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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION

**ON THREE LEGAL QUESTIONS
ARISING IN THE PROCESS OF DRAFTING
THE NEW CONSTITUTION**

OF HUNGARY

On the basis of comments by

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I. Introduction

1. 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.
2. The Venice Commission did not receive any draft of the Constitution, but three legal questions on specific issues which are of particular concern for the Hungarian authorities in the context of the current constitutional process.
3. A working group of Rapporteurs was set up, composed of Ms Hanna Suchocka and Messrs Wolfgang Hoffmann-Riem, Christoph Grabenwarter, Kaarlo Tuori and Jan Velaers.
4. On 7-8 March 2011, the working group, accompanied by Mr Thomas Markert and Ms Artemiza Chisca of the Venice Commission Secretariat, travelled to Hungary in order to meet with the authorities, including the Ad Hoc Committee in charge of the drafting of the Constitution, and civil society. The Venice Commission wishes to thank them all for the discussions which took place on this occasion.
5. *The present opinion was adopted by the Venice Commission at its .. Plenary Session (Venice, ... 2011).*

II. Background

6. The Constitution of the Republic of Hungary was adopted on 20 August 1949. It is the country's first and only written Constitution, and Hungary is the only former Central and East-European country that did not adopt an entirely new Constitution after the fall of Communism¹.
7. From 1988 on, the idea of preparing a new Constitution emerged in Hungary: it was supposed to establish a multiparty system, parliamentary democracy and a social market economy. Due to time pressure, however, a new Constitution could not be drafted and the National Assembly adopted a comprehensive amendment to the 1949 Constitution (Act XXXI of 23 October 1989). This reform was adopted like a normal constitutional amendment, with a majority of two thirds of the Parliament approving.
8. The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force until the adoption of a new Constitution.
9. Since 1989, the Constitution has been amended several times, beginning in 1990. Due to the two-thirds majority held by the ruling coalition, in the last months it has been amended ten times.
10. Recently, the National Assembly initiated a project to rewrite the Constitution altogether. An *Ad-Hoc* Parliamentary Constitution Drafting Committee and a Body of National Consultation have been set up for this aim. At the date of the Venice Commission visit to Hungary, the drafting process was expected to be finished and the adoption of the new Constitution planned for 18 April 2011.

¹ See also the particular case of Latvia: On 4 May 1990 the Supreme Council of the Republic of Latvia declared Latvia independent and adopted articles 1, 2, 3 and 6 of the Constitution of 1922. The rest of the Constitution remained in abeyance until it was reviewed to fit the modern situation; the Constitution was fully reinstated by Latvia's parliament on 6 July 1993.

III. The object of the opinion

11. In the present Opinion, the Venice Commission has not examined the draft of the new Constitution of Hungary. According to the request submitted to it, the mandate of the Venice Commission was not to examine every aspect of the new Constitution of Hungary but to give its legal opinion on three specific issues arising in the context of the preparation of the text.

12. The Venice Commission was addressed three legal questions by the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary. The questions are the following:

1. The EU's Charter of Fundamental Rights and the Constitution

To what extent may the incorporation in the new Constitution of provisions of the Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights?

2. The role and significance of the preliminary (ex ante) review among the competences of the Constitutional Court

In particular, two questions should be addressed: Who is entitled to submit a request for preliminary review? What is the effect of a decision passed by the Constitutional Court in a preliminary review procedure on the legislative competence of the Parliament?

3. The role and significance of the actio popularis in ex post constitutional review

In Hungary, the Constitutional Court receives around 1600 petitions a year, due to the fact that anyone, with no legal interest, can submit a petition asking for the constitutional review of a legal norm. What is the state of play in Europe as regards the availability of actio popularis in matters of constitutionality? Could it be considered as an infringement of the European constitutional heritage (acquis) if the main focus of the Constitutional Court's activity was to shift from the posterior review, carried out on the basis of an actio popularis, to the examination of specific constitutional complaints? (The latter complaint may be submitted by someone who alleges that his or her fundamental right has been injured due to the application of an unconstitutional law provided there is no other legal remedy available .

13. The Venice Commission wishes to point out from the outset that, in the absence of the draft of the new Constitution and notwithstanding its dialogue with the main stakeholders involved in its preparation, it has been difficult for it to express a detailed and circumstantiated opinion on the three questions submitted to its analysis.

