

Council of Europe
Conseil de l'Europe



Strasbourg, 4 September 1995
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CDL (95) 56

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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

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Comments on the Regulatory Concept of the Constitution of
the Republic of Hungary

by Prof. Dr. János Zlinszky

In Hungary after some months of severe negotiations and feverish haste in 1989 the Constitution of 1949 was amended throughout. Although the circumstances of the creation of that almost new Constitution have caused some dissensions and contradictions in it, the Constitution of 1949/1989 has served as a good basis for the creation of the rule of law in Hungary. The new chapter on basic rights witnesses the optimism and euphoria of that time, the rights guaranteed by it are in some aspects far in front of the regulation of other states or the international law. Some fields are on the other hand not well elaborated. The Constitutional Court by its judicature has helped to enlighten some rules of the Constitution.

The old/new Constitution has worked not worse than any other would have. This is the reason for the discussion in Hungary whether to pass a new Constitution or not. We have certainly time enough to go into details, to prepare a Constitution suited just for Hungary. We can still afford to live for a time with the actual Constitution and change it only for a better one.

As a general remark I would like to emphasize the importance of the general principles of international law that provide good framework for the elaboration of a new national Constitution. International treaties, declarations also provide guidelines for the preparation of the main law of a nation. The recent concept of the new Constitutions shows in my opinion concerning basic rights some drawing-backs from the reached standard of guarantees. The rights guaranteed once should be respected in the future too and have to be expressly provided for in the new text.

Remarks to specified parts of the concept:

II. Introducing and General Regulations

Basic rights. In 2.b/ para 1 additionally the security of life should be protected.

All power derives from the people. 2.c/ para 1 pronounces the principle that all power derives from the people. In Hungarian a sharp distinction is to be made between people and nation. While the word "people" indicates the ethnic origin, the word "nation" is a political notion. This distinction should be observed in order to ensure that the sentence reflects the real intention of the legislator. The actual definition is a marxist reminiscence.

Direct type of exercising power. The same paragraph contains that the people /correctly: nation/ exercises the power through its constitutional institutions. The not or not precisely formulated relationship of the indirect and the direct type of exercising power in the actual Constitution caused a vivid debate in the political life of Hungary at the beginning of this year which came also before the Constitutional Court. To avoid further misunderstandings this relationship should be formulated here precisely.

The notion of the duty of the state to protect the freedom and power of the people in 2.e/ does not include necessarily the duty to protect the freedom of its citizens. Therefore this latter one - being of high importance - should be mentioned too as duty of the state.

Right to participation. 2.g/ para 1 contains the basic rights of Hungarian citizens. In my opinion almost the most important right is missing: the right to participation in public matters.

European integration. The conception proposes in 2.i/ to formulate the participation of Hungary in the European integration as an aim of the Hungarian foreign policy. Should this proposal be accepted it would be essential to put this question separately in the referendum deciding on the new constitution.

Abuse of rights. 2.j/ suggests the formulation of a general constitutional principle according which rights may be exercised according to their purpose. As far as this principles relates to public organs the political responsibility and the legal consequences should be listed by the Constitution itself.

Economic, social and cultural rights. 2.k/ raises the question how to regulate economic, social and cultural rights. In my opinion these rights can be defined even in a changing society and economy like in Hungary - if not by the legislator then by the courts. The process of expounding these rights could be followed during the last years in the decisions of the Hungarian Constitutional Court. Formulating these rights as obligations of the state, as aims to be reached wouldn't however make the judicial control unnecessary. The Hungarian Constitutional Court stated in some of its decisions that even in case of a state obligation the state has to keep the reached standard and this role of the Court has to be regulated on constitutional level.

Basic rights

List of basic rights. The list of basic rights in 2.c/ should be thought over again from several aspects.

The order. The order of the list seems to be quite arbitrary. Rights that logically match together are listed far away from each other, the ranking of the rights lacks any logical explanation.

Top right. One of the most important questions is which right should be on the top of the list. From theoretical point of view there are two very different approaches. The first considers freedom and equality as basic rights the other one puts substantive values /e.g. human dignity or legal capacity/ to the top of the list of rights. I cannot see any conscious decision in the ranking of rights in the conception and suggest to think over this question again.

Some of the listed rights - like the presumption of innocence - do not apply only for the judicial process so they are at right place. There are however rights that would be better placed in the section on the judiciary.

Right to information. The right to publicity of information should be better formulated as right to receive and duty to give information.

