CHANGES IN THE CONSTITUTIONAL STATUS OF THE GOVERNMENT SINCE THE CHANGE OF REGIME (FROM „OUR PARTY AND GOVERNMENT" TO THE EUROPEAN UNION)

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The entire Hungarian constitutional system transformed right at the onset of transition from a single-party to a multi-party system. The organizational changes are well known: instead of a collective presidency, a single president was named, the Constitutional Court and the State Audit Office were set up, etc. Behind the dramatic changes lie differences between Communist and Western-type interpretations of constitutionality. The first one was based on the single-party rule, the unity and indivisibility of power and a matching hierarchy; the latter on the separation of powers and the principle of responsibility that follows from it. As far as the Government was concerned, the changes were less spectacular but more far reaching. This paper sheds light on the key constitutional aspects of that process.

Before Transition: „Our Party and Government"

Before 1990, the definition of the status of the Government [officially called „Council of Ministers" at that time] was ambiguous [ambiguity in the status of institutions being common at that time]. The theoretical literature modestly [and in compliance with a complex hierarchy] referred the Government to the category of executive agencies, and described it as the highest ranking among them [and that could be seen on the so-called static model of state organizations]. However, political praxis assigned the Government to the centre of the system of state agencies. The Council of Ministers played a crucial role in the [Communist] party control of state agencies. The Party [officially called: Hungarian Socialist Worker' Party] could „reach" all state agencies via the Council of Ministers. When it intended to reach organs of public administration or state-owned enterprises, it relied on the strict rules of sub- and superordination and a command economy, and in the case of institutions of other types, such as the National Assembly, the Presidential Council of the People's Republic, etc., it issued orders *that were camouflaged as recommendations*.[i]

Thus, the political phrase „our Party and Government" was not incidental. Let us add that the Council of Ministers had the task of imparting a state form and binding force for party intentions.

Due in part to the above circumstances, in the course of the constitutional change of regime the Council of Ministers received a treatment that differed from that of any other constitutional institution. The architects of the change of regime sought to increase the competence and constitutional weight of the National Assembly and the courts, so that they could fulfil the role assigned to them along the classical history of constitutional development. By contrast, they sought to restrict the competence of the Council of Ministers, because that was identical with eliminating the single ruling party and its hegemony.[2]

Constructive Vote of No Confidence

Just as in the case of other constitutional institutions, transformation occurred in several stages yet fast.

As it has been mentioned above, the new constitutional system was based on the principle of responsibility, and that replaced the earlier principle of hierarchy. At constitutional level, this change mainly affected the relationship between the Government and the National Assembly.

A brief reminder for the reader: before the constitutional change of regime the Council of Ministers and its members had an indefinite mandate. Legally speaking, it meant that the length of the mandate, composition, etc. of the Government depended on changes in the country's political line instead of decisions of, or cycles in the operation of the National Assembly. Note that the country's political line was usually readjusted at party congresses, sessions of the Party's central committee, party resolutions, etc.

The political and institutional changes in the Government occurred following the amendment of the Constitution by Act VIII of 1989 and Act IX of 1989, which amended Act III on the Legal Status of State Secretaries. According to those provisions, the mandate of members of the Council of Ministers may also end when *confidence is withdrawn from them.*

Act XL of 1990 was adopted by the newly elected National Assembly, which introduced the institution of constructive vote of no confidence – which in turn can be seen as a theoretical, conceptional and historical mutation of the responsibility of the executive power before legislature.

The essence of the constructive vote of no confidence is well known: a censure motion may only be submitted, if it is accompanied by a recommendation for a new prime minister, etc. It will be recalled that the idea behind that institution

is to prevent protracted government crises, that is, situations when there is a long time between the termination of the mandate of a government and the election of a new prime minister and new government. As far as that purpose is concerned, the Hungarian version of that institution has been fulfilling its political mission. Its critics claim that the constructive vote of no confidence prevents the assertion of the basic requirement of ministerial responsibility. A censure motion may only be submitted against a prime minister and not against individual ministers; a vote of no confidence against individual ministers counts as a censure vote against the prime minister, etc. Some recommendations have been tabled to resolve this „contradiction" (for instance, when in 1994-98 preparations were made to draft a new Constitution): in case a censure motion is introduced (and carried) against a minister for the fourth or fifth time, that minister should resign. At stake here is the confirmation or abandoning of the essence of that institution: it is part and parcel of the constructive vote of no confidence that political confidence must be presumed between the prime minister and his/her ministers. A prime minister could in principle tie his/her mandate – politically – to the mandate of his/her minister, even without the constructive vote of no confidence. It is a mistake to think that in countries, where ministerial responsibility is defined in a traditional manner, it is possible to secure the resignation of a minister with a censure motion against the will of the prime minister. In countries like that the presumed political confidence between the prime minister and his/her minister is asserted by political means, while in countries committed to the constructive vote of no confidence, by legal means. Let us stress that the constructive vote of no confidence does not mean relinquishing the political responsibility of individual ministers. Ministers have the obligation to respond to questions and interpellations in the Parliament, etc.

The constructive vote of no confidence has been serving its purpose: over the past 15 years Hungary has not experienced any major and protracted government crises and the parties in majority retained their government position. That process has not been broken by the related constitutional provisions, but a law adopted in 1997 on the responsibility of ministers. That law defined a time limit of 30 days for the resignation of a prime minister. As we will see in more detail below, later on a confused constitutional situation occurred as a consequence. Suffice it to mention here that the law concerned contradicted the constitutional objective of the constructive vote of no confidence, because it has lengthened government crises. (Let us emphasize: a government crisis is not identical with a constitutional crisis; a government crisis is resolved in compliance with constitutional rules.) An example was the change of government in Hungary in the summer of 2004. (The former prime minister resigned in accordance with the relevant constitutional provisions, yet the president of the re-

public only appointed the new prime minister after the thirty-day „resignation period" elapsed, as required by the law on ministerial responsibility. In the meantime, the constitutional status of the prime minister, who had resigned, was unclear.)

There is only one open question concerning the present-day *constitutional regulation* of the institution of the constructive vote of no confidence: what if a parliamentary majority does not accept a person recommended by the president of the republic for prime minister? Article 63 of the German Constitution (which the framers of the Hungarian Constitution considered as an example) provides for such cases: „If the person elected (as Federal Chancellor) obtained the votes of the majority of the members of the Bundestag, the Federal President must appoint him within seven days from the election. If the person elected did not receive this majority, the Federal President must within seven days either appoint him or *dissolve the Bundestag*." The framers of the Hungarian Constitution have not adopted this provision, which, by the way, is regarded as a procedural stipulation belonging to the assertion of the constructive vote of no confidence. Note that if the president of the Republic of Hungary had the powers to dissolve the National Assembly or appoint a minority prime minister, he/she would have a much stronger constitutional position, than what is the case today. (About half of the principal political forces would have never accepted such a formula.) Under such conditions, assertion of the constitutional rule that the prime minister of the time must enjoy the confidence of the majority of the National Assembly, cannot be considered elegant in terms of constitutional law. In case the National Assembly „makes the appearance" of accepting the recommendation of the president of the republic, but immediately after that introduces a censure motion against him/her, then the prime minister wins his/her office „without the good offices" of the president of the republic. Fortunately, in Hungary it has not occurred yet that the National Assembly failed to elect a prime minister in the absence of the required majority.

Under the conditions of the constructive vote of no confidence the right of Members of Parliament to submit interpellations preserves the responsibility of the Government and the ministers in a way that differs from the usual pattern. Let us add: over the past one and a half decades in Hungary the right of interpellation has had some specific offshoots. As it is well known, interpellations and parliamentary questions are instruments of the supervision of legislature over the work of the executive power. Hence, it follows that it is typically used by Members of Parliament of the Opposition. However, in Hungary Members of Parliament of the government parties have also interpellated their Government and its members. Yet, a closer look at those interpellations shows that they offered the opportunity for the Government or the MP concerned (or both) to show off their „serious efforts," that is, they were PR.

Interpellations and questions are not the only ways the National Assembly may call the Government to account. *Reporting* is another way. Before the change of regime the Hungarian Constitution, just as that of other Communist countries, obliged numerous state organs to report about their work for the supreme organ of state power. There were diverse legal relationships between the National Assembly and the addressees of that obligation. Those organs were under the obligation to submit a report, because state power was unified and indivisible, and there was consensus *in principle* on the undisputed primacy of the National Assembly. Today, the obligation to report to the National Assembly concerns the Parliamentary Commissioner for Human Rights, the President of the State Audit Office, etc. Article 39 (1) of the Constitution provides that "The Government is responsible to the National Assembly for its operation and is required to *submit regular reports* to the National Assembly about its work" (*author's italics*). The individual ministers are also under the general obligation to report about their work, which is not in full harmony with the institution of the constructive vote of no confidence. Certain laws may also request reporting to the National Assembly, in such cases the subject of the reports is spelled out in those rules of law. For instance, the Government must report to the National Assembly about its programme of legislation and the way it is implemented.

The Constitution and the other key rules of law are not entirely compatible with the obligation of the Government (which dates back to the Communist times) to report to the National Assembly. The Standing Orders of the National Assembly has transformed the Government's constitutional obligation of reporting into the institution of a *day of political discussion*. In case the Government or at least one fifth of the Members of Parliament recommend that in writing, the National Assembly must hold a day of political discussion on the broad political issue defined in the recommendation. In the course of implementing the Standing Orders, the reports made by personalities, who have this obligation according to the Constitution or some other law *have to be considered as reporting*. Such reports inform the National Assembly about measures taken, inquiries conducted and the activities of some agency. (Articles 89[3] and 98 [1] of the Standing Orders)

Notwithstanding the fact that the principle of responsibility dominates the relationship between the National Assembly and the Government, the Government plays a central role in coordinating and influencing the operation of state agencies. Still, it must operate as the Government of the National Assembly and not as that of any party. Examining the question from a theoretical point of view, we also have the opportunity to quote the concurring opinion of László Sólyom, President of the Constitutional Court (CC) at that time, attached to Resolution 53/1996 (22 November) of the CC: „the prohibition on parties to exercise power directly …and several provisions of the Constitution on the

prohibition of public officeholders being party members… are general arguments to confirm that the 'will of the people' as conveyed by the parties may only assume the form of state power via the representative bodies."