14. The Commission wishes to underline that the present Opinion is not a legal opinion on the actual provisions of the new draft Constitution relating to the three issues submitted to its consideration. Under the said circumstances, the Commission limited itself to general comments on the three issues at stake and on the most suitable options that, in its view, could be implemented in the Hungarian context.

IV. The process of the adoption of a new Constitution

15. At the date of the visit of its delegation, the text of the draft Constitution had not yet been released. The Commission was informed that the draft was being finalized and it was envisaged to present it very soon to the majority's parliamentary group (FIDESZ) and to

subsequently submit it to Parliament (by 15 March 2011). The adoption of the Constitution was foreseen for 18 April 2011.

16. The Venice Commission notes that, while initially associated to this process in the framework of the Ad-hoc Committee for Preparing the Constitution, the opposition forces were for several months not participating in the elaboration of the draft and that there was no longer a dialogue between the majority and the opposition in this regard. It understands that the opposition's decision to withdraw from the process was in particular linked to the limitation of the powers of the Constitutional Court with regard to the constitutionality of acts and bills on state budget and taxes, adopted by the Hungarian parliament in November 2010.

17. Moreover, concerns have been raised within the civil society over the lack of transparency of the process and the inadequate consultation of the Hungarian society on the main constitutional challenges to be addressed in this context. In the absence of a public draft, only limited public debate took place on the changes and novelties that the future Constitution might introduce.

18. The tight schedule established for its adoption is also a serious source of concern and has been raised by most of the interlocutors of the Commission. Nevertheless, no major divergences of view have been reported as regards the actual content of the future Constitution.

19. The Venice Commission acknowledges that the adoption of an up-to-date Constitution is a fundamental step for a modern European country, and notes that the present Hungarian Constitution still remains a temporary one². Although previous governments have already elaborated drafts for a new Constitution, never in the past 20 years it has been possible to meet the conditions necessary to adopt it.

20. The Commission would like to recall that transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process.

21. In its opinion, a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate.

V. Specific questions

A. The EU's Charter of Fundamental Rights and the Constitution

22. The question posed to the Venice Commission is "to what extent may the incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights".

23. The Venice Commission finds that up-dating the scope of human rights protection and seeking to adequately reflect, in the new Constitution, the most recent developments in the

² "In order to facilitate a peaceful political transition to a state under the rule of law, realizing a multi-party system, a parliamentary democracy and a social market economy, the Parliament hereby establishes the text of the Constitution of our country - until the adoption of the new Constitution of our country - [...], The Constitution of the Republic of Hungary [Act XX of 1949 as revised and restated by Act XXXI of 1989];

field of human rights protection, as articulated in the EU Charter, is a legitimate aim and a signal of loyalty towards European values. Notwithstanding this commendable goal, the Commission considers that a number of questions should be raised from a legal perspective and carefully examined before a concrete solution is adopted.

24. According to Article 51(1) of the Charter, its provisions “*are addressed to the institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law*”. Thus, the legal significance of the Charter in the Member States is limited to the instances where Member States authorities are implementing EU law. This article confirms the case law of the Court of Justice of the EU (CJEU), which ruled that member states must respect EU fundamental rights while implementing Community Law³ and also while applying the derogation clauses of the EU-treaties.⁴

25. The Lisbon Treaty provided the Charter with the same legal value as that enjoyed by the Treaties (6(1) TEU)⁵. This also means that the Charter, including its general provisions in Chapter 7, has direct effect in the Member States, as well as priority over conflicting domestic law. The Charter also precludes the adoption of national legislative measures incompatible with its provisions. At the same time, as stated in its Article 53, “*[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ Constitutions*”.

26. Member States may refer to the Charter and its significance in the implementation of EU law in their constitutions. They may also use the substantive provisions of the Charter as a source of inspiration when drafting their constitutional provisions on fundamental rights and, thus, try to ensure the congruence of fundamental rights protection at domestic and EU level.

27. An overall incorporation of the Charter would however lead to unnecessary legal complications. “Incorporation” of the Charter in a technical sense would mean that the Charter becomes “as such” part of the Constitution. This could cause problems resulting from a catalogue of rights in the national Constitution of a member State different to those in the EU Charter⁶.

