



Hungarian Helsinki Committee



EÖTVÖS KÁROLY  
POLICY INSTITUTE



HUNGARIAN CIVIL LIBERTIES UNION

## The case of the Hungarian Government with the Venice Commission

*Assessment of Government reactions concerning the Venice Commission's opinion on the new Constitution of Hungary*

August 2011

### Introduction

#### Reasons and methodology of the analysis

The new Constitution of Hungary, called the Fundamental Law of Hungary (hereinafter “Fundamental Law”), was adopted in April 2011 by the Parliament of Hungary and will enter into force on 1 January 2012. In late June 2011, the European Commission for Democracy through Law (the Venice Commission) issued an opinion concerning the new Constitution of Hungary (hereinafter “Opinion”).<sup>1</sup>

No meaningful debate on the Opinion and its critical statements took place in Hungary. No official Hungarian translation of the Opinion is available, and the Hungarian Government has not defended the Fundamental Law against the criticism included in the Opinion. Furthermore, the Government and governing party representatives have submitted false information as to the content of the Opinion. Because of all this, three Hungarian NGOs, the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee, have decided to prepare a summary of the Opinion in Hungarian and analyze the related governmental reactions. This document focuses on the reactions of the Hungarian Government and also includes further criticism, not included in the Opinion, of the Fundamental Law by the three NGOs, mainly in light of the Hungarian Constitutional Court's decisions.

It may be stated in general that, contrary to the official Hungarian statements,<sup>2</sup> the Opinion may not be charged with malicious assumptions. However, even if the charges of prejudice were true, a good constitution should be able to resist malicious challenges. Our analysis also shows that it is not true that the majority of the Opinion is positive, as stated by Gergely Gulyás, MP of the Fidesz,<sup>3</sup> or that “criticisms concern primarily the process of making the constitution”, as stated by

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<sup>1</sup> Available at: <http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-e.pdf>.

<sup>2</sup> See for example: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>3</sup> See: television programme “Közbeszéd”, Duna Televízió, 22 June 2011 (<http://www.dunatv.hu/video/videoplayer?vid=705587>).

Gergely Prőhle, representative of the Ministry of Foreign Affairs.<sup>4</sup> It is also clear that the Fundamental Law does not comply with the principles of rule of law and checks and balances “to a maximum extent”, as suggested by Gergely Gulyás in his parliamentary speech.<sup>5</sup>

### **Preface: the Hungarian Government’s approach towards the Venice Commission differs depending on the country criticized**

MEP József Szájer, member of the Fidesz, wrote on 17 June 2011 in his blog that “Hungary cannot accept the opinion of the Venice Commission”.<sup>6</sup> He also stated that “the decisions of the Commission are not legally binding, the text and the recommendations are only expressing an opinion, and their content does not lay a charge on Hungary”. It became clear a few days later, in a press conference launched concerning the opinion of the Venice Commission, that the Government does not deem the criticism voiced by the Opinion as being worth considering. Gergely Gulyás, MP of the Fidesz, summed up the official standpoint in the following way: “There are statements which we consider false and there are statements which we do not agree with.”<sup>7</sup> The statements above are in strong contrast with the earlier approach of the Hungarian Government towards the Venice Commission, indicated in relation to the Venice Commission’s opinion on the Slovakian language law.

*For example Zsolt Németh, official of the Ministry of Foreign Affairs, stated at a press conference in October 2010 that the Venice Commission “may be regarded as a kind of European Constitutional Court”,<sup>8</sup> and later on he also said that most recommendations of the Venice Commission were fulfilled in the past years and states mostly follow them.<sup>9</sup> Deputy Prime Minister Zsolt Semjén said that he hopes Slovakia will fulfil the recommendations of the Venice Commission,<sup>10</sup> while Zsolt Németh expressed the view that since Slovakia itself requested the opinion of the Venice Commission, Hungary hopes that it will comply with it.<sup>11</sup>*

In light of the statements above it is hard to explain why the Venice Commission’s opinion on the Fundamental Law of Hungary is not deemed as worth considering by the Hungarian Government. It is obvious that the Hungarian Government uses double standards: while expecting Slovakia to comply with the recommendations of the Venice Commission it claims in the case of the Fundamental Law that the recommendations are not legally binding.

