of scientific research's gears. This volume provides an effective introduction and explanation to each of these viewpoints and the reader may choose to identify with any of these views.

**2. COMMENDING THE INTERVIEWS:
“CANDID AND HONEST ANSWERS TO INVESTIGATIVE QUESTIONS”**

The direct and fluid style of the interviews, which are a characteristic of this genre, lead and assist the reader in understanding the more complex constitutional law problems and their context. The distinct viewpoints and arguments clear the way for the identification of the Fundamental Law's virtues and weaknesses. There is, of course, tension. It is hardly possible to answer “sine ira et studio” questions that are often embedded in starkly adverse

¹ Bibó (1990) 304. (Translation by the author.)

(daily) political “ideals”. The common denominator remains the legal sciences mindset, which is characterized by, among others, pure logic, the pursuit of coherence and the ostracism of inconsistency.

The authors do not blanket their cautionary critiques but also emphasize constructive solutions and support their views with professional-scientific arguments.

The anthology includes interviews with professionally acclaimed constitutional lawyers starting with László Sólyom, former President of Hungary and former President of the Constitutional Court; István Kukorelli, former Member of the Constitutional Court, University Lecturer and Head of the Department of Constitutional law at ELTE ÁJK; László Trócsányi, former Member of the Constitutional Court and former Ambassador to France; Herbert Küpper, Country Referent for the Institute of East European Law in Regensburg and Honorary Professor of Andrassy University Budapest; András Jakab, Director of the Institute for Legal Studies of the HAS Centre for Social Sciences and finally András Patyi, Rector of the National University of Public Service and President of the National Election Commission and Péter Tölgyesi, former Member of Parliament and political analyst.

This book has undertaken a task no smaller than to shed light on topics that have been heatedly discussed in Hungarian (political) public life, both before and after the adoption of the Fundamental Law but which had not clearly and unambiguously appeared before the audience concerned. These themes are of importance to all citizens and the wider public opinion of the European Union and the world.

These topics include Does the Fundamental Law express a common will and is it founded on the broad consensus of the entire public? Can this consensus be supplanted by reference to the election results or the answers provided to the Government during the National Consultation? To what degree was publicity realized during the constitution-making process? Does Hungary adhere to democratic criteria? What are the advantages and dangers of a 2/3 majority in parliament? Is a uni- or bicameral parliament the “better” solution in this legislative system? What is the role of the National Avowal, does it bear any legal relevance? What might be the long-term consequences of curtailing the Constitutional Court’s competencies? To what degree should we consider the Venice Commission’s critical opinion? Is the constitutional and political culture of Hungary strong or weak? Do we have reason to be hopeful for our future? There are many more important topics of constitutional law that are touched upon in these discussions. The interviewees provided honest and candid answers to questions about the contemporary constitutional and political landscape.

3. GETTING LOST IN THE DETAILS AND FINDING A WAY OUT

The review’s author sought answers to questions regarding the transparency of the constitution-making process; the degree that the constitution authors relied on constitutional lawyers’ experiences and advice; how much time remained for substantive consultation with representatives of social subsystems, non-governmental organizations and whether the need for broad public consensus regarding the Fundamental Law as a universal societal norm was realized during the drafting phase. These questions are closely linked, and will therefore be considered together.

The definition according to which „the constitution is a foundational law expressing a broad public consensus”² may be taken as a point of departure. In relation to this we should

² Kukorelli (2007) 29. (Translation by the author.)

highlight the end, to which constitutional lawyers axiomatically aspire, according to which the purpose of a constitution (or its making) is a “product” founded on overarching public consensus. László Sólyom states this idea in the following way: “The constitution holds the basic operational norms of society and the state, therefore these question require a broad consensus, which should appear during the drafting phase”³. Discussions, debate⁴ and a public clash of ideas are prerequisites of this consensus. However, the drafting procedure in 2011, according to the views of professionals expressed in academic publications, was not characterized by broad political agreements or the pursuit of a consensus. Naturally several factors posed an obstacle to the realization of a consensus, which is a prerequisite of an “ideal constitution-making procedure”⁵. These factors will be discussed they appear as topics in the volume.

