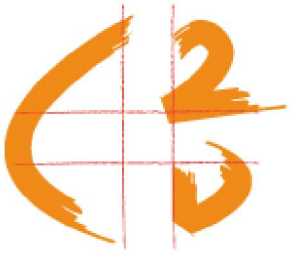

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Hungary:

Country Report

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ABSTRACT

Direct democracy has a relatively weak tradition in Hungary. Although the socialist constitution (Law No. XX of 1949, modified several times, especially in 1972) in force in 1989 provided laconically of the possibility of a „national referendum" (Art. 30 para 1 point d) there was no law to implement the constitutional provision, and still less the political will to organize a referendum in the constitutional system as it existed in 1988. In 1988 however, as a part of the gradual erosion of the legitimacy of the existing socialist system, demands were voiced advocating a referendum on various topics, especially on the still sharply debated question of the joint (then) Czechoslovakian–Hungarian joint project to build a water power plant in the Danube bend.

CONTENT

Direct democracy: country-report on Hungary (1989–1999)

Márta Dezso[a] and Andras Bragyova[b]

1. Introduction

Direct democracy has a relatively weak tradition in Hungary. [1] Although the socialist constitution (Law No. XX of 1949, modified several times, especially in 1972) in force in 1989 provided laconically of the possibility of a „national referendum" (Art. 30 para 1 point d) there was no law to implement the constitutional provision, and still less the political will to organize a referendum in the constitutional system as it existed in 1988. In 1988 however, as a part of the gradual erosion of the legitimacy of the existing socialist system, demands were voiced advocating a referendum on various topics, especially on the still sharply debated question of the joint (then) Czechoslovakian–Hungarian joint project to build a water power plant in the Danube bend. In fact demands for referendums (and other forms of direct democracy) were part of the movement for democracy as a means of opposition to the existing political system. The call for a referendum on Nagymaros had been a good tool for two reasons: first it was indeed difficult to refuse by a regime that claimed to be based on the will of the working people and second that at the same it was impossible to agree to it. Thus, in any event the communist leadership was in an unpleasant position. As a public opinion survey made in 1988 showed, the overwhelming majority of the citizens (83% and 73 %) was for a referendum on the question of the Nagymaros power plant and in similar issues of national importance, although they were much divided as to their prospective vote in the question of Nagymaros.[2] There were even signatures collected in support of a referendum. Since then no political party denied that at least certain forms of direct should be part of the Hungarian constitutional and political order.

This was the prelude to a long series of debates and disputes in Hungary on referenda and other institutions of direct democracy.

2. Constitutional regulation of direct democracy: an overview

By the term 'constitutional regulation' we mean, in addition to the rules of the constitution pertinent to direct democracy, the sub–constitutional, mostly statutory norms governing the same subject–matter. In case of direct democracy, they included in the period here envisaged both levels: the constitution itself, and the statutes governing the substantive and procedural aspects of direct democratic institutions. As we shall see in due course, they changed in the period under review quite significantly.

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2.1. The transformation period: 1989–1990

At the outset of the story we find the communist (”socialist”) constitution in force in the beginning of the year 1989. It provided for referendum by saying (in Art 30 para 1 point d) that the Presidential Council "may ordain referendum in questions of national importance".

The Presidential Council,[3] an organ consisting of twenty–three members elected by Parliament from among its deputies that was at the same time a collective head of state and, more importantly, the organ ’substituting’—in fact replacing—Parliament in its most functions, in legislation and other matters, such as dismissing and electing ministers or even the whole government. These functions of the Presidential Council were original (in the sense of non–delegated) powers, proven by the fact that Parliament had not to ratify any act of Presidential Council in order to be valid. In theory, of course, Parliament might also have had the competence to ordain a referendum, since its sovereignty in law had been unlimited in theory. As a matter of fact, most legislation was made through law–decrees (*törvényerej rendelet*) until 1987 when the Law on law–making curtailed the powers of the Presidential Council.[4]

This, in itself, might have been sufficient — one finds in many other constitutions, as a matter of fact, no more and sometimes even less — but in practice, there were no statutory rules governing the conditions and procedure of the national referendum. In fact no referendum was held in the socialist period. For one thing, the there were no rules implementing the constitutional provision quoted, and, more importantly the socialist/communist political system based on the leading role of the ”party of the working class”[5] any political action not initiated and controlled by the communist party was impossible, at any rate not in the scale necessary to provoke a referendum. There was another reason, too. The socialist doctrine of constitutionalism was to a large extent inimical to direct democracy. First, because it confessed a rather crude theory of parliamentary sovereignty[6] (amounting, in the context, to the sovereignty of the Party, controlling Parliament); second, because the socialist theory of political representation[7] claimed that it amalgamated both direct and representative democracy. Arguments supporting this view were mainly that the constitution guaranteed recall of the deputies by the people—although it happened, until 1988 quite rarely, that the recall of a deputy had been initiated. In these cases all the concerned (mostly prominent functionaries of the communist party) resigned, not awaiting the outcome of the procedure.[8] One must conclude that the use of recall (and any other form of direct democracy) was nothing but fiction.

The first occasion when a serious case for a referendum at the national level was made in the then still constitutionally communist Hungary was related to an issue which has been for long since agitated Hungarian politics: the conflict over the Gabcikovo–Nagymaros Dam.[9] To cut a long story short, the popular aversion (and in certain cycles, hostility) against the plans of the government to build a costly hydroelectric power plant on the Danube in cooperation with Czechoslovakia (as it then was). The situation was complicated by the latter factor, since Hungary assumed in a treaty concluded in 1977 [10](and modified in 1986) to cooperate with Czechoslovakia an *international obligation* to build the plant and the dam, so that it was at the moment —and has been not since— at the disposal of the Hungarian state without the consent of the other party to the treaty (now Slovakia). The aversion grew into protest during the autumn of 1988, with

mass demonstrations against the dam; the protest movement (that united under this banner many opposition forces) demanded a referendum on the future of the Nagymaros dam, referring to the constitutional provision quoted above that allowed Parliament to order referendum in any matter. (The slogan was: ”Democracy or Dam”). In fact, the government was faced with an insoluble problem, since the Czechoslovakian government demanded the fulfilment of the treaty obligations, thus the abandonment of the project at the moment seemed to be to too risky. Nobody doubted that referendum would decide not to build the dam, and the government —willing to avoid international and internal complications— did not dare to allow it. Although there was no referendum, the debate on it compelled the adoption of a *Law on referendum and popular initiative* adopted in 1989 (Law No. XVII. of 1989).

The direct aim of this law was to rule out the possibility of a referendum on *Nagymaros*, since it excluded from among the subject–matters of a referendum the fulfilment of international obligations based on treaties, and the statutes containing [promulgating] them in Hungarian law. (Art 6 para 1 point c).

This formula clearly reflects the main concern of the legislator, i.e. to avoid the referendum on the Nagymaros dam. A direct textual evidence in the text of the law is Art 35 para 1 envisaging unmistakably the case of a referendum on Nagymaros: it says that the exception of international treaty obligations does not apply, on treaties relating to a public investment the environmental effects of which became known after the conclusion of the treaty *concluded before the entry into force of the law*; thus leaving the way open for a referendum on the grounds the Hungarian government later (in May 1992) ’terminated’ the treaty between Czechoslovakia (as it then was) and Hungary of 1977.

In fact, this statute appears as a compilation from various European statutes. Indeed it reflects a rather democratic attitude towards popular rights: its greatest weakness is that there seems to be no consistent idea of the role and function of popular rights in the constitutional system. This law was conceived in the vein of a constitutional conception accepted by the reformist fraction of the MSZMP (Hungarian Socialist Workers’ Party) and the government of Miklós Németh which aimed to establish a new constitutional regime in Hungary; as a first sign it voted a substantial change of the old constitution (Act No. I 1989) and tried to move forward to make a new constitution. The law on referendum was an outgrowth of this conception—it was prepared in the spirit of the constitutional reform as it was conceived by the government and party leadership, which then already accepted political pluralism and therefore already recognised the legal existence of political parties (Law No. II. of 1989). One has the distinct impression that it wishes to compensate the public for the loss of the possibility of the vote on Nagymaros with a rather wide range of possible (and then still unforeseen) grounds for referendum and popular initiative. This circumstance, as we shall see later on, was a source of a lot of problems in the years that were to come.

Another distinctive feature of the *Law on referendum and popular initiative* that it was voted in a moment (June 1989),[11] when the Round Table negotiations were already initiated, but the law itself was drafted and adopted unilaterally, i.e. outside the framework of the negotiations. So, it was from the beginning a bit idiosyncratic in the formation of the new constitutional order, since that was based on an agreement with the Opposition Round Table, the members of which existed although not represented in Parliament) legally.[12] A

few weeks later the whole conception of the new constitution propounded by the government became obsolete, since the HSWP accepted the idea of round table talks with the Opposition and suspended the implementation of its own constitutional reform, pending the results of the negotiations with the opposition.

The result was a political agreement reached in September 1989, not signed but accepted by a part of the opposition (SZDSZ and FIDESZ), and enacted by then still communist party dominated Parliament. The modified, in fact new, constitution entered into force on October 23, 1989. The constitutional package left the rules of on direct democracy untouched.

2.2. The stabilisation of the constitutional regime 1990–1997

The whole epoch is characterised by the rather swift building up of the constitutional institutions in Hungary: Parliament, Constitutional Court, Ombudsmen (parliamentary commissioners) began to work, public administration and judiciary reformed, but the rules and working of direct democracy remained incomplete, contradictory and above all unclear. There were, as we shall see below, several unsuccessful attempts for referenda, and some of them gave opportunity to the Constitutional Court to invoke the omissions of the lawmaker in this respect.

The Law on referenda and popular initiative remained in force since 1989 until 1997, but with modifications. So we shall first expose the content of the law and then refer to the modifications it went through. Its content could be conveniently divided into two parts; first, the substantive provisions and second, the procedural and other ”technical” provisions.

To begin with substantive provisions, the law defines the scope of direct democracy—in its both forms—in a rather far-reaching way, viz. it said that, as a rule, a referendum or a popular initiative was allowed in any matter within the competence of the Parliament. There were, however, exceptions to the rule, i.e. cases in which there referenda were *a limine* excluded.

These exceptions concerned three fields. First, the laws concerning taxes, duties and the budget (i.e. generally financial laws): a second group includes all the ”personal questions” within the competence of the Parliament, that is, all the elections, nominations etc. to be made by Parliament. The third group of exceptions were already mentioned: these were the fulfilment of obligations based on international treaties in force, but not excluded referendum on the acceptance of new international obligations (pro futuro) and (what amounts to the same) on the renewal of expiring treaties.