Also, on 21 February 2011, the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary, Mr. Tibor Navracsics, requested the Venice Commission to prepare a legal opinion on three particular issues arising in the framework of the drafting of a new Constitution of the Republic of Hungary – it would be quite surprising if the Deputy Prime Minister of Hungary would have officially requested the opinion of a body whose standpoint is irrelevant.

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<sup>4</sup> See: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/)

<sup>5</sup> See: speech of Gergely Gulyás in Parliament on 14 June 2011 ([http://www.parlament.hu/internet/plsql/ogy\\_naplo.naplo\\_fadat?p\\_ckl=39&p\\_uln=98&p\\_felsz=12&p\\_szoveg=&p\\_felszig=12](http://www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=98&p_felsz=12&p_szoveg=&p_felszig=12)).

<sup>6</sup> See:

[http://szajerjosef.blog.hu/2011/06/17/magyarorszag\\_a\\_velencei\\_bizottsag\\_velemenyet\\_nem\\_tudja\\_elfogadni](http://szajerjosef.blog.hu/2011/06/17/magyarorszag_a_velencei_bizottsag_velemenyet_nem_tudja_elfogadni).

<sup>7</sup> See: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>8</sup> See: <http://www.fidesz.hu/index.php?Cikk=154147>.

<sup>9</sup> See: <http://www.fidesz.hu/index.php?Cikk=154598>.

<sup>10</sup> See: <http://www.fidesz.hu/index.php?Cikk=155027>.

<sup>11</sup> See: <http://www.fidesz.hu/index.php?Cikk=154598>.

# The Venice Commission's opinion and the Hungarian Government's reactions to it

## I. Government reactions to the Opinion's preliminary remarks [§§ 10–13. of the Opinion]

According to Gergely Gulyás, “the Government and the Parliament took into consideration the Venice Commission’s comments also earlier. The Venice Commission itself welcomes that its recommendations from March have been taken into account to a significant extent.”<sup>12</sup> However, on the contrary, the Venice Commission notes in its Opinion only that its earlier recommendations “have been *partly* taken into account” [§ 10. of the Opinion], thus it does not state that the recommendations were taken into account to a “significant” extent, and refers already in the preliminary remarks to the limitation of the Constitutional Court’s power to review. Furthermore, other statements of Gergely Gulyás show that in fact the Government does not want to consider the Opinion.

As to the criticism on the process of framing the new Constitution, Gergely Próhle said that it is useless to talk about the process of the adoption of the new Constitution after it has been adopted,<sup>13</sup> which shows that the new Constitution’s wide social acceptance is still not a priority for the Government. However, at the same time, Gergely Gulyás deemed the criticism as to the inadequate consultation on the new Constitution righteous,<sup>14</sup> but stated that “the responsibility for the lack of consultation lies solely on the opposition parties”.<sup>15</sup> However, on the contrary, there has not been one moment in the procedure where the ruling parties have shown their intent to treat the opposition political parties as equals – this was demonstrated, for example, by getting rid of the provision of the Constitution requiring a 4/5 majority of MPs to adopt the procedural rules for the preparation of the new Constitution and by determining the composition of the Parliamentary Ad-Hoc Committee responsible for preparing the new Constitution’s concept paper. Thus, the opposition had no other possibility than to refuse to take part in a process that they were unable to have the slightest impact on.<sup>16</sup>

As to the Venice Commission’s criticism on the lack of inadequate consultation with the Hungarian society, Gergely Gulyás noted that “since all the law faculties, minority self-governments, dignitaries and trade unions of Hungary, and everybody, including churches had had the chance to submit their opinion”, the consultation had been adequate.<sup>17</sup> In this regard, attention should be drawn to the fact that the opinion of the stakeholders listed above was theoretically used only by the Parliamentary Ad-Hoc Committee whose concept paper was later

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<sup>12</sup> See: <http://www.szajer.fidesz-eu.hu/hu/cikk/367/>.

