

HISTORY BY AND FOR A NATIONAL CONSTITUTION: THE EXAMPLE OF THE HUNGARIAN FUNDAMENTAL LAW

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ABSTRACT

The Fundamental Law of Hungary can serve as a very particular, even though not exceptional, especially in Central European region, example for studying the relationship between history and constitution. With two recent events, this study highlights the timely interest for that matter in Hungarian constitutional law. Also, from the beginning, it renders that history and constitutionalism are closely linked in many aspects, already by the definition of constitutional law. In order to be able to analyse in a very complex Hungarian constitutional context the role of history, first, a methodological problem is solved: a clear distinction is made between past, history and memory – also with the help of the two introductory cases. Second, two risks more for the interpretation of history with regards to constitutional law are recalled: the danger of anachronism and the bad influence of historical interruptions. Especially, the second one is identified as a main factor of impact on the Hungarian constitutionalism when handling historical objects or being simply subject to history. Finally, the relation between past, history, and memory with the Fundamental Law of Hungary is described. On one hand, historical narrative plays an identity-creating role, and as such with constitutional symbols but also the symbolic narrative on national history offered by the Fundamental Law, it is a source of legitimacy in the framework of the Hungarian state. On another hand, the so-call historical constitution brings history to the level of constitutional sources even though in a very abstract and indirect way: the achievements of this historical constitution are to be used as guidelines for constitutional interpretation.

KEY WORDS

constitutional history
historical narrative
constitutional symbols
achievements of historical constitution
constitutional identity
constitutional anachronism
historical interpretation

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1. Introduction

In 2022, Hungary celebrated the 800th anniversary of the birth of the so-called Aranybulla (Bulla Aurea), also known as the Golden Bull or, as we prefer to call it, the Hungarian Magna Carta. Issued in 1222, on the 24th of April, Andrew II promulgated it in the form of a royal charter with a golden royal hanging seal (*függőpecsét*)². As part of the unwritten Hungarian constitution, this charter enumerated fundamental privileges of the Hungarian nobility, and as such it remained in force until 1848, when all noble privileges were abolished. More importantly, the document itself, and especially its golden seal, became symbols of Hungarian constitutionalism. An authentic copy of the Bulla Aurea is preserved and exhibited in the building of the Hungarian Constitutional Court, and during their time in office, constitutional judges wear a replica of the seal on a golden collar around their necks when appearing in their official robes to announce their judgments publicly.

In addition, in 2022, the National Assembly of Hungary adopted the Eleventh Amendment of the Fundamental Law of Hungary on the 19th of July³. One of the amended provisions concerns the territorial division of Hungary, changing the administrative terminology of former counties (*megye*) to shires (*vármegye*), and renaming the head of the territorial Government Office, formerly Government Commissioner, the shire-reeve (also known as sheriff, *főispán*). Neither of these terms is new. For centuries, these denominations have been used in Hungarian constitutional and public laws. It was after the installation of the socialist regime under the pressure of the Soviet Union that the old terms were abolished, and historical continuity was destroyed. For several years, even after the Communists took power, the head of the departmental administration was referred to by this name. On the one hand, these terms are the conventional, traditional ones; on the other hand, at least nowadays, they seem anachronistic to many, overly historicising modern constitutional and administrative structures.

Both of the above-mentioned examples demonstrate the strong link, the special relationship, one might say, that exists between history and constitution. This relationship is even more significant in Hungary. The preamble of the Fundamental Law of Hungary (National Avoval) contains an extraordinary definition of the constitution that is closely related to this topic: 'Our Fundamental Law shall be the basis of our legal order; it shall be an alliance among Hungarians of the past, the present, and the future'⁴. The first part of the sentence goes is quite self-explanatory: it is a simple, formal definition of the constitution; however, the second part is quite original. It is an important insight into the role of a constitution in a nation-state, but also the particular relationship between Fundamental Law and history can be deduced from it. The same idea appears when one says that a national constitution should answer three questions: where we are coming from, what we are, and what we would like to be⁵. The answers to these questions originate and are rooted in the past.

2 | Zsoldos, 2022.

3 | The Eleventh Amendment of the Fundamental Law of Hungary was published in the Hungarian Official Journal (*Magyar Közlöny*) on 23 July 2022.

4 | National Avoval of the Fundamental Law of Hungary.