3.1. Transparent Solutions? – Clash of Ideas

The answers presented in the volume regarding transparent solutions paint a remarkably heterogeneous picture. According to László Sólyom, “the current constitution-making process was done in secret and the public will it expresses is much weaker than its predecessor’s”⁶. András Jakab is more cautious, he identifies the basis of doubts regarding the Fundamental Law in the incomplete transparency and unilateral government support⁷ of the preparatory process.⁸ In this regard, one of the interview subjects, Péter Tölgyessy, held a prophetic-esq professional opinion (before the constitution-making process), that if any party won the parliamentary elections with a two-third majority would not pass up the opportunity of replacing the provisional constitution with a new foundational law. In this case, Tölgyessy writes that the unilateral attempt at constitution-making could hardly result in a constitution accepted by the entirety of the political community.⁹

The diversity of opinions within this volume is well reflected with László Trócsányi emphasizing a different view. He highlights the role of several professional conferences and the role of the Constitution Drafting Commission in addressing the public at large and the national consultation^{10,11}. The constitution drafters also provide a different interpretation of the preparatory process, when they speak of a “completely public debate” on certain topics, or of the “unprecedented openness of the entire process”.¹² The difficulties to see clearly with such diversity within a domestic framework requires an external perspective .

³ Molnár et al. (2013) 18. Others also emphasize the constitution’s overarching nature. See Jakab (2011c) 164; Kukorelli (2007) 32; Küpper (2012) 35. On the reasons for broad social dialogue see also Szegvári (2009) 431.

⁴ Jakab (2011b) 16 states a thought provoking opinion on the role and importance (as well as the lack) of ‘public debate’ in constitution-making .

⁵ with respect to the definition see Kukorelli (1995) 39.

⁶ Molnár et al. (2013) 19.

⁷ László Sólyom speaks of one party constitution-making, see Molnár et al. (2013) 19. The opposition’s lack of participation is highlighted by Herbert Küpper, see Molnár et al. (2013) 90. Péter Tölgyessy takes it as an objective fact that the new Fundamental Law is “solely Viktor Orbán’s constitution”. See Molnár et al. (2013) 180. Compare with Küpper (2012) 35.

⁸ Molnár et al. (2013) 112.

⁹ Tölgyessy (2009) 42. Compare with Majtényi (2009) 188.

¹⁰ For an opposite interpretation of the national consultations’ function see Küpper (2012) 33.

¹¹ Molnár et al. (2013) 72.

¹² Ablonczy (2011) 34.

The Hungarian constitution-making process generated never before seen interest internationally as well. The Venice Commission, rather tellingly, emphasized the criteria of a democratic constitution-making process including “transparency”, “openness”, “inclusiveness” and an “adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues.”¹³ The mere mention of these criteria suggests a lack of transparency throughout the constitution-making process.

The duration of the constitution-making process was slightly over one month¹⁴ in which time the proposed legislation was submitted, adopted and published, then – in my opinion – this time frame excluded possibility and realization of the confrontation of opinions and (public) debate.

3.2. The relationship between time and the lack of professional discourse

It is easy to demonstrate that public consultation regarding the final wording of the constitution¹⁵ was only superficial and professional discourse was impossible.

Before preparations for the constitution-making process had begun, the constitutional law profession, with regard to “perpetual constitution-making” based on democratic values and public consensus, had warned that “the procedural nature of constitution-making could not be secured by adopting a new norm in one swift move, since it is worthwhile to conduct broad public discourse [...]”¹⁶. As a result of “governmental hyperactivity”¹⁷, including hectic lawmaking¹⁸, this type of perpetual constitution-making was not realized. Much criticism was fired from all political sides at the rapid law-making process, which included the new constitution. In general, hyperactivity in the regulatory area resulted in a lack of professional consultation and impact studies.¹⁹ In this regard, codification also suffered.²⁰ All this originated from the impossibility of expressing professional opinions, which is

¹³ Venice Committee, 2011, point 18. See also Venice Committee, 2011, points 71–73.

¹⁴ Hungary’s Fundamental Law draft legislation was submitted on 14 March 2011, adopted on 18 April 2011 and published on 25 April 2011. It is sufficient to look at the mere facts for a basis of the analysis. The volume contains a chronology of the Fundamental Law’s adoption. See Molnár et al. (2013) 131.

