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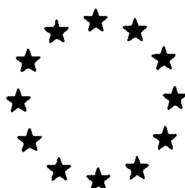

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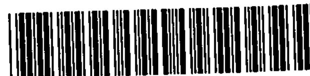

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

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

III. FUNDAMENTAL RIGHTS
XII. ADMINISTRATION OF JUSTICE

by
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COMMENTS RELATING TO CERTAIN CHAPTERS OF

"REGULATORY CONCEPT OF THE CONSTITUTION OF THE HUNGARIAN REPUBLIC." (CDL (95) 21)

Chapter III. Fundamental Rights.

1.a.

I shall refrain from detailed comments on the analysis, presented in the document before us, relating to the present, existing Hungarian constitution, since the present constitution is about to be changed. I wish to add, however, that I do share some of the observations expressed in 1.a. and find myself, basically, in agreement with these points of view.

1.b.

It is a sound point of departure when it is stated in CDL (95) 21 that "the Hungarian constitution may not contradict international agreements obligatory to Hungary or its international obligations." I also share the implications drawn from this premise. It is certainly not necessary for any state to reproduce the international conventions in the constitution itself. (The text in 1.b. reads, furthermore, that it is not necessary that the treaties "should be....directly followed." I take it that this is to be interpreted as "reproduced", not as "implemented" or "effectively realised".) As a matter of principle, it suffices "that the constitution provides that the rules of international law must be applied in Hungary". The text correctly emphasises, however, that "the fundamental rights included in the constitution illustrate which values the legislator considers important."

This symbolic role of a catalogue of specific human rights should certainly not be disregarded, in particular when consolidating a democratic government, guided by the principle of rule of law. As the Venice Commission has had the opportunity to state on a number of occasions, however, there exists, at least in principle, a possibility for discrepancies between the set of human rights norms spelled out in the constitution, as applied by the domestic courts on the one hand and the human rights standards spelled out in the international instruments, as applied by the international supervisory bodies on the other. Whether this is more than a theoretical possibility only, depends on the general techniques established in the constitution in order to solve conflicts between international and domestic law.

1.c. Here, the document describes the different categories of legal subjects which is to be given protection according to the domestic human rights standards. As this analysis operates at a rather general level, it is hard to disagree with the conclusions reached therein.

I wish to add one remark, though. Towards the end, it is held that "[r]ights of legal persons may be restricted by any act without the need for authorisation in the constitution". According to my view, this statement goes either too far or too short. One could hardly claim that in a situation where no human rights are explicitly spelled out in the constitution itself, any restriction - whether referring to a physical or legal person - requires authorisation in the constitution. On the other hand, if the constitution does spell out rights, the restrictions - whether referring to a physical or legal person - shall have to be (at least) in conformity with ("authorised in") the constitution.

2.a. I find it very convincing when the text declares the authors' sceptisism towards the quite many different possible ways in which to categorise human rights. Such efforts are basically carried out in legal theory; one might like or dislike the categories established. I normally find them useful for analytical purposes. In the constitution-making process, I would strongly recommend not to waist time - and political energy - on such an exercise. It is inconceivable that a political body would be able to establish consensus as how to establish the categories. It is definitely a constructive approach, the one which is advocated in the document before us, simply to list a number of rights, without separating them into chapters.

2.b. It is difficult to make a sound assessment as to the wisdom of the conclusions reached under this sub-para.: "In contrast to the present constitution this concept suggests that fundamental rights should not be dealt with in the chapter on fundamental rights but rather in the sections corresponding to their subject matter". I would be hesitant to recommend this approach as the general approach (simply because of the symbolic value of a "catalogue"). When studying the three examples given in the text, I tend to agree, however, that the duty to serve in the military, the duty to pay taxes and the duty to attend primary education do belong in the respective sections regulating these areas in the constitution. One could add, however, that, according to a traditional approach, these examples tell more about a citizen's duties vis a vis society than about his or her rights.

2.c. At this stage, I have not found it useful to go deep into the long catalogue of specific rights which is proposed in the text. The list is obviously an indication of which social values are to be protected at the constitutional level, more than a polished legal document. Of course, different people will have different views as to which values should be included and which values should be excluded from the constitutional level. The answers to these questions depend more on political preferences than on legal expertise.Suffice it to mention that the controversial questions of the right to abortion/the protection of the unborn child, the prohibition of/the neccesity for capital punishment seem not to be adressed in this list. I will be prepared, however, to elaborate positions on these matters at a later stage.