The most problematic aspect of the law was, however, its contradictory or inconsequent regulation of the compulsory referenda, that allowed to raise serious doubts as its conformity with the constitution. Contrary to the standard practice of representative democracies that usually do not admit compulsory referenda, the law provided cases in which the referendum was obligatory for Parliament. In two respects: if the initiators succeeded to collect at least hundred thousand signatures in support of the referendum it was obligatory for the Parliament to order the referendum to be held and in that case the result of the referendum obliged Parliament (at least for two years). Moreover, there were rather tight time limits set in the law for Parliament

to order the referendum: it had to be ordered within two months and held not later than within three months from the date of the decision of the Parliament.

Obviously enough, if taken seriously, that provision would have destroyed representative democracy in Hungary, or at least it would have endangered heavily the parliamentary character of the form of government. This, happily, did not happen, but the price to be paid for it was a series of constitutional conflicts repeated in each case when there was a ”popular” initiative had been lanced.

Parliament itself, on its own initiative could order a referendum by the two-thirds majority of the votes of its members. This provision suffered two handicaps: first, if there is a two thirds majority, there is hardly a reason to hold a referendum, since it is the majority to modify the constitution itself (including the provisions on referenda, if any); and, second, it seems having been unconstitutional, since it contradicted *in a statute* to the constitutional rule providing for the simple majority as the general rule in parliament except it is otherwise provided for *in the constitution*.[13]

Finally, it turned out quite quickly that there *must be* other, hidden or *implied* exceptions in addition to those stated explicitly to the subject matters of the referenda, derived from the constitution. Such exceptions were, for instance, the modification of the constitution itself by way of referendum, or the dissolution of the parliament— none of them fell within the exceptions provided expressly by the law. So the imperfection of the regulation became ever clearer, although the Constitutional Court had several times urged the parliament to re-regulate the matter. At the end, nearly the whole of the law was under suspicion of unconstitutionality.

A serious failure of the regulation of the referendum in the Law of 1989 was the lack of appropriate procedural rules. There was no regulation how long the signatures were allowed to be collected—in fact, there was no time limit at all; the admissibility of the questions proposed were not subject to preliminary scrutiny. This resulted in repeated discussions in Parliament as to the interpretation of the law. For instance, the financial exception might have been interpreted in a way that would have excluded any referendum which could have caused any budgetary effect, increasing the expenditures or reducing the revenues of the budget, albeit indirectly. As a result, the Constitutional Court had repeatedly dealt with the questions of the referendum, with the limitation that it could interpret only the constitution and not the ordinary law (which contained the essential rules on referendum).

Another aspect of the regulation of the referendum (and popular initiative) in Hungary deserves mentioning: the rules governing the validity of the referenda. These were rather strict in this epoch as (as we shall see below) considerably relaxed in 1997. Until 1997, unless at least the half of the electorate did vote the referendum had been invalid (Art 28 para 1 of the 1989 Law). The most important (and most substantial) criticism against the prevailing system of the referendum had been that the rules allowed *too easily* to launch a referendum (one hundred thousand signatures in a country where the electorate is well above 7 million) but at the same time it makes nearly impossible the valid result for it.[14]

2.3. The amendment of the constitution: from 1997 to present

As we have seen, the shortcomings of the regulation based on the 1989 law became more and more obvious. A new regulation of the institutions of direct democracy was inevitable, given the problems raised by the system under the 1989 law. Roughly two tendencies were present: a tendency to restrict direct democracy through procedural and substantive rules: a different school of though wanted finally ”give the people back its rights”. Those who favoured this view referred to a certain ”democratic deficit” in the Hungarian road to democratic constitutional government. Let me note in passing that the two schools were not divided along party lines: indeed, nearly all the parties had in their ranks hard democrats and those who were more reserved towards direct democracy.

The result of this debate happened to be a curious one: a compromise *a la hongroise*. It did not change much for good or bad in the regulation, but rendered it more complicated. In its turn, the new regulation caused at least as many problems as it resolved. Moreover, it is difficult to discern any consistent, let alone comprehensive theoretical background or conception that lead the pen (or the cursor) of the drafters. The most important (and in a way fatal) change was that the principal rules on referenda and on popular initiative have become constitutional.[15] The constitution by now includes Articles 28/B-E which regulate all the essential aspects of the referenda and popular initiative. It defines the subject matters of the referenda, the prohibited subjects and in particular the cases of ”obligatory referendum”. Since the constitutional amendment through Law No. XCVII. of 1997, the time limit for the collection of signatures has also been constitutionalized.

The new regulation introduced a completely new element into the Hungarian constitutional law on referendum, viz. the *constitutionalization* of the same fundamental rules that were formerly statutory rules. This of course has changed their status considerably, since they are by now at the same footing with any other constitutional rules, including those that specify the fundamentally representative character of democracy in Hungary.

3. Forms and subject matters of direct democracy in Hungary

At present the legal regulation of referendums consists of three components: the constitution itself, and of two statutes, viz. the law on electoral procedure[16] (that encompasses all procedural rules of all kinds of elections and votes, national, local or municipal, including referenda) and the new law on referenda and popular initiative (Act No. III. of 1998) that replaces the law of 1989.

3.1. The problem of the referendum in the constitution

As mentioned before, by now the constitution itself contains almost all essential rules on institutions of direct democracy. First, it retained the rule that the scope of referendums is (with the exceptions) co-extensive with the competences of Parliament (or rather a subset of it). Thus, any matter falling within the competence of Parliament is *prima facie* suitable for a referendum, if it does not belong to the excluded subjects.

The constitution recognizes two types of referendums: decision– making referenda are those that decide an issue conclusively and the consultative ones are those (as the name indicates) possess only advisory character. In any case the Parliament has to decide on the launching of the procedure, but there is a difference between cases when it is obliged by the constitution to arrange a referendum (called 'compulsory referendum') or when Parliament is not obliged to organize the referendum (so called 'facultative referendum'). In case of a facultative referendum—facultative in the sense that it is not obligatory to ordain it—Parliament decides whether the referendum will be conclusive or consultative, not binding legally Parliament. There is one exception, however: if Parliament orders a referendum on the ratification of a law voted by it, but not yet promulgated, the referendum may only be decisive—its result will bind Parliament.

A facultative referendum may be ordered by Parliament by simple majority of its votes if it is initiated by the one third of its members, the Government, the President of the Republic and hundred thousand electors. If two hundred thousand electors duly demand it, the referendum is obligatory (for Parliament) and at the same time decisive too. Thus, peculiarly enough, the obligatory or facultative (in the sense above) nature of a referendum depends *only* the number of the signatures supporting it. But it, it should be added, this question is not yet settled, since it open to discussion, what should happen if the initiators of the referendum want to organize a consultative referendum only, but they succeed to collect more than two hundred thousand signatures. It is difficult to say at the moment, what ought to happen in that case: after all, the constitution says that if there are two hundred thousand citizens supporting a proposal, Parliament is obliged to order the referendum and if the referendum is obligatory then it will be inevitably decisive as well. So, it seems to be independent of the will of the organizers: it is simply an operative condition of the obligation of Parliament to ordain a referendum. On the other hand, if the signatures are collected for a *consultative* referendum, they are hardly equivalent with the support of a *decisive* referendum. Thus, it seems to be that the question turns on the interpretation of the nature of the supporting signatures: are they objective conditions the existence of which entails the obligations of Parliament to order a referendum, or rather are they declarations of will of the citizens supporting it. The latter view presupposes that one sees the launching of the referendum as a right, then its use may depend on the will of the citizens supporting the initiative.

The better view seems to be that if the signatures were collected for a consultative referendum, the initiative may not turn into a decisive (i.e. compulsory) one simply by the higher number of supporters. This view can be justified along the following lines. The 'right to have a referendum' is, according to the Constitutional Court, a constitutional right; a right is a capacity to act according to one's own will. A declaration of will may not entail legal effects going beyond that will (*praeter intentionem*), and so if the intention of the supporters of a referendum was that the referendum had to be consultative (demonstrated by collection sheets they signed) it may not be changed by the number of those who have *the same intention*.

3.2. Limits of the Referendum

Given the constitutionalization of the rules on referendums it is only the constitution that may exclude matters from the scope of referendums. An ordinary law may not do it since 1997, not even the law—to be

voted by two thirds majority of the members present— regulating the rest of the subjects pertaining to a referendum. The subjects are the following. First, the constitution excludes referendums on the budget, including its execution, taxes, duties and customs duties, on the conditions of local taxes, the obligations stemming from international treaties in force and on the content of the statutes containing these obligations. Furthermore, it excludes referendum on the provisions of the constitution concerning referendums and popular initiative, as well as questions of personnel and organisation within the competence of Parliament, and on the dissolution of Parliament, the programme of the government, the declaration of the state of necessity and the state of emergency, the use of the armed forces or within or without the country, on the dissolution of an assembly of a local self-government[17] and on general amnesty.

This is a rather impressive (but, as we shall see, not at all exhaustive) list of exceptions. On the other hand, it is easy to see that the constitution itself must contain all the exceptions, given the constitutionalization of the rules on referenda and popular initiative. The question arises, as it did in the case of the 1989 law, whether the enumeration of the referendum–proof subject matters quoted above is exhaustive; or there are other unstated exceptions to be derived from the rest of the provisions of the constitution. Or, to put a bit differently: does Article 28/C para 5 contains *all* the exceptions, or one may find them anywhere or elsewhere in the constitution? (On this question see below under point 4.)

3.3. Conditions of validity of referenda

As indicated above, an important question is the regulation of the conditions of validity of referenda. By 'conditions of validity' is meant the required minimal number of voters participating in the voting procedure (*quorum*) and the precise definition of the majority requirements. Both are of fundamental importance. This can be illustrated with the changes of Hungarian regulation. Were the referendum on NATO membership held a year earlier—the rules of majority requirement having been changed in 1997[18]—it would have been invalid (unsuccessful), that is, incapable to produce a result of any legal effect. The former majority requirement—participation of at least the half (50%) of the eligible voters—was very high, and to certain extent unrealistic: the single valid referendum held under this rule met very narrowly this requirement in 1989 (50,1 % against 49,9%)). Given the propensity of the Hungarian electorate to remain home (about 44% in the last Parliamentary elections did so), the requirement of validity made highly improbable that any initiator of a referendum, except supported by a mass movement, might be able to mobilise so many voters.This would have needed a political mobilisation capacity just attained by all the parties in Hungary taken together (at the time of Parliamentary elections). No doubt, this could happen only in exceptional cases, like in 1989. Thus, the mitigation of the validity requirements in 1997 was, from this point of view, quite justified: now the constitution requires for a valid referendum that at least twenty–five percent of the total eligible electorate vote for one alternative (i.e. either 25% yes, or 25% no) independently of the number of participants. So, if 26 percent of the electorate participate and 25 percent of them vote yes, the result will be valid.

