CDL(1995)073e-restr
Strasbourg, 10 November 1995

# REGULATORY CONCEPT OF THE CONSTITUTION OF THE HUNGARIAN REPUBLIC

# DRAFT CONSOLIDATED OPINION

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## I. INTRODUCTION

In May 1995, the Hungarian Ministry of Justice requested the Venice Commission to give an opinion on a document containing some fundamental elements on the on-going Hungarian Constitution making process, the "Regulatory Concept of the Hungarian Constitution".

The present opinion was adopted by the Venice Commission at its 25th meeting in Venice, on 24-25 November 1995 on the basis of individual opinions given by Prof. Giorgio Malinverni (Principles relevant to a new Constitution, General Provisions, International Agreements, Constitutional Court); Prof. Jan Helgesen (Fundamental Rights, Administration of Justice, Parliamentary Commissioner of Citizens' Rights); Mr A. Marques Guedes (Parliament and Legislative Process); Mr A. Suviranta (Government and Public Administration, Armed Forces, Protection of Public Order); Prof. E. Ozbudun (Parliament and Legislative Process, Emergency Situations); Mr G. Reuter (State Finances, Public Societies, Economic and Social Council); Mr M. Russell (Public Prosecution); Prof. S. Bartole (Municipalities, Amending of the Constitution) and Mr J. Zlinszky.

At its 24th meeting (Venice, 8-9 September 1995), the Commission held an exchange of views with Mr Pal Vastagh, Hungarian Minister of Justice on the constitutional developments in Hungary.

The Commission took note of the fact that there is no absolute need for a change in the Hungarian Constitution. The Constitution was substantially amended in 1989 allowing the creation of a modern pluralist democracy in Hungary. Nevertheless, the Commission understands that the competent Hungarian authorities may wish to complement the process of transformation and obtain a large consensus of all significant political forces on the basic rules of the State.

The "Regulatory Concept" is the result of a thorough treatment of the subject matter with expert knowledge. As a whole, it is an excellent basis for the drafting of the text for the new Constitution.

The Commission is convinced that mutual consultation and sharing of experiences of all European States in the field of constitutional law are factors which possibly contribute to the improvement of the technical and structural aspects of fundamental laws but also necessarily contribute to the realisation of one of the Council of Europe's aims: promoting a mature European legal culture based on the democratic heritage, the respect for the rule of law and the protection of human rights.

The Commission is satisfied that by bringing the "Regulatory Concept of the Hungarian Constitution" to the centre of the Commission's discussions, the Hungarian Government has shown the importance of this sharing of experience.

## II. COMMENTS

1. Principles relevant to a new Constitution - Introductory and General Provisions

In order to relieve Parliament of some of its legislative duties, the authors of the "Regulatory Concept of the Hungarian Constitution" (hereafter the "Concept"), 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.

The Concept 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 revitalised 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.

The Concept (Point 2 (k) also refers to the distinction between traditional freedoms and economic, social and cultural rights. In the Commission's 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.

2. Fundamental Rights

It is a sound point of departure when it is stated in the "Regulatory Concept of the Hungarian Constitution" that "the Hungarian Constitution may not contradict international agreements obligatory to Hungary or its international obligations". It is certainly not necessary for any state to reproduce the international conventions in the Constitution itself. 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, 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 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.

The Commission finds it very convincing when the text declares the authors' scepticism 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. Nevertheless, the Commission would recommend not to waste 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 Concept, simply to list a number of rights, without separating them into chapters.

The Commission is further convinced that the drafters are seriously concerned with the problem of restricting or suspending human rights, and feels that they have tried to effectively eliminate the danger of undermining the basic human rights. In particular, the Commission welcomes the emphasis on the importance of regulating restrictions by acts of Parliament itself. This is instrumental, seen from a democratic perspective.

3. International Agreements

The Concept refers 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 for incorporating international law. However, it is not quite correct to state that, according to the monist theory, international law prevails over all domestic 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 domestic 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. 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.

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 are 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.

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.

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.

4. Parliament - Legislative process

These chapters of the Regulatory Concept display a high degree of legal scholarship and of common sense. It is a praiseworthy effort to combine strict adherence to the rule of law, the supremacy of the Constitution, and the essentials of parliamentary system with a concern for making the government more efficient and effective.