<sup>13</sup> See: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>14</sup> See: [http://index.hu/belfold/201106/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/201106/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>15</sup> See: television programme „Közbeszéd”, Duna Televízió, 22 June 2011

(<http://www.dunatv.hu/video/videoplayer?vid=705587>).

<sup>16</sup> See also: Eötvös Károly Institute – Hungarian Helsinki Committee – Hungarian Civil Liberties Union: Comments on the Process of Framing the New Constitution of Hungary ([http://helsinki.hu/dokumentum/Comments\\_on\\_the\\_Process\\_of\\_Framing\\_the\\_New\\_Constitution\\_of\\_Hungary\\_EKI\\_HCLU\\_HHC.pdf](http://helsinki.hu/dokumentum/Comments_on_the_Process_of_Framing_the_New_Constitution_of_Hungary_EKI_HCLU_HHC.pdf)), § 7.

<sup>17</sup> See:

[http://galamus.hu/index.php?option=com\\_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2](http://galamus.hu/index.php?option=com_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2).

downgraded to “working document” by the Parliament.<sup>18</sup> Furthermore, no text or regulatory concept of the new Constitution was known at the time of the “consultation” referred to above, thus those submitting an opinion had no actual text to comment on at that time.

## II. Government reactions to the Opinion’s general remarks

### Reactions on §§ 18–21. of the Opinion

Government and governing party statements emphasized again and again that the Fundamental Law complies with the principles of the division of powers and the rule of law according to the Venice Commission.<sup>19</sup> The Opinion states indeed that the Fundamental Law establishes a constitutional order based on the principles referred to above, but following this statement the Opinion lists problems impeding the full realization of these principles on more than twenty pages. Furthermore, the fact that the Constitution declares that Hungary is a state based on the rule of law or that the operation of the state is based on the principle of the division of powers apparently does not solve the problems arising in connection with certain provisions of the Constitution.

### Reactions to criticism concerning cardinal laws [§§ 22–27. of the Opinion]

Gergely Gulyás said on multiple occasions that the Opinion contains “factual errors”, and cited the statements of the Opinion regarding the extensive use of cardinal laws (i.e. laws requiring a two-thirds majority) as examples: “In our view the Venice Commission made a mistake when the only thing they did was to count the references to cardinal laws in the Fundamental Law. (...) [T]he fact is that 26 areas will be regulated by cardinal laws in the future. The number of these areas was 28 before.” He also mentioned that “it is a matter of debate” whether certain issues, such as the pension system and the protection of families will be regulated by cardinal laws, saying that it is a fact that the Fundamental Law will not provide for the use of the cardinal laws in more areas than the Constitution in force.<sup>20</sup>

The reactions cited above show that the Government tries to present the criticism of the Venice Commission as if it would concern only the number of areas covered, not the character of them. However, it is clear that the Venice Commission’s main concern is that areas such as family legislation or social and taxation policy have to be regulated by cardinal acts according to the Fundamental Law. The Opinion says that these issues “should/could have been left to ordinary legislation and majoritarian politics”, and that “[t]he more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country’s legal order.” [§ 24. of the Opinion] This basically means that the Fundamental Law deprives the political force replacing the current governing majority of the possibility to realize its own government program if it does not have a two-thirds majority. Hence, the Fundamental Law

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<sup>18</sup> Parliamentary resolution 9/2011. (III. 9.) OGY on the regulatory principles of Hungary’s new Constitution, point 2.

<sup>19</sup> See for example: [http://index.hu/belfold/2011/06/22/semiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semiben_sincs_igaza_a_velencei_bizottsagnak/), speech of Gergely Gulyás in the Parliament on 14 June 2011 ([http://www.parlament.hu/internet/plsql/ogy\\_naplo.naplo\\_fadat?p\\_ckl=39&p\\_uln=98&p\\_felsz=12&p\\_szoveg=&p\\_felszig=12](http://www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=98&p_felsz=12&p_szoveg=&p_felszig=12)), and <http://www.szajer.fidesz-eu.hu/hu/cikk/367/>.

