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Strasbourg, 28 August 1995
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CDL (95) 42

COE262626

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

ON THE REGULATORY CONCEPT OF THE CONSTITUTION OF THE REPUBLIC OF HUNGARY

CHAPTER XIV
MUNICIPALITIES

CHAPTER XIX
AMENDING THE CONSTITUTION

by

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Remarks by prof. Sergio Bartole, University of Trieste, on the " Regulatory concept of the Constitution of the Hungarian Republic ".

XIV Municipalities

An useful starting point could be a comparison between the preliminary working paper and what the paper calls " the effective Constitution ". According to the new proposal a lot of the principles which are proveided for by the Constitution which is now in force, shall be kept:

- the division of the territory into villages, towns, capital city and its districts is kept. Counties are not explicitly listed but are mentioned sub XIV, 1, and - in any case - would deserve some detailed provisions about their role in the system of the local self-government;
- the communities of the electors are entrusted with the powers of the local government (independent, democratic management of local public issues);
- the equality of the powers is guaranteed. Their content shall be the municipality administration which has to be separated from the State administration;
- the local self-government powers will be exercised by the elected representative bodies or through local referenda;
- the list of the basic rights of the municipalities;
- also the mayors are allowed to exercise local government functions and can be entrusted with State administrative tasks;
- the municipalities have normative powers to issue municipality decrees which " should not be contradictory to legal regulations of a higher level ";
- the Parliament is entrusted with the power of dissolving the representative bodies of the municipalities.

Some new provisions should be added to those of the " effective Constitution " which the proposal would like to keep in force.

This is the case of the rules concerning the principles of the local

elections: not only the members of the representative bodies but also the mayors shall be directly elected by the people for the term of four years. Nevertheless the paper does not deal with the electoral system leaving the decision to the law on the election of the governing bodies of the municipalities. It is a wise choice which leaves a free hand to the legislator in shaping the functioning of the electoral machinery which can have a strong impact on the system of the political parties.

More space is given to the provisions concerning the local referenda in the view of the exigence of guaranteeing the position of the minorities against the majorities. The body of the representatives has to call a referendum if a proposal is submitted signed " by 10% of the electors ".

Drafting this part of the Constitution requires an attentive balancing between the reasons of the constitutional guarantee which suggest the adoption of some rules in a rigid Constitution, the uniformity exigences requiring the approval of an implementing parliamentary statute on the matter and the rights of municipalities to some degree of organizational autonomy. For instance, detailed constitutional provisions concerning the internal organization of the municipalities are proposed (the role of the chief clerk, the executive offices, the system of the committees), and the addition of statutory rules to them could limit the freedom of choice of the municipalities. The law on the organization of the municipalities should restrict its content to principles and avoid too much detailed provisions (sticking to the model of the s.c. loi cadre).

On the other side provisions on the functions of the municipalities have to be drafted in view of the task entrusted to the constitutional court of protecting the rights of the municipalities: therefore it would be advisable giving the court clear and unambiguous criteria of judgement with regard to the distinction between " mandatory and elective " functions, the creation of " forced associations " of municipalities and the transfer of local functions from the municipalities to the State administration in presence of special exigen-

ces. If the constitutional court is a judge, it cannot have a free hand on the matter but it has to judge on the basis of previous constitutional provisions. Also the provisions concerning the dissolution of the representative bodies have to offer to the constitutional court sufficient ground for judgement.

Art. 44/A 1 d of the " effective Constitution " entrusts the local representative body with the task of determining - " subject to the laws " - " the classes and rates of local taxes ". The reference to the parliamentary laws is missing in the paper (page 116). I don't think that the municipalities could be allowed to adopt a taxation policy outside a framework established by a statute approved by the National Assembly.

The german Constitution can offer useful suggestions about the implementation of the principle of regional equilibrium, even if the hungarian Constitution does not adopt a federal order in dealing with the local government. The Constitution has to provide for some rules in the matter also in connection with the new statements concerning the relations between the revenues of the municipalities and the functions which the municipalities have to discharge.

In view of these developments the design envisaged at the end of page 114 has some merits: perhaps the proposed detailed suggestions about mutual informations, proposals and initiatives should be completed by a clear enunciation of the principle of loyal cooperation between the State administration and the municipalities.

The newly submitted proposals about properties and enterprises of the municipalities and about the " legality " and " financial " controls of the activities of the governing bodies of the municipalities deserve full consent too.

XIX Amending the Constitution.

Notwithstanding the " preliminary working material " critizes the Constitution in force with regard to the rules concerning the revision of the Constitution, the document sticks to the idea that the adoption of a new Constitution or of a constituional law amending the Constitution in force shall require the consent of two thirds of the members of the legislative Assembly. The preference is evident for an amending procedure which does not imply an excessive rigidity of the Constitution and guarantees its stability. But because the document recognizes that the constitutional rules in force could " allow for the governmental majority to be the same as the constitutional power ", the proposal is submitted aiming at strenghthening the rigidity of the Constitution through a possible direct participation of the people in the procedure.

If a new Constitution is adopted, a referendum shall be called to approve or reject it. For the adoption of a constitutional law amending the Constitution three possible alternatives are provided for According to my opinion the preferred alternative shall be contained in the Constitution, and not only in the Standing Orders of the Parliament. The presence of a constitutional rule would allow a judgement of the constitutional court on the constitutionality of the procedure adopted to amend the Constitution and - therefore - the court would be entrusted with the task of checking the compliance with the limits of the majority power. Sometimes the constitutional courts refrain from dealing with the observance of the Standing Orders of the parliaments and avoid interfering in the internal decisions of the parliaments. If there is a constitutional rule, the question has no more a strict internal parliamentary relevance and can be dealt with by a court.

The preliminary working paper itself has a preference for the first alternative (of the three of them it lists), " because it considers the creation of the Constitution by the direct participation of the people as the strongest form of legislation ". Actually the di-

vision of the procedure into two stages (a preliminary general discussion and a subsequent vote of the provisions of the bill) and the provision for intervals of time between the initiative, its general discussion and its detailed approval allow a more considerate adoption of the amendments of the Constitution. But when the possibility of calling a referendum is provided for, pending the delay of the promulgation of the act approved by the Parliament, the people is offered the chance of expressing their will in the matter and of giving the act the strongest legitimacy. There is some resemblance between this proposal and art. 138 of the italian Constitution, but the proposal allows the calling of a referendum not only when the act is approved by a not qualified majority (as in Italy). Therefore the hungarian proposal leaves more space open to the expression of the will of the people.

The second alternative, if adopted, could be dangerous because it confronts the will of the people expressed through the parliamentary decision-making process with the will of the representatives of the society as expressed by the structures of the local government, the interest groups and the national communities, and gives the last word to this organic expression of the society in contradiction with a modern idea of democracy. The third alternative provides for a stronger qualified majority (four fifths of the members of the Parliament) which would be very difficult to get, therefore it restrains the possibility of amending the Constitution. Moreover it " would not allow the submission of a new amendment bill within a specified period from the last amendment ": but this proposal would make sense only if it referred to amendments concerning the same matter.

The solution of keeping the requirement of the two thirds looks more pratical than the other two alternatives: the required majority can be easily obtained if there is a general agreement on the proposed amendment, while some procedural and substantive limitations can control the exercise of the amending power by a strong governmental majority.