Human Rights and Legitimacy

CSABA CSERVÁK
Professor at the Károli Gáspár University of the Reformed Church in Hungary,
Faculty of Law, Head of the Department of Constitutional Law
cservak.csaba@kre.hu

The constitution of a country is the primary bearer of popular sovereignty. Either a constitution is legitimized by the will of the people as a whole, or by the legal continuity. Democratic elections are of paramount importance for the legitimacy of law. This includes the prevention of frauds and a proper electoral system. The legal profession is important, but the system must not become a "juristocracy". The application of the law has two main types: hierarchical and norm controlling. It is essential that the general rules set out by law shall be the best possible ones for the society. But this has its individual victims. Democracy is not just the rule of the majority, but the rule of the majority - with the protection of the interests of the minority.
Keywords: *human rights, constitution, legitimacy, election, democracy, European Law*

According to certain views, it is human rights that constitute the true fundaments of law, overriding in their importance every other consideration.

Contesting such sentiments is the opinion that an „elitist" circle being able to ignore the decisions of the parliament, itself the most legitimate and most direct manifestation of popular sovereignty is worrisome, to say the least.

In the author's view, a healthy compromise can be reached between these theories, as antagonistic as they might appear at first glance, depending on the specific legal dilemma and life situation at hand. One must tread carefully when balancing such fundamental interests.

The constitution of a country is the primary bearer of popular sovereignty and as such, it must have very prominent legitimacy. It is no mere legislation; it is the highest norm of society. During their development, law and state alike had an essential impact on one another and neither can truly exist without the other. Society needed a set of rules to prosper and endure. Law is exactly these rules, without which there is only chaos. As a system, law also has its intricate internal framework and properties, in whose absence a norm cannot be considered law. Jurists themselves have a very significant

role in upholding this system, however, they cannot go against the will of society for long. (Whether society can be protected from itself is a rhetorical question at best. In a way, this is exactly the function of representative democracy, as well as the reason that certain subjects are ineligible to call a referendum on.) Though it might seem evident these days, we still ought to ask the question: why is representative democracy a necessity? Technical infeasibility is already a major point against direct democracy, as well as the fact that certain issues requiring professional knowledge would be beyond the scope of regular citizens to weigh and judge with due wisdom. Wouldn't this lead to the necessary conclusion, however, that there should be strict educational requirements for parliamentary representatives?

Considerations of lawfulness and expediency are, unfortunately, often blended together. Decisions on the latter cannot be taken away from the people, and the panel they elected and legitimised. Matters of lawfulness, however, require specific professional knowledge. Without making this acknowledgement, we would be questioning the legal nature of law itself. The constitution, though part of the legal system, is fundamentally a product of decisions made along evaluations of expediency. The same can be said about legislation. And yet, all of these must be kept within the professional confines of law: their specific terms and internal logics must adhere to the paradigms of jurisprudence. To ensure this is the task of constitutional courts, their proper application being guaranteed by professional and independent regular courts.

The consolidation of organised society and the coalescence of the state required its inhabitants to resign their former, arbitrary ways of conflict resolution, such as revenge killings, and task an independent entity — the state — with carrying out justice. But they preserved certain other rights, rights which cling closely to the human condition. In other words, their human rights. These rights become fundamental the moment they are enshrined in a country's constitution. Their true legal nature, however, is granted by the ability to vindicate and enforce them, which is, in essence, what constitutional courts do.[1] From the above, it also follows that the protection of human

1 Judging fundamental rights based on abstract third generation human rights (environmental rights, right to family) can be highly subjective. These rights become much more tangible when they are spelled out in detail in specific legislation. For example, the right to a family can be detailed in rules providing special benefits for family businesses. On family businesses, see: Arató, Balázs: Családi vállalkozások; családi alkotmány és generációváltás, Budapest, Patrocinium, 2023, 241 p., ISBN: 9789634133797, Arató, Balázs: A családi vállalkozások utódlásának és vagyonmegóvásának jogi aspe-

rights cannot harm society as a whole. To expand, a human rights „movement" can be deemed extreme whenever its actual practice in significantly great numbers would endanger the very existence of society. An example would be gay marriage, or the adoption rights of homosexual couples, but a more significant matter here is the prevention of effective and efficient countermeasures against the perpetrators of willful and serious criminal offences, under the guise of human rights protection.