<sup>20</sup> See: [http://galamus.hu/index.php?option=com\\_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2](http://galamus.hu/index.php?option=com_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2) and <http://www.szajer.fidesz-eu.hu/hu/cikk/367/>.

undermines equality in political change and in democratic political competition.<sup>21</sup> The Opinion also states the following: “When not only the fundamental principles but also very specific and ‘detailed rules’ on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.” Accordingly, the Venice Commission’s criticism in this regard means way more than concerns related to the number of issues regulated by cardinal laws.

Gulyás Gergely said also in the interview cited above that the high number of areas governed by cardinal laws is rooted in the legal traditions of Hungary. It is to be regretted that this argument was not considered by Government politicians when eliminating the right to *actio popularis* petitions for the constitutional review of laws and when abolishing the system of ombudspersons, considered a system worthy of adoption throughout Europe.

In the same interview, Gergely Gulyás also stated that “the requirement of a two-third majority with regard to fundamental rights was eliminated in certain cases because in the areas affected the Constitutional Court is able to guarantee the already achieved level of protection”. However, the fact that the Constitutional Court guarantees the level of protection for the rights affected (e.g. the right to assembly and association) – as also in case of all other rights – does not mean that there is no need for a wide consensus when adopting the relevant legal provisions. This way, the Parliament basically created an unjustifiable hierarchy of rights and the reasons for this “classification” are also not clear.

### **III. Government reactions to the Opinion’s specific remarks**

#### **A. Government reactions to the Preamble [§§ 31–40. of the Opinion]**

József Szájer wrote in his blog that the Venice Commission “acknowledges that it is the right of the lawmaker to determine the constitution’s preamble and to refer to the outstanding events of the Hungarian history and constitutional history”. It is true that, according to the Opinion, “the specific elements that are included in the Preamble depend on the will of the constitution-making authority”, and “it would be difficult to neglect the importance” of the historical references included in the text [§§ 31–32. of the Opinion]. At the same time however, József Szájer remained silent about the strong criticism formulated by the Venice Commission with regard to the Preamble. The Opinion claims, for example, that according to Article R) “the Preamble shall have a substantial influence on the interpretation of the entire Constitution and appears to be provided legal significance” which may lead to problems in the Hungarian case “since the Preamble’s text lacks precision, which is essential for a legal text, and contains a number of potentially controversial statements” [§ 34. of the Opinion]. Furthermore, while the Opinion states that “a Constitution should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society”, the Fundamental Law and the preamble are dominated by a powerful right-wing Christian ideology – thus those who do not accept these ideologically selected values as the pre-eminent values of the community and seek to pursue their personal happiness in different ways, are deprived of the possibility to enjoy their basic rights as

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<sup>21</sup> See also: Eötvös Károly Institute – Hungarian Helsinki Committee – Hungarian Civil Liberties Union: The Third Wave – the New Constitution of Hungary ([http://helsinki.hu/dokumentum/Hungarian\\_NGOs\\_assessing\\_the\\_draft\\_Constitution\\_of\\_Hungary\\_20110414.pdf](http://helsinki.hu/dokumentum/Hungarian_NGOs_assessing_the_draft_Constitution_of_Hungary_20110414.pdf)), pp 6–7.

full members of the community.<sup>22</sup> This aspect was also not elaborated on by Government representatives.

The Venice Commission also raised concerns regarding the fact that the 1949 Constitution is proclaimed invalid by the Preamble. According to the Opinion, if this is meant to have legal consequences, it can only be read as leading to *ex tunc* nullity, which would e.g. lead to the result that all acts of state enacted under the former Constitution would lose their legal basis and will thus be invalid themselves. According to the Opinion, “[t]his may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court” and “[e]ven Constitutional institutions like the Parliament would lose their legitimacy and have to be seen as legally inexistent”. However, the Venice Commission notes that the provision above may also be considered to be a political statement – thus it is not clear for them, how these provisions were meant to be understood.