³ Art. 6(1) of the TEU lays down that the Charter “shall be interpreted ... with due regard to the explanations referred to in the Charter”. The explanations relating to Article 51 of the Charter provide (OJ 2007 C 303) as follows: “[Article 51] seeks to establish clearly that the Charter applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity. This provision was drafted in keeping with Article 6(2) of the Treaty on European Union.... As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 ERT [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case-law in the following terms: ‘In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules ...’ (judgment of 13 April 2000, Case C-292/97 [2000] ECR I-2737, paragraph 37 of the grounds).”

⁴ According to the Court, the derogation to the freedom of services on the grounds of public policy, public security or public health could only be accepted if the national provision in derogation of the Treaty was compatible “with the fundamental rights the observance of which is ensured by the Court” (CJEU, C-260/89 ERT (1991) ECR I-2925).

⁵ Article 6.1 of the Treaty of the European Union stipulates: “*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*”

⁶ Article 6.3 TEU nevertheless specifically refers to the national identity of a member state, which would imply that a catalogue distinct from the Charter rights might be advisable: “*The Union shall respect the national identities of its Member States*”.

28. This situation would call for a complete new codification of the guarantees of fundamental rights of the Hungarian Constitution in order to prevent incoherent norms, contradictions or duplications. There would be a need for a detailed evaluation of the existing and the new guarantees, taking into account the case law developed by the Constitutional Court under the existing fundamental rights catalogue (in Chapter 12 of the Constitution of Hungary) as well as those developed by the European courts. Such a process would need effort and time.

29. More precisely, in a new codification it should be taken into account that the interpretation of the EU Charter by the CJEU might deviate from the one provided by the Constitutional Court of Hungary. From an overall perspective, it may well be the case that the Constitutional Court is inclined to follow the case law of the CJEU thereby giving up a part of constitutional autonomy of the member state.

30. In addition, the interpretation of the substantive provisions of the EU Charter is dependent on the ECHR and the case-law of the ECtHR. Art. 52(3) of the Charter lays down that, "*in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention*". This dependence on the ECHR and its interpretation through the ECtHR will be further strengthened, when the EU accedes to the ECHR, as is presupposed by Art. 6(2) of the TEU.

31. Moreover, the EU Charter includes provisions which have been modelled after other international human rights instruments. Their interpretation should therefore also take into account these instruments and their monitoring bodies' case law.

32. In contrast to the EU Charter, the ECHR and other international human rights instruments possess potential significance for all acts of the authorities of the Parties, not only those acts "implementing Union law" (see above). In view of this fact and the substantive dependence of the EU Charter on these instruments, ensuring the congruence of domestic protection of fundamental rights with the ECHR and other human rights treaties binding on Hungary is essential. This can be achieved through either a general provision on the status of international treaty-law (or international human rights law) in domestic legal order or a particular provision ensuring that the ECHR, as it has been interpreted by the ECtHR, constitutes the minimum standard of protection of fundamental rights within the domestic legal order.

33. The overall incorporation of the Charter could also result in competing interpretative competence in cases of relevance for the implementation of the EU law, with the risk of overlapping competences between Hungarian ordinary courts and the Constitutional Court.

34. As integrative part of the EU law, compliance of national norms with the EU Charter in the context of the implementation of the EU law should be examined by all ordinary national courts and not just by the Constitutional Court. Moreover, ordinary courts should have the discretion to refer preliminary questions to the CJEU with regard to the interpretation of the Charter's provisions (art. 267 TFEU)⁷. In its judgement of 22 June 2010 in the case *Melki-Abdeli v. France*⁸, the Luxembourg Court concluded, with regard to the interpretation of EU-

⁷ CJEU, C-166/73, *Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1973) ECR I-00033.

⁸ In this judgment, the CJEU determined under which conditions priority can be given to the review of the Constitutionality of national laws. See CJEU In Joined Cases C-188/10 and C-189/10, *Aziz Melki and Selim Abdeli v. France*: "43. (...) the Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law, is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by

law's provisions, that it would be incompatible with the EU law to preclude the domestic courts from directly applying the Charter to domestic laws enacted in the scope of the EU law, eventually after having referred a preliminary question to the CJEU on the interpretation of the Charter.