Either a constitution is legitimized by the will of the people as a whole, or by the legal continuity[2]. (The former would ideally mean that all the people would vote for every paragraph of the constitution.) The latter is related to the formal rule of law. But how far back can that be traced? For example, in most of the states in Central and Eastern Europe, the change of regime took place on the basis of legality and legal continuity. A rhetorical question: how far can the rule of law be formally traced back? What is the legal basis if the starting point was a system that was substantively a very questionable one?... Because the predecessors of any state that developed on the basis of the continuity of law were undemocratic from today's point of view. In the face of these problems of the formal rule of law, the rule of law in its substance could be seen as an etalon, but its subjectivity could be a problem[3]. *The rule of law is not a goal, but a tool. It is* a tool to ensure that society should continue to exist, and its will shall be carried out (this is the basis of the state), including the guarantee of human rights (this serves as the basis of law).[4]

---

ktusai; in: Glossa Iuridica 7:1–2.; pp. 141–177; 2020, see also: Arató, Balázs: The Legal Institutions of Asset Preservation and Asset Transfer in Hungary; in: Karoli Mundus 1:1; pp. 229–240.; 2021., or Arató, Balázs: A családi vállalkozások jellegmegóvásának eszközei (Instruments to preserve the character of family businesses), in: Gazdaság és Jog 3–4.; 2023.; Orac; p. 31–38., and Arató, Balázs: Családi vállalkozások nemzetközi kitekintésben: Jogalkotási irányok, jó gyakorlatok; in: GLOSSA IURIDICA 7: 3–4; pp. 263–285., 23 p. (2020).

2 Because then the will of society can be traced back to the creation of the state itself. On the continuity of law see. Zoltán József Tóth: Some Observations on the Interpretation of the Fundamental Law, Polgári Szemle, 2013/1–2, pp. 13–40.

3 According to some approaches, some people can explain their own subjective will into the malleable concept of the rule of law at will. Cf. Varga Zs. András Varga: Eszményből bálvány? – a joguralom dogmatikája, Századvég Kiadó, 2015.

4 On the rule of law and its specific aspects, see for example: Arató, Balázs: A tisztességes eljáráshoz fűződő jog, különös tekintettel a tisztességes igazságügyi szakértői eljárásra, in: Tóth, J Zoltán (ed.): Az Abtv. 27. §-a szerinti alkotmányjogi panasz. Tanulmányok a „valódi" alkotmányjogi panasz alkotmánybírósági gyakorlatáról, Budapest, Károli Gáspár University of the Reformed Church in Hungary, Faculty of Law, Patrocinium 2023, 216 p. pp. 9–30., 22 p.

We must ask the question of principle: What is the interest or will of the society?[5] What is wanted by 51% but opposed by 49%? Or what is that something that 67% (i.e. 2/3) agree upon, but totally against the basic interests of the 10%? It's hard to calculate such an "aggregate index" in social science, but in my view, this is roughly the limit is complying with the human rights. Enforcement of fundamental rights means that the most basic interests of all people are taken into account.

Of course, the perception of the situation also depends on how abstractly the interests are formulated. However, the cardinal question is whether in specific cases this is not overwritten by individual interests. This is why legislation must be separated from lawmaking. Legislation is not case-specific, but normative and forward-looking. And here we would like to refer to the difference between decisions on legality and expediency[6], which is also the

5 Measuring this from a party-political perspective is also very difficult. Some voters have a strong attachment to certain parties. Others struggle to choose between 2. Some voters may be sympathetic to one candidate, but on a list (if there is one) they would vote for a completely different political community. It is not unprecedented for a voter to decide only which party should not win. (The latter, of course, requires an extraordinary degree of civic awareness, information and intelligence.)
The ideal electoral system is sociologically adapted to the electorate. Of course, the political composition of society, the „macro" behavior of the electorate, changes from cycle to cycle, even from month to month. Even a single major event can have a major impact on people's attitudes towards political parties. (It would therefore be justified, ad absurdum, to introduce a different electoral system for each electoral period. But this would be an extreme violation of the rule of law, and it is hardly realistic for the parliamentary majority of the time to change the electoral system for the ‚common good' rather than to promote its own victory.) For example, a system of relative majorities (based on single-member districts) is not a very objective measure of public will in a state where the rejection of one of the parties of choice is extremely high (it may be possible to win with 30% support in a relative majority model, with 70% of society expressly rejecting that particular political force). For more on this, see Csaba Cservák, Categorical and Ordinal Electoral Systems, Iustum Aequum Salutare, Vol. XIII, 2017/3, 27–40.
6 Of course, rigid demarcation is not always easy. According to some views, the Montesquieuian notion of the law enforcer, i.e. that the law enforcer is a quasi-automatic machine, just the „mouth of the law", does not apply to the law enforcement activity of public administrations. Decisions made by discretion can (also) be qualified as expediency, and if we deny it, if we admit it, the decision-maker makes the gap between the framework of the law by his autonomous decision Cf. Péter Kántás: The dilemmas of discretion, Jogelméleti szemle, No. 3, 2001, p. 1. This problematic indeed concerns mainly the law-making activity of public administration, and as far as the state/legal decisions as a whole are concerned, in my opinion, it has received less attention than it deserves. Professionalism is also important for public administrations (e.g. the required higher education qualifications of civil servants), but the professional domi-

basis for the division of powers.