Rights and freedoms. 3. e/ should distinguish between rights and freedoms. While it is possible to oblige somebody or to relieve somebody of the obligation to exercise his/her rights it is logically impossible to do the same with freedoms.

IV. Parliament

Representation of the future generation/s/. Some of the state decisions have large impact on the future, sometimes larger than on the present. A right to assert the interests of the next generations or at least the living young generation the members of which do not have voting rights yet should be ensured. The problem is to secure that the representant of the juveniles be objective and consider exclusively the interests of the represented. Should this problem be solved the principle of equality of the voting right would not be violated. The voting right may be vested e.g. in parents or parliamentary commissioners.

Incompatibility. 2.c para 4 proposes to prohibit both the loosening and the tightening of the rules of incompatibility relating to the members of the actual parliament. This rule may ensure the equality of the passive voting right of the members of the same parliamentary assembly during the whole period of its functioning. Problems may arise if the notion of the incompatibility is not regulated based on a homogeneous principle because the questions put by the emergence of new offices or by the changing economic life cannot be answered later.

V. Legislation

Quality of the drafting work. In article 3 the conception deals with questions of passing parliamentary acts. Among the rules relating to this issue the role and the responsibility of the Ministry of Justice is missing. This ministry elaborates the drafts and the quality of the parliamentary work very much depends on the quality of the drafting work. A certain minimum standard of quality should be required for the draft and the political responsibility of the minister should be stated for the drafting work.

Decrees of the Government or of a Minister and the local self-government. To the listed limitations in 4. b/ to the competence of the Government or of a Minister to issue decrees should be added that these decrees must not violate the competence of any local self government (principle of subsidiarity).

Secrecy of legal means. 5.b/ para 2 provides for the possibility of secret legal means not qualifying as legal acts but containing rights and obligations of the subordinate organs. The conditions and requirements of a decision on secrecy should be regulated in the Constitution.

Referendum. The referendum against an act of the Parliament may not decide - as it is formulated in 6 para 5 - on the act but on a disposition of that act. Voters may reject an act for several reasons and if they should decide on the whole act or the principles of the act the outcome of the referendum would not reflect then the real will of them. Only a defined question that can be answered by yes or no should be put on referendum.

VII. The President of the Republic

Incompatible activities. The President of the Republic may exercise a limited activity because of his/her special status in the Hungarian political structure as a balancing power. In my opinion the second alternative mentioned in article 3 should be accepted according to which the President may not be allowed to accept fees for his/her activity under the protection of the law of intellectual property.

The expiration of the mandate of the President of the Republic. The conception suggests in article 6 para 1 as one of the reasons for the expiration of the mandate of the President of the Republic when his state makes impossible for him/her for more than 90 days to perform the duties of his/her office. From the point of view of the office the short time fixed is understandable. From the point of view of a human being a three month period is quite short /e.g. a case of illness/. As a compromise I would introduce the possibility of a temporary substitution.

VIII. The Government and the Public Administration

The Government's programme. The political responsibility of the Government to observe and keep the programme pronounced before the elections also after the elections should be included in the Constitution.

Inflation

From among the main duties of the Government contained in 2.e/ para 4 the duty to guarantee the social well being is hardly realizable in any country of the world. Social security can and should be guaranteed instead. In stating the control of inflation as a duty of the Government the concept accepts inflation as a fact. The stability of the value of the national currency should be guaranteed instead.

XI. Financial matters

Taxation. It should be granted by the Constitution that on no income under the official minimum subsistence level and on no tax can be imposed. This rule would be in harmony with the duty of the Government to guarantee social security. (article 2 para 2)

Public property - publicity. The draft mentions in article 4 para 1 publicity as a guarantee for citizens to receive information on the changes of the state property. The used notion "necessary information" raises however the question who will decide whether an information is necessary to know for the public or not? It should be the citizen or the member of the public to decide which information he needs and requires and the state should provide that information except under very strict conditions of secrecy.

Public property - state debt. Besides the limits and conditions of getting into national debt the political and legal consequences of the violation of those rules should be included also in the Constitution. (article 4 para 4)

XII. Jurisdiction

Revision of a final judgement. The draft preserves the actual system of appeals (see 1.b/) that means the distinction between the so called ordinary appeals open for everybody and the so called extraordinarily appeals against final judgements. Administrative decisions lack of finality because they can be revised by a court. Judicial decisions must however have at a certain point of the procedure a final character. If it is allowed to appeal against those final court decisions, that finality can never be reached. This may seriously weaken the respect of court decisions and affect legal security. The two types of appeals should be integrated into one and the binding force should be reached at a later moment of the procedure.

