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## **Some Remarks to the Future of the Social Dialogue in the Hungarian Constitutional System**

### **I. Introduction**

In October 2008 the Constitutional Court declared unconstitutional certain provisions of the drafts on National Council for the Reconciliation of Interests and on Council of Social Dialogue on Branch Level.<sup>1</sup> In my opinion with this decision an era of the social dialogue ended, but without elaboration of a new concept.

The idea of the social dialogue came up just before the change of political system. In 1988 the former Prime Minister, Károly Grósz established the National Council for the Reconciliation of Interest. The primary reason for it was to support the economical social dialogue, but also to preserve the legitimacy of the socialist system, without success. After the changing of the system the reconciliation of interests renewed both in structure and organisation, and in composition. The Council, established in August 1990, adopted its rules of procedure within the month and its statutes were adopted on the first plenary meeting on the 20 September 1991. These dates are important, because at that time the new labour code hasn't come into force. The reason for hurry was, again, the legitimacy of the new political system.<sup>2</sup> The statues have been amended several times, but two fundamental questions stayed unanswered: the legal status of the Council and, as a consequence, its function.

The labour code, entering into force on the 1 July 1992, couldn't dispel the doubts. Section 16 of the Labour code regulates the relations between the Government and the Council:

*"The Government shall discuss issues of national significance pertaining to labour relations and employment relationships with the interest representation organizations of employees and employers through the National Council for the Reconciliation of Interests."*

Section 17 of the Labour Code regulates as follows:

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1 124/2008. (X. 14.) AB

2 Lajos, Héthy: *A tripartizmus lehetőségei és korlátai Közép-és Kelet-Európában*, [in Mária, Ladó (szerk.): *Tripartizmus és munkaügyi kapcsolatok Közép- és Kelet-Európában*], Budapest Munkaügyi Minisztérium Munkaügyi Kutatóintézete, 1994, 196 – 197. [Lajos, Héthy: *Possibilities and limitations of tripartite social dialogue in Central and Eastern-Europe*. [in Mária, Ladó (ed.): *Tripartite social dialogue and industrial relations in the Central and Eastern-Europe*.] Research Institute of Ministry of Labour, 1994, Budapest, pp. 196 – 197.

*"(1) The Government, with the agreement of the National Council for the Reconciliation of Interests, shall*

*a) establish the provisions, in derogation from this Act, concerning the termination of employment due to economic reasons affecting large numbers of employees, in the interests of preserving jobs;*

*b) decree the provisions for the mandatory minimum wage and the guaranteed wage minimum established in accordance with the level of education and/or vocational training of the employee required for a particular job or position, and the supervision of labour relations;*

*c) submit recommendations to define the maximum duration of daily working time and to determine official holidays...*

In the function of the Council, informality was often detectable, which went together with the uncertainty of the members' legitimacy. Nevertheless, the Council was able to operate thus way since its foundation, until the Constitutional Court declared it unconstitutional by decision no. 124/2008 (X. 14.) AB. This decision arises several questions concerning the social dialogue. The first one is the function and purpose of the social dialogue. The answer to this question might be the "start point" for analysing the legal nature of the social dialogue. Within this frame the demarcation of the definition legitimacy and the representatives of members of the Council is crucial.

In this study I try to prognosticate the future of social dialogue after the Constitutional Court's decision.

## **II. Decision of the Constitutional Court**

### **1. Legislation preliminaries**

a) Two drafts were adopted by the Hungarian Parliament on 11th December 2006. By adoption of the draft on National Council for the Reconciliation of Interests the legislator superseded an unconstitutional default, stated by a former decision of the Constitutional Court (No. 40/2005 (X.19) AB). The reason for the second draft, on Council of Social Dialogue on Branch Level, is based on a declaration of intention by the Government and the social partners.<sup>3</sup> The almost 2 decade absence of regulation shows the significant characteristic of the Hungarian social dialogue, namely its informality.<sup>4</sup>

b) Regarding the process of social dialogue, many acts contain fragment-provisions, but none of them regulates the substance of social dialogue or the legitimacy of the members of the Council.

Aside from the Labour Code, the Act IV of 1991 on Job Assistance and Unemployment Benefits (Employment Protection Act) contains provisions about the social dialogue in employment. According to Section 10: *'The*

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<sup>3</sup> This draft was supported by PHARE-program on the basic of a framework agreement between the memberships of NCRI in 2004.

<sup>4</sup> The Arbitration and Conciliation Service in Labour Disputes is left to its fate in similar way. The Service was established in 1996 without legal basic and its legal status and place were unclarified.