Ministerial Responsibility: the „Destructive" Way of *Regulation by Laws*

(a) We can describe the constitutional formulation and practical implementation of the constructive responsibility as successful. True, there have been some problems with practical implementation, but that is attributable to Act LXXIX of 1997 on the Legal Status and Responsibility of Ministers and State Secretaries (hereinafter referred to with its Hungarian acronym: Kjf.). The Constitutional Court has recently requested the amendment of a provision of that law, yet several reservations can still be raised. The *anomalies stem from the regulation itself*, and they might bring about a crisis in constitutional life. That is what the word „destructive" refers to in the subtitle above, so it should not be interpreted as the opposite of constructive responsibility, when no confidence in the Government is separated from the decision on the composition of a new Government.

When we mention the constructive vote of no confidence, we bear in mind the rules of political responsibility as interpreted according to the Constitution in effect. Essentially, it means that the Government enjoys the political confidence of the legislature; and when that confidence is undermined, the Government loses its mandate.

Responsibility in terms of (constitutional) *law* is related to the infringement of the Constitution, laws and other rules of law. That form of responsibility involves damages under civil law and measures under criminal law, etc.

The *legal responsibility* of ministers was first regulated by Act III of 1848. It listed acts that may incur calling the ministers to account. „All acts or decrees that violate the country's independence, the guarantees of the Constitution, the effect of the law in force, individual freedom or the sanctity of property…, appropriating money or other valuables that are given to their trusteeship…, omissions in implementing the laws or maintaining public order…" (Article 32).

The Constitution of 1949 – which was diametrically opposed to the principles of Western-type constitutionality – provided that „The Chair (Deputies) and members of the Council of Ministers are responsible for their measures and conduct also individually. A separate law [sic!] shall regulate the *way of calling them to account*." (Article 27)

Until the constitutional change of regime the implementing decree for the said provision of the Constitution was Act III of 1973. It provided that the responsibility of the members of the Government in terms of labour law, administrative law, etc. shall be adjudicated under the relevant laws, yet eventually the *procedure* of calling those officeholders to account was never enacted.

What Act III of 1848 stipulated about the responsibility of ministers was in force until as late as 1973.[3]

(b) The Constitution presently in force provides (in Article 39) that the „Members of the Government are responsible to the Government and Parliament, and shall provide the Government and Parliament with reports on their activities. The legal status, compensation and method of accountability of Members of the Government and State Secretaries shall be regulated by a law."

The National Assembly had failed to adopt the law referred to by the Constitution for a long time. In its Resolution 49/1996 (25 October) the Constitutional Court annulled some related rules of law, and declared that the omission to adopt that law violated the Constitution. Next year Act LXXIX on the Legal Status and Responsibility of Ministers and State Secretaries (Kjf.) was enacted.

Conceptionally, ministerial responsibility involves consequences that belong to civil law, criminal law, etc. The Kjf. fails to specify them. Therefore, provisions of Article 225 of the Criminal Code on crimes related to office have to be applied. Legislators should have asked themselves the question, whether there were any penal categories, where only a minister can be the perpetrator. (There are such categories for the president of the republic, and the Constitution defines the related procedural rules.) The framers of the Kjf. could also have considered, who is entitled to initiate criminal proceedings against a minister in connection with a crime committed in the course of his or her official activities. Restrictions on that account – which may not be interpreted as immunity – could have protected ministers from unjustified harassment. (During the preparatory stage of that law, one of the early versions of the text would have granted ministers immunity in a similar manner to Members of Parliament, which is a theoretical nonsense. Immunity has always protected Members of Parliament from executive power. If ministers had immunity, that could have produced the constitutional nonsense where, for instance, it protected the minister of the interior from the harassment of police, which that minister supervises.)

It would be worthwhile formulating special rules for (in effect removing from the competence of the executive power) cases where ministers are involved (investigation and prosecution), because that would guarantee that also ministers would be called to account if they commit a crime, but they could be protected from unjustified harassment.

The Kjf. fails to define the length of time while a minister is legally liable for his activities after the termination of his or her mandate. Neither does the Kjf. include provisions on who and under what conditions may grant pardon to a minister, who has been called to account under the criminal law.

The absence of special criminal law regulations is felt even more keenly as, under the Constitution presently in force, Members of Parliament as well as non-members may be elected or appointed prime minister or minister. Under the present regulations, the prime minister and ministers enjoy immunity if they are Members of Parliament, but those members of the Government, who are not Members of Parliament, do not have immunity.

(c) The Kjf. fails to regulate certain action in the field of criminal law that such a law should, and to which the Constitution grants entitlement. However, it is excessively eager, relative to certain constitutional provisions connected to members of the Government and state secretaries, since it widens the circle of the subjects covered by such a regulation: in addition to regulating the responsibility and legal status of members of the Government, the political and administrative state secretaries, it also regulates these questions concerning *deputy state secretaries*. The motivation behind this is not quite clear. This formula undoubtedly lends prestige to the rank of deputy state secretary, however, it indicates the erosion of a theoretical and practical borderline between two divisions of executive power: public administration and the governmental machinery. Appointments in public administration are made under the law of public administration, while appointments in government are made under constitutional law.

The pivotal principle of the Kjf. is that it creates a relationship alongside the one that connects the National Assembly and the members of the Government. This other relationship shows the characteristics of public administration and public service, and it covers the members of the Government, the political and administrative state secretaries and deputy state secretaries. The framers of the Kjf. posit that there is a labour relationship among the persons involved. The law provides that, unless otherwise provided, the minister's employer is the prime minister. [Article 10 (2)] There is some inconsistency here, however, as no one is named to exercise employer's rights in relation to the prime minister.

The way the Kjf. regulates said issues elicits the question: is it possible to apply the rules of public administration, civil service and employer-employee relationship to the executive power? Note that it is explicitly forbidden under German law[4] – and that is not incidental.

From the viewpoint of constitutional law, the application of the rules of public administration and civil service to the governmental sphere (which belongs to the domain of constitutional law) is questionable on at least two points.

(1) Responsibility in public administration and in civil service mainly works in terms of hierarchy, yet ministerial responsibility lies outside the realm of super- and subordination. Legally speaking, a minister may not get orders from the legislature, the Government or the prime minister. An interpretation that works otherwise is doomed to ruin ministerial responsibility.

No minister may elude responsibility claiming that he/she acted (or did not act) at the order of the legislature or the prime minister. In the present Hungarian constitutional system the Government or the prime minister may assert their will through political means or through indirect constitutional means. For instance, the president of the republic appoints or relieves ministers at the prime minister's recommendation. In case a prime minister is unable to assert his or her will through political or constitutional means, the use of legal means or issuing orders cannot help. The principle of political solidarity – which has to be taken as granted in the relationship of the prime minister and the ministers – must not be confused with super- and subordination in a hierarchy.

(2) The other consideration is related to the *disciplinary right*, which is part of the employer's rights. In case a prime minister exercises employer's rights over the ministers, he/she may only do so by curtailing the powers of the National Assembly. In other words, the legislature loses the powers to call the executive to account, which means the executive will judge its own deeds.

The Kjf. includes provisions about the financial responsibility of ministers. It fixes the limit of compulsory indemnification at the minister's pay of two or six month. Note that the harm a minister can cause might run to tens of millions of forints or more. The Kjf. defines the principles and rules of calling ministers to account financially, just as in the civil service: the minister's liability for damages is decided by the prime minister at the recommendation of the disciplinary council. As the National Assembly is excluded from this process, the executive power judges its own acts; and it may even exonerate itself from responsibility.

(d) Referring to the prime minister, the ministers, state secretaries and deputy state secretaries as *state leaders* the Kjf. uses a terminology that is unusual in classical constitutional law. The Kjf. divides state leaders into two groups: *political leaders*: the prime minister, ministers and political state secretaries, and *professional leaders*: administrative state secretaries and the deputy state secretaries.

(e) The introductory part of the Kjf. defines the conditions of the election/appointment of the members of the Government, state secretaries and deputy state secretaries, and spells out the rules of *conflict of interest*. Description of the details would run beyond the competence of this paper. Suffice it to say here that a state leader may not pursue an activity that is *not worthy of his/her office*, and the administrative state secretaries and deputy state secretaries must act free of partisan bias or any other outside influence.

The Kjf. refers questions of conflict of interest in the case of the prime minister to the National Assembly, and in the case of ministers to the president of the republic. In the first case, initiatives may be made by any Member of Parliament (!), in the latter by the prime minister.

The concept „unworthy of one's office" is so general that it can hardly be separated from the causes that might lead to a vote of no confidence against the Government, which under Article 39/A of the Constitution, may only be introduced by one fifth of the Members of Parliament, if a candidate for a new prime minister is proposed simultaneously. Any Member of Parliament, however, may claim that a prime minister has acted in a manner that is unworthy of his/her office, and in such a case the sponsor of the motion does not need to recommend a new prime minister. If it is a censure motion by Members of Parliament, it has to be sponsored by one-fifth of the House and an alternative prime ministerial candidate must be put forward, while it is next to impossible to differentiate among the causes of the various motions at removal. In our opinion, what we have here is a new form of the institution of no confidence, because as long as a censure motion is tabled, the activity of the prime minister is „assessed" only by the Member of Parliament, who submits the motion at conflict of interest. A censure motion, just as when a conflict of interest is established, may incur the termination of the prime minister's mandate. Such a regulation of the conflict of interest in the context of the constructive vote of no confidence may raise questions of constitutionality.

As far as a conflict-of-interest motion against a *minister* is concerned, it may not be tabled by the National Assembly or Members of Parliament. Only the prime minister may do so, what for practical purposes is identical with disciplinary rights. In principle, the prime minister may act contrary to the intentions of the National Assembly: the *non-submittal* of a motion about conflict of in-

terest, or a negative decision on that question means immunity for the minister. If such decision latitude were transferred to the president of the republic, that would inevitably implicate the head of state in partisan politics.

(f) The Kjf. complements constitutional provisions on the way a prime minister and ministers receive their mandate and the way it is terminated. It defines rules of procedure including time limits, which cannot be found in the Constitution. For instance, a prime minister, or the Government, may tender his/her/its resignation – to be submitted to the president of the republic and addressed to the Speaker of the National Assembly – by requesting *thirty days of notice*. (Article 7) Ministers, etc., may also tender their resignation with thirty days of notice.

