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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

**ON ACT CLI OF 2011
ON THE CONSTITUTIONAL COURT
OF HUNGARY**

**Adopted by the Venice Commission
at its 91st Plenary Session
(Venice, 15-16 June 2012)**

on the basis of comments by

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A. Introduction

1. By letter of 1 February 2012, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Mr Herkel, asked the Venice Commission to provide an opinion inter alia on the Act on the Constitutional Court of Hungary (Act CLI of 2011 - CDL-REF(2012)017). The Commission invited Mr Grabenwarter, Mr Hoffmann-Riem and Mr Neppi Modona to act as rapporteurs on this issue.

2. *The present Opinion was adopted by the Commission at its 91st plenary session (Venice, 15-16 June 2012).*

B. Preliminary remarks

3. This Opinion should be seen in the context of the Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary¹, the Opinion on the new Constitution of Hungary² and the Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary³.

4. This Opinion is based on an English translation of Act CLI of 2011 on the Constitutional Court (hereinafter "ACC"). The translation may not accurately reflect the original version on all points and, consequently, certain comments may be due to problems of translation.

5. When the Venice Commission examines the powers of a state institution, it may for instance criticise overwhelming powers or other structural problems. However, the Commission would like to point out that its criticism of legal provisions does not amount to criticism of the current post-holders.

Chapter I - General provisions, the legal status and organisation of the Constitutional Court

6. The Venice Commission welcomes the provisions on budgetary guarantees in Section 4 ACC which contributes to the institutional independence of the Constitutional Court and prevents that the Court can be 'punished' for unwelcome judgements by a reduction in its budget. However, such guarantees are not an end in itself but pursue the aim to ensure proper, qualified and impartial administration of constitutional justice and the implementation of the right to a fair trial.⁴ In exceptional situations and under specific conditions – particularly when a country suffers considerably from the consequences of an economic crisis – reductions may be justified and cannot be regarded as an infringement of the independence of the judiciary, as long as they are based on law and part of a general reduction in spending, namely a cut of the salaries of all state officials.⁵ In such situations a reduction of the Constitutional Court's budget "may be seen as a token of solidarity and social justice, demanding of judges a proportional responsibility for eliminating the consequences of the

¹ CDL-AD(2011)001, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011).

² CDL-AD(2011)016, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011).

³ CDL-AD(2012)001, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

⁴ Amicus Curiae Brief for the Constitutional Court of "The former Yugoslav Republic of Macedonia" on Amendments to several laws relating to the system of salaries and remunerations of elected and appointed officials., CDL-AD(2010)038, para. 15.

⁵ CDL-AD(2010)038, para. 20 *et seq.*, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010).

economic and financial crisis of their country, by putting on them a burden equal to that for other public officials".⁶

7. The Venice Commission welcomes the fact that the Hungarian authorities have taken up in Section 6.3 ACC the Commission's suggestion⁷ to rule out the re-election of Constitutional Court Judges in order to further increase the judges' independence. This is as well the goal of Section 6.4 ACC, which provides for a "cooling period" of four years for leading officials of political parties of the state as well as members of the Government, before they can be elected as a judge at the Constitutional Court. While such a period is a commendable step, it should be implemented with a sense of proportion. It seems that the term 'Government' does not include local government.

8. According to Article 24.5 of the Fundamental Law, Sections 7.1 and 8.1 ACC provide that Parliament can elect Constitutional Court judges (members). They are proposed by a parliamentary committee composed in proportion to the members of the parties represented in Parliament and they are elected by Parliament with a qualified majority of two-thirds. In Europe, constitutional courts are often entirely elected by a qualified majority in Parliament (e.g. Germany) or various bodies and institutions have the power to appoint part of the judges of the Constitutional Court, for instance in Italy where one third of the members are appointed by the President of the Republic, one third are appointed by the judges of the higher ordinary and administrative Courts, and the last third is elected by the Parliament with a qualified majority. While the 'Parliament-only' model provides high democratic legitimacy, a mixed composition has the advantage of shielding the appointment of a part of the members from political actors. Taking into account the current situation in the Hungarian Parliament where the Governmental party enjoys a 2/3 majority, a mixed composition could avoid the risk of politicisation of the Constitutional Court.

