

The fundamental principles of criminal procedure law in the constitutions of EU member states

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At the beginning of 2012 the new Fundamental Law of Hungary² (herein after referred to as: FL) entered into force. The adoption of the FL on April 2011 put an end to a long period of constitution making, as all governments which took office after the change in the political system in 1989 defined their intention to make a new basic law, but this is the first time when it was finally realised. The FL replaced the constitution of 1949 (herein after referred to as: Constitution), which was first compiled at Soviet pattern after the Second World War, then was modified fundamentally in 1989 in order to meet the requirements of constitutions of democratic, rule of law states.

Both the Constitution and the FL contain provisions about the fundamental guarantees and principles of criminal law and procedure. Moreover, the FL provides for even more guarantees as it has added two more internationally recognised basic principles to the list of those already mentioned in the Constitution before. In this paper I review the process how the fundamental principles of criminal procedure were incorporated into the basic legal document of Hungary, then I will compare the text of the Fundamental Law with the constitutional provisions of the countries of Europe. It is always interesting to observe the list of those fundamental principles which are considered important enough to be regulated at the highest level of the hierarchy of laws. Nowadays it is not only a matter of the countries' own decision but also subject to the text of certain international agreements and conventions which bind the governments. Still, it will be apparent from the comparison that even though the fundamental principles of criminal procedure law are generally accepted throughout Europe there are different levels of constitutional protection.

At the beginning I shall state that when I reviewed the national constitutions I looked especially for the principles of criminal procedure law. The general organisational principles, such as the right to court, the independence of judges, the requirement of impartiality are generally present in all constitutions, as these are requirements for all procedures, not only for criminal procedures. Therefore I directed my attention towards those which specifically concern criminal procedure, such as the presumption of innocence, the right to defence, the right to appeal, the guarantee of fair trial, the guarantee of personal freedom and the conditions for its limitation, and the prohibition of torture and inhumane or degrading treatment. I also observed some criminal law principles, such as *nullum crimen sine lege / nulla poena sine lege*, as these usually go hand in hand with the mentioned procedural rights and requirements.

The Hungarian constitutional protection

In its original version the Constitution did not mention any fundamental principles of criminal procedure. It did have a chapter on fundamental rights, but it did not touch upon any criminal law or procedural law issues, did not even declare the right to personal freedom. At this time the rights of the accused – such as the right to defence, the right to appeal – were expressed in

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²<http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

the detailed regulations of act XXXIII of 1896³, the Criminal Procedure Code of the time. After the Second World War, when the legal system was modified upon Soviet pattern, this latter law was soon replaced with act III of 1951⁴ which with its modern and transparent structure provided for broader protection of fundamental rights – at least in its text. It was modified in 1954, then a new criminal procedure code was approved in 1962. At this time the fundamental rights were still missing from the constitution and were only referred to in the sectoral acts.

Act I of 1972 thoroughly modified the Constitution and consolidated its text. Regarding fundamental rights the most significant modification was the incorporation of a declaration into the text, according to which “The Hungarian People’s Republic respects human rights.”⁵ Not much later act I of 1973 was approved, a new criminal procedure code which remained in force for 30 years, until 1 July 2003. In its original version it ensured numerous rights of the accused and guaranteed the protection and execution of fundamental principles.

As it may be seen, at this time the fundamental principles of criminal procedure were not declared and ensured at constitutional level. According to many scholars the fact that they gained more and more space in the more and more developed criminal procedure codes of the country was due to external circumstances. Hungary joined the United Nations in 1955, which approved the Covenant on Civil and Political Rights in 1966, followed by its first and second optional protocols. Hungary, as member of the UN had the obligation of incorporating the provisions of the Covenant into its internal legal system, which required – among others – the broadening of the scope of protected fundamental rights. Hungary joined the Covenant on 17 January 1974, ratified the First Optional Protocol in 1988 and the Second Optional Protocol (on the abolition of death penalty) in 1994. For the ratification of these documents the declaration of the protection of human rights was necessary – at least in sectoral laws – and with this the country also aimed at expressing that it is not against any modern trends and is ready to ensure those fundamental rights which are protected in Western countries. It is disputed, however, whether these requirements were also put into practice or remained just words put on paper.