The Hungarian Parliament is set up according to the model of classical parliamentary government, where the government is politically responsible to Parliament and remain in office only as long as it enjoys Parliament's confidence. While remaining a triangular system (legislative power, executive power and, standing above them in an arbitrating capacity, the Head of State), the parliamentary system nevertheless allows for two variations: the cabinet system and the assembly system. The former is practised in Great Britain; the latter is the traditional French version. Under the cabinet system, the ascendancy of the Prime Minister and the Cabinet over parliament ensures the stability of the executive, which remains in office until a new parliament is elected, while the assembly system gives pride of place to parliament and thus leaves the door wide open to the instability of the executive, which must resign immediately while parliament (whether one or two chambers) pursues its mandate. In the Constitution of the Vth Republic (1958) De Gaulle had to resort to a mixture of the parliamentary system and a barely disguised presidential system to try to remedy the major shortcoming of this variant: the lack of stability of the executive. That is why, since the 1930s, efforts have been made throughout much of Europe to establish what Mirkin-Getsevich called the "rationalised parliamentary system", ie auxiliary devices to safeguard government stability in relation to assemblies. The French Constitution of the IVth Republic (1946) sought to introduce a few of these devices, although without success - quite the reverse. It was the Bonn Constitution that succeeded, with the so-called "constructive vote of no confidence" arrangement (Article 67); the possibility open to the Chancellor to ask the President to dissolve parliament if it passes a vote of no confidence but does not succeed in electing a new chancellor within 48 hours (Article 68); or provision for the President, if he so prefers, to declare a state of legislative emergency and promulgate the bill(s) that the Chancellor needs to pursue his policies, even if this runs counter to the will expressed by parliament (Article 81). All this would be worth bearing in mind because political stability is essential to social harmony and progress.

As to the method of election of deputies, the Commission would express some doubts as to the idea of inserting the election system in the Constitution. The Constitution should limit itself to stating such general principles as universal and equal vote, direct and secret ballot, etc. However, the legislature should retain some flexibility to change the electoral system by way of ordinary legislation if such need arises. Consistently with other constitutional provisions on "organic laws", the adoption and amendment of electoral laws may require a qualified majority (but not one as strict as in the process of constitutional amendment). The proposed provision to the effect that a new act on elections passed in the year of general elections or the preceding year would take effect only after elections is a very useful one to prevent the manipulation of electoral laws in order to give an undue advantage to the present majority party (or parties). The present Hungarian electoral system, somewhat inspired by the German model, seems to function quite satisfactorily. It is a good compromise between the needs of proportionality and of governability. The 4% national threshold should be maintained.

The proposed provision that parliamentary immunity should extend to the right to refuse to give evidence regarding facts which the deputy has learned in connection with his office is a positive novelty. So is the proposal that absence from parliamentary duties would entail a loss of salary but not the loss of office.

The right of the Parliament to dissolve itself should be retained. There is no incompatibility between this and genuine parliamentarism. Moreover, the right of the President or the executive to dissolve the Parliament should be somewhat broadened. The suggested solution on the mechanism of dissolution seems reasonable. Finally, the provision that no dissolution should take place during a state of emergency is a useful and reasonable one.

The Commission sees no reason to disagree with the views expressed in the Concept that in the case of Hungary, there is no need for a second chamber. However the following remarks might be helpful for the final choice: Besides a federal structure or a high degree of regionalisation, there may be many reasons for having more than one chamber. Examples include the Conseil des Anciens (Council of Elders) set up by the French Constitution of the year III (1795). On the other hand, there will always be those who, like Abbe Sieyes, say that if the second chamber agrees with the first it is unnecessary (since hearing it is a waste of time) and, if it disagrees, it is a nuisance (since it may ultimately block even the best decisions). Nowadays, the programming nature of constitutions and the welfare-securing function which is the distinctive feature of the modern state nevertheless demand that the parliamentary assembly in which political parties and forces are represented should be not only coupled with, but also supplemented by another assembly (or a council) enabling the real interests of civil society and its institutions to be represented and to make themselves heard. That is the case of the Conseil Economique et Social (Economic and Social Council), which indisputably performs a political function under the present French Constitution; it is also the case of many similar bodies provided for by a growing number of other constitutions. In the United States in 1946 consideration was even given to the idea of setting up a Third House of Congress for the purpose. The idea was dropped, but provision was made instead for lobbies, which subsequently assumed greater importance in the actual conduct of American politics than the parties themselves. This experience should be borne in mind and the discussion on whether to opt for a second chamber should be linked to the functioning of the Economic and social council provided in Chapter XVI of the Concept (see below p. 20, para. 14).