Said procedural rules prove that the framers of the Kjf. only had considerations and principles of public administration in mind. When the Kjf. was challenged with reference to the letter of constitutional law, the Constitutional Court voted in favour of the petition. Decision 884/B/2004 of the Constitutional Court annulled the Kjf's provision about the thirty days' notice. Let us add: the Constitution *does not authorize* the National Assembly to formulate procedural rules for the termination of the mandate of the prime minister and the ministers. That is not the *only* cause, why said provisions are unconstitutional. The same conclusion can be made upon subjecting the Constitution to a systems analysis. The *raison d'être* of the institution of the constructive vote of no confidence is to limit any government crisis that is concomitant to a change of government to the shortest possible time. That was evidently on the mind of the framers of the Hungarian Constitution, when they adopted it. The provision in the Kjf. that the prime minister may resign from his/her office with thirty days of notice lengthens the government crisis related to such a resignation, which causes uncertainty in the operation of the governmental machinery.

The Kjf. includes detailed provisions about the pay ministers are entitled to during and after their tenure, yet it is silent on the conduct they are expected to pursue after their mandate ends. *In the private sector* people in senior positions often get considerable severance pay on leaving their companies, as their former employers expect them not to join competitor firms. In a similar manner, it would be desirable to regulate past ministers' conduct and oblige them to keep official secrets, refrain from using inside information for private gain and/or to the detriment of the state – *at least* in proportion to the size of the „severance pay" they get. As the Kjf. includes no provision about such expectations, it seems that the money ministers get on leaving their post is simply a compensation.

Those and other reservations about the Kjf. are more than enough to justify a thorough constitutional examination of that law. The government crisis Hungary experienced in 2004 has been resolved. Our subjective remark is that the only reason why that government crisis did not escalate into a constitutional crisis was thanks to the wisdom of the president of the republic. But however important the human factor is in the life of a country, it is an axiom of constitutionality that power conflicts should be resolved in compliance with pre-established norms.

The Formation of the Government

Hungary's Constitution provides that „the Parliament shall hold the vote on the election of the Prime Minister and on the adoption of the Government's programme at the same time. … The Government is formed upon the appointment of the ministers." (Article 33 of the Constitution) Said provision was first included in the Constitution based on Act XXXI of 1989 on the Amendment of the Constitution. It tied the Government to the party (parties) in majority through the National Assembly and not in a direct manner. That formula was taken over by Act XL of 1990, which introduced the constructive vote of no confidence. Today the phrase „government programme prior to the formation of the Government" is regarded as a contradiction in definition. Partly in connection with the role a prime minister candidate plays during the general elections, it is doubted, whether the parliamentary vote should be held simultaneously with the adoption of the programme of the Government. If the programme of the Government were adopted later, in a less improvised manner, the newly appointed ministers could take part in the parliamentary debate of the government programme that would realistically assess the state of the country.

The Composition of the Government

(a) Neither the Constitution, nor the Kjf. carry restrictions on who may become a member of the Government: Members of Parliament and non-Members are equally eligible. The philosophy behind that is to make it possible both for *experts on constitutional affairs* and *politicians, who are not directly associated with the majority party (parties)* to become government members, irrespective of whether they are MPs. Consequently a key principle of the separation of powers is not honoured: people, who participate in the executive power should not take part in legislation. We cannot raise objections against that. However, we find it objectionable that Hungary's legal system fails to be consistent on that point. There is a flagrant contradiction: ministers, who are Members of Parliament enjoy immunity, whereas those who are not MPs do not.

That contradiction may not be resolved in a way – which was originally proposed by an early draft of the law on ministerial responsibility – to extend immunity to all ministers. It follows from the historical and theoretical logic of the institution of immunity that the Members of Parliament need to be protected from harassment by the executive power, that is, the Government. Under the present legal conditions it may not be ruled out, for instance, that the tax authority is carrying out an inquiry in the finances of the minister of finance, who oversees the work of the tax authority. As a consequence of a mistake in legislation, in such cases the prosecutor's office *does not have exclusive* powers of investigation. (The prosecutor's office has exclusive powers of investigation relative to, *inter alia*, the officeholders elected by the National Assembly, yet the ministers are not elected by the National Assembly: they are appointed by the president of the republic.)

In Hungary, before 1990 the Council of Ministers included, in addition to ministers who headed the ministries and ministers without portfolio [who were officially called ministers of state], *officeholders who headed certain committees*. That state of affairs was maintained even by Act XXXI of 1989 with the proviso that only ministers could be appointed to the head of those committees. Thus, ministers could either lead a ministry or head a committee or national office. What really mattered – this was the official explanation at the time – was that they should be ministers. In our view, at that time the assertion of ministerial responsibility was not consistent.

Act XXXI of 1989 repealed the position of *deputy prime minister*, and that helped rendering ministerial responsibility more consistent. The post of deputy prime minister was incompatible with traditional Western principles of ministerial responsibility, and it evidenced that the state agencies were directed by a single party, and that the pattern of public administration reflected the public ownership of the means of production, and that ministries were arranged in compliance with the branches of the economy. Each deputy prime minister was responsible for some ministry and had the powers to instruct ministers.

Act XXXI of 1989 did not make it compulsory to establish a separate post of deputy prime minister, yet it enabled the prime minister to appoint one of the ministers of state to substitute him, if need be. (Over the past one and a half decade the idea to re-establish the post of deputy prime minister in the Constitution has kept re-emerging, as for instance when the text of a new constitution was drafted.)

The title *minister without portfolio* is a product of the constitutional change of regime. The Constitution does not limit their number. Article 37 (2) of the Constitution stipulates „The ministers without portfolio shall attend to the responsibilities determined by the Government." A minister without portfolio

may head an organ of public administration. For instance, Act LI of 1990 commissioned a minister without portfolio to oversee the work of the national security service. In our view, the idea behind that formula was to relieve the prime minister from direct political responsibility. Most recently, the title of minister without portfolio has been receiving the same acceptance as that of ministers.

Is the Government a Collegiate Body?

When examining the structure of the Government, we have to take two contradictory points of departure into consideration.

> *(1)* Traditional Western approach differentiates between two attributes of the Government in constitutional law. From a legal point of view, the Government is not a collegiate body, because an opposing interpretation would run contrary to the principle of responsibility. The members of the Government may not elude responsibility claiming that they do, or do not do, something at the order of the Government as a body. From the viewpoint of political responsibility (as interpreted within constitutional law), the members of the Government are attached to one another, and especially to the prime minister, via the principle of political solidarity. If political solidarity is missing, a minister's mandate is likely to be ended.
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> *(2)* The case is different with *Communist* constitutions. Under a Communist constitution the Government is a collegiate body legally as well, however, the relationship between the prime minister, the Government and the ministers is hierarchical.

The two approaches differ for various reasons. First, because in Western societies there are several parties, while in Communist countries there was just one party. Secondly, in Western constitutions responsibility and accountability are basic assets, while for Communist constitutions the *method of decision-making*, the collegiate principle was regarded as an asset. (It is another question to what degree were the decisions made by those collegiate bodies, genuine or formal.)

In the Hungarian Constitution reference to the collegiate nature of the Government has been waning. That corresponds to the institution of the constructive vote of no confidence, the requirements of multi-party system, etc. However, other rules of law do not yet sufficiently reflect the transformation of constitutional rules since the change of regime. According to (the several times amended) Government Regulation 1088/1994 (20 September), the Government shall exercise its functions under the leadership of the prime minister *as a col-*

legiate body. In decision-making the members of the Government shall have equal vote. Decisions shall be made by majority vote; and in a tie the prime minister shall have the casting vote. The decisions of the Government shall be declared by the prime minister; etc. In case the term "collegiate body" means that the Government passes its decisions by majority vote, this contradicts the aspects of the constructive vote of no confidence, which says that a censure motion may not be submitted against the Government, only against the prime minister. The principle of collegiate body is not in harmony with the requirements of *coalition government* either, because if that is asserted, a government by a coalition of parties would be impossible.

Transparency

The activities of the National Assembly are explicitly and characteristically public. It goes without saying that those of the Government are not. Neither would it be a legitimate demand to make government meetings accessible to the public. However, it is justified to claim transparency for the whole of governmental activity, partly from a constitutional, partly from a political aspect. As for the first aspect, it refers to the Government's relationship to the National Assembly, as for instance, responses to interpellations and questions of Members of Parliament, the participation of government members in sessions of parliamentary committees, etc. Access to data of public interest is an independent legal institution that assures the transparency of the work of the Government. Under the same heading belongs the institution of the *spokesperson for the Government*, which dates back to the years before the constitutional change of regime. As can be seen from these references, transparency – a complex of legal and institutional components – can best be judged in the context of the rights of the Opposition.

The assertion of transparency, on the other hand, can be assessed from a political aspect. From that angle, transparency is asserted as depending on the political approval, ideals and *interests* of the Government and the ruling parties.

Cabinet, Government Commission, Collegium, Advisory Body, Expert Committee, Government Commissioner

Cabinet**,** government commission, collegium, advisory body, expert committee and government commissioner – these are bodies and officials appointed by the Government for specific purposes. The scope of this paper does not allow a detailed analysis of their status. We can address two issues in their respect in general terms. The first one is of a constitutional law character: may those bodies and officials act independently *vis-à-vis* organizations outside the gov-

ernment sphere as subjects of public law? The answer is affirmative only in the case of the government commissioner. The activities of the collegia, advisory bodies, etc. are worthy of attention from the viewpoint of transparency of governmental work.

Article 96 of Government Regulation 1088/1994 (20 September) provides that the *government commissioner* acts in the name of the Government and he/she regularly reports to the Government about his or her activities. In the past, government commissioners were appointed for specific periods and with definite territorial jurisdiction in cases of emergency: floods and other natural disasters.[5] By now, however, it has become routine to appoint such officials, which raises several legal and competence-related questions in terms of rule of law. Article 2 of Government Regulation 148/2002 (1 July) mentions additional governmental officials: *government emissaries* and *government representatives*, but it is silent about their powers and status.[6]

The Tasks

(a) The Constitution contains a detailed list of the Government's *tasks*: to protect constitutional order, ensure the fulfilment of laws, direct the work of ministries and other organs placed under its direct supervision, etc. The list ends with a general clause: the Government shall „attend to those responsibilities assigned to its sphere of authority by *law*." (Article 35 [1]) (Author's emphasis)

The intention to provide a detailed description of the Government's competence has its origin in the Communist approach of framing a constitution. We still have the list following the constitutional change of regime, apparently in order to deny some of the earlier provisions. An example could be the provision that the Government may only monitor, whether the local government authorities operate in compliance with the law.

