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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT OPINION
ON THE NEW CONSTITUTION
OF HUNGARY

on the basis of comments by

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I. Introduction

1. At its meeting of 26 March 2011 in Paris, the Monitoring Committee of the Parliamentary Assembly decided to ask the Venice Commission to provide an Opinion on the new Constitution of Hungary.
2. 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.
3. On 17-18 May 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 representatives of the authorities, the political parties represented in the Hungarian Parliament, the Constitutional Court and the civil society. The Venice Commission wishes to thank them all for the discussions which took place on this occasion and the Hungarian authorities for the excellent organisation of the visit.
4. *The present Opinion, which is based on the comments provided by the rapporteurs, was examined and adopted by the Venice Commission at its th Plenary Session in Venice from 17 to 18 June 2011.*

A. Background information

5. The present 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.
6. From 1988 on, the idea of preparing a new Constitution emerged in Hungary. The declared aim was 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). The Preamble of the Constitution as amended in 1989 states that the Constitution shall remain in force, as a temporary one, until the adoption of a new Constitution².
7. Since 1989, the Constitution has been amended several times, including, due to the two-thirds majority held by the ruling coalition, more than ten times more recently.
8. When the current Hungarian Government came to power in 2010, the preparation and adoption of a new constitution was again put on the agenda and this became a major project for the current majority. A Body of National Consultation and an *Ad-Hoc* Parliamentary Constitution Drafting Committee have been set up for this aim. The *Ad-hoc* Parliamentary Committee was set up in June 2010 and started its work on 20 July 2010. It prepared a Concept Paper, which in the end was only considered to be a working document for the constitution-making process. Meanwhile, a Draft was prepared by FIDESZ/KDNP elected representatives and introduced before the Hungarian Parliament on 14 March 2011. It was adopted by the Hungarian Parliament with the votes of the FIDESZ/KDNP coalition on 18 April 2011 and signed by the President on Hungary on 25 April 2011. As indicated by its Closing

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.

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];

Provisions, the new Constitution shall take effect on 1 January 2012. Transitional provisions are still to be adopted.

9. The Monitoring Committee of PACE on 26 March 2011 decided to request the Venice Commission for an opinion on the adopted Constitution.

B. Preliminary remarks

10. The Venice Commission has already provided its legal assistance to the Hungarian authorities in the context of the current constitutional process. In its Opinion CDL-AD(2011)001 adopted at its 86th Plenary Session (Venice, 25-26 March 2011), it assessed, at the request of the Hungarian authorities, three legal questions having been raised in the process of drafting the new Constitution: the possible incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights (hereafter: the EU Charter), the role and significance of the preliminary review among the competences of the Constitutional Court and the role and significance of the *actio popularis* in *ex post* constitutional review. The Commission gave its legal opinion on these three specific issues and the most suitable options that, in its view, could be implemented in the Hungarian context, in the absence, at that time, of the draft of the new Constitution. The Commission notes in this context that the recommendations contained in this Opinion have been taken into account in the last stage of the constitution drafting.

11. In its Opinion adopted in March 2011, the Venice Commission, in the light of the numerous concerns raised within the civil society over the lack of transparency of the process of the adoption of the new Constitution and the inadequate consultation of the Hungarian society, has also formulated a number of general comments with regard to this process. It criticised the procedure of drafting, deliberating and adopting the new Constitution for its tight time-limits and restricted possibilities of debate of the draft by the political forces, within the media and civil society. It took note with regret that no consensus had been possible - among political forces and within society - either over the process or the content of the future constitution³. In the light of the information received with regard to the final stage of debate and adoption of the new Constitution, the above-mentioned comments are still valid.

12. More generally, the Commission is concerned that a number of important elements in the newly adopted Constitution - such as the wide use of cardinal laws, the controversial statements contained in the Preamble or the provisions related to the Budget Council, the autonomous regulatory bodies, the composition of the constitutional court, the appointment of its president and the limitation of its competences - may reflect an attempt, by the current ruling coalition, to buttress for the foreseeable future its institutional power positions and its policy options.

13. The Venice Commission wishes to underline that a constitutional culture which clearly separates constitutional issues from ordinary politics and sees the constitution as a commonly accepted framework for ordinary democratic processes - with their understandable and even healthy political disagreements - is a precondition for a fully successful and legitimate constitution-making process. The frequency of amendments to the present Constitution, even after the recent adoption of the new Constitution, as well as the introduction of such amendments immediately after the adoption of important decisions by the Constitutional Court represent a source of concern from this perspective and might complicate further the public understanding and acceptance of the Hungarian new constitutional order.

³ See CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, § 16-19.

14. The Commission however notes that, while no genuine dialogue has been possible between the majority and the opposition during the debate and final adoption of the new Constitution, according to the information provided to the Venice Commission during its visit in May 2011, there will be co-operation between the majority coalition and the opposition in the preparation of the implementing legislation.

C. The object of the opinion

15. It is generally welcomed by the Venice Commission that former communist countries adopt a new and modern Constitution to create a new framework for society, guaranteeing democracy, fundamental freedoms and the rule of law.

16. When the Venice Commission evaluates a new Constitution, it primarily tries to check whether the its provisions are in compliance with the European Convention on Human Rights (ECHR) and in line with the democracy and rule of law standards and fundamental values commonly shared by the member states of the Council of Europe.

17. The analysis below is based on the English translation of the adopted Constitution provided by the Hungarian Ministry of Public Administration and Justice and published on the official website of the Hungarian Government. The translation may not accurately reflect the original version in every point and, consequently, certain comments and omissions could be affected by problems of the translation.

18. The following comments are not meant to be an in depth study of the entire Constitution. They aim at providing substantial insights with regard to some selected points.

II. General remarks

19. Hungary has adopted a new Constitution which aims to meet the general features of a modern Constitution within the framework of the Council of Europe. In particular, the Venice Commission welcomes the fact that this new Constitution establishes a constitutional order based on democracy, the rule of law and the protection of fundamental rights as underlying principles. It notes that constitutions of other European States, such as Poland, Finland, Switzerland or Austria, have been used as a source of inspiration. A particular effort has been made to follow closely the technique and the contents of the ECHR and to some extent the EU Charter.

20. A special feature of the new Constitution of Hungary is that, while drawing on the above-mentioned standards, this Constitution contains a number of particular variations of European guarantees which can partly be found in a limited number of European constitutions. Most of them are linked to national traditions and identity. These are considered to be an important factor in European Union law (Art. 6 TEU)⁴ and also accepted under the ECHR. The Venice Commission considers in this respect that, while a number of these special guarantees may be seen as part of national constitutional autonomy, other guarantees must be analysed in the light of European standards, above all the case law of the ECtHR (see comments under specific provisions of the Constitution).

21. The task might be more difficult in some cases due to sometimes unclear interrelations between its different provisions as well as to the fact that the constitutional text often relegates to cardinal (organic) laws the definition of the detailed rules applicable to the concerned matters (including fundamental rights, institutional settings, structural arrangements for the operation of the judicial power etc.).

⁴"Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." (Art.6.3).

22. More generally, while it represents a major step for the current ruling coalition and for Hungary, the adoption of the new Constitution in April 2001 appears to be, as confirmed by its text, only the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures. To be fully successful, these processes should be based on the largest consensus possible within the Hungarian society.

A. Cardinal laws

23. The new Constitution provides for an extensive use of cardinal laws to regulate in detail the most important society settings. It contains over 50 references to cardinal laws, including their definition in Article T § 45. Cardinal laws should regulate *inter alia* issues or sectors such as: family policy (Article L) the designation of ministries and other public administration organs (Art. 17 § 4), the term of office and remit of the “Autonomous Regulatory Organs” (Art. 23, §§ 2, 4), the judiciary (Article 25 (7)), the basic rules of public finances, public service provisions, pension system etc. (Art. 40), the State Audit Office (Art. 43 § 4), the Budgetary Council (Art. 44 § 4), the defence forces (Art. 45 §§ 2, 5), the police and the national security services (Art. 46 § 6), the rights of nationalities (Art. XXIX § 3) etc.

24. These cardinal laws, known in other legal systems as “organic laws”, require a qualified majority of two thirds of the members of parliament present for their adoption and amendment. Their aim is to prevent too easy introduction of changes concerning matters related to the Constitution, which nevertheless are not of such fundamental importance as to be regulated by the Constitution itself. The requirement of a supermajority also underlines the need for a broad consensus in these fields. For instance, matters such as the elections or the rules of procedure of the parliament are often laid down in cardinal acts. Such organic laws are not a specific feature of the Hungarian constitution system, as other constitutions, e. g. in Albania⁶, Austria⁷, Croatia⁸, France⁹ and Montenegro¹⁰, make also use of this possibility to regulate certain topics. Moreover, a comprehensive - though less broad - system of cardinal laws is already part of the current Hungarian Constitution.

25. This being said, the Venice Commission finds that a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. In its view, there are issues on which the Constitution should arguably be more specific. These include for example the judiciary. On the other hand, there are issues which should/could have been left to ordinary legislation and majoritarian politics, such as family legislation or social and taxation policy. The Venice Commission considers that parliaments should be able to act in a flexible manner in order to adapt to new framework conditions and face new challenges within society. Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does the present two-third majority have of cementing their political preferences and the country’s legal order. “Article 3 of the First Protocol to the European Convention on Human rights, is at stake. Elections, which should guarantee the “free expression of the opinion of the people in the choice of the legislator”, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and “detailed rules” on certain issues will be

⁵ “Cardinal Acts shall be Acts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament present.”

