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# Historical Legal Institutions in the New Hungarian Fundamental Law with Special Attention to the Incompatibility

The examination of the historical legal institutions is vital to the understanding of the process of constitutionalisation in Hungary, which also creates a certain legal continuity in the Hungarian constitutional history. My purpose with this study is to describe the historical process of the constitutionalisation of Hungary through the analysis of certain institutions of public law, taking extra attention towards those legal institutions which are present in the new Fundamental Law of Hungary, coming into effect on the 1st of January, 2012.

Hungary had a historical constitution until 1949 (except the Constitution of the Dictatorship of the Proletariat), which was based and created on the cardinal rights (leges cardinales) according to József Hajnóczy.[1] This is supported by the statement of István Kovács (professor of constitutional law), which says "There are no traditions in Hungary for written constitution. The cardinal rights of the early historical constitution were used as common laws in the creation and application of laws."[2]

The basis of our 'Thousand Year Old Constitution' can be found among the most vital laws of the feudalism, which were fundamentally changed by the Laws of 1848 (for example, the 3rd Act of 1848 on forming an independent, amendable Hungarian ministry; the 4th and 5th Act of 1848 on the parliament; the 8th Act of 1848 on the liberation of serfs), by establishing the foundations of a civil state system, which, supplied with the basic law of the Austrian – Hungarian Conciliation (lex fundamentalis), the 12th Act of 1867 and other acts were in effect up to 1918, the proclamation of the People's Repub-

[1] CSIZMADIA ANDOR: *Hajnóczy József közjogi-politikai munkái*, Budapest, 1958. 236–240. pp.

[2] KOVÁCS ISTVÁN: *Az alkotmányfejlődés elvi kérdése*, Magyar Tudomány (2) 1989. 97. p. See about István Kovács's scientific work: TÓTH KÁROLY (ed.): *In memoriam Dr. Kovács István akadémikus, egyetemi tanár*, Acta Jur. et Pol., Tom. XI., Fasc. 1–26. Szeged, 1991. 443–456. pp.; NAGY FERENC: *Előszó*, in: TÓTH KÁROLY (ed.): In memoriam Dr. Kovács István (id.) 6. p; KOVÁCS ISTVÁN: *Az állam és a társadalom az új alkotmányokban*, in: KOVÁCS ISTVÁN – TÓTH KÁROLY (eds.): Nyugat-Európa legújabb alkotmányai, Budapest, 1990. 11–54. pp.; TRÓCSÁNYI LÁSZLÓ: *Alaptanok*, in: Trócsányi LÁSZLÓ – SCHANDA BALÁZS (eds.): Bevezetés az alkotmányjogba, Budapest, 2010. 45–50. pp.; KOVÁCS ISTVÁN: *A magyar alkotmány fejlődése*, in: SZABÓ IMRE (ed.): Az Állam- és Jogtudományi Intézet Értesítője (3/4) 1960, 343. p.

lic. We should also remember that our historical constitution also included several acts of unwritten, customary laws (for example, the Tripartitum of István Werbőczy).

Apart from the eras of the People's Republic and the Dictatorship of the Proletariat, our constitution was in effect until the acceptance of the 20th Act of 1949, and it determined the structure of government as it was established in 1848, with its organization and operation of legislation, its system of administration of justice, public administration, with the inclusion of the 1st act of 1946.[3]

The following examples are going to be my way of demonstration on what role might the historical legal institutions will take in the process of constitutionalisation in the new Hungarian Fundamental Law.

It is essential in the process of constitutionalisation to maintain continuity, and looking back at the historical legal institutions, but only within reasonable bounds. It is not certain that the most sensible way is to include the chartal constitutions of western European nations. The constitutional system of Hungary provides several examples for the codificators, which are necessary and must be taken into account for the discussion, and necessary for a well-operating, viable constitution. In my opinion, this must not mean a simple archaising.