*Steering Body of the Labour Market Fund (hereinafter referred to as "MAT") is a body consisting of the representatives of employees, employers and the Government for exercising and fulfilling the rights and obligations relative to the Labour Market Fund, as prescribed by this Act.*<sup>5</sup> The Act doesn't use the expression 'accordance', but the Governing Body is entitled to decision power. As the Governing Body is based on a tripartite structure, the common will of the three parties is necessary for a valid decision. The Act remains in silence when it comes to the legitimate requirements of membership.

Act LXXXIV of 1991 on Social Security Governed by the Self Governments only disposes that the insurance representatives of the employers are delegated by the national employers' representative bodies. In 1997 the Act was substantially amended, and therefore determine precisely the requirements for national representative bodies. For the purpose of the Act, an employees' or employer' organisation shall be constructed on a national level:

- which has member-organisations in at least three national economical sections and in at least five sub-branches, and
- which has member-organisation in at least five counties, and
- there are independent of the counter party.

Some of these standards were found unconstitutional and were annulled by the Constitutional Court.<sup>6</sup>

Also other Acts, such as the Act LIII of 1995 on the General Rules of Environmental Protection, the Act CXXIX of 2003 on Public Procurement and Act XXI of 1996 on Regional Development, regulates the delegation of the employer's and employee's representatives to various tripartite councils without referring to the legitimacy of the delegation.

c) The Constitutional Court made its former decision [no. 40/2005 (X. 19) AB] because this status of the social dialogue. The court stated, that the status of the social dialogue is unconstitutional in consequence of the failure to act by the Parliament, which did not adopt a law on establishing the organisation and operation of the social dialogue. The Constitutional Court arrived at a conclusion that the various councils/bodies of reconciliation of interests are self-established, and their statutes are voted by themselves. The number of acts entitling the right to delegate members to several organisations has increased. The legislator empowered the Council for Reconciliation of Interests and similar bodies besides the traditional right of consultation with public functions, e.g. to participate in legislation. In the opinion of the Constitutional Court the reconciliation of interests (or the social dialogue) between the exerciser of the power (such as the organisations of state and self governments) and between the organisations of the "civil society" must be meant as traditional consultation, discussion, information sharing and the intention of involve the civil organisations in the preparation of the legislation process. But the social dialogue can not be covered only by direct participation in legislation. On the basis of the separation of powers, it is necessary to

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<sup>5</sup> In the former decision of the Constitutional Court [no. 40/2005. (X. 15.) AB] it was emphasised, that the EPA does not content criteria for the representations of employees and employers.

<sup>6</sup> S. decision of the Constitutional Court. [no. 16/1998. (V. 8.) AB']

distinguish between the power of the state and the functions of representatives' organisations. As a consequence, the legislation, as a public authority activity, can not depend on the standpoints of the trade unions and other civil organisations.

The Government reacted upon this decision with the above mentioned drafts. The legislator paid his attention solely on how to join to the National Council for the Reconciliation of Interests and on the legitimacy of the members. In accordance with these standpoints, in the opinion of the legislator, the membership-conditions of the National Council and Councils of Social Dialogue on a Branch level are finally regulated. The rights of the various councils remained unchanged, namely the right of approval/agree can be found in both drafts. The legislator's opinion is that it is only acceptable when the support of the members is on a high level in the council.

## **2. The content of the drafts; necessary conditions of membership and the rights of the Council:**

a) Hereinafter I analyse the requirements of the membership and the rights of councils on the basis of the two drafts. In Section 5 of the draft on NCRI the conditions of membership are stated. Those trade union associations can be members of the Council, which

- have member-organisations at least in four branches and at least in eight sub-branches; furthermore
- have member-organisations at least in three regions or in eight counties; furthermore
- its member-organisations operate at least in hundred and fifty employer's organisations and
- is a member of the ETUC.

Those associations of employers' can be members of the Council, which

- have member-organisations at least in three branches and at least six sub-branches; furthermore
- have member-organisations at least in three regions or ten counties; furthermore
- have at least thousand employer's organisations at least one hundred thousand employees employed and
- are members of European employer's association.

The requirements for membership in the councils of social dialogues on branch level are similar. Under Section 7 of this draft those branch associations of the trade unions can be member, which

- have member-organisations in a certain branch at least in ten employer's organisations at least one percent of employees in a branch employed; or
- have member-organisations in a certain branch at least in three employer's organisations at least ten percents of employees in a branch employed.