⁶ Art. 81 § 2.

⁷ See *inter alia* Art. 14 § 10, Art. 14 a § 8, Art. 30 § 2, Art. 37 § 2.

⁸ See *inter alia* Art. 6, 7, 11, 23, 25, 27, 34.

⁹ Art. 91 § 3.

¹⁰ Art. 91 § 3.

enacted in cardinal laws, the principle of democracy itself is at risk.¹¹ This also increases the risk, for the future adoption of eventually necessary reforms, of long-lasting political conflicts and undue pressure and costs for society. The necessity of a certain quorum may however be fully justified in specific cases, such as issues forming the core of fundamental rights, judicial guarantees or the rules of procedure of the Parliament.

26. While acknowledging that States enjoy a wide margin of appreciation in establishing the scope and level of detail of the constitutional provisions and of the different levels of domestic legislation, the Venice Commission considers that the subjects of cardinal laws, as prescribed by the new Hungarian Constitution, are far too many. The risk of edging in stone the concerned matters represents a serious source of concern.

27. In addition, in view of this extensive use of cardinal laws, it is important to clearly distinguish these laws from other laws and the Constitution itself. The new Hungarian Constitution makes such a distinction in one aspect: cardinal laws require a two-thirds majority of the MPs present while a two-thirds majority of all MPs shall be applied with regard to the Constitution itself. As far as the substance is concerned, a sufficient justification for using this type of law is very often missing. The Commission would like to recall that, as stated in its March Opinion, *“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”*(§ 52).

28. In the same Opinion, the Venice Commission also invited the Hungarian authorities, when re-defining the role and functions of the Constitutional Court, to clarify the position of cardinal laws in the constitutional jurisdiction. It however notes that Article 24 of the newly adopted Constitution, dealing with the competencies of the Constitutional Court, does not make clear distinction between cardinal and other laws. The only distinction may be found in the use of two different terms (“piece of legislation” and “constituent provision”) to designate legislation that might be affected by the constitutional review¹². The Constitutional Court Act should provide further clarity in this respect.

B. Rules of interpretation

29. The Commission takes note with interest of the effort made by the Hungarian constitutional legislator to provide guidance with regard to the main principles, values and sources to be used for an adequate interpretation and application of the new Constitution. This effort is however hampered by a certain lack of clarity and consistency between elements, in different constitutional provisions, which are of relevance for the interpretation of the Constitution.

30. Another factor engendering uncertainty in constitutional interpretation relates to the use of insufficiently clear concepts or terms as a source of reference for the future interpretation of the Constitution. For instance, the concept of “historical constitution”, used both in the Preamble and in Art. R, dealing specifically with the interpretation of the Constitution, brings

¹¹See in particular the following articles: L (3) on the protection of families; VII (3) on the detailed rules for Churches, VIII (4) on the detailed rules for the operation and financial management of political parties, IX on the detailed rules for the freedom of the press and the organ supervising media services, press products and the infocommunications market, XXIX (3), on the detailed rules for the rights of nationalities living in Hungary and the rules for the elections of their local and national self-governments, XXXI (3) on the detailed rules for military service; 38 (1) on the requirements for the preservation, protection and responsible management of national assets, 38 (2) on the scope of the State’s exclusive properties and exclusive economic activities and the limitations and conditions of the alienation of national assets; 40 on the fundamental rules of general taxation and the pension system and 41 on the monetary policy.

¹² “The Constitutional Court: a) shall annul any piece of legislation or any constituent provision which conflicts with the Fundamental Law, within its competence set out in Paragraphs (2), Subpara-graphs b), c) and e)”(Article 24(3)).

with it a certain vagueness into constitutional interpretation. There is no clear definition what the “achievements of the historical constitution”, referred to in Art. R, are.

31. Furthermore, it is regrettable that neither Art. R above-mentioned nor Art. 28, dealing with the courts’ interpretative obligations, mentions Hungary’s international law obligations, nor does the chapter on “Freedom and Responsibility” include any reference to international human rights instruments. In the dualistic model of the relations between international and domestic law, an important means to secure respect for international human rights treaties consists of the obligation, for courts and public authorities, to interpret constitutional provisions on fundamental rights and freedoms in light of human rights treaties. It is thus particularly important to derive such an obligation from Art. Q(2), according to which “*Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law*”. The obligation to interpret constitutional provisions in the light of international human rights treaties binding on Hungary concerns, inter alia, Art. I (3), which states that “[a] *fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right*”. This would for instance mean that eventual limitations should also be in harmony with the limitation clauses in the ECHR (see also comments under *Article 28* below).

III. Specific remarks

A. Preamble

32. The Commission recalls that preambles have above all a political purpose and represent political declarations meant to stress the importance of the fundamental law, its principles, values and guarantees, for the state concerned and its population. As a consequence, they should also have a significant unifying function. In the absence of European standards in this area, the specific elements that are included in the Preamble depend on the will of the constitution-making authority.

33. The Preamble of the new Constitution indeed contains numerous national, historical and cultural references, such as to King Saint Stephen, the Christian tradition and the Hungarian culture and language. It would be difficult to neglect the importance, for Hungary, of these factors and their particular role in building and preserving the Hungarian state and nationhood. One can note, as far as the religious aspect is concerned, that while stressing the major role of Christianity in the history of Hungary, the Preamble also states that “*we value the various religious traditions of our country*.” This statement is of key importance and should be adequately taken into account in the future application and interpretation of the Constitution.

34. It should also be noted that, notwithstanding the strong emphasis put on the national element and the role of the Hungarian nation¹³, there has been an effort to find a balance, in the Preamble, between the national and universal elements: “*we believe that our national culture is a rich contribution to the diversity of European unity and we respect the freedom and culture of other nations, and shall strive to cooperate with every nation of the world*”.

35. That being said, there are a number of statements and terms in the Preamble that might raise concern. These statements, terms and the underlying approach are all the more problematic as, according to Article R § 3¹⁴ of the Constitution, the Preamble shall have a main influence on the interpretation of the entire Constitution and appears to be provided legal significance. Although preambles are usually seen as one of several means of interpretation of the Constitution, the reference to the Preamble in Article R § 3 may lead to problems in the

¹³“We are proud that our people has over the centuries defended Europe in a series of struggles and enriched Europe’s common values with its talent and diligence.”

¹⁴ “The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal and the achievements of our historical constitution.”

Hungarian case since the Preamble's text lacks precision, which is essential for a legal text, and contains a number of potentially controversial statements. The reference to the "historical constitution" might also give reason to concern, as there is no consensual understanding in Hungary of the term "historical constitution".

36. First, problems of legal nature may arise. This might be the case if the paragraph on the old 1949 Constitution is understood strictly in a technical way: "*We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.*" If this is meant to have legal consequences, it can only be read as leading to *ex tunc* nullity - otherwise it would have been sufficient to declare that the former Constitution was repealed. *Ex tunc* nullity of the former Constitution could 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. This may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which, although based on this "invalid" constitution, has played an important role in Hungary's development towards a democratic state governed by the rule of law. Even Constitutional institutions like the Parliament would lose their legitimacy and have to be seen as legally inexistent. This would lead to a legal paradox since an illegitimate or even non-existent Parliament cannot enact a new Constitution.

37. At the same time, the above-mentioned paragraph can be considered to be a political statement, statement which does not mean that all acts and laws based on the former constitution, especially since 1989, will become invalid. Rather, the expression can be regarded as drawing a clear line between the democratic system in place and the former communist regime. The 1949 Constitution was legitimized by the decision of Parliament and the amendments adopted since 1989 and the 1990 elections. This is clearly stated by the Preamble's text: "*We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected body of popular representation was formed. We shall consider this date to be the beginning of our country's new democracy and constitutional order.*" Moreover, the new constitution in its Closing provisions refers to the provisions of the present Constitution as the legal basis for the adoption of the Fundamental Law¹⁵.

38. The Commission has taken due note that, according to the Hungarian authorities met during its May visit to Budapest, the declaration of the invalidity of the 1949 Constitution should only be understood as a political statement. It nonetheless finds regrettable that such an important statement and an unfortunate internal contradiction has been retained in the Preamble without due regard to its potential legal and political implications. It trusts that the Constitutional Court of Hungary will provide clarity on this sensitive issue in the context of its future interpretation of the new Constitution. The adoption of transitional provisions is also an opportunity for providing legal clarity on this matter.

39. The Commission further considers that, while it is not uncommon that the Preamble to a Constitution or the chapter on the general principles includes provisions on the values underlying the Constitution, a Constitution should avoid defining or establishing once and for all values of which there are different justifiable conceptions in society. Such values, as well as their legislative implications, should be left to the ethical debates within society and ordinary democratic procedures, respecting at the same time the country's human rights and other international commitments.

40. It is also of particular importance that the constitutional legislator pays proper attention to the principle of friendly neighbourly relations and avoids inclusion of extra-territorial elements and formulations that may give rise to resentment among neighbouring states. In this respect, the Preamble seems to be premised on a distinction between the Hungarian nation and (other) nationalities living in Hungary. The Hungarian nation, in turn, also includes Hungarians living in other states. According to the Preamble, "we promise to preserve the intellectual and

¹⁵ "Parliament shall adopt the Fundamental Law pursuant to Sections 19(3)a) and 24(3) of Act XX of 1949." (Closing provisions, paragraph 2).

spiritual unity of our nation torn apart in the storms of the last century". This statement implies obvious historical references and should be read in conjunction with Art. D, establishing Hungary's "responsibility for the fate of Hungarians living beyond its borders". Such a wide understanding of the Hungarian nation and of Hungary's responsibilities may hamper inter-State relations and create inter-ethnic tension (see also comments under Article D below).