2.d. The legal technique described in this sub-para. seems to be an interesting approach when the drafters of the new constitution are to enter the prosess of spelling out, of editing the human rights provisions. I do look forward to see how this general model will be applied in details, regulating each and every right.

3. a. - f. I have no detailed comments, on this stage, to the conceptual approach presented in these sub-paras, referring to the problems of restricting and suspending fundamental rights. The general impression one is left with when reading this analysis, is that the drafters are seriously concerned about the effective elimination of different ways to undermine the basic human rights. In particular, I welcome the views expressed in **3. a. and b.**, when the emphasis is so strong on the importance of regulating restrictions by acts of Perliament itself. This is instrumental, seen from a democratic perspective.

4. The document indicates that the new constitution will establish a sophisticated system of remedies and mechanisms in order to guarantee the effective enjoyment of human rights.

Chapter XII. The Administration of Justice.

1.a.

I do agree that "[i]t is necessary to lay down the basic principle arising from the principle of the division of the branches of state power, according to which jurisdiction in Hungary is performed by courts."

The next statement made under **1.a.** is of great interest, both seen from a perspective of principle as well as of practice. It is a fact that alternative machineries for resolving conflicts are developing in many European states. The relationship between the ordinary courts and these alternative institutions certainly needs to be analysed and even regulated through legal norms. I do not know, however, whether the constitution is the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

1.b.

I do not know whether it necessarily is correct that "[t]he constitution must define the individual elements of the court organisational structure". The disagreement between the authors of the document is, however, probably reduced to a question of the degree of specificity. I tend to share the opinion that only the general framework of the organisation of the court system deserves to be reflected in the constitution itself. The wisdom of such a position is to be seen in the future, when amendments - unavoidably - will have to be made in the court system.

As far as I am informed, the structure - or restructure - of the court system is put on the agenda in Hungary.The document points to a question, which is crucial in the present discussions: whether one should opt for a unified system or for specialised courts. Different states in Europe (and elsewhere) have based themselves on different models for the organisation of the court system. The respective states will have different experiences in this area. Living in a unified court structure, I shall be extremely careful to advocate the blessings of such a system. In my view, the answer to these questions cannot be adequately offered until one is more familiar with the socio-political conditions (including the structure and composition of the legal profession) in the present and future Hungarian society.

2.a., b.and c. The independence of the judges and the court is - correctly - emphasised. The idea that the competence of the Minister of Justice within this area is transferred to a new institution, The National Jurisdiction Council, seems interesting. The practical importance of such a new body will probably depend on the detailed regulations which are to be established (i.a.on the composition and the functioning of the Council).

2. d.

The individual freedom of judges is an item for permanent discussions. I have the feeling that the document is setting high standards when it states that "judges .... may not perform political activities, may not be party members ..." Based on past experience, it is easy to understand the concerned expressed. I shall simply have to add that in some other European states - including my own - the private life of the judges are not restricted in such a way.

3.

I agree with the basic distinction between fundamental human rights and the basic principles by which civil and penal procedures are to be conducted. A practical consequense of this distinction is to separate them into different chapters in the constitution. As I had the opportunity to state above, however, one should adress the question to what degree should the details of civil and criminal procedures be covered in the constitution at all. On the other hand, one might well argue that the norms spelled out under 3. a. - e. are of such a fundamental and general nature that the do deserve to be spelled out in constitutional provisions, rather than at the statutory level.

Chapter X. Situations Endangering the Country's Security.

Chapter XIII. Public prosecution.

Chapter XVIII. The parliamentary Commissioner of Citizen's Rights.

Due to lack of time, I have not had the opportunity, at this stage, to study in all details and to reflect adequately on the quite many ideas and proposals referring to these areas. I am therefore, most unfortunately, not in a position which enables me to submit comments on these chapters at this stage. I shall, however, be prepared to go further into these parts later, if that should be of interest.

Oslo, September 1, 1995.

Jan Helgesen