Supposedly, it was the criticism above which József Szájer referred to when stating that the Venice Commission often raises concerns because the “improper or restrictive interpretation of the text of the Constitution would lead to the violation of rights”, which “questions the Hungarian authorities’ good faith”. The same was claimed by Gergely Próhle, who cited “the uncertainty regarding the constitutional protection of values enshrined in the preamble (the National Avowal of Faith)”<sup>23</sup> by way of example. The politicians above did not take into consideration though that the contradictions highlighted arise directly from the text of the Constitution, and the Venice Commission’s worrisome interpretation may be derived from the text forthwith. However, the text of a Constitution, being the basis of the legal system and the state structure, must not allow such *mala fide* interpretations.

## B. Foundations

### Government reactions to Article D) [§§ 41–45. of the Opinion]

The Venice Commission criticizes extensively the Constitution’s concept of the Hungarian nation and nationalities and finds among others that “the statement in Article D) that ‘Hungary shall bear responsibility for the fate of Hungarians living beyond its borders’ touches upon a very delicate problem of the sovereignty of states and, being a rather wide and not too precise formulation, might give reason to concerns” [§ 41. of the Opinion]. Furthermore, the Venice Commission also raised concerns regarding the reference to collective and individual rights and emphasized that “it is not up to the Hungarian authorities to decide whether Hungarians leaving [*sic*] in other States shall enjoy collective rights or establish their own self-governments” [§ 43. of the Opinion]. In light of the criticism above it is hard to understand why Gergely Próhle stated that the Venice Commission acknowledged that the new Constitution has no extraterritorial effect. Gergely Gulyás has also denied the extraterritoriality of the Constitution – however, he stated at the same time, in relation to the new law on elections, that Hungarians living abroad will also have the right to participate in the elections.<sup>24</sup> It is also odd that in the view of Gergely

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<sup>22</sup> See also: Eötvös Károly Institute – Hungarian Helsinki Committee – Hungarian Civil Liberties Union: The Third Wave – the New Constitution of Hungary ([http://helsinki.hu/dokumentum/Hungarian\\_NGOs\\_assessing\\_the\\_draft\\_Constitution\\_of\\_Hungary\\_20110414.pdf](http://helsinki.hu/dokumentum/Hungarian_NGOs_assessing_the_draft_Constitution_of_Hungary_20110414.pdf)), p. 4.

<sup>23</sup> See: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>24</sup> See: [http://www.nol.hu/kulfold/20110623-a\\_kritika\\_tevedes\\_http://www.szajer.fidesz-cu.hu/hu/cikk/367/](http://www.nol.hu/kulfold/20110623-a_kritika_tevedes_http://www.szajer.fidesz-cu.hu/hu/cikk/367/).

Gulyás the Hungarian Constitution “may be set as an example” as far as nationalities are concerned.<sup>25</sup>

József Szájer may have (also) referred to the issue above when writing the following in his blog: “In other cases they [the Venice Commission] criticize provisions included also in the Constitution in force.” The basis of the statement is that Article 6 (3) of the current Constitution sets out the following: “The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.” Thus, the text in force says that Hungary “bears a *sense* of responsibility” and the Constitution in force does not mention collective or individual rights. Furthermore, the Opinion’s aim was not the comparison of the Constitution in force to the Fundamental Law, and the fact that a provision is included in the Constitution in force does not mean that no objections may be raised related to it. The Venice Commission reacted the following to the blog post of József Szájer: “If a problematic detail was included also in the previous constitution, it should be changed when adopting the new Fundamental Law.”<sup>26</sup> Moreover, the criticism regarding Article D) should be understood together with the Venice Commission’s statements concerning the Preamble and should be evaluated in light of the fact that the Fundamental Law merges the notions of cultural and political community. Namely – even though this is unfortunately not mentioned separately by the Venice Commission – it follows from the provisions of the Fundamental Law that Hungarians living abroad may also have the possibility to take part in parliamentary elections, even though they, in most cases, do not fall under the scope of the acts adopted by the Parliament, thus they do not feel the effect of the actual consequences of political decisions.