The thorough and comprehensive modification of the Constitution was realised with act XXXI of 1989⁶ in which most parts of the Constitution received revised wording and content. Among others Chapter XII on Fundamental rights and freedoms was modified thoroughly and it received the text which remained in force until 31 December 2011. Based on this modification article 55 ensured personal freedom and declared that its limitation shall be in compliance with the law (detailed in the newly formulated article 2 of the Constitution). Article 57 was dedicated to the rights and fundamental principles related to criminal law and procedure: in addition to the right to independent, impartial court and to just and public trial [par (1)] it declared the presumption of innocence (2), the right to defence (3), the nullum crimen sine lege principle (4) and the right to appeal (5). This list complies with the requirements set forth in the already mentioned Covenant, but raised the protection to constitutional level, by this expressing its special importance.

The regulations remained unchanged after this modification and the newly introduced FL also contains the mentioned references and declarations, moreover, it added one more which had been missing from the list, even though in practice it was a living expectation: the right to a fair trial. Even though Hungary joined the European Convention of Human Rights in 1993

³ <http://www.1000ev.hu/index.php?a=3¶m=6650>

⁴ <http://www.1000ev.hu/index.php?a=3¶m=8381>

⁵ <http://www.1000ev.hu/index.php?a=3¶m=8487>

⁶ <http://www.1000ev.hu/index.php?a=3¶m=8629>

and has had an obligation to ensure the right to fair trial ever since, it had not been formulated in the text of any laws before.

In its Article III the FL states that “no person shall be subjected to torture, any inhuman or degrading treatment or punishment”, while in Article IV it declares the right to personal freedom and sets the conditions for its limitation. In Article XXVIII it contains a similar list as the one in the Constitution, thus declares the already mentioned right to court and adds the right to a fair trial. In the consecutive paragraphs it states the presumption of innocence (2), the right to defence (3), the nullum crimen sine lege principle (4)-(5), and the right to appeal (7). As another new regulation in paragraph (6) it declares the prohibition of double jeopardy, extending its scope to the judgements of the member states of the European Union. Naturally, this requirement has been known in Hungarian criminal procedure before, but was contained only in the Criminal Procedure Code. It may be stated that the regulations set forth in the FL cover a wide range of those fundamental principles which form core content of the human rights regime.

Fundamental principles in constitutions throughout Europe

The examination of the constitutional provisions of the basic laws of EU member states shed light on the diversity of solutions which are followed by the different countries. The basis of the examination was the list of fundamental principles contained in the FL. I examined whether these requirements are present in the constitutions or are not formulated in its text. The examined constitutions were selected upon availability in English or Hungarian. I did not analyse the basic legal instruments of the United Kingdom⁷, as they do not form one written constitution, even though majority of the procedural requirements are contained in the historical documents, certificates and declarations.

There are countries which offer wide-scope protection of fundamental rights and guarantees of criminal procedure in their constitution, while others are rather short-spoken. For example, the constitution of Greece⁸, Poland⁹, Latvia¹⁰, Lithuania¹¹, Malta¹², Bulgaria¹³, Estonia¹⁴, Portugal¹⁵, Slovakia¹⁶ and Slovenia¹⁷ regulate several principles, while the basic law of Germany¹⁸, the Czech Republic¹⁹, Austria²⁰, Finland²¹, Italy²², Spain²³, Luxembourg²⁴, the

⁷ Such “constitutional statutes” are the Magna Carta Libertatum, the Bill of Rights, the Human Rights Act 1998, etc.

⁸ <http://www.cecl.gr/RigasNetwork/databank/Constitutions/Greece.html>, see articles 5-8.

⁹ <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>, see articles 40-45.

¹⁰ http://www.wipo.int/wipolex/en/text.jsp?file_id=190855, see articles 92-95.

¹¹ <http://www3.lrs.lt/home/Konstitucija/Constitution.htm>, see articles 20, 21, 31.

¹² <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1>, see Chapter IV, especially article 39.

¹³ <http://www.parliament.bg/en/const>, see articles 29-31.

¹⁴ <http://www.president.ee/en/republic-of-estonia/the-constitution/index.html>, see articles 21-24.

¹⁵ http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf, see articles 27-32.

¹⁶ http://aceproject.org/ero-en/regions/europe/SK/Constitution_slovakia.pdf, see articles 17, 46-50.

¹⁷ <http://www.us-rs.si/media/full.text.of.the.constitution.full.text.pdf>, see articles 18-31

¹⁸ http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html, see articles 2, 19, 103, 104.

¹⁹ <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html>, together with <http://sps.prf.cuni.cz/aj/2-93en.htm>, see articles 7-9.