Those employers organisations' can be member of the Council

- whose members employ at least five percents of the employees in a branch; or
- which have at least forty member-organisation in a certain branch.

From these rules the following conclusion can be drawn: the aim of legislator was to elaborate the criteria of 'recognition of organisation' of the social dialogue. This 'recognition' must be distinguished from the legitimacy of the legislation. The Preamble of the drafts supported this distinction, namely 'the conditions of participation in (national) social dialogue are follows: presence with required influence on a domestic and in an international economy, on a labour market and during its representative activity. The trade unions and the association of employers are qualified as civil associations. The definition of trade unions is set in the Labour Code, in compliance with the above. Under Section 18 LC *"In the application of this Act, 'trade union' shall mean all employee organizations whose primary function is the advancement and protection of employees' interests related to their employment relationship."* This approach is similar to the regulations in more European countries.

The legislative definition of 'recognition of organisation' do not raise a problem when the above mentioned requirements only affect the social dialogue. At this point a basic question arises: what does it mean the social dialogue? On the basis of the preamble of the drafts it seems, that the legislative activity does not belong to the social dialogue – in other words – the civil associations has no duty or right regarding legislation.

b) Not the preamble but the content of the drafts itself is decisive. The draft on NCRI states the role and aim of the social dialogue in a society. The social dialogue – as such – 'provides the constitutional rights of employees and employers in the fields of safeguarding of interests.' The social dialogue in national level is realised by the National Council for the Reconciliation of Interests, which is 'the most comprehensive continuously operating institution for reconciliation of interests between the employees' and employers' associations and between the Government.'<sup>7</sup> The aims of the Council are:

- disclosing interests and efforts of employees, employers and the Government;
- reconciliation, evolving of agreements;
- prevention of and solution for labour disputes on national level;
- information exchange, analysing proposals and alternative issues.

To attain these aims the themes and drafts are discussed in accordance with the labour market and employment and in connection with them, the tax, contributions and budget issues have to be taken into consideration.<sup>8</sup> It is emphasised, that the definition of reconciliation of interests and the statement of aims of the Council do not refer to the right to some sort of common decision between social partners and Government. Later the statement of rights of social partners becomes useless and complicated. Under Section 3 subparagraph 2 of the draft on NCRI the National Council is an institutional frame of consultation between the Government and the employees' and employers' associations. The Council

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<sup>7</sup> Sec. 2. of draft on NCRI

<sup>8</sup> Sec. 3. of draft on NCRI

- consults on conceptions of employment and labour market policy and on principles of distribution of income;
- reports on most important drafts regarding employment and in connection with these drafts and the authorisation of act exercises the right to approval/agreement.

Section 15 of the draft on NCRI contains the explanatory rules. The legislator makes a significant distinction between ‘negotiation’ and ‘consultation’. For the purpose of the draft on NCRI ‘negotiation is a reconciliation and a discussion with common decision making.’ In other words: the necessary condition of success of the negotiation is an agreement. On the contrary – for the purpose of the draft on NCRI – ‘consultation is a process to exchange opinions and to discuss on standing points which is not qualified as negotiation.’

### **3. Questions of the proposer**

The President of the Republic of Hungary sent the drafts to the Constitutional Court before signature. In his proposal, referring to former decisions of the Constitutional Court, he emphasised, that ‘under the authority of the Constitution, the power of the state can be exercised by a person or by an organisation which is authorised by the community falling within the public power’.<sup>9</sup> This principle must be prevailed by the authorisation of organisation of social dialogue, if they wanted to exercise those rights of public power belonging to the state. Whereas, the National Council of Reconciliation of Interests is not an elected organisation, its legitimacy is given by its members, in such way, that the great majority of voters belongs to these associations. The necessary conditions are only set for member-associations, and requirements can not be found regarding the voters in general.<sup>10</sup> In the opinion of the President Section 5 and Section 6 Subparagraph 1 of the draft of NCRI are unconstitutional. The proposer emphasised, that the unconstitutional legal status of the Council exists because it exercises public power.

Some questions can not be evaded in relation to the proposal of the President. First: is it possible to entitle an organisation exercising public power, which is not named in the Constitution? This question is fundamental for the legal nature of the public power. Namely, the public power’s decisions are concerned to every ‘third party’. And the second question: are all regulations, providing right to agree to all organisations of the social dialogue without constitutional authorisation, unconstitutional. At last: is it without any interest to join as a member in several councils of social dialogue failing exercising of right to agree?