It goes without saying that no list of the Government's tasks can be exhaustive. That is why the list ends with the above-mentioned general clause. According to the classical constitutional approach the tasks of the Government are defined in less specific terms, as for instance: the Government directs the realization of policies that are defined by legislature, directs the implementation of the country's domestic and foreign policy, etc. Underlying the actual wording of the list of tasks is the so-called *residual principle*: a government needs to address all those tasks that the Constitution does not assign to any other organ. A government may never elude responsibility with the excuse that the Constitution did not assign a certain task to its competence. The Constitutional Court possesses guarantees against the abuse of power by the Government, as for instance the right to decide, whether a case belongs to the organs of public administration or

the courts, prior constitutionality review, the constitutional appeal, etc. When the Government acts *ultra vires* in its legislative or other activities to the prejudice of the constitutional competence of another organ or the citizens' freedoms, the Constitutional Court may rectify the situation.

When assessing the Government's relationship to other government agencies or to protect basic freedoms, the Constitutional Court *applied the „residual principle" and/or interpreted the competence of the Government in general terms.*[7]

Let us draw attention to contradictions in the constitutional regulation of the Government's tasks. The so-called residual principle is in contradiction with the general clause that the Government shall „attend to those responsibilities assigned to its sphere of authority by law", because from the residual principle it would logically follow that a government activity does not always need to be attributable to a legislative act. As once Montesquieu, the great oracle of the separation of powers, put it, the Government, the executive power has its „natural limitations." Here and now, those limitations are the competence of other constitutional institutions, the Constitutional Court, which guards constitutionality, etc. The contradiction between the residual principle and the general clause is most conspicuous in the field of legislation. As we will detail it below, according to the law on legislative activities, the Government may issue decrees without separate legal authorization.

(b) When the Constitution and other rules of law define the competence of the Government, they vest the majority of powers in the Government, but actually they mostly depend on decisions of the prime minister. In a similar manner, the powers of the central agencies of public administration mostly depend politically and hierarchy-wise on the ministers. The relationship between the prime minister and the ministers is reminiscent of the relations in a presidential system between the president of the republic and his or her ministers.

Of outstanding prestige are the positions that are entitled to *countersign acts of the president of the republic*.[8]

Decision 48/1991 (26 September) of the Constitutional Court provides that – with the exception of the right of appointment defined by Article 48 of the Constitution (the appointment of top-level judges) – the countersignature of the prime minister or the competent minister is needed, when the president of the republic appoints, promotes, confirms somebody in office or relieves someone. The president of the republic must refuse to grant appointment, if the conditions required by law are not met. Otherwise, refusal by the president of the republic is only constitutional, if the president of the republic has a good reason to suppose that granting approval would gravely endanger the democratic operation of the government machinery.

It would be beyond the scope of this paper to embark on a detailed analysis of the day-to-day exercise of all the powers of the Government. Let us restrict our inquiry to two issues.

Today the institution of countersignature does not cover the *entirety* of relationships between the Government, its members and the president of the republic. There may arise new, yet unregulated constitutional issues relative to powers of the president of the republic, and that may only be exercised with the participation of the prime minister and certain ministers.

Another issue is the *regulation of courts*. In the past, courts were regulated from outside by the minister of justice and from the inside by court presidents, who in turn worked under the supervision of the Ministry of Justice. Under the new law on the operation of courts (*Gerichtsverfassungsgesetz*), the work of the courts is overseen by the National Judiciary Council (Hungarian acronym: OIT), which in turn operates within the organizational framework of courts. The focus of this paper being the status and functions of the Government, we cannot go into details on that question. Let us however mention that, because of the said arrangement, the regulation of courts is no more in the competence of the Government, whose work is supervised by and which is accountable to the National Assembly. In other words, the National Assembly has no oversight of that area any more. When it comes to appropriating the courts' proposed budget for the subsequent year, the president of the Supreme Court (who is also president of OIT) has no other option but to engage in a demeaning bargain, which might shed doubt on the organizational integrity of courts. Furthermore, traditionally, recommendations about the appointment of judges were made with the approval of the minister of justice: the person who made the recommendations, and the minister who countersigned them were accountable for their decisions to the National Assembly. Under the present arrangement it is impossible to ascertain related responsibilities.

How are Decrees Passed?

(a) Some of the issues of the Government's legislative activities are specific (and can only be evaluated within their conceptional system), others are universal (and are ascribable to the general state of legislation).[9]

Today, the Government may issue decrees (apart from the powers it has under extraordinary conditions) on two grounds: as authorized by the National Assembly, or on its own right. As Article 35 (2) of the Constitution puts it: „Within its sphere of authority, the Government shall issue decrees and pass resolutions … Government decrees and resolutions may not conflict with the law." It is not necessary for each government decree to be attributable to a legislative act.

The way the Government may frame decrees is limited by the National Assembly's general powers. The competence of the two bodies is not delimited. The competence of the National Assembly is „open towards the Government", because it may decide to regulate any aspects of life. True to the above-quoted constitutional provision that government decrees may not conflict with the law, issues that have once been regulated by law will thereafter always belong to the competence of the legislature. Let us now approach the question from another angle. The National Assembly's exclusive competence is defined by the Constitution: these are the *exclusive legislative subject matters.* Yet, the National Assembly may transcend the exclusive powers that the Constitution defines for it. The issues thus regulated by laws – which may be called (non exclusive) *legislative subject matters* – must from then on come under the competence of the legislature. As could be predicted from these premises, the number of subject matters that are regulated by decrees other than those formulated under the National Assembly's authorization has been gradually decreasing. Actually, today there are few decrees that are not issued by the Government under the ad-hoc authorization of the National Assembly.

That state of the formulation of decrees can be attributed to historical circumstances. Before the constitutional change of regime the Presidential Council of the People's Republic (which was a „rival" of the National Assembly in the legislative field) had nearly an unlimited competence to substitute the National Assembly and issue law-decrees. When (after the change of regime) democratic guarantees were put in place in legislative work, and some nostalgia was felt about the classical traditions of Hungarian constitutional arrangements, it was justifiable to restrict the Government's powers to issue decrees. Today, however, such a state of affairs may be questioned on several grounds:

– Hungary is no exception internationally, when it complains about the insufficiency of the law-making capacity of the legislature. The modern constitutional systems have found various responses to the problem. What they have in common is that, when it comes to the number of rules of law passed, for quite some time it has not been a requirement that the legislature should play a dominant role. Concrete formulas may differ but „adherence to a conduct that is worthy of a democratic society" must be maintained.

– After a country accedes to the European Union, the primary role of its *legislature* weakens for several reasons. The Community law rarely differentiates between the institutions of legislation. If a hierarchy between the institutions of legislation appears at all, judicial decisions enjoy primacy. Furthermore, Community law overrules national legislation, irrespective of the source of legislation.

When asking the question, whether greater scope could be granted for legislation by government decrees, it needs to be considered that, *apart from legislative issues that require two-thirds majority, parliamentary legislation has been conducted by the parties in government*. (The expansion of the scope of legislation by decrees would require the amendment of the Constitution; and the enactment of a new law on legislation to replace the obsolete old one would also require the approval of two thirds majority of the National Assembly.) Openness and the scope for debate in the National Assembly differentiate the framing of decrees by the Government from parliamentary law-making. In case the emphasis of legislation is shifted towards the framing of decrees, the related rights of the Opposition need to be reconsidered.

(b) The Constitution provides that the Government has the right to issue decrees. In my opinion, the *present legal arrangement* is a hangover of the Constitution of Communist times. Under Communism Constitutions presuppose a hierarchy between the state organs and emphasize collective decision-making instead of responsibility. When examining theoretical aspects of the framing of decrees by governments, we can find at least two contradictions in the new constitutional system.

> Under classical constitutional law, it is impossible to assert the responsibility of *collegiate bodies* under constitutional law. (The case is different in Hungary today, because interpellations may be tabled both to government members and to the *Government* as a whole.) The validity of that long-standing legal axiom will also depend on the assessment under Community law of tort liability.
>
> The coalition government system also contradicts granting greater scope to legislation by government decrees.
>
> Let us conclude: as far as the Government's legislation by decrees is concerned, it would be desirable to stress the responsibility of the *prime minister*. That would be justified by general constitutional law and responsibility-related considerations, and by the institution of constructive vote of no confidence, which places the prime minister in the hub of executive power politically and in terms of constitutional law. (Today rules of law issued by the prime minister have the same rank as those issued by ministers.)

The Government and the Executive Power

Traditionally, the executive power subordinated to the Government was considered as unified. With time the functions of public administration became increasingly varied, and the system of ministries even more differentiated. Furthermore, certain functions have been outsourced.

The legislature has retained the right to restrict the action radius of public administration in certain fields, as for instance, national defence. A wide variety of agencies of public administration has sprung up and their bonds to the Government are also diverse. From the viewpoint of constitutional law it is important that the National Assembly should always know which agency of public administration to hold responsible politically and legally for what happens in public administration.

Soon after the constitutional change of regime these issues needed reconsideration. The theoretical questions of the structure of public administration are outside the scope of this paper.[10] We will only examine those subsystems that are defined by the Constitution, namely, the armed forces, the so-called independent agencies created by law, and agencies set up by the Government under Article 40 (3) of the Constitution. (The Government has the right to place any branch of public administration under its direct supervision…)

The functions of the state have been increasing mainly in the fields of research, (electronic) media and sports.[11] As a rule, mixed (that is, public and civil) or exclusively civil organizations are set up to discharge those functions. They are (also) called non-governmental organizations (NGOs). In the Hungarian context it would be more precise though to call them *non-state* organizations. From the aspect of constitutional law, the relationship between NGOs and the state can be problematic as for independence, supply with funds, responsibility for the use of those funds, etc. In addition, there are agencies that are to a certain extent independent from the Government (not the government, the interpretation of which in Hungary is uncertain), as for instance the Central Statistical Office, and the Hungarian Competition Authority. They are undoubtedly „purely" state administration agencies, the relationship of which to the *Government* (the executive power in the strict sense of the term) can be regarded as special from the viewpoint of constitutional law as regards their responsibility.

The Government and Public Administration

(a) The present version of the Hungarian Constitution is taciturn concerning the relation between the Government and public administration:

> – [the Government shall] direct and co-ordinate the work of the Ministries and other organs placed under its direct supervision; [Article 35(1)c)],
>
> – The Government has the right to place any branch of public administration under its direct supervision […] [Article 40 (3)].

(b) The organs subordinated to the Government usually operate as ministries. The way a ministry is structured, and the functions that are directly subordinated to the minister depend on expectations towards public administration and on aspirations of the government programme.