3.4. Procedural rules and constraints

As mentioned above, the greatest defect of the legal regulation of referenda in Hungary had been since 1989 the lack of appropriate regulation of proper and reasonable procedural rules. In fact, one can speak of the nearly complete lack of procedural rules. This situation was changed only in 1997, when the fundamental procedural rules were even transferred into the constitution. This move, however, did not solve all the problems. The greatest weakness of Hungarian constitutional regulation of institutions of direct democracy remains the procedural side. There are still too many uncleared and unregulated questions of procedure that can be a source of repeated disputes.

Since 1997, there are much more limitations of procedural nature. First, in case of a referendum initiated by the 'people' (i.e. by citizens), the admissibility of the question must be controlled by the National Electoral Commission. Only if the question is admissible may the initiators begin the collection of signatures. This regulation is partly sound, partly quite curious. For one thing, it is reasonable that the question of admissibility be cleared before the collection of the signatures (and the political campaign accompanying it) starts. This was clearly required from the legislator by the Constitutional Court, in a decision of 1997.[19] But, on the other hand, it is doubtful why this *judicial* function (the interpretation of the Constitution) is entrusted to a political organ. (Members of the National Electoral Commission are partly delegated by parties and they lack the judicial independence.) There is only a curious possibility of 'appeal', a recourse called 'exception', to the Constitutional Court by anybody within a *three days*.[20] It is difficult to understand why this decision has not been given by the legislator to the Constitutional Court directly. And since the Constitutional Court several times decided contrary to the National Electoral Commission, disallowing referenda the Commission thought admissible, one might be inclined to question the reasonableness of these rules. The most important argument may be this: the National Electoral Commission is an organ designed to control the procedural regularity of the electoral process, like a referee. That of the admissibility is, however, a substantive (non–procedural) question of constitutional interpretation, since the constitution contains *all* the exceptions.

The other limitation concerns the length of time allowed for the collection of signatures. Earlier, in the1989 Law, there were no such limitations and these proved, not surprisingly, unreasonable in practice. Strictly, then one could forever collect signatures for the same question. In case of a referendum this time limit is now four months, for popular initiative two months, both counted from the final decision of admissibility. Another set of procedural questions concerns legal remedies and controls. Here, we believe, it is reasonable to distinguish between legal remedies against *irregularities* of the electoral and voting procedure (including control of the authenticity of signatures) on the one hand, and the control of the constitutionality of the procedure. As to the latter, the in most important cases—such as the refusal by Parliament to ordain a compulsory referendum if the conditions of it are met—the ultimate decision is made by the Constitutional Court.

There are still questionable procedural rules in Hungarian law. The most defective is probably the control of the authenticity of the signatures, despite its crucial importance. A signature with the personal data

(personal identification number or number of the ID card) is no evidence that the person whose personal data are recorded on the collection sheet signed the list. Thus the way signatures are to collected excludes the possibility of controlling the fact that the person whose data are shown on the list, did in fact sign it. It could be controlled only by questioning back at least one–hundred thousand persons all over the country. Even then, the control by the electoral registry proves only that the data shown are the personal data of *existing* persons, but not that they indeed signed the list. A better solution were—that would remove discussion on the authenticity of the signatures—to require certified signatures only (like this is the case in several states).

3.5. Effects of the referenda

If a referendum was successful, its result, says the Constitution, 'binds' Parliament.[21] It is not at all clear yet, what does this enigmatic proposition means. There can be several difficulties with it. For instance, does it bind Parliament forever? The Law of 1989 answered this question, limiting the binding force of the referendum to two years. Since now the nature and the limits of the binding force of a referendum are unclear; it can be answered, if at all, by way of constitutional interpretation.

One might restate the problem in the following way. Hungarian law does not know a source of law called 'people's resolution' (or 'resolution by referendum'). Thus it is not, in the technical sense, a source of law. It binds Parliament, as quoted above, but it is not all clear what this binding force means. It is even more unclear because the Constitution reserves the right (power) to legislate exclusively to Parliament (Art 25 para 2). Thus, Parliament is obliged to act in accordance with the referendum, but there is no way to compel it to do so. (Except perhaps an exhortative decision of the Constitutional Court.) Although the Constitutional Court in a decision said that in the case of the 'immediate exercise of the people's power' Parliament is only ' as it were, the position of executing the will of the people' it remains a puzzle what this statement means. We do not see any other way to eliminate this contradiction than a change in the constitution, that would regulate the relationship between referendum and law–making by Parliament. Until this will be done, there will be perplexing questions of constitutional interpretation in Hungarian law.

3.6. Popular initiative

Popular initiative has played in Hungarian constitutional system a rather insignificant role, although there were several attempts in the last ten years to use this instrument of direct democracy with more vigour. The reform of the constitutional rules on direct democracy in 1997, although not unproblematic in this field too, will undoubtedly offer better conditions then before.

The maximum result to be achieved by a campaign collecting (as required by the constitution, 50 thousand) signatures in support of a popular initiative, i.e. a formal discussion of a question in Parliament, can be obtained with less effort.

The new regulation is more advantageous to popular initiative on two counts. First, it extends the reach of admissible subject–matters, since it does not seem to exclude even those topics that are referendum–proof. This being generally true, one can have doubts that, for instance, a popular initiative on the dissolution of

government would be admissible at all. Second, unlike the Law of 1989 it obliges Parliament to *discuss* and 'decide' on the popular initiative in three months. This is a gracious time limit, since in Hungary the law–making process is rather lengthy: a bill submitted to Parliament often has to wait several years for adoption.

There are nonetheless questionable features of this regulation. Hungarian law, unlike other legal systems, does not restrict the scope of popular initiative to *legislation*. Thus, the subject–matter of a popular initiative may be any subject falling into the competence of Parliament. In addition, even in case of a legislative initiative, the law does not demand a formal bill from the proponents; and this lack weakens the role of popular initiative, since makes it simpler to reject an initiative on seemingly plausible grounds. In practice each year there were normally two–three popular initiatives meeting the requirements submitted to Parliament. All failed at some stage of the parliamentary procedure, although a few of them (for example the one on the modernisation of railways) rather narrowly. In time of the writing the latest popular initiative is launched by SZDSZ on the establishment of an army consisting only from professional (commissioned) soldiers, that is, on the abolition of the general conscription. There can be no doubt that the initiative will be supported by the required number of signatures.

4. The Constitutional Court on direct democracy

One of the pervasive features of Hungarian constitutional and political system has been since 1989 the important role of the Constitutional Court in deciding outstanding political issues.[22] This applies fully to the problems and issues surrounding direct democracy. There are several decisions of the Court on various riddles of Hungarian constitutional law governing the institutions of direct democracy. It fact as it will be discussed below there were four cases when the Court blocked possible referenda already launched or likely to be launched successfully. Moreover, the Court took the pains to make pronouncements on the fundamental constitutional assumptions of the relationship between direct and representative democracy in Hungarian constitutional law—and did it with some startling turns. In the last ten years the Constitutional Court dealt with legal questions of direct democracy on several occasions. All of them were, rather more than less, directly connected with different initiatives to referenda. For this reason alone, although the decisions of the Court are tuned in an abstract manner— they take seriously in consideration the circumstances. This makes it rather uneasy to find consistency in the decisions of the Court. In the following we shall analyse not each decision that concerned direct democracy, but rather select the most significant (and, in a way, most interesting) ones.

The background of the first case in 1993 was an initiative by a non–party grouping that lost its importance in national politics later, called *Létminimum alatt él□k társasága* (LAÉT—Association of Citizens under Subsistence Minimum). This grouping collected signatures from citizens in support of a referendum on the dissolution of Parliament (for more details see below 5.). The legal question (under the legal regulation then in force) was the following: since under the constitution Parliament may dissolve itself (Art. 28 paras 2 and 3), this is a question clearly 'falling within the competence of Parliament' as required by Law XVII. of 1989, nor it has fallen under any of the exceptions provided by the same law (Art 6). The conclusion seemed to be

inescapable: the referendum had to be ordered by Parliament, although it appeared to many (including the authors of the present paper) as sheer nonsense. In fact, the Court argued that the Constitution itself contains all the conditions of the dissolution of Parliament, and since the dissolution by way of referendum—if it were, properly speaking, a referendum at all—was not mentioned in the constitution, there may be no referendum held on the dissolution of Parliament.[23] But the Court also said that the Law on Referendum and Popular initiative adopted as the Court pointed out *before* the constitutional reform of 1989 was not compatible with the constitution as it stood then (in 1993); thus it instructed Parliament to adjust the old statute to the constitution until December 31, 1993. It is noteworthy that the Constitutional Court did not declare the law invalid, although it stated that it was unconstitutional— a position not easy to follow. The Court made three further fundamental statements— all the three were challenged later either by the Court or by observers, and for this reason stood in the centre of discussion on the legal questions of direct democracy in Hungary since then. First, the Court declared that the primary form of the exercise of the power of the people in Hungary was representative democracy (viz. Parliament), accordingly procedures of direct democracy are, to quote the language of the Court, 'only complementary'. Second, the Court said that it is possible to deduce from the Constitution further, non stated referendum–proof subject–matters. And third, the Court said that the referendum is bound to exercised within the limits set by the constitution. Consequently, the 'the question [to be answered at the referendum] may not involve an indirect modification of the constitution'. This statement probably means that there may not be any possible answer to the question with 'yes' which would oblige Parliament to adopt a decision (law, resolution etc.) violating the constitution.

There is a fatal ambiguity in this decision, however. It rejects expressly (and correctly) the communist concept of the 'unity of power' [of the state] as inconsistent with the post–1989 constitution, but it still speaks of the 'exercise of the rights emanating from popular sovereignty'[24] through Parliament (and eventually through the people), albeit they are bound to exercise it in the ways established by the constitution. At the theoretical level, it reflects a great deal of perplexity and confusion as to the concept and meaning of popular sovereignty in constitutional democracy. One might ask, if the people are sovereign, how can it be bound by the constitution—when the constitution itself is based (grounded) on the sovereignty of the people. Are there two 'peoples': one people that created and authorized the constitution, and another one bound to obey it?