### **4. The decision of Constitutional Court – with dissenting opinions**

a) The Constitutional Court, prior to its decision, directed questions to the Ministry of Labour relating to the drafts. In its answer the Ministry referred to the fact that the Council is the only continuously operating forum for social dialogue. No continuously operating forum/organisation exists for the

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<sup>9</sup> Proposal point 3.

<sup>10</sup> Proposal point 5.

Government, which is capable to take in account the population's opinion. In its answer, the Ministry admitting that there are no criteria for 'recognition of organisation', emphasised, that the membership in the Council as such means the 'power of representation'. In other words it is unnecessary to distinct between 'recognition of organisations' and the membership in the Council as such. To involve the social partners into decision making would be indispensable. This is independent from the rate of support of these organisations.

The decision gave importance to the legal nature of 'the right to agree'. Under the Constitutional Court's decision the 'right to agree' is more than the 'right to consult'. This right is equivalent to the 'common decision making'.<sup>11</sup> The Constitutional Court emphasised, that the 'right to agree' is not an original/independent decision. As the social partners exercise a part of the legislation power, this shares the perception of the legislative power. The 'right to agree' is deemed to exercise the public power itself – in this context. The Constitution has a closed system for the legislation: the legislative organs, the rule of law and the hierarchy of several rules are set. The organisations of social dialogue can not be recognised as legislative organs in Hungarian Constitution. Under its final conclusion, the Constitutional Court pointed out that the 'right to agree' is unconstitutional for these legal circumstances.

b) Two dissenting opinions are attached to this decision. In the first dissenting opinion it was set, that the majority opinion did not give an answer to the question of the proposer. It was discussed by the proposer that an organisation of social dialogue without having a democratic legitimacy, is entitled to the right to agree. The author of the dissenting opinion drew the conclusion, that the proposal affects the constitutional perception of joining to the Council and not the legal nature of right to agree.<sup>12</sup> Thus the Constitutional Court answered the question regarding the constitutionality of the composition of the Council.

The second dissenting opinion analyses the proposal in its complexity. The controversial point is similar to the first dissenting opinion. But in the second dissenting opinion a substantial argumentation can be found. The author of this opinion stated that the right to agree of the Council is not deemed to be unconstitutional. Thus, the power of the Government to decree is not restricted unconstitutionally by the right to agree. There can be no doubts that the legislator only can be an organisation named and defined in the Constitution. In his opinion the drafts fulfil these requirements. Two constitutional reasons are emphasised. The first reason refers to Art. 36. of the Constitution. The relevant rule is as follows: 'In the course of fulfilling its responsibilities, the Government shall co-operate with the relevant non governmental organizations.' The second basic rule is Art. 35. Subparagraph (1) *l*): 'The Government shall... attend to those responsibilities assigned to its sphere of authority by law.' The task referred to the Government by law is one the one hand the participation in the operation of the tripartite organisation of

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<sup>11</sup> S. 124/2008. (X. 14.) AB II. 3.

<sup>12</sup> S. First part of the first dissenting opinion.

the social dialogue, and on the other hand cooperation and establishment of a common decision in the regulation of certain issues.<sup>13</sup>

In the second dissenting opinion the author emphasizes that the reason of this legislative solution is to motivate compromise based legislation. In this case the task referred to the Government by law is the common decision, which actually restricts its competence. However, this limitation is not unconstitutional. The reasons for this are that (1) the draft on NCRI does not establish a new legal source; (2) the decree is established by Government henceforward; (3) the failure of a common decision/agreement the authority of Government is not exercised by other organisation, the authority of legislation is reverted to the Parliament. The former decision of the Constitutional Court stated a constitutional negligence which is remedied by these drafts.

As the above mentioned two dissenting opinions are in a substantial contradiction, it is necessary to analyse the aim, functions, structure and legal status of a social dialogue in the light of the legitimacy of legislation.

## II. The Legal Nature and Status of the Social Dialogue

### 1. The legal nature of recognition of organisations accordance with social dialogue

a) *Hepple* asked: the European social dialogue: alibi or opportunity?<sup>14</sup> The question was asked on European Community level, but in certain relations it can be true for the social dialogue on national level. To estimate the arrangements of a social dialogue in legal system, first it is necessary to clarify the legal nature of the social partners. The recognition of representation of employees and employers – as further social partners – went together with maintenance of private autonomy. Because of the subordinate characteristic of employment it was necessary to rise the terms of individual employment to a collective level.<sup>15</sup> The legal arrangement of this development was the collective agreement. The recognition of new subjects in labour relations caused dogmatic difficulties to both public law and to private law.

