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Beyond the Text
An Essay on the Hungarian Constitution
(PhD Thesis)

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1. The aim of the research

The topic of the paper is the Hungarian constitution, in a broader sense the Hungarian constitutional jurisprudence. Seemingly, thinking about the constitution is determined by a paradox. In order to comprehend the sentences in the constitution, the meaning of the text has to be understood. For selecting the proper method of understanding the target of analysis has to be well aware of, precisely what the deed and essence of the constitution is.

So, as in other texts, in case of the constitution the substantive and methodological aspects are connected to each other. One of them is about what the constitution contains, while the other one is about how the meaning of the constitution can be explained. This paper intends to present the constitution by simultaneous analysis of these two aspects. The examination of the methodology of interpreting the constitution brings us closer to the understanding of the regulations of the constitution. Namely, the methodological analysis of the Hungarian constitutional practice interlocks with the examination of the content of the constitution.

So the aim of this analysis is to bring the nature of the constitution into a new light. In addition, the evaluating presentation of the past and the present of the constitution offers a measure for assessing the upcoming change.

2. Sources and methods of research

2.1. Debates on the constitutional theory

The starting points of the dissertation are the Hungarian debates on *constitutional theory* of the past two decades. There are rival standpoints occurred in the literature about the nature of the interpretation of the constitution, about the proper and improper methods of interpretation, about the acceptability of the interpretation of the constitution by the judges and about the constitutional status of the fundamental rights. Debates in the Hungarian literature are embedded into an approximately 50-year old international political and constitutional theoretical discourse. This paper reconstructs these debates.

2.2. Pre-assumptions

This paper accepts such premises in which no radically divertive viewpoints have been stated during the constitutional theoretical debates. In a wider sense it includes that the state is a product of human conventions; human autonomy, freedom and equality are not mere political ideas but rights; and that the practice of the public authority and the right-limiting state intervention is to be verified.

In a narrower sense the assumptions include certain conceptions about the entity, the subjects and objects of the interpretation of the constitution. The paper agrees with the legal literature regarding the question what the constitution is, and who are authorized to interpret its text. In connection with the entity of constitution this paper claims in advance that the constitutional structure settled in 1989-'90 is in contrast with the former one and complies with the main criteria of constitutionalism in terms of content. In relation to the subjects of the constitution interpretation, the paper presents that the Constitutional Court is a special authority since its interpretation is obligatory for everyone, however it has no privilege to interpret the constitution.

The pre-assumption regarding the nature of interpretation is that all the regulations of the constitution are to be interpreted. It is also a result of interpretation that a reasonable and unambiguous meaning can be attributed to a linguistic unit. All these considerations are stated in this paper as fundamentals of the discourse about the constitution.

2.3. Approach, methods

The paper uses mainly the Hungarian constitutional case-law in order to illustrate the theoretical problems. So the paper utilises the arguments, interpretations and approaches that are relevant from the point of this examination instead of complete content presentation of Constitutional Court judgments or other decisions of public authorities. The presentation of the international and foreigner legal provisions, case-law and interpretive varieties of methods always appear connected to these.

The line of thought relies on three, partially interlocking, theoretical streams, develops the statements of them. These are the following: hermeneutical theory, analytical legal theory and contemporary theories verifying constitutional democracy.

The hermeneutical hypothesis is based on Hans-Georg Gadamer's human understanding theory. According to this the interpreter of a text approaches the text with preconceptions ("prejudices") based on his culturally and historically determined knowledge. Without precognition and previously existing beliefs not a single text can be understood. During the interpretation these preconceptions get in a confrontation (a dialog) with the text, and in this process such an interpretation of the text gets shaped that can be harmonised with the also changing expectations. So fundamentally, the constitution can be explained in similar hermeneutical considerations as any other written texts: novels, poems, religious documents or other legal instruments. At the same time differences are also determining: these texts are written for different purposes, they take their effect in different institutional environments, they are embedded into different society practices. Therefore it is not only a hermeneutical, but also an institutional question how the interpreter of the constitution can proceed.