## **C. Comments on the chapter “Freedom and Responsibility”**

### **a) General remarks on rights and restrictions [§§ 56–61. of the Opinion]**

In the Venice Commission’s view, the way in which the Fundamental Law provides fundamental rights and defines the possibilities of their restrictions is problematic for the following reasons:

1. The “Freedom and Responsibility” Chapter seems to contain a collection of provisions of different legal nature. In the Venice Commission’s view, constitutions should provide a clear differentiation between principles, legal guarantees, freedoms and responsibilities and present them in a systematic order [§ 58. of the Opinion].
2. Articles II–XXI. of the Fundamental Law contain many vague terms and there seems to be a risk that the constitutional provisions on freedom and responsibility might be eroded by special Acts [§ 59. of the Opinion].<sup>27</sup>
3. The Opinion states in § 60. that it is also essential to provide legal clarity, through the subsequent legislation, as far as restrictions of fundamental rights are concerned and limitation clauses specified in these international instruments should also be fully respected.

These considerations are alarming themselves but further aspects make them much more serious. It is mentioned also by § 57. of the Opinion that some provisions seem to indicate a shift of emphasis from the obligations of the state toward the individual citizens to the obligations of the

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<sup>25</sup> See: television programme “Közbeszéd” Duna Televízió, 22 June 2011 (<http://www.dunatv.hu/video/videoplayer?vid=705587>).

<sup>26</sup> See: <http://www.168ora.hu/itthon/kilogva-a-klubbol-78210.html>.

<sup>27</sup> Certain acts adopted recently by the Parliament, such as the act on churches and the one weakening criminal procedure safeguards show that these concerns are well-founded..

citizens toward the community. In addition to this, Article R) (3) requires those interpreting fundamental rights to take into consideration the “achievement of the historical constitution” and ideologically detached values included in the preamble.

It should be added that in our view Article I does not comply with Hungary’s international obligations: the article sets out that fundamental rights may be restricted in order to protect “constitutional values” not defined by the text, whereas legitimate aims for restriction are precisely defined by the European Convention on Human Rights.

## **b) Detailed remarks**

### **Article II. – *Right to life and dignity* [§§ 61–68. of the Opinion]**

While the Venice Commission found that there is nothing particularly wrong with the formulation of the provision on right to life, in our view Article II. creates a basis for restricting women’s reproductive rights in the future. Since Hungary has developed a constitutional practice aimed at ensuring women’s freedom of choice, Article II. of the Fundamental Law is unacceptable. The Opinion could have quoted in this regard the Council of Europe’s report “Access to safe and legal abortion in Europe”<sup>28</sup> which invites Member States to guarantee women’s effective exercise of their right to abortion, allow women freedom of choice and offer the conditions for a free and enlightened choice. In addition to this, in the case of *A, B and C v. Ireland*, cited also by the Opinion, the European Court of Human Rights stated it is the duty of the state to develop the conditions to choose legal abortion.

### **Article IV. – *Right to freedom and personal security* [§§ 69–70. of the Opinion]**

The Opinion states that by allowing life imprisonment without parole, Article IV of the Fundamental Law fails to comply with European human rights standards. The governmental response that lifelong imprisonment without parole “does not put the condemned in a hopeless position”<sup>29</sup> is cynical and inhuman in our view. Further governmental statements include that of József Szájer, who stated that the “Hungarian Government is bound by the unequivocal opinion of almost one million Hungarian citizens submitted on the national consultation questionnaires”.<sup>30</sup> (12-question national consultation questionnaires were sent out to citizens in the course of the constitution-making process. Some of its questions were loosely related to the constitution-writing process; others were a populist wish list.) However, the “opinion of the people” as such may never serve as a basis for seriously restricting human rights, and one million people do not even constitute a majority of those having voting rights in Hungary.

