Some reflections on historical elements in contemporary written constitutions: selected examples and a recent case in Hungary

Stephan Foldes, University of Miskolc
Some reflections on historical elements in contemporary written constitutions: selected examples and a recent case in Hungary

Stephan Foldes

Notes for discussion and comments, 31 August 2012

Any views expressed in these notes are those of the author only, they do not purport to reflect views of the academic institutions with which the author is affiliated.

Author’s email address for comments and correspondence: istvan.foldes@web.de

1. Interpretation of historically based constitutional provisions

Codified, written constitutions bear the mark of the historical circumstances in which they are born, but they have a limiting effect on the relationship that a legal system has with its own historical past. Nonetheless, the framers of a constitution may choose to include provisions of previously valid written or unwritten law, previously accepted legal principles, or previously established legal institutions as part of the new foundations that they intend to lay. This may be done by pre-existing sources of law being explicitly referred to in the constitutional text, or by the provision of some form of constitutional guarantee or protection for certain rights whose historical pre-existence might be established by judicial or scholarly interpretation. Early examples of this latter type of reference to fundamental rights are seen in the Constitution of the United States of America, where the rights referred to in the First, Second, Third, Seventh and Ninth Amendments appear as presumed, pre-existing rights, not called into existence by these Amendments, but only preserved or protected against being abridged, infringed, violated, denied or disparaged. Interpretations of these rights, chiefly by the Supreme Court, may then endeavour to uncover their origin in the constitutional regime of the United Kingdom, in order to determine their historical content: witness the 2008 case of District of Columbia et. al. v. Heller involving the Second Amendment.

Constitutional enactments need interpretation, as much as other acts of the legislator, and opportunities of historical interpretation may need to be recognized, used or rejected. Such opportunity can appear as the occasion offered either by the specifics of a case to be judged, or by some specific provision of the written constitution itself. At the same time questions of appropriateness may also arise: is it opportune or inopportune, is it useful or desireable at all, that historical interpretation be relied upon in a case involving a provision of a codified constitution? This seems to have been a key issue in a recent decision of the Constitutional Court of Hungary that brought into play Article R) of the Fundamental Law of Hungary in effect since January 2012, requiring the interpretation of provisions of the Fundamental Law itself in light of historical constitutional law, and which the Court applied to the judicial independence provision of Article 26 (1) of the Fundamental Law.
2. Historical elements in Swedish and Canadian constitutional enactments

Some countries, like Sweden and Canada, while not having a single document that can be called their written, codified constitution, do have a small number of separate but interrelated fundamental texts governing their legal system. Although the aggregate of the texts in question may not amount to a codified constitution, each of them has constitutional status. For each separate text the issue of its interpretation may have to be faced, not only in its connection to the other texts, but in light of previous historical elements of written or unwritten constitutional law, of national history, or of religious tradition. Such historical elements may be explicitly mentioned in the constitutional texts themselves. This is notably the case of one of the fundamental laws of Sweden, the Act of Succession of 1810 last amended in 1979, which in particular continues to limit the religious freedom of members of the royal family with reference to the Confession of Augsburg of 1530 and to the Resolution of the Uppsala Meeting (of the Church) held in 1593. Another example, in the Constitution Act, 1982 of Canada, is the reference to aboriginal treaties, and then in the Constitution Act, 1867 of Canada, the reference to the principle of similarity with the constitutional regime of the United Kingdom. The latter prompted in particular the Supreme Court of Canada to examine the applicability of the English Bill of Rights of 1689 when rendering a decision, in 1993, in the case of New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly) involving the limitation of media access to parliamentary proceedings.

3. Constitutions with historical references of limited scope

The scope of historical references in the preamble of a constitutional enactment tends to be general, applicable to all persons and encompassing all areas of law: some of these constitutions will be discussed in the next section.

On the other hand, some constitutions have no preambles, and even when they do, they seem to exhibit an intention to refrain from all-encompassing generalities rooted in history. It is then within particular chapters devoted to certain areas of law that special provisions of historical origin may be found, relating to a particular subject, to a well defined geographic territory, or to specific institutions. The constitutions of Norway, Belgium, Finland, and Luxembourg, discussed below, have no preambles, while in the constitution of the Federal Republic of Germany it is not in the Preamble, but in articles dealing with particular subjects that concrete historical content is to be found.