41. The Preamble however continues by stating: "*the nationalities living with us form part of the political community and are constituent parts of the State*". While this statement may be seen as an effort towards inclusiveness, what makes the distinction "nation"/"nationalities" problematic in this particular context is the possibility of invoking it as a justification for discriminatory treatment. It is also to be noted that the Preamble has been written in the name of "we the members of the Hungarian nation", intimating that members of the "nationalities living with us" are not part of the people behind the enactment of the Constitution. The Constitution should be seen as the result of the democratic will-formation of the country's citizens as a whole, and not only of the dominant ethnic group. Therefore, the language used could/should have been more inclusive (such as, for example "We, citizens of Hungary..."). It is, again essential, that a comprehensive approach is favoured in the context of the interpretation of the constitutional provisions.

B. Foundation

Article D

42. The Venice Commission finds 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. In particular, the Venice Commission finds unfortunate the use, in this context, of the term "responsibility". This term may be interpreted as authorizing the Hungarian authorities to adopt decisions and take action abroad in favour of persons of Hungarian origin being citizens of other states and therefore lead to conflict of competences between Hungarian authorities and authorities of the country concerned. Such action includes *inter alia* support to the "*establishment of their community self-governments*" or "*the assertion of their individual and collective rights*".

43. The Venice Commission recalls that, while states may legitimately protect their own citizens during a stay abroad, as indicated in its Report on the Preferential Treatment of National Minorities by their Kin-State¹⁶, "responsibility for minority protection lies primarily with the home-States". The Commission indeed added, in that report, that "kin-States also, lay a role in the protection and preservation of their kin-minorities, aiming at ensuring that their genuine linguistic and cultural links remain strong". It however considered that respect for the existing framework of minority protection, consisting of multilateral and bilateral treaties, must be held a priority. Unilateral measures by a State with respect of kin-minorities are only legitimate "if the principles of territorial sovereignty of States, *pacta sunt servanda*, friendly relations amongst States and the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination, are respected". The Commission would also like to make reference in this respect to Article 2 of the Framework Convention for the Protection of National Minorities¹⁷ (hereafter: the Framework Convention), to which Hungary is a Contracting Party. In this connection, it welcomes the provisions of Article Q of the new Constitution stressing the importance of ensuring "harmony" between international law and Hungarian law¹⁸ and wishes to underline their importance.

¹⁶(CDL-INF (2001) 19 Conclusions.

¹⁷"The provisions of this framework Convention shall be applied in good faith, in a spirit of understanding and tolerance and in conformity with the principles of good neighbourliness, friendly relations and co-operation between States".

¹⁸ "(2) Hungary shall ensure harmony between international law and Hungarian law in order to fulfil its obligations under international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in the form of legislation."

44. As to the issue of “collective rights”, it should be noted that, as indicated by the Explanatory Report of the Framework Convention, while “the rights and freedoms flowing from the principles of the Framework Convention may be exercised individually or in community with others”, “no collective rights of national minorities are envisaged”. This of course does not prevent Hungary, on its territory, to provide its own minorities with collective rights. Nevertheless, it is not up to the Hungarian authorities to decide whether Hungarians living in other States shall enjoy collective rights or establish their own self-governments.

45. The Venice Commission trusts that future interpretation of the Constitution and subsequent legislation and policies will be based on the interpretation of the said statement¹⁹ as a commitment to support the Hungarians abroad and assist them, in co-operation with the States concerned, in their efforts to preserve and develop their identity, and not as a basis for extra-territorial decision-making. The Commission wishes to emphasise that, in their dialogue with the Commission’s Rapporteurs, the Hungarian authorities have formally confirmed this narrow interpretation of the said statement.

Article H

46. The Venice Commission finds regrettable that Art. H, which regulates the protection of Hungarian language as the official language of the country, does not include a constitutional guarantee for the protection of the languages of national minorities. It however notes that Article XXIX guarantees the right to the use of these languages by Hungary’s “nationalities” and understands this provision as implying also an obligation for the State to protect these languages and to support their preservation and development.

Article L

47. Article L of the new Constitution contains a constitutional guarantee for the protection of the institution of marriage, which is defined as “the union of a man and a woman established by voluntary decision”, as well as of the family “as the basis of the nation’s survival”. This definition of marriage has been criticized, as it might be interpreted as excluding the union of same sex couples.

48. The Venice Commission notes in this respect that, as the ECtHR held in its judgment of 24 June 2010, in the case of *Schalk and Kopf v. Austria*, “*although, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same-sex marriage*” (§ 58).

49. The Court further held, in § 105 of its judgment that “*[t]he Court cannot but note there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes. (see *Courten*, cited above; see also *M.W. v. the United Kingdom (dec.)*, no. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom)*”

50. Moreover, although not explicitly addressing the institution of traditional marriage, the EU Charter states in its Article 9: “The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.” Also, Article 23 of the United Nation International Covenant on Civil and Political Rights, establishes that, “[t]he family is the natural and fundamental group unit of society and is entitled to

¹⁹“Hungary shall bear responsibility for the fate of Hungarian living beyond its borders”.

protection by society and the State.”²⁰ This Article further recognizes “[t]he right of men and women of marriageable age to marry and to found a family”²¹

51. In the absence of established European standards in this area and in the light of the above-mentioned case-law, the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator and, as such, it does not appear to prohibit unions between same sex persons (although such unions cannot enjoy protection under the institution of marriage). The Commission notes in this context that registered same-sex civil partnerships enjoy legal protection (although within certain limits) in Hungary since 2009.

Article N

52. According to Art. N § 3, the Constitutional Court is obliged to respect the “principle of balanced, transparent and sustainable budget management”. This statement gives reason to concern as it seems to give the budget management priority with respect to a weighing of interests in cases of infringements of fundamental rights. The Venice Commission considers that financial reasons should not in any way hamper the responsibility of the Constitutional Court to scrutinize an act of state and to declare it invalid if necessary (see further comments under *Article 24* below).

Article O

53. The provisions of Article O including an obligation for every person “to contribute to the performance of state and community tasks to the best of his or her abilities and potential” lack clarity, are too wide and may be difficult to apply. In particular, it is not clear either what kind of contribution could be imposed on “every person”, nor who will decide on this or what the significance of “every person” is. One may also raise the question whether such an obligation can be extended to non-citizens and, if this is the case, what would be the consequences.

Article R (See comments under *Rules of interpretation* above)

Article T

54. A list of legislative acts by which generally binding rules of conduct can be established, as well as related publication rules (Article T (3)) are provided by Article T of the Constitution. The list includes Acts of Parliament, government decrees, orders by the Governor of the national Bank of Hungary, orders by the Prime Minister, ministerial decrees, orders by autonomous regulatory bodies and local ordinances. In addition “legislation shall also include orders issued by the National Defence Council and the President of the Republic during any state of national crisis or state of emergency”. Art. T (3) lays down that “no legislation shall conflict with the Fundamental Law”. At the same time, Art. 23(2) stipulates that the decrees issued by autonomous regulatory bodies may not conflict with any act, government decree, any decree of the Prime Minister, ministerial decree or with any order of the Governor of the National Bank of Hungary. In other respects, the hierarchy of the enlisted legislative acts remains open.

55. The hierarchical relations between legislative acts are somehow complicated by the provisions on “special legal orders” empowering the National Defence Council (Art. 49(4)), the President (Art. 50(3)) and the Government (Art. 51(4), 52(3) and 53(2)) to “suspend the application of particular laws and to deviate from any statutory provision”. This power is not limited by any explicit requirement of proportionality and should be adequately regulated by the relevant cardinal law.

²⁰ International Covenant on Civil and Political Rights, art. 23, cl. 1, Dec. 16, 1966, 999 U.N.T.S. 171, [ICCPR], available at <http://www2.ohchr.org/english/law/ccpr.htm#art23>.

²¹ *Id.* at art. 23, cl. 2

56. Article T(4) defines “cardinal acts” as “[a]cts of Parliament, the adoption and amendment of which requires a two-thirds majority of the votes of Members of Parliament” (See related comments under *General Remarks* above).

C. Freedom and Responsibility (Article I to XXXI)

a) General remarks

57. The Chapter “Freedom and Responsibility”, laid down in Articles I to XXXI, regulates fundamental rights and has been built drawing on the model of the EU Charter of Fundamental Rights and Freedoms.

58. The Commission recalls that the EU Charter places the individual and individual dignity at its heart. It notes at the same time the particular emphasis put by several parts of the Constitution on the citizens’ responsibilities and obligations, which seems to indicate a shift of emphasis from the obligations of the state toward the individual citizens to the obligations of the citizens toward the community. In view of the vagueness of the relevant constitutional provisions, it would be advisable to specify obligations (and their legal consequences) such as :

- “Every person shall be responsible for his or herself, and shall be obliged to contribute to the performance of state and community tasks to the best of his or her abilities and potential.” (Article O);
- “All natural resources, especially agricultural land, forests and drinking water supplies, biodiversity – in particular native plant and animal species – and cultural assets shall form part of the nation’s common heritage, and the State and every person shall be obliged to protect, sustain and preserve them for future generations.” (Article P).