9. It is however to be regretted that Article 24.5 of the Fundamental Law provides that the Constitutional Court's President is elected by the Parliament as well with a two-thirds majority. The previous solution of an election of the President of the Court by the judges themselves is clearly preferable. The Venice Commission already expressed the opinion that the election of the Court's President by the judges themselves is seen "as a stronger safeguard for the independence of the Constitutional Court".⁸

10. Like for the judiciary as a whole⁹, the Fundamental Law does not provide any explicit statement on the independence of the Constitutional Court and its judges. As a main subject, the Fundamental Law devotes to the Constitutional Court only Article 24, which summarises some principles regarding the competences and the appointment of the judges and the President. Article 24.1 of the Fundamental Law provides that "the Constitutional Court shall be the supreme body for the protection of the Fundamental Law" without making any reference to the independence of the Constitutional Court. Moreover, the guarantees related to the status of the judges are provided for only in the Act on the Constitutional Court, below the level of the Fundamental Law.

11. As regards to the new legislative system set forth for the Constitutional Court the Venice Commission has strongly recommended that the main principles and conditions related to the independence and autonomy of the Court be clearly laid down in the new Constitution.¹⁰ So far this recommendation has not been taken up. **At least, the Act on the Constitutional**

⁶ CDL-AD(2010)038, para. 21..

⁷ CDL-AD(2011)016, para. 95.

⁸ CDL-AD(2011)016, para. 94.

⁹ CDL-AD(2011)016, para. 120.

¹⁰ CDL-AD(2011)001, para. 51-53; CDL-AD(2011)016, paras. 92, 96, 97.

Court should include a clear statement on the independence of the Constitutional Court.

12. The Venice Commission appreciates that Section 8.3 ACC provides for a time limit for the appointment of new judges in order to ensure continuity in the membership of the Constitutional Court.

13. The salary of the Judges at the Constitutional Court is laid down in Section 13 ACC. In principle, they will be entitled to the same salary and allowances as Government ministers. However, Section 13.1 ACC provides for one exception: with respect to the supplement for managerial responsibilities the judges shall be granted 150 % of the amount for ministers. The remit of ministers consists first and foremost of managerial activities whereas the latter only play a minor role amongst the duties of Judges at the Constitutional Court. However the Commission learned that in Hungary, such supplements do not relate to concrete managerial tasks but are related to the level of responsibility linked to the position.

14. Section 14 ACC grants the Members of the Constitutional Court functional immunity, i.e. immunity from prosecution for acts performed in the exercise of their functions, which is well in line with European standards. Exceptions are provided for civil liability, abuse of secret information and both defamation and libel of "persons exercising public power and politicians acting in public". As to civil liability, it is a European standard that judges enjoy protection from civil suits for actions done in good faith in the course of their functions.¹¹ To be in line with European standards, exceptions must necessarily require intentional misconduct of a judge.

15. It is appreciated that Section 15.3 ACC provides for an extension of the mandate of the incumbent member of the Constitutional Court, if the Parliament fails to elect a new member to the Constitutional Court within the time-limit set forth hereto. Such measures are not an uncommon feature with regard to constitutional courts throughout Europe. Thus, the ability of the Constitutional Court to act is not endangered, even if no new member is elected yet. In the case that the Parliament appoints fewer members within the time-limit than Constitutional Court members whose mandate was terminated, the mandate of the youngest member shall be extended. Such a system ensures that the number of judges at the Constitutional Court does not fall below the quorum. Such a situation was once narrowly avoided in Hungary, following the retirement of several judges. Of course, the Venice Commission recalls that prolonging the term of office "should be seen as an exception, so as to prevent it from becoming an institution"¹².

16. Nevertheless it should also be noted, that Article 24.4, 2nd sentence of the Fundamental Law does not provide for such an exception to the term of office of twelve years. The Fundamental Law should be amended accordingly.