The Commission finds it a commendable idea to state the hierarchy of legal rules in the Constitution.

The Commission understands that the law-making powers of Parliament and the executive should be made more balanced. The solution suggested by the Regulatory Concept seems quite reasonable. The Commission further agrees that it is absolutely essential to specifically define in the Constitution not only the distinct areas of legislative competence of parliament and the government, but also parliament's inalienable right to legislate on matters exclusively reserved for it and the right it may have to authorise the government to legislate in matters exclusively reserved for parliament. Observance of the hierarchy of legal rules also requires the Constitution to give an equally strict and precise definition of the prescriptive powers conferred at different levels on sovereign bodies and purely administrative bodies (whether central or local).

The introduction of "act-substituting decrees" within the limits foreseen in the Concept would be a positive innovation for the more efficient functioning of the system. Alternatively, a system can be envisaged whereby such decrees become immediately effective in urgent cases, subject of course to rejection or amendment by Parliament.

The Commission agrees that the President or the parliamentary commissions should not have the right to initiate acts. To broaden this right to include other bodies could be against the principles of parliamentary government. On the other hand, the introduction of popular initiative in law-making is in conformity with the modern trends in constitutionalism.

With regard to the rights of the parliamentary minority in the legislative process, the Constitution may state that all parliamentary groups represented in parliament shall participate in all kinds of legislative activities in proportion to their percentage of seats (eg in parliamentary commissions and the chairmanship council).

The essentials of referenda should be regulated in the Constitution along the lines suggested by the Concept. The institution of the referendum tallies with all other measures designed to ensure greater and more effective participation by civil society in government, from the perspective of the forms of semi-direct democracy that are possible in contemporary societies. As such, however, the practice of the referendum must not be allowed when it can be used as a means of destabilising the established government and, in particular, against each of the established powers arising from it. In other words, it must not be used as a substitute for the specific mechanisms of the exercise of constituent power, the revision of the basic law, the exercise of legislative power, appraisal of the government's political responsibility and, generally speaking, budgetary, fiscal and financial acts. That would be tantamount to rejecting the authority of the established powers or even of the state itself. In a democracy other channels must be used, not those that would be formally allowed by the undue demagogical use of the referendum (one could benefit in this respect from the experience of the restrictions placed on Article 118 of the 1976 Portuguese Constitution by the 1989 constitutional revision). For these reasons, the Commission finds that the role envisaged for the Constitutional Court is an important guarantee for maintaining the supremacy of the Constitution. Likewise, the suggested validity threshold should be maintained.

5. The President of the Republic

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. The alternative according to which the President is not allowed to accept fees for his/her activity under the protection of the law of intellectual property should be accepted.

6. The Government and Public Administration

As the President of the Republic is intended to be an individual branch of power with a balancing function, the Government and Public Administration form the Executive Branch. The provisions on the Government are mainly intended merely to update the corresponding provisions in the existing Constitution on the basis of practical experience. There is no reason to criticise this solution or the grounds given for it.

Public Administration, on the other hand, is not regulated in the present Constitution. The proposal of the Concept now to include provisions covering the most important organs and principles of public administration as well as the basic rules of public service is fully motivated.

*Forming of Government*. Due to the separation of powers between the Parliament and the government and the role of the President as a balancing power but not as the head of the Executive Branch, the proposed procedures relating to the forming of Government are necessarily fairly complicated. The model chosen in the Concept (based on current provisions but redeveloping them) seems to be commended.

In regard to the presentation of the programme of the Government to the Parliament, the alternative postponing the presentation until the new

Government has been formed might be worthy of some reconsideration. Despite the Prime Minister's dominant position - which in itself is apt to support a steady governance of the country - it would be useful if a sufficient amount of time could be devoted to the drafting of the programme and the programme could then be approved by the whole Government before it is presented to the Parliament. Especially in the case of a coalition Government, the programme is a basis for the co-operation in the Government of the coalition parties. Of course, the vote on the programme may - in rare cases, one could hope - lead to a vote of no confidence and thus to a new round in the cabinet building.

*Public Administration*. The Concept has found a good balance in choosing the matters concerning public administration which shall be regulated in the Constitution.

*Administrative procedure*. To include basic principles of administrative procedure in the Constitution, as proposed in the Concept (pp. 77 et seq.), is to be commended warmly.

