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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

OPINION

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

CHAPTER XIII

PROSECUTION

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REGULATORY CONCEPT OF THE CONSTITUTION OF THE HUNGARIAN REPUBLIC

XIII - PUBLIC PROSECUTION.

1. The fundamental principle which, I suggest, should govern the system of public prosecution in a state is the complete independence of the system, no administrative or other consideration is as important as that principle. Only where the independence of the system is guaranteed and protected by law will the public have the confidence in the system which is essential in any healthy society.
2. While provision for that independence could be made by a legislative act of parliament, it could equally easily be removed by a subsequent act of parliament. Consequently it would be preferable that the guarantee and protection of independence should be contained in the Constitution of the Hungarian Republic where (I would hope) it would require the assent of the Hungarian people by referendum, rather than a mere parliamentary vote, before it could be removed.
3. It would not be essential to set out in the Constitution detailed provisions regarding public prosecution. All that would be required would be
 - a guarantee of the independence of the general prosecutor of the Republic in the performance of his functions;
 - the method of his appointment [see paragraphs 5 and 6 below]
 - the method of his removal from office [see paragraph 7 below].

Provisions that the general prosecutor shall not be a member of the government or of parliament or hold any position of emolument and that his remuneration as general prosecutor shall not be reduced during his continuance in office might also be included in the Constitution if desired.

4. Less fundamental matters can be fixed by laws passed by the Parliament such as the term of office, age of retirement, remuneration and pension of the general prosecutor, and the organisation of the prosecution service and the conditions of employment of its staff. This would be preferable to fixing these matters by regulations or decrees of the Government, if public confidence in the independence of the system from the Government is to be maintained. The general prosecutor's

period of office should not be co- terminus with that of the Government since this would tend to led to the assumption in the public mind of his political allegiance.

5. It is important that the method of selection of the general prosecutor should be such as to gain the confidence of the public and the respect of the judiciary and the legal profession. Therefore professional, non - political expertise should be involved in the selection process. However it is reasonable for a government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process.

It is suggested , therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government. It might consist of the occupants for the time being of some or all of the following positions:

The President of each of the courts or of each of the superior courts.

The Attorney General of the Republic.

The President of the Faculty of Advocates.

The civil service head of the State legal service.

The civil service Secretary to the Government.

The Deans of the University Law Schools.

A public announcement would be made inviting written applications for the position of general prosecutor and stating the qualifications required for the position; it is suggested that these should be not less than those required for appointment to high judicial office. The commission would examine the applications and (having interviewed all the qualified applicants, or at least those whom the commission considered to be most eligible) submit to the Government (or to Parliament if that is preferred) not more than, say, three names all of whom the commission considered to be suitable for appointment. The Government (or Parliament, as the case might be) would be free to make the selection from those names. [The reason the formula "not more than three names" is suggested is that it is possible that the commission might consider only one or two applicants to be suitable for appointment.]

In order to emphasise the importance of the position of general prosecutor he might be appointed by the President of the Republic on the nomination of the Government

(or Parliament) although the President would have no power to reject the nomination.

A possible variation of the above proposal is that the selection of nominee that is made by the Government should be approved by Parliament before submission to the President.

6. Not all the matters set out in paragraph 5 above need to be stated in the Constitution which might merely say " the general prosecutor of the Republic shall be appointed by the President of the Republic on the nomination of the [Government] [with the approval of Parliament] [Parliament]". The other matters would be set out in a law of Parliament.
7. An important element in the independence of the general prosecutor is his protection from arbitrary or politically motivated dismissal. If the Government were to have the power to dismiss him at will then he could not discharge his function with the absolute independence which is essential. On the other hand to involve Parliament in the decision to dismiss might draw him into the arena of party politics which would be undesirable.

In my opinion the grounds for dismissal should be stated in the Constitution - e.g. stated misbehaviour or incapacity [Note: the expression "stated misbehaviour" does not mean that the different types of misbehaviour need to be listed in the Constitution; it merely means that the misbehaviour that is alleged against the general prosecutor must be specified in the charge against him.]

8. A body whose membership would command public trust should investigate allegations of misbehaviour or incapacity and , if it finds the allegation proved, make a recommendation of dismissal if it considers that dismissal is justified. The body, for example, might be of similar composition to the nominating body described in paragraph 5 above or consist of the remaining members of the National Jurisdiction Council. Alternatively the body might consist of three judges appointed by the presidents of their courts.

It would be advisable not to involve the Constitutional Court in the investigation or the dismissal procedure because it is not unlikely that there might subsequently be a legal challenge in that court to the affair, whatever its outcome.

Whatever body is selected it is probably better that it be comprised of ex officio members rather than be appointed ad hoc, in order to avoid suggestions that its members have been chosen so as to obtain a particular result.

An alternative (though I think less desirable) approach would be to confine the function of the body to establishing the facts, leaving to the Government or Parliament the decision whether those facts amount to misconduct and deserve dismissal.

Whether the body conducts its investigation in public or in private its report would be published. It is probably better that any citizen should have the right to make a complaint to the body. However, in order to guard against frivolous or vexatious complaints it should have the power to reject complaints without investigation or report.

9. All the matters suggested in paragraph 8 above could be provided for in a law of Parliament (rather than in a regulation or decree of the Government except the removing authority ("The President of the Republic at the request of the Government/Parliament"), which should be in the Constitution.
10. Paragraphs 1 to 9 are based on the assumption that the system of public prosecution that is envisaged under the new Constitution is that the general prosecutor will have overall responsibility in law for the prosecution of all crime throughout the Hungarian Republic, that he will have the function of appointing salaried lawyers to be local prosecutors, and that they will be members of his staff. The extent of their autonomy in individual cases will be a matter for him, but if they are legally answerable to him then they will share in his independence.