Still, in this decision the Court had been in a relatively comfortable position to let its phantasy work, since the constitution itself did not regulate but vaguely the conditions of referenda. As long as it had remained so (until 1997) the superiority of the constitution in legal order had been a strong argument against an overuse of the referendum, especially in ways that run abreast the parliamentary form of government. The next decision came—like the first, upon a submission of the Parliamentary Committee for Constitutional and Legal Affairs—in 1995. It was connected with an initiative to elect the president of the republic directly (i.e. by popular election, instead of the procedure prescribed in the Constitution, by Parliament). It rejected the submission to interpret the constitution and stated that Parliament did not adopt a regulation consistent with the constitution, notwithstanding the decision, quoted above, that instructed Parliament to adopt a new (or

modified) law on referendum and popular initiative. The Court still did no t use its power to declare invalid the law—although it repeated its earlier statement on its inconsistency with the constitution, Thus, nobody could know what rules regulated the referendum in Hungarian law. There was an unconstitutional law in force, but it had been unclear which rules of it were unconstitutional. Still, the law was being in force and thus it had to be applied, if anybody knew what was to be applied.[25]

The next case was an attack by the non–parliamentary[26] Workers' Party (Munkáspárt) against the resolution of Parliament refusing to allow a referendum on Hungarian membership in NATO, arguing that it is 'too early' i.e. premature, but pledged itself to hold one, if the time comes. (Parliament honoured this promise in 1997.) For many supporters of the initiative—including radical pacifists—Parliament was obliged to ordain the referendum[27] At any rate, the position of Parliament was self–defeating: it recognized the lawful nature of the initiative by pledging itself to ordain a referendum later. The argument of Parliament that it was premature to hold a referendum is, given the state of the law, juridically absurd (though perhaps politically sound)[28], since the referendum would have concerned the future conduct of Hungarian foreign policy—the conclusion of a treaty— and this question was not all 'premature' at the moment, just the contrary. As a matter of fact, it cannot be by definition 'premature' since it concerned the future policy of the republic and as such was, as impliedly recognized by Parliament, clearly within the powers of Parliament. The case once again revealed the unsatisfactory state of Hungarian law on referendums.

Probably this was the reason why the Constitutional Court declined to decide the merits of the case, i.e. determine whether Parliament was under the obligation to ordain the referendum. Instead, the Court made use of various intricacies of Hungarian law said that it had no jurisdiction to review a resolution of Parliament *if it applies only to a single concrete case*, but reserved its jurisdiction for resolutions of law–making character. Moreover, responding to another argument of the applicant, it held that there is no possible violation of constitutional rights and therefore no room for constitutional complaint except the case if Parliament refused to allow the referendum on the ground of incorrect counting of the signatures. In essence the Court held that there was no substantive remedy against the dismissal by Parliament to ordain the referendum. (This position of the Court was sharply overruled in slightly more than a year.) Also, the Court warned the legislator to meet the overdue obligation set out by the Court earlier (in 1993) to adopt a new law on referenda consistent with the Constitution.

Parliament, one might be inclined to say, although belatedly overdid its obligation. Instead of adopting the new law as required by the Constitutional Court, it amended substantially the constitution—transforming important parts of the arguably unconstitutional law into the constitution. In this way, of course, it ceased to be unconstitutional, but remained (as we shall see) no less problematic and prone to create new disputes. The first of these disputes reached the Court quite quickly and revealed many frailties of the new regulation.

The contradictions of the theoretical, as distinct from practical, stand of the Court are demonstrated in the issue of 'unconstitutional question'. For one thing, the Court held that the question put to the compulsory referendum *may not be contrary to the constitution*. This means, (as pointed out above) that at least one of the possible outcomes of the referendum would oblige Parliament to adopt an unconstitutional law or to

oblige it to decide contrary to the constitution. On the other hand, however, the Court also said repeatedly that the referendum is 'the direct exercise of the people's sovereignty'. If the 'people', as the Court alleges, are sovereign, it would be difficult to imagine how could it decide anything unconstitutional, against itself, so to speak. But the Court held that no 'unconstitutional question' (in the sense defined above) is admissible. It follows, then, that the 'people' exercising, according to the Court in referenda its power 'directly', is bound to the content of the constitution. Thus the people directly may not change what it is allowed to do indirectly. One problem in this argument is, from our point of view, the conceptual identification of people of the constitution with the 'electorate' (or with the majority of the latter).

Another significant decision of the Constitutional Court in matters of referenda followed in 1997,[29] after the modification of the constitution described above. In this controversial and complex case the Court was faced for the first time with the consequences of the constitutionalisation of the rules relating to the referendum. To simplify, the Court said that (as in the case it envisaged) there is a popular initiative and another one authored by the government (and endorsed by Parliament) on the same subject, the popular initiative ought to be given priority from the moment of the collection of the signatures, provided the collection, duly notified, is successful. The Court even said that the persons who support the initiative for a referendum have a *fundamental constitutional right* that to the *referendum*, created, in the opinion of the Court, by the constitutionalisation of the rules relating to referenda. This position of the Court is baffling. One could argue that the right to collect signatures and the participation in the voting procedure are constitutional rights, but it is at best curious to contend that they have a right (or a claim) on the referendum be held. (Compare this with the position of the Court in the NATO case in1995.) In our opinion, it is doubtless true that if the conditions of a compulsory referendum are met, Parliament is *obliged* to ordain the referendum. This a constitutional duty of Parliament, imposed by the Constitution. But it is odd to say that it is a constitutional *right* of the citizens supporting the referendum 'to have the referendum held'. By the way, if it were a right, then anybody who signed the sheet demanding a referendum would have the right to withdraw it, for instance.

More importantly, the Court seems to have had only a vague idea of the constitutional implications of a representative system. It took the 'will' of two hundred thousand citizens (about 5 % of the regularly active electorate) as equal to the 'will of the people', while forgot that in a representative system Parliament is deemed to represent the *people as whole.* On this ground it is more than questionable that a popular initiative must supersede the decision of Parliament, provided Parliament also decides to ordain a referendum on the same subject.

The last case to date involved fundamental constitutional problems. A probably small group called 'Association of Social–Democratic Youth' supported tacitly by a wide occasional coalition announced in 1999 that they initiate the collection of signatures for a referendum in order to change the rules governing the election of the President of the Republic: they wanted a president elected by the 'people' instead of the regulation in force, i.e. the election of the president practically by the simple majority of Parliament. The political background of the initiative was the coming election of the President of the Republic,[30] but here we

are concerned with the legal aspect. Those who argued for the admissibility of the question—subject under the new rules to a preliminary scrutiny of the National Electoral Commission—found support in the recently inserted Art 28/C of the Constitution that stated in its operative part that there may not be a referendum on the rules of the constitution relating to referendum and popular initiative.

They drew from this provision of the Constitution the conclusion—using the *argumentum a contrario*[31]—that this can only mean that *in any subject matter* there may be, indeed under circumstances ought to be, a referendum. The referendum must have been of the character modifying the constitution since the election of the President of the Republic is regulated in detail in the Constitution. The National Electoral Commission agreed with this view and declared the question submitted for the referendum (if the initiators can collect the two hundred thousand signatures, which nobody ever doubted) constitutional. The Court decided the case upon two applications submitted by private individuals as *actio popularis* allowed by the law on electoral procedure (Art 130) which calls it 'exception'.[32] The Court in essence adopted the argumentation set out by the applicants[33] that the Constitution may not be modified (amended) by way of compulsory referendum, since the procedure of the modification of the constitution is regulated in Art 24 para 3 of the Constitution. Thus the Court reaffirmed the view it held before the amendment of 1997 that it is possible to deduce from the constitution referendum–safe subject–matters not mentioned in Art 28/C para 5. The Court held that these are exceptions applicable to *any case* of referenda, including those ordained by Parliament (i.e. both to compulsory and non–compulsory. Thus, the single reasonable interpretation of the provision is that it excludes referendum on the rules of the constitution relating to referendum and popular initiative is that the constitution prohibits any referendum on the constitutionally regulated institutions of direct democracy and leaves it exclusively to the constitution–making power[34] to re–regulate this question. To be sure, this interpretation does not exclude referendum on constitutional matters— barring, of course, on referendum and popular initiative—only compulsory referendum is excluded. Thus, the constitution–making and amending power is held in the Hungarian constitution exclusively by the two–thirds majority of members of Parliament,[35] as it did before the modification of the constitution in 1997.

The decision of the Court still has left unresolved several problems. For instance, what does it mean to say that the 'result of referendum binds Parliament'? Does it mean to say that the legislative power of the people is exercised 'directly' whatever that means, by the people?. This remark wishes to be a hint that the sequence of the cases in matters of direct democracy dealt with the Constitutional Court is by far not finished.

5. Referendums in Hungary

Since 1989 there had been at least fifteen cases when the question of holding a referendum was seriously posed. There were three referenda in fact held, and two of them produced valid results. The majority of attempts had for various reasons, failed. Some of them failed because the National Electoral Commission did not validate the signatures or there were no sufficient number of valid signatures supporting the initiative. In three cases where apparently all conditions to hold the referendum were met, a decision of the Constitutional

Court precluded the referendum; in another case all the procedural conditions were satisfied but parliament refused to order it (and the Constitutional Court let it so). In the last case in 1999 once again the Constitutional Court ruled out the possibility of the referendum as a preliminary decision under the new rules.

5.1. The 'Four–Yes' referendum in 1989

Undoubtedly the most significant (and also the most controversial) case of a referendum ever held in Hungary has been the so–called *Four–Yes* referendum in November 1989.[36] It has come to be seen by many as the single most dramatic event in the peaceful—and for this reason relatively undramatic—transition process in Hungary. One might perhaps distinguish between the political and the psychological effects of the Four Yes referendum and its 'real' (as distinct from psychological) role in the transition process. As to the latter, it decided a relatively minor—but not immaterial—question on the election of the President of the Republic. The three other questions (the dissolution of the Workers' Militia, the prohibition of political parties in workplaces, and to oblige the then already non–existing MSZMP [37]of its assets) were either moot at the moment.

To cut the long and complex story short, it was related to the round table negotiations on the transition in Hungary, that began in 1989 and ended in an agreement signed on 16 September.[38] The agreement was not signed by the Alliance of Free Democrats and FIDESZ —although they accepted the agreement themselves— because of certain elements in it, first of all the method of the election of the President of the Republic. For this reason the representatives of the two parties did not sign the agreement and announced, they will collect signatures for a mandatory referendum on four topics as allowed by the Law of 1989, adopted, as mentioned above, outside the negotiations process.

The complexity of the case of the so–called *Four–Yes Referendum* does not allow here the detailed analysis it deserves. From our present point of view it is important to note that this referendum was not held in the context of a parliamentary democracy but in the political context of the peaceful and negotiated transition from socialist system to constitutional democracy. The immediate subject–matter was then twofold: first the settlement of a political dispute between MSZMP/MSZP and MDF on the one side and SZDSZ/FIDESZ and FKGP on the other. It concerned a resolution of Parliament on the timing (and so the mode of election) of the President of the Republic: the first group agreed to elect the President before the parliamentary elections the other opposed this. (The election of the President before Parliament meant, in the context, popular election.) The dispute was settled by the voters. The second aspect concerned the rest of the questions: they were already practically settled in November. Their function was then plebiscitary: that is the ratification of measures already taken. The result was, accordingly quasi–plebiscitarian; with 'yes' votes between 94 and 95 %. This is not say that they were meaningless; their meaning was something else: the acceptance, if indirectly, by the electorate the political agreement between power and opposition.