According to the Concept, one of the principles would, however, be that the discretionary rights of public administration bodies must be minimised (p. 74). This principle should be seen in connection with the proposal (p. 62 et seq.) to abolish the general right of the Government under the current Constitution (Article 40) to review acts of inferior bodies and to deprive any body of its competence to act in any issue of public administration. Together these proposals can be seen as a realisation of the principle "Government by laws and not by men" in the manner that public administration is entrusted to independent bodies whose main task is to apply rules of law to concrete situations.

It would be useful to weigh the pros and cons of this view against the idea of "Administration by objectives", where the ends of administrative action are defined in law while the means to achieve these ends are more or less open to administrative discretion - and even the ends may be expressed as flexible standards. Administrative decisions made under this system are quite open to judicial review: is the decision a suitable means to achieve the ends given in the law, has the decision in fact been made with another purpose in mind (*detournement de pouvoir*), etc? And while a power of the Government or another superior authority to review acts of inferior bodies or even to deprive any organ of its competence is not necessary in this system, either, it would be possible to retain such a power in order to use it eg when the superior organ is of another meaning as to the most expedient means to reach the given ends. But the Commission admits readily that such a power should not be available against self-governing authorities (p. 63).

It is important to include the possibility of judicial review among the principles of public administration. The principle is, however, expressed in the Concept in a very extensive way, enabling any citizen to contest an administrative decision if he is of the view that the decision contravenes the law (p. 74). It is essential that anyone is entitled to contest a decision on the ground that it violates his rights; but whether someone not immediately touched by a decision should have a standing to contest it (*actio popularis*, etc) could well depend on ordinary legislation.

*Public service*. It is a good choice to have only the most basic rules on public service recorded in the Constitution. The choice of the principles to be included is also sound. As to the contents of the different principles, it might be a too rigorous rule to require an advertisement for the vacancy in every case, without regard to the nature of the post to be filled. And one might ask whether all the other principles will stand the harsh proof of the realities of life.

7. Armed Forces

The armed forces, the border guards, the police and the state security services are to be regulated in the same chapter of the new Constitution. The Commission does not question this solution.

*Qualified majorities*. More detailed rules in regard to these branches of State structure are to be given by Acts of Parliament adopted by a qualified majority (pp. 78 et seq.). This is a continuation of the system of "organic acts" in the present Constitution, which requires qualified majorities in very many cases. The Concept proposes a substantial reduction of the number of acts requiring a qualified majority (pp. 5, 33); but it might be asked if the number should not be reduced still more. An organic act, once adopted with the needed majority, gives a good support and a certain security to the branches in question, but the system might also be a brake to much needed development.

*Limitations to military conscription*. The Concept would limit the conscription for armed and unarmed military service to "male Hungarian citizens resident in Hungary" (p. 77). The Commission wonders whether it is expedient to limit the conscription already in the Constitution on the basis of sex and residence. Should these limitations not have their place in the (organic) act on armed forces (which will anyway include other limitations based on age, etc), while the Constitution would not forbid the extension of the conscription by legislative amendment to women and citizens residing abroad?

8. Emergency situations

The Concept devotes an entire section (section X) to the exceptional situations. In line with the trend in many modern constitutions, the Concept adopts a graduated approach and distinguishes among four types of exceptional situations (defence situations, emergency situations, state of disaster, and situations of economic emergency) depending upon the nature of the threat and commensurate to its gravity. It appears that the Concept does not envisage a "state of siege" or "martial law".

The Concept envisages a number of constitutional guarantees presumably covering all exceptional situations, including the gravest one (ie defence situations):

(a) Deviations from the normal rules should be proportional to the gravity of the threat (the principle of proportionality).

(b) The act regulating the exceptional situations is to be adopted by a qualified majority (ie it must be an organic act). Likewise, the parliamentary resolution declaring a state of armed defence or a state of emergency requires a two-thirds majority. It is not clear whether such majority is required only in the declaration of a state of armed defence (ie in case of foreign threat), or in emergency situations arising out of domestic threats to constitutional and public order as well. In any case, while it is desirable that the response to such grave threats be based on as broad a consensus as possible, the requirement of a two-thirds majority may conceivably impede or delay decision-making precisely at a time when quick action is indispensable. Nor is it clear whether the parliament takes such resolutions upon its own initiative or upon the proposal of the government or the president.

