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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

SPEECH

ON THE OCCASION OF THE 24TH MEETING OF THE VENICE COMMISSION (7-9 September 1995)

by

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Speech of Dr Vastagh Pál,
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Liberties and Statehood in the Hungarian Constitution Making Process

Ladies and Gentlemen,

Expressing my thanks for your kind invitation and the possibility given by the distinguished Venice Comission to discuss the key features of the ongoing Hungarian Constution making process, I would like to seize the opportunity to base this short contribution of mine on the regulatory concept of the new Hungarian Constitution elaborated by the advisory team of the Hungarian Ministry of Justice following a wide-scope scientific preparation. It seems to be sensible to compare our domestic endeavours with the European tendencies first.

The history of the development of the Hungarian public law has again been following the mainstream of European constitutionalism since 1989. The present upsurge is the third great wave of the modern European constitution making. The first two took place in the years following the World Wars of the 20th century, whereas the actual period of constitution making evolved during and after the changes of political systems in 1989. In the new Central-European democracies this is the period of negation or rejection, which after the so-called Socialist experiments (1949-1989) as a negation of negation means a return to the standards of European constitutionalism. (1) The present processes of constitution making constitute an integral part of this third wave. What makes and to what extent our notions sensible and, if I can use the terminology of micro-electronics often used today, euro-compatible?

In the course of our constitution making, with the consent of the significant political forces we did away with the approach that originates from the description of the social, economic and political system. We highlight the individual liberty, freedom of enterprise, the civic virtues and the autonomy of civil society.

The European constitutional traditions which originate from human rights and political liberties of citizens, complement the regulations that set the limitations and bounds of the intervention of state. The aim is to declare a system of state institutions which does not strive to plan and guide the overall social and economic movements. The principle of the classic constitutional state also contains the point of view **that the individual is at liberty to do anything that the laws do not prohibit, whereas the state is only entitled to act in accordance with what it has been legally empowered for.** The state authority and the organisations of the public administration cannot act contra legem, neither by evading the law, nor even in the lack of legal authorisation. The basic principle of state-organisation with which the idea of constitutional state can be realised is the separation of powers. This gives a framework to the wielding of power and this ensures that the state institutions and the different branches of powers mutually check each other and act in accordance with their function and spheres of authority.

Since 1990 our Constitutional Court can assert principles of natural right and the constitutional bounds and protect the most important values and principles through basic rights jurisdiction beyond the level of formal equitableness and legality. We superseded the classic positivist notion of a Constitution set up by Georg Jellinek's book which had been considered as

representative by the European literature of constitutional law for a long time. The definition of the "Allgemeine Staatslehre" was that "a Constitution as a regulation contains all the maxims of law that refer to the highest institutions of the state, they lay down their relations with each other, their spheres of activity and the basic relationship of the individual to the state authority"). In these aspects our new concept contains not only descriptive solutions but resolutions that prescribe the fundamental rights and ensure their legal guarantees.

During the transition period in Hungary the role and importance of the juridical controll on public administration has increased in accordance with the demands of constitutional governing. It is a logical tendency in the 20th century that the social and economic functions of the state have broadened. This has been projected in the constitutional law to the European Charter of Economic and Social Rights. The judicial revision of the acts and decisions of the public administration has gained significant importance. The legality of the acts of the public administration can be questioned by independent jurisdiction without any taxative restriction.

There has been a change in the relationship of the domestic law and international law, which also constitutes a part of recent European trends. As opposed to the recent past, the primary importance of internal law, the role of international law, the various international treaties and charters, being also expressed in integrations, is now preferred. This means an increasing convergence and harmonisation of national laws, and politically the self-restriction of the sovereignty of a national state in an increasingly global world that is built on mutual dependence. As an

expression of these tendencies we came upon the idea in the process of constitution making that we should, perhaps, introduce the monist solution instead of the dualist principle.

The already mentioned European standards have been principally in effect in Hungary since 1989. Our law in its totality follows the mainstream of the European development of constitution and law. If this is true, you might ask why we need a new constitution at all.

