

Interview

The Rule of Law in Hungary

An Interview with Dr Kálmán Kulcsár

Dr Kálmán Kulcsár was elected Justice Minister by the Hungarian Parliament in June 1988. As the government's chief jurist, the 61-year-old Dr Kulcsár is responsible for supervising the codification of the government's ambitious legislative programme, which includes a new constitution and a law on freedom of religion and conscience. Both are due to be enacted by the Hungarian parliament in 1990. In January of this year Dr Kulcsár steered through Parliament a law on association, which enables unofficial organisations, including religious groups, to function as independent legal entities without first obtaining government approval. In February he announced that the Justice Ministry would review political trials involving church men and women between 1948 and 1962, including that of Cardinal Mindszenty. A distinguished sociologist of law and member of the Hungarian Academy of Sciences, Dr Kulcsár belongs to the currently ascendant reformist wing of the ruling Hungarian Socialist Workers' Party. Speaking with John Eibner in January 1989, Dr Kulcsár discussed the principles governing his plans for the reform of the country's political and legal system and how these principles relate to church-state relations.

Q. For years it has been said by senior Hungarian statesmen, including János Kádár, that 'socialist legality' had been reestablished in Hungary after 1956.¹ The new post-Kádár leadership now says that it is necessary to create a state in which the 'rule of law' prevails. What, in your view, is the difference between these two concepts?

A. I think 'socialist legality' is an artificial term, which emerged from a less than excellent political context. It became a political and ideological slogan after the introduction of the Soviet Constitution of

1936; a time when there were very serious problems of legality in the Soviet Union. I have never been able to understand the concept of 'socialist legality'. Legality either exists, or it does not. This term 'socialist legality' has a very bad reputation among lawyers and political thinkers precisely because of its undefined content and because of the context in which it developed. We are now trying to move to the idea of the 'rule of law'. Perhaps it would be more precise to use the term '*Rechtsstaat*', rather than the 'rule of law' because we have a continental rather than an Anglo-Saxon legal tradition. This means that we are developing an approach to legal and political issues according to the principle: whatever is not explicitly forbidden by the law is legal. The term *Rechtsstaat* was first used in Germany in the second half of the 19th century. But then it had had only a formal meaning. That is to say, every rule and regulation was regarded as legal provided it was the product of the prescribed legal procedure. The content of the rule or regulation was immaterial. From this point of view we can rightly regard Hitler's Germany as a *Rechtsstaat* because Hitler was elected legally and he used one of the provisions of the Weimar Constitution to legalise all of his activity. Therefore, as we transform Hungary into a *Rechtsstaat*, we wish to do so not only formally, but also in a principled way. The principles we wish to apply are those that provide the underpinning of the 'rule of law' in Britain. These principles should be incorporated not only in the text of the Hungarian Constitution, but should pervade the entire legal system. It is not enough to declare certain basic principles in the Constitution and then forget about them. These principles must apply equally to the state, the individual and corporate bodies. During the period of 'socialist legality' it was possible to forget about these principles.

Q. At the present time rights expressed in the Hungarian Constitution, for instance the right of religious freedom and the separation of church and state, reflect aspirations rather more than guaranteed rights. If it was possible to forget about principles enshrined in the Hungarian Constitution under 'socialist legality', how will the rights of the citizen be guaranteed when the 'rule of law' becomes a reality in Hungary?

A. I agree with Edmund Burke who, when writing about the French Revolution, said that it is one thing to make a declaration, but it is another thing to realise it. In Great Britain the situation is better than in Hungary, because human rights and the rights of the citizen developed over centuries. But Hungary too has constitutional roots. The idea of constitutionality forms an important part of Hungarian political thought, and it was developed early in the Hungarian legal

culture, so it is not an entirely alien concept that needs to be introduced now. First of all we have to declare all these rights without any qualifying clauses. The Hungarian Constitution today includes some human rights clauses, but we also have some qualifying phrases. For instance, the Constitution gives every citizen the right to express his or her opinion, but only if it is in the interest of the socialist society. In virtually every case one can find a qualifying clause of this kind. We will have to leave such clauses out of the new constitution. Secondly, we have to enact legislation that will in a more concrete way reinforce the human rights provisions of the Constitution. For example, the Hungarian Parliament has just passed a new law on association and assembly, which created the legal possibility for the citizen to practise the abstract right found in the Constitution. We have to change the legal system so that it will be in harmony with the rights declared in the Constitution. The most difficult task will be to force organs of state in Hungary to act according to the Constitution.

Q. You have spoken in recent months about the need to establish an independent judiciary. Is this the way in which the arbitrary and unconstitutional actions of organs of state can be checked?