The participation in the referendum that was held on November 26, 1989 was not surpassed by any referendum in the last decade: about 58 % of the voters went to vote. As to the most debated question, the

first, the result was extremely narrow, the difference between the yes and no votes was less than six thousand, out 4 297 751 votes validly cast. In per cents: the yes votes were 50, 1 %, the nos 49, 9 % (the figures are rounded). One should add that in this case the non–participation was also a concious political decision, since one of the major parties, MDF (which less than half a year later won the parliamentary elections) requested its supporters to abstain, i.e. not to vote.

5.2. An invalid referendum, 1990

There was an invalid national referendum on a topic that reemerged in 1999 nearly in the same form, viz. on the procedure of election of the President of the Republic and was indirectly already a question decided in the Four–Yes referendum. Given the relatively small political powers of the President of the Republic it is a bit puzzling how much ink has been spilled on the constitutional status of the President and especially on the methods of his election.

The referendum was initiated by the MSZP as a reaction to the constitutional pact between the then biggest party of the ruling conservative coalition MDF, and the biggest opposition party the liberal SZDSZ.[39] In the 'Pact' they agreed in a package deal that involved the modification of the constitution that allowed more stable government and the election of the President of the Republic by Parliament; moreover, in the Pact the two parties agreed that the post of the President of the Republic will go to the candidate of the SZDSZ, Árpád Göncz. One cannot escape the impression that the MSZP wanted to take revenge against the at least two counts: first, it still resented the defeat at the 'Four–Yes' referendum, and second, they wanted to attack the 'Pact' copying the methods of the SZDSZ (and FIDESZ) in the Four Yes referendum, by trying to validate a part of it through a referendum. This time, the tactics of turning to the people was not successful at all; this in spite of the fact that all the political parties left out of the Pact resented it.

The reasons for this lack of success are certainly manifold. For one thing MSZP argued that the timing of the vote on the referendum was the worst possible: end of June (June29), when most electors prefer to enjoy the summer holidays rather than go to vote. There can be a deal of truth in this explanation, but there are more powerful others too. The position of MSZP in the summer of 1990 was the weakest possible: no political party in Parliament was prepared to co–operate with the Socialists and they were attacked by the rest of the political parties. In short, MSZP in the summer of 1990, following the electoral defeat on the first competitive parliamentary elections was in the position of a pariah party, made responsible for anything wrong that happened during the 'last forty years'. In such a situation there was no chance to reach the extremely high validity criteria prescribed by the law. Still, MSZP was able to mobilize its own stable electorate, even slightly more than that: there was a participation of about 14 % with a predominant (85,90 %)' yes' vote.

5.3. Failed Referenda from 1990–1999

Between 1990 and 1997 there were several aborted attempts for referenda.[40] Most of them raised the question of their admissibility, and a few of these were decided by the Constitutional Court. Here we would

like to mention those only that reached a relatively advanced stadium and then failed for tow typical reasons. First, they ceased because the initiators were unable to collect the required number of signatures supporting their proposal or they collected the signatures, but failed on the verification procedure. A second type of the failed referendum is when the initiators collected the signatures and they were authenticated, but they failed on legal grounds.

One must state that in the cases that failed the initiators were *not* parliamentary political parties. Indeed, any parliamentary party launching a campaign are in all probability able to collect the signatures required by law. There were only two cases—in 1995 and 1997 apart from the rather specific case in 1990—when opposition parties supported an initiative for referendum and in both cases they were able to collect quite quickly the signatures required. One should observe that the parliamentary ('established') parties were quite reluctant to resort to the weapon of the compulsory referendum. As a matter of fact, as both cases when they did after 1990, illustrate that even these are rather counterproductive. This is clearly shown by the fact that the parties tend to forget their statements made during the referendum campaign as quickly as they can. For instance, the Smallholder Party (FKGP) organised in 1995 a collection of signatures for the election of the President of the Republic by the people (they probably meant 'the electorate'); in 2000, when they have a chance to get the office of the President through parliamentary election, they are opposed firmly the same idea, supported by MSZP and other groupings.

One recurrent topic of failed referenda has been the question of capital punishment. Capital punishment was abolished in Hungary by a decision, in 1990, of the Constitutional Court.[41] The Constitution itself did not expressly prohibit capital punishment and Parliament was rather reluctant to enact such an unpopular measure, although it knew that without the abolition of capital punishment Hungary has no chance to be admitted into the Council of Europa and other European organisations it wanted to join. Thus, the decision of the Court came as a salvation for Parliament: it saved the legislation to do anything in that matter. Since then the legal situation has been the same as if the the constitution itself prohibited capital punishment. Given the position of the Constitutional Court, set out above, any question on the restoration of capital punishment is inadmissible. Happily, since capital punishment is a subject–matter that could eventually mobilize many people the majority of the people being in favour of. Despite popular support for idea, until now there were attempts to collect signatures for to revive capital punishment always from outside the mainstream politics and as yet did not produce any success.

Another failed referendum was organised to counteract the decision of Parliament (in 1995) to renounce the organisation of EXPO 2000, a world exposition which was to be held in Budapest in 2000. The reasons motivating the decision of the Parliament were mostly financial, given the necessity of budgetary restrictions. The opposition parties launched a rather languid campaign (mostly by proxies) for the referendum that failed, partly because it was rather clearly within the 'budget clause' of the 1989 law then in force. The question of admissibility this time exceptionally did not reach the Constitutional Court. At the end there were about 84 thousand valid signatures, and so the attempt failed.

There was another failed, still interesting attempt to compel Parliament and government to give up for ever the building a dam on the Danube even outside the region of Nagymaros. The idea of a referendum on this complex (as set out above) is far from being new: the legal possibility for such a referendum—given the 'treaty clause' of the Law of 1989 then in force—seemed to be extremely meagre. Moreover, it came in a period when the International Court of Justice pronounced its judgement in the Dam case (in September 1997) and Slovakia and Hungary were obliged to negotiate within six months an agreement on the implementation of the judgement of the Court. After the lapse of this six–month period, any party had the right to request from the Court a judgement determining the legal consequences of the judgement. The promoters of the referendum wanted to rule out the possibility of an agreement between Slovakia and Hungary that might oblige Hungary to build a dam elsewhere on the Danube. An organisation called *Együtt Magyarországért Unió*[42] that received on the elections next year much less than one per cent of the list votes, requested the National Electoral Committee to declare admissible, as required by the law, the question to be put for referendum.

The legal question was clear: would the prohibition of building a dam *on any part on the Danube* (if voted on the referendum) violate international obligations of Hungary? The promoters (including the environmentalist groups) argued no, since the Court did not oblige Hungary in its judgement to build a dam, although it said that the treaty in which Hungary obliged itself to build a dam at Nagymaros was still in force, the Hungarian 'termination' being contrary to international law. The Court said that the parties should *renegotiate* treaty in view of the conditions as they existed at the moment of the judgement. Furthermore, Hungary was bound by a treaty, the Special Agreement to submit the dam dispute to the International Court of Justice of 1993 to fulfil *any judgement* of the Court in the case, even in the future. The National Electoral Commission, surprisingly enough, decided however that there was a legal obstacle to hold a referendum on the issue and declared the question admissible. This was an erroneous decision, since the referendum could have obliged Parliament (and government) to violate international obligations of the state. The National Electoral Commission was probably impressed by the contention of the initiators that they demand only a *consultative* referendum, that would by definition not oblige Parliament. This is quite a weak argument, however, since one might ask, what would have been the legal consequence, if the initiators had succeeded to collect more than two hundred thousand signatures; one could then argue that the collection of more than two hundred thousand signatures would automatically oblige Parliament to ordain the referendum.

The organisation launching the collection of signatures was unable to collect the signatures required by law (i.e. less than hundred thousand in four months) so no further steps were taken. The failure is difficult to explain in terms of the issue: many people have been against the building of a dam on the Danube, for various (normally not entirely hydrological) grounds. Nonetheless, the action was quite flagrantly unsuccessful. This fact can only be explained by factors other than the issue at stake: for one, the organisation initiating the referendum was virtually unknown to the public opinion, and, arguably lacked the resources to make themselves better known. Second, all major political parties silently but consistently boycotted the collection of signatures, thus hindering the referendum without giving up their stance in the

debate. The best possible explanation of this behaviour is that most political leaders understood, if not all said it in public in so many words, that a referendum on this issue (with its probable outcome) would have seriuosly damaged the negotiating position and international reputation of Hungary.

5.4. A successful referendum: the NATO vote

The last referendum held in Hungary was in 1997 ordained by Parliament by a resolution. This goes back to an earlier promise of Parliament (in 1995) rejecting the initiative of anti–NATO groups on the same topic. With a rather high participation rate (49...%) the overwhelming majority voted yes, thus (under the rules of changed few months before the referendum) the referendum produced a valid result binding Parliament. This referendum was quite peculiar, since in this case no parliamentary party opposed the NATO membership, so there was little discussion in the media but, as critical voices alleged, apparently not without ground, rather a government or a pro–NATO campaign, with the opposition parties supporting also the NATO membership of Hungary.

In fact, this referendum that decided no outstanding political issue (at least not in terms of party politics) had a flavour of being slightly plebiscitarian. On the other it was the belated referendum that was not held in 1995. The refusal compelled Parliament to ordain a referendum on NATO in a moment when most electors, rightly or wrongly had the distinct impression that the question had already been decided. Even so, Parliament vacillated long before it agreed to a referendum legally binding Parliament, obviously for fear of the risk of a negative outcome (from the point of view of the NATO membership)

5.5. Conclusion

The lesson to be learned from the preceding analysis is this. For one, any political party that is able to pass the threshold of 5% to get into Parliament (that requires about two–hundred thousand list–votes), will be able to collect the signatures required (also two hundred thousand) for a compulsory referendum, if it so decides. It will not resort too often to this tool, since it is costly and quite risky. Non–parliamentary parties and organisation, without the support of at least a parliamentary political party, have no chance to collect the two–hundred thousand signatures within the period of four months as provided by the law. On the other hand, given the present picture of the Hungarian electorate and their behaviour, it is highly improbable that a single party be able to mobilize the electors for a successful referendum. Thus, to obtain a valid result binding Parliament, one must look for allies. Without the support of other parties it is highly improbable that a referendum will ever be successful. Both successful referenda prove this thesis: the Four–Yes referendum was a contest between SZDSZ–FIDESZ (and FKGP) on the one hand, and MDF and MSZP on the other, the two latter adopting different strategies that would have produced the same result, were they successful. In the case of the NATO referendum there were no parliamentary parties advising their voters to vote no; only two parties, then not represented in Parliament (Munkáspárt and MIÉP) advocated this.