Division of labour within the government is presently defined by the National Assembly: there is a separate law that lists the ministries of the Republic of Hungary (as provided for by Article 34 of the Constitution). Defining the duties of the ministries is not a direct task of the legislature: the ministers comply with the rules of law and the Government's orders. The ministers without portfolio discharge functions defined by the Government [Article 37 (2) of the Constitution].

Following the change of regime the new pattern of ministries soon reflected the changes that have occurred in the economy: the ministries of the economic branch were dismantled before or during the transition. The volume of public assets dwindled fast because of privatization and reprivatization. A law was adopted to ensure the autonomy of state-owned companies; and the State Holding Company was trusted to handle them. Note that no minister has been appointed to supervise the companies that remained in state ownership, or to direct the agencies that handle privatization.

Ever since 1990 the structure of government was modified, when a new Government was installed. The ministries each overseeing home affairs, finance, defence and education have been exempt to change, but water management, environment, sports, informatics, etc. are now independent ministries, now merged with other areas, now treated as sub-ministry functions. The ebb and flow of domestic politics may justify some of those changes, yet they weaken trust in the law, and occasionally there are professional objections to certain decisions, as for instance, when the environment and water management come under a common ministry.

Division of labour within the government system is a peculiar business. The list of ministries is laid down in a law, which means forming, dismantling and renaming a ministry is in the National Assembly's competence. Changes in the name of ministries involve redeployment of functions, as provided for by Act LXXXVI of 1998 on Changes in the Competence of Ministers. Certain functions of some ministries are specified in a separate law.

When a new Government is installed it might cause some delay that Article 33 (5) of the Constitution provides that „The Government is formed upon the appointment of the Ministers" whereas a minister may only be appointed to head a ministry that is already in operation. Hence, it follows that [in an ideal case] during the process that leads to the installation of a new Government, the leg-

islature must adopt a law on the enumeration of ministries after the election of the prime minister, but before the appointment of ministers. Moreover, the legislature must also be aware of the budgetary changes any modification of the list of ministries might entail.

(c) Government Decree 1040/1992 (5 July) regulates the operation of agencies with national competence. Such agencies are directed by the Government, and each one is supervised by a designated government member.

An agency with national competence is represented in Parliament and during sessions of the Government by the minister charged with its supervision, and that minister helps with the work of the head of that agency. Let us stress, said government decree stipulates that the minister supervises that agency independently from his/her responsibilities of his/her portfolio.

Whatever status the Government accords to the agencies of public administration under its supervision and direction, the government members may not be exempted from the legal and political responsibility for the operation of those agencies of public administration. If that were not the case, the Government could relieve such agencies from their legal and political responsibility to the National Assembly.[12]

It is a sensitive question, whether a minister is ready to respond to interpellations about agencies of public administration that are under his/her supervision. Two related rules of law: Government Decree 2396/1997 (8 December) on the conception and proposed measures concerning the further development of central agencies of public administration other than ministries, and Government Decree 2013/1999 (21 April) amending it, have failed to resolve that problem, because they do lay emphasis on the ministers' responsibility for the central agencies of public administration. (The word „responsibility" does not even occur in those instruments.)

(d) Among the agencies of public administration directly subordinated to Government, special mention has to be made of KEHI, the Government Control Office, which until a few years ago, operated in accordance with Government Decree 61/1999 (21 April), and presently in accordance with Government Decree 70/2004 (15 April), under the aegis of the Cabinet Office.

A detailed description of the said government decree would be out of place here. Suffice it to refer that it defines the competence of KEHI from two directions: from the aspect of public money and from an organizational aspect. Legally speaking, the controlling powers of KEHI do not cover agencies that are not subordinated to the Government. However, functionally KEHI carries out checks on the use of public money in the private sector, more specifically, on how government subsidies are used by various ventures, companies and public foundations.

At present, the powers of KEHI are related to those of the State Audit Office. As KEHI acts „ultra vires" – checks also on entities that are not subordinated to the Government – the question evidently arises, whether the State Audit Office abides by the rules that limit its powers. The question can be further generalized: where are the limits to the interference of public administrative acts in processes of the private sector?

(e) The *annulment of decisions* of agencies of public administration is an important component of the relation between the Government and public administration. There are uncertainties in the related regulation and its theoretical foundations. To put it briefly: according to the classical constitutional principles, executive power – as it operates under the "umbrella" of the Government – is unified and indivisible. The Government's responsibility is unaffected by the fact that the agencies of public administration can be grouped according to „branches of activity" and as being central agencies or county administrative offices. A Government may only fulfil its related responsibilities, if it has the right of disposal over the organs that are subordinated to it. That also involves the Government's right to annul decisions that are either illegal or not purposeful. Under Communism, it was considered an essential instrument of Communist constitutionality that decisions of agencies of public administration that violated the law could be annulled. Since Hungary has been a multi-party democracy, legally irreconcilable decisions (in case they set norms) may be annulled by the Constitutional Court or (in the case of concrete measures) by courts. Consequently, the Government's right to annul legally irreconcilable administrative decisions has become insignificant. However, its right to annul decisions that are not purposeful follows from its responsibility for public administration, otherwise its responsibility for decisions, which do not violate the law could not be asserted. Accordingly, Article 35 (4): "With the exception of legal statutes, the Government shall annul or amend all legally irreconcilable resolutions or measures taken by any subordinate public authorities" is, to say the least, debatable. It is, furthermore, difficult to tell how this constitutional provision relates to those statutes that define by name the interrelationship between the Government and the agencies subordinated to it (as for instance, the armed forces).

(f) The formation of *county administrative offices* – the regional division of the otherwise unified executive power under the guidance of the Government – was a logical consequence of Hungary's transition to a system of local and regional authorities of local government. The detailed regulations about the *köztársasági megbízott* [commissioner of the republic] were first promulgated in Act XC of 1990 on Local Government. The parliamentary debate on the draft of that law caused a major political controversy. The Opposition of that time gave voice to the concern that the commissioner of the republic, even if

his/her functions are purely administrative and professional, will assume a political role, and in such a capacity it will strengthen the Government's position in its tug of war with the local authorities, which were organized on a political basis. The Reasoning of the said law also reflects that concern: „When regulating the legal status of the commissioner of the republic it must be borne in mind that, when defining the outlines of that institution, the framers of the Local Government Act took into consideration both the political and the professional aspects of public administration." Opposition politicians compared the commissioner of the republic to the old lord lieutenant. Even though each commissioner of the republic was put in charge in several counties, opposition fears were not allayed. The opponents of that law referred it to the Constitutional Court, but to no avail.

Later on, the institution of the commissioner of the republic was replaced by the county administrative offices, and this removed the personal touch from that institution.

(g) At first sight, it is clear that the Constitution is silent about public employees and civil service. By contrast, it includes provisions about the personnel of the armed forces and police: „Professional members of the armed forces, the police and other civil national security services may not be members of political parties and may not engage in political activities." [Article 40/B (4)]

Hence, it follows that the Constitution considers public administration first and foremost as an organization. We miss the constitutional requirement that civil servants must be politically neutral, and such a requirement could go further than prohibiting party membership.[13] It could be required that the civil servants should be loyal to the Government of the time; and the Constitution could also require that the civil servants should protect public administration and *public service*.

It goes without saying that rules of law that are lower in the legal hierarchy, than the Constitution include provisions about the protection of public service and the politically neutral conduct of civil servants. As for the latter requirement, Act XXIII of 1993 on the Legal Status of Civil Servants provides that civil servants may not hold office in political parties; and it is a part of their oath of office that they must fulfil their official duties *without bias*. The author of this paper would like to see those requirements being incorporated into the Constitution.

State Secretaries

The institution of *political state secretary* and *administrative state secretary* has direct relevance to the constitutional status of the Government from several aspects. Let us now focus on the differentiation and interconnection of the political and professional aspects of executive power. What was the situation before the constitutional change of regime? The institution of the state secretary was a part of the hierarchy of public administration, where the Council of Ministers stood at the top. A state secretary of ministry – just like the deputy minister – had the right to substitute a minister. The powers of state secretaries, who headed agencies of national competence, were nearly identical with those of ministers. They had the right to issue *orders*.

Act IX of 1989 that modified Act III of 1973 on the Legal Status and Responsibilities of the Members of the Council of Ministers and State Secretaries provides that state secretaries may substitute ministers if, for instance, a minister's mandate expires, until the election of his/her successor. The office of deputy minister was still in use in 1989, and he/she could deputize the minister during sessions of the National Assembly.

Act XXXIII of 1990 on the Temporary Regulation of the Legal Status of State Secretaries heralded a radical change. The law divided the two aspects of executive power. It assigned the office of political state secretary to the realm of politics and granted the right of appointment to the Government. The mandate of the administrative state secretary was defined as indefinite, and he/she was placed to the top of the hierarchy of career civil servants. It is not the purpose of this paper to offer a detailed analysis of that law. The author is content with observing that its main deficiency was that it only placed said offices in a governmental context, but failed to consider the requirements of career civil service. (A law on civil servants and public employees was only enacted in 1992.) Let us add that it would be unfair to blame only the real or assumed deficiencies of that law for the fact that its underlying concept could not be asserted. Whenever there was a change of government, both the political and administrative state secretaries lost their jobs, and even the deputy state secretaries. Ever since 1990, the newly installed governments dismiss the top officeholders of their predecessors with an almost „Marxist-Leninist" zeal, because they blame them with political bias. By doing so, they inadvertently „incriminate" the newly appointed officeholders. This spoils system has become a chronic illness of Hungarian public administration and civil service, because after each change of government accumulated professional experience is wasted. We believe that Governments could compel civil servants to be loyal to them and the spoils system could be abandoned.[14] (Until 2002 administrative state secretaries were entitled to about thirty times their monthly pay in case they were dismissed without a good reason.)

Another aim of Act XXXIII of 1990 on the Legal Status of State Secretaries was to adjust it to the requirements of the newly-born governmental system: the primary duty of the political state secretary is to represent the minister in the National Assembly [Article 3 (1)].

The present rules referring to the members of the Government and state secretaries can be found in Act LXXIX of 1997 (which has been amended several times). Its first version seems to be uncertain in asserting the requirements of parliamentarism, also in connection with state secretaries (which was partly rectified by Act XVII of 2002). A political state secretary may only issue an instruction for the administrative state secretary, when he/she substitutes the minister (in other words, the minister's responsibility remains unchanged); if a minister is unable to attend a meeting of the Government, he/she is substituted by the political state secretary. The law does not empower the administrative state secretary to substitute the minister. It can be ascertained that the relevant provisions of Act XXXIII of 1990 better asserted the requirements of parliamentarism: in case a minister's mandate expired, he/she *could not be* substituted by the political state secretary; during government meetings a minister could be substituted by the prime minister or another minister of his/her choice; a political state secretary could attend government meetings with a voice but no vote [Article 3 (2), Article 4].