Of course, people's interest, and their perception of their own interest can change from time to time; this is manifested in the elections (usually) held in every four years.

In legislation two competing trends can be identified. The exemplary one, a principled model and the casuistic one, an enumerated model of regulation. Their appropriateness varies from one area of law to another, and is quite different in criminal law, in administrative law, which also imposes sanctions, and also in civil law.[7] (The choice of regulatory style is not only a question of legality but also of expediency, but the decision should be made by consulting a legal expert. The legal profession is important, but the system must not become a "juristocracy"[8]. A risk of subjectivity arises if some people want to use the internal context of the law to question the legitimate state legislation or the application of the law. For a remedy, we would recommend that the most important legal principles should be enshrined in a constitution having strong legitimacy.)

How directly can we apply human rights or constitutional norms? In the author's approach, the application of the law has two main types: hierarchical and norm controlling. In the former case, taking into account the established hierarchy of legal norms, the regulations closest to the events of the actual case — the *lege specialis* — are to be employed. According to the latter category, as seen under the aegis of the Supreme Court of the United States, legislation contrary to higher-level norms (such as the constitution) is to be put aside without application, placing norm control in the hands of individual judges. Such a view used to be wholly alien to European legal practice, but the direct usage of the European Union's certain norms brought a change into this paradigm. The author considers the most permissible compromise for the direct application of fundamental rights, is that they be employed only in the case of

nance of the legal profession is most pronounced in the courts and other ‚independent law enforcement bodies'. (In some ‚mixed-function bodies', such as media authorities or data protection authorities, the professionalism of other relevant disciplines, such as info-communications, deserves attention in addition to legal professionalism.)

7 Furthermore, if the legislator regulates in an area using only abstract standards, then the legislators themselves will start to fill in the gaps with more precise rules. Béla Pokol, The Juristocratic State, p. 117

8 The essence of juristocracy is the „rule of jurisprudence" instead of democracy, i.e. legislative activity wrapped up in a dysfunctional way in the application of law. In other words, making unauthorised (subjective) expediency decisions instead of lawfulness decisions. See Béla Pokol, The Juristocratic State, Dialóg Campus Kiadó, Budapest, 2017, 160 p.

a legal vacuum. Therefore, the constitution itself is to be used in lieu of an explicit *lex specialis* only. In every other case, fundamental rights are the fundaments of legal interpretation only; one of the many possible methods, their weight and importance depending on a case-by-case basis. Other, important means of interpretation operate according to the plausible intention of legal norms or the general principles of law.

In conclusion, there are a number of things to lay down. There is a resounding need for a constitution with great legitimacy, compiled with the highest degree of professional aptitude. There must also be a parliament reinforced by full popular sovereignty and made as efficient as it is possible within the principles outlined above. The parliament's main consideration must be expediency, while the constitutional court remains the judge of what is constitutional and what is not. It is entitled only to interpret, but not to create or modify a constitution. Admittedly, clear-cut differentiation between the two areas isn't always possible. There is always the odd grey area, especially regarding whether or not the creation of legal norms derived from the constitution, but not expressly present in it before is an act of constitutional codification.

Popular sovereignty possesses three layers. The most visible of these is the election of the parliament, the legislative body that is the popular will made manifest.

Even more important is the legitimacy of the constitution, which must also stem from the popular will.

Lastly, we must harken back to the creation of organised society itself. The mere transformation of primitive local communities into societies (and the creation of the state) was an act of popular sovereignty as well. Likewise, popular sovereignty also governed the fact that a particular type of norm, law became the principal tool in the organisation of early society. A significant question here is how far can law distance itself — citing its unique and abstract internal logic and the requirement of a „long-term rule of law" — from the masses that created it and their popular will?

The literature on the internal logic of law (even legal doctrine), the professional criteria that determine the training of staff are often universal. It is precisely the non- contradictory dogmatics of constitutional law that is lacking in some literature, in comparison with civil or criminal law.[9] In other words, the legitimacy of the jurist-professional expectations that supersede the substantive law may be called into question on several occasions. Especially if it is of international origin and diverges from the will of the elec-

9 See Béla Pokol, Theory of Law, p. 80.

torate of the country concerned. A legal thesis can only be regarded as uncontroversial if it is presented in the same way in all relevant textbooks and monographs and if there is no authoritative professional opinion to the contrary. (In case of doubt, of course, the authoritative character would be disputed by some...)