35. The incorporation of the EU Charter would thus raise problems of incompatibility with the EU law, if this incorporation would mean that only the Constitutional Court would have the competence to assess the compliance of the Hungarian laws enacted in the scope of the EU law with the Charter. Should the ordinary courts exercise their competence in this regard as required by EU law and confirmed in its ruling by the CJEU, this could reduce the consistency in the application of the Hungarian Constitution. As a result, this could not only undermine the authority of the Constitutional Court as a guardian of the Constitution, but also the autonomy of the Hungarian legal system as such.

36. In the light of the above, the Venice Commission is of the opinion that it would be more advisable for the Hungarian to consider the EU Charter as a starting point or a point of reference and source of inspiration in drafting the human rights and fundamental freedoms chapter of the new Constitution. Such a solution would offer more adequate possibilities, to the future Constitution, to integrate and adapt more recent developments in the field of human rights protection to the experience and traditions of Hungary in this field⁹.

37. As previously stated, particular attention should be paid to ensuring compliance of constitutional and legislative provisions in this field with the ECHR and other human rights treaties binding for Hungary. It would be also important for the Hungarian new Constitution to clarify the place of international treaties to which Hungary is a Contracting Party in the domestic law. Specific reference could also be made, as far as the interpretation of the relations between the EU and domestic law is concerned, to the key role played in the application of EU law by the principle of subsidiarity, as confirmed by the Lisbon Treaty.

B. The role and significance of the *ex ante* review

a) The role of the *ex ante* review in the constitutional justice system

38. The *ex ante* constitutional review is seen in many countries, i.e. before the promulgation of legislation, as a highly important device for securing constitutionality of legislation.

legislative or other Constitutional means (see inter alia Simmenthal, paragraphs 21 and 24; Case C-187/00 Kutz-Bauer [2003] ECR I-2741, paragraph 73; Joined Cases C-387/02, C-391/02 and C-403/02 Berlusconi and Others [2005] ECR I-3565, paragraph 72; and Case C-314/08 Filipiak [2009] ECR I-0000, paragraph 81).

45. Lastly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unConstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration that a rule of national law is unConstitutional, is subject to a mandatory reference to the Constitutional court".

⁹ In its Interim Opinion on the Draft Constitutional Amendments of Luxembourg, adopted at its 81st Plenary Session (Venice, 11-12 December 2009), CDL-AD(2009)057, the Venice Commission "*when a Constitution is being revised, there is no obligation to incorporate blindly the provisions of any particular international human rights conventions into the text. Besides, the number of such conventions and the variety of rights and freedoms which they contain would make such a requirement unrealistic*" (§ 34) and also that "*(a) national Constitution should guarantee the human rights and public freedoms which are designated as "fundamental" at State level*" (§ 36).

39. Nevertheless, there is no common European standard as regards the initiators and the concrete modalities of this review. States decide, in accordance to their own constitutional traditions and specific needs, which organs, and to what extent, are authorized to conduct an *a priori* review and who should have the right to initiate it.

40. One could say that limited *ex ante* control is conducted as part of the law-making process in parliament, in both law-drafting within the bureaucracy and during the parliamentary deliberations by the parliamentary committees. Nevertheless, as these bodies' decisions are verified and endorsed (or not) by the plenary assemblies, they do not have a binding effect. As to the binding review, it is difficult to see, in centralised systems of constitutional adjudication characterized by the existence of a Constitutional Court, any alternative to such a court as the *locus* of legally binding *ex ante* review.

41. The practice shows that the role of the Constitutional Court in *ex ante* review is accepted in many states beside its main role in *ex post* review. The Venice Commission therefore considers that the Constitutional Court should be seen as the only and best placed body to conduct *ex ante* binding review. Nevertheless, to avoid over-politicizing the work of the Constitutional Court and its authority as a judicial body, the right to initiate *ex ante* review should be granted rather restrictively.

42. On the other hand, the Venice Commission considers that, should this be needed, non binding *ex ante* control may also be exercised, prior to the adoption of the law, by a parliamentary body¹⁰ or by independent bodies or structures.

b) The *ex ante* review in the Hungarian context

43. In the Hungarian constitutional system, the *ex ante* review of legal acts exists and is rooted in Art. 26 (4-5)¹¹ of the Constitution and the provisions of the Act on the Constitutional Court¹².