59. The “Freedom and Responsibility” Chapter moreover seems to contain a collection of provisions of different legal nature. It covers fundamental principles and rights, so-called social rights as well as individuals’ responsibilities. Fundamental rights are not restricted to individuals but also extended to communities²² and “subjects of law established by an act”. In the Commission’s view, constitutions should provide a clear differentiation between principles, legal guarantees, freedoms and responsibilities and present them in a systematic order.

60. The new Hungarian Constitution relegates the task to determine “the rules for fundamental rights and obligations” to “special Acts” (Art. I § 3). The Constitution gives no guidelines for “special Acts” and does not specify nor restrict their scope. Since Articles II-XXI contain many vague terms, it seems that there is a broad leeway in determining the content of these guarantees and obligations by special Acts and that constitutional guarantees may be seen as not full guarantees. One can conclude that, as a result of such a construction, there is always a risk that the constitutional provisions on freedom and responsibility might be eroded by special Acts. The Hungarian authorities are encouraged to make sure that, in the process of adoption/amendment of the relevant special acts, sufficient legal clarity and guarantees be provided for the effective enjoyment and protection of fundamental rights, in line with the applicable international standards. The Venice Commission stresses that the content of fundamental rights is a constitutional matter *par excellence*.

61. It is also essential to provide legal clarity, through the subsequent legislation, as far as restrictions of fundamental rights are concerned²³. In addition, in so far the rights guaranteed in the Constitution are also guaranteed in international and European conventions on human rights ratified by Hungary, limitation clauses specified in these international instruments should also be fully respected. For example, Article 52 § 1 of the EU-Charter, contains *inter alia* the

²² “(2) Hungary shall recognise the fundamental rights which may be exercised by individuals and communities.”

²³ “A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.”

requirement that in a state under the rule of law, any restriction of a human right should be "provided for by law."²⁴

b) Specific remarks

Article II

62. Article II of the Chapter "Freedom and Responsibility" stipulates that human dignity shall be inviolable. Furthermore, every human being shall have the right to life and human dignity, a right which can be found in any modern catalogue of fundamental human rights. As a special rule, Article II provides for the protection of embryonic and foetal life from the moment of conception.

63. This duty to protect may under certain circumstances come into conflict with Article 8 ECHR. Legislation regulating the interruption of pregnancy touches upon the sphere of private life of the woman concerned, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus.

64. According to the ECtHR case law, while the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must - in case of a therapeutic abortion - also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (ECHR judgement of 7. 2. 2006, Tysiac. / POL, no. 5410/03, § 107). Concerning Article 2 ECHR, the ECtHR is of the view that, in the absence of common standards in this field, the decision where to set the legal point from which the right to life shall begin lies in the margin of appreciation of the states, in the light of the specific circumstances and needs of their own population (ECtHR judgement of 8. 7. 2004 (GC), VO/. FRA, no. 53924/00, § 82).

65. At the same time, the preamble to the UN Convention on the Rights of the Child states "that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". Article 24, § 2 of this Convention requires moreover that "[s]tates take appropriate measures: "(d) To ensure appropriate pre-natal care for mothers".

66. However, this does not result in the recognition of an absolute right to life of the foetus. If Article 2 ECHR were held to cover the foetus, and its protection under this article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the unborn life of the foetus would be regarded as being of a higher value than the life of the pregnant woman (Commission decision of 13. 5. 1980, X./ UK, no. 8416/78, § 19).

67. In the light of the above, Article II of the Hungarian Constitution cannot be read as considering the life of the unborn child to be of higher value than the life of the mother and does not necessarily imply an obligation for the Hungarian State to penalise abortion. Weighing up the various, and sometimes conflicting, rights or freedoms of the mother and the unborn child is mandatory. Provided that such a balance of interests is met, the extension of the safeguards of Article II to the unborn child is in line with the requirements of the ECHR.

²⁴ "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

68. It is, at present, not clear how the Hungarian legislator will regulate abortion in the future. Concerns have been expressed that this provision might be used to justify legislative and administrative action restricting or even prohibiting abortion. For such a situation, the Venice Commission considers that the Hungarian authorities should pay particular attention to the ECtHR case law, including the recent judgment of 16 December 2010, in the case of *A, B and C v. Ireland*. In this judgement, the Court assessed that the Irish legislation struck “*fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.*” In its judgment, the Court had *inter alia* taken into account that Ireland allows abortion where there is a risk to the life of the expectant mother.

69. The Venice Commission would like to add that, in the light of Protocol 6 (“Restriction of death penalty”) and to Protocol 13 (“Complete abolition of death penalty”) to the ECHR, both ratified by Hungary, and taking into account that the will of Hungarian authorities is to give high protection to human life, Article II nor any other Article in the Constitution mentions explicitly the complete abolition of the death penalty.

Article IV

70. By admitting life imprisonment without parole²⁵, be it only in relation to the commission of wilful and violent offences, Article IV of the new Hungarian Constitution fails to comply with the European human rights standards. More specifically, it is only in line with Article 3 ECHR under certain conditions, as applied by the ECtHR in its case law. In its judgment of 12 February 2008 (*Kafkaris v. Cyprus*, no. 21906/04), the ECtHR summarized the case law as follows:

“97. The imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention [...]. At the same time, however, the Court has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 [...].

*98. In determining whether a life sentence in a given case can be regarded as irreducible the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. An analysis of the Court's case-law on the subject discloses that where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3. The Court has held, for instance, in a number of cases that where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, that it could not be said that the life prisoners in question had been deprived of any hope of release (see, for example, *Stanford*, cited above; *Hill v. the United Kingdom* (dec.), no. 19365/02, 18 March 2003; and *Wynne*, cited above). The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited (see for example, *Einhorn* (cited above, §§ 27 and 28). It follows that a life sentence does not become “irreducible” by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible.*

101. In reaching its decision the Court has had regard to the standards prevailing amongst the member States of the Council of Europe in the field of penal policy, in particular concerning sentence review and release arrangements [...] (). It has also taken into account the increasing concern regarding the treatment of persons serving long-term prison sentences, particularly life sentences, reflected in a number of Council of Europe texts (see paragraphs 68-73 above).”

²⁵ “No person shall be deprived of his or her liberty except for statutory reasons or as a result of a statutory procedure. Life imprisonment without parole shall only be imposed in relation to the commission of wilful and violent offences.” (Article IV (2)).

71. In this regard, the Venice Commission refers to its previous comments stressing the particular significance of the interpretation of constitutional provisions on fundamental rights and freedoms in the light of human rights treaties binding on Hungary and related case-law, as it results from Article I (3) and Article Q(2) of the new Constitution (see related comments under *Rules of Interpretation* above).

Article VII

72. Article VII contains the right of freedom of thought, conscience and religion. According to its second paragraph, State and Churches shall be separate and Churches shall be autonomous. Furthermore, the State shall cooperate with the Churches for community goals.

73. Article 9 ECHR guarantees the freedom of thought, conscience and religion. That freedom entails, *inter alia*, freedom to hold or not to hold religious beliefs, and to practise or not to practice a religion (ECtHR judgement of 18. 2.1999 (GC), *Buscarini and others* ./ SMR, no. 24645/94, § 34). Article 9 ECHR applies not only to individuals but also to churches and religious communities. According to the ECtHR, the State shall act neutrally and impartially when organising the exercise of different religious beliefs in order to uphold public security, religious harmony and tolerance in a democratic society. A separation between state and churches is an inevitable consequence of the rule of law, respect of human rights and the idea of democracy.

74. Mentioning the co-operation between churches and the State for community goals in Article VII does not constitute a State Church (although such systems exist in Europe), insofar as it is explicitly stipulated that churches shall be autonomous and separated from the state. The cooperation between state and churches can be seen as an additional value for the overall State policy in this field and may even strengthen the State's role as a neutral and impartial arbitrator and organiser. Furthermore, Article 17 TFEU²⁶ stipulates that the European Union shall maintain an open, transparent and regular dialogue with churches and non-confessional organisations. Also, as stated by the Venice Commission in its 2004 Guidelines for Review of Legislation Pertaining to Religion and Belief, "[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination" (Chapter II.B.3). Against this background, Article VII is in line with Article 9 ECHR.

Articles IX - X

75. The Commission finds it problematic that freedom of the press and the freedom of science, art and learning are not formulated as individual's rights which can be enforced by a court of law, but as obligations of the state. It notes that the detailed rules (Art. IX § 2) and the "framework" for the "freedoms" protected under Art. X, shall be determined by law, and not by the Constitution itself.

Article XV

76. Article XV guarantees for all persons equal treatment before the law and states that special measures should be taken to promote effective implementation of this principle. Moreover, according to Article XV (2), "*Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of race, colour, gender, disability, language, religion, political or other views, national or social origin, financial, birth or other circumstances whatsoever*".

²⁶1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

2. The Union equally respects the status under national law of philosophical and non-confessional organisations.

3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations." (Treaty on the functioning of the European Union, Consolidated version, 30 April 2008, Article 17).