With respect to public law the recognition of representation of employees and employers is one segment of the right of association. E.g. the recognition of a trade union became fundamental right by the international sources of labour law. The other part of recognition of representatives in public law is the arrangement of social dialogue in so far as the activity of parties of public organisations. The recognition of employees and employers representatives was not self-contained, but it was connected to the right to collective bargaining and right to conclude a collective agreement. The final result is a

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<sup>13</sup> S. Second dissenting opinion point 1.

<sup>14</sup> *Hepple, Bob: European social dialogue – Alibi or Opportunity?* The Institute of Employment Rights, 1993, London.

<sup>15</sup> Because of the insufficiency of private autonomy on individual level, a new status of equilibrium must be established on collective level. This development was obviously successful. S. Migsch, Erwin: *Die absolut geschützte Rechtsstellung de Arbeitnehmers*, Wilhelm Fink Verlag, 1972, München/Salzburg.

collective agreement (*Tarifvertrag, conventions collectifs*). The legal nature of the collective agreement is a problem in motion up to the present. According to the prevailing opinions the collective agreement is a contractual source of labour law.

The normative tenor of the collective agreement raises the important question: who is entitled to conclude such agreement affecting third parties? This is stated by requirement of recognition of these organisations, particularly the recognition of representatives of employees. These criteria are different in certain countries.<sup>16</sup> Thus, the right to association has a particular protection in the German law.<sup>17</sup> The ability to conclude a collective agreement (*Tariffähigkeit*) has to be estimated on different way: this is deemed by the jurisdiction. The substance of *Tariffähigkeit* rests on the private law based creative power (*privatrechtlich begründete Gestaltungsmacht*).<sup>18</sup>

The constitutional basis of employees' and employers' representation stayed on safe grounds in the French labour law which was approved by the *Conseil Constitutionnelle*.<sup>19</sup> The criteria of *représentativité* are similar to requirements of *Tariffähigkeit*. Nevertheless, these requirements are regulated in the *Code du Travail*.<sup>20</sup> The legal nature and belonging to the private law of 'representation' of social parties are unambiguous in the English law. The way of recognition of trade unions is an agreement (recognition agreement).<sup>21</sup> This means expressively that the basis to conclude a collective agreement is the

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<sup>16</sup> S. Erika, Kovács: The image of trade unions in the European Social Charter, *Pécsi Munkajogi Közlemények*, 2008/1, pp. 43 – 71.; ib. A szakszervezetek elismerésének összehasonlító elemzése; (The comparative analysis of recognition of trade unions), *Jogtudományi Közlöny*, 2008/10, pp. 467 – 479.

<sup>17</sup> Art. 9. Subparagraph 3 of German Grundgesetz regulates the direct effect of the right to association (*unmittelbare Drittwirkung*): „Abreden, die dieses Recht einschränken oder zu behindern suchen, sind nichtig, hierauf gerichtete Maßnahmen sind rechtswidrig.“ This support is confirmed by German Constitutional Court to: „Art. 9. Abs. 3 GG schützt auch die Koalitionen als solche“. BVerfGE 4, 96 (Hutfabrikant); BVerfGE 4, 96 (Hutfabrikant); 18, 18 (Hausgehilfenverband); 17, 319 (Bayerische Bereitschaftspolizei); 19, 303 (Dortmunder Hauptbahnhof); 28, 295; 93, 352 (Mitgliederwerbung I – II); BVerfGE 18, 18 (Hausgehilfenverband).

<sup>18</sup> A trade union is capable to conclude a collective agreement when it has social power (*soziale Mächtigkeit*). The jurisdictional requirements of social power are as follows: number of members, financial background, willing to conclude collective agreement and independence from the counter party. Richardi, Reinhard: *Kollektivgewalt und Individualwille bei der Gestaltung des Arbeitsverhältnisses*, C.H. Beck, 1968, München, p. 164.; Zöllner, Wolfgang: *Die Rechtsnatur der Tarifnormen nach deutschem Recht*, Manzsche Verlags- und Universitätsbuchhandlung, 1966, Wien, pp. 24 – 34.; Hemmen, Wolfgang: *Durchsetzungsfähigkeit als Kriterium für den Gewerkschaftsbegriff im Tarifvertragsrecht*, Waxmann, 1988, Münster.

<sup>19</sup> Décision n 80-127 DC des 19 et 20 janvier 1981 – Loi renforçant et protégeant la liberté des personnes; 82-144 DC du 28 octobre 1982 – Loi relative au développement des institutions représentatives du personnel; 83-162 DC du 20 juillet 1983 – Loi relative à la démocratisation du secteur public.