For example, the Constitution of the Kingdom of Norway, laid down in 1814 and in force today as last amended on 21st May 2012, makes now only a couple of references to religious organization antecedent to the written constitution. Article 2 no longer declares that the Evangelical-Lutheran religion is the official religion of the state (nor does it impose any duties on parents in that respect), although Article 4 still obliges the King to profess the Evangelical-Lutheran religion, and the second sentence of Article 16 seems to preserve some
of the special status of the Evangelical-Lutheran Norwegian Church - weakened, however, by the equality provision of the fourth sentence. Article 2 now refers to Christian and humanist inheritance, which are to remain "the basis of our values". The provisions of Articles 12 and 27 concerning the Council of State involve religion no longer. One may speculate about the interpretations that may be given, in the context of any further constitutional amendments in the direction of complete secularization, to the provision of Article 112 that amendments should not contradict the "principles embodied in this Constitution" or alter its spirit. Finally, we note that, other than in relation to religious matters, historical law still appears in Article 107 which provides for the continuation of certain rights related to alodial property and primogeniture.

Even more limited is the scope of historical antecedents in the Constitution of Belgium, adopted in 1994 and subsequently amended, where reference is made to some religions being recognized religions ("religions reconnues") in the context of a provision of Article 24 relating to public education.

Religious organization is also within the scope of pre-existing legislation brought into a contemporary republican constitution, the Constitution of Finland (Suomen perustuslaki, Finlands grundlag) adopted in 1999, which refers to previously enacted legislation concerning the Evangelical Lutheran Church (Section 76). The only other element of historical law in that constitution concerns the special status and autonomy, in particular in legislative matters, of the Åland Islands (Sections 75 and 120).

In several contemporary monarchies one common function of a written constitution is to codify the rules for succession in the position of head of state. The rules of succession can be provided by reference to older acts or treaties. In the Constitution of the Grand Duchy of Luxembourg, adopted in 1868 and subsequently amended, this is actually the only historical element of law that the constitution includes: hereditary succession of the Crown is regulated by Article 3, which refers to a family pact of 1783, the Treaty of Vienna of 1815, and the Treaty of London of 1867. Otherwise that constitution is entirely modern and devoid of historical references.

Historical elements are also scarce in the Basic Law (Grundgesetz) of the Federal Republic of Germany adopted in 1949 and last modified in 2012. Article 29(1) provides that in future revisions of the subdivision of federal territory, historical and cultural relationships are to be taken into account. Perhaps more significant is Article 140, which provides that several articles of the German Constitution of 1919 (Weimarer Verfassung) shall be integral part of the Basic Law. These articles relate to religious organizations and practice; religious non-discrimination, freedom, and privacy; and the absence of an official religion.

4. Historical references with general scope or pervasive intended effect

A constitutional act may refer not only to previously enacted statutes or pre-existing institutions, but also to declarations of principles that are part of national history, or to the
historical origins of the legal system and of the nation-state in general. The preamble of a constitutional act is one place where such references can occur, as early as in the Constitution Act, 1867 of Canada, discussed above, and as late as in the Fundamental Law of Hungary, 2011, and between those dates in the written constitutions of Ireland, France, the Republic of Turkey, the Slovak Republic, and the Czech Republic.

The Preamble of the Constitution of Ireland, enacted in 1937, refers explicitly to history, to “centuries of trial” and the struggle to regain national independence. However, the principles of legitimation that it enunciates are religious and specifically Christian, and it has been argued that this reflects the theocratic aspect of the history of the state and of the legal system. These issues were considered from both the legal and political points of view in Senator Ivana Bacik’s Philip Monahan Lecture at UCC, 19th November 2009. At least in one instance, the Supreme Court of Ireland considered the main moral principles enunciated, Prudence, Justice and Charity, as principles rooted in ancient philosophy and historical Christianity relevant to the interpretation of the Constitution (McGee v. The Attorney General, 1974). But beyond the Preamble, Article 41.1 contains a recognition of elements of natural law relative to the family in terms of ”a moral institution possessing inalienable and inprescriptible rights, antecedent and superior to all positive law”, while Article 43.1 contains the statement that ”man, by virtue of his rational being, has a natural right, antecedent to positive law, to the private ownership of external goods”. The wording here indicates a conception of natural law as historically based natural law. The question whether precedence of natural law over all positive law should also mean precedence over other written provisions of the country’s codified constitution was tested, with a negative conclusion, in a 1995 Supreme Court case (S.C. No. 87 of 1995). In that case the Court upheld the constitutionality of a Bill concerning information on pregnancy termination services outside Ireland, which was passed that year based on provisions of the Fourteenth Amendment of the Constitution Act, 1992. On that occasion at least, the Supreme Court thus asserted a principle of changeability of the law, notwithstanding historically based elements of natural law that are included in the Constitution. Finally, on the subject of historical law being explicitly incorporated in the constitution, Articles 49 and 50 should be mentioned, as they recognize powers and rights that existed in the former Irish Free State to continue to exist, but declare them to belong now to the people of Ireland, and also provide for the continuation of laws of the Irish Free State subject to their compatibility with the new Constitution.