One of he most important guarantees in the public law of the Hungarian parliamentary system is the ministerial responsibility, which was first regulated by the 3rd Act of 1848.[4] According to this ministerial responsibility, which is a basic principle for parliamentalism, the government – as the representative of the executive powers, – is under the jurisdiction of the legislation, in this case, the Parliament.

The legal institutions of ministerial responsibility and ministerial countersignature are considered such constitutional guarantees, that their consistent enforcement resulted that the constitutional monarchy worked within legal frameworks even after 1848, because, according to this legal disposition, ministers could not be held responsible. Unlike the current regulations of the Hungarian Fundamental Law on the responsibilities of a minister, the 3rd Act of 1848 explained these ministerial responsibilities in a more detailed fashion: it separated the legal and public law responsibilities, while the parliamentary practice established the institution of political responsibilities.[5]

Certain constitutional guarantees can only be arranged as rules with immediate effect in the Constitution. It is not enough if these guarantees can only get a clear legal meaning via a certain interpretation of the Constitution, or by an interpretation of a certain act.[6] This regulation gives a chance to nullify certain public law guarantees, which

[3] RUSZOLY JÓZSEF: *Az alkotmányozás történetisége*, in: RUSZOLY JÓZSEF: Máig érő alkotmánytörténelem. Írások és interjúk, Szeged, 2002. 39. p.

[4] BRAGYOVA ANDRÁS: *Az új alkotmány egy koncepciója*, in: LAMM VANDA (ed.): Jog és Jogtudomány 7., Budapest, 1995. 176. p.

[5] 3rd Act of 1848 § 32: "Ministers can be held responsible: *a)* For any action or decree, which violates the independence of the country, the constitution, the existing laws, the individual freedom, or one's possessions, and if these are declared as official matters. *b)* For the misappropriation or misuse of monies or valuable objects, which were entrusted to him. *c)* Any failure concerning the abeyance of the law or protection of silence and safety, if the caused damage would have been avoidable by using legal matters." VARGA NORBERT (translated and edited): *Reformtörvények Magyarországon 1848-ban. The Acts of 1848 in Hungary*, Szeged, 2012. 18. p.

[6] KOVÁCS 1989, 100. p.

would result in the extreme, and sometimes anti-democratic enforcement of the will of the interests of the current political system. It is especially essential with such a legal institution as the ministerial responsibility.

The characteristics of law and government limit the possibility of which legal institutions can be reintroduced. The bicameral parliament is a good example of taking historical legal institutions into account, yet their restoration must not be enforced at all costs, if there are no sufficient legal arguments to do so.[7] Due to the argument on historical legal institutions during the acceptance of the new Constitution, the idea of reintroducing the bicameral Parliament emerged, and in spite of historical traditions, it was not restored. The previous Hungarian Constitution stated that the legislation is unicameral. In order to create constitutional boundaries for the insistence on historical traditions and legal institutions, they must be limited by modernisation and common sense.

Professor István Kovács drew the attention of the constitutioners in his writing published in 1898, that they should connect our constitution with the nation's historical past.[8] According to him, "looking at the big picture, we should take into account our thousand-year-old Hungarian nation's heritage a lot more".[9] This is a cautionary statement for all those experts, who took part in creating our constitution, and it draws attention to the importance of the historical legal institutions.

During our constitutional history, we could observe the establishment of such legal institutions, where "restoration" is valid, even if we have to take the constitutional requirements since their first introduction into account. Legal continuity must not mean what it meant back in 1867, after the Austrian – Hungarian Conciliation any longer, for the social, political and legal circumstances have changed greatly since then.[10] Historical legal institutions can not be reintroduced completely in their old forms, but after a certain amount of modernisation, their basic legal historical foundations can still be used to make the functioning of the recent constitutional system of Hungary more effective. Legal continuity and modernisation, in their modern understanding, must be taken into account together, which means no other that we must observe and use our constitutional heritage rationally.

In this study, I would also like to give examples for how a classical parliamentary legal institution can look back at their historical heritage, and take it into account at creating rules on incompatibility, or accepting cardinal laws on a two-third majority. The moral integrity and political independence of the legislation, the Parliament is one of the most important attribute of public life, not to mention that it does not show in separate offices or official posts, but in the moral stability and sense of commitment of a given person, which is guaranteed by separate itemized laws, through the codification of legal dispositions on incompatibility, basically.