77. Article XV lacks any mention of the prohibition of discrimination on the ground of sexual orientation. This however appears to be common to the majority of European Constitutions. In contrast, various international instruments, including the ICCPR (articles 2 and 26), the TFEU (article 19), and the Directive 2000/78/EC (the so-called “Employment Equality Directive”), as well as, more recently, the EU Charter (article 21§1), explicitly protect against discrimination on the ground of sexual orientation.

78. The Venice Commission would like to draw the attention of the Hungarian authorities to recent case law related to the meaning of the prohibition of discrimination, namely a recent judgment of 28 September 2010 (in the case of J.M. v. the United Kingdom), in which the ECtHR held (§54):

“54. As the Court's case-law establishes, for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations, such difference being based on one of the grounds expressly or implicitly covered by that provision. Such a difference in treatment is discriminatory if it lacks reasonable and objective justification, that is to say it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim pursued. There is a margin of appreciation for States in assessing whether and to what extent differences in otherwise similar situations justify a different treatment, and this margin is usually wide when it comes to general measures of economic or social strategy (see most recently Carson and Others v. the United Kingdom [GC], no. 42184/05, § 61, 16 March 2010). However, where the complaint is one of discrimination on grounds of sexual orientation, the margin of appreciation of Contracting States is narrow (Karner, § 41, Kozak v. Poland, no. 13102/02, § 92, 2 March 2010). The State must be able to point to particularly convincing and weighty reasons to justify such a difference in treatment (E.B., § 91).”

79. Furthermore, in its recent judgment of 24 June 2010 in the case of Schalk and Kopf v. Austria, the ECtHR itself summarised this case law (see § 87²⁷).

80. Article XV is an open-ended provision (“or other circumstances”). For that reason, the Hungarian Constitution might create the impression that discrimination on this ground is not considered to be reprehensible. The Venice Commission however proceeds from the assumption that the Hungarian Constitutional Court will interpret the grounds for discrimination in a manner according to which Article XV prohibits also discrimination on grounds of “sexual orientation”. This is in line with the ECtHR case law, which regards “sexual orientation” as a prohibited distinctive feature under Article 14 ECHR, although the wording of Article 14 ECHR does not include this ground of discrimination.

81. It is important to note in this context that the Hungarian Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities forbids discrimination based on factors that include sexual orientation and sexual identity in the fields of employment, education, housing, health and access to goods and services.

²⁷“87. The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45; Norris v. Ireland, 26 October 1988, Series A no. 142; and Modinos v. Cyprus, 22 April 1993, Series A no. 259) and the discharge of homosexuals from the armed forces (see Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999-VI). Others were examined under Article 14 taken in conjunction with Article 8. These included, inter alia, different age of consent under criminal law for homosexual relations (L. and V. v. Austria, nos. 39392/98 and 39829/98, ECHR 2003-I), the attribution of parental rights (Salgueiro da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX), permission to adopt a child (Fretté v. France, no. 36515/97, ECHR 2002-I, and E.B. v. France, cited above) and the right to succeed to the deceased partner's tenancy (Karner, cited above)”.

Article XXIII

82. Article XXIII (6) of the new Constitution establishes that “a person disenfranchised by a court for committing an offence shall have no suffrage”. The Venice Commission considers that the ECtHR case law²⁸ relating to Article 3 of Protocol No. 1 is of particular relevance for the subsequent interpretation and application of this constitutional provision.

Article XXIX

83. The Commission notes that, while the present Constitution asserts the State’s obligation to ensure the fostering of the cultures of national and ethnic minorities, the use of their native languages, education in their native languages and the use of names in their native languages²⁹, the basic provisions of the new Constitution dealing with the protection of Hungary’s “nationalities” only make reference to the “respect” of the rights of citizens belonging to national minorities, without establishing any positive obligation on behalf of the State. The term “protect” is not used in relation to minority rights and the term “promote” is only mentioned in the Preamble in reference to “the cultures and languages of nationalities living in Hungary”. It is true however that the Preamble includes a broader commitment of the State for the protection of its nationalities. The Venice Commission encourages the Hungarian authorities to make sure that such an approach will not result, in practice, in a diminution of the level of minority protection previously guaranteed in Hungary (see also comments under *The Commissioner for Fundamental Rights*).

Article XXXI

84. Article XXXI stipulates the duty of every adult male Hungarian citizen living in Hungary to perform military service and the possibility for those, whose conscience does not allow such a military service, to perform an unarmed service. Furthermore, every adult Hungarian citizen living in Hungary may be ordered to perform work for national defence purposes during a state of national crisis and to engage in civil protection for the purpose of national defence and disaster management:

85. The exception for conscientious objectors may raise a specific problem. While it is true that the ECHR leaves it to the member states to decide whether to establish any obligation to perform armed services, the obligation to perform unarmed service in Article XXXI has to be interpreted using a systematic approach. Unarmed services should be performed outside the army in order to avoid potential conflicts with Article 9 ECHR (the right to freedom of thought, conscience and religion). This would resemble regulations in other European states and their handling of armed and unarmed services.

86. Article 4 ECHR prohibits slavery, servitude and forced labour. Explicit exceptions are listed in § 3 and include, *inter alia*, any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service, as well as any service exacted in case of an emergency or calamity threatening the life or well-being of the community (see also comments under *Special legal orders* below).

87. In view of Article 4 ECHR, the compulsory performance of work for national defence purposes during a state of national crisis as stipulated in Article XXXI § 4 is in line with human rights standards. The duty of Hungarians to engage in civil protection for the purposes of national defence and disaster management lies within the scope of Article 4 § 3 ECHR as well. Situations that come naturally with the necessity of national defence, or disasters, can be seen as cases of “emergency or calamity”.

²⁸ See in particular *Hirst v. the United Kingdom* (No. 2), no. 74025/01, Judgment of 6 October 2005, and *Frodl v. Austria*, no. 20201/04, Judgment of 8 April 2010.

²⁹ Article 68(2) 1949 Constitution of the Republic of Hungary, as amended.

88. In addition, Article XXXI § 5 of the Hungarian Constitution establishes that every person may be ordered to provide economic and financial services for the purpose of national defence and disaster management.

89. The provision of economic services can also be covered by the exception of Article 4 § 3, which exists for situations threatening the life or well-being of the community. In contrast, the duty to provide financial services has to be considered under Article 1 Protocol no. 1 ECHR³⁰, which provides for the right to the peaceful enjoyment of one's possessions. Public charges such as taxes can be regarded as an interference with Article 1 Protocol no. 1 ECHR. Such an interference can be justified, when a fair balance between the right to peaceful possession of property and the concerned public interest is struck³¹. Particular attention should therefore be paid, in the practical implementation of Article XXXI § 5, to the respect of the said balance.

D. The State

90. The Venice Commission notes that the new Constitution maintains the current parliamentary system. It further notes that, in spite of the change of the country's name (from the Republic of Hungary to Hungary, Article A, "Foundation"), Hungary's present form of government - a republic, governed by the principles of democracy, rule of law and separation of power (as confirmed by the provision of the "Foundation" chapter - is maintained. Specific sections (although unevenly elaborated) are dedicated to the state powers, the main public institutions and their interrelations. The weakening of the parliamentary majority's powers and of the position of the Constitutional Court in the Hungarian system of checks and balances, as it results from the new Constitution, is for the Venice Commission a reason of concern.

Article 23 (Autonomous regulatory bodies)

91. Article 23 creates a power for the Parliament to establish autonomous regulatory bodies through a cardinal law. According to the Hungarian authorities, this provision has been adopted mainly to enable setting up the autonomous bodies that are required by EU legislation. Nevertheless, as its wording does not explicitly state this aim, one could see a risk that this instrument could be used (too extensively) as a way to curtail the parliament's powers. It is therefore important that this provision is not used to restrict unduly the scope of parliamentary control mechanisms.

Article 24 (The Constitutional Court)

92. Since 1990, the Constitutional Court has played a vital role in the Hungarian system of checks and balances. Moreover, the Venice Commission is pleased to note that the Court has gained international recognition through its case law.

93. Article 24 does not regulate in detail the mandate, organisation and functioning of the Constitutional Court, leaving it the cardinal law to define more precisely the scope of its competences and related rules and procedures. In addition, further articles of the Constitution are relevant for the operation of the Constitutional Court (see related comments under *Rules of Interpretation, Public Finance*, etc.).

³⁰ "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

³¹ See in this respect ECtHR related case law, in particular ECtHR judgement of 18.12.1984, *Sporrong v. Lönnroth./SWE.*, no. 7151/75, § 73.

94. As far as the composition of the Court is concerned, the new Constitution increases the number of its members from 11 to 15 and prolongs their term of office from nine to twelve years. In addition, it transfers the election of its president from the Court to Parliament (by two-thirds majority) and prolongs his/her mandate to the entire duration of the mandate.

95. The Venice Commission acknowledges that election of the Constitutional Court's president by a political actor, and not by the Court itself, is a widely accepted phenomenon. It however notes that, according to the present Constitution of Hungary, the judges have elected the president from their own ranks, a system which is seen, in general, as a stronger safeguard for the independence of the Constitutional Court.

96. Regarding the duration of term of office of the Constitutional Court's judges, which is prolonged to twelve years, the Constitutional Court Act should preferably state that it is non-renewable, to further increase the independence of the Constitutional Court Judges.³²

97. The Commission notes that further constitutional amendments to the Constitution still in force in Hungary - aiming to already introduce the above-mentioned changes to the number of judges of the Constitutional Court, their term of office and the election of the Court's president - are currently under discussion. The envisaged changes and the initiative to introduce them through an amendment to the present Constitution immediately after the enactment of the new Constitution have raised concerns within Hungarian society and represent a reason for concern for the Venice Commission also.