Analytical legal theory provides the basis for the examination of the sources usable for constitution interpretation. It is to be verified what sources are relevant for the interpretation. The sources thesis, which belongs to Joseph Raz's and the late Herbert Hart's theory says that the existence and the content of law can be determined by

reference to its sources without recourse to moral argument, except when the public act itself contents moral criteria to determine law. On this view, the sources of law include both the circumstances of its promulgation and relevant interpretative materials, such as court cases involving its application. Sources thesis essentially refers to the validity of law. The starting point in this paper is that the Hungarian constitution contains valid legal norms, so the text of the constitution and the interpretive adjudications count as society facts determining law. Therefore it does not deal with the dilemma how the normativity of the Hungarian constitution can be verified, but the methodological question what kind of sources the interpreter employs in order to understand the sentences of the constitution. (The two problems, verifying the constitution and the know-how of the interpretation, have the same roots.)

Based on contemporary theories of the constitutional democracy, on John Rawls's work in the first place, this paper states the hypothesis that the constitution can be divided into procedural and substantive domains. In the substantive domain the basic rights norms can be positioned, while the regulations of state organization, authority, delegation of authority belong to the procedural domain. Besides these the self-defining norms of the constitution can be treated as a separate agglomeration (republic, democracy, constitutionality, sovereignty, etc.). In accordance with all above mentioned the recurring question of this paper is how the difference between procedure and substance appears. In order to understand the relation between procedure and substance the sentences of the constitution are to be interpreted.

This paper restricts its perspective regarding one essential question. Several analyzers display the debates about constitution interpretation as the battle between the legal positivists and the natural law conceptions. However, the line of thought of this paper does not fit into this conceptual frame. Beyond the analysis of the content of constitutional law and revealing the underlying political philosophical aspects it does not search for the space and time independent concept of law. So the paper has a local viewing angle: it deals with the Hungarian constitution and its interpretation.

3. Results of the research

3.1. Main statements

In opposite to the traditional canons on legal interpretation this paper relies on the interpretation theory and the statements of the analytical legal theory in analyzing the sources used at interpretation of the content and procedural cases: first of all the text of the constitution, as well as the statements of legal literature, the original intent of the framers, the traditional meaning of the text, the world of legal norms and the precedents. The conclusion is that these sources offer interpretive alternatives at most, but do not give the right answer for the dilemmas of constitution interpretation.

This paper separately examines the possibility of the moral interpretation of the constitution. As from the examined sources several approaches and solutions can be concluded, the rival moral conceptions can lead to various results. This paper compares these attitudes, and argues that it is possible to choose between better and worse

interpretive ways. A moral interpretation exists that meets the text of the constitution, can be connected to the interpretative practice and is based on widely accepted preconceptions.

To reveal constitutional law morality the paper uses the works of the late John Rawls, Jürgen Habermas and Ronald Dworkin on the one hand and on the other hand it employs the communitarian criticism of constitutional democracy. The substantive, self-defining and procedural norms of the constitution embody coherent, integrated political values; or they serve such values. So the constitution is a coherent legal text which embodies a kind of construction of political morality: it describes a political community of equal persons. In the modern circumstances of social plurality the integrated values of the constitution can mean the solid bases of which the legal system builds regulating the coexistence of persons with different beliefs, origin, and view of life. The principles, institutions and procedures of the constitution are suitable for uniting the nation defined as a political and cultural community. Consequently there is not a clear borderline between constitutional procedure and substance.

After circumscribing the nature of moral interpretation and the moral content of the constitution the paper examines further methodological dilemmas. On the one hand it studies the question what kind of considerations and strategies can help the interpreters of constitution to articulate the appropriate answer in certain cases. Arguments show that from intuitions, personal moral opinions and conventional morality it is possible to reach constitutional law morality with due wisdom. Examining Cass R. Sunstein's and others' assumptions, an answer can be given to the question what can be done if seemingly irresolvable conflicts may appear in the society regarding interpretational matters, or if the social practice significantly lags behind constitutional norms. The paper argues that by predictable evaluations, self-limiting techniques and by developing constitutional customs it can be reached that the interpretive solutions may not only be true but also applicable.

Methodological analyses cover the presentation of an exterior interpreting source (seen from the aspect of the Hungarian constitutional practice), comparative law. The paper states that certain legal institutions and interpreting results of other countries can be adapted not because of they are used successfully in many places; on the contrary: these certain solutions are used in many constitutional democracies because of they are morally correct, and that is why they have to be institutionalized or take them into consideration also in the Hungarian legal system.

3.2. Utility

The paper puts the moral nature of the constitution into a new light. So it can be appropriate to serve as a starting-point for further theoretical discourses.

By the evaluating presentation of the past and present of the constitution the paper offers a measure for the assessment of the upcoming changes. The main content and

methodological statements of the paper can be utilized for evaluating the modifications, reversals made in the text and interpretive practice of the constitution.