44. The Hungarian system at present provides for three different situations where *ex ante* control is possible:

- the control of a statute not yet promulgated, (art.26(4) of the Constitution), which can be initiated only by the President of Hungary;
- the control of the provisions of the rules of procedure of Parliament - it is an exclusive competence of the Parliament to initiate the procedure;
- the control of international treaties, which can be initiated by the Parliament, the President and the Government.(Art.11, art. 34.1, art. 36.1 of the Act on the Constitutional Court).

45. In the light of the existing domestic practice and traditions, the Venice Commission is of the Opinion that in Hungary, the competence of a priori review should be retained and included by the new Hungarian Constitution in the prerogatives of Constitutional Court.

¹⁰ For example, in Finland, the Constitutional Law Committee exercises *ex ante* (binding) Constitutional review.

¹¹ Art. 26(4) of the Constitution lays down that "should the President of the Republic consider any provision of a statute to be unConstitutional, the President shall, prior to signing it, refer it to the Constitutional Court for appraisal", and, according to Art. 26(5), "should the Constitutional Court - in extraordinary proceedings - determine the statute to be unConstitutional, the President of the Republic shall return the statute to the Parliament".

¹² See articles 1(1), 43(1), 35(2) and 36(1) of the Act on the Constitutional Court.

46. Also, Hungary's constitutional choice to grant only the President, who is expected to stand above party political game, the right to initiate such a review, should be retained.¹³

47. As a matter of principle, the Commission is of the view that an entitlement to submit a request for binding preventive abstract review should be awarded restrictively, as such a procedure easily becomes part of the political game if it is widely available. It notes that Hungary has experience in *ex post* control with remarkable efficiency. The Commission therefore considers therefore that a large competence in *ex ante* control could endanger the fulfilment of the important task of *ex post* control - be it through *actio popularis* or through constitutional complaint - for various reasons, including workload or bias (see paragraph 54 below).

48. Opening the initiation of binding *ex ante* constitutional review to government and/or parliament organs, as well as to factions in parliament, would "politicise" the Constitutional Court; the Court would then act more as an arbitrator between competing groups in parliament, in the course of lengthy legislative processes. This could seriously undermine the credibility of the Constitutional Court as a judicial body and that of constitutional review as a reliable mechanism for guaranteeing the full respect of the rule of law and the coherence of the country's legal and constitutional system.

49. The Commission also considers that the stage, in the legislative process, at which the *ex ante* control should take place, is of particular importance. In the light of the concerns previously expressed over the risk that the Constitutional Court plays a too politicised role and that the legislative process is unduly prolonged, the Commission considers advisable that the control takes place only after adoption in parliament and before publication of the law and, for international treaties, before their ratification. Limiting the initiative for constitutional review to the President only, as mentioned before, could also be a way to minimise the dangers for the Court of working under the pressure of short time limits (necessary to a certain extent in *ex ante* proceedings) and to allow it to adapt its working methods to the challenges faced.

50. The Commission would like to add that *ex ante* and *ex post* reviews have partly different functions and should be seen as complementary rather than alternative or mutually exclusive mechanisms. Therefore, decisions of the Constitutional Court adopted in the framework of the preliminary review should not prevent the Court from assessing again the adopted law in the course of *ex post* review.

51. During their visit to Budapest, the Rapporteurs of the Venice Commission could note that there is a clear wish, in Hungary, for a more comprehensive *ex ante* constitutional review of normative acts. Since it is not appropriate for the Constitutional Court to conduct such a wide review, the introduction of a non-binding review by a parliamentary committee or an independent body could be considered. The Venice Commission would welcome such a system, provided that it is a non binding way of constitutional review.

52. The Courts rulings, in the case of such a preliminary (abstract) review, must be obeyed just as any other decision of the Constitutional Court. Hence, statutes dealing with the same issue may not be adopted again unless either the critical aspects are addressed with different solutions or new facts appear, of which the Constitutional Court could not have been aware.

¹³ The Venice Commission acknowledges that, even when the right to initiate the *ex ante* control is limited to the President of the country, its exercise may have a political character in certain situations, in particular in cases where the President represents a different political tendency than the parliamentary majority.