17. In the opinion on the Judiciary Acts, the Venice Commission criticised that the mandate of the President of the National Judicial Office can be indefinitely extended by a blocking minority of 1/3 plus one of the members of Parliament.¹³ As set out in that opinion, the President of the National Judicial Office has vast powers, without sufficient accountability. The further extension of the long mandate (9 years) by a minority in Parliament is found not to be acceptable. However, this situation needs to be distinguished from the extension of the mandate of a Constitutional Court judge, who is part of a collective organ, which needs to

¹¹ CDL-AD(2003)012, para. 15 adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011); CCJE Opinion N° 3, para. 76.

¹² See CDL-STD(1997)020, para. 4.4.

¹³ CDL-AD(2012)001, para. 31.

maintain its quorum to be able to decide cases. Therefore the prolongation of the term is an adequate way of dealing with the problem

18. Section 16.4 ACC stipulates that the **mandate of a member of the Constitutional Court may be terminated by exclusion, if the member has become unworthy of his/her office**. The meaning of the term “unworthy” may be seen as rather vague. In particular, as there will not be much previous practice to guide in a concrete case, it remains unclear, which actions by a member would be deemed to make him or her “unworthy”.

19. Admittedly, such a wording is not completely unusual from a comparative perspective. Section 10.1.c of the Austrian Act on the Constitutional Court for example uses the same term, stating that a member has to be removed from office, if the member becomes unworthy regarding the respect and the trust his or her mandate demands, or disregards the obligation of non-disclosure. As the vagueness of this term seems to be necessary to a certain extent, it **should be compensated by procedural safeguards. A possible compensation could be to provide for the requirement at least for the two-thirds majority or even the unanimity of other judges**. A qualified majority in such issues serves the independence of the Court and should not be linked to a qualified majority in judicial decision making, which would dramatically decrease the main function of the Constitutional Court to ensure the supremacy of the Fundamental Law. In addition, the provision should be completed by giving some examples (e.g. disregarding the obligation of non-disclosure).

20. Former Presidents of the Constitutional Court shall receive payments equivalent to their monthly salary for six months, if (a) they were in this position for a period of at least two years and their mandate was terminated due to the end of the term of office, (b) the reaching of the age of 70 or (c) dismissal (Section 20). If the mandate was terminated due to resignation the former Presidents shall receive payments only for three months. This distinction seems not justified: It is questionable why a President of the Constitutional Court who resigned for reasons that are not imputable to him/her, e.g. for health reasons, should receive fewer monthly payments than a President of the Constitutional Court who was dismissed according to Section 16.3 ACC.

21. Salary and non-financial benefits of the President of the Constitutional Court are laid down in Section 19 ACC. It is for the Hungarian authorities to decide, whether these benefits are appropriate in the light of the social conditions in their country and compared to the level of remuneration of higher civil servants. However, while the salary of judges should indeed be guaranteed by law,¹⁴ other fringe benefits¹⁵ – if they are granted at all – should not be included in a cardinal law but be left to lower level regulation.¹⁶ The personal privileges, provided for in such a specific way in Section 19 and 20, can affect the dignity of the Court's President and the public perception of the independence of the Constitutional Court at a whole. On the other hand, regulating the salary and the benefits of the President of the Constitutional Court in an act of parliament is a guarantee because it could violate the independence of the Constitutional Court if these benefits would be regulated by the executive and thus could easily be used to ‘punish’ the Court for unwelcome decisions (in some countries, the withdrawal of access to government facilities, e.g. government aircraft, has been used for this purpose). In order to avoid that the Court can be made subject to political influence, another solution could be to entrust the Court itself with defining the scope of such benefits.

¹⁴ CDL-AD(2010)004, para. 51 adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010)

¹⁵ E.g. the use of a presidential residence, the use of a mobile phone and internet, the use of two personal cars also for personal purposes, the use of government's central holidays complex for the family, including companion, children, parents, grandchildren and children's spouses, to use first class abroad, to use government lounges.

¹⁶ See also CDL-AD(2012)001, para. 19.

22. Section 21.5 ACC contains rules on powers of the oldest member of the Constitutional Court when neither President nor Vice-President are able to exercise presidential power. This list does not refer to the President's responsibility to take all necessary measures in case of infringement of the immunity of the members of the Constitutional Court (Section 17.1.k ACC). This competence can be necessary to defend the independence of the Court in the absence of the President and the Vice-President. Therefore, the Commission suggests adding this competency to those which can be exercised by the oldest member of the Constitutional Court.