Thus, as long as the Hungarian electors—although quite volatile among the parties—will follow in politics the position of a political party, if not necessarily the same, a referendum will be successful only if at

least one major party supports it. Since the major parties do not possess a support much over 30 per cent of the electorate and one would need for a successful referendum by now 25 per cent of the' yes' or 'no' votes of electors voting, it seems to be highly improbable that one party without the at least indirect support of others will be able to conduct alone a successful referendum campaign. Political and social groupings other than parties are unable to mobilize the electors, even if the case they advocate is quite popular—as proven by the failure of the Dam referendum in 1997.

6. The role of the referendum in the Hungarian constitutional form of government: the measure of directness

6.1. General views on direct and representative democracy

We would argue that direct democracy—both on the national and on the local level— has two plus one distinct, though interrelated functions: first, it is a way of resolving political conflicts (deciding issues) and, second, it is a form of channelling protest against politics. In both cases it has, as it were, a character of an 'appeal'; an appeal, of course, against decisions already made, or likely to be made, by Parliament or government.[43] A third (perhaps plebiscitarian) function is the *ratification* of a decision already made.

In Hungarian political and constitutional system direct democracy (or referendum) is a means of protest or conflict resolution as argued above. But as a means of appeal or protest it is only the last choice for a political party or movement, or interest group to try to resort to a compulsory referendum. This is due to the fact, already mentioned, that in Hungary the Constitutional Court has a wide range of powers; moreover, procedurally it is very easy to get a case before the Court. So, if a political party or group wants to 'appeal' or 'protest' against a decision—a statute, first of all—adopted by Parliament the easiest and most cost–effective way is to turn to the Constitutional Court. Since in Hungarian law any person, without having any interest to sue, may take a case before the Constitutional Court, the US President as well as a fellah of Egypt, the first choice will be understandably the constitutional review. A recourse to the collection of signatures comes only if there is no case before the Constitutional Court for the issue, and it is still weighty enough for a costly and time- consuming campaign to collect the signatures. In fact, the cases analysed above confirm this claim: in most of them the issue at stake had no chance before the Court or it had already been there. A good example is the referendum (not held until now) on the right of foreigners to own agricultural land in the country; on this issue the Court had already ruled that the regulation attacked—though justified for the time being— is constitutional,[44] so that the way to the Constitutional Court was blocked.

6.2. The unsettled conflict between direct and representative democracy in the Hungarian constitutional system

The conflict between direct and representative democracy in Hungary might be treated as a question of the proper role, if any, of the compulsory referendum on the one hand and on the proper topics of it. In short, the question is the justification of direct democracy in a representative system. The central question is, quite obviously, the role and limits of the compulsory referendum, since this allows to bypass institutions of

representative democracy. A compulsory referendum is inherently anti–parliamentarian: so, it is not surprising that the parliamentary parties are quite reluctant to resort to it, whereas others are incapable although would be willing.

By ‘plebiscitarian’ one might understand several different phenomena.[45] For the present purposes one might retain that ‘plebiscitum’ (as contrasted to referendum) means either (1) the use of popular vote to counter–play representative democracy, and/or (2) the popular vote as a ratification (or legitimation) of measures already taken, or vote on individual measures of political importance. If this definition of ’plebiscitarian’ is accepted, one must say that the Hungarian constitutional system does not exclude either of them. To bypass Parliament by way of compulsory referendum is quite a possibility, albeit a limited to certain issues. This injects an element of plebiscitarianism into Hungarian constitutional system.

This contradiction in the constitutional system was clearly pointed out by János Kis, in an article[46] in which he argues that since the result of a compulsory referendum binds Parliament (Const. Art 28/C para 3) it seriously curtails the law–making power of Parliament. This leads to a contradiction in the constitution, as the constitution confers the law making power to Parliament and to the people. Now, if there is—let us say, apparent—contradiction in the constitution, it should be resolved (i.e. eliminated) by means of legal interpretation, lawyers say. From the point of view of the constitutional theorist, the problem may remain unsolved: she might be satisfied with pointing it out. This way is not open to the judge, who is under the constitutional obligation to decide the cases submitted to her.

6.3. Referendum and popular initiative as a weapon of the parliamentary opposition

In Hungarian constitutional system the most important problem has been since 1989 the proper role of the compulsory (and for this reason also decisive) referendum, that is to say its functions and limits. Clearly, the parliamentary majority does not need the compulsory referendum as a means to accomplish its political programme, since it has at its disposal the greatest part of legislative power.[47] Thus, a compulsory referendum—i.e. at present the collection of two hundred thousand signatures for an initiative— has been a weapon of the parliamentary opposition to counter a majority decision.

The problem on the theoretical level is this. How much of direct democracy—in this case, compulsory referendum—is acceptable in a parliamentary system without sacrificing the system itself. Thus, the question is this: how much (if any) compulsory referendum is consistent with the premisses of the parliamentary government. Our position is that pretty little, if anything at all.[48]

As it was pointed out above, the very existence of the compulsory referendum gives the parliamentary opposition an extra–parliamentary weapon, the appeal to the ’people’, or more exactly, to the electorate. Since two hundred thousand voters by necessity supported any parliamentary party (due to the four percent threshold) it is almost sure that any opposition party will be able to mobilize a sufficient number of voters to subscribe in support of a referendum. The compulsory referendum is, in this system, exclusively a tool used by the opposition in Parliament, since the majority does not need it in order to achieve the same aim. Thus the institution of the compulsory referendum undermines (or at any rate weakens) the very principle of

parliamentary government: the right of the the majority in Parliament pursue the policy it prefers in a legislative period.

The key concept here is that of 'policy'. A policy is a comprehensive and consistent set of political and legislative acts that aim at the achievement of certain aims. If the parliamentary majority or any other opposition can counter the implementation of the policy, there will no political responsibility of the majority as expressed in the judgement of the electorate of its conduct during the elections. But, we would add this argument applies strictly for the *policy domain*, that is, roughly, a consistent set of legislative, administrative, budgetary and so forth measures to be implemented in order to achieve a given state of society (for instance, reduction of unemployment). Now, if a referendum allows to take out from this presumably consistent set some of its elements, no parliamentary majority may ever be held responsible for its policy. Constitutional decisions quite obviously do not fall within the concept of policy as used here.

One must conclude that the *compulsory* referendum in its present form is a potentially destabilizing element in Hungarian political and constitutional system. This is illustrated by the case of the failed referendum on the direct election of the president of the republic. It failed a narrowly—due to a unanimous decision of the Constitutional Court— but imagine for a moment what could have happened, if the court would have decided as many Hungarian lawyers have thought it had to.[49] The compulsory referendum as an opposition tool, can contribute to a certain perversion of direct democracy. An example illustrates this. If a party in opposition militates a referendum on a topic and rejects (or 'forgets') its own position as soon as it is in majority—and thus having the possibility to order the referendum by simple majority vote— contributes much to the degradation of direct democracy. The use the argument for direct democracy as an argument for a substantive political aim, is self–defeating, since it advocates not direct democracy as such, but it wants to achieve a political aim possibly using direct democracy as means to an end. This instrumentalist view of direct democracy is quite damaging for the credibility of direct democracy, and promotes scepticism towards democratic procedures.

7. Politics and Direct Democracy

7.1. The attitudes of political parties to direct democracy

There are few parties in Hungary that do not support indirect (i.e. representative) democracy. There are few, if any, however who would be prepared to disallow people's rights—i.e. direct democratic institutions. As a matter of fact, direct democracy can be a concurrence to established parties and their leading groups ('political class'). Thus in Hungary, like elsewhere, established parties are not in practice very favourable towards direct democracy in action. One can—on a more systematic level— discern a few typical attitudes in Hungarian political scene, subject to the proviso, that if they feel necessary any party(though admittedly not to the same extent) are prepared to depart from their general views. In the following, we wish to identify a few typical attitudes of Hungarian parties. It must be added they are often cross–currents, in the sense that most parties unite different currents.

1. *Conservatives.* They are generally not too favourable to direct democracy (indeed as a matter of principle to democracy). Hungarian conservative parties identify themselves as 'national' forces and they prefer to use a nationalistic, rather a purely democratic language. In Hungary, by now not having internal national conflicts the national question is either rhetorics, or eventually a question of Hungarians living outside the borders of Hungary in the Carpathian basin (and being citizens of the neighbouring states). Conservatives prefer to speak of 'nation' rather than 'people'— so, political tactics apart, they are generally not favourable towards direct democracy: they are speaking in the name of an ideal entity (the nation) that has little to do with the empirical people on the street. For them the will of the nation is definitely not an empirical will and certainly not that of the majority of the citizens.

2. *Liberals*. They are also not the most astute proponents of direct democracy: Liberals are reluctant to accept a full–blooded version of popular sovereignty—or, rather the majority principle in general. Liberal democrats accept only constitutionally limited democracy, and one of the limitations is that democracy must be representative. This entails and explains their principal reluctance against direct democracy which they are able to endorse only in a strictly limited version.[50] Liberals perceive democracy rather in terms of free deliberation than as a simple majority voting: no liberal would ever subscribe to unrestricted majority rule.

3. *Democrats*. There are democrats in nearly all Hungarian parties who would be prepared to support more than others direct democracy. There are democrats in the right wing parties as well as on the left, but nowhere they seem to have an overhand. Democrats, in this sense, are those who are prepared to accept any decision as good or correct, if it was approved by the 'people' irrespective of its content.

4. *Leftists.* The radical left seems to be the most (and most sincerely) enthusiastic for direct democracy. Institutions of direct democracy are indeed, in a sense, part of the radical leftist tradition as founded by Rousseau and the Jacobins.[51] The radical left is, in theory at least, most bound to radicalise the idea of democracy that entails the support of any form of direct democracy. This of course to large extent is based on their hostility towards political representation in general, as it is illustrated in Marx's and later Lenin's more radical rejection of any form of 'parliamentarism. The non–communist radical left is sometimes rather close to these views too.