In the Constitution of France of 1958, subsequently amended and currently in force, the Preamble contains a proclamation of attachment to rights and principles that are described in the Déclaration des Droits de l’Homme et du Citoyen, adopted in 1789, in the Preamble of the Constitution of 1946, and in the Charter of the Environment of 2004. The preamble of the Constitution of 1946 already contains a reaffirmation of the rights contained in the Declaration of 1789. These rights appear to be based, at least partly, on natural law: witness the reference to ”droits naturels” in the preamble as well as in Articles 2 and 4 of the Declaration. The preamble of the Constitution of 1946 also contains a brief reference to recent history (to the then recent victory of the free peoples), and to historical traditions on a more remote horizon, namely to conformity with international public law, to the mission of France.
in relation to peoples for which France has taken a responsibility (peuples dont elle a pris la charge), and to fundamental principles acknowledged (principes fondamentaux reconnues) in pre-existing law. Finally, the Charter of the Environment of 2004 contains one of the least precise but most encompassing historical references as it speaks of the "émergence de l'humanité".

The Preamble of the Constitution of the Republic of Turkey, adopted in 1982 and subsequently amended, mentions "historical and moral values" among the basic principles. The importance of these principles is reinforced by Article 2, which provides that the state governed by the rule of law is "based on the fundamental tenets set forth in the Preamble". For greater certainty, Article 176 (1) provides that "[t]he Preamble, which states the basic views and principles underlying the Constitution, shall form an integral part of the Constitution". However, the main time horizon of historical memory in the Constitution seems to be that of modern Turkish history, corresponding to the founding of the Republic by Atatürk, as the text of the Preamble’s historical reference indicates, where within a same sentence it refers to "Turkish historical and moral values or the nationalism, principles, reforms and modernism of Atatürk". Article 174 in particular provides that "[n]o provision of the Constitution shall be construed or interpreted as rendering unconstitutional” certain "Reform Laws” introduced by legislation between 1924 and 1934 concerning mainly education, civil marriages, titles of nobility, and religious institutions.

In the Constitution of the Slovak Republic, adopted in 1992 and subsequently amended, some natural law principles are also mentioned briefly and without reference to historical antecedence or superiority to positive law: the Preamble recognizes the natural right of nations to self-determination, and Article 134(4) provides that judges of the Constitutional Court, in their oath before the President of the Slovak Republic, commit themselves to protecting "the inviolability of natural human rights and rights of a citizen”. Explicit mention of history only appears in the Preamble, which refers in general terms to political heritage, centuries of struggle for national existence and statehood, the spiritual bequest of Cyril and Methodius, and the historical legacy of Great Moravia.

The Constitution of the Czech Republic, adopted in 1992, promulgated as Constitutional Act No. 1/1993 Sb and last amended in 2009, is the principal enactment among a number of constitutional acts that determine the constitutional order of the Czech Republic (similarly in that respect to the constitutions of Sweden and Canada which include more than one fundamental law of constitutional status). The Preamble of Constitutional Act No. 1/1993 Sb refers specifically to "good traditions of the long-standing statehood of the lands of the Czech Crown, as well as of Czechoslovak statehood” and to "material and spiritual wealth handed down to us". Article 112 is more precise about the historical legacy of statehood, in that it assigns constitutional status to those legislative acts of the Czechoslovak Republic, and of the Czech and Slovak Republic, that define territorial boundaries. Constitutional status is also assigned to the Charter of Fundamental Rights and Freedoms of 1992, last amended in 1998, which in its preamble refers to the "nation’s traditions of democracy and self-government” and to the "bitter experience of periods when human rights and fundamental freedoms were supressed”. Article 1 of the Charter states that fundamental rights are “inherent”. In contrast
to the Constitution of Ireland, however, it stops short of declaring the precedence over positive law of any natural law principles, in the sense of being historically antecedent or superior in any way to positive law.