5 | Public lecture of Jean-Marc Sauvé, first vice-president of the Conseil d'État, Constitutional Heritage and European Integration, Hungarian Institute, Paris, September 2012.

What then is the exact role that history plays in a constitution, particularly Hungarian constitutional law? What is the constitutional function of history?⁶ Different distinctions should be made to answer this question. In addition, methodological and substantial risks should be avoided. First, the past, history, and memory are three different approaches to history in general, and in constitutional analysis, they should be clearly distinguished. The past reflects the chronology of events that define a nation's history. As components of a common historical experience, such events greatly impact the way of life of any given society, especially its political and constitutional cultures. History is a structured description of one's past. This is the result of research, and as has been said, the historical description of one hour of the past demands several years of research. History is an even more important part of constitutional law.

2. Past, history, and memory – three different constitutional approaches

National constitutions as the framework of the coexistence of a political community are, in fortunate cases, the result of long historical development. The way that we describe our history, the events that are highlighted and emphasised, and the explanations that historians attribute to them have an important impact on the constitutional structure of a state. In Hungary, the first example clearly demonstrates this. The Hungarian Magna Carta is a well-known element of the Hungarian constitutional past. Historical research has focused on its text and context, in light of its adoption for many centuries. However, even 800 years after its promulgation, new approaches can be developed for its study⁷. Often presented as a 'Hungarian version' and compared as such to the Magna Carta Libertatum of 1215, even though both gave legal privileges to nobles, the different contexts in which these documents were adopted should nuance any analysis.

King John Lackland (I) issued the Magna Carta to England's barons to end their rebellion. Although both the king and the nobles accepted the Carta, it did not reflect their real intentions. Neither side complied with it, and the war continued. Helped by Louis VIII of France, the powerful English lords started a civil war that only ended after the death of the king in 1216.

In Hungary, Andrew II was neither weak nor criticised for his fiscal policy. The conflict between the king and nobles was due rather to the strong royal alliance with Bavaria and the appearance of a new class of nobles that the King 'imported' to replace the old ones. The promulgation of a constitutional document was hoped to resolve this conflict, as it was to be respected by all involved; it was not a true source of weakness for the King⁸. Consequently, historically speaking, the two documents cannot be analysed and described in the same frame of reference.

In addition, our memory of the past – being even more structured, layered, and complicated than history – also plays an important role. As we will argue, it is most important

6 | Balogh, 2016, p. 541.

7 | Zsoldos, 2022, p. 5.

8 | Ibid.

in a national constitution, especially in Hungarian constitutional law, from a functional approach⁹. Our memory of the past is mostly nourished by (narratives of) history. Thus, it has a subjective element that makes it very different from history. As much as history wants to be as objective as possible when describing and analysing past events¹⁰, memory is a special approach, highlighting some of them in a particular reading or from a particular vantage point (narrative) and often forgetting or relativising many others.

To return to our first example, we can say that the Hungarian Magna Carta was remembered as a document containing privileges for nobles during the Revolution of 1848, and as such it had to be abolished. However, after the Revolution and the period leading to the Compromise with Habsburgs (1867, 1868), it was recalled that this very same document is the first source of the *ius resistendi* of Hungarians.

This example demonstrates how memory can change the subjective approach to a document of historical significance. Most importantly, memory is also about preservation: the conservation of one specific reading of history.

Therefore, the second example mentioned in the introduction is more characteristic. Why did the Hungarian National Assembly want to return to some historical constitutional terms that could be considered anachronistic from a strictly linguistic perspective? The most likely reason is the preservation of constitutional memory, which, as such, already has a very important function. This memory renders the state's constitutional framework continuous and stable. This refers to the permanent existence of the state with its special political and legal structure. As evidence of such stability, constitutional memories have an important general function without forgetting the special elements that they refer to.

3. Anachronisms and historical interruptions – two major gaps in relation to history

The distinction between past, history, and memory, even though we use history to speak about the constitutional past and our own specific reading of it, is essential for our analysis. Despite the above, we make a clear distinction between them without denying the existence of genuine links. From another perspective, some deeper risks, once again methodological rather than substantial problems, appear. The history of constitutional law by its very nature has a constitutive function in every state. There is constitutional development that establishes constitutional normativity in the long run. This can happen in two different ways: by organic development, when the 'wall' of the constitution is constructed brick by brick according to the form of its 'foundation'; or, by a strategy of interruption, when a new regime begins in opposition and often with the aim of the deconstruction of the old one.