(c) The application of the Constitution may not be suspended, and the functioning of the Constitutional Court may not be restricted. Does this mean that the emergency decrees may contain no provisions against the Constitution or may not suspend any of the constitutional guarantees? If so, the government may not have sufficient powers to deal with the emergency. It could seem more reasonable either to state in the Constitution which constitutional rights and guarantees can be restricted or suspended during an emergency, or alternatively to delineate a "core area" of constitutional rights that cannot be restricted or suspended even in an emergency (parallel to Article 15 of the European Convention on Human Rights) thereby implying that the rest may be subject to restriction or suspension, observing of course the principle of proportionality.

(d) In a state of emergency Parliament may not dissolve itself or may not be dissolved by the executive.

Although these safeguards are highly commendable to maintain the supremacy of the Constitution and the functioning of the democratic state, it would be useful to state explicitly that emergency decrees and other acts and actions of the emergency authorities shall remain subject to judicial review. Also, while it is stated in the Concept that Parliament has the power to declare or terminate a state of defence or a state of emergency, the Constitutions should provide a parliamentary review process at regular intervals (eg every two or three months) whereby the Parliament may decide to prolong or terminate

the state of emergency.

Emergency rules may sometimes involve changes in the distribution of powers among organs of the state or shifts in the competencies of such organs. A typical and quite ingenious example is provided by the present Hungarian Constitution, and it is maintained, with some modifications, by the Concept. The system involves the transfer of the powers of the Parliament, the government, and the President of the Republic to the "Defence Commission". The Commission would be composed of the Speaker of Parliament, the Prime Minister, the leaders of the party groups in Parliament, the Ministers of Interior, Defence, and Finance, the Minister in charge of the intelligence services, and the commander of the Hungarian Armed Forces, under the chairmanship of the President of the Republic. Thus, the system ensures an effective concentration of governmental authority to deal with the crisis, while at the same time providing for a kind of constitutionally designed national unity government. A national unity government may well be the most suitable model of government in times of grave crises, provided that there are no profound differences among political parties on matters of defence policy. The Concept envisages two relatively minor changes with regard to the Defence Commission. One is to reduce its membership; the other is that the Commission would work in peace time too, without however having any decision-making powers. Both proposals are quite reasonable.

9. State finances.

State finances nowadays play a key role in the activities of the governments of modern states. The volume of its financial resources often makes the state one of the principal economic players. Its action (major works programmes, intervention in the areas of social policy, national defence etc) has a major impact on the economic situation of a country.

It is therefore essential to ensure the sound management of public finances by establishing clear and precise rules. These rules must be fairly rigidly applied to ensure that they are observed and that they direct the medium to long-term management of public funds at national level.

For this reason it is important to lay down the principal rules governing the management of public funds in the basic law of the state.

*The state's financial revenues*

Where financial resources are concerned, the Constitution must stipulate that taxes, duties and loans can only be raised on the basis of legislation, that is to say with the authorisation of the legislative authority. This stipulation is essential to enable Parliament to exercise proper political control over government action.

Likewise, it is desirable to lay down in the Constitution the legal basis for taxes and duties levied by authorities below central government level and to stipulate that bodies subordinate to these bodies may be empowered to levy such taxes.

It is advisable to leave the definition of classes of persons subject to taxation to ordinary legislation, and for the Constitution merely to state the principle of the obligation to pay taxes.

The details set out in the section on "the revenues of state finances", which adopts the basic principles of most modern Constitutions, call for no special comment except to insist on the importance of specifying that apart from taxes, duties and other financial resources, state loans can only be raised with the authorisation of the legislative authority.

*The administration of public funds*

The basic principles underlying the management of all public funds are transparency and parliamentary control. It is therefore essential that all expenditure on behalf of the State should receive prior authorisation from Parliament. This is ensured through the annual vote on the budget. The basic principles governing the establishment and implementation of the budget (annual nature, universality, unity, specificity and non-allocation of resources) must be enshrined in the Constitution. It is true that in most states there is a trend towards debudgetisation, which means that not all state expenditure is entered in the budget. The arguments usually put forward to justify this practice are the volume and complexity of the state's transactions. However, debudgetisation cannot be justified by its undoubted convenience. It can enable the government to spend ever larger amounts of money without any genuine parliamentary control. It is therefore advisable for the Constitution to state clearly that, in conformity with the principle of budgetary universality, all state revenue and expenditure should be included in the budget. Moreover, it would also be advisable to include the principle of provisional twelfths, described in the document, in the Constitution. It is also recommended that the Constitution should stipulate that legislation is required for transfers of appropriations between different budgetary lines, as Parliament would otherwise be unable to control the implementation of the budget once it had been voted.