### **Article VII. – *Right to freedom of religion* [§§ 71–73. of the Opinion]**

The Opinion states solely that the new Constitution “does not constitute a State Church” [§ 73.]. However, even if we accept that cooperation between the state and churches is allowed and that acknowledging the historical role of certain churches is not discriminatory, there is a need for

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<sup>28</sup> Available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc08/EDOC11537.pdf>.

<sup>29</sup> See: [http://index.hu/belfold/2011/06/22/semmiben\\_sincs\\_igaza\\_a\\_velencei\\_bizottsagnak/](http://index.hu/belfold/2011/06/22/semmiben_sincs_igaza_a_velencei_bizottsagnak/).

<sup>30</sup> See:

[http://szajerjosef.blog.hu/2011/06/17/magyarorszag\\_a\\_velencei\\_bizottsag\\_velemenyet\\_nem\\_tudja\\_elfogadni#more2993526](http://szajerjosef.blog.hu/2011/06/17/magyarorszag_a_velencei_bizottsag_velemenyet_nem_tudja_elfogadni#more2993526).



strict rules and exact guarantees in this regard. (§ 72. of the Opinion states, for example, that the separation between state and churches is an inevitable consequence of the rule of law, respect of human rights and the idea of democracy.) Furthermore, it is unreasonable to interpret Article VII. in a benevolent way in light of the new law on religion and churches adopted recently by the Parliament. This new cardinal act shows that the Government is committed to principles of constitutionality in words, but it empties and flips them around in practice: the cardinal act in question discriminates between religious communities, deprives already established churches from their status and approves politically motivated cooperation between the Government and certain churches.

**Article IX. – *Freedom of speech***  
**[§ 74. of the Opinion]**

The Venice Commission found it problematic that freedom of the press is not formulated as an individual's right, but as an obligation of the state and that Article IX. leaves the detailed rules for this freedom and its supervision to a cardinal act, but without outlining the purposes, contents and restrictions of such a law. In our view the problems arise not primarily because freedom of press is not formulated as an individual right, but the real problem is that the former Constitution's terms were replaced by ambiguous terms, like those of the restrictive media laws adopted by the Parliament, and a considerable part of media laws require a two-third majority. Thus, media laws will be hard to amend by simple-majority Parliaments, and their constitutional review will be partly impossible.

**Article XV. – *Non-discrimination***  
**[§§ 75–80. of the Opinion]**

Sexual orientation is not explicitly mentioned as a protected characteristic in terms of a ban on discrimination. In our opinion, this omission sends a bad message since the case law of both the European Court of Human Rights and the Constitutional Court is uniform in respecting the prohibition of the discrimination on the basis of sexual orientation.

**Article XXIII. – *Right to vote***  
**[§ 81. of the Opinion]**

It is regrettable that the Opinion does not comment on the provisions on the voting rights of those under guardianship. However, depriving disabled persons from their right to vote by an individual decision does not comply with Article 29 of the UN Convention on the Rights of Persons with Disabilities, which states that state parties shall ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, including the right and opportunity to vote and be elected, *inter alia*.

**D. Comments on the chapter “The State”**

**The Constitutional Court**  
**[§§ 91–101. of the Opinion]**

The Venice Commission formulates an elaborate opinion on the changes brought about to the Constitutional Court. The Opinion echoes many of the main criticisms that had been voiced in Hungary, concerning for example the curtailment of the Court's power or the new mode of election of judges to the Constitutional Court. The Commission notes that despite some

improvements, such as the introduction of the individual constitutional complaint, “a number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order”.

The Venice Commission sustains its critical stand against the curtailment of the Constitutional Court’s powers in budget related issues. Relying on its previous opinion on the Fundamental Law and the practice of the ECtHR, the Venice Commission underscores the need for a constitutional court to be entitled to review all laws from a human rights point of view. The Commission also notes that, in sharp contrast with what had been suggested by the Commission, the Fundamental Law puts more emphasis on the *a priori* review in the procedure, hence the role of politics will be increased in the procedure of the Constitutional Court.