If, by contrast, it is envisaged that there will be regional prosecutors who will not be legally answerable to the general prosecutor but will have, in their own region, autonomous prosecutorial functions, then their independence requires to be specially protected also.

11. Consideration might be given to including in the law governing the public prosecution service a prohibition on communicating with the service for the purpose of influencing the making of a decision by the service to withdraw a prosecution or

not to initiate one, save in the case of specific categories of person such as the accused person or a victim or a medical or legal adviser or relative of theirs.

A prohibition on communication for the purpose of influencing a decision to initiate a prosecution would have the disadvantage of preventing a victim or other person who was aware of a crime from requesting the service to intervene where the police were failing to investigate the offence.

12. As regards the basic models referred to at a) and b) in XIII.I of the Regulatory Concept I would suggest that the function of the general prosecutor and the other public prosecutors should be confined to the prosecution of crime, through the criminal courts, and should not be extended to the protection of the public interest in civil matters and administrative causes. These functions would appear to be more appropriate to another organ such as the Parliamentary Commissioner of Citizens' Rights or (if he has a discretionary authority independent of the Government) the Attorney General of the Republic.

13. I do not think that if a public prosecution service does not have a role in the protection of the public interest it necessarily follows that its function is to execute the criminal policy of the government or that it should be subordinate to the government. Quite the contrary. If, by reason of an increase in alcohol-related road accidents or rapes or drug-related crimes it becomes government policy to suppress with special vigour offences of that category, then the proper way to tackle the problem is for the government to introduce legislation into parliament to improve the existing law as far as possible and to ensure that the police enforce the law in a thorough and efficient manner. It is not a function of the prosecution service to respond to the government's policy by prosecuting increased numbers of drivers or persons suspected of drug or sexual offences despite public clamour to do so unless the evidence exists which is required before a prosecution may be properly brought, against a citizen in a country that is governed by justice and the rule of law.

14. Although in some countries the system of public prosecution has in the past been used as an instrument of state oppression - by the bringing, in co - operation with the police, of criminal charges that were unjustified - or of corruption - by permitting some people to be above the law - it should be borne in mind that this is not the only danger to be guarded against. With increasing crime throughout Europe, and growing public dissatisfaction at the inability of the state to protect its citizens from crime, governments, no matter how democratic they might wish to be,

are finding themselves subject to new and powerful pressures. They are urged by the voters as well as by the press and television to take stern measures against criminals even if such measures will infringe human rights. There are public calls for the abolition of "legal technicalities which allow criminals to go free", despite the fact that the law is technicalities and that they are designed to guard against injustice. This new factor in today's Europe requires the public prosecution service in every country to be capable of resisting pressures from the public and its parliamentary representatives and from the police (who themselves are under pressure to produce "results") just as much as pressures from a government to harass its political opponents or to protect its friends.

15. I do not know enough about the existing system of public prosecution in the Hungarian Republic to offer a view on that system as referred to in XIII.3 of the Regulatory Concept. I would merely suggest that it is not necessary for much organisational detail to be included in the Constitution; an ordinary law of Parliament should be sufficient and would be more flexible. While the Constitution should confer independence on the system as well as on the general prosecutor care will have to be taken to maintain a balance between, on the one hand, the protection of subordinate prosecutors from interference by the Government, Parliament, the police or the public and, on the other hand the authority and responsibility of the general prosecutor for ensuring that they carry out their functions properly.
16. The independent status of the general prosecutor and the public prosecution service does not necessarily preclude the possibility of an annual report to Parliament describing in general terms his work but without commenting on individual cases. However, it does mean that a decision by him to prosecute in a particular case, or not to prosecute, cannot be appealed against, or overturned by any executive or parliamentary authority. Whether or not the courts will have the authority to review such a decision will be a matter for the Constitutional Court in due course; it may perhaps take the view that it will not seek to substitute its own opinion of the merits of the case for the decision of the prosecutor and will only interfere if the litigant can show that the decision had been taken mala fide.
17. Two other issues may also be mentioned:
 - (a) The question of whether a private citizen should be entitled to bring a prosecution against another citizen whom he alleges has committed a crime against him (e.g. assaulted him) , where the general prosecutor has

not initiated a prosecution is a matter to be dealt with by law, as is the question whether the general prosecutor should be entitled to veto or take over the conduct of such a prosecution.

- (b) A difficult question is whether the general prosecutor or the prosecution service should give reasons for the non - prosecution of cases. It is likely that - perhaps following a much published crime questions will be asked by the press why a particular suspects is not being prosecuted. To announce the reasons would be quite likely to do injustice to the good name of the suspected person or the victim or perhaps a third party; for example, it might be that a vital witness has died or is mentally unstable or unreliable and therefore the prosecution would be unlikely to succeed. To announce this as the reason for not prosecuting would cause the public to believe that the suspect was guilty and would amount to his condemnation without a trial. This would clearly be unjust. Nor could reasons be given in some cases and not in others.

I would therefore suggest that reasons for not prosecuting should never be announced. However a procedure might be devised to allay public unease whereby, for example, the Attorney General of the Republic could request the general prosecutor to inform him of the reason and the Attorney General, could then, if he was satisfied with the reason, inform Parliament or the Government but without disclosing what the reason was. If he was not satisfied with the reason he could either inform the Government or Parliament accordingly, leaving the prosecutor's decision unchanged, or reverse the decision. Obviously the latter course of action is an interference with the autonomy of the general prosecutor, and whether this is desirable depends upon the constitutional position of the Attorney General and his freedom from political influences.