In a Central European, and especially in a Hungarian constitutional context, these questions about historical construction as a continuation or else an interruption of historical 'programs' are raised in a very different way. Because of its history and the fact that

9 | Tribl, 2020.

10 | 'Sine ira et studio', as per the famous expression of Tacitus in the introduction of *The Annals*.

the constitution recalls this idea, a part as much of history as a constitutional memory, that, from the very beginning of modernity Hungary, exposed to foreign occupants, emphasised its continuous constitutional existence¹¹. The historical development of its constitutional framework is not only the product of its own constitutional construction (as happens very often in such a model), but the idea of the stability and continuity of constitutional evolution is always simply brought into light as priorities because of the risk of the loss of statehood (as Hungarian historical experience dictates). Because of this, one cannot really speak about organic constitutional development in the Hungarian case, as the external factor has always played a definitive role in this regard in the past.

4. Anachronisms – a first danger of the constitutional approach to history

Because of the above, the risk of anachronism can be considered in other ways as well in Hungarian constitutional law. To demonstrate this, it is sufficient to remember the second example above of the renaming of counties and their administrative leaders. What can be seen as anachronistic in some other parts of Europe, in the Central European region and in particular in Hungary, is simple proof of the special attention paid to constitutional continuity. This does not mean that there is no risk of overly historicising anachronism¹². One should always remember the famous quote:

There have been many who could not even recite one principle of our constitution but talked about it in such a way as if they had been knighted by Saint Stephen or Andrew II to act as knights of constitutionalism¹³.

With this reference to the Hungarian Magna Carta, the internationally recognised Hungarian professor of the history of law, György Bónis, bade us remember that the danger of anachronism is always present.

This anachronism consists of going back to certain historical periods, taking legal terms or provisions from those periods, and seeking to use and apply them without their reinterpretation and adjustment to modern times. Solely due to the historical value of these constitutional elements and the special importance that they might gain accordingly one would prefer to invoke and apply them even in modern times. However, their meanings cannot be understood outside or without knowing the context in which they were originally adopted. Consequently, the application of these terms in a completely different context centuries later does not make sense. This does not mean that nothing can be deduced and used from earlier constitutional documents and provisions, but that they first must be understood in their original context and then reinterpreted to a new context based on their usefulness and relevance. This exercise is even more difficult because of

11 | The concept of the '1000-year-old constitution' is at the heart of Hungarian constitutional law; see the National Avowal in the Fundamental Law of Hungary.

12 | Vörös, 2020, pp. 40, 41.

13 | Bónis, 1942, p. 2.

the important changes in modern constitutionalism in its fundamental opposition to former medieval and feudal regimes.

However, in Hungary, due to a long lack of independence, modern constitutionalism had difficulty in 'gaining ground', and all the older historical constitutional documents and the constitutional normativity that they provide have not been completely eradicated and disregarded. They can continue to structure and influence Hungarian constitutionalism, while in another, more abstract and indirect way remaining part of Hungarian political culture. The fact that Hungary was ruled under a historical constitution until the adoption of the first written constitution¹⁴, which followed the model of the Soviet constitution of 1936 (and thus was not a modern liberal, but rather a Stalinist constitutional text), renders historical constitutional documents and provisions even more important. However, this makes the danger of anachronism even more real¹⁵. To avoid it, one should always

- (1) Remember the aim of modern constitutionalism (efficient protection of the fundamental rights of individuals and the regulation of the exercise of public power),
- (2) exactly understand the context of their adoption, and
- (3) be able to reinterpret historical references and the ensuing, possibly anachronistic terms according to their actual context.

The relationship between the past and the present in constitutional law is complex. Anachronism is not the only risk arising from this, which shapes how we draw conclusions from it. History is an evolution, a way to develop a state and nation in a constitutional manner: a legal structure and political community. In such a development, there are mutually enriching and closely connected influences between the political reality of a historical period, the theory developed in the same period, and the reforms that can be achieved in constitutional law.

The actual political context experienced by philosophers and scholars has had a great impact on theories explaining and describing this reality. However, thanks to these analyses, new doctrines may have affected the evolution of constitutional law. From the need for a moral justification of the exercise of power developed in the work of Saint Augustine in the context of Hippo at the end of the Western Roman Empire¹⁶, to the concept of the separation of power announced by Montesquieu in Bordeaux in the middle of the 17th century, where old feudal structures were maintained but modern commerce was also flourishing¹⁷, numerous examples clearly evidence the above-mentioned idea about connections.

