

# Legislative Stupidities in the New Hungarian Constitution

Balázs Majtényi\*

The United States Constitution is considered one of the greatest contributions to Western Enlightenment, but it even contains what authors call «legislative stupidities»<sup>1</sup>. (For instance the requirement that the President should be «a natural born citizen»<sup>2</sup>). I think that the problem of legislative stupidity has academic legitimacy in every constitution, including the new Hungarian Constitution (named Fundamental Law)<sup>3</sup>. The comparison I am making unfortunately does not mean that the Hungarian Fundamental Law will become one of the greatest contributions to the constitutional development of the 21st century. Quite to the contrary, if in the near future a research group decides to edit a book about the most stupid provisions of European constitutions, some provisions of the new Hungarian Constitution will no doubt have a prominent place therein. I am going to illustrate this with the example of the new Hungarian regulation on citizenship. As the regulation is doctrinally incoherent (it contains a lot of contradictions and inconsistencies), what follows is merely a textual rather than dogmatic analysis of the issue.

After a short introduction into the current situation, my paper examines a number of constitutional and other legislative stupidities that result from the impossibility of giving a clear interpretation of the new Hungarian legislation on nationality. I will support my claim with the example of the use of the term «nation» in the Hungarian Constitution and its effect on citizenship rules. The new citizenship legislation will be analysed in comparison with the new legislation on national minorities.

## 1. The Legal Situation

Let me start with the brief story and the reasons of the new

\* Balázs Majtényi is associate professor at ELTE Social Science Faculty and senior research fellow at the Centre for Social Sciences (HAS).

<sup>1</sup> W.N. Eskridge, S. Levinson (eds.), *Constitutional Stupidities/Constitutional Tragedies*, New York-London, New York University Press, 1998.

<sup>2</sup> «No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President», The Constitution of the United States, Section 1, Article II.

<sup>3</sup> The Hungarian Parliament passed Hungary's Fundamental Law on 18 April 2011, which entered into force on 1 January 2012 and superseded the previous constitution (Constitution of 1989).

citizenship legislation: before the constitution-making process in 2010 the Hungarian Parliament adopted an amendment of the Act on Hungarian Citizenship and introduced a new naturalisation procedure for ethnic Hungarians living outside Hungary's borders<sup>4</sup>. About 3 million persons of Hungarian ethnicity live in neighbouring countries. (The population of Hungary is currently somewhat below 10 million). The amendment among other things abolished the residency requirement for persons of Hungarian ethnicity. Due to this fact, it introduced an extraterritorial citizenship for ethnic Hungarians living abroad. According to the conservative government of Hungary, the new citizenship policies serve the symbolic «national reunification beyond borders». Naturalisation is often described as a way of integration into the political community, which is hard to achieve if the citizen does not live in the territory of the state. Another problem is that some home states of the applicants refuse to recognise dual nationality (Ukraine, Slovakia, Austria), though some others tolerate the intentional acquisition of dual citizenship.

The new law is likely to be in effect for a long time, as the possibility of non-voluntary loss of citizenship is seriously limited by international law<sup>5</sup>. While the number of naturalisations of all foreigners has been below 10,000 annually in the past years, the modified Act has attracted many (ethnic Hungarian) applicants: between the adoption of the amendment and March 2012, 230,000 non-resident ethnic Hungarians applied, and 130,000 were naturalised<sup>6</sup>. Without listing all the rules of the EU that are based on the population of a member state (e.g. seats in the EP are calculated based on the number of nationals), new nationals will appear on the population registry, administratively increasing the population.

In accordance with the vision behind the extension of citizenship, the Preamble (named *National Avowal*) of the Fundamental Law of Hungary, adopted in 2011, uses the ethnic (cultural) concept of nation. As János Kis points out: «The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”: not political, but cultural. There is no place in this community for the national minorities living within the territory of the Hungarian state»<sup>7</sup>.

The Hungarian conservative government also grants voting rights to these new external citizens (maybe because of their

<sup>4</sup> After the collapse of the regime Hungary introduced two types of naturalisation: «standard» applicants got no preferences in naturalisation while those who were considered to be ethnic Hungarians enjoyed benefits in citizenship law. See in detail on the legislation J. Tóth, Z. Körtvélyesi, *Naturalisation in Hungary: Exclusion by Ethnic Preference*, in «Open Citizenship», vol. 2, no. 1, October 2011, pp. 54-74, at <http://www.opencitizenship.eu/article/view/9447>.

<sup>5</sup> *Ibidem*.

