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The Role of the Historical Constitution in Hungary¹

Introduction

Law school students frequently ask why they have to learn the historical backgrounds of certain institutions although they can never use those backgrounds in litigations or in the courtroom. They scarcely believe the words of their professors that legal history exists neither to put an extra burden on students nor just for curiosity's sake. On the contrary, history has an impact on the present, and certain institutions can only be understood in relation to their historical evolution.

This article argues that constitutional history has a special relevance in contemporary jurisprudence. First, it analyses the evaluation of the historical constitution in Hungary, and then it discusses how that constitution is used in the jurisprudence of the Constitutional Court. The paper concludes that instead of using the spirit of the historical constitution, the Court rather picks out certain elements of Hungarian history and refers to them as the elements of the historical constitution.

1. The historical constitution in Hungary

As in other countries, legitimacy has played an important role in the history of Hungary. A key question is where sovereignty and state power come from. From the conquest of the region (896) until the beginning of the fourteenth century, legitimacy was by descent; the power of the kings came from the fact that they were the descendants of Árpád, who led the tribes of the conquest. Apart from this, the country was hardly united in anything else; it was heterogeneous in its nationality, language, and culture.

After the extinction of the House of Árpád (1301), sovereignty and statehood had to be put on a different foundation. The primary basis for this was the doctrine of the Holy Crown. The Holy Crown, as a personality abstracted from the person of the king, was the

¹ The research was supported by the ICT and Societal Challenges Competence Centre of the Humanities and Social Sciences Cluster of the Centre of Excellence for Interdisciplinary Research, Development and Innovation of the University of Szeged.

supreme subject of state power. The members of a divided legislative and executive were united in it: the current king and the current political nation. Under the conditions of the time, the Holy Crown was also a guarantee of the exercise of power. The Holy Crown, as a legal entity, had full power, which neither of its members (that is, neither the king nor the political nation) can usurp. The doctrine of the Holy Crown, therefore, includes the completeness of the separation of powers, which is a guarantee that legislative and executive powers can only be exercised by the king and the nation together.²

The flexibility of the doctrine of the Holy Crown ensured the possibility of regaining the country's sovereignty and returning to its public law traditions in periods when continuity seemed to be broken, especially during the 150 years of Ottoman Turkish aggression when the country was torn into three parts. This openness of the historical constitution made it possible for it to be filled with rich content over the centuries.

The historical constitution is the conceptual framework that enabled the doctrine of the Holy Crown to prevail. During the period of the historical constitution, constitutional rules were put together by various laws, customs, and principles, which were constantly and continuously evolving.

The first half of the nineteenth century was a period of constitutional charters; constitutional laws were adopted in many countries. The Kingdom of Hungary did not follow this path. The main reason for this is that the country was then part of the Habsburg Empire. An imperial constitution would have served the unity of the Empire but not national independence. During the age of reform in the 1820s, Hungarian culture, art, and language evolved greatly, but they did not follow the mainstream European processes in the field of constitution-making. The aspiration to preserve constitutional traditions is completely understandable politically, but the Hungarian process consequently diverged from the Western wave of development. In view of this, Hungary kept the historical constitution within the Habsburg Empire, and this did not change even after the compromise of 1867 (*Ausgleich*), when the country gained more importance within the Empire.

The period following the First World War marked an important stage of the historical constitution. After losing the war, the Habsburg monarchy collapsed and broke up, and Hungary lost two-thirds of its territory as a result of the Trianon Peace Treaty. Under these circumstances, the two main countries of the Habsburg Monarchy, Austria and Hungary, followed fundamentally different paths. Austria created a new state with no connection to the Habsburg Empire. Hungary, on the other hand, maintained the historical constitution and a monarchical form of government in the inter-war period. The political structure of the country was rather similar to a semi-presidential system, the governor exercised the power of the head of state instead of the king, but the country remained a monarchy in name and form. Facts and law differed here. Legally a country remains a kingdom until it constitutionally turns into a republic, and this did not happen at that time, even though the Allies pushed Hungary to become