The results of these theoretical works have relied upon by decision-makers and practitioners of constitutional law, and they still strongly influence the development of actual constitutional rules, customs, principles, and the way that they are interpreted and applied. However, the different levels of such development should be clearly distinguished, resulting in appropriate understanding and avoiding the risk of misinterpretation. Even though modern principles come from theories describing former political reality, it would be a mistake to use the concepts behind those principles when analysing

14 | The first written constitution of Hungary was the Constitution adopted on 20 August 1949 as Act No. XX.

15 | Bónis, 1942, p. 3.

16 | Szent Ágoston, 2009.

17 | Montesquieu, 2019.

the ancient provisions governing this former reality. When looking at the Hungarian Magna Carta, we cannot speak about modern liberties, but the *ius resistendi* of the nobles can, of course, be interpreted as the first form of protection of constitutional privileges against the ruling monarch. In contemporary contexts, this may also be translated into civil disobedience, an institution which permeates contemporary constitutional discourse in many countries.

5. The problem and consequences of interrupted constitutional development – source of a second danger

If the risk of anachronism is not enough when discussing the relationship between history and constitutional law, specifically in a Central European context, a second problem arises regarding the consequences of the different interruptions of constitutional development. Interruptions in the constitutional history of a state can ruin the results of an organic evolution of the national constitutional structure as it can derail its direction. The constitutional history of Hungary, especially in the 20th century, was characterised by such interruptions. To better understand the relationship between Hungarian constitutional law and history, we should carefully study these interruptions and their consequences and have an attentive reading of what sort of relationship these had on each other.

We use the term interruption where, because of an external factor, the core of a constitutional structure is destroyed and an externally imposed readaptation becomes necessary. For Hungary, such interruptions were caused by both World Wars. Ending the Habsburg Empire, WWI shook the ground under contemporary Hungarian constitutional arrangements. However, the main elements could be maintained, and the historical constitution was readapted to fit the constitutional arrangements of a monarchy without a monarch and to the loss of two-thirds of the historical national territory and one-third of the ethnic national population. At the same time, for obvious historical reasons, the same development could not be followed in the path that was established regarding liberal legislation or a strong parliamentary control of the executive, otherwise characteristic of Hungarian constitutional law from the end of the 19th into the 20th century.

However, the most important interruption from which Hungary could have difficulty recovering even after the regime changed was caused by WWII when the country was occupied first by Nazi Germany and then by the Soviet Union. The loss of sovereignty, in itself a disaster for any state, caused a real interruption, as an 'obligation' due to the pressure of the Soviets to overhaul Hungary's historically founded constitutional framework to create an ideologically based new one. It is interesting to recall that even the ensuing radical changes encroached upon territories of Hungarian historical symbolism: the Stalinist constitution was adopted on the 20th of August, which is Saint Stephen's Day, named after the first Hungarian king, the founder of Hungarian statehood. On the other hand, at the time of the adoption of the Fundamental Law, these interruptions were highlighted clearly in the constitutional preamble, which branded as periods of suspension of

the historical constitution of Hungary¹⁸ and changed the historical narrative of the 1989 constitution, which was less characterised by such an approach¹⁹. From a purely positivist legal perspective, such a declaration can be considered problematic. Even though it is placed in the constitutional preamble without any normative legal effect, the use of the term invalidity can make one believe that the legal normativity issued from this period of 46 years (from the Nazi German occupation until the first free elections) should be considered invalid, with the consequence of nullity. If for the short period of the Vichy regime, France could make such an argument work, it would be impossible in a different situation and for such a long period of time; for us, the meaning of such a constitutional declaration is deeper than a simple legal provision. It is not a question of legal invalidity but of a lack of continuity: the interruption of Hungarian statehood as Hungarian and constitutional. This means that it was legal, and some acts continue to be applied even today as sources of law despite being gradually replaced, but the regime was not a Hungarian constitutional regime.