53. A clear disadvantage of a *a priori* constitutional control by the Constitutional Court is that the Court has to decide without the benefit of knowing how that law is applied in practice. Often, unconstitutionality only becomes apparent through the practice of administrative and judicial organs. Conversely, the ordinary judiciary may have 'dealt' with a possibly unconstitutional law by interpreting it in a constitutional way.

54. The strongest argument against a wide use of a *a priori* Constitutional review again lies in the possibility that an unconstitutionality of a law may arise through the practice of state organs, and this even in cases where the Constitutional Court had already been called upon to decide on the constitutionality of the law in abstract *a priori* proceedings.

55. Particular consideration should also be paid, when re-defining the role and functions of the Constitutional Court as a guarantor of the Hungarian state's constitutional order, to the position of so-called "cardinal laws" (organic laws) in the constitutional jurisdiction. During its visit to Hungary, the Venice Commission was informed that the new Constitution would be rather a brief document, leaving to the "cardinal laws" the task of regulating details pertaining to the various fields addressed in a more general way by its own provisions. It was not clear neither whether these organic laws could be subject of constitutional review nor whether they would constitute a criterion for such a review. According to the information received, such laws would be assimilated, in this context, to ordinary laws and could not be relied on in constitutional review. If this interpretation is followed, a lack in constitutional review may emerge if the Constitution is of a summary nature and emphasis is shifted on "cardinal laws".

56. The Commission would like to recall that, as a rule, constitutions contain provisions regulating issues of the highest importance for the functioning of the state and the protection of the individual fundamental rights. It is thus essential that the most important related guarantees are specified in the text of the Constitution, and not left to lower level norms.

57. In this connection, the Commission considers it particularly important that basic provisions regulating the functions of the Constitutional Court in *both ex post* and *ex ante* review, as well as the right to initiate constitutional review before the Court, are included in the Constitution. In addition, the main principles and conditions relating to the nomination of judges to the Constitutional Court and the Court's functioning, such as the judges' independence and the financial autonomy of the Court should be clearly laid down in the new Hungarian Constitution.

58. With regard to the Constitutional Court and its specific role in a democratic society, it should be pointed out that a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court's competence in such a way that it would review certain state acts only with regard to a limited part of the Constitution, runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament "to enhance the protection of fundamental rights in Hungary". This aim was explicitly expressed in the first of the three questions submitted to the Venice Commission (see § 11 above).

C. The role and significance of the *actio popularis*

59. Hungary has become an interesting model for the functioning of *actio popularis* system within constitutional justice. This system implies that every person is entitled to take action for constitutional review against a normative act after its enactment, without needing to prove that he or she is currently and directly affected by it.

60. According to Article 32/A(4) of the Hungarian Constitution, “*everyone has the right to initiate proceedings of the Constitutional Court in the cases specified by statute*”. Art. 21(2) of the Act on the Constitutional Court lays explicitly down that the examination of the unconstitutionality of legislation can be initiated by everyone in the frame of the *ex post* review.

61. The Venice Commission would like to stress that the availability of an *actio popularis* in matters of constitutionality cannot be regarded as a European standard. It acknowledges that this mechanism has been seen as the broadest guarantee of a comprehensive constitutional review¹⁴, which allows eliminating from the legal order quickly unconstitutional laws, especially laws adopted prior to the Constitution. Nevertheless, a comparative perspective shows that most countries did not choose to introduce this mechanism as a valid means to challenge statutory acts before the Constitutional Court. As a consequence, *actio popularis* is at present rather an exception in Europe and among the Member States of the Venice Commission.¹⁵

62. Moreover, in its Opinion on the Draft Law on the Constitutional Court of Montenegro (CDL-AD(2008)030), the Venice Commission recommended the exclusion of the *actio popularis*. The Commission referred, in this context, to the Croatian experience showing that “*such a wide access can totally overburden the Court*” (see § 51).

63. The Venice Commission notes that the Constitutional Court of Hungary is reported to receive about 1600 *actio popularis* petitions every year, which testifies the relevance of the danger of overburdening the Court in Hungary, too. It understands, based on the information provided to it, that the Hungarian authorities would envisage, in the framework of the adoption of a new Constitution, the abolition of the *actio popularis*. According to the authorities, this reform aims to avoid, in the future, the risk of overburdening the Court with an unmanageable amount of petitions as well as the misuse of remedies before it, and to make it possible for the Court to concentrate its efforts on petitions where a specific legal interest is present.