Let us have a look at the relationship of the political state secretary and public administration. As it turned out, that office has become involved with the leadership of the work of the ministry concerned. It has strengthened the process that today several political state secretaries may be appointed to the same ministry. The Kjf. stipulates [in Article 18 (2)] that a political state secretary may be given specific assignments, which means that he/she may be appointed to the head of agencies with national competence. From this point of view, I would draw attention to the changes that have occurred in the Cabinet Office. Today the Cabinet Office's functions go beyond ensuring the administrative basis for the work of the prime minister and of the Government. For all intents and purposes it gives an organizational umbrella for the operation of agencies with national competence.

The regulations about *titular state secretaries* have also undergone several modifications. Originally, that office carried additional rank and status, and perhaps tasks separated from the routine of public administration. However, the original version of the Kjf. terminated that office. Act XVII of 2002 then amended the Kjf. and restored it, but defined it as a *position*. The most recent version of the Kjf. (according to Article 31/A) provides that the rules relevant to the administrative state secretary should be applied to the legal status and responsibility of the titular state secretary; the titular state secretary is subordi-

nated directly (without the mediation of an administrative state secretary) to the minister concerned; unless otherwise provided by a law or government decree, he/she exercises employer's rights over organizational units under his/her direction, etc. The question is evident: is the office of titular state secretary a revival of the former state secretary commissioned to head an agency with national competence?

Government Decree 164/2001 (14 September) on the Corps of Senior Civil Servants was (meant to be) a step to consolidate the status of the civil service.

In my opinion it would be justified to reconsider and re-regulate the entire complex of questions related to political, administrative and titular state secretaries in the constitutional context of agencies with national competence and civil service.

National Defence and the Armed Forces

National defence and the armed forces became an area separated from unified organization and activities of executive power early in the classical history of constitutional law. In Hungary, following the constitutional change of regime that process was strengthened by the desire to negate the Communist approach to constitutional issues, and block any Communist attempts at restoration.

(a) The very definition of the *notion of armed forces* was uncertain for a long time. In line with the Communist approach, the category involved all the law-enforcement agencies, the law and order agencies, the frontier guards, etc. The process of differentiation only finished in 2004. Finally, Act CIV of 2004 reclassified the frontier guards. According to the Reasoning of the law, the frontier guards stand closer to the law and order agencies than the armed forces, which guard Hungary's territory against outside attacks. For that reason the law reclassified the frontier guards from a part of the armed forces into a law and order agency. The related chapter heading of the Constitution has also changed. The new heading is *The Hungarian Armed Forces and the Law and Order Agencies.*

The key theoretical question is *who controls the armed forces?* For a long time related questions were referred to civilian control. The need to amend the terminology arose after Hungary acceded to the NATO. The phrase: „civilian control" – which also qualified former career officers to participate in the control of the armed forces – was replaced by the requirement of *democratic control*. The term refers to the various levels of control, the role of the National Assembly and its committees, the organizational set-up of the Ministry of Defence, the role of the state secretaries at that ministry and their relation to the chief of staff and the commander of the armed forces, etc.

As for concrete aspects of regulation, there are two or three neuralgic questions of constitutional law in the relationship between national defence and the armed forces on the one hand and the Government on the other. All of them are rooted in the political and historical situation of the recent past. One such „root" is the stationing of foreign troops in Hungary, and the stationing and deployment of Hungarian troops abroad; another, issuing orders for the armed forces in various situations, including the period of martial law.

The question of who may issue orders for the armed forces was a central dilemma in the course of the constitutional change of regime. In order to remove the armed forces from the *direct* control of the single political party, and to avoid that the armed forces should become an independent political factor, those powers were transferred to the Government. The new type of regulation focused on the National Assembly (where the vote of two thirds of the MPs are required for such decisions), the president of the republic and the Government. Soon after the change of regime the Constitutional Court dropped the president of the republic from the trio of entities that may pass crucial decisions. (The minister of defence's countersignature is needed for the president of the republic to act as the commander in chief of the armed forces, to appoint and promote generals, and to direct the armed forces in peacetime.)

According to Article 40/B (3) of the Constitution, „Within the framework of the Constitution, only Parliament, the President of the Republic, the National Defence Council, the Government and the responsible Minister shall have the right to command the armed forces, unless otherwise provided by international treaties."

The original text of Article 35 (1) of the Constitution provides that the Government supervises the operation of the armed forces, the police and other security organs. The present, revised version uses the terms armed forces, police and law and order agencies. Such phrasing, according to the Constitutional Court, may be interpreted in the way that all the agencies listed belong to the executive power, and the direction of the operation of the armed forces, the police and the law and order agencies encompasses all the directional powers over the armed forces that, in compliance with the laws currently in force, are not expressly vested in the National Assembly and the president of the republic. The armed forces must be organized and kept in the required state under the guidance of the Government.

(b) After Hungary acceded to the NATO, Act CIX of 2003 was enacted, and that meant the modification of the Constitution. Accordingly, Article 40/C (1) of the Constitution provides: „The Government shall have powers to authorize *a)* the use of Hungarian and foreign armed units by decision of the North Atlantic Council, or *b)* the deployment of troops by decision of the North Atlantic

Treaty Organization in accordance with Subparagraph *j)* of Paragraph (3) of Article 19." Said constitutional provision means an exception from Article 19 (3) (j), which vests the National Assembly with the right to deploy the armed forces within or outside the territory of Hungary.

(c) The fact that the Constitution distributes control over the armed forces and the law and order agencies between the National Assembly, the president of the republic and the Government, may be evaluated from various angles. One approach may stress *mutual and equal inspection* that checks and balances are in operation here. Another approach, however, may identify *mutual distrust*. It is not the purpose of this essay to resolve that dilemma. Suffice it to observe that the logic applied here is the same as the one used, when constitutional powers are arranged in connection with the period of state of emergency and martial law. The Speaker of the National Assembly and the president of the Constitutional Court are interspersed as independent actors between said entities.

The regulation of powers amid *extraordinary conditions* (officially called: state of emergency) plays an outstanding role among the traditional governmental powers. There are two neuralgic points here: the decision to introduce and terminate the emergency legal system, and the decision what powers are vested in the Government during the period of emergency legal system.

As mentioned above: the Constitution is well-balanced or identifies mutual distrust – depending on how one regards it – relative to the introduction of the emergency legal system and the assignment of powers in such a period. We have the impression, however, that the regulation tilts towards restricting the room of manoeuvre of the Government.

In a case of emergency, when Hungary is endangered from outside, a National Defence Council plays the central role. When martial law is declared, the president of the republic assumes decisive powers: he/she may introduce extraordinary measures, etc. One might ask, how come that in *such a critical situation* of all situations, it is not the Government that is at the helm? In such situations the burden and responsibility of governance shifts to an „artificially" created body, the National Defence Council and/or the president of the republic, whereas under „normal" conditions, the president of the republic does not participate in governance. Such arrangement is unusual in parliamentary democracies. The principle of checks and balances – or mutual distrust – can be identified also towards the president of the republic. A state of emergency is normally declared by the National Assembly. If it is prevented from doing so, the president of the republic has the right to do so as well. Whether or not the National Assembly is indeed prevented from action, and whether or not the declaration of a state of emergency is justified, must be determined collectively

by the Speaker of the National Assembly, the president of the Constitutional Court and the prime minister. After fifteen years of parliamentary democracy, it can be said that the effort of the framers of the Constitution to ensure checks and balances for periods of state of emergency or martial law between the prime minister, the president of the republic, the Speaker of the National Assembly and the president of the Constitutional Court has proved to be „overkill". Historically speaking, the motivations can be justified: the Constitution was framed in a manner to prevent the Government from turning back the wheels of political history. However justifiable it may be historically, in critical situations all those checks and balances may paralyse the country, and it would be next to impossible to tell who is responsible for what.

In the years after 1989 the Government's role somewhat changed in the power triangle of Government, National Assembly and the president of the republic: distrust in the Government gradually eased, due to the way the situation changed in world politics. Act CII of 1993 (without amending the powers of the National Assembly) *empowered the Government to evade an attack from outside* in case the country's airspace is deliberately violated, there is an unexpected air raid or in case of the intrusion of armed groups. The law provides that the frontier guards need to be made suitable to protect the frontiers even before the declaration of a state of emergency. (The career members of the armed forces, police and the non-military national security agencies are prohibited by law to join political parties.)

Act CIV of 2004 created a new situation by introducing a new category: the *preventive defence situation*. In such a situation – when there is no direct danger of an outside attack, or when Hungary has to fulfil its allied obligations – the necessary measures may be taken, without the restriction of fundamental freedoms. When deciding about the introduction of a preventive defence situation, the National Assembly is free to determine the length of such a qualified period and, simultaneously, *it empowers the Government* to ward the danger off or take measures necessary to fulfil Hungary's allied obligations. Moreover, the law empowers the Government – when the conditions of the preventive defence situation are fulfilled, after it initiated the declaration of a qualified period and until the National Assembly passes its decision –, to take all the measures ensuring that public administration, Hungarian armed forces and law and order agencies can fulfil all the tasks necessitated by the danger threatening the country or required by Hungary's allied obligations. However, on the whole, the regulations referring to the state of emergency and martial law have not been modified over the past fifteen years.

The Local Authorities

In the first year after the constitutional change of regime, the local government authorities were the councils (*tanács)*, which Hungary inherited from the previous regime. There was consensus on the need to reorganize them into self-governing local authorities. At closer look, however, the exact notion of self-government was rather hazy at the time. Back in 1989, an opportunity existed that the state-owned enterprises would shift into employee ownership. That is why the autonomous business organizations were also understood as belonging to the notion of self-governments. The law on local and regional self-governments was only adopted after the general elections of 1990. It could be foreseen already in 1989 that the system in which the councils were closely subordinated to the Government would be radically transformed and replaced by autonomous local authorities. The first step in that direction was taken with Act XXXI of 1989. Its Reasoning stated that it would violate the principle of self-government if the Council of Ministers attempted to *direct* the work of the councils. Consequently, that provision was repealed.

In time, the *allocation of financial resources* gained increasing importance in influencing the work of the local authorities.