23. Section 22.5 ACC provides that the President may require that candidates for posts at the Office have further educational qualifications, certifications or practical experience. It should be made clear that such qualifications can be sought for only when they are objectively related to the post to be filled (e.g. specific IT knowledge, etc.).

Chapter II - Procedures Falling within the Tasks and Competences of the Constitutional Court; Legal Consequences

24. The procedure of the *ex ante* review, the so-called preliminary norm control, is provided for in Section 23 ACC. The Venice Commission recalls its warning, that "an entitlement to submit a request for binding preventive abstract review should be awarded restrictively, as such a procedure easily becomes part of the political game if it is widely available."¹⁷ With the exception of *ex ante* review of international treaties, this competence should be exercised restrictively.

25. Section 24 ACC deals with the *ex post* review of legal acts. As provided for in Article 24.2.e of the Fundamental Law, the right to initiate such proceedings is given to the Government, one-fourth of the members of Parliament as well as the Commissioner for Fundamental Rights. The attribution of such a competence to the Commissioner for Fundamental Rights takes up a recommendation by the Venice Commission¹⁸ and is warmly welcomed.

26. 26. The constitutional complaint procedure is specified in Section 26 et seq. ACC. Three different types of constitutional complaints are available:

- a) Article 26.1 ACC – a complaint against a legal provision applied in court proceedings;
- b) Article 26.2 ACC – an exceptional form of the complaint under Article 26.1 ACC against a legal provision, when there are no real and effective remedies available;
- c) Article 27 ACC - a full constitutional complaint against final court decisions.

The Venice Commission appreciates that constitutional complaints both against all legal provisions and court decisions are provided for in order to counterbalance the abolishment of the *actio popularis*.¹⁹ Nevertheless, the concept of constitutional complaints under the ACC should be further clarified. Despite the fact, that Section 26.1 ACC refers to Article 24.2.c of the Fundamental Law, *i.e.* constitutional complaint against other than judicial decisions, its scope is reduced to "judicial proceedings", whereas "judicial decisions" are subject to Section 27 ACC referring to Article 24.2.d of the Fundamental Law. Legislative measures shall only be subject to constitutional complaints under Section 26.2 ACC by way of exception from Section 26.1 ACC. The rationale behind this distinction seems to be to draw a line between the review of a legal provision as such (Section 26.1 ACC) – as a normative

¹⁷ CDL-AD(2011)001, para. 43.

¹⁸ CDL-AD(2011)001, para. 66

¹⁹ CDL-AD(2011)001, para. 64..

constitutional complaint²⁰ - on the one hand and the review of its application (Section 27 ACC) – as a full constitutional complaint²¹ - on the other, as it is also mirrored in Section 31 ACC. Section 28 ACC states that one kind of review may as well include the other. The scope of this provision should be clarified.

27. Finally, the additional threshold-criteria for each procedure largely resemble each other. Indeed with regard to Sections 26.1 ACC and 27 ACC they seem to be identical in substance, though not in the wording. Firstly, a violation of the complainant's rights under the Fundamental Law is required. Secondly, as an expression of the subsidiary character of the constitutional complaint, all legal remedies must have been exhausted beforehand. Section 26.2 ACC introduces an additional qualification to the violation of the complainant's rights, stating that it must occur directly, which is defined as "without a judicial decision". As a result, only the violation of the applicant's rights and the exhaustion of legal remedies function as filters, whereas other requirements are only decisive for the identification of the applicable norm, even though the latter has no further consequences for the further procedure (besides different time-limits for submitting applications, Section 30 ACC). The criteria for each type of complaint should be set out more clearly.