The state must have recourse to private sector undertakings to ensure the functioning of its services. When public funds are involved, state procurement of goods and services must take place under conditions of transparency and free competition and on the best market terms. It is recommended that the Constitution should stipulate that special conditions (public tender), to be determined by the legislature, should apply to public contracts entered into by the state or local authorities (to be specified). Most modern Constitutions provide that the state's accounts must be approved by Parliament.

*The State Audit Office*

The status, composition and tasks of the State Audit Office, as set out in the document under discussion, are comparable to those enjoyed by similar control bodies in other modern democracies. The primary task of the Office is to ensure the correct execution of the state budget. The Office's annual report enables Parliament to exercise political control over the government. It is important to stress the importance of the consultative function of the State Audit Office. The Office should be able to provide Parliament with opinions, on both the execution and the preparation of the budget, whenever the latter requires them. It would also be advisable to stipulate in the Constitution that the general accounts of the state must be accompanied by the opinion of the State Audit Office. The independence of the Office appears to be adequately guaranteed by the procedure for appointing members and by the fact that the Office has its own budget for operating expenses.

*Guarantees of public property*

Public property transfers must be attended by a series of guarantees.

Moreover, the state property to which these guarantees should apply must be defined. The guarantees should primarily apply to the transfer of immovable property allocated for direct public use (roads, bridges, rivers). As long as these properties are allocated for direct public use, they must remain inalienable. The transfer of these properties out of the public domain must not take place except through legislation.

The disposal of other movable and immovable property belonging to the State but not part of the public domain (state forests, mining sites, furniture allocated to the public service) should be governed by ordinary law. An exception to this rule should be made for the acquisition and disposal of property of a certain value which should only be authorised by special legislation.

It would therefore be advisable for the Constitution to stipulate that the acquisition and disposal of immovable property belonging to the state and major financial commitments by the state require prior legislative authorisation.

*The Hungarian National Bank*

Since the Hungarian National Bank functions as a central bank it plays an important role in the economic and financial role. Its independence must therefore be guaranteed both as regards the recruitment of its directors and the functioning of its agencies.

10. Administration of justice

According to the Concept : "It 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". Moreover, in civil law cases "judgment may be made by non-state arbitration courts, but the state court may, upon request, perform control over their decisions". This statement 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. The Constitution is perhaps not the appropriate place to settle such problems, beyond a mere reference to the existence of the problem as such.

It is not necessarily correct that "the Constitution must define the individual elements of the court organisational structure". The disagreement between the authors of the Concept is, however, probably reduced to a question of the degree of specificity. 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.

The structure - or restructure - of the court system is on the agenda in Hungary. The Concept 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. 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.

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).

The individual freedom of judges is an item for permanent discussions. The Concept seems to set 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 concern expressed. It should be added that in some other European states the private life of judges is not restricted in such a way.

One should address 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 of Chapter XII of the Concept (Constitutionality of laws being controlled by the Constitutional Court; principle of hearing both parties (audiatur et altera pars); principle of publicity of court proceedings; principle of free evidence and free evaluation of evidence; obligation to give reasons for judicial decisions) are of such a fundamental and general nature that they do deserve to be spelled out in constitutional provisions, rather than at the statutory level.

11. Prosecution

The fundamental principle which 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 confidence in the system which is essential in any healthy society.

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.

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;
- the method of his removal from office.

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. 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 lead to the assumption in the public mind of his political allegiance.

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 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. 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. Not all the matters set out 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.

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. The grounds for dismissal should be stated in the Constitution, eg stated misbehaviour or incapacity. 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 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. All the matters suggested above could be provided for in a law of Parliament except the removing authority ("The President of the Republic at the request of the Government/Parliament"), which should be in the Constitution.

The above observations 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.

As regards the basic models referred to in the Concept, one could 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.

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.

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*.

12. Municipalities

A useful starting point could be a comparison between the preliminary working paper and what the Concept calls "the effective Constitution". According to the new proposal a lot of the principles which are provided 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 (Chapter 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 Concept 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 Concept 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 organisational autonomy. For instance, detailed constitutional provisions concerning the internal organisation 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 organisation of the municipalities should restrict its content to principles and avoid too much detailed provisions (sticking to the model of the so-called *loi cadre*).