Since the civil state constitution was established in the 19th century, the regulation of incompatibility still comes into the limelight during public law discussions up to this day. It is questioned whether a legal institution, which is demoted to the level of cardi-

[7] See BRAGYOVA 1995, 123. pp.
[8] KOVÁCS 1989, 100–104. pp.
[9] Ibid. 105. p.
[10] See János Zlinszky's opinion. http://www.alkotmanyertekei.hu/?p=114 (18 January, 2011).

nal legal regulations, should be, or could be its antecedents of its constitutional history taken into account? In my opinion, the legislative powers do not have a legal obligation to do so, however, the practical examination of institutions of constitutional history could move forward the professional regulation of a modern legal institution – and I would like to support my observation with a solid example.

Incompatibility was always particularly significant in Hungarian constitutional history, as one of the basic regulations of the parliamentary state structure, for the improper functioning of the Parliament could result in constitutional crisis, because it could result in the interruption of legal continuity, and push the historical constitution in the background. This is why a statement made by constitutional lawyer István Egyed is still valid until today, because according to him, "the honour of the magnificent constitutional life can only be maintained by the means of strict incompatibility."[11]

My opinion is that the establishment and operation of parliamentary legal institutions has and always had a strong connection with the separation of the branches of power, the question of ministerial responsibility, which is the essence of parliamentarism, for the Parliament can only practice its right to observe the executive branch legally, if its make-up is completely different than the one of the government, and the most important guarantee of this is putting down the rules of incompatibility exactly by the law, and also the provision of the parliamentary privilege of immunity, and the provision of mandate. The legislative branch can only oversee the executive branch, if the two are separate and independent from each other. This is the reason behind the ongoing need since the transformation of the middle-class that the incompatibility of the Members of Parliament (MPs) should be regulated on a legal basis, and this is exactly what is in the way of accepting the regulation, as we can see it even nowadays. The executive power never felt and still does not feel the need to increase the severity of the restrictions today.

The constitution, which was in effect before the new Hungarian Constitution (20th Act of 1949, § 20) regulated,[12] among other things, the incompatibility of the members

[11] EGYED ISTVÁN: *Országgyülési összeférhetetlenség. Közjogi és politikai tanulmány*, Budapest, 1937. 5.p. See also EMERICUS: *A magyar parlament tekintélye*, Budapest, 1897.; OPPLER EMIL: *A törvényhozás tagjainak összeférhetetlenségéről*, Budapest, 1918.; PÁLOSI ERVIN: *Az összeférhetetlenségi kérdés Magyarországon*, Budapest, 1932.; TECHERT GYULA: *Törvényhozói összeférhetetlenség az európai államokban*, Budapest, 1932.; VÁRNAI SÁNDOR: *A képviselői összeférhetetlenség (1875:I. tc.) elvei és gyakorlata*, Budapest, 1897.; ZELLNER ÁRPÁD: *Az országgyülési képviselők összeférhetetlenségéről*, Budapest, 1930.; MEZEY BARNA (ed.): *Magyar alkotmánytörténet*, Budapest, 2003. 336–339. pp.; SZENTE ZOLTÁN: *A törvényhozó hatalom szervezete és működése: parla-mentek Európában*, in: MEZEY BARNA – SZENTE ZOLTÁN: Európai alkotmány-és parlamentarizmus-történet, Budapest, 2003. 600–601. pp.; PECZE FERENC: *A magyar parlamenti jog intézményei a 19. század második felében 1861–1900. Különös tekintettel a képviselik jogállására*, Budapest, 1974.; PECZE FERENC: *A magyar parlamenti összeférhetetlenségi jog (inkompatibilitás) szabályozása a századforduló előtt (1861-1901)*, in: CSIZMADIA ANDOR (ed.): Jogtörténeti tanulmányok I. Budapest, 1966. 29–54. pp.