Such an interruption has even greater consequences than simple legal or constitutional invalidity. Its impacts and effects can be seen to this day in the Hungarian legal order, in the constitutional framework, and also in its political culture. In this study, we are, of course, only interested in its consequences for the relationship between history and the constitution. This relationship is not only affected by the fact that the organic development of a historically founded constitutional order was broken, and it is remembered as such, but also in that the entirety of constitutional history was put in a new light by the prism of such a constitutional interruption. The constitutional past before the interruption gained special importance; however, it could not be relinked directly with the present constitutional reality. What one could call anachronism, as our second example demonstrated, can also be considered the result of such a particular relationship to history because of the interruption of constitutional development.

6. The relation between the past, history, and memory with the fundamental law of Hungary

After the presentation of these problems and questions, that is:

- (1) on the one hand, methodological difficulties – when anachronism or the projection of modern concepts to history must be avoided; and
- (2) on the other hand, the substantial consequences they have due to the long-term existence of a historical constitution developed in a special Central European context interrupted in the 20th century,

we summarise our findings about the relationship between the past, history, and memory with the Fundamental Law of Hungary.

18 | As the National Avowal states, 'We do not recognise the suspension of our historic constitution due to foreign occupations. [...] We do not recognise the communist constitution of 1949, since it was the basis for a tyrannical rule; we therefore proclaim it to be invalid'.

19 | Trócsányi and Sulyok, 2015, pp. 1–10.

First, it is important to recall that the adoption of the Fundamental Law was mainly justified by historical argumentation. For the first solid political majority after the transition having the opportunity (and necessary votes) to modify the constitution²⁰, it was obvious that to finish the work started at the time of the change of regime, the adoption of a new constitutional text needed to happen. The former constitution was indeed perfectly modern; however, it lacked a Hungarian character²¹.

This Hungarian character is also, we would argue, added to the Fundamental Law by the positioning of the Fundamental Law in view of Hungarian history. In comparison to other national constitutional texts, the past, history, and memory are present in the Fundamental Law of Hungary. As stated in the Introduction, even the definition of the constitution refers to history. In the first, theoretical part of our study, we argue that this is because of the special consequences of a particular national and constitutional history. On the one hand, Hungary has a historical constitution developed over the centuries up to the end of the 19th century, with the adoption of important national acts (such as on the relations between State and Church and on the independence of the judiciary); on the other hand, after a tormented century, the nation saw the adoption of a modern, European constitution (in 1989) without any national character (due to the specific historical and political circumstances of the transition, and its 'revolution by negotiation'). To reconcile the two, particular work on history had to be done²².

Hungarian constitutional terminology uses history as a source of legitimacy when the Fundamental Law gives a special narrative of the history of Hungary including certain highlighted, willingly chosen elements explaining how they become symbols of Hungary and elements characterising its constitutional arrangements. In developing such an aspect of Hungarian character and history as a source of that character, the constitutional text also seeks to create an identity for the Hungarian nation and statehood, as well as for the Hungarian political and constitutional structures inherent in national identity²³. These 'constitutional functions' of history (herein highlighted by Hungarian examples) are more or less common to most modern constitutions. For the Fundamental Law of Hungary, history means and represents a historical constitution, the achievements of which have also played a role in the interpretation of the constitutional provisions²⁴. Thus, history, as we will argue, is also an indirect and abstract source of constitutional normativity. We present our findings related to constitutional history and the historical constitution below.

20 | The constitutional revision at the time of the change of regime was intended to be temporary, as the Preamble adopted by that time declared; however, even though the different political forces succeeding one another tried to adopt a new constitution, no coalition secured a two-thirds majority in the National Assembly.

21 | Trócsányi, 2014, p. 23.

22 | Ablonczy, 2011.

23 | Treaty establishing the European Union, Art. 4(2).

24 | Fundamental Law of Hungary, Article R); Varga, 2016, p. 86.

7. Constitutional history: source of legitimacy and of identity

History is described by the Fundamental Law of Hungary, but it is not represented, of course, as a series of past events or as a complex process of development. It is cited rather in the third approach mentioned above as a willingly selected memory of some interpreted historical events that build and shape a special, national character. The role of this historical narrative is symbolic but it also has an identity-creating function. No accusations of historicisation or anachronism stand in the face of this, as symbols are almost always and exclusively historically rooted, and constitutional memory also refers to the historical context. Even though one could argue that these characteristics are not particularly Hungarian but are common to many Central European countries, taken together in the special preambular narrative, they can, however, constitute a source of a special, national identity.