² I. Kocsis, *A Szent Korona tana. Múltja, jelene, jövője* [The Holy Crown Doctrine. Its Past, Present, and Future], Budapest 1995, pp. 91–92.

a republic.³ There was a political reason for emphasizing continuity. If Hungary had created a new state, it would have lost its claim on its annexed territories, and giving up the territories was politically unacceptable in the circumstances of that time. In practice, the historical constitution remained on force, as the state continued to function according to previous constitutional traditions.⁴

After the Second World War, in 1946 Hungary proclaimed itself a republic and a state structure was created on a parliamentary basis. However, Hungarian legal history considers the proclamation of the republic to be part of the historical constitution. Thus, the historical constitution survived until 1949, when a communist constitution was introduced.

At the time of the transition period of 1989–1990, Hungary was able to return to its public law traditions that had been abandoned in 1949. However, this kind of return certainly did not take place on the basis of formal legal continuity, since, in this case, an attempt should have been made to repeal the constitution and, together with it, to restore the cardinal statutes. However, it is not possible to create a historical constitution;⁵ it is not possible to accept customs, traditions, and unwritten sources of law within the framework of formal legislative procedure, merely through the actions of Parliament.

The obvious purpose of the Basic Law is to restore legal continuity with the legal system before 1949. The National Avowal (the preamble to the Basic Law) leaves little doubt on that: it claims that the Holy Crown represents state continuity. The purpose of the Basic Law is to ‘open to the past’ in order to provide an opportunity for the ‘revival’ of the historical constitution.⁶ The narrative of the Basic Law regards the constitutionality between 1990 and 2011 as temporary and seeks to establish continuity with the pre-1949 period. The main explanation is found in substantive legitimacy: there is no social or political consensus beyond the Basic Law, and in their absence, a basis had to be sought in the historical roots.

2. Differences between a historical constitution and constitutional charters

The most obvious difference between a historical constitution and a constitutional charter is that, in the case of the latter, the basic rules regarding human rights, the

³ I. Szabó, *Az államforma rendezése (1920)* [Handling the Form of State in 1920] [in:] *A bonis bona discere. Ünnepi kötet Belovics Ervin 60. születésnapja alkalmából*, eds. T. Barabás, G. Vókó, Budapest 2017, p. 446.

⁴ I. Szabó, *The Constitutional Development of Hungary after 1918* [in:] *Comparative Constitutionalism in Central Europe*, eds. L. Csink, L. Trócsányi, Miskolc–Budapest 2022, p. 74.

⁵ P. Paczolay, *A történeti alkotmány és a konzervatív jogi gondolkodás* [Historical Constitution and Conservative Legal Thinking] [in:] *Magyar konzervativizmus – Hagyomány és jelenkor*, ed. L. Tőkész, Budapest 1994, p. 34.

⁶ According to the drafters of the Constitution, ‘we re-tied the broken thread of continuity with slight changes, as we fitted the classic notion of the historical constitution to modern constitutionalism’; see: B. Ablonczy, *Az Alkotmány nyomában* [In Pursuit of the Constitution], Kerepes 2011, p. 83.

structure of the state, and the social system are contained in a single document: the constitution. Exceptionally, it may be that the constitution is not a single document, but even in this case the rules form a unified whole.⁷ In the case of a historical constitution, these rules are separated in space and time.

One deeper difference is that a historical constitution is characterised by continuity: its elements are not formed in a revolutionary way, but newer interpretations are connected to earlier ones. A historical constitution is not simply a collection of rules but progress itself.⁸

A historical constitution is more flexible, and, unlike constitutional charters, the provisions of the historical constitution do not have formal supremacy over other provisions. In the case of constitutional charters, the 'constitution' is of a different hierarchical rank, which must be created according to specific procedural rules. It follows from the constitutional provisions that they are superior to other rules. In the case of a historical constitution, there is no formal supremacy. Whether a rule is part of the historical constitution is itself a matter of interpretation (and possible debate). This in itself makes constitutional adjudication impossible: there is no solid ground on which legal provisions can be measured.