²⁰ <http://www.vfgh.gv.at/cms/vfgh-site/english/downloads/englishverfassung.pdf>, the Federal Constitution of Austria does not say much about criminal procedure – except for the publicity of the hearing – but leaves this topic to the lands.

²¹ <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>, see articles 7, 8, 21.

Netherlands²⁵, Ireland²⁶, Denmark²⁷ and France²⁸ keep it short and brief. Keeping in mind the fact that the examined countries are generally members to the same human rights conventions, it is interesting to observe the diversity of the regulations. However, there is no standard about what the required level of the declaration of fundamental principles and the protection of fundamental rights is in constitutions, but it seems to be undoubted that there are some issues which shall definitely be clarified in the most significant legal document. Furthermore, there is no requirement in any human right treaties or conventions that the member states shall regulate certain issues in their constitution – the requirement is rather that the fundamental principles shall be formulated in the domestic law and shall be applied properly in practice.

In general it may be stated that all constitutions ensure the right to personal liberty and freedom, and describe the forms and conditions of its limitation. The regulations are quite similar to each other in the sense that personal liberty may be limited or detention may be applied only in cases described in law and in a proper procedure. Regarding the term of detention and the rights of the detainee the constitutions differ. In many countries – among them in Hungary – the constitution does not go into detail about the specific rules of detention, these are regulated in the criminal procedure code. In a significant number of countries, however, the constitution states that the detainee may be held under arrest for a specific period of time – usually 48 or 72 hours, in Romania 24 hours – and he shall have access to his lawyer and shall be informed about the reasons of detention. The mentioning of these rules in the constitution may be unexpected, but certainly it provides more guarantees regarding the protection of the detainee’s rights, at least due to the difficulties of modifying these constitutional rules.

The prohibition of torture, inhumane or degrading treatment is also declared in all constitutions.

Regarding the rights of the accused, the presumption of innocence – even though it is one of the fundamental rights of the person subject to criminal procedure – is missing from some basic laws. The Greek and the Finnish constitution do not mention it, for example. In many constitutions there is clear reference to the prohibition to compel anyone to give evidence against himself. Moreover, the constitution of Lithuania, Estonia, Slovenia and Slovakia extends this prohibition to family members and close relatives, which is an unusual solution, as such provisions are usually contained in the criminal procedure code, as in their details they go beyond the sole rights of the accused, and broaden the scope of protection.

Closely related is the right to defence counsel, which is another fundamental right of the accused, especially with regard to the fact that in certain cases the accused cannot perform the defence duties on his own and is in need of a defence counsel. Majority of the constitutions

²² http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf, see articles 13, 24, 25, 27.

²³ http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf, see article 24

²⁴ Nemzeti alkotmányok az Európai Unióban / [szerk. Trócsányi László, Badó Attila]. - Budapest : KJK-Kerszöv, 2005. pp 615-634.

²⁵ Ibid. pp 463-482.

²⁶ Ibid. pp 489-518.

²⁷ Ibid. pp 249-260.

²⁸ <http://www.assemblee-nationale.fr/english/8ab.asp> together with <http://www.diplomatie.gouv.fr/en/france/institutions-and-politics/the-symbols-of-the-republic/article/the-declaration-of-the-rights-of>

grant this right to the accused, but in some countries this requirement is only formulated in the criminal procedure code. For example, such provision is missing from the basic law of Greece but is formulated in – among others – the constitution of Poland, Latvia, Lithuania, Malta, Romania, Portugal, Slovakia and Slovenia.

The *nullum crimen sine lege* principle is a very important requirement, especially regarding legal certainty and the clear behavioural expectations of society and of the law maker. According to this principle one shall not be punished for any act which was not considered a crime at the time of perpetration. This requirement is the basis of the determination of criminal responsibility, thus shall be regulated accordingly. Another related principle is the *nulla poena sine lege* rule, according to which no one shall be punished more severely than what was set forth for the given crime at the time of perpetration. Of these two usually the former one is present in the basic laws, the latter one is rather formulated in the criminal or criminal procedure codes. Therefore, both principles are missing from the constitution of Poland, Latvia, Romania, while one or both are present in the Greek, German, Finnish, Estonian, Italian, Portuguese, Slovakian, Spanish, Dutch and Maltese basic law.