<sup>6</sup> *A legidősebb igénylő 104 éves, a legfiatalabb 2 hetes* [The Oldest Applicant is 104 Years Old, the Youngest is 2 Weeks], in «Magyar Nemzet», 14 March 2012, at <http://mno.hu/befold/a-legidosebb-igenylo-104-a-legfiatalabb-2-hetes-1059876>.

<sup>7</sup> G. Halmaj, K.L. Scheppele (eds.), with M. Bánkúti, T. Dombos, Z. Fleck, G. Halmaj, K. Rozgonyi, B. Majtényi, L. Majtényi, E. Polgári, K.L. Scheppele, B. Somody, R. Uitz, *Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, available both in English and Hungarian at <https://sites.google.com/site/amicusbriefhungary>, p. 7.

right-wing political preferences) and, considering their number, they could significantly alter the outcome of parliamentary election in Hungary.

## 2. Constitutional Stupidities

As a following step I would like to underscore that recently there has been no clear logical link between the different provisions of the Constitution and other legislation in the field of citizenship and minority legislation. Let me begin by providing some examples of constitutional stupidities.

My first example concerns the legal quality of the text of Fundamental Law. The first sentence of the Fundamental Law stems from the national anthem of Hungary: «God Bless the Hungarians». But we find this provision in the text of the Constitution without quotation marks. It is not easy to decipher the normative content of the quote. One of the possible interpretations could be that it is an obligation in a transcendent constitution. The question then arises what could happen if God does not follow his obligation? In this case the legislator might want to secularise the country. But this interpretation is not possible in a rule of law state. There remains only one solution to interpret the phrase: the citation could be a national slogan, and the legislator just forgot to use quotation marks, and we don't have to interpret it at all, as it is devoid of normative content. I only note that the last sentence of the Fundamental Law is also a quote without quotation marks from a historical document of the Hungarian national revolution in 1848. «MAY THERE BE PEACE, FREEDOM AND ACCORD»<sup>8</sup>. We can interpret this quotation in the same way because we are living now in Hungary in peace and freedom. And the two-thirds majority of the government parties also guarantees accord if it means *inter alia* adopting all kinds of important legislation overnight, a habitual practice of the Orbán government.

While, similarly to most democratic constitutions of Europe, the former Hungarian Constitution used the political concept of nation, as I mentioned earlier, the new Fundamental Law uses a cultural concept. The Fundamental Law addresses primarily Hungarians, who thus constitute the subject of the Constitution, leading to the erosion of the theoretical basis of

<sup>8</sup> One can read the quotation in the original Hungarian text of the Fundamental Law without quotation marks.

minority rights on which the former constitution was based, namely the fundamental principles of the multi-cultural model. It says: «Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future»<sup>9</sup>. I have to mention again that it is difficult to define the meaning of this sentence because past and future Hungarians are not legal subjects, so the question arises: how can they be a subject of a social contract?

But the main problem is that national and ethnic minorities cannot even participate in the creation of the constitution, as the document begins with the following sentence: «We, the members of the Hungarian Nation, at the beginning of the new millennium, with a sense of responsibility for every Hungarian»<sup>10</sup>. The document does not use the term «we the people of Hungary»<sup>11</sup>, instead of this it uses the phrase «We, the members of the Hungarian Nation»<sup>12</sup>. It means that members of national minorities (or other, non-ethnic Hungarians not forming a national minority, such as Jews) become secondary citizens; they are not part of the constitutional power. (According to the Fundamental Law national minorities only «form part of the Hungarian political community and are constituent parts of the State»<sup>13</sup>). Surprisingly, despite changes to the concept of the nation, the document leaves the minority self-government system based on the principle of personal autonomy intact<sup>14</sup>. Restoring historical names, the new Constitution uses the term nationalities instead of national and ethnic minorities.

The Preamble of the Fundamental Law also states: «We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid»<sup>15</sup>. Despite this the «Founding Fathers» of the new Constitution used the text of the former Constitution, and copied some of its provisions. When drafting the text the «Founding Fathers» forgot that they had changed the concept of the nation and forgot to make the old and new provisions consistent. For instance we can find in the new Preamble of the Constitution the following new provision: «We honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation»<sup>16</sup>. But they didn't change another provision defining the status of President of the Republic, which stipulates that the President «[...] shall embody the nation's unity». Thus, according to the Fundamental Law both the Hungarian Holy

<sup>9</sup> The Fundamental Law's Preamble is entitled *National Avowal*. For the «official» English translation of the Fundamental Law, see <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>.