In the Fundamental Law of Hungary of 2011, which entered into force on 1st January 2012, the preamble (Avowal of National Faith) includes references to the historical foundations of the Hungarian State as a state within Christian Europe, struggles for national independence, the country’s different religious traditions, the achievements of the country’s historical constitution, constitutional continuity and its period of interruption due to foreign occupations (which period includes the codification of a constitution in 1949), and to the events leading to the 1990 recovery of the country’s self-determination after its loss in March 1944. Moreover, Article R) paragraph (3) provides specifically that the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the preamble, and with the achievements of the country’s historical constitution. Hungary’s historical constitution is understood to comprise both written and unwritten elements prior to the constitutional enactment of 1949.

5. **Ratio decidendi and dissenting opinion in a recent case in Hungary**

A very recent case brought before the Constitutional Court of Hungary illustrates some of the issues raised by the inclusion of historical elements in contemporary codified constitutions. On 16th July 2012 the Constitutional Court, ruling in plenary session of the fourteen judges, declared repugnant to the Fundamental Law and invalidated with retroactive effect two provisions of a statute that entered into force on 1st January 2012 (on the same day that the Fundamental Law entered into force). Seven of the fourteen judges disagreed with the decision and formulated dissenting opinions. The rationale for the Court’s decision included, among many considerations, the application of Article R) (3) of the Fundamental Law, while one of the dissenting judges expressed, among his objections, his concern about the manner in which the historical interpretation provision of Article R) was applied. The opposing arguments relative to the application of Article R) are summarized below.

The statute under constitutional review, Act XCLIII of 2011 concerning the legal status and remuneration of judges, had subsection **ha)** of its Section 90 and also its Section 230 invalidated by the Constitutional Court. Section 90 provides for the mandatory retirement of judges under any one of several conditions, among which subsection **ha)** specified the attainment of an upper age limit. In conjunction with other provisions of law according to which the age limit referred to in subsection **ha)** is calculated, subsection **ha)** had the effect of forcing into retirement judges whose tenure was to last until age 70. According to data provided by the Government (executive branch), this affected 274 judges. Section 230 regulated the schedule of retirements in 2012.

The Court first examined the implications of Article 26, paragraph (1) of the Fundamental Law, which provides in particular that “judges shall be independent”. The Court deemed it necessary to develop an interpretation of this provision, taking into account the historical
interpretation rule of Article R). In the opinion of the Court the elements of Hungary’s historical constitution that should be counted among its “achievements” were to be determined by the Court itself. The Court determined that these achievements included the non-removability of judges. In Hungary the principle of non-removability of judges was first formulated, as being a component of judicial independence, in Act IV of 1869, Section 15, and reinforced by Act IX of 1871. The Court thus interpreted the judicial independence provision of Article 26(1) of the Fundamental Law as including the principle of non-removability, and based its authority to make this interpretation mainly on Article R) of the Fundamental Law itself. This appears as a significant reason for the Court’s determination that Section 90, ha) and section 230 of Act XCLIII of 2011 violated the Fundamental Law, and for its decision to invalidate these provisions of Act XCLIII.

One of the dissenting opinions, that of Judge B. Pokol, expressed disagreement with the manner in which the historical interpretation provision of Article R) was applied. The dissenting judge pointed to problems with citations referring to memories of legal history, and cautioned that the notion of interpretation in light of the achievements of the country’s historical constitution has not yet been sufficiently elaborated. He maintained that what the Court cited from the laws of 1867 and 1871 were mere details of a past regulation, and warned that attributing to these a binding force today would contradict the principle that positive law is changeable, leading to a degradation of the idea of a historical constitution. The dissenting opinion proposes that before proceeding uncautiously on this road, separate analysis of the possibilities offered by Article R) would be needed, and suggests that a separate session of the Court might be devoted to carrying out this analysis.