64. The Commission has also been informed that the system of preliminary requests brought before the Constitutional Court by ordinary courts in the context of preliminary ruling procedures would be retained (Article 38 of Act No. XXXII of 1989 on the Constitutional Court).

65. It notes that, in addition to the *actio popularis*, Hungary already has the mechanism of *ex post* direct individual complaint against normative acts (Article 48 of Act No. XXXII of 1989 on the Constitutional Court). It seems, however, that Article 48 is rarely used by applicants, who prefer the more simple access to the Constitutional Court via *actio popularis*, as for Article 48, the individual has to show an interest and has to exhaust remedies.

66. The Commission welcomes the intention by the authorities to extend the mechanism of *ex post* direct individual complaint, related to a concrete case, to include the possibility to complaint not only against a normative act but also against the violation of his or her subjective fundamental rights through an *individual act* based on a normative act. The eligibility criteria to initiate such a procedure would be set out by law and would include the existence of a legal interest¹⁶.

67. If confirmed, the extension of the constitutional review to the “*individual acts*” (individual administrative acts and decisions of the judiciary), would be a positive development from the

¹⁴ H.Kelsen, cit.in: R. Ben Achour, “Le contrôle de la Constitutionnalité des lois: quelle procédure?”, Actes du colloque international “ L'effectivité des droits fondamentaux dans les pays de la communauté francophone ”, Port-Louis (Île Maurice), 29-30 septembre, 1^{er} octobre 1993, p.401.

¹⁵ CDL-AD (2010) 039 rev., § 74.

¹⁶ See in this respect Article 93 (1) of the German Constitution and Article 90 (1) of the Law on the Federal Constitutional Court; see also Article 144 of the Austrian Constitution.

perspective of the effective protection of individual fundamental rights. In its recent Study on individual access to constitutional justice¹⁷, the Venice Commission noted in this respect that,

“With the growing value of human rights protection, one can observe a clear tendency towards opening constitutional review of individual administrative acts and decisions of the judiciary upon application by the individual”¹⁸, as human rights violations are often the result of unconstitutional individual acts based on constitutional normative acts¹⁹. The Venice Commission is in favour of the full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights, but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the desirability to settle human rights issues on the national level.”

68. The Venice Commission is therefore of the opinion that regulations in the future Hungarian Constitution removing the *actio popularis* should not be regarded as an infringement of the European constitutional heritage. As indicated before, the Commission considers that a restriction of ex post constitutional review of legal acts by individuals via the well-proven criterion of “current and direct affection of constitutionally guaranteed rights” (a specific legal interest) does not meet with objections, if accompanied at the same time by the introduction of a full-fledged constitutional complaint. Such a change cannot be seen as a violation of European standards.

69. Notwithstanding this position of principle, the Commission considers that, in case the *actio popularis* is abolished, other ways of constitutional review must be provided for, as such a change to a system of constitutional review may have some repercussions on the scope and efficiency of the control.

70. Taking into account the Hungarian constitutional tradition and legal culture, the Commission considers advisable – while introducing of a full-fledged constitutional complaint - to keep some limited elements of *actio popularis*. A possible solution could be an indirect access mechanism through which individual questions would reach the Constitutional Court for adjudication via an intermediary body (such as the Ombudsman or other relevant bodies).

71. As indicated in the above-mentioned study,

“[m]ost of the countries of the Venice Commission do not grant judicial standing rights to ombudspersons. However, among those countries which provide for this possibility, the ombudsperson is entitled to act either before ordinary courts (e.g., Finland) or directly before the Constitutional Court (e.g., Armenia, Austria, Azerbaijan, Brazil, Croatia, Czech Republic, Estonia, Hungary, Portugal, Spain, Moldova, Montenegro, Slovenia, Slovakia, Bosnia and Herzegovina, Latvia, Poland, Russian Federation, “The former Yugoslav Republic of Macedonia”, Peru, Ukraine, Romania and South Africa). It is also important to note that, when the ombudsperson has standing before the Constitutional Court, the scope of its power can be limited to challenging a norm in the framework of a specific case in which it is acting. However, an ombudsperson is sometimes entitled to challenge a norm in the abstract; as is the case in Azerbaijan, Estonia, Peru and Ukraine.