5. *Populists*. They appear in many shades and different forms. In Hungary the most effective (as it seems) populist argument is the anti–elitist one. This contends that the whole process of system transformation—in Hungary one can safely say that it has already been essentially ended— was accomplished without the participation of the 'people' (whatever that means). The transition has been, the argument runs, but an agreement within the elite (viz. between elite groups), or (alternatively) the elite had remained the same. This is not the place to discuss the merits of these contentions, but it must be noted that it does not devoid of appealing force, although (in this form at least) it is manifestly untrue. Still, it reflects a great deal of disappointment prevalent in wide circles of the Hungarian population. This disappointment extends to Parliament itself: Parliament has been in the last decade constantly highly unpopular among the people. Thus, an unfavourable attitude of the electorate towards parliament—'the people was left out of the process of transformation'[52]—might easily prepare the soil for radical advocates of direct, probably plebiscitarian,

democracy. Until now, this did not happen in Hungary—probably because almost all exponents of this view are themselves sitting in Parliament.

7.2. Public opinion and media on direct democracy

Public opinion seems generally but not intensively (or vaguely) favourable to any form of direct democracy. This formula means that people are, if asked, generally in favour of forms of direct democracy ('let the people decide'), but their wish for this, as matter of practical implementation, i.e. in action, seems to be rather feeble— as shown in the low participation rates and almost general disinterest in referenda. This can be attributed to other factors, as social psychology, or as an effect of de-politisation of Hungarian electorate due the disappointment of wide circles with the social and economic effects the system transformation. This a question of social psychology with obvious repercussions on the political consciousness and processes in the country. As a consequence, one can safely say that to mobilise electors for a referendum with success one needs a great deal of organizational skill and resources, otherwise the whole enterprise is doomed to failure. Moreover, such a mobilisation demands quite important financial resources—something which most parties and social movements are in bad need of. It seems to be quite difficult to mobilize the Hungarian electorate in any matter— evidence is the low participation in national elections; even this is in decline.

In fact, most Hungarian citizens perceive it as an insult to be invited to vote. Alternatively, one might say that the Hungarian electorate is not particularly eager to participate in political decision–making. This attitude of a bit less than the half of the electorate is an unquestionable fact of Hungarian political life. There are, of course, different explanations of this disposition of the Hungarian electorate—although serious empirical studies in this respect are not abounding[53]—but one plausible explanation is that this attitude is a continuation of the attitude of the Hungarian population in two–three decades preceding the political transformation in 1989.

Nonetheless one can safely affirm that the use of direct democratic institutions—first of all 'collecting signatures for a referendum'—is a widely accepted form of political protest in Hungary. Moreover, it has been increasingly regarded by the people as the most accepted (or legitimate) form to express discontent with a political decision whatsoever. Public opinion polls invariably attest the correctness of this statement. In 1994, for instance, only 68,3 % of a sample regarded launching of a referendum acceptable; their part grew to 84,5% in 1998.[54] This form of political protest is even more widely accepted among persons of higher social status, for instance among those living in Budapest, who earned a university degree: they accept the initiation of a referendum in about 90 % as a legitimate method of expressing disagreement in politics.

As to the inclination to *participate* in various forms of political protest we find a similar picture. About two–thirds (63 %) of the Hungarians in the sample would be prepared to participate in collecting signatures for a referendum; this is an increase of about 20 % in comparison to the results collected two years before. Once again, the younger, the more educated, the more urban people are more inclined to take part in a collection of signatures for a referendum. Among the citizens younger than 30 years the inclination to

participate in a collection of signatures is above 70 %. Here too, the referendum is the form of political protest—we would prefer to say, political action of the ordinary citizen (i.e. those not taking part regularly in political activities)—best regarded by the Hungarian electorate. In addition, about 75 % of those who accept the referendum as a means of political action in general (that is, for others), would be prepared to participate in it. Even from this point of view the initiation of a referendum by collecting signatures is by far the leading one.[55] (It must be added that the persons in the sample were asked to compare different forms of political protest, such as strike, disobedience to laws, mass demonstrations etc.)

7.3. Participation of the voters

Facts on the actually held referenda display a somewhat different picture. In only one referendum of the three that has been held in Hungary since 1989 was the participation higher than 50 of the registered electorate. This was the Four–Yes referendum, where the participation did exceed considerably the 50 per cent (58%).

Participation of voters in referenda, as it is well known, depends on several factors. Despite the generally positive attitude towards the referendum, the Hungarian electorate is not too prone to visit the ballot box. In 1998, the last Parliamentary elections, about 44 % of the electors did *not* participate at all. Of the three actually held referenda one failed due to the low participation (in June 1990.). On the two others, the participation was lower than on parliamentary elections closest to them (at least in the first round), still nevertheless not strikingly low and was able to produce a valid result.

Although the Hungarian electorate are, as we have seen, generally quite well disposed towards direct democracy, their actual behaviour is remarkably different. One possible explanation of the behaviour of is this. Hungarian electors are far from being satisfied with actual standing of democracy in Hungary. This is shown by various surveys abundantly clearly. Recent research revealed that only about one third of the Hungarian population is satisfied with the development of democracy, although their part is slightly growing (the rest is either not satisfied or cannot judge it).[56] In view of these data the non–participation might be interpreted as an expression of the dissatisfaction with the actual state of affairs, but not the rejection of democracy in general.

8. Local Direct Democracy

Elements of local direct democracy were in existence in Hungary already in the 'socialist' system. The local self–government was not banned since the 1970s but in theory at least, the Soviet system prevailed. The underlying principle of it was the unity of the state; this entailed that the local Councils were primarily organs of the central government, their autonomy consisted in the realisation of the law and purposes set by the central government. At any rate in Hungary in the last two decades of the socialist system, some institutions of local direct democracy, such as the village assembly were not entirely unknown, but their role was seriously limited. The possibility of recall existed in theory rather than in practice. Most importantly from our point of view, the socialist system of local administration did not recognise the right to self–

government, although the act on Local Councils of 1971 described councils as (among others) organs of popular representation and *self–government*.

It is only since 1989 that the Hungarian constitution (Arts 42 and 44. Para 1) guarantees the right to local self–government as a constitutional right[57] to the community of electors, exercised both through their elected representatives and directly. Nevertheless, the Law on Local self–government (Law LXV of 1990), makes it clear that the primary form of local self–government is representation, while direct democracy remains an exception. Still, the same law renders compulsory the decision through a local referendum in a series of cases; in others, the local referendum is facultative, i.e. depending on the decision of the representative organ (assembly). In both cases the outcome of the successful referendum is binding and no repeated referendum is allowed within a year (even when it was unsuccessful).

Subject matters of the compulsory referendum are twofold: few of them are made compulsory in the law on local self–government law itself, like the questions related to the merging of local communities (or their division), the formation of a new local community (separation of a part of the local community into a new one). The second class of compulsory referenda is an open one: local assemblies may define themselves (in ordinance) the conditions of compulsory referenda. In these cases they are free to establish the subject–matters and conditions where the referendum will be compulsory (and its result, of course, binding). The law makes it obligatory that a local referendum should be held if part of the local electors demand it; it may lie between ten and twenty–five per cent of the electors, and must be defined in a local ordinance. There are, however referendum–proof subject–matters: in these cases no referendum, facultative or compulsory, may be held (or defined as compulsory in a local ordinance). These are, modelled on the law governing national referendum, local budget and taxes, matters of organisation, functioning and personnel within the competence of the local assembly, and the dissolution of the assembly. In small villages of less than five hundred inhabitants, the referendum may be replaced (depending from the decision of the local assembly) by the decision of the assembly of the citizenry as a whole (village assembly): its decision is valid if more than the half of the local electors were present.

Local popular initiative is also an institution governed by the law on local self–governments, although only in outlines, the rest of it being left to the local assemblies. Any question within the competence of the local assembly (but not in local affairs not falling within the competence of

the assembly, but say that of the burgomaster—including those labelled above as 'referendum–proof'—may be a subject–matter of a local initiative. The number of persons need for a successful local initiative should be defined (like in the case of a referendum) in a local ordinance: it may not be less than five per cent and not more than ten per cent of the number of local electors. The local assembly is bound to discuss the popular initiative, supported by the number of electors defined in a local ordinance.

In 1994 the rules of governing local democracy were substantially amended. The change concerned important technical and procedural details, such as rules on the collection of signatures, the form and substance of the circular used for the collection of signatures, the obligations of the local administration in this respect and the legal remedies. The most important among legal remedies is the constitutional complaint

that may be launched (within fifteen days) in a limited number of cases against the most important breaches of the rules governing the exercise of direct democracy, such as the refusal of the local assembly to ordain a compulsory referendum, or its irregularity as well as the refusal of an assembly to discuss a popular initiative regularly submitted.[58]

Two further questions deserve mentioning. First, one of the problems often discussed had been the concept of 'local citizenship'. A local citizen is, within the meaning of the law, anybody domiciled in the local community; in localities where there are holiday–recreation areas (specially designed as such in local ordinances), the concept of local citizenship in certain cases includes persons domiciled elsewhere, but being owners of real property for leisure purposes in the locality. This is quite a significant question, since in Hungary about half of the families possesses leisure (or week–end) property outside the local community they are domiciled.[59] The question of local citizenship is of great—perhaps decisive—importance in secession cases; when a part of a local community wants to secede, most for financial reasons, from the rest.

As to the practice of direct democracy at the local level, it is difficult to have a detailed picture of the last decade in Hungary. One can safely assume that by far the most important topic of local referenda has been what might be called 'secession issues', cases when a part of the local community strives to secede from the existing one and establish a smaller community of their own (or join another). One can also conjecture that in most cases the mobile of these secession movements has been economic or financial. Since under the law secession is possible only through a local referendum, it is understandable that the most important cases in the practice of local direct democracy in Hungary are concerned with this subject matter. It must be noted, however, that secession is (at least in theory) quite a borderline case of democracy, since it concerns the very presuppositions of democracy—in this case the membership and the borders of the democratic community—themselves not capable to be decided democratically.[60] By now, secession referenda are in decline for the obvious reason that the division of local self–governments has a natural limit and that seems to have been reached. On the other hand local referenda on local environmental issues show a growing trend. Examples are referenda on the plans to opening of industrial equipments working with hazardous wastes, like a nuclear waste deposit or a waste mill, or the settlement of noisy establishments as shopping malls, a fuel station and the like.

As to the quantitative aspects of local direct democracy in Hungary, there are no reliable data available on the national level. Experts estimate that there must have been several hundred local referenda in the last ten years, the majority of them concerned secession issues where it has been compulsory to hold a referendum.

9. Conclusion: Much ado for a bit?

One could say, that direct democracy has made a progress in Hungary in the last decade. More than that: for the first time in history elements of direct democracy appeared as rules of the constitutional law in Hungary. The last decade brought the first experiences of Hungarians in direct democracy—at least on the national level. It is certainly premature to assess the functioning of the institutions of direct democracy conclusively. Still, one can venture to make a few observations.