<sup>20</sup> Chauchard, Jean-Pierre: Conventions et accord collectifs de travail. Droit de la négociation collective. Régime juridique: conclusion, application, sanctions, [*in Encyclopédie Juridique*:], Dalloz, 1988, Paris.

<sup>21</sup> Morris S. Gillian– Archer, Timothy: *Collective labour law*, Hart Publishing, 2000, Oxford – Portland Oregon, pp. 593 – 596.

mutual cooperation. The *voluntary recognition* is under the private law. The *statutory recognition* does not alter this perception.<sup>22</sup>

b) The distinction between *legitimacy* in the public law and *recognition (representation)* in private law is important in the view of criteria of membership of several organisations of social dialogue. In most of the countries the above mentioned requirements were taken over of recognition of organisations. The Constitutional Court's decision refers to the following regulations. *Le Conseil Économique Social et Environnemental* consists of 233 members, delegated by branch organisations or by the Government.<sup>23</sup> The Council has the right to consult and prior to certain decision, the Government is due to consult with the Council. The Italian Constitution regulates the legal status of *Consiglio Nazionale dell'Economiche e del Lavoro*. This Council has the right to consult and in certain cases is entitled to initiate law. The Council consist of 12 experts and 99 representatives of different professions, both are delegated.<sup>24</sup> The Portugal Constitution regulates the legal status of *Conselho Económico e Social*. The members are delegated by the Government, by recognised employers' and employees' organisations, by the Council of Cooperatives, by the Council of Sciences and by Association of Freelancers. The Council has the right to consult, to initiate law and set recommendations for the Government.<sup>25</sup>

At the time of the political change in the Central and Eastern-European countries the tripartite organisations of the social dialogue were founded.<sup>26</sup> In Bulgaria the amendment of the Labour Code (1992) established the legal basis for "the tripartite cooperation" as a form of the social dialogue.<sup>27</sup> The LC regulated the national Council for Tripartite Cooperation, an other Act established and regulated Economic and Social Council. Under this Act the Council covers "wide circle of the civil society".<sup>28</sup> Economic and Social

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<sup>22</sup> Lourie, Julia: *Trade union recognition*, House of Commons Library, Research Paper 00/55, May 2000.

<sup>23</sup> The sections are as follows: section des questions économiques générales et de la conjoncture; section des finances; section des affaires sociales; section du travail; section des relations extérieures; section de l'agriculture et de l'alimentation; section des activités productives, de la recherche et de la technologie; section des économies régionales et de l'aménagement du territoire; section du cadre de vie.

<sup>24</sup> Legge 30 Dicembre 1986. n. 936. sec. 10.

<sup>25</sup> Lei 108/91, de 17 de Agosto.

<sup>26</sup> Lajos, Héthy: *Az érdekegyeztetés és a táguló világ (The reconciliation of interests and the widening world)*, Friedrich Ebert Stiftung, 2000, Budapest.; ib. *Az új demokráciák törékeny tripartizmusa (The fragile tripartitisme of new democracies)*, *Szakszervezeti Szemle*, 1992, pp. 3 – 4.

<sup>27</sup> Bulgarian Labour Code sec. 3.

<sup>28</sup> The recognition of the organisations of employees and employers is regulated in the Labour Code. According to Section 34 of the LC a trade union is 'recognised' in accordance with the membership of the Council 'which has at least 50000 members; at least 50 organizations with not fewer than 5 members each in more than half of the industries designated by the Council of Ministers in accordance with the National Classifications of Economic Activities; local bodies in more than half of the municipalities in the country and a national governing body; the capacity of legal entity, acquired according to the procedure established by Art. 49 LC.' Under Section 35 LC an employers' organisation is recognised accordance with the membership of the Council which has 'at least 500 members with at least 20 employees each; organizations with at least 10 members each in more than one-fifth of the branches designated by the Council of Ministries in accordance with the National Classification of Economic

Council is not an organisation of legislation but can have influence on it. The Romanian Labour Code regulates in the particular part the institution of the social dialogue. The purpose of social dialogue is ‘to ensure the stability and social peace.’ The Economic and Social Council ‘shall be a national interest, tripartite, autonomous public institution established for the accomplishment of the social dialogue at national level.’ The Council consists of 27 members who are delegated by the Government and by employees’ and employers’ organisations. The recognition of these organisations is certificated by the court.<sup>29</sup> The function of the Council is as follows: expressing an opinion on the Government’s orders, conciliation in certain industrial disputes and control of ILO standards. In the early nineties a discussion evolved in relation to the function of the Council. The trade unions demanded a right to suspensory veto. This effort of trade unions was rejected, because it would have destroyed the sovereignty of the Parliament.<sup>30</sup> In Slovenia the Economic and Social Council was established after a wage-policy agreement in 1994. The Council takes an important part in the preparation of different agreements. The Council has the right to proposal. Therefore some important rules came into force with high support.<sup>31</sup>