¹⁷ CDL-AD(2010)039rev, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

¹⁸ CDL-AD (2004)24, Opinion on the draft Constitutional amendments with regard to the Constitutional Court of Turkey.

¹⁹ CDL-AD (2008)029, Opinion on the draft laws amending and supplementing 1) the Law on Constitutional Proceedings and 2) the Law on the Constitutional Court of Kyrgyzstan.

In these systems, ombudspersons provide possible ways of access to individual justice, albeit indirectly. The Venice Commission considers that ombudspersons are elements of a democratic society that secure respect for individual human rights. Therefore, where ombudspersons exist, it may be advisable to give them the possibility to initiate constitutional review of normative acts on behalf of or triggered by individuals.²⁰

72. The Venice Commission notes in addition, that, according to Act LIX of 1993 on the Parliamentary Commissioner for Civil Rights, Article 22, in Hungary,

“The Parliamentary Commissioner for Civil Rights may make a motion to the Constitutional Court for:

- a) The ex post facts examination of the unconstitutionality of a statutory instrument or any other legal means of government control;*
- b) The examination of whether a statutory instrument or any other legal means of government control conflicts with an international agreement;*
- c) (repealed)*
- d) The termination of unconstitutionality manifesting itself in an omission;*
- e) The interpretation of the provisions of the Constitution.”*

73. This is a positive practice and should be maintained, together with the extension of the individual complaint.

VI. Conclusions

74. The Venice Commission notes that the constitutional legal order continues to be based, in Hungary, on a Constitution which, although amended several times since 1989, dates back to 1949.

75. Against this background, the adoption of a new Constitution, in line with the current legal standards and reflecting the most recent evolutions within society, is a legitimate aim.

76. The Commission nevertheless finds that the current process of preparing the draft new Constitution in view of its rapid adoption (foreseen for April 2011) raises a number of concerns which would deserve careful consideration by the Hungarian Authorities.

77. These include the lack of transparency of the process and, several weeks before its adoption, the absence of a public draft for the new Constitution, the absence of dialogue between the majority and the opposition, the insufficient opportunities provided to enable an adequate public debate on such a fundamental process, and its very limited timeframe.

78. Increased flexibility, openness and spirit of compromise are key elements for all stakeholders concerned, and should enable them, beyond their political background and orientations, to adopt a legitimate and sustainable Constitution, in line with the democratic standards and widely accepted by the Hungarian society.

79. With regard to the three specific legal questions addressed to it, the Venice Commission is of the view that:

- 1) It is not advisable for Hungary to opt for the incorporation of the EU Charter of Fundamental Rights as such in its Constitution, as this would result *inter alia* in problems of interpretation and overlapping competences between domestic ordinary courts, the

²⁰ CDL-AD(2010)039rev - Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), § 106.

national Constitutional Court and the European Court of Justice. The substantive provisions of the EU Charter can however be used as a source of inspiration for the national constitutionally guaranteed human rights. Particular attention should be paid in this context to the conformity of the domestic protection of human rights with the ECHR and other binding international human rights treaties.

2) The competence for *ex ante* review should be retained and specifically laid down, as well as all other prerogatives of the Constitutional Court, by the new Constitution. In order to avoid over-politicizing the mechanism of constitutional review, the right to initiate the *ex ante* review should be limited to the President of the country. The review should take place only after the adoption of the law in parliament and before its promulgation and, for international treaties, before their ratification. In addition, wider non-binding *ex ante* review could be conducted, if needed, by a parliamentary committee or by independent bodies or structures;

3) The removal, by the future Constitution, of the *actio popularis*, to avoid the danger of overburdening the Constitutional Court and the misuse of the remedies before it, would not represent an infringement of the European constitutional standards. It is nonetheless advisable, in the light of the specific Hungarian constitutional heritage, to seek ways to couple this measure, if adopted, with alternative review mechanisms, e.g. to retain the indirect action via an intermediary actor, such as the Ombudsman or other relevant bodies. The Venice Commission in addition recommends that the system of preliminary requests by ordinary courts be retained. The planned extension of the constitutional complaint to review also *individual acts*, in addition to normative acts, is a necessary compensation for the removal of *actio popularis* and therefore a highly welcome development.