¹⁵ István Kukorelli refers to the fact that more ardent critics to not hold the Salamon materials to be a part of the constitution-making process, since they were not cited during the drafting of the final wording. See Molnár et al. (2013) 19. László Sólyom holds this view as well. The Constitution Drafting Committee’s concept was submitted to parliament on 20 December 2010, but by January it “was placed among other materials to be taken under advisement”. (Sólyom (2011) 11. n. 1.)

¹⁶ Szegvári (2009) 431. (Translation by the author.)

¹⁷ I have adopted the expression from Péter Zárug Farkas. See: Tóth et al. (2012) 211.

¹⁸ Several domestic and foreign sources highlighted the record breaking intensity of Hungarian law-making. For an example of the multiplication of regulations see Mátyás (2013). On the subject of rapidity and law-making „*output*” see also Küpper (2013) 167.

¹⁹ See Sárközy (2012) 310. Tamás Sárközy believes that the adoption of the new Fundamental Law was the right step, but “not as lightning fast law-making, intentionally disregarding the tested techniques of codification”. See Sárközy (2012) 311. (Translation by the author.)

Tamás Prugberger reflects on Sárközy’s thoughts and expresses reservations as to the fact that the government “eliminated the system substantive negotiations and introduced faction and member submission based law-making” to secure unobstructed law-making. See Prugberger (2013) 106. (Translation by the author.)

²⁰ See Jakab (2011a) 70.

closely linked to the time factor. As László Sólyom showed²¹, circumstances were largely determined by the fact that a draft which could have served as the basis of scientific discourse between professionals was not readily available. Therefore it is not surprising that, as a result of the short time made available to study the draft, an onslaught of statements were published in place of substantive professional consultation and dialogue with law professors and practicing lawyers.²² The Venice Commission expressed its concerns regarding the tight schedule established for the adoption of the constitution and pointed out the importance of involving the academic community.²³

My view is that, because of the aforementioned reasons, the opportunity of creating an “optimal constitution”²⁴ was missed. During the 2011 constitution-making process the scales were severely tipped in the favor of policy, to the detriment of professionalism. Scientific discourse cannot be constrained by such a strict schedule. It is well known that professional debate, the clash of ideas, formation of counterarguments and their synthesis, and even “feedback” are a time and labor intensive processes requiring precision. Not to mention the fact that Hungary’s Fundamental Law stood at the center of it all.

4. THE AIM OF THE BOOK: TO INVITE EVERY CITIZEN

It should be emphasized that the interviews may be of interest to professionals and also for citizens who may be interested in gaining a wider perspective of the public law system. The editors have provided several explanatory notes to aid an in depth understanding. There are short and well placed informative paragraphs throughout the interviews which help answer readers’ questions on constitutional history such as what is meant by the “Four Yes Referendum”; how the 1989 Constitution was born; who the “Midnight Judges” are or what really is the Hungarian historical constitution. The editors have taken their guiding role seriously as they know that the concepts of constitutional law, which appear in the volume, are not readily accessible to all and a legend explaining key concepts can be found at the end of the book, which aids in finding the way through a forest of unfamiliar terms. A few examples include *ex tunc* effect, paritarian nomination committees, vote of confidence, *action popularis*, the Easter constitution, cardinal act, political veto and eternity clause. Those terms, clear to professionals, become accessible to readers with a general knowledge of public law and so the collection of interviews enables everybody who is interested in Hungarian public life of which constitutional legal science forms an immanent part.

The editors’ aim, with this volume and the explanatory solutions, is, as stated in the Foreword, “to take the citizens for whom the Fundamental law was written seriously”.²⁵

The significance of the publication of this book requires emphasis because the editors have brought a perspective which not only introduces citizens to debates concerning the Fundamental Law but also serves to enrich their understanding of democracy. This aids in meeting the modern criteria of democracy, as stated by István Bibó “all grown persons have

²¹ Sólyom (2011) 11.

²² Küpper (2012) 33; Jakab (2011a) 70.

²³ Venice Committee, 2011, points 17, 19, 72.

²⁴ During the birth of an optimal constitution professional theories and the polity itself are equally present. See Kukorelli (1995) 43.

²⁵ Molnár et al. (2013) 11.

the right, responsibility and competence to have and express their opinion regarding the most important issues of public life”.²⁶

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²⁶ Bibó (1990) 212.