The right to fair trial is a quality requirement regarding criminal procedures which has been worked out and clarified by the European Court of Human Rights.²⁹ The exact contents of a fair trial cannot be listed, but it may be stated that the fairness of a trial may be judged upon the characteristics of the procedure, whether all rights and guarantees were duly respected. All principles and guarantees form part of this requirement, therefore we may conclude that a trial may be considered fair if all principles and guarantees are exercised and protected, both regarding the procedure and the rights and obligations of its participants. This is a core requirement towards criminal procedure, the eventual goal regarding the quality of the procedure of determining criminal responsibility, therefore it shall be regulated accordingly.

Nevertheless, as in Hungary it was not part of the Constitution and was codified for the first time only in the FL, it is missing also from the basic laws of other countries. In the constitution of Poland, Latvia, Lithuania, Malta, Romania, Bulgaria there is reference to the right to a fair trial, while the basic law of Greece, Germany, Estonia, Italy, Slovakia, the Netherlands and Slovenia remain silent about it. However, in these latter cases the set of principles and guarantees defined in the constitution and in the criminal procedure law meets the requirements of a fair trial, only it is not mentioned expressly in the basic law.

With regard to some special cases it shall be mentioned that the constitution of the Czech Republic does not contain any chapter on fundamental rights. Interestingly, a separate document, the Charter of fundamental rights and freedoms, which shall form part of the constitution sets forth some relevant fundamental rights and principles. In France the constitution expressly refers to the 1789 Declaration on the rights of man, which forms part of the constitutional regime and declares fundamental rights, among them the ones relevant in criminal procedure. The Maltese constitution gives very detailed regulation with regard to the rights of the accused in criminal procedure, so detailed that one may have a feeling of reading the criminal procedure code instead of the constitution.³⁰ The Bulgarian constitution declares

²⁹ For details see: A guide to the implementation of Article 6 of the European Convention on Human Rights. Human Rights Handbook Nr. 3. <http://echr.coe.int/NR/rdonlyres/687924D0-A8FF-4EE7-99C8-1707A6FCF466/0/DG2ENHRHAND032006.pdf>

³⁰ It even regulates the obligation to give copies to the accused from the file of the case.

that “no one shall be convicted solely by virtue of confession”³¹, a provision which is more common in criminal procedure codes than in constitutions, and is a basic principle of the evidence procedure. The constitution of Estonia stresses the publicity of hearings and the public announcement of judgements. It also refers to the use of the mother tongue, therefore to the right to interpreter as a fundamental right of the accused. The Finnish constitution states that the detailed regulations about the right to court and the rights in procedures (appeal, defence, etc.) shall be regulated in acts. The Slovakian constitution declares the right of the accused to remain silent, a right which is usually not regulated at constitutional level. Instead of ‘fair trial’ the Spanish constitution’s wording regulates ‘public trial with full guarantees’.

The prohibition of double jeopardy is not common in the basic laws, only the constitution of Germany, Lithuania, Malta, Estonia, Slovakia and Slovenia. The right to appeal is rarely mentioned, except for, among others, the constitution of Portugal, Slovenia and Denmark.

Conclusion

Following the examination of the above mentioned constitutional provisions it may be stated that the Hungarian FL offers medium level protection of fundamental rights and guarantees in criminal procedure, several requirements are formulated in the criminal procedure code. There are some constitutions which offer more, there are some which offer less. In general the impression is definitely positive, because all constitutions consider it important to regulate at least the most important issues, such as the freedom of personal liberty and its limitation by law, and the prohibition of torture, inhumane or degrading treatment. Moreover, all constitutions offer something else in addition to these, even those which dedicate only few paragraphs to criminal procedural rights. Some declare the right to defence counsel, others state the presumption of innocence or the right to interpreter.

Therefore it may be generally stated that the overall picture of the protection of fundamental rights is promising, majority of the countries offer more than sufficient protection, at least compared to the Hungarian FL. Furthermore, several constitutions provide broader protection than the Fundamental Law, as they contain detailed provisions majority of which are contained in the criminal procedure code of Hungary, not in the FL.

In my opinion the regulation of these fundamental rights and guarantees, as well as the detailed provisions of criminal procedure regarding detention or the further rights of the accused in the constitution is important but beyond a certain level it is rather symbolic, proving the commitment of the legislator to the enforcement of such requirements. It is also noteworthy, however, that in most cases the regulations of the constitution are more permanent, more difficult to modify than the rules of the criminal or criminal procedure code, therefore this consideration may reason the inclusion of rather detailed regulations into the constitutions.

³¹ Article 31.2

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