Democratic elections are of paramount importance for the legitimacy of law. This includes the prevention of frauds and a proper electoral system. States have considerable leeway in designing the latter. *However, I believe that we must say this: the minority must not win against the majority. This is ensured partly by a sound electoral model and partly by a system of legal remedies with guaranteed elements.* Otherwise, we can only talk about democracy in a formal sense. We also have to formulate further constitutional requirements, such as the fact that it counts to be a violation of legal certainty if the electoral system is changed immediately before elections without sufficient preparation time.[10]

It is essential that the general rules set out by law shall be the best possible ones for the society. But this has its individual victims. In legislative terms: as a result of loopholes. We talk about a legal loophole when there is no rule on something, but there should be one because of some higher principle or norm. We can understand by a hidden legal loophole, – according to Larenz – a situation where there is a rule about something, but a higher-level provision or legal principle would justify the existence of a lex specialis; the subsumption of a general rule may be considered a matter of concern. "The loophole here consists in the absence of the imposition of a limitation."[11] The legitimate interests of these aggrieved persons must also be protected by law. Nor can we ignore the fact that legislation can be "flawed".[12] (Whether through a typo or through bad drafting, we can think of a legal effect other than the intended purpose - we do not wish to deal with "deliberate mistakes" arising from personal interests. Of course, it is not always easy to determine whether it is a "mistake" or whether it is a deliberate legislative act that disregards the interests of some.)[13] This may be

10 Obviously, this raises the issue of adequate preparation time. For an excellent general discussion of the latter, see. Tilk Péter-Kovács Ildikó: Gondolatok a kellő felkészülési idő számításának kezdőpontjáról, Jogtudományi Közlöny 2015./11. 549-555.

11 Béla Pokol: Theory of Law, Századvég Publishing House 2005. Budapest, p. 143.

12 On certain questions of interpretation of the laws, see for example: Arató Balázs: Quo vadis, igazságügyi nyelvészet? Magyar Jogi Nyelv; 2020/2.; pp. 8-15. https://joginyelv.hu/quo-vadis-igaszsagugyi-nyelveszet/.

13 On the requirement of norm clarity, see for example: Arató, Balázs: Norm clarity in the light of Hungarian case law; in: Magyar Nyelvőr 146; 2022; pp. 81–90.; DOI: 10.38143/

- the fault of legislators,
- or even the fault of the codification of the legislation. It is a sociological fact that, especially in the case of a law with several hundred paragraphs, it is the drafters who become the quasi decision- makers.
- And loopholes can also arise. These can be both original and ex post, depending on the time when they were created. In the former case, the legal loophole had already existed at the time when the legislation was drafted, the latter occurs when social, technical, or scientific developments make it necessary to regulate an area which did not previously require regulation. This was the case when criminal codes still usually punished the counterfeiting of coins; when paper money suddenly became widespread in Europe and began to have a high value, the principle of "*nullum crimen sine lege*" meant that the most serious offenders could not be punished. (It is less common for a rule to be repealed in an area that was originally regulated. This is most conceivable in the case of a detailed rule in a complex legal relationship. One long law is replaced by another long law – and one legal relationship is not thought of.) For this reason, there is a constant need for correction.

- This is primarily the purpose of the creation of "lex specialis", the creation of specific rules alongside the general ones. And in this context, feedback from the citizens concerned, the practitioners and the profession become particularly important. (In addition to the strict legality review, the ombudsman's legal protection is also a form of correction for legality. This is most relevant to our subject in relation to administrative acts. The ombudsman investigates abuses of fundamental rights; he can draw attention not only to unlawful but also to 'unfair and objectionable' rules.)
- Constitutional review, and in particular the genuine constitutional complaint, also serves to protect the victims of legal loopholes.
- In a certain sense, the protection of the interests of individual cases is also a means of control by the head of state, such as the right of veto and the right for pardon.[14]

It should be pointed out that democracy is not just the rule of the majority, but the rule of the majority – with the protection of the interests of the

Nyr.2022.5.81., see also: Arató Balázs - Balázs Géza: The linguistic norm and norm of legal language; Magyar Nyelvőr 146: 91–103.; 2022; DOI: 10.38143/Nyr.2022.5.91.; https://nyelvor.mnyknt.hu/wp-content/uploads/146507.pdf.

14 Presidents of the republic may have a number of such powers by international standards, for example to release irrecoverable state claims and (in a quasi-extension of the right to pardon to other areas of law) to grant derogations from the general application of the law. See Géza Kilényi, The Office of the President of the Republic in the Light of International Comparative Law. Hungarian Public Administration, 10/1994; pp., 577–584. 11/1994, 577–584, pp. 641–648.

minority. The interests of minorities are indirectly protected by attentive legislation, but the most powerful instrument for the national minorities is autonomy. *And the motto of all this should be: law for the people, not the people for the law!* A very big problem can be caused by democratic deficits, which the literature tends to mention mainly in the context of the European Union.[15] However, in my view, the concept can also be of great importance for individual states.

15 See for example András Körösényi: Democracy deficit, federalism, sovereignty, Political Science Review, 2004/3, pp. 143–161.