98. In the Commission's view, the above-mentioned changes in the composition and mode of election of the Constitutional Court must also be assessed in conjunction with the competences of the Court. On the one hand, the Venice Commission notes that the new Constitution has in general taken into account its recommendations contained in its March Opinion. On the other hand, in the light of the 2010 curtailment of the Court's powers³³, confirmed by the new Constitution and of the recent developments mentioned in the previous paragraphs, the Commission is concerned that 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.

99. The Constitution imposes specific criteria for the management of the state budget as well as strict limitations to the State debt. Nevertheless, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, it gives a special power of intervention in this domain to the new Budget Council. In line with the "veto power" of the Budget Council, the said curtailment of the powers of the Constitutional Court and which regards the budget, taxes and other financial legislation is conditional on the state debt exceeding 50 % of the GDP. This will, however, be the case for the foreseeable future. This limitation of the Court's competences also covers the State Budget "implementation", which may expand even further the number and scope of acts that will not be subject of constitutional review. It is strongly recommended that the cardinal law regulating the competences, organisation and operation of the Constitutional Court (as required by Article 24 § 5 of the new Constitution) provide all clarifications needed in this respect (see also related comments under *The Budget Council*).

³²See CDL-AD (2009) 042, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia, § 14. See also CDL-INF(96) 2, Opinion 6/1995 Regulatory Concept of the Constitution of Hungary, § 15, stating: "to ensure that judges are completely independent of the bodies which elect them, it would be preferable if their term of office - provided it is sufficiently long - were not renewable".

³³ See CDL-AD(2011)001, § 9. "As a result of a constitutional amendment in November 2010, a serious limitation of the competences of the Constitutional Court was introduced. According to this amendment, the Constitutional Court may assess the constitutionality of Acts related to the central budget, central taxes, stamp duties and contribution's, custom duties and central requirements related to local taxes exclusively in connection with the rights to life and human dignity, the protection of personal data, the freedom of thought, conscience and religion or with rights related to the Hungarian citizenship. Also, the Court may only annul these Acts in case of violation of the abovementioned rights."

100. In this context, the Commission recalls its remarks in its already mentioned Opinion of March 2011, on the role and functions of the Constitutional Court:

“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”.(§ 54; see also paragraphs 51-53).

101. Article 6 § 8³⁴ may also be seen as a potential limitation to the authority of the Court. The Commission stresses in this respect that, to be referred to the Constitutional Court again, a law must differ substantially, in its wording, from the previously reviewed text. Otherwise, a second review is superfluous. The requirement of an expedited procedure in § 8 is also problematic. If the doubts regarding the constitutionality of a law have not been entirely dispelled through a different wording, the Court should be given sufficient time for a new deliberation. If from the Parliament’s view the adoption of the act is urgent, the Parliament can decide to adopt it without the objected provision and provide for a later amendment or amend the provision in a way that evidently takes into account all objections.

102. As indicated above, the provisions of Article N § 3 of the new Constitution, impose the Constitutional Court the obligation to respect the “principle of balanced, transparent and sustainable budget management” in the course of performing its duties. The Commission wishes to understand this obligation as a requirement applicable to the administrative management of the Constitutional Court as a public institution, and not as an interpretation principle to be enforced in the context of its constitutional review task. In addition, it considers that this principle should not be applied in a way that adversely affects the financial autonomy and the overall independence of the Court in its functioning (see remarks on *Article N* above).

Articles 25 to 28 (Courts)

103. The new Constitution only establishes a very general framework for the operation of the judiciary in Hungary, leaving it to a cardinal law to define “the detailed rules for the organisations and administration of courts, and of the legal state and remuneration of judges” (Article 25 (7)). Although Article 26 (1) clearly stipulates that individual judges shall be independent and only subordinated to the law, a clear statement that courts constitute a separate power and shall be independent is missing. This however results from the general principle of separation of powers enshrined in Article C of the “Foundation” chapter. It is recommended that a clear reference to the principle of the independence of the judicial power and concrete guarantees for the autonomous administration of the judiciary be included in the relevant cardinal law.

104. During its visit to Budapest in May 2011, the Commission was informed that a far-reaching reform of the judiciary was under preparation in Hungary. Nevertheless, there is very limited information on this important reform in the Constitution and little knowledge within Hungarian society on its details.

³⁴ “The Constitutional Court may be requested to re-examine the Act discussed and adopted by Parliament under Paragraph (6) for its conformity with the Fundamental Law under Paragraphs (2) and (4). The Constitutional Court shall decide on the repeated motion as soon as possible but no later than ten days from receipt”.

105. This part of the Constitution also contains rather vague and general provisions. This entails a significant degree of uncertainty with regard to the content of the planned reform and gives reason to concern as it leaves scope for any radical changes. The Hungarian authorities are strongly encouraged to ensure that any future changes in the area of the judiciary and the envisaged reform as a whole are fully in line with the requirements of the separation of powers and the rule of law, and that effective guarantees are available for the independence, impartiality and stability of judges.

106. Provisions concerning the system of courts are of very general nature. Article 25 (4) only states that “the judiciary shall have a multi-level organization” and their detailed regulation is relegated to a cardinal law. In the absence of transitional provisions in the new Constitution, it is difficult to understand not only what “multi-level organization” means, but also whether all existing courts will be maintained and how the future structure will affect the status of judges.

107. It is also important to note that the new Constitution does not contain any reference to the National Council of the Judiciary, the body entrusted by the present Constitution (Article 50 §1) with the administration of the courts. It is therefore not clear whether this body will continue to exist, which solutions will be found to ensure adequate management of courts until the justice reform is effectively implemented and which mechanism will be put in place by the reform. The Venice Commission calls upon the Hungarian authorities to make sure that, whatever the chosen mechanism, strong guarantees will be provided for the independent administration of courts and no room for political intervention will be left.

108. According to Article 25 (1) of the new Constitution, the “Curia” (the Hungarian historical name for the Supreme Court), will be highest justice authority of Hungary. In the absence of transitional provisions and despite the fact that the election rules for its president remain unchanged in the new Constitution³⁵ a question arises: will this change of the judicial body’s name result in replacement of the Supreme Court’s president by a new president of the “Curia”? As to the judges, they “shall be appointed by the President of the Republic as defined by a cardinal Act.” (Article 26 (2)). This also leaves of margin of interpretation as to the need to change (or not) the composition of the supreme body.

109. As stipulated by Article 26 (2), the general retirement age will also be applied to judges. While it understands that the lowering of the judge’s retirement age (from 70 to 62) is part of the envisaged reform of the judicial system, the Commission finds this measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges . According to different sources, this provision entails that around 300 of the most experienced judges will be obliged to retire within a year. Correspondingly, around 300 vacancies will need to be filled. This may undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary. In the absence of sufficiently clear information on the reasons having led to this decision, the Commission trusts that adequate solutions will be found, in the context of the reform, to address, in line with the requirements of the rule of law, the difficulties and challenges engendered by this measure.

110. Article 27 (3), stipulating that “In cases defined by law, court secretaries may also act within the competence of sole judges subject to Art. 26(1)”, also lacks precision and creates ground for questions. Can the court secretary, who is not a judge, act as a judge? If this will be the case, this provision seems questionable from the perspective of the European standards relating to the status of judges. It is therefore essential that, in the context of the adoption of legislation to determine the specific “cases” referred to by Article 27 (3), the applicable standards are fully respected. In particular, clear mention should be made of the requirements to fulfil in order to discharge judicial duties and more general, of the conditions which should

³⁵“The President of the Curia shall be elected from among its members for nine years by Parliament on the recommendation of the President of the Republic. The election of the President of the Curia shall require a two-thirds majority of the votes of the Members of Parliament” (Article 26 (4)).”

guarantee the competence, independence, and impartiality of judges and tribunals (cf Article 6 ECHR).

111. Article 28 seems to contain interpreting guidelines for courts, to be followed in the application of laws: *“In applying laws, courts shall primarily interpret the text of any law in accordance with its goals and the Fundamental Law. The interpretation of the Fundamental Law and other laws shall be based on the assumption that they serve a moral and economical purpose corresponding to common sense and the public benefit.”* The Commission understands that, since it is located in the section titled “Courts”, this statement only aims at ordinary courts, excluding the Constitutional Court. In view of its rather general nature, it sees it more as a political declaration than as a constitutional interpretative directive. Nevertheless, the above-mentioned assumption should not be used, in the context of the interpretation of the Constitution, as a way to relativize, in the light of concrete moral and economic needs, the normative content of the Constitution.

Article 29 (Prosecution Services)

112. Compared to Chapter XI of the present Constitution, Article 29 of the new one reflects an evolution in the approach of the role of the prosecutor's office. While the present Constitution seems to establish, as a primary function of the Chief Public Prosecutor, the protection of the rights³⁶, the new Constitution focuses on the contribution of the Supreme Prosecutor and prosecution services to the administration of justice.

113. The Supreme Prosecutor and prosecution services shall: exercise rights in conjunction with investigations; represent public accusation in court proceedings; supervise the legitimacy of penal enforcement and exercise other responsibilities and competences defined by law (Article 29(2)). This approach is in line with the findings of the Venice Commission in its Report on European Standards as regards the Independence of the Judicial System³⁷:

81. Further, in its Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, the Venice Commission found that:

“17. [...] The general protection of human rights is not an appropriate sphere of activity for the prosecutor's office. It should be better realised by an ombudsman than by the prosecutor's office”³⁸.