A. Yes. This is one of the most important means. In Eastern Europe, not only in Hungary, there has never been a real independent judiciary. Such a judiciary did not exist even in the old historic Hungary, which had an 'unwritten' constitution. The three branches of government, the executive, the legislative and the judicial were never entirely separate. The judiciary was always directed by the Minister of Justice, who was an agent of the executive branch. Therefore, the idea of an independent judiciary is quite new in Hungary now. Nevertheless, the idea should be realised entirely. It is interesting that although the courts are aware of their independence in passing sentence in practice, they are not very eager to accept all the organisational consequences of the establishment of an independent judiciary. Some of the opposition results from the day to day reality of the Hungarian situation. For example, judges fear that if the Minister of Justice is not responsible for the court system, there will be no one to represent their interest in the Council of Ministers, and, in particular, in the Budget Office. Nevertheless, we are trying very hard to establish an independent judiciary. But reforms of the law and public administration are not all that is required. There is a cultural dimension to the issue of reform. There are retrograde attitudes among the public, and within the legal profession that have to be changed if constitutional rights are to be properly guaranteed. This will be very difficult indeed.

Q. It would seem that in Eastern Europe the courts have for centuries operated under the assumption that the state has the right to restrict freedom wherever freedom is not unambiguously guaranteed by statute law. Do you think it will be possible to change this mentality which has many centuries of tradition behind it?

A. This will be very difficult, but we must begin to try. Let me give you a surprising example of how this assumption is still valid among the Hungarian public. When we published the draft bill on public assembly for public discussion prior to the debate in Parliament, we encountered a great deal of suspicion because the bill did not specifically refer to religious assemblies and electoral meetings. Many people asked what kind of bill this is because one of the most important rights of the citizen is to participate in political meetings that are a part of the electoral process and this bill, they thought, does not allow it.

However, we started from the assumption that whatever was not forbidden by the law was permitted, and that exclusion from the bill did not mean such gatherings would be illegal. Our position was that they are free to participate in such electoral meetings. I then had to explain that we do not want to regulate these types of assembly.

Q. Why is there a need for laws on associations or religious freedom if in the Hungarian *Rechtsstaat* everything will be permitted that is not forbidden?

A. In the Anglo-Saxon world there is no tradition of laws of this kind, neither in Britain nor the United States. But such laws can be found in virtually every European country, for example, in France and the Federal Republic of Germany. This is because there is a difference between the Anglo-Saxon and the continental legal systems. Under the common law system human rights are under the protection of the courts. This has evolved over the course of centuries. On the continent there is a constitutional — i.e., *ius publicum* — system. So, if we did not pass laws on associations and religious freedom, but had only constitutional rights, it would have been the source of a lot of conflicts. If the matter was not regulated then every one would interpret the right in his own way.

Q. During the parliamentary debate on the association law the Reformed Bishop Károly Tóth asked for the bill to include a clause forbidding religious associations from using the name of a church in their title without the permission of church leaders. On what grounds did you agree with this request?

A. This question of name applies not only to the churches. If somebody is already using the name, be it a person or an organisation, I think it should be protected in this way. For example, the Catholic Church is an organisation that has developed over the centuries, and has its own hierarchy and legal system. It must therefore be given the right to express its opinion if some other organisation wishes to use the name 'Catholic'.

Q. It is natural that legal experts should think of the churches in legal terms. But they are not just legal entities. They are spiritual and cultural communities. It would seem from what you are saying that a group of faithful Catholics, for example, could not legally describe their association as Catholic unless they had the approval of the hierarchy.

A. This was a demand that was unanimously expressed by the leaders of all the churches, not only the Catholic, but also the Reformed and Lutheran Churches, the Baptists and others.

Q. Will the new law on association apply only to unofficial religious groups and will official church organisations fall under the jurisdiction of the new law on freedom of religion and conscience.

A. I do not think this question has yet been settled. It will depend a lot on the new law on religious freedom. Of course, I am sure there will be a great debate on the preparation of the new law on religion. It is a very interesting question that can be solved only by answering the question: are the churches in society part of the public order or are they absolutely private organisations? This question has not been fully answered in Europe, or in Great Britain. I am ready to raise the question when I become involved in the preparation of the new law. Right now I don't want to interfere, because in the present stage of the preparation it is up to the churches and the State Office for Church Affairs. But this will be my first question for them for this is a basic question. However, I am afraid that almost every church in Hungary wants to preserve its own special status in relation to the state and wishes to think of itself as a public body with special rights.