## 2. Purpose and Functions of the Social Dialogue

As a conclusion it can be said, that the statement of requirements of the membership does not reflect to same solutions. In certain countries the recognition of organisation is regulated by law; in other countries the recognition is granted by the court; and it can also be based on an agreement of parties. However, the dogmatic basis of requirements is unified. That is to say that the social dialogue does not mean the direct participation in the legislation, the representation of organisation belongs to the private law, and it is a manner of mutual recognition by the parties.

## III. The constitutional purpose of the Government

### 1. The role of the Government in the public order

The Government is a constitutional organisation, its authority and function are derived from the Constitution. The Government is not an organ of the Parliament, but the Government depends on the confidence of the Parliament.<sup>32</sup>

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Activities; local bodies in more than one-fifth of the municipalities in the country and a national governing body; the capacity of legal entity, acquired according to the procedure established by Art. 49 LC.’ See Sredkova, Krassimira: National social dialogue in Bulgaria: within and beyond tripartim, *Pécsi Munkajogi Közlemények*, 2009/I. (under publishing)

<sup>29</sup> Ghebrea, Georgeta: Social dialogue in Romania: from a forgotten tradition to a renewed practice, *South-East Europe Review for Labour and Social Affairs*, 2005/03, pp. 41 – 61.

<sup>30</sup> Stefan, Ioan: *Tripartizmus és munkaügyi kapcsolatok Romániában* [in Ladó Mária (szerk.): *Tripartizmus és munkaügyi kapcsolatok Közép- és Kelet-Európában*], .Stefan, Ioan: Tripartite social dialogue and industrials relations in Romania, [in Mária, Ladó (ed.): *Tripartite social dialogue and industrial relations in Central and Eastern-Europe.*] Research Institute of Ministry of Labour, 1994, Budapest, pp. 157 – 158.

<sup>31</sup> See the pension reform in 1999 or the amendment of the individual labour law in 2002.

<sup>32</sup> József, Petrétai: *A magyar alkotmányjog II, Államszervezet, (Hungarian constitutional law. State organisation.)*, Dialóg Campus, 2008, Pécs, pp. 1 – 2.; András, Bragyova: *Az új*

In relation to the particular connection between the Government and the Parliament the following question seems appropriate: isn't it a fiction to speak about the separation of powers, including the control of the Parliament over the Government.<sup>33</sup> In the Hungarian constitutional system the Government is established as an extremely stable – almost immovable – organ. In consequence of the political confidence between the Parliament and the Government, the Government's authority only ceases by the withdrawal this confidence.<sup>34</sup> In the Hungarian Constitution the legal nature of the Government is not set, and this circumstance makes its position stronger.

An unavoidable question arises: what does the widespread independence of the Government mean? More authors have emphasised, that although Art 35 Subparagraph 1 of the Constitution may seem detailed, the real influence of the Government is stronger than what results from the enumeration.<sup>35</sup> With regard to this 'relative' enumeration there are several proposals to cease it. Compliance with these proposals 'the Government should be entitled to original constitutional authorisation to frame its governmental policy'. The governance 'in its sole discretion' is important in relation to the right to propose drafts. It seems that the competence of the Government is unlimited. In this content this means that the Government has the right, but in the same time is obliged to exercise a power, which does not belong to the competence of any other public organs. As a consequence, the competence of the Government is residual.<sup>36</sup>

## 2. Democratic legitimacy

Because of the widespread competence of the Government, it is necessary to analyse the legitimacy of legislation and the content of Art. 35. Subparagraph 1 point 1) of the Constitution. Art. 2. Subparagraph 1 of the Constitution was interpreted by the Constitutional Court several times, also in connection with the legitimacy of legislation.<sup>37</sup> Under this Art.: 'The Republic of Hungary is an independent, democratic constitutional state.' The constitutionalism of legislation means the constitutional regulation of the legal sources. This regulation consists of the following parts: authorities entitled to legislation (as the subjects of legislation), and the legislator powers (as the object to legislation). The subjects and its authorities are named in the Constitution. Only these subjects have the legitimacy of legislation. The democratic legitimacy is attained by the direct vote of citizens or by indirect delegation by organisations which were directly elected. Consequently, the conditions of democratic legitimacy are the recognition of citizens (as electors), therefore