Also as a result of flexibility and lack of formal supremacy, the rules of a historical constitution do not form a unified system. In the case of constitutional charters, the presumption is that they form a logically coherent unit, within which there can be no contradiction or *lacunae* (the completeness theory). However, a historical constitution does not have any such pretension. This is one other reason that excludes constitutional adjudication based on a historical constitution.

The differences between a historical constitution and constitutional charters are set out in the following table.

Table. Differences between a historical constitution and constitutional charters

Listing	Constitutional charter	Historical constitution
Number of documents	generally one	numerous
Continuity	not necessarily, might be revolutionary	continuous
Formal supremacy	yes	no
Substantial unity	yes	no

Source: author's own work.

In what follows, I analyse the use of the Hungarian historical constitution based on the above table.

⁷ For instance, in the Czech Republic, the Charter on Fundamental Rights is a separate document from the constitution.

⁸ J. Szalma, *A történelmi/történeti és a kartális alkotmány teljességéről és jogalkalmazási kérdéseiről* [On the Completeness and Judicial Issues of the Historical Constitution and Constitutional Charters], "Jogelméleti Szemle" 2017, no. 2, p. 180.

3. The historical constitution in the Basic Law

One may find references to the historical constitution in the Hungarian National Avowal.

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.⁹

The next sentence of the National Avowal makes it clear that it considers the Basic Law as continuous with the historical constitution; it states that 'we do not recognize the suspension of our historic constitution due to foreign occupations'.¹⁰ In this theory the German and the Soviet invasions are considered as a suspension (not termination) of continuity that could be resumed in 1990.

References in the National Avowal reflect on the legitimacy and ideology of the Basic Law; they are much more political than they are legal references. Nevertheless, the normative part of the Basic Law also refers to the historical constitution: according to Article R) para (3) 'The provisions of the Basic Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution'.¹¹

The historical constitution itself cannot be the basis of constitutional adjudication. On the one hand, the peculiarities of the historical constitution do not support this: it does not form a complete system, it has no formal supremacy, and its content is also disputed. On the other hand, there are also substantive obstacles: there is no doubt that Hungarian public law before 1944 bore many signs of constitutionality, but that is not the same as the rule of law after 1990. Even if the Hungarian public law system met the constitutional requirements of its time up to the middle of the twentieth century (although the preliminaries of the World War also influenced constitutionality), after that the concept of democracy and fundamental rights requirements continued to evolve. The following constitutionality is not continuous with the communist state law, nor with the public law system up to 1944. In the sense of constitutional principles, the development following the regime change is, therefore, a new beginning and not a continuation of an earlier public law system.

Here is why the term achievements gains importance. The Basic Law does not intend to place the judiciary within the historical constitution, yet gives the opportunity for a court to cherry-pick individual elements of the historical constitution and use this in its jurisdiction.

⁹ Translation of the Hungarian Law Library: <https://njt.hu/jogszabaly/en/2011-4301-02-00> [accessed: 2025.05.12].

¹⁰ Translation of the Hungarian Law Library: *ibid.*

¹¹ Translation of the Hungarian Law Library: *ibid.*

4. The invisible constitution and the historical constitution: the role of interpretation

The invisible constitution was one of the important cornerstones of constitutional adjudication under the previous Constitution. The term itself hardly came up in the decisions of the Constitutional Court: Justice Sólyom stated in his concurring opinion on the abolition of the death penalty [Decision 23/1990. (X. 31.) AB] that ‘in the interpretation, the Constitution as a whole is the starting point. The Constitutional Court must continue its work of articulating the principle bases of the Constitution and the rights contained therein in its interpretations, and form a coherent system with its rulings, which serves as a reliable standard of constitutionality over the Constitution, which is still often amended for daily political interests, as an invisible constitution.’¹² In this interpretation, the invisible constitution is an unwritten rule that includes constitutionality, in some cases also against the written constitutional rule. The invisible constitution helps the Constitutional Court’s interpretation and, because of its uncertain content, provides the Constitutional Court with a wide margin of appreciation.

The concept of the invisible constitution was also necessary because the Constitution, which was renewed after the regime change and thought to be temporary in the early 1990s, was ideologically empty and contained no values. This *lacuna* was filled by the practice of the Constitutional Court and the doctrine of the invisible constitution.