The Operation of the Government

It is understandable that the Constitution has little to say about the operation and organizational set-up of the Government. The regulation in this case focuses on responsibility, because responsibility absorbs the details of organization and operation. To put it simply, when it comes to the Government, what matters is not *how* decisions are made, but that responsibility for those decisions should be accountable before Parliament. That is why the Constitution leaves it *as a rule* to the Government to define the detailed rules of its organization and operation. (Traditionally, it was only the Parliament that could adopt a legal instrument about itself. It is a theoretical question, whether rules adopted by the Government about its own operation can be considered legal instruments.)

Since the constitutional change of regime every Government has amended the by-laws it inherited from its predecessor, in accordance with the requirements of its platform and coalition arrangement. The regular meeting of *administrative state secretaries*, which precedes meetings of the Government, has been a lasting institution, one that each Government has honoured since 1990. (It would be incompatible with the *methodology* – and the scope – of this paper to consider the question to what degree is the burden and opportunity of governmental work shifted from the Government to the meeting of administrative state secretaries.)

The question may arise, whether there are components of the proceedings of government sessions, the regulation of which would need a legal instrument of a higher rank than a decree. We do not know of any. If such components existed, they should belong to issues that only demand a simple majority of the National Assembly, and it would perhaps only pose a routine task for the government majority after election time. As far as the proceedings of the work of Government are concerned, in our view *transparency* is the prime issue.

The Government and the NGOs

Before the constitutional change of regime, the state organs and those social organizations that were politically active interacted primarily through the Council of Ministers. Take the example of some Communist countries other than Hungary: the highest-ranking trade union official was occasionally a government member as well. Trade unions discharged state functions in Hungary as well, mainly in the field of social insurance and labour safety. In the latter area they had the powers to issue regulations.

Act II of 1989 merged under the same heading all the „social organizations" that had no state functions, and it *terminated the supervision of public administration over them*. It took some time before that law was implemented. A milestone along that road was Act XXVII of 1991, which cancelled the Government's right to examine the legality of certain social organizations.

Following the constitutional change of regime differentiation began among the NGOs *in accordance with their activities* and their legal status. Act CLVI of 1997 on the Public Benefit Organizations provides the legal definition of the umbrella term NGO, which covers *social organizations*, foundations, public foundations, public benefit companies, public bodies and national associations of branches of sports.

The scope of this paper does not allow us to analyse the Government's relation to all those organizations in detail[15]. Let us briefly mention that Act CLVI of 1997 was less rigid in separating the state and social entities than Act II of 1989. On the one hand, the Government (and the ministries) maintain(s) considerable influence on the NGOs by assigning them public functions, retaining the right to establish certain types of NGOs, operating a system of direct government subsidies and defining the criteria according to which certain NGOs may benefit from tax allowances; on the other hand, the Government gladly cooperates with the NGOs and listens to their comments. There are political documents that corroborate that. Over the past fifteen years a lot of things have changed in the sphere of NGOs, yet some of the rules referring to them are hangovers from Communist times. For instance, the way the Constitution

regulates the relationship between state agencies and NGOs is typical of the „old" approach: „In the course of fulfilling its responsibilities, the Government shall co-operate with the relevant social organizations." (Article 36) The Constitutional Court has interpreted this provision as a „recommendation on methodology for the Government."

Article 27 of Act XI of 1987 on the Legislative Process provides that the NGOs and interest associations concerned have the right to formulate an opinion about the bills that are submitted to Government. Decision 10/1991 (5 June) of the Constitutional Court stipulates that the omission to obtain the opinion of the organizations concerned does not render a statute unconstitutional. The Constitutional Court later modified that position in Decision 30/2000 (11 October) stating that the organizations (some of which have the right of refusal, others the right of comment) that are specifically named by rules of law [not just by Act XI of 1987 − *author's comment*] must be seen as part of the executive power, and therefore the framers of statutes must consider their comments.

The relationship to the *trade unions* has remained a separate complex of issues. The Government has the duty to coordinate its policies with Hungary's about a hundred trade unions. Act XLVII of 2002 provides that the National Interest Reconciliation Council will take over the functions of the National Labour Council.

In some modern Western democracies interest associations – including trade unions – have both the functions of safeguarding interests and carrying out political activities. As an example, we can mention the French *Conseil économique et social* (CES), which rallies, among other entities, trade unions. Until a similar situation arises in Hungary, the Government will play an outstanding role in fostering relations with the trade unions.

The Government's Role since Hungary has Acceded to the EU

Hungary's accession to the European Union has brought an epochal change in Hungarian constitutional law, and it has a fundamental impact on the Government's constitutional status.

Act LXI of 2002 amended the Constitution by inserting the so-called EU clause and sought to rectify certain constitutional inconsistencies that were to arise in the wake of Hungary's EU membership. Article 6 of that law provides (augmenting Article 35 of the Constitution) that „the Government shall represent the Republic of Hungary in the institutions of the European Union that require government participation." Article 35/A (1) states: „In all matters in connection with European integration, the detailed rules governing the oversight powers of

Parliament or its committees, the relationship between Parliament and the Government, and the Government's obligation to disclose information shall be enacted by a two-thirds vote of those Members of Parliament present." Article 35/A (2): „The Government shall present to Parliament the motions that are on the agenda of the decision-making mechanism of those institutions of the European Union that require government participation." In other words, said amendments of the Constitution authorize the National Assembly – in connection with affairs related to European integration – to formulate laws on the rules of the *oversight competences of parliamentary committees*, *problem reconciliation* between the National Assembly and the Government, and the *information obligations* of the Government. In fact, the amendment of the Constitution does not authorize the legislator to amend the constitutional provisions that relate to broadly interpreted governmental powers and related procedural rules. Technically speaking, that should have been stipulated by the amended Constitution.

However, Act LIII of 2004 on the Cooperation of the National Assembly and the Government on EU Affairs (Hungarian acronym: OKtv.), which was enacted following said constitutional authorization, does not follow the constitutional authorization in every detail. Its Preamble includes the key words of the relevant constitutional provisions: oversight, problem reconciliation and information obligations in connection with EU affairs, however (to tell it in non-technical language), it cancels the procedural rules that are defined in the Constitution. In other words, the OKtv. overrules the Constitution.

Let us have a closer look at that. According to the OKtv., right after receiving it, the Government has to send to the National Assembly every draft of European Union legislation, recommendation and document that plays a role in the decision-making processes of those EU organs that operate with the participation of national governments.

However, the OKtv. obliges the Government to discuss with the National Assembly themes that have *significant constitutional importance*: affairs that need a qualified majority, the definition of fundamental rights and duties, provisions that are in contradiction (!) with the laws in force (Article 2). As far as said themes – and other themes – are concerned, the Government puts forward its *draft position,* and the National Assembly may adopt a *position*. In that position the National Assembly identifies the viewpoints, which it intends to assert in the course of the decision-making process, related to EU-related affairs. [Article 4 (1), (2)]

In other words, the National Assembly „responds" to the Government's draft position on issues of key importance with a position.

However, the question evidently arises: to what legal category will such a position of the National Assembly belong? To what extent will such a position oblige the Government to do something? Our short answer is: to no extent. Let us see a more detailed answer, one that is based on the text of the law concerned.

The Government formulates the position that it intends to represent during an EU-related decision-making process after considering the National Assembly's position … If the matter concerned requires a two-thirds majority of the MPs, the Government may only divert from the National Assembly's position in justified cases. [Article 4 (4), (5)] However, during the European Union's decision-making process the Government may modify that original position, about which the National Assembly formulated its response – true, the Government has continuously to inform the National Assembly about the state of affairs, and the National Assembly may also modify its (original) position during the process.

To paraphrase those provisions: the European Union decisions, which are formulated with the participation of the Government's representative, may overrule the Constitution without guarantees, antecedents or consequences.

That part of the OKtv., which speaks of another procedure than the routine procedure of problem reconciliation between the Government and the National Assembly, is constitutionally the most problematic part. [Article 4 (6)] In case the National Assembly fails to adopt a stance about the Government's position by the time limit required by the EU decision-making process, the Government may pass its decision on the position to be represented in its absence. In such cases the Government's opportunities are almost unlimited. That is only *mitigated* by the fact that after the EU's institutions that operate with governmental participation have adopted their decisions, the Government gives oral explanation to the National Assembly, if the position it represented diverts from the National Assembly's position. In case the difference between the two institutions touches on a theme, the regulation of which under the Constitution requires a decision with a qualified majority, then the National Assembly must pass a decision about the *adoption of the explanation (!).* [Article 6 (2)]

We have come full circle: the Government's position, which it represented contrary to how the National Assembly responded to the Government's draft position, and which the Government „sealed" with its vote in the European Union's institutions, is final and cannot be modified. *The National Assembly may only decide, whether to agree with the Government's explanation about the position the Government represented.*

According to the OKtv., it is impossible to question the effect and validity of the EU decision that has been made with the participation of a minister. As far as responsibility is concerned, the position the prime minister or a minister has taken as a member of the Council of the European Union, the National Assembly may only evaluate it in terms of general political and legal responsibility.

In that connection, the contradiction can be increased almost to the absurd: concerning certain subjects, the Council may by a majority vote reject a recommendation that was put forward by the prime ministers of some of the Member States. Projected back to the Hungarian constitutional conditions, such a scenario means that the prime minister or a minister has to assume political responsibility before the National Assembly for a decision with which he/she himself/herself did not originally agree, and even voted against it in the Council of the European Union.

Overall, we can state that the OKtv. cannot resolve the important contradiction that appears between the urgency of decisions on EU-related matters, and the democratic guarantees demanded by the domestic law of the country concerned. On a deeper, philosophical level, we are talking about a fundamental question of the operation of the European Union. It was clear for the „Founding Fathers" of the European Community right from the beginning that a consensual decision-making process between multi-party parliaments of the Member States could stymie the operation of the Community. It has to be borne in mind that, as far as European Union affairs are concerned, the relationship between the legislature and the executive power is regulated along similar principles in other Member States of the European Union as well. The domestic proceedings of exercising the Government's EU-related powers may not be allowed to question the primacy of Community law under any condition. However, from the standpoint of Hungarian constitutionality, the present state of affairs is hardly tenable. A mutually acceptable compromise formula needs to be found that satisfies both the requirements of the European Union and the Hungarian Constitution.