114. The Constitution is very laconic as regards the legal status of prosecutors. It only regulates the prosecutors' appointment and the election of the Supreme Prosecutor, and refers to a future cardinal law for the detailed rules of the organisation and operation of prosecution services, the legal status and remuneration of the Supreme Prosecutor and prosecutors (Article 29 (7)). There is no indication, in the constitutional provisions, of any particular changes that would affect the legal status of the prosecutors.

Article 30 (The Commissioner for Human Rights)

115. According to Article 30, one single Commissioner for Fundamental Rights will replace the previous four parliamentary commissioners (specialized ombudspersons), whose general responsibility will be to “protect fundamental rights”. His or her deputies will be vested with the task to specifically to “defend the interests of future generations and the rights of nationalities living in Hungary” (Article 30.2). As it results from Article VI.3, an independent authority in charge of supervising “the exercise of the right to the protection of personal data and the

³⁶“The Chief Public Prosecutor and the Office of the Public Prosecutor of the Republic of Hungary shall ensure the protection of the rights of natural and legal persons as well as organizations without legal personality, and shall prosecute consistently any act which violates or endangers the constitutional order, security and independence of the country” (Article 51, § 1).

³⁷ CDL-AD(2010)040, Report on European Standards as regards the Independence of the Judicial System: Part II - the Prosecution Service, Venice, 17-18 December 2010.

³⁸ CDL-AD(2009)048, Opinion on the Draft Law of Ukraine on the Office of the Public Prosecutor, Venice, 12-13 June 2009, emphasis added.

access to data of public interest” will replace the commissioner for personal data and freedom of information. While the detailed rules for the Commissioner for Fundamental Rights shall be established by separate act, no information is provided with regard to the future competences and functioning of the new data protection authority, nor reference is made to any related subsequent legislation.

116. The Venice Commission acknowledges that states enjoy a wide margin of appreciation with regard to such institutional arrangements, which depend to a large extent on the domestic specific situation. Moreover, one single ombudsperson or multiple ombudspersons may be more appropriate at different stages of the democratic evolution of states³⁹. This being said, it considers it important that the above-mentioned re-organisation 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. More generally, it deems important to ensure that the decrease in the number of independent institutions does not have a negative impact on the Hungarian system of check and balances and its efficiency.

Articles 31-35 (Local governments)

117. Article 31 (1) of the new Constitution stipulates that “[I]n Hungary local governments shall be established to administer public affairs and exercise public power at a local level”. Nevertheless, no explicit mention is made of the principle of local self-government. The Venice Commission recalls that the European Charter of Local Self-Government (CEAL), which is binding for Hungary, requires compliance with a minimum number of principles that form a European foundation of local democracy, including as a starting point the principle of local self-government⁴⁰.

118. According to Article 2 of the CEAL, “the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution”. It is recommended that the cardinal law entrusted with the definition of local governments rules duly stipulate this and other important key principles laid down in the CEAL: the principle of subsidiarity, the principle of financial autonomy and that of adequacy between resources and competences, the legal protection of local self-government, the limits of the administrative supervision of local authorities. Adequate guarantees should be provided for their effective implementation.

119. With regard to local authorities’ supervision, the new Constitution enables metropolitan or county government offices to adopt, upon court decision, local ordinances in cases of failure by the local authorities to introduce such acts under their “statutory legislative obligation” (Article 32 (5)). At present, the government supervises the lawful operation of local authorities and can only react to shortcomings by means of legal action, without being allowed to introduce local acts on their behalf. In the absence of more detailed rules, this provision might be problematic from the point of view of the principle of local self-government. According to Article 8.2 of the CEAL, “[a]ny administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-

³⁹ See CDL-AD(2007)020, Opinion on the possible reform of the Ombudsman Institution in Kazakhstan, Venice, 1-2 June 2007, § 25: “ On balance, however, it would seem preferable to follow the third-named alternative in **Kazakhstan**, where the Ombudsman institution is presently in a stage of consolidation and development, and **to organise the functions of the specialised ombudsperson within the overall institution of the national Ombudsman**, by way of establishing a special department and/or appointing a deputy ombudsman for the special field. The special function presumably could then benefit directly from the status and legitimacy of the general Ombudsman, and the connection could in fact lend added strength and efficiency both to the special function and the national institution. If this approach is followed, it would be appropriate to have the deputy ombudsperson or head of department appointed either by the Ombudsman or by the appointing authority (Parliament/President) upon recommendation of the Ombudsman.”

⁴⁰ “Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population” (CEAL, Article 3 § 1).

level authorities in respect of tasks the execution of which is delegated to local authorities.” It is therefore recommended that the subsequent local self-government legislation provide clarity in this respect. In particular, a clear distinction should be established between, on the one hand, the local authorities’ own competences and those delegated by the central government and, on the other hand, between the control of the local authorities’ activities’ legality and supervision of their decision’s expediency.

120. Art. 35(5), allowing for Parliament’s dissolution of local elected bodies on the ground of a violation of the Constitution, is also a source of concern. Such an important decision seems not to require a binding court decision and the role of the Constitutional Court in this context appears to be only of an advisory nature. It is recommended that the specific rules applicable in such situations, to be established by cardinal law (Article 35(4)), take duly into account the relevant principles of the CEAL and include guarantees to enable their respect.

Articles 36 to 45 (Public Finances)

The competence of the Constitutional Court

121. The Chapter on the Public Finances contains provisions which aim to bring about an improvement in the State finances. Specific restriction on the Parliament and Government budget-related decisions are set out in Art. 36 § 4, Art. 36 § 5, Art. 37 § 2-3.

122. The adoption of constitutional provisions which impose to maintain the state deficit below 50 % per cent of GDP, responds to a legitimate aim. Thus, it cannot be criticized in the light of international and European standards of democracy, human rights and the rule of law, on the condition that the laws implementing the budget - by raising taxes or by cutting the expenses of the state - comply with these standards.

123. From this perspective, serious concern has to be expressed as to Article 37 (4) of the new Constitution, which openly leaves breaches of the Constitution without a sanction by stating that the Constitutional Court’s power to review is limited to the fields explicitly listed. Article 37 (4) reads as follows:

“(4) As long as state debt exceeds half of the Gross Domestic Product, the Constitutional Court may, within its competence set out in Article 24(2)b-e), only review the Acts on the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes for conformity with the Fundamental Law or annul the preceding Acts due to violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship [...]”.

124. In its March Opinion, the Venice Commission has already expressed its regrets with regard to this serious limitation of the competences of the Constitutional Court introduced in November 2010 by constitutional amendment. In its view, such a limitation creates the impression that capping the national budget at 50 per cent of the GDP may be considered to be such an important aim that it may even be reached by unconstitutional laws (see related comments under the chapter on the Constitutional Court).

125. It is important to note in this respect that the limited competence of the Court to assess whether a tax law violates “the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship” still allows the Hungarian Court to sanction potential abuses of the tax power. In a recent judgment dated 6 May 2011, the Court had to rule on a 98% tax law with a retroactive scope of five years. In its ruling, the Court held that “[T]he retroactive taxation of a legal income, generated without infringing any laws, in a tax year which has ended, represents such a degree of public interference into an individual’s autonomy that it lacks an acceptable reason, and thus, goes against human dignity...”

126. Furthermore, as it results from the ECtHR case law⁴¹, tax laws fall within the ambit of Article 1 of the First Protocol of the ECHR. According to the ECtHR, a retroactive tax law imposing an excessive burden on the citizens can be considered to be a violation of Article 1 of the First Protocol of the ECHR⁴².

127. In addition, to the extent that the words “the Acts on the State Budget and its implementation” in Article 37 (4) of the new Constitution also apply to laws cutting state expenses, the Venice Commission wishes to stress that, as indicated by the ECtHR case-law, the notion of “possessions” in Article 1 of the First Protocol covers all pecuniary rights, including welfare benefits, both of a contributory and of a non-contributory nature⁴³.

128. While the ECtHR recognised in a recent judgment that states dispose of a large margin of appreciation in this field⁴⁴, this margin of appreciation is however not unlimited. On the one hand, the legislator will have to strike a fair balance between the demands of the general interest of the public and the requirements of the protection of the individual’s fundamental rights, not imposing a disproportionate and excessive burden on certain private persons (Article 1, First Protocol). On the other hand, it will have to respect the principle of non-discrimination: persons in analogous or relevantly similar positions may not be treated differently without an objective and reasonable justification (Article 14 ECHR). It is therefore essential, in states having opted for a constitutional court, that this court should be entitled to assess the compliance of all laws with the human rights guaranteed in the constitution, and especially with human rights of such a particular importance: the right not to be discriminated and the right not to be unduly deprived of its possessions.

The Budget Council

129. The establishment and the competences of the Budget Council, as well as its composition and the way it is established (Article 44(4))⁴⁵, has a significant impact on the adoption of the State Budget and the Parliament’s related power. This is of key importance for Parliament as, in addition to legislation, the Budget is the main instrument for parliamentary majority to express and implement its political programme. Article 44(3), interpreted in conjunction with Article 36(4)-(5), seems to grant the non-parliamentary Budget Council a “veto” power over Parliament’s decision for the foreseeable future.