Q. There are some anomalies between the constitution and statute law, on the one hand, and practice, on the other, when it comes to religious questions. For example, the present Constitution calls for freedom of religion. Yet there are some religious groups, such as the Jehovah's Witnesses and the unofficial Adventists, that are regarded as illegal. The Constitution calls for the separation of church and

state. Yet Hungarian statesmen publicly acknowledge the need to create 'greater separation'. There is a State Office for Church Affairs that can arbitrarily legislate on religious questions. No senior church leader may be appointed without the prior approval of the state. The larger churches receive financial subsidies from the state. A law of 1947 calls for equality between religious denominations, yet today there is a hierarchy of churches. There are legally recognised churches that receive state subsidies, legally recognised churches that receive no subsidies, unrecognised churches whose clergymen have been granted preaching licences, and unrecognised churches that are regarded as illegal. Do you think these anomalies will be removed in the future Hungarian *Rechtsstaat*? If not, will the constitutional clauses regarding religious freedom and separation of church and state disappear if the *de facto* situation does not correspond to the requirement of the Constitution?

A. Nowadays the *de facto* and *de jure* situations are different not only regarding the church, but generally. Of course we are going to try to eliminate the differences. The only solution is to make the law correspond to the *de facto* situation, because in my view as long as there are these differences there will be frustration. There are signs of this frustration in the field of religious affairs. The Jehovah's Witnesses are not regarded as a legal body in Hungary, but they have *de facto* freedom, because nobody wishes to interfere in their affairs. If we want to change the situation, we have to change the law. There have always been differences between the law and reality. Sometimes the law is more advanced than the *de facto* situation. Sometimes the reverse is the case. We have to see this as a movement or a process. It is never a static state of affairs. As to the Constitution, we have the consequence of history. After the war there was a land reform, which deprived the historic churches of property that was necessary for their maintenance. The state then had to give them some compensation. So the state provides subsidies to those churches which lost property. This was a part of the legal basis of the whole arrangement at the time. Those churches which lost no property receive no subsidies from the state. How to regulate this in the future is an open question. There are several possible solutions. We can maintain the present system with financial help coming from the state. And if this is accepted by the churches, they must also accept with it some kind of interference from the state. The two go hand in hand. You know there is an ancient right belonging to Hungarian kings, which enables them to make proposals and give consent for the filling of certain offices in the Catholic Church, though, of course, this was never the case with regard to the Protestant churches. I am not aware of any state in the world that

allows the Pope to appoint bishops without some possibility of interference. It is interesting in Hungary that we always wish to preserve some form of historic continuity. But I have no definite opinion on this subject at this point.

Q. Would it be right to say that the creation of genuine separation of church and state does not have a very high priority as you seek to establish a system based on the rule of law?

A. Probably not at present, but I am ready to accept a complete separation. It must be remembered that complete separation means the abolition of financial help from the state. I don't think this will be acceptable to church leaders and church folk generally. At the time of the land reform the population was very much opposed to the confiscation of church property. If they were to realise that financial subsidies were to be abolished, I don't think they would be in favour of separation.

Q. The State Office for Church Affairs was established in 1951, the height of the Stalinist period in Hungary. In light of the declared intention of the Hungarian Government to remove Stalinist structures and institutions from society, what future, if any, does this institution have? If it does have a future, what should its role be?

A. It is my opinion, which is shared by some members of the government and experts, that we don't need this special institution. I think that the Ministry for Culture and Education can handle any business that needs to be conducted between the churches and the Council of Ministers, if there is any such business. If the State Office is retained, I don't know what its functions should be. If the state is to continue subsidising the church or if state approval is necessary for the highest church appointments, then it may have a function. But I am not sure that we need a special organisation for these purposes, because, according to my own experience, every organisation is ready to enlarge its own sphere of competence. If we want to create a system that is in conformity with 'the rule of law', we have to consider this question very seriously but I must stress that this is my personal opinion. Right now I don't know just what solution will be reached.

Q. What validity have the decrees — some of which remain unpublished — of the Chairman of the State Office for Church Affairs?

A. Various government offices have too much power. That is why the legal situation in the country is so confused and overregulated. Frankly speaking, I don't know about these decrees of the Chairman. I have never seen one. This is perhaps my shortcoming. The Chairman, as Secretary of State, has the right to issue some orders. This is legal on the basis of the law dealing with the decrees of Secretaries of State. There are restrictions on the use of these decrees, which have never been properly taken into account by many State Secretaries and Ministers. This has had especially tragic consequences in the economic field. We are now trying to bring some order into this area. I am opposed to decrees that are not published. I cannot accept this. I am very much against it.

Q. Do you know of any plans to amnesty the conscientious objectors to military service in advance of the new law which will make provision for alternative service?

A. From the very beginning I thought it unwise to sentence these people for those actions that are soon to be legal. But I have no means to force the courts to act according to my opinion. This is unfortunately one sign of the independence of the judiciary. I am sure that there will be an amnesty, but probably only when the bill becomes law.* This will take place rather soon.

*Since this interview took place, an amnesty has been passed for all those sentenced for conscientious objection to military service, *Ed.*