<sup>10</sup> *National Avowal* (Fundamental Law).

<sup>11</sup> See in detail Z. Körtvélyesi, *From «We the Peoples» to «We the Nation»*, in G.A. Tóth (ed.), *Constitution for a Disunited Nation Hungary's New Fundamental Law*, Budapest, Central European University Press, 2012 (forthcoming).

<sup>12</sup> *National Avowal* (Fundamental Law).

<sup>13</sup> *Ibidem*.

<sup>14</sup> «Nationalities living in Hungary shall have the right to establish local and national self-governments», para. (2), Article XXIX, Freedom and responsibility (Fundamental Law). The former Constitution nominated the same rights as the same wording as the Fundamental Law in Paragraph (4), Article 68.

<sup>15</sup> During the 1989-1990 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). Because of this fact the Hungarian constitutional lawyer called the document the Constitution of 1989.

<sup>16</sup> *National Avowal* (Fundamental Law).

Crown and the President of the Republic embody the nation's unity. One of the possible meanings of the two contradictory provisions could be that the President is the Holy Crown. More in earnest, it is questionable whether the Holy Crown can symbolise the Republic<sup>17</sup>.

There are some other problems with the new regulations. Since citizenship means membership in a political community, if a state grants external citizenship, it serves internal and external political and power interests. It would be preferable not to establish any direct public law relation between a state and persons belonging to kin minorities in another state. Another problematic point is the following provision of the *National Avowal* of the Fundamental Law: «We believe that our children and grandchildren will make Hungary *great again* with their talent, persistence and moral strength» (italics added)<sup>18</sup>. The wording of the provision is highly problematic because it might be understood as referring to an intention of territorial revision, in particular the revision of the post World War I Trianon Treaty (where Hungary lost two-third of its territory). The Holy Crown has traditionally been a unifying symbol for territories way outside the current borders of Hungary. However, if we interpret this sentence together with other constitutional provisions, it is not likely to have a revisionist meaning – it could perhaps refer to some politics that serves for instance to improve the scientific or sport importance of Hungary. Still, it would be better if the legislator annulled this provision of the text because the possibility of the revisionist interpretation cannot be excluded either.

### 3. Representation in the National Assembly

According to Article 2 (2) of the Fundamental Law nationalities (national minorities) living in Hungary shall participate in the work of the Parliament as defined by a cardinal act. The new Minority Act (Act on Nationalities) and the Act on the Election of the Members of Parliament introduce the representation of nationalities in the Parliament, according to which all the thirteen nationalities<sup>19</sup> acknowledged by the Nationality Act can bring representation to the Parliament at the expense of mandates of the national electoral list. Under preferential quota

<sup>17</sup> «Hungary's form of government shall be that of a republic», Fundamental Law, Article B (2), Foundation.

<sup>18</sup> *National Avowal* (Fundamental Law).

<sup>19</sup> The following ethnic groups qualify as nationalities of Hungary: Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.

a minority mandate can be gained by one-quarter of the number of votes needed for ordinary mandates of the electoral list. If someone votes for the minority list, they can, of course, cast their vote for individual candidates as well. (The regulation includes multiple possibilities for abuse, it will not be able to exclude abuse with minority rights).

Ethnic Hungarians living outside the borders (non-regular Hungarian citizens), however, have only one of these two votes, i.e. they cannot vote for individual candidates in single member districts, only for the list. The vote of Hungarians living outside the borders but belonging to the cultural nation thus altogether (half vote of Hungarians outside borders multiplied by one quarter – the vote enough for preferential mandate of nationalities in Hungary) may be worth one-eighth of the vote of nationalities who do not even constitutional power, which is contrary to the previously mentioned concept of the Fundamental Law. In my opinion, it breaches the Fundamental Law, in which non-resident citizens are part of the constitutional power. What is more, both solutions (the preferential vote of minorities and the half vote of non-resident citizens) violate the «one person, one vote» principle and that of the equal weight of all votes.

#### **4. Conclusion**

I tried to prove through examples that the new Constitution (named Fundamental Law) in its present form cannot provide a stable basis for a democratic state and the Hungarian citizenship legislation in its present form cannot function without significant conceptual modification. This fact leads to deficiencies of the legal text. Due to the aforementioned contradictions and inconsistencies no detailed dogmatic analysis can be carried out. The legal education background and the legislation experience of the Hungarian «Founding Fathers» cannot be the task of analysis here. For these reasons my paper is limited to a textual analysis of the issue.