The concept of the invisible constitution came under serious political attack in the 2010s: the parliament and the government obviously did not identify themselves with a doctrine limiting legislative power, especially because the doctrine could also limit the constituent power. Emphasising the historical constitution served the purpose of replacing the invisible constitution.

Considering historical aspects was a method widely used by the Constitutional Court, under the previous Constitution too.¹³ Imre Vörös adds that the Court has made no distinction between the use of the achievements of the historical constitution and historical interpretation.¹⁴

There are several references to the historical constitution in constitutional jurisprudence. However, such references are *obiter dicta* elements of the decisions. Some conclude that they help the interpretation of the court;¹⁵ others say that they only have the function of decoration.¹⁶

¹² An English translation of the decision is available at: https://media.alkotmanybirosag.hu/sites/3/1990/10/23_1990-ab_eng.pdf [accessed: 2025.05.12].

¹³ I. Vörös, *A történeti alkotmány az Alkotmánybíróság gyakorlatában* [The Historical Constitution in the Jurisprudence of the Constitutional Court], “Közjogi Szemle” 2016, no. 4, p. 44.

¹⁴ *Ibid.*, p. 50.

¹⁵ L. Csink, J. Fröhlich, *Egy alkotmány margójára* [To the Sidelines of a Constitution], Budapest 2012, p. 134.

¹⁶ I. Vörös, *A történeti alkotmány...*, p. 47.

Because a decision cannot be based on any achievement of the historical constitution by itself, the constitutionality of a law cannot be determined with the help of the historical constitution. This is especially so because, if the historical constitution were the basis in itself, the concept of changeable law would be called into question. The historical constitution would overrule normative provisions.¹⁷

In Hungarian legal literature, the question is also raised as to whether the achievement of the historical constitution can only be a source created under the historical constitution. According to a more permissive opinions, if there really is legal continuity, then that is not the case, and, for example, the concept of the invisible constitution is also an achievement of the historical constitution.¹⁸ However, this has not come up in constitutional adjudication.

The Constitutional Court referred to the achievements of the historical constitution when developing some important elements of the organisation of the state (for example, judicial independence, self-government, and the separation of powers) and also when defining the content of some basic rights (freedom of religion and freedom of speech).

Remarkably, when referring to the historical constitution, the Constitutional Court takes into account selected elements of Hungarian legal history, and not the historical constitution itself, as a system formed on the basis of continuous development of principles and rules. In this sense, there is a discrepancy between the concept of the historical constitution used by legal historians and that employed by the Constitutional Court.

Decision 33/2012 (VII. 17.) AB analysing the topic of judicial independence was the first to interpret the role of the historical constitution. The decision points out that 'It is a duty of the Constitutional Court to determine on the basis of the [Basic] Law which elements of the historical constitution should be regarded as achievements [...] Therefore when the [Basic] Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions.'¹⁹ The Court adds that 'it is an interpreting principle obligatory to everybody, based on the provisions of the [Basic] Law, and which is to be applied also in the course of exploring other potential contents of the [Basic] Law.'²⁰ Hungarian legal literature has analysed further decisions

¹⁷ Justice Pokol drew attention to this fact in his dissenting opinion to Decision 33/2012 (VII. 17.) AB.

¹⁸ László Sólyom's foreword to András Jakab's *Az új Alaptörvény keletkezése és gyakorlati következményei* [The Birth of the New Basic Law and its Practical Consequences], Budapest 2011, p. 12.

¹⁹ Reasoning [74]–[75]. Official translation of the Court, http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en_0033_2012.pdf [accessed: 2025.05.12].

²⁰ Reasoning [80]. Official translation of the Court, http://89.135.41.81/en/wp-content/uploads/sites/3/2017/11/en_0033_2012.pdf [accessed: 2025.05.12].

of the Constitutional Court.²¹ The authors vary on the use of the doctrine, but they agree that the finding of the first decision has been preserved.

The conclusion that can be drawn from the above is that:

- the content of the historical constitution is subject to interpretation; so it is uncertain;
- the doctrine helps the Constitutional Court in its legal interpretation activities;
- its application significantly influences the result of the legal interpretation, and thus the content of statutory law.