On the other hand, 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 judgment 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 exigences. 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 judgment.

Article 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 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 the chapter on responsibilties of municipalities (page 114) has some merits: perhaps the proposed detailed suggestions about mutual information, proposals and initiatives should be completed by a clear enunciation of the principle of loyal co-operation 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.

13. Public Societies

The decision to define the status and nature of public companies in the Constitution is justified. These bodies play an important role in the constitutional organisation of the state. The principal guidelines for their operations and activities should therefore be laid down in the basic law. The provisions governing the detailed operation of individual public companies should be determined by ordinary legislation.

Finally, responsibility for the financial supervision of public companies should be defined in the Constitution. One possibility would be to assign this task to the State Audit Office. Another possibility would be to entrust it to an independent private sector audit firm whose report would be subject to parliamentary approval.

14. Economic and Social Council

This institution exists in most modern states. The role of the Economic and Social Council is essentially consultative. The opinion of the Economic and Social Council should be required whenever the government intends to adopt legislation involving general measures affecting either the national economy as a whole or areas of concern to several occupational groups. The composition of the Economic and Social Council should be such as to give its opinion moral authority, without its being binding on Parliament and thus liable to block legislative action. The possibility of allowing professional institutes composed of representatives of the principal economic sectors (trade, crafts, manual workers, private and public employees, agriculture) to operate alongside the Economic and Social Council should not be excluded. Professional institutes can guide legislative action by delivering opinions which, although they are not binding, can serve to highlight the relevant corporative interests whenever draft legislation is being prepared. In this way the Economic and Social Council would have a more general role covering several sectors of the economy and the field of activity of several occupational groups. At the same time, the consultative role of professional institutes would be confined to the specific interests of their own areas.

The composition and organisation of the Economic and Social Council should be regulated by law. The *modus operandi* of the Council might even be determined by rules of procedure approved by the plenary assembly of the Council.

15. The Constitutional Court

It would be more correct to say that the Constitutional Court examines the constitutionality (not the legality) of laws, decrees etc.

The procedure envisaged for the organisation of constitutionality of international agreements conflicts with the international undertakings which Hungary might assume. 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 Concept covers domestic law as a whole, including constitutional law.

The Concept 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.

The Concept fails to mention the length of the term of office of constitutional judges, 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).

16. Parliamentary Commissioner of Citizens' Rights

The Concept states that the Constitution should specify "that parliamentary commissioners serve the protection of citizens' rights". If the functions of the parliamentary commissioner are to be described in the Constitution itself, the Constitution should obviously describe the organisation of the institution of the parliamentary commissioners. It is a purely political problem - and a problem of practicability and convenience - whether a state should establish more than one commissioner or whether one commissioner with general competence would suffice. If one looks to neighbours in Western Europe, the picture is highly different in this respect.

Another question deserves to be commented upon. The Concept refers to the "commissioner and his deputy". There is a question, both of principle and of practicability, what formal position the deputy commissioner is envisaged to play. If one establishes a system in which the commissioner himself shall

have to make the formal decision in any complaint, one will risk overburdening the commissioner and creating a backlog. On the other hand, it is certainly complicated to distinguish, in the legislation establishing the system of parliamentary commissioners, which complaints shall have to be decided upon by the commissioner himself and which complaints are to be delegated to the deputy commissioner.

The task of the commissioner is described as being to "eliminate constitutional irregularities". It is not clear whether this is an intentional restriction on his competence, or whether the commissioner shall be entitled to look also into the legislation and its application by the executive branch.

17. Amending the Constitution

The Concept sticks to the idea that the adoption of a new Constitution or of a constitutional 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. However, the document recognises that the constitutional rules in force could "allow for the governmental majority to be the same as the constitutional power", and this makes the Hungarian Constitution "one of the most easily amendable Constitutions". The proposal submitted aims at strengthening 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 envisaged. The possible alternatives shall be stated in the Constitution, and not only in the Standing Orders of the Parliament. The presence of a constitutional rule would allow a judgment 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 no longer has 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 division 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 are offered the chance of expressing their will in the matter and of giving the act the strongest legitimacy. There is some resemblance betweeen this proposal and Article 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 society as expressed by the structures - the local government, the interest groups and the national communities, and gives the last word to this organic expression of 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 limits 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 only make sense if it referred to amendments concerning the same matter.

The solution of keeping the requirement of the two-thirds looks more practical 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.