28. The Venice Commission recommends clarifying the complaint procedures, without reducing their scope. This would also allow the simplification of the filter criteria. In addition to the rule already contained in Section 26.2 ACC, an exception for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual.²²

29. Section 26 ACC also empowers the Prosecutor General **to request the Constitutional Court to examine the conformity of regulations with the Fundamental Law, if a person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people.** It is incoherent to give the power to defend individual interests to the Prosecutor General who is called upon to defend the public interest. The Prosecutor General could easily come into a situation where these interests conflict and he or she cannot pursue both of them with the same vigour which they may merit. Admittedly this is mitigated by the fact that the Prosecutor General may bring a complaint to the Constitutional Court only if he or she participated in the court proceedings on which the case is based. While such powers do not contradict European standards, the Hungarian authorities **should consider vesting them in the Commissioner for Fundamental Rights.**

30. An additional filter for admissibility of constitutional complaints is laid down in Section 29 ACC. Complaints shall only be admissible, if "a conflict with the Fundamental Law significantly affects the judicial decision, or the case raises constitutional law issues of fundamental importance." This provision seems to have been modelled on Article 93a Federal Constitutional Court Law of Germany. While the fundamental constitutional significance is indeed equivalent in both acts, the first variant in the ACC is again focused only on judicial decisions. This results in a further restriction of complaints filed against other than judicial decisions, namely under the provision of Section 26.2 ACC. Hence, in order to synchronise the requirements for the different procedures and to allow for a comprehensive constitutional complaint, Section 29 ACC should be reformulated, taking into account that protection should also be provided in situations, where conflicts with the Fundamental Law significantly affect other acts of public authority besides judicial decisions. Moreover, Article 93a Federal Constitutional Court Law of Germany focuses on the consequences of inadmissibility for the protection of constitutional rights as such and only takes into account the concrete case of the applicant. The focus of Section 29 ACC seems to lie with the

²⁰ See CDL-AD(2010)039rev, para. 77.

²¹ See CDL-AD(2010)039rev, para. 80.

²² Cf. CDL-AD(2010)039rev., para. 122..

question, whether a successful complaint will really alter the situation of the applicant. This need for legal relief (the German concept of *Rechtsschutzbedürfnis*) should generally be assumed and should only lead to the denial of a review in cases where it is manifest that the constitutional court's decision will be ineffective as a means to provide effective access to constitutional justice.²³ This remark relates to judicial practice rather than the ACC itself.

31. It is appreciated that Section 30 ACC contains special provisions on constitutional complaints about decisions that were not communicated (para. 2) and on constitutional complaints that were submitted after the time-limit due to the submitter's inability to submit the complaint due to a circumstance beyond his or her control (para. 3). These provisions ensure an extensive possibility to approach the Constitutional Court even and especially under exceptional circumstances. In order to assure legal certainty, the maximum time limit to initiate Constitutional Court proceedings is 180 days after the communication of the decisions, the violation of the right guaranteed or the entry into force of the legal regulation that is contrary to the Fundamental Law (para. 4). This generous time limit is considerably longer than in other member states, which is of course acceptable.²⁴

32. With regard to Sections 30.2 and 30.4 ACC, which provide for different starting points for the deadline, it is unclear, which point actually is the decisive one. While the formulation of Section 30.4 ACC indicates, that all conditions must be fulfilled cumulatively, which implies that the latest starting point will be decisive, the wording of Section 30.2 ACC does not allow for such a conclusion. The relationship of these provisions should be made explicit for the sake of clarity.

33. The effect *ratione materiae* of constitutional complaints and – surprisingly here in chapter 9 on the constitutional complaint – norm control in concrete cases (“judicial initiative”) is specified in Section 31.1 ACC. It states, that decisions confirming the constitutionality of a certain provision have in principle a *res iudicata* effect, unless an evolution of the factual and legal circumstances occurs, which means that applications aimed at the same provision are normally inadmissible. It should be noted, that this provision does not rule out the possibility to seek relief via a constitutional complaint, if the same provision is applied in a different context.

34. Section 34 ACC introduces the so-called “Opinion on the Dissolution of a Local Representative Body Operating Contrary to the Fundamental Law”. On its own, this provision is not very elaborate and thus does not sufficiently specify its content. It seems that Articles 125, 129, 132 of Act CLXXXIX of 2011 on the local governments of Hungary provide for a procedure in these cases. An explicit reference the applicable provisions should be included in the ACC.