To begin with the good news, one can state that direct democratic institutions have already a foothold in Hungarian constitutional thought. One noteworthy indicator of this fact is that no significant political force has ever challenged *in principle* that direct democratic institutions have a place in Hungarian constitutional system. (They do not agree in the extent of it, but they do not reject it either.) Especially after the (not entirely successful) 'constitutionalisation' of direct democratic institutions in 1997, direct democratic institutions became an *acquis* in Hungarian constitutional law.

On the negative side, one must observe that the role and function of the institutions of direct democracy is still not sufficiently well defined in Hungarian political and constitutional system. The experimentation with direct democracy did not yet yield a clear idea of the function of the institutions of direct democracy; on the contrary, it has sometimes contributed to make it more ambiguous. So, there is a constant built–in tension in the Hungarian political and constitutional system between representative and direct democracy that has not been eliminated in the last years. One might, alternatively or conjunctively, argue that in Hungary the real conflict is between the 'plebiscitarian' and 'referendarian' conceptions of direct democracy. By the latter we mean a constitutional organisation of direct democracy compatible with representative democracy.

In Hungary at present there is no consensus on the proper role of the institutions of direct democracy. This fact is well reflected in the uncertainty of the constitutional rules since they cannot be but 'dilatory compromise formulas'. There are, like everywhere, strong democrats and there are others who prefer a more restricted use of direct democratic institutions, giving priority to representative democracy. Quite characteristic is that in Hungary there were more discussions on failed referenda, than on those in fact held. To venture a prediction: this is bound to remain so for many years.

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[1]The single exception is the plebiscite held in Sopron (Ödenburg) in 1921 as a result of an agreement between Austria and Hungary, involving as a matter of fact the division of Burgenland between the two countries. But this vote on the national question had hardly anything to do with democracy. See in detail Soós K, *Burgenland az európai politikában*, Budapest, 1972, 169.

[2] A közvélemény 1988–ban = *Magyarország politikai évkönyve, 1988* ed. S. Kurtán, P. Sándor, L.Vass, Budapest, 1989, 597, 676.

[3] See in detail Ádám A.: *A Népköztársaság Elnöki Tanácsa*. Budapest, 1959.

[4] Introduced in 1987 by the adoption of the Act on Law– making (No. XI., still partly in force); this statute considerably enhanced the role of the Parliament and conversely reduced the powers of the Presidential Council. This statute did not provide for any direct democratic institution, except perhaps the so–called "popular debate" on projects of laws.

[5] The constitution itself guaranteed the leading role of the party in Article 3: 'The Marxist–Leninist party of the working class is the leading force of society.'

[6] See J.Beér, I. Kovács, L. Szamel: *Magyar államjog*, 1960. And see I. Kovács: *A szocialista alkotmányfeljodés új elemei.*Budapest, 1969.

[7] See O. Bihari, *Socialist Representative Institutions*, Budapest, 1970. passim and 18, 29, 116. However, a valuable monograph devoted todirect democracy was published in the period, see I: Szentpéteri: *A közvetlen demokrácia fejldodési irányai*, Budapest, 1965. (With an English summary at 467.).

[8] It should be added that even earlier, when a deputy was regarded "dishonoured" for his mandate, she was more or less gently forced to resign, instead of using the recall.

[9] In the meantime, the International Court of Justice rendered its (presumably first) judgment on the international legal aspects of the dispute. See ICJ *Reports*, 1997

[10] 1109 UNTS 236; 32 ILM 1247 (1993)

[11] *Magyar Közlöny*, of 15 June, 1989.

[12] The full minutes of these negotiations were published in 1999. See A. Bozóki, Z Ripp. And M. Kalmár eds. *A rendszeváltás forgatókönyve*. I–IV,. Budapest, 1999.

[13] The Hungarian constitution requires in a series of cases, called ”two-thirds laws”, a qualified, two–thirds majority for certain laws and for some other decisions of Parliament (including until 1997, perhaps, the decision to ordain a referendum).

[14] So, e.g. I. Kukorelli: *Az alkotmányozás évtizede.* Budapest, 1996

[15] The constitution was amended in this respect by Law No. LIX. of 1997.

[16] Act. No. C. of 1997

[17] They may be dissolved by Parliament upon a motion of the Government under Art 19 para 2, point l, of the Constitution, if their working is unconstitutional. An additional requirement is that the Government should consult the Constitution Court before submitting the motion.

[18]

[19] ABH, 1997,

[20] This rule is no longer in force, since the Constitutional Court, quite rightly found it unconstitutional. See *ABK*, 1999,

[21] Art 28/C para (3) of the Constitution.

[22] ’[P]erhaps the most powerful court of its kind in the world’ in the words of Kim Lane Scheppele. See K.L. Scheppele, ’The New Hungarian Constitutional Court’ *East European Constitutional Review(8)* 1999, 81.

[23] ABH, 1993, 33.

[24] The curious formula is a repetition of the language of Art 19. para 2 of the Constitution which speaks of the ’exercise of *certain rights* emanating from popular sovereignty’ through Parliament, whatever that means. It does not specify, in particular, who exercises the rest of the rights emanating from popular sovereignty. Historically it goes back to the text of pre–1989 constitution that said ’Parliament exercises all the rights emanating from popular sovereignty’; the new version simply left out the qualification ’all the’.

[25] ABH, 1995, 427.

[26] The party, that identifies itself as communist, minimally failed on each election the threshold and could not get into Parliament.

[27] For a powerful statement of this position, see T. Csapody: ’Egy népszavazási kísérlet jogszer⟨sége’ *Társadalmi Szemle* 1996. No. 6. 40.

[28] Indeed all the parties represented in Parliament voted for the resolution.

[29] ABH, 1997

[30] Note that on this topic there had been already an unsuccessful referendum in 1990..

[31] Also known as ’*inclusio unius est exclusio alterius*’.

[32] For a view supporting the position of the National Electoral Commissin see Halmai, *Mancs* and HVG. 1999.

[33] See Kis J.:’A nép és alkotmánya I–II’. *Magyar Hírlap* May 10 and 11, 1999, and see Bragyova, ’Módosítható–e népszavazással az alkotmány?’ *Népszava*, May 5, 1999.

[34] Or ’constitution–modifying’, if the two are different.

[35] This term probably means ’that of the maximal possible membership as defined by law’, i.e. vacant seats included.

[36] See Babus, E: ’Népszavazás—1989’ = *Magyarország politikai évkönyve 1989.* Ed. S. Kurtán, P. Sándor and L. Vass, Budapest, 1990, 209..

[37] At the last Congress of MSZMP, at the end of October 1989, it was legally transformed into the MSZP (Socialist Party) but all former members had to renew their membership. The communists proper founded a new party, now called Munkáspárt, that has remained outside Parliament.

[38] In English see, among others, R. Tokés: and Andrew Arató,... A. Bozóki and János Kis...

[39] The text of is conveniently reprinted in *Magyarország politikai évkönyve* 1990, Ed. S. Kurtán, P. Sándor, L. Vass. Budapest, 1991

[40] For a list of them see A. Körössényi, A magyar politikai rendszer, 1997. 187.

[41] ABH, 1990, 88. And see *A halálbüntetés eltörlése Magyarországon*.

[42] 'United for Hungary', a political movement issued out of a splitter group of a non–parliamentary party, *Köztársaság Párt*.

[43] In a parliamentary government, as in Hungary, the two can be identified without much simplification.

[44] ABH, Technically it was presented as a question whether legal persons may own agricultural land; since in Hungary (like in any other market economy) nobody can determine whether the owner of a corporation is a foreigner or not, in order to exclude foreigners one ought to prohibit the agricultural land ownership to every legal person (with a few exceptions).

[45] See generally, Jean–Marie Denquin, *Referendum et plébiscite*. (Paris: LGDJ) 1976.

[46] J. Kis, A nép és alkotmánya I–II. *Magyar Hírlap* 1999. p.

[47] Not the whole, though. As mentioned above, there are the so–called 'two–thirds statutes' the adoption of which needs a two–thirds majority of the members of parliament present and voting. These are mostly statutes implementing the constitution, such as fundamental rights, media law, press law, etc. They include the law on referendum and popular initiative and the law(s) governing electoral procedure.

[48] Se for instance M. Dezso, *Képviselet és választás a parlamenti jogban*, Budapest, 1998 and A. Bragyova, *Az új alkotmány egy koncepciója*, Budapest, 1995

[49] See for instance, G. Halmai, 'Dönthet–e a nép?' *Mancs* April 22. 1999 18., 38–39. and 'Taláros verdkt' *HVG* , May 17, 1999, 48.

[50] See J. Kis: A republikanizmus...*Világosság* ...Bragyova, *Az új alkotmány egy koncepciója* Budapest,1995, and A. Sajó: *Az önkorlátozó hatalom*, Budapest, 1995.

[51] Here we follow J.F Talmon, *The Origins of Totalitarian Democracy*, London, 1952.

[52] See for instance Kukorelli:

[53] See however, F. Gazsó.: Pártbázisok és válsztói magatartás–típusok..= *Választástudományi tanulmányok*. Ed.. M. Dezso and I. Kukorelli, Budapest, 1999 , 107. And see *A választói magatartás: szavazók és nem szavazók*. Research report (MS) by A. Böhm, F. Gazsó, J. Simon, Gy. Szoboszlai, Budapest, Institute for Politrical Science of the Hungarian Academy of Sciences, 1994.

[54] The data are borrowed from: E.Lengyel and M. Pálvölgyi, A különbözo tiltakozási formák iránt tanúsított elfogadási illetve részvételi hajlandóság trendjei (1994–1998) = *Magyarország politikai évkönyve 1998–ra*. Ed. S. Kurtán, P. Sándor and L. Vass. Budapest, 1999. 770, 773.

[55] Lengyel and Pálvölgyi, ibid., 779.

[56] E.Lengyel, A. Tóth,, E. Vinczellér, M. Pálvölgyi: A magyar lakosság véleménye gazdaságról, politikáról, és az európai együttm⟨ködésrol 1998–ban = *Magyarország politikai évkönyve 1998*, 747, 751.

[57] The Constitutional Court interprets this 'right' in the sense of an institutional guarantee of local self–government as an institution, rather than a full–fledged individual constitutional right. See ABH, 1993, 27.

[58] See É. Szalai, Az alkotmánybíróság és az önkormányzatok. = *Alkotmánybíráskodás*. Ed G. Kilényi, 1994,

[59] Typically the urban population has a leisure property in a village.

[60] This is the so–called 'paradox of democracy' (or, rather, one of them). See St. Holmes: 'Pre–commitment and the paradox of democracy' = J. Elster / R. Slagstad eds. *Constitutionalism and Democracy*. Cambridge, 1990