Hungarian Helsinki Committee

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Comments on the Response of the Hungarian Government Concerning the Opinion of the Venice Commission on Act CLI of 2011 on the Constitutional Court

July 2012

The Hungarian Government commented on the draft opinion of the Venice Commission no. 665/2012 (hereafter: Opinion) on Act CLI of 2011 on the Constitutional Court (hereafter: ACC), which was sent to the Venice Commission by the Hungarian Government on 13 June 2012, before the finalization of the Opinion. The Government did not publicize its comments on the Opinion; they were made public on the website of the Venice Commission.[1]

Below we outline and assess the reactions of the Government given in a document titled „Comments" to the critique expressed by the Venice Commission. We do not analyse those parts of the document that clarify issues without relevance to constitutional law; neither shall we react to those governmental comments which welcome the fact that the Venice Commission did not criticize a certain provision or in fact welcomed its introduction. However, we point out those parts of the Opinion on which the Government did not comment.

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Our overall assessment is that the Government did not take the critique of the Venice Commission seriously and did not accept its suggestions. The Government's response did not indicate any willingness to review or amend provisions with which the Venice Commission had grave concern, not even those provisions which the Venice Commission indicated as not in conformity with the Fundamental Law. This governmental attitude is worrying because compromising the Constitutional Court (CC) leads directly to compromising the already-seriously-weakened constitutional protection both at domestic and international level.

1. The Venice Commission emphasized that **the Fundamental Law does not contain any clear provision stating that both the Constitutional Court and its members shall be independent;** the guarantees of independence are detailed only in the ACC. The Commission held that the most important principles and conditions of independence and autonomy of the CC must be contained in the Fundamental Law. Further, the Venice Commission stated that at the very minimum, the ACC should declare the independence of the Constitutional Court and its members. (Opinion § 10-11).

[1] Available at: http://www.venice.coe.int/docs/2012/CDL(2012)045-e.pdf.

The Government pointed out in its response that despite the fact that the Fundamental Law does not mention the independence of the CC, it may be derived from the Fundamental Law's general rules. In this respect, the Government referred to Articles B) and C) of the Fundamental Law, declaring the principle of rule of law and separation of powers. In addition, the Government reminded that the ACC provides that members of the CC shall be independent and only subordinated to the laws. Also, the rules of the election of the members of the CC remained unchanged and the personal conditions for becoming a member are also completely the same as before. Finally, the prohibition of re-election and increasing the number of the members – which are new rules – are also guarantees of independence.

As opposed to what the Government wrote in its response, **the general provisions of the Fundamental Law concerning the rule of law and the separation of powers cannot function as constitutional guarantees. What is more, there are certain provisions in the Fundamental Law that actually refute the Government's position.** For example, Article N) of the Fundamental Law provides that in the course of performing their duties, the Constitutional Court, courts, local governments and other state organs shall be obliged to respect the principle of balanced, transparent and sustainable budget management. Another such example is Article 37 (4) of the Fundamental Law, which makes the scope of power of the CC dependent on the size of state debt. Furthermore, it is evident that guarantees of independence laid down in sources of law that are lower in the hierarchical level than the constitution cannot make up for the lack of guarantees at constitutional level.

Beyond this, the following governmental statements concerning the independence offered by the ACC must be corrected as well:

– The provision saying that members of the CC shall be independent and only subordinated to laws does not provide effective protection against laws violating the independence of either the CC or its members. Protection against such attacks can only be ensured by rules enshrined in the Fundamental Law.

– In addition, it is not true that the rules concerning the election of CC members remained the same as they were since 1989. One of the first highly debated decisions of the Parliament elected in 2010 was to amend these provisions. The aim of the amendment was to make it possible for the ruling party, having two-thirds of parliamentary seats, to elect members of the CC without the consent of any opposition party. Every critic of this amendment deemed it a serious attack against the independence of the CC. One must remember that the amendment was also challenged by László Sólyom, Hungary's then President, who raised a political veto against it. However, the Parliament adopted the new rule without any changes. Therefore the statement of the Government is based on incorrect facts.

– It is especially cynical to argue that increasing the number of CC members is a move towards strengthening the independence of the CC. Taken together, the amended election rules and the increase of the number of CC members made it possible for the current governmental majority to fill the CC with its own candidates. Increasing the number of members in fact was a serious attack against the independence of the body.

In addition, the Government did not comment on the Venice Commission's critique that, taking into account the current situation in the Hungarian Parliament where the

governmental party enjoys a two-thirds majority, the present procedure for electing CC members does not help to avoid the risk of politization of the body (Opinion § 8).

2. The Venice Commission called attention to the fact that under **Article 15 (3) the mandate of CC members is prolonged if the Parliament fails to elect a new member within the time limit set forth, which is not in conformity with the Fundamental Law** (Opinion § 16).

> The Government responded that the two rules are not contradictory because CC members are elected for a period of 12 years and the prolongation of their mandate is only exceptional.

In terms of the constitutional law the Government's answer is inappropriate. CC members derive their democratic legitimacy from the Fundamental Law. A lower level source of law may not prolong this legitimacy in even exceptional cases once it ceased to exist on the basis of the Fundamental Law. The ACC is therefore in contradiction with the Fundamental Law.

3. The Venice Commission criticized the fact that **based on Article 16 (4) of the ACC, the mandate of a CC member may be terminated by exclusion if the member has become unworthy of his or her office, claiming that the meaning of the term "unworthy" may be seen as rather vague.** The Venice Commission recommended counterbalancing this uncertainty by procedural guarantees (a possible compensation could be to require the votes at least the two-thirds of the judges or even a unanimous vote in these cases). (Opinion § 18–19)

> The Government responded that unworthiness has been a reason for losing mandate as CC member since 1989 and has never been used.

The Government's answer to the constitutional concerns related to this rule threatening the irremovablitiy of CC members is completely irrelevant from the point of view of constitutional law