35. Section 34/A ACC was introduced by Section 49 of Act CCVI of 2011 on the Right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary. This provision provides that the Constitutional Court shall express an “opinion in principle” on whether the operation of a church is contrary to the Fundamental Law. On the basis of this “technical opinion” (Section 26 of Act CCVI) the church in question shall be dissolved by Parliament, upon initiative of the Government (Section 28 of Act CCVI). Such a procedure is highly untypical for a Constitutional Court. The Venice Commission has already adopted an opinion on Act CCVI of 2011.²⁵

²³ CDL-AD(2010)039rev., para. 124

²⁴ The time limit for applications to the ECtHR is to be reduced from six to four months.

²⁵ CDL-AD(2012)004, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

36. Section 39.1 ACC stipulates, that decisions of the Constitutional Court are, in principle, binding on everyone. This seems to imply binding power not only of the *ratio decidendi* (the operative part of the judgment), but also on the reasoning. Exceptions seem to be opinions in Sections 34 and 34/A ACC. The Venice Commission appreciates that the decisions of the Constitutional Court are also binding on ordinary courts “as to the constitutional issue” (Section 43.3 ACC). With regard to Section 39.3 ACC the Constitutional Court shall itself establish “the applicable legal consequences [of its decisions] within the framework of the Fundamental Law and of this Act”, which seems to be aimed at allowing for flexible solutions, e.g. deciding on the postponement of the entering into force of a decision.

37. The Venice Commission is of the opinion that the possibility to amend the Fundamental Law in order to bring it in line with an international treaty should also be envisaged in Section 40.3 ACC.

38. According to Section 41.1 ACC, the Constitutional Court may annul legal regulations and provisions in part or in whole. Section 41.2 ACC states that this power is subject to the exceptions and conditions provided for in Article 37.4 Fundamental Law. The Commission recalls its critique of this infringement of the powers of the Constitutional Court.²⁶ **It regrets and notes with serious concern, that the scope of Article 37.4 Fundamental Law has even been extended further under Article 27 Transitory Provisions²⁷**, stating that the exemption of certain acts from constitutional review is not only valid until the state debt falls below 50 % of the Gross Domestic Product, but that these acts will not be subject to full and comprehensive supervision by the Constitutional Court, even when the budget situation has improved beyond that target. This “transitory provision” in fact turns a materially transitory provision of the Fundamental Law into a permanent provision, which seems to run counter the Fundamental Law itself.

39. The effect of the verdict of unconstitutionality of legislative acts shall have an effect *ex nunc* according to Section 45 ACC. The system of an *ex nunc* effect in general together with an *ex tunc* effect in the applicant’s case (Section 45.2 ACC) will function as an incentive to submit complaints against normative acts.²⁸

40. Certain exceptions from the *ex nunc* effect are provided for, namely with regard to criminal proceedings (Section 45.6 ACC), as well as the power of the Constitutional Court to deviate from the general *ex nunc* effect, “if this is justified by the protection of the Fundamental Law, by the interest of legal certainty or by a particularly important interest of the entity initiating the proceedings” (Section 45.4 ACC). This flexible provision should also allow the Constitutional Court to postpone the entry into force of the annulment of a legal provision in order to avoid a legal gap.

41. The *ex nunc* effect of a Constitutional Court decision is a widespread phenomenon in Europe;²⁹ The Commission welcomes that necessary attenuations³⁰ have been provided for in Section 45 ACC.

Chapter III - The Rules of Operation of the Constitutional Court and Rules of Procedure

42. Details for the plenary sessions of the Constitutional Court are laid down in Section 48 ACC. It allows the President of the Constitutional Court to invite “other persons” to attend the

²⁶ CDL-AD(2011)001, para. 54; CDL-AD(2011)016, para. 98 *et seq.*, 122 *et seq.*; see also *Kriszta Kovács/Gábor Attila Tóth*: Hungary’s Constitutional Transformation, 7 *EuConst* 2011/2, 183 (194-195); *András Jakab/Pál Sonnevend*, *Kontinuität mit Mängeln: Das neue ungarische Grundgesetz*, 72 *ZaöRV/HJIL* 2012/1, 79 (98-99).

²⁷ CDL-REF(2012)018.

²⁸ CDL-AD(2010)039rev. para. 187.

²⁹ CDL-AD(2010)039rev., para. 190.