The main aims of the constitution making can be listed as follows:

a) **law-technically, structurally and in its normative material a coherent constitution should be created**

b) which is based on the system of values of the civil constitutional state, that is, of the **constitutional governing and law providing legal security**

c) in the institutional framework of the system of **parliamentary democracy** and its form of **governing**

d) **stabilises and terminates** the peaceful transition into plural democracy and social market-economy in Hungary.

I also share the evaluation of the situation which states that there is no emergency in the process of constitution making. The reason for this is that with the help of Act XXXI. of 1989 and due to its amendments the constitutional principles and institutions of a modern pluralist democracy have been functioning in our country. Nevertheless, I am convinced that the creation of the new constitution can become a national issue and the process of constitution making provides opportunity for the establishment of new political consensus.

Political, professional and scientific points of view also support the above statement. The present patched constitution cannot only be criticised because of its structural and law-technical form but because life has surpassed some of its solutions. From a political point of view the most important argument for constitution making is that the new constitution could close the period of transition. The economy which is built on the institution of private ownership has to be complemented with the ownership of local governments and with the self-motivated forces of public foundations and civil societies. As for the fundamental institutions, we can state that there is no such gap between the manifestos of the parliamentary parties that would exclude the possibility of their reaching a consensus.

In my opinion, no revolution of the public law is necessary but the renewing complementation of the existing public law and the synthesis of the new one, in other words the elevation of the public law to a higher level is indispensable. Our law has incorporated the international treaties, the European catalogue of basic rights since 1989. On the other hand, the specification of the existing institutions of the constitutional state from the point of view of values and the extension of the coherence of regulations would not only be possible but necessary. We must not forget that we can analyse the praxis of such institutions as the president, the Constitutional Court, the system of local governments and the State Audit Office which had all been established without experience. Consequently, I cannot agree with the point of view that concludes the redundancy of the present constitution making from purely political factors without the criticism of the functioning of the legal system and disregarding the institutional experiences.

It is the Hungarian experience of the Hungarian constitutional jurisdiction that indirectly proves that the more elaborated and normative the constitution is the less work the judges of the Constitutional Court have to cope with. (2) Statutory law has to be applied and the load of the constitutional court increases in the fields where there are numerous gaps and contradictions in the law and questions to be interpreted resulting from an insufficiently normative and coherent constitutional regulation.

The direction of the development of our constitution would be if the point of views brought up by the professional, scientific and political circles could reach a productive equilibrium. So, with the help of the Ministry of Justice, only this type of communication will promote this process.

I would like to thank you in the name of the Hungarian government that you put our constitutional concept on the agenda. The expertise of this Comission is a very important guideline for us in the parliamentary phase of the constitution making, as well. Thank you very much for your kind attention.

NOTES:

1. Sári, János. Central European Constitutions 1994: The negation of negation, Jogtudományi Közlöny, 1994/7-8

2. The considerable load of cases that the Constitutional Court of the Hungarian Republic has had to cope with since 1st of January 1990, justifies the necessecity of the making of a new, normative and coherent constitution both professionally and legally. The statistics also support this since

in 1990 1625
in 1991 2302
in 1992 1700
in 1993 1328
in 1994 1078

motions were forwarded to the Constitutional Court. The Constitutional Court received 607 motions in the first six month of the year, and since its establishment 8635 motions have been sent, this amounts to an annual average of 1570 motions. Since its functioning to court made 1216 decisions on the merits, 830 resolutions and 386 orders, and established 250 cases of violation of the constitution.

3. Regulatory Concept of the Constitution of the Hungarian Republic (premliminary working material) March 1995.
The preliminary concept has been sent to various public and private institutions, social and state organs with request for opinions. Conferences, workshops and public meetings have been organised during the process of elaboration. In the last few monts

the Ministry of Justice has received hundreds of written opinions from all over the country. Conceptual opinions have been written, among else, by each ministries, central administrative organs, the Hungarian Acedemy of Sciences, county courts, the Supreme Court, the Constitutional Court, faculties of law of domestic and some foreign universities, the State Auditory Office, the Economic Competition Office, the Central Office of Statistics, the central bank, commercial organisations, perssure groups, trade unions, lawyers' assotiations, scientific institutes, local governments, the Central Assotiation of Local Governments, professional authorities, all the churches and church organisations, civic assotiations, organisations of ethnic minorities and different foreign scientific institutes as well as individual legal experts both in Hungary and abroad.