130. The adoption of the State budget is part of the core competence of the Parliament and usually its main exclusive privilege. Making its decision dependent on the consent of another authority - with limited democratic legitimacy, as none of the members of the Council is directly elected - is therefore problematic and might have a negative impact on the democratic legitimacy of budgetary decisions. Such decisions may be complicated further by the fact that the Council’s composition will consist of members appointed by a previous majority. Moreover, apart from the general requirements stipulated in Article 36(4)-(5) previously quoted, the Constitution does not set up any condition for the “prior consent” of the Budgetary Council. The Venice Commission trusts that the Hungarian authorities will avoid a too rigid/restrictive interpretation of the “prior consent”, and that this condition will be interpreted and implemented, as it results from Article 44 (1)-(2): as a “statutory contribution to the preparation of the State Budget Act” through “supporting Parliament’s legislative activities and examining feasibility of the State Budget” (and not as an absolute power to block the adoption of the budget).

⁴¹ See e.g. ECHR decision n° 19276/05, Allianz – Slovenska poisťovna a.s. and others against Slovakia, 9 November 2010.

⁴² ECHR, *di Belmonte v. Italy*, 16 June 2010., appl. 72638/01; see also ECHR *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, judgment 23 October 1997, §§ 80-82. See also, on depriving private persons retroactively of their right to payment ECHR, case *Pressos Compania Naviera SA and others v. Belgium*, judgment of 20 November 1995, Series A, n°332

⁴³ See in particular the recent ECtHR judgment, *Plalam S.P.A. v. Italy*, 18 May 2010: § 36.

⁴⁴ *Idem*, § 46.

⁴⁵ “The members of the Budget Council shall include the President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office. The President of the Budget Council shall be appointed for six years by the President of the Republic”.

Levels of regulation

131. Several provisions of the Chapter on Public Finances refer to cardinal acts. These provisions are related to issues such as: general taxation and the pension system; the organisation and operation of the National Bank and its responsibility for monetary policy; the organisation and operation of the State Audit Office, the operation of the Budget Council.

132. As indicated before, there are no standards or precise criteria to determine the issues which should be regulated in the Constitution itself or in special majority acts. Nevertheless, the Commission considers to be in contradiction with the majority rule, which normally applies in a democracy, that the social, fiscal and financial policies of one political majority at a specific moment in time are cemented through a two third majority in the constitution or in cardinal laws. As a result, it will be particularly difficult to translate the “free expression of the opinion of the people in the choice of the legislator” (Article 3, First Protocol to the ECHR), in future elections, in changes of these policies. The way in which the cardinal laws will be drafted is thus of key importance (see related comments under *Preliminary Remarks. Cardinal Laws*).

Articles 45 - 46 (The Hungarian Defence Forces and the Police and National Security Services)

133. It is a Hungarian constitutional tradition that the issues of armed forces and police are regulated by the Constitution (see also chapter VIII of the present Constitution). In many countries, it is a matter of an ordinary law.

134. The Venice Commission notes that, in line with the main constitutional values referred to in the Preamble, the provisions of Article 45 clearly states the main aims of the military defence of the country, namely Hungary’s independence, territorial integrity and state borders. It is commendable that the constitutional provisions also open the way for common defence, peacekeeping tasks arising from international agreements.

Articles 48 to 54 (Special legal orders)

135. The provisions of Articles 48-54 are provided for a situation when normal functioning of the state’s organs are seriously disturbed and it is impossible to make use of the regulations applicable to periods when such disturbances do not exist. The Hungarian Constitution is not unique in regulating special legal orders in such a detailed way (see in this respect the Polish or the German Constitution).

136. The new Constitution sets out the conditions for the establishment of different types of special legal orders (the state of national crisis, the state of emergency; the state of preventive defence; unexpected attacks; the state of extreme danger) as well as specific conditions for the adoption of related extraordinary measures.

137. In order for special legal orders to be in line with the European standards, certain specific conditions must indeed be fulfilled. The Constitution itself in its Article I (3) dealing with restrictions to fundamental rights states that „ [A] fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right”.

138. In the light of the Venice Commission’s conclusions in its Opinion concerning the Protection of Human Rights in Emergency Situations⁴⁶, this Chapter of the Hungarian Constitution appears to be generally in line with the European standards.

⁴⁶ (CDL(2006)015), § 35 and § 38.

139. Increased clarity would be needed as to the scope of the cardinal law referred to in Article 50 (3), 51 (4), 52 (3), 53 (1-2). It is not entirely clear, from the wording of these provisions, whether the cardinal law only relates to “any extraordinary measure” or also - what would be advisable - to the suspension of the application of particular laws and the deviation from any statutory law. The general wording of Article 54 (4) seems to confirm this wider interpretation: “The detailed rules for any special legal order shall be defined by a cardinal Act.” When the relevant cardinal law is adopted or amended following to the requirements of the Constitution, this aspect should be clarified and the scope of the law defined accordingly.

140. The Commission also notes that, according to Article 54 (1), “[In] a special legal order, the exercise of fundamental rights may be suspended or restricted beyond Article I (3), except for the fundamental rights set out in Articles II and III, and Article XXVIII (2)-(5)”. As Hungary is also bound by Article 15 of the ECHR and by Article 4 of the ICCPR, special legal orders will also have to comply with the provisions of these articles (see also comments under *Article T* above).

Closing provisions

141. As previously indicated, the reference in second paragraph of the Closing Provisions to the 1949 Constitution seems to be in contradiction with the statement, in the Preamble, by which the Hungarian 1949 Constitution is declared as invalid. The Venice Commission tends to interpret this apparent inconsistency as a confirmation of the fact that the said statement does not have legal significance. Nevertheless, it is recommended that this is specifically clarified by the Hungarian authorities. The adoption of transitional provisions (as required by the third paragraph of the Closing Provisions), of particular importance in the light of the existence, for certain provisions of the new Constitution, of possibly diverging interpretations, could be used as an excellent opportunity for providing the necessary clarifications. This should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution.

IV. Conclusions

142. The adoption of a new Constitution, aiming to consolidate Hungary as democratic state based on the principles of separation of powers, protection of fundamental rights and the rule of law, is a commendable step.

143. The Venice Commission welcomes the efforts made to establish a constitutional order in line with the common European democratic values and standards and to regulate fundamental rights and freedoms in compliance with the international instruments which are binding for Hungary, including the ECHR and the recent EU Charter. It notes that the current parliamentary system and the country’s form of government - the republic - have been maintained.

144. The Venice Commission notes that the recommendations it formulated, in March 2011, following the authorities’ request for assistance on specific legal issues raised in the constitutional process, have been taken into account in the last stages of preparation and adoption of the Constitution.

145. By contrast, it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe. The Commission hopes that the adoption of implementing legislation will be a more transparent and inclusive process, with adequate opportunities for a proper debate of the numerous major issues that are still to be regulated. It calls upon to all parties involved to adopt, beyond their political background and orientations, a more open and constructive approach and effectively co-operate in this process.

146. The significant number of matters relegated, for detailed regulation, to cardinal laws requiring a two-thirds majority, including issues which should be left to the ordinary political process and which are usually decided by simple majority, raises concerns. Since future governments are unlikely to have a two-thirds majority, they will be unable to amend laws adopted by the present Parliament. Hence, cardinal laws should not be used to cement the cultural, religious, moral, socio-economic and financial policies of a given two third majority.

147. The limitation of powers of the Constitutional Court on taxation and budgetary matters and the prominent role given to the Budget Council in the adoption of the State budget, as well as the procedure for establishing autonomous regulatory bodies, represent further sensitive issues that have raised concern in the light of their potential impact on the democratic principles of the rule law and of separation of powers.

148. In addition, a rather general constitutional framework is provided for key sectors, such as the judiciary and further important society settings. This is also a source of concern, as it may have an impact on the quality and level of guarantees and protection available and on the effective implementation of the standards applicable to the sectors concerned. Guarantees for the main principles pertaining to such important matters are usually enshrined in the Constitution, especially when major reforms are planned, as it is the case for the Hungarian judiciary. In the sphere of fundamental rights, the provisions relating to life imprisonment without parole raise issues of compatibility with international norms that are binding on Hungary and the related case-law

149. More generally, with regard to the constitutional protection of fundamental rights, the Commission considers that more precise indications should be provided by the Constitution as to their content and stronger guarantees for their effective protection and enjoyment by individuals, in line with the international human rights instruments to which Hungary is a Contracting Party. The Venice Commission recalls that, as indicated in its March 2011 Opinion⁴⁷, “[...] 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”.

150. The relevance of the Preamble for the Constitution’s interpretation and some potentially problematic statements and terms contained therein have also gave reason to questions and would call for adequate clarification by the Hungarian authorities. This include the wording on the protection of the rights of Hungarians abroad contained in the Preamble and other related provisions of the new Constitution, which may be found problematic and engender concern in the framework of inter-state relations.

⁴⁷ CDL-AD(2011)001, § 52.

151. The Venice Commission trusts that adequate clarifications and responses - fully in line with the applicable standards - to the concerns mentioned before, due *inter alia* to the too general nature of certain provisions of the new Constitution, will be provided in the context of the future interpretation and application of the new Constitution. The preparation and adoption of the various cardinal and other implementing laws is an excellent opportunity in this respect. The Venice Commission stands ready to assist the Hungarian authorities in this process upon their request.