Such elements of an identity-creating, symbolic historical constitutional narrative can be found mostly in the National Avowal of the Fundamental Law of Hungary. First, the beginning of Hungarian constitutionalism is brought back to the foundation of Hungary by King Saint Stephen: 'We are proud that our king Saint Stephen built the Hungarian state on solid ground'. The official national holiday of 20 August, Saint Stephen's Day, recalls the founding of Hungary: the historical narrative ties back to this first historical fact. This symbolises the ancient and continuous existence of Hungary. In addition, this symbol emphasises that the Hungarian state and, in a certain way, Hungarian constitutionalism, do not exist only from the period of modern constitutional states. This is a symbolic declaration of thousand-year-old Hungarian statehood in the Hungarian constitutional narrative.

The reference to Saint Stephen also brings into light another special historical element that also has a symbolic, more general importance: as the National Avowal reminds us, he 'made our country a part of Christian Europe one thousand years ago.' On the one hand, the fact that Hungary as a 'country' has been integrated into Europe (which obviously should be interpreted more like a civilisation than a continent) for a thousand years would highlight a choice of values. On the other hand, those values are not only European but belong to a 'Christian Europe'. Christianity and its role will be highlighted in another paragraph, also lending a historical perspective, when the National Avowal states that 'We recognize the role of Christianity in preserving nationhood'. Thus, emphasising the special role of Christianity not as a religion but as one would, say, a cultural and political factor in the foundation and the preservation of the state and the nation is a second element of this national constitutional narrative that apports a unique character to it.

Two other important elements serving as the main pillars for the structure of this historical narrative are the fights for independence related to the community's survival, the freedom of its members, and the traumas of the 20th century. The Fundamental Law declares: 'We are proud of our forebears who fought for the survival, freedom, and the independence of our country' and 'We promise to preserve our nation's intellectual and spiritual unity, torn apart in the storms of the last century'. Concerning these 'storms', the National Avowal also declares:

We do not recognise the suspension of our historic constitution due to foreign occupations. We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under national socialist and communist dictatorship. We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; we, therefore, proclaim it to be invalid.' Even if originally tragic, but from a more positive perspective, the National Avowal continues: 'We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution.

Summing up: First, in the constitutional historical narrative, there is a reference to the history of modernity to the fights for national independence, which guaranteed the continuous existence of the political community and state institutions, but also, as modern constitutionalism demands, the freedom and liberty of the people. In the Hungarian constitutional historical narrative, the independence of the 'country' must always be in connection with the protection of individual freedoms and fundamental rights. Only an independent, sovereign Hungary can protect its citizens' rights. The symbol of the fights for independence is a special indicator of this. This is also why even tragic fights could be construed as successful as they contribute to the future protection of rights when the state becomes independent (again).

This historical narrative by the constitution, which we called simply 'history', is a source of legitimacy in three different ways.

First, it provides a list of values (i) that are shared by the Hungarian political community, (ii) that give the European cultural and civilizational character of Hungary, and (iii) that are related to the Christian past and culture, but also a special engagement for the preservation of national sovereignty and, in parallel, the protection of individual rights.

Second, this mixture of values creates a special character for the Hungarian nation and the state. As a source of identity, it can also have a legitimising function, creating loyalty between citizens and the state.

Finally, the opposition to totalitarian regimes, the fight for freedom, also provides a third, 'properly constitutional' legitimacy, as these are the main objectives of modern constitutionalism.

8. Historical constitution: more than a symbol, an indirect source of constitutionality

As mentioned above, the relationship between the Fundamental Law of Hungary and history is special because Hungary was ruled under a historical constitution until the adoption, during a period of constitutional interruption or suspension, of the first written Stalinist constitution. The value-neutral constitution adopted for the sake of regime change did not try to define itself in relation to this special historical constitutional fact. The Fundamental Law had to find a way to commemorate this fact without falling into a trap of anachronism. When speaking about the historical constitution, the first thing to remember is the special responsibility of those who are adopting constitutional texts referring to it and of those who are interpreting or analysing those references and the

historical constitution itself. Such a responsibility was also underlined by the Constitutional Court in the first case where it referred to the so-called achievements of historical constitution, wherein constitutional judges stated that ‘the responsibility of the Constitutional Court, in such a new situation, is huge, one would say historical’²⁵.