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*alkotmány egy koncepciója, (One conception of the new Constitution), Közgazdasági és Jogi Könyvkiadó, MTA Állam- és Jogtudományi Intézet, 1993, Budapest, pp. 150 – 153.*

<sup>33</sup> Géza, Kilényi: A parlament és a kormány viszonya a hatalommegosztás rendszerében, (Relationship between the Parliament and the Government in the system of the separation of power), *Magyar Közigazgatás*, 1994/5., p. 269.

<sup>34</sup> István, Kukorelli (szerk.): *Alkotmánytan, (Principles of constitutional law)*, Osiris, 1998, Budapest, p. 308.

<sup>35</sup> Kukorelli, p. 308.

<sup>36</sup> Bragyova, p. 152.

<sup>37</sup> See László, Sólyom: *Az alkotmánybíráskodás kezdetei Magyarországon, (The beginnings of the constitutional jurisdiction in Hungary)*, Osiris, 2001, Budapest, p. 708.

the authorization of a particular strata of citizens e.g. employees is not sufficient. The authorisation of this latter might be important for the recognition of representation of some organisations e.g. trade unions.

The following question is what does Art. 35. Subparagraph 1 point 1) means in this context? Under this Art.: ‘The Government shall perform the responsibilities assigned to its sphere of authority by law.’ This formulation is very important for the above mentioned second dissenting opinion. In accordance with this provision of the Constitution, the following question arises: is it possible to curtail and if yes, how, the authority of the Government by law? In this case: is Section 17 is constitutional: ‘The Government – with the agreement of the National Council for the Reconciliation of Interests – shall ... decree the provisions for the mandatory minimum wage...’ Namely, every door is closed: the National Council for the Reconciliation of Interests does not fulfil the conditions of the democratic legitimacy, only the members of this Council have the requirements of recognitions of representation. But this recognition belongs to the area of private law and it has nothing to do with the public law.

### 3. The legal nature of ‘right to agree’

The ‘right to agree’ is a fairly unfortunate phrasing.<sup>38</sup> To adapt the ‘right to agree’ in the law means, that the coming into force of a decision depends on the approval of a third party or organisation. In other words ‘the right to agreement’ is a condition of the validity of a decision. The Constitutional Court emphasised, that the ‘right to agree’ does not mean an independent decision, but in this context, this right shares the perception of the legislative powers.

The consequences of ‘right to agree’ or ‘right to approval’ faces difficulties in a private and the public law because of the different meaning of the ‘recognition of organisations’ and the democratic legitimacy. In our case the ‘right to agree’ of the National Council of Reconciliation of Interests means the exercise of a public power. In relation to legal nature of ‘right to agree’ is necessary to remind of a different former regulation. By virtue of the LC amendment in 2000 the Government regulated the mandatory minimum wage without having an agreement of the Council, when the negotiations/reconciliations were unsuccessful.<sup>39</sup> In my opinion by this regulation the legal nature of ‘right to agree’ was changed, and the function of social dialogue was limited to consultation. In terms of decision making this construction meant that authority of legislation was not reverted to the Parliament, but the Government could enact a decree on the basis of its own democratic legitimacy.<sup>40</sup>

## IV. Conclusions

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<sup>38</sup> See László, Román: *Munkajog, Elméleti alapvetés, (Labour law, Theoretical establishment)*, Tankönyvkiadó, 1989, Budapest, p. 302.

<sup>39</sup> This regulation made the members of social dialogue highly indignant. In their opinion the social dialogue became a mere formality.

<sup>40</sup> See the argumentation in the second dissenting opinion.

Although it is controverted by two dissenting opinions the decision of Constitutional Court decided on three important issues: namely on substance of democratic legitimacy (distinguishing from 'recognition of organisations' of social dialogue); on constitutionality of the legislator and of the legislation power and on the legal nature of 'right to agree'. The decision of Constitutional Court is due to the history of social dialogue. As one of the particularity of the social dialogue is the informality, the system of social dialogue depends on the political actualities. With respect to the future fate of the social dialogue a substantial change not to be expected. According to the experiences received so far, the informal operating can be supposed in the future. Nevertheless, it is unambiguous that this legal status of the social dialogue is not maintainable. One of the solutions would be to conclude collective agreements on branch or national level. But for that special conditions are needed, which are not a subject of the present study.