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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

**COMMENTS ON THE REGULATORY CONCEPT OF THE
CONSTITUTION OF
THE HUNGARIAN REPUBLIC
CHAPTERS VIII AND XI
(CDL (95) 21)**

by

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Regulatory Concept of the Constitution of the Hungarian Republic

COMMENTS on the Preliminary working material [CDL (95) 21]

Introduction

I have been asked to comment upon the "Regulatory Concept", especially its chapters VIII (Government and Public Administration) and IX (Armed Forces and Protection of Order and Security).

The "Regulatory Concept" is the result of a thorough treatment of the subject matter with expert knowledge. As a whole, it is in my opinion an excellent basis for the drafting of the text for the new Constitution; and as an outsider, I must be very modest in making comments upon such a comprehensive Concept. An outsider may, however, be able to look at some points with fresh eyes.

VIII. The Government and Public Administration

As the President of the Republic is intended to be an individual branch of power with a balancing function (pp. 5 et seq.), the Government and Public Administration form the Executive Branch. The provisions on the Government are mainly intended merely to update the corresponding provisions in the existing Constitution on the basis of practical experience. I have no reason to criticize this solution or the grounds given for it (p. 62).

Public Administration, on the other hand, is not regulated in the present Constitution. The proposal of the Regulatory Concept now to include provisions covering the most important

organs and principles of public administration as well as the basic rules of public service (p. 62) is in my opinion fully motivated.

According to the proposed Structure of the Constitution (at the present stage; Chapter XX of the Regulatory Concept), the provisions on Government and Public Administration are intended together to constitute Chapter 3 of Part III of the Constitution. Provisions on Government would occupy six of the Chapter's seven subchapters (p. 145) and would thus be in volume much more prominent than the new provisions on Public Administration.

Forming of Government. Due to the separation of powers between the Parliament and the Government and the role of the President as a balancing power but not as the head of the Executive Branch, the proposed procedures relating to the forming of government are necessarily fairly complicated. The model chosen in the Concept (based on current provisions but redeveloping them; pp. 63 et seqq.) seems to me to be commended.

In regard to the presentation of the programme of the Government to the Parliament, I would, however, think that the alternative postponing the presentation until the new Government has been formed would be worthy of some reconsideration. Despite the Prime Minister's dominant position-which in itself is apt to support a steady governance of the country (cf. pp. 67 et seq.)-it would in my opinion be useful if a sufficient amount of time could be devoted to the drafting of the programme and the programme could then be approved by the whole Government before it is presented to the Parliament. Especially in the case of a coalition Government, the programme is a basis for the cooperation in the Government of the coalition parties. Of course, the vote on the programme may-in rare cases, one could hope-lead to a vote of no confidence and thus to a new round in the cabinet building.

Organization of Public Administration. The Concept has in my opinion found a good balance in choosing the matters concerning public administration which shall be regulated in the Constitution (pp. 71 et seq.). In the English text, only a circular reasoning shows what is meant with the terms "Administrative bodies with nationwide authority" and "Central offices" (p. 72)-a German translation might have been helpful.

Centrally controlled but decentralised bodies. I have understood the Concept (pp. 72 et seq., compared with Ch. XIV on Municipalities) so that the State administration will not include any regional or provincial units with a general competence (under a Governor, Prefect etc.) and that all general administration on the regional or provincial (county) level will be in the hands of self-governing units. This is by all means a possible-modern and democratic-solution. If, however, I have misunderstood the intent of the Concept, the Constitution would in my opinion need some basic provisions on the State regional/provincial administration.

Administrative procedure. To include basic principles of administrative procedure in the Constitution, as proposed in the Concept (pp. 73 et seq.), is in my opinion to be commended warmly.

According to the Concept, one of the principles would, however, be that the discretionary rights of public administration bodies must be minimised (p. 74). This principle should be seen in connection with the proposal (p. 62 et seq.) to abolish the general right of the Government under the current Constitution (Art. 40) to review acts of inferior bodies and to deprive any body of its competence to act in any issue of public administration. Together these proposals can be seen as a realisation of the principle "Government by laws and not by men" in the manner that public administration is entrusted to independent bodies whose main task is to apply rules of law to concrete situations.

I am not advocating against this idea. However, it would in my opinion be useful to weigh the pro's and con's of this view against the idea of "Administration by objectives", where the ends of administrative action are defined in law while the means to achieve these ends are more or less open to administrative discretion-and even the ends may be expressed as flexible standards. Administrative decisions made under this system are quite open to judicial review: is the decision a suitable means to achieve the ends given in the law, has the decision in fact been made with another purpose in mind (*détournement de pouvoir*), etc.? And while a power of the Government or another superior authority to review acts of inferior bodies or even to deprive any organ of its competence is not necessary in this system, either, it would be possible to retain such a power in order to use it e.g. when the superior organ is of another meaning as to the most expedient means to reach the given ends. But I admit readily that such a power should not be available against self-governing authorities (p. 63).

It is important to include the possibility of judicial review among the principles of public administration. The principle is, however, expressed in the Concept in a very extensive way, enabling any citizen to contest an administrative decision if he is of the view that the decision contravenes the law (p. 74). It is essential that any one is entitled to contest a decision on the ground that it violates his rights; but whether some one not immediately touched by a decision should have a standing to contest it (*actio popularis*, etc.) could in my opinion well depend on ordinary legislation.

Public service. It is in my opinion a good choice to have only the most basic rules on public service recorded in the Constitution. The choice of the principles to be included is also in my opinion sound. As to the contents of the different principles, it might be a too rigorous rule to require an advertisement for the vacancy in every case, without regard to the nature of the post to be filled. And one might ask wheth-

er all the other principles will stand the harsh proof of the realities of the life.

IX. The Armed Forces, Protection of Public Order and Public Security

The armed forces, the border guards, the police and the state security services are to be regulated in the same chapter of the new Constitution. I cannot question this solution.

Qualified majorities. More detailed rules in regard to these branches of State structure are to be given by Acts of Parliament adopted by a qualified majority (pp. 78 et seq.) This is a continuation of the system of "organic acts" in the present Constitution, which requires qualified majorities in very many cases. The Concept proposes a substantial reduction of the number of acts requiring a qualified majority (pp. 5, 33); but it might be asked if the number should not be reduced still more. An organic act, once adopted with the needed majority, gives a good support and a certain security to the branches in question, but the system might also be a brake to much needed development.

Crossing of borders by armed forces. I understand the proposed rule limiting to thirty days the time which Hungarian troops may spend abroad or foreign troops in Hungary for purposes of exercise, show, etc. (p. 76) so that Parliament is entitled to grant a longer stay.

Limitations to military conscription. The Concept would limit the conscription for armed and unarmed military service to "male Hungarian citizens resident in Hungary" (p. 77). I wonder whether it is expedient to limit the conscription already in the Constitution on the basis of sex and residence. Should these limitations not have their place in the (organic) act on armed forces (which will anyway include other limitations based on age, etc.), while the Constitution would not forbid

the extension of the conscription by legislative amendment to women and citizens residing abroad?