³⁰ CDL-AD(2010)039rev., para. 192 *et seq.*

plenary session. Given that the sessions of the Court are not public, it seems that this provision relates to the procedure of taking evidence in Section 57.2 ACC. This should be made explicit to avoid misunderstandings.

43. Section 51.2 ACC declares legal representation to be mandatory in Constitutional Court proceedings. Whereas such a provision aims to raise the quality of complaints, it may easily amount to an outright denial of access to constitutional justice if it is not counterbalanced by providing legal aid either free or granting financial assistance at least.³¹ **Provisions on legal aid should be available also for proceedings before the Constitutional Court.** In order to provide for legal aid in proceedings before the Constitutional Court, the legislator may also simply refer to provisions concerning other proceedings, such as civil procedures. In Austria, for instance, legal aid in proceedings before the Constitutional Court is also granted according to the provisions of the Code of Civil Procedure (see Section 35 Austrian Act on the Constitutional Court in conjunction with Section 63 et seq. Austrian Code of Civil Procedure).

44. The Venice Commission welcomes that proceedings before the Constitutional Court shall be free of charge (Section 54.1 ACC). This facilitates the access to the Constitutional Court for people with reduced financial resources. If the applicant's claim was successful, the applicant has served the public good. It is recommended to oblige the state to reimburse the costs of the applicant in such cases - insofar as the expenditures have not been out of proportion.

45. With regard to the procedural fine supplied in Section 54.2-4 ACC, the Venice Commission acknowledges that relieving the Constitutional Court from abusive complaints is a legitimate aim. Parties must exercise their procedural rights in a *bona fide* manner.³² When this obligation is neglected on a large scale, the effectiveness of constitutional justice is at stake. Taking into account the vast scale of abuse fees from HUF 20,000 to HUF 500,000, depending on the gravity and the consequences of the concrete abuse, the procedural fines can hardly be deemed disproportional. Nevertheless, when determining the actual amount, the financial situation of the applicant should also be taken into account.

Chapter IV - Closing Provisions

46. According to Section 69 ACC, the whole Act shall be considered a cardinal Act pursuant to Article 24.5 of the Fundamental Law.

47. According to Article T.4 of the Fundamental Law, cardinal acts must be adopted by the Hungarian Parliament with a two-thirds majority. In its Opinion on the new Constitution of Hungary, the Venice Commission had acknowledged that a "certain quorum may 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." The Commission, however, also recommended restricting "the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority." The Venice Commission argued on the basis of Article 3 of the first Protocol to the ECHR: "When not only the fundamental principles but also very specific and "detailed rules" on certain issues will be enacted in cardinal laws, the principle of democracy is itself at risk. This also increases the risk, for the future adoption of eventual necessary reforms, of long-lasting political conflicts and undue pressure and costs for society."

48. In order to avoid the above-mentioned problems the Venice Commission is of the opinion that the "cardinal elements" in the ACC should be restricted to fundamental

³¹ CDL-AD(2010)039rev., para. 113.

³² CDL-AD(2010)039rev., para. 119.

principles and important rules on the issue and that merely technical details should have been regulated at the level of ordinary law, which can more easily be amended by a simple majority in Parliament.

49. Transitory provisions are introduced in Sections 71-74 ACC relating to *acciones populares*. The Venice Commission is critical of the *actio popularis* in general³³ and in its Opinion on the new Constitution of Hungary, it held that the *actio popularis* is not requisite in a democratic state ruled by law.³⁴

50. Sections 71-74 ACC are aimed at ending all pending cases resulting from *acciones populares*, unless they would still be admissible under the new regime. The applicants are invited to resubmit their petitions, if they are still admissible – though as another type of procedure – under the amended ACC; with regard to time-limits, which would already have run out in the meantime, Section 71.4 ACC provides for certain exceptions. The deadline for resubmission is 31 March 2012 according to Section 71.3 ACC. However, Section 71.5 ACC refers to 30 June 2012 as a deadline. It seems that the first deadline would be a subjective one, for which an excuse is possible, whereas the second deadline is a final and objective one.