These three elements were also valid for the concept of the invisible constitution. Both concepts give priority to abstract constitutionality over normative legal provisions, thereby significantly increasing the margin of appreciation for the Constitutional Court.

The origins and narratives of the two doctrines are radically different. The invisible constitution is considered a product of liberal constitutional law of the 1990s, and the consideration of the historical constitution is attributed to the historicising-conservative narrative that has been dominant in Hungary since the 2010s. The reference base is also different: one refers to abstract principles, the other to rules and solutions that are significant in Hungarian history. Still, the difference in their application is much smaller: the Constitutional Court has been armed to extend its freedom of interpretation and increase its room for manoeuvre. The difference, however, is that in the case of the historical constitution, this weapon was put into the hands of the constitutional court by the constituent power itself.

Conclusions

The clear references of the Basic Law to the historical constitution has a legitimizing function: it intends to re-establish the continuity of present constitutionalism with that of the past. For this purpose, the Constitutional Court persistently refers to the historical roots of certain institutions.

This article argues that the use of the historical constitution is not equivalent to the reference to historical background. The former is rather an attitude, the acceptance and maintenance of continuity. Such an attitude is still missing from Hungarian constitutional jurisprudence.

This article also concludes that the Basic Law's historical constitution, considering its effect, is rather similar to the invisible constitution, which was the leading doctrine of the previous constitution. Ideology has changed; the effect has not.

²¹ I. Vörös, *A történeti alkotmány...*, p. 45, and D. Juhász, *A történeti alkotmány vívmányai és a Nemzeti Hitvallás szerepe az alkotmányjogi érvelésben gyakorlati szempontból* [The Role of the Achievements of the Historical Constitution and the National Avowal in Constitutional Reasoning in a Practical Aspect], "Alkotmánybírószáji Szemle" 2021, no. 2, p. 28.

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Summary

Lóránt Csink

The Role of the Historical Constitution in Hungary

Compared to other constitutions, the Hungarian Basic Law relies heavily on extra-legal elements. These include culture, religion, and history. Because of its historical references, some contemporary Hungarian authors consider the Basic Law to be archaic (e.g., Zoltán Szente), while others see it as the core element of sovereignty (e.g., András Zs Varga). This article first presents why the historical constitution was important at different stages in Hungarian history, and then during the creation of the Basic Law itself. The second part of the article describes how contemporary Hungarian constitutionalism refers to the historical constitution, and it gives an overview of how the historical constitution is applied in the practice of the Constitutional Court. Finally, the arti-

cle draws conclusions as to how the historical constitution relates to the doctrine of the invisible constitution, a principle that was used in constitutional jurisprudence in the 1990s.

Keywords: constitutional adjudication, historical constitution, interpretation.

Streszczenie

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Znaczenie historycznej konstytucji na Węgrzech

W porównaniu z innymi konstytucjami węgierska ustawa zasadnicza opiera się w dużej mierze na elementach pozaprawnych: kulturze, religii i historii. Ze względu na odniesienia historyczne niektórzy współcześni autorzy węgierscy uważają ustawę zasadniczą za archaiczną (np. Zoltán Szente), podczas gdy inni widzą w niej podstawowy element suwerenności (np. András Zs Varga). W artykule najpierw wyjaśniono, dlaczego „historyczna konstytucja” była ważna na różnych etapach historii Węgier, a następnie podczas tworzenia ustawy zasadniczej. W drugiej części opracowania opisano, w jaki sposób współczesny konstytucjonalizm odnosi się do historycznej konstytucji, i dokonano przeglądu, w jaki sposób historyczna konstytucja jest stosowana w praktyce Sądu Konstytucyjnego. Na koniec zaprezentowano wnioski na temat tego, jak historyczna konstytucja odnosi się do doktryny „niewidzialnej konstytucji”, zasady, która była stosowana w jurysprudencji konstytucyjnej lat 90.

Słowa kluczowe: orzecznictwo konstytucyjne, interpretacja, konstytucja historyczna.