[12] 20th Act of 1949, § 20 "(3) Members of the Parliament are granted parliamentary immunity, in accordance with regulation of the law defining the legal status of Members of Parliament. (4) Members of Parliament shall be entitled to remuneration adequate to ensure their independence. A majority of two-third of votes of the Members of Parliament present shall be required to pass the law on remuneration of Members of Parliament. (5) A Member of Parliament may not be the President of the Republic, member of the Constitutional Court, the Ombudsman for Civil Rights, the President, Vice President or account of the state Audit Office, a

of the Parliament, which was elaborated in a more detailed way in the 55th Act of 1990 on the legal positions of the representatives, and was modified by the 5th Act of 1997. Article 2 of the 4th paragraph of the new Hungarian Fundamental Law, which is in effect since 1st of January 2012, is only a frame working instruction, only declares that a cardinal law should determine the legal positions of the representatives. The government is yet to write a proposition on this matter, but it should be introduced to the Parliament in the near future. Yet it is visible even now that the basic principles of the regulation of incompatibility can be found in our chartal constitution. The new Fundamental Law does not cite any cases of incompatibility in connection with the legal position of a representative, but leaves the matter to a two-thirds act, which is a cardinal law in the modern understanding of the word.[13]

There were several attempts to modify the act on the legal positions of the Hungarian representatives which is currently in effect, especially on fields like the stating the incompatibility for holding both the office of mayor and having the legal position of a parliamentary representative. One can state that establishing the group of office-holding incompatibilities has always been and still is a neuralgic part of the Hungarian constitutional law.

I state that in order to understand the acts on incompatibility currently in effect, and the political debates around them, we should look back the history of these acts of incompatibility, back to the 19th century, for that era provides several examples worthy of following for the legislators of the 21st century. The first thorough regulation of the incompatibility was only after the Austrian – Hungarian Conciliation, which was a permanent element of our public law even back in that era.

Because of the lack of thorough legal regulations, the parliamentary practice shaped and developed the rules of incompatibility up to 1875 in Hungary, and taking this into account, legal scientists separated the official, the involvement or economical, the criminal law and the moral incompatibilities.

The Hungarian representatives created several rules in connection with incompatibility in the 19th century. In my opinion, we should not continue to push forward the creation of incompatibility regulations, which, because of the lack of a consistent legal regulation, were established in the acts controlling the creation of a civil constitution. Among these, there is the prominent 4th Act of 1869, which describes the incompatibility rules of judges. According to the regulations of the 18th Act of 1870, members of the State Audit Office could not be members of the House of Representatives or the Table of Magnates. The 33rd Act of 1871, which was on public prosecutors, extended the incompatibility of judges to members of the prosecution. The 35th Act of 1874, which was on notaries, also stated that notaries cannot be members of the Parliament.

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judge or prosecutor, the employee of administrative body – with the exception of members of the Government, state secretaries and appointed government officials – nor an active member of the Hungarian Armed Forces and law enforcement agencies. Other cases of incompatibility may be established by law. (6) A majority of two-third of votes of Members of Parliament present is required to pass the law on the legal status of Members of Parliament." See: http://www.parlament.hu/angol/act_xx_of_1949.pdf (April 18, 2011.).

[13] Fundamental Law, Article 4 "(5) The detailed rules for the legal status and remuneration of Members of Parliament shall be defined by a cardinal Act." See: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf (April 18, 2011.).

It can be established that it was the lack of unified legal regulation of incompatibility, which resulted in the securing of partial rules in separate acts, which was, and still is the standard parliamentary procedure. However, it proved to be indispensable to regulate the incompatibility of the MPs in a separate act (1st Act of 1875)[14], which did not put out the effects of the regulations on incompatibilities in the acts mentioned above.