From the ruling parties, it was Gergely Gulyás, MP of the Fidesz, who responded to the Venice Commission’s Opinion. He openly denied that the powers of the Constitutional Court were weakened, but instead, he went on, its role will be substantially changed.<sup>31</sup> However, Gergely Gulyás failed to respond to any given critical argument of the Opinion on the power curbing measures of the Fundamental Law. It is also recalled at this point that the Fundamental Law makes it possible for governing parties having a two-thirds majority in the Parliament to nominate and elect judges to the Constitutional Court without the consent of the opposition parties, which in itself may result in undermining the Constitutional Court’s independence.

### **Courts** **[§ 102–110. of the Opinion]**

The Venice Commission heavily criticized the vague formulation of the Fundamental Law concerning the judicial system: guarantees are vague or non-existent and the Fundamental Law will not provide any guide for the direction of the reform of judiciary. This lack of clarity extends to the fact that it is unclear whether the autonomous National Council of Judiciary shall be maintained or not.

We find it alarming that none of the criticisms were answered by the Government. It still seems unclear whether changing the name of the Supreme Court will induce the nomination of a new chief judge. However, recent government statements suggested that the ongoing mandate of the chief judge shall not be shortened, however, there is no guarantee for this self-restraint.

The Opinion formulates a lengthy criticism on the general lowering of the retirement age of judges. In the Venice Commission’s opinion, this measure goes counter to the independence and immovability of judges. Furthermore, the forced retirement of the 300 most experienced judges will surely have a devastating effect on the court system. The Venice Commission finds that the Fundamental Law is unclear and eventually problematic on the new role of the “court secretaries” who might act as judges in some cases.

### **The Commissioner for Human Rights** **[§§ 114–115. of the Opinion]**

Given that there is no European consensus with regard to the organization of the ombudsman system, the Venice Commission merely expresses hopes that the level of the protection of human rights will not decrease after the institutional changes. The centralized ombudsman system, set up by the Fundamental Law, will put an end to the independent information rights ombudsman, and subordinate the remaining minority rights ombudsman and the green ombudsman, responsible

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<sup>31</sup> See: [http://www.nol.hu/kulfold/20110623-a\\_kritika\\_tevedes](http://www.nol.hu/kulfold/20110623-a_kritika_tevedes).

for natural resources and environment protection, to the authority of the general ombudsman for civil rights.

The Opinion states that the Venice Commission “considers it important that the above-mentioned re-organization does not entail a lowering of the existing level of guarantees for the protection and promotion of rights in the fields of national minority protection, personal information protection and transparency of publicly relevant information”. We dispute that the level of independence of the information rights could be maintained in light of the institutional changes, since a government agency replaces an independent parliamentary commissioner.

### **The Budget Council** **[§§ 128–129. of the Opinion]**

The Fundamental Law sets up a Budget Council, composed of nominees of the President of the Republic, the President of the Audit Office, and the President of the National Bank, which shall have a veto power over the Parliament’s budget proposal. The Opinion finds this problematic for different reasons. Firstly, the Budget Council, having limited democratic legitimacy, “might have a negative impact on the democratic legitimacy of budgetary decisions”. The Budget Council will be able to curb the power of the Parliament whose main exclusive privilege is the adoption of the state budget. Furthermore, the rules in the Fundamental Law fall short of clarity when it comes to the detailed rules of “prior consent” of the Budget Council.

MP Gergely Gulyás stated in Parliament that the provisions on the powers and the competence of the Budget Council are progressive and the Venice Commission will have an opposite opinion on the matter in five to ten years.<sup>32</sup> He made this statement without responding to any argument of the Venice Commission, so he merely implied that the Opinion was irrelevant.

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<sup>32</sup> See:

[http://galamus.hu/index.php?option=com\\_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2](http://galamus.hu/index.php?option=com_content&view=article&id=76444&catid=69&Itemid=106&limitstart=2).