51. Ending all pending *acciones populares* may seem problematic from the viewpoint of legal protection and the principle of non-retroactivity but is consistent with the aim of the legislator to reduce the workload of the Constitutional Court. While it is true that the retroactive discontinuation of pending proceedings compromises the trust that citizens place in the rule of law, it has to be taken into account that the *acciones populares* were introduced on the basis of a Constitution, which no longer exists.

52. A sufficient and comprehensive level of individual protection can be guaranteed via a full constitutional complaint, at best combined with a preliminary ruling procedure. As a result, as long as the applicants of *acciones populares* are given sufficient time to resubmit their petitions as constitutional complaints, their legal protection remains sufficient. However, taking into account that the details of the transitory provision were not widely discussed within the Hungarian society and the fact that the ACC was adopted only weeks before it entered into force, the Commission suggests that the possibilities for excuse under the deadline of Section 71.3 ACC be interpreted in an open manner.

C. Conclusions

53. The Commission found the Act on the Constitutional Court in general well drafted and coherent. It identified a number of positive elements in the Act, *inter alia*:

1. the provisions on budgetary guarantees (Section 4 ACC),
2. the exclusion of the re-election of Constitutional Court Judges (Section 6.3 ACC);
3. the time limit for the appointment of new judges in order to ensure continuity in the membership of the Constitutional Court (Section 8.3 ACC);
4. functional immunity for the Judges of the Constitutional Court (Section 14 ACC);
5. the extension of the mandate of the incumbent member of the Constitutional Court if the Parliament fails to elect a new member within the time-limit (Section 15.3 ACC)
6. the possibility for one-fourth of the members of Parliament as well as for the Commissioner for Fundamental Rights to request *ex post* review of legal acts (Section 24 ACC);
7. Provisions on access to the Constitutional Court out of time in exceptional circumstance (Section 30 ACC);

³³ CDL-AD(2010)039rev., para. 74.

³⁴ CDL-AD(2011)001, para. 64.

8. the decisions of the Constitutional Court are also binding on ordinary courts “as to the constitutional issue” (Section 43.3 ACC):
9. the attenuation of the *ex nunc* effect of Constitutional Court decisions (Section 45 ACC);
10. the absence of fees for the proceedings before the Constitutional Court (Section 54.1 ACC).

54. Nonetheless, the Commission also found several provisions, which should be revised. The major points include:

1. The independence of the Constitutional Court and the status of its judges should be guaranteed in the Fundamental Law, and not only in the Act on the Constitutional Court. At least, the Act should include a clear statement on the independence of the Constitutional Court.
2. In order to balance the vagueness of the term of “unworthiness” in Section 16 ACC, allowing the exclusion of a member from the Court, procedural safeguards should be introduced, for example to provide for the decision on exclusion to be taken by at least a two-thirds majority or even the unanimity of other judges.
3. The two individual complaint procedures should be clarified, without reducing their scope (Sections 26 and 27 ACC).
4. An exception to the requirement for the exhaustion of legal remedies should be provided for all cases where adhering to this rule could cause irreparable damage to the individual (Section 26 ACC).
5. The power to request the Constitutional Court to examine the conformity of regulations with the Fundamental Law if a person concerned is unable to defend his or her rights personally or if the violation of rights affects a larger group of people should be vested with the Commissioner for Fundamental Rights rather than with the Prosecutor General (Section 26 ACC).
6. The personal privileges granted to the President, provided for in Sections 19 and 20 ACC in such an analytical and specific way, can affect the dignity of the President and the public perception of independence of the entire Constitutional Court. A regulation on the level of law provides a guarantee of independence, however.
7. A reference to other applicable provisions should be included for the “dissolution of a local representative body operating contrary to the Fundamental Law” (Section 34 ACC).
8. Provisions on legal aid should be available also in proceedings before the Constitutional Court (see Section 51 ACC).
9. The “cardinal elements” in the ACC should be restricted to fundamental principles and merely technical details should be regulated at the level of ordinary law (Section 69 ACC).
10. The limitation of the Constitutional Court's control powers in budgetary matters should be abolished. At least, the excessive restriction of Article 27 of the Transitory Provisions should be brought into line with Article 37.4 of the Fundamental Law.

55. The Venice Commission remains at the disposal of the Parliamentary Assembly and the Hungarian authorities for further assistance.