NOTES

[1] The author of this paper was a university student when the following episode happened. A secretary of the Presidential Council of the People's Republic presented a paper at a conference. He spoke of the circumstances under which a law-decree on the awarding of decorations had been adopted a short time before. The Presidential Council, he said, modified the recommendation that had been submitted to it by the Council of Ministers: the medal that accompanies the highest decoration should be made of gold instead of copper. The modification was expected to increase costs by the price of a wedding ring. The secretary of the Presidential Council told the conference that a short time after the modification was made, a deputy chairperson of the Council of Ministers indignantly rejected the modification.

[2] A paper that analyses the constitutional status of the Government faces the following dilemma: its activities touch on nearly every aspect of the state's institutional system. We cannot be silent about the various ramifications of the issues concerned, yet the scope of this paper prohibits going into details. That is why the reader will too often see the phrase: a detailed discussion would go beyond the scope of this paper.

[3] Even though the relevant provisions of the law dating back to 1848 were in force, and there were voices calling for their application, they were never applied. Those, who were called to account for war crimes and crimes against the Hungarian people under Decree 81/1945 of the Provisional Government, and were formerly members of the Government, declared that their cases should be referred to a council of deliberations consisting of Members of Parliament instead of the so-called people's court. *See*: Tibor Lukács: *A magyar népbírósági jog és a népbíróságok (1954-1950)* [The Law Applied by the People's Courts], Budapest, 1979, p. 395. In the case of Ferenc Rajniss (who was a minister in the Government of Ferenc Szálasi from October 1944), the National Council of People's Courts (Hungarian acronym: NOT) rejected that argument by stating that Szálasi took power by force, so the continuity of law was broken. Consequently, the defendant cannot be considered a minister appointed in a constitutional manner, who could request a special treatment with reference to any other crimes by invoking Act III of 1848. Lukács, op. cit. pp. 397-398. As for Béla Imrédy and László Bárdossy, who had been ministers before 19 March 1944, the NOT considered Decree 81/1945 applicable, because it was seen as a special source of law by comparison to Act III of 1848. „In what capacity the defendants committed the war crimes and crimes against the people is irrelevant."
There is no evidence showing that the court that tried Imre Nagy (who was appointed prime minister during the Revolution of 1956) and some of his ministers, ever considered applying Act III of 1848.

[4] As both the German and Hungarian systems are based on the principle of constructive vote of no confidence, a comparison can be most enlightening. „In Germany the Chancellor and the ministers have individual responsibility. The Federal Government as a body is not responsible to the Parliament. … The relationship between the ministers and the Chancellor differs from what is customary in public administration…The responsibility the members of the Government have towards the Chancellor, differs from the disciplinary responsibility of civil servants. Article 8 of the law on federal ministers *explicitly prohibits the application of that law to federal ministers* (*author's italics*). József Hargitai: „A jog és politika határvonalán. (Gondolatok a miniszteri felelősségről)" [On the Borderline of Law and Politics. Thoughts about Ministerial Responsibility], *Magyar Közigazgatás*, vol. 5, 1995, p. 279.

[5] *See* Zoltán Bánsági: A kormánybiztos jogállásáról [About the Legal Status of Government Comissioners], manuscript.

[6] Professor Tamás Sárközy, government commissioner for a reform of the governmental system, published a brief, preliminary summary of his comprehensive survey of the organizational set-up, cost management, etc. of government, while the author was writing the Hungarian original of this paper. Though the present paper only examines the government in the context of constitutional law, there is considerable overlapping in the findings of the two surveys. The summary of Sárközy's report includes dramatic observations: „…whether regarded from the inside or the outside, the network of ministries is in a state of disintegration … the political decay of ministries needs to be halted … the work of ministries should be carried out by the civil servants working at the ministries … the state should see to the realization of state tasks and the satisfaction of public needs mainly through the agencies financed from the central budget … the unhealthy mixing up of the spending of public money and entrepreneurial activities should be stopped …" When it comes to legal issues that are discussed in this paper, Sárközy is severely critical: „The fact that there are fast-changing

central agencies of public administration (other than ministries), and a legion of ministers without portfolio, political state secretaries at the Cabinet Office, government commissioners, government emissaries and government representatives, it means that certain powers of the traditional ministries are suspended and/or certain powers are duplicated." *See* Tamás Sárközy: „A Way Out from the State Labyrinth", *Népszabadság*, 5 March 2005.

[7] For details, *see*: András Holló: „Az Alkotmánybíróság tizenöt éve" [Fifteen Years in the Work of the Constitutional Court], *Magyar Közigazgatás*, October 2004 p. 596. – About the activities of the government *see also* József Petrétei: „Kormányzás és kormányzati rendszer" [Government and Governmental System] in: *Válogatott fejezetek a rendszeres alkotmánytan köréből* [Selected Essays on Constitutional Studies], ed. László Kiss, Pécs, 1996; László Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon* [The Early History of Constitutional Courts in Hungary], Osiris, Budapest, 2001, p. 734; Zsolt Balogh-András Holló-István Kukorelli-János Sári: *Az alkotmány magyarázata* [An Interpretation of the Constitution], Budapest, KJK KERSZÖV, p. 449.

[8] On the early history of the relationship of the president of the republic and the Government *see* István Kukorelli: „The Government and the President of the Republic" in: *Balance. The Hungarian Government 1990-1994*], Korridor, 1994, pp. 97-116.

[9] On theoretical questions and certain developments of the framing of decrees *see* „The Government and Legislation by Decree" in: *Balance. The Hungarian Government 1990-1994*, Korridor, 1994, pp. 144-161.

[10] For a review of related issues *see* István Balázs: „A központi közigazgatás különös hatáskörű szerveinek szabályozási koncepciója" [Regulation Conception of Specialized Central Agencies of Public Administration], *Magyar Közigazgatás*, September 2004, pp. 513-528.

[11] *See* „A tudományos forradalom hatása az államszervezet fejlődésére [The Impact of Scientific Revolution on the Development of the State Machinery], *Állam és Igazgatás*, November 1968; Gábor Teimer: *A kormányzattól független szervezetek beillesztése a magyar államszervezetbe a tudományban, médiában és a sportban* [How Agencies Independent of the Government Adjust to the Hungarian State Machinery in Science, Media and Sports], EU-Studies, vol. 4, National Development Office, Budapest, 2004, pp. 597-636.

[12] As for the conditions under which the agencies of public administration other than ministries operate, *see* Imre Verebélyi: „A nem minisztériumi jogállású központi közigazgatási szervek reformja" [Reform of Central Agencies of Public Administration], *Magyar Közigazgatás*, December 1997, pp. 705-712. For a report about research on the relationship between the Government and public administration during the 1990s, *see* Imre Verebélyi: „A kormányzás és közigazgatás reformjának tervezete" [Draft of the Reform of Governance and Public Administration], *Magyar Közigazgatás*, April 1996, pp. 193-229.

[13] On the neutrality of public administration *see* István György: „Közszolgálat és politikai semlegesség ma Magyarországon" [Public Service and Political Neutrality in Hungary Today] in: *A demokrácia intézményrendszere Magyarországon* [The Institutional System of Democracy in Hungary], Hungarian Academy of Sciences, Budapest, 1997. Lajos Lőrincz: „A független és semleges közszolgálat lehetőségei Magyarországon: eredmények, hiányosságok, perspektívák" [Potentials of an Independent and Neutral Civil Service in Hungary: Achievements, Deficiencies and Perspectives], *Társadalomkutatás*, nos. 1-2, 1997.

[14] *See* previous note.

[15] *See* Ágnes Simkó Sári: *A kormányzat és a civil szervezetek kapcsolatának korszerű lehetőségei* [Modern Potentials in the Relationship between the Government and the NGOs], Papers on the EU, vol. 4, National Development Office, Budapest, 2004, pp. 561-596.

SUMMARY

Changes in the Constitutional Status of the Government since the Change of Regime (From „Our Party and Government" to the European Union)

JÁNOS SÁRI

The essay examines how the constitutional status of the Hungarian Government evolved during the one and a half decades after the political changes of 1990. The most important change was that the Government was made responsible to the Hungarian National Assembly (1989), and the constructive vote of no confidence was introduced (1990). As time went by, the requirements of Western constitutions were gradually asserted in various aspects of the Government's organization, operation, its relation to public administration and local governmental authorities. That process was somewhat disrupted by the adoption of Act LXXIX on the Legal Status and Responsibility of Ministers, which for practical purposes implemented civil servant responsibilities for ministers. Some of the laws that did not comply with the Constitution were later partly annulled by the Constitutional Court. After Hungary acceded to the European Union, further changes attracted attention. Act LIII of 2004 on the Cooperation of the National Assembly and the Government on EU Affairs cancels certain procedural rules that are defined in the Constitution, which in effect means that the law concerned overrules the Constitution.

RESÜMEE

Entwicklung der verfassungsmäβigen Situation der Regierung nach dem Systemwechsel (von ’unserer Partei und Regierung’ bis zur Europäischen Union)

JÁNOS SÁRI

Die Studie gibt einen Überblick über die verfassungsmäßige Situation der ungarischen Regierung in den seit dem Systemwechsel vergangenen 15 Jahren. Die Änderungen von größter Tragweite waren einerseits die Schaffung der Verantwortung gegenüber dem Parlament (Landesversammlung), andererseits der Übergang zum System des konstruktiven Misstrauensvotums in den Jahren 1989 bzw. 1990. Danach wurden an verschiedenen Punkten des Aufbaus der Regierung, der Funktion im Verhältnis zur Verwaltung und zu den Gemeinden usw. die Bedingungen der klassischen Verfassungsmäßigkeit stufenweise erfüllt. Dieser Prozess wurde durch das Gesetz Nr. LXXIX vom Jahre 1997 über die ministerielle Verantwortung gewissermaßen unterbrochen, da es im wesentlichen die Verantwortlichkeitsprinzipien des Beamtentums in der Regierung zur Geltung brachte. Diese, nicht einmal der Verfassung entsprechenden Regeln wurden vom Verfassungsgericht teilweise für nichtig erklärt. Die neueste Änderung hinsichtlich der Zuständigkeiten der Regierung wurde wegen des Beitritts zur Europäischen Union notwendig. Das Gesetz Nr. LIII vom Jahre 2004 über die Kooperation des Parlaments mit der Regierung in Angelegenheiten bezüglich der Union hebt – im Allgemeinen – diejenigen Schranken, Kompetenz- und Verfahrensregeln in Unionssachen auf, welche die Verfassung für diese Sachen gemäß ihrer Natur, und aufgrund ihrer verfassungsmäßigen Bedeutung feststellt.