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OPINION ON THE DRAFT AMENDMENTS TO THE CONSTITUTION OF THE REPUBLIC OF HUNGARY

I. PRINCIPLES RELEVANT TO A NEW CONSTITUTION
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I. The principles relevant to a new constitution

This first chapter, which is by way of an introduction, does not require much comment. It is impossible to take issue with the general principles set out in it. I shall therefore confine myself to two brief remarks.

1. In point 3 (a)(p. 5), in order to relieve Parliament of some of its legislative duties, the authors of the report call for a corresponding increase in the government's regulatory power. In view of the problems which this transfer of power will inevitably raise with regard to the separation of powers, the two areas of (a) law, which is the prerogative of Parliament, and (b) decree, which pertains to the government, should be clearly defined in the constitution, which should clearly state under what conditions and on what matters the executive authority can legislate through decrees or regulations. A distinction should also be made here between legislative decrees, which have their own content, and ordinary decrees for the application or implementation of Parliament's laws, which merely refer to these laws and explain them in detail or clarify them. The first category of decree raises far more problems than the second from the point of view of the separation of powers.

The constitution should also define the conditions under which delegation of legislative power (from Parliament to the government) can take place. The salient provisions should be set out in a formal law (ie of the Parliament).

Moreover, acts which authorise serious interference in the fundamental rights of the individual should be parliamentary laws. The legal basis for any major curtailment of freedom should be a law in the formal sense. This should apply to criminal and tax law in particular.

2. Point 4 (a) (p. 6) distinguishes between first and second generation rights, the former being subject to the jurisdiction of the courts, whereas the latter are not. Although this is a perfectly valid distinction, it nonetheless needs to be qualified and relativised to some extent. Some rights referred to as second category rights (economic and social rights) can be regarded as subject to the jurisdiction of the courts and can be directly invoked before the courts. A distinction could therefore be made within social rights between simple social objectives, programmes to be carried out and mandates given to the State (right to housing, education, etc), on the one hand, and genuine social rights which confer subjective rights on individuals (the right to minimum subsistence, the right to decent housing etc), on the other. Unlike the former, the latter would be subject to the jurisdiction of the courts, in the same way as first category rights, ie rights and freedoms.

II. Introductory and General Provisions of the Constitution

3. Point 2 (k) (p. 13) also refers to the distinction between traditional freedoms and economic, social and cultural rights. In my opinion, these last-mentioned rights are genuine fundamental human rights in the same way as the former and are of equal importance (indivisibility of human rights). They should therefore unquestionably be included in the chapter on fundamental rights to highlight the fact that they are indeed human rights. To refer to them only under the heading of general provisions would devalue these rights. At the same time, in view of the different character of these rights both as regards their enforceability and the obligations which devolve on the State (simple abstention or provision of positive benefits), these two categories of fundamental rights should be placed in different sections of the same chapter.

VI. International Agreements

4. In point 1 (a) (p. 42) the authors of the document refer to the dualist and monist theories of the relationship between domestic law and international law and express a preference for the latter. This is a good choice, as monism is the more modern, simpler and faster method of incorporating international law. However, it is not quite correct to state that, according to the monist theory, international law prevails over all internal law with the exception of the constitution. There is a confusion here between two theoretically quite distinct questions, namely the way international agreements are incorporated - or find their way - into internal law (through transformation, ie dualism, or without transformation, ie, monism) and how they rank with respect to standard-setting derived from domestic legislation. The first problem to be solved concerns the validity under domestic law of international treaties. It is here that the distinction between monist and dualist theories applies. Once this problem has been resolved, the further problem of how treaties are to be ranked in the domestic legal system has to be considered. In my opinion, it is perfectly possible to regard treaties as superior to all domestic standard-setting instruments, including the constitution. This is in fact the only solution compatible with the Vienna Convention on the Law of Treaties. A third problem, not mentioned in the document, concerns the direct applicability or the direct effect (self-executing character) of international treaties.

5. Still under point 1 (a), two further clarifications are needed.

a. International law rules which are binding on States, whether or not they have been incorporated, are part of customary law or the general principles of international law and not, as the report states, "the generally binding international treaties concluded under the auspices of the United Nations". Some of these conventions may contain general customary principles of this sort, but that is not necessarily the case. In any event, these general principles are binding on all States, independently of ratification (and not, as the document incorrectly states, of their incorporation) precisely by virtue of their customary, universal character.

b. The primacy of international law over domestic law and the direct effect of its provisions are characteristics of supra-national organisations such as the European Union, but not of all international organisations (ILO, IMF, etc) as the report incorrectly suggests. In any event it would be preferable, in my opinion, for the constitution to state explicitly that the law of supra-national organisations takes precedence over domestic law (see also point 1 (e) (p. 45).

6. Point 1 (b) (p. 44): Again, in the event of a conflict between international law and domestic law, international law must prevail, even if it conflicts

with a domestic constitutional rule. By its very nature, international law is intended to take precedence over domestic law as a whole. The rule of the primacy of international law over constitutional law should in any event at least apply in the case of international treaties which protect human rights and contain several jus cogens rules.

The harmonisation of international rules and constitutional rules should normally take place before the treaty is ratified, either by way of a reservation under the former or by means of an amendment to the constitution. However, if harmonisation has not taken place before ratification and it is discovered that there is a discrepancy between the domestic rule and the international rule after the treaty has entered into force, the international rule must prevail.

XVII. The Constitutional Court

7. Point 2 (a) (p. 122): It would be more correct to say that the Constitutional Court examines the constitutionality (not the legality) of laws, decrees etc.

8. Point 2 (c) (p. 123): In my opinion, the procedure envisaged here conflicts with the international undertakings which Hungary might assume. To repeat what I said above, the examination of the conformity of an international treaty with the constitution should take place before ratification. However, if it is discovered that a conflict exists between the constitution and an international treaty which is already in force, the Constitutional Court must in no circumstances be empowered to suspend the execution of the treaty on the territory of Hungary. At most the treaty could be denounced; but this is a matter for the government. Moreover, it makes no sense to state that a treaty can be unconstitutional, since the constitution must conform to international law and not vice versa. In other words, the treaty cannot be unconstitutional, although the constitution may fail to conform to the treaty.

Consequently, the power here vested in the Constitutional Court is clearly contrary to the principle "pacta sunt servanda". A treaty which is in force cannot be suspended unilaterally. Where a contradiction is found to exist between a treaty already in force and the constitution, the constitution must where appropriate be amended to bring it into line with the treaty. The treaty can, of course, always be re-negotiated, but pending re-negotiation it remains in force. Contrary to what the authors seem to believe, the clause of the Vienna Convention on the Law of Treaties referred to on page 124 of the report covers domestic law as a whole, including constitutional law.

9. Point 1 (f) (p. 125) distinguishes between direct constitutional review and constitutional review of last instance. It is difficult to decide which is the better system. The choice between them is ultimately a political decision.

10. In point 1 (i) (p. 127), it may be asked why the Constitutional Court can only exercise it function with regard to referenda at the request of the President.

11. Point 3 (a) (p. 128). It would be better for the number of Constitutional Court judges to be uneven. An even number of judges would place too heavy a responsibility on the President who, in the event of a tied vote, would in practice be forced to take the decision alone by using his casting vote.

12. Point 5 (a) (p. 132) on the status of constitutional judges fails to mention the length of their term of office, and above all whether or not it is renewable. To ensure that judges are completely independent of the bodies which elect them, it would be preferable if their term of office - provided it is sufficiently long - were not renewable. This solution has in fact been adopted in several countries (Italy, Germany etc).

Geneva, 25 August 1995.