The elective franchise reforms, which were established by the 33rd Act of 1874, resulted in the codification of the first law on incompatibility in Hungary, which stated that the guarantee of official independence is the dominant viewpoint in case of economical incompatibility. It is worth examining the incompatibilities of mayors from this point of view, for this topic is always in the limelight of political debates in Hungary. Thanks to the correct legal sense and keeping to the correct behaviour in the Parliament of their own free will, basically on 19th century parliamentary representative ever had to deal with a case of official incompatibility. According to the nation's first incompatibility act, the executive power, in this case, the paid representatives of the government and members of the offices practicing the rights of the local authorities (for example, the municipal authorities (certain groups of counties and cities) and the village communities) cannot be members of the Parliament at the same time.

Only the 26th Act of 1925 changed this regulation, which is exemplary even nowadays, in a negative way, and by that, it "opened Pandora's Box", because that act stated that members of municipal authorities and communal public office-holders can also be parliamentary representatives.[15] Nowadays the Hungarian government returns to the regulations of 1875 – as it is stated in the cardinal draft of the new law, which is the two-thirds act – in the sense that mayors can not be members of the Parliament.

As you can see, it can be stated that the historical examination of a legal institution is essential to understand the significance of its formation, and to regulate its development. Our nation's constitutional system provides several examples for codificators, which should be taken into account to create a law, which works well in real-life practice, even if the contents of certain legal institutions underwent a significant transformation because of the changes in the economical and social life since its creation. If we consider and keep thinking about their historical foundations – no matter whether they are legal institutions, or just discussions in the Parliament, which could only give us a picture on the political mentality and thinking of that era, yet still remain exemplary, – they can still be useful to make the operating of the constitutional system of present day Hungary even more effective.

If you ask me, the concepts of sticking to the historical legal institutions and modernisation do not rule each other out. In practice, they should be taken into effect supplying one another. Thanks to our historical constitution, the constitutional legal system of Hungary could remain up to date by keeping certain legal institutions, which were still properly working, from our legal history. Hungarian constitutional history also teaches us that it is not always worth-wile to mindlessly follow and copy certain foreign legal

[14] See the legislation debate NAGY IVÁN (ed.): *Az 1872. évi september 1-re hirdetett országgyűlés képviselőházának naplója*, Vol. VIII, Buda, 1874. 75–142. pp., Hungarian National Archives: MOL K 27 (03. 04. 1874.) 18R/26 18–19. pp.

[15] EGYED 1937, passim.

patterns, if we can find a well-working legal institution in the legal system of Hungary, which, if reintroduced, would prove to be suitable. In my opinion, the work of a legal historian, the researcher on the field of constitutional history should be none other than to create a connection between the past, the present, and, in certain cases, the future.[16]

In my point of view, we should dare to look back at our constitutional history, and use those legal institutions, which were already clarified by the history of our nation. This should mean that on the one hand, the practical examination of historical processes and legal institutions could lead us to such a scientific result which we could use to understand the regulations of a legal institution currently in effect, and on the other hand, it could give us result which could be used and implemented by the codificators of the 21st century. This logical reasoning could lead us to a thorough reform in the researches on the field of constitutional history. Instead of conducting researches in the field of legal history, which have an end in themselves, we should put such scientific examinations into the foreground which could result in the working interaction between the constitutional history and the constitutional law of the 21st century. Using a modern, scientific term, we should conduct such innovative researches on the field of constitutional history, which could result in a paradigm shift in the area of legal historical researches.

Allow me to finish my study with such a quotation by István Kovács that shows an unconditional respect towards the history of Hungary: "the ongoing existence of the Hungarian statehood – throughout the centuries, up to the present days – is an extremely exceptional, and more to this, unique example in these parts of Europe. This is why everyone should give a particular attention towards the development of such frameworks of public law, and also state law, and the development of the institutions of the state, which supported this continuity through the means of law. The new constitution must pay extra attention to this as well."[17]

[16] RUSZOLY JÓZSEF: *Alkotmány és hagyomány. Historikus észrevételek három alkotmányozási előmunkálatra*, in: RUSZOLY JÓZSEF: Máig érő alkotmánytörténelem. Írások és interjúk, Szeged, 2002. 124. pp.

[17] KOVÁCS 1989, 105. pp.