National Judicial Board. 2.b/ para 1 deals with the National Judicial Board that would secure the independency and the effective functioning of the self government of judges. The draft proposes the election of the Board member on a shared voting bases: the Parliament, judges and general attorneys should elect its members. Lawyers are however incomprehensibly missing from among those who have right to vote. Lawyers are representing the parties and especially if general advocats have the right to influence the constitution of the Board this right should be given also to lawyers.

The President of the Supreme Court. He/she should be elected exclusively from among the judges. This limitation should be contained in the Constitution itself.

New cases of incompatibility. The actual Constitution does not allow for judges to held any other public office, to be a member of the Parliament, be a member of any party and to pursue any gainful employment except some few activities. During the last few years new economic activities, e.g. participation in a company, have appeared in the Hungarian society and those forms should be also taken into consideration. A difference should be made along the characteristics of the activiy, e.g. a partner in a partnership has not the same economic position as a shareholder in a big company. /2.d/ para 2/

Obligation in case of unconstitutionality. The draft states in article 3 para 2 a/ the obligation of pourses to apply to the Constitutional Court in case of unconstitutionality. According to the actual regulation the jurisdiction on basic rights lies not with the ordinary court but with the Constitutional Court and the draft proposes only as an alternative to shift that competence to ordinary courts. If according to the future regulation ordinary courts shall have no competence to decide upon constitutionality of the norm that ought to be applied it is exacter to say the judge is obliged to apply to the Constitutional Court if he / she suggests that the norm is unconstitutional.

XIII. Public attorney organization

Elimination of the office of the General Public Attorney. The draft proposes to create a possibility to dismiss the General Public Attorney if he / she violated law in connection with his /her office and that was stated by a final court decision. In my opinion if the holder of that office violated law under the above mentioned strict conditions his / her office should terminate automatically.

XIV. Local self-government

Their position in the system of the branches of power. In the relationship between the local self-government and the central government old reminiscences of the socialist double hierarchy concept can be traced. The principle of subsidiarity is accepted by the concept but the realization reflected in the regulation leaves some doubts.

Property of the local self-government. Self-government of the municipalities is one of the basic principles in the concept. More and more municipalities in Hungary went bankrupt during the last few years because they believed that the state would help them in a serious financial situation like it had done during the past decades. The responsibility of the office-holders of the municipality for decisions causing great damages to the municipality cannot be stated however for the time being. In regard to office-holder of the municipalities like in regard to office-holder in the central government /see before/ the responsibility and the consequences for entering into damaging obligations should be regulated in the Constitution.

XV. Public bodies

Churches. The concept mentions some examples for public bodies. Churches as important elements of the society having that legal form should be certainly mentioned here. The qualification of a church should depend besides the legal conditions on the will of the believers forming the group and not given automatically or maybe against the will of the members.

XVII. The Constitutional Court

Competence of the Constitutional Court. The Hungarian Constitutional Court prepared an detailed proposition for the concept and regulation of that chapter of the future Constitution. Some questions that have been raised in that proposal:

1. In the Hungarian legal system not only legal norms have general binding force. The so called guidelines and principal decisions of the Supreme Court are binding for ordinary courts and by that way for the parties. This is why the proposal suggests that the Constitutional Court should

have competence to examine the constitutionality of those general decisions of the Supreme Court.

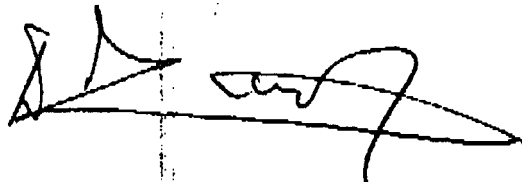
2. The Constitutional Court should have right to suspend, eliminate or temporary substitute the unconstitutional legal norm by its own decision. The Court has for the time being only the first possibility and in some cases the second one.

3. In case that the Constitution itself violates the general principles of international law the Constitutional Court should have right to examine also the part that is alleged to violate the Constitution.

4. According to the actual regulation unconstitutionality may constitute itself in an omission. The Constitutional Court exercised self restraint in that question during the years of its functioning. Non-regulation does not mean omission automatically according to the practice of the Court because the legislator has also power to decide not to regulate a question. Therefore the Court requires besides the omission also an unconstitutional situation created by the omission to pronounce unconstitutionality. Otherwise the Court would decide instead of the legislator whether to regulate a question or not.

5. The competence to examine the constitutionality of a referendum should extend only to nationwide referenda.

Budapest, 31st August, 1995



/Prof. Dr. János Zlinszky/