The Fundamental Law refers to the historical constitution four times: Three times, the term appears in the constitutional preamble, the so-called National Avowal, and once among the constitutional provisions, in Article R), paragraph 3. In the preamble, we read that

We honour the achievements of our historic constitution, and we honour the Holy Crown which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the state. We do not recognise the suspension of our historic constitution due to foreign occupations.

These paragraphs are located between the declaration of values and some more technical and constitutional declarations, serving as a transition between those parts of the constitutional preamble.

It is also through its achievements that the historical constitution reappears in Article R), paragraph 3: ‘The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution’. Thus, only the achievements and not the historical constitution itself can appear as a source of constitutional normativity, but not directly, only as guidelines for interpretation, such as the constitutional preamble parallel to the so-called teleological interpretation²⁶. The Constitutional Court also confirms such a very indirect and abstract use of the historical constitution by its achievements when it says: ‘This provision does not emphasize the role of the historic constitution as such, but the role of its achievements’, therefore, ‘when the Fundamental Law opens a window towards the historic dimension of our public law, it values some historically developed institutional precedents, without which our present public law would lack its roots’, and, ‘when examining cases, the Constitutional Court is obliged to elevate its view to the horizon where sources of legal historical institutions can be found’²⁷.

One should also remember the famous sentence of István Széchenyi, well-known and recognised politician of the first half of 19th century, according to whom ‘the protectors of an 800-year-old constitution can only be uncivilized men’²⁸. Regarding this idea, we would state that as the Fundamental Law states (and as it was interpreted by the Constitutional Court of Hungary), the historical constitution is not to be protected; however, its so-called achievements can be used as guidelines for the interpretation of the actual constitutional provisions. The historical constitution only plays a symbolic role, but its achievements require the integration of a new historical dimension into the interpretation of constitutional provisions. As the Constitutional Court argued, some historical institutions of Hungarian public law can be referred to in this regard.

25 | Decision of the Constitutional Court of Hungary in case number 33/2012 on 17 July 2012.

26 | Vörös, 2016, p. 39; Varga, 2016, p. 86.

27 | Ibid.

28 | Bónis, 1942, p. 5.

History, however, not only has a symbolic or identity-creating constitutional function. The continuity ensured by and through the historical constitution led to a particular constitutional provision that obliged the interpreters of the Hungarian constitution to think about some institutions of the historical constitution and use what it contributed to Hungarian public law as a tool in defining constitutional rules. However, neither does it elevate the historical constitution to the rank of positive constitutional law, nor does it elevate its achievements, as even those can only be referred to as guidelines for interpretation. Jenő Szmodis thus calls the Fundamental Law a multi-layered constitution.

This study focuses on the relationship between history and constitutional law. As history is of great importance in Hungarian constitutional law, a fact that we demonstrated with two topical examples, it was interesting to engage in a deeper analysis of its constitutional function. In our opinion, the relationship between history and Hungarian constitutional law is characterised by the two constitutional functions of history: (i) we have constitutional history 'reported' by the constitution as part of a historical narrative in the Fundamental Law, which is one source for its legitimacy, and (ii) the historical constitution is also an indirect source of constitutional normativity, as the Fundamental Law's provision of constitutional interpretation refers to its achievements, which thus can serve as interpretative guidelines for the Constitutional Court.

In order to correctly understand these two functions of history in Hungarian constitutional law, we also examined three methodological but also two substantial problems of constitutions dealing with history, with particular regard to the Hungarian Fundamental Law. All this was intended to prove that not only 'scientifically proven history' but a special view or reading of a 'national myth', a kind of 'memoire' appears in constitutional texts (we earlier called this 'constitutional memory'). We need to reiterate that when we use historical references not only as symbols then it is important to avoid anachronism, especially in a Central European context where the history of the 20th century left a gap between organically developed constitutionalism and the present one, without clearly letting modern constitutionalism settle in for a longer time.

However, such a particular history cannot be the reason for neglecting the organically developed historical roots of Hungarian constitutionalism. On the contrary, a special path must be scouted and paved which leads back to those roots. The historical dimension of the interpretation of actual positive constitutional provisions can definitely mark this path. As the Constitutional Court also recognised, it constitutes a great responsibility and burden for those who would venture on this path, as it should lead from the past to the future and not from the future to the past. Just as the living constitutional tree is growing, so its roots can go further and deeper, and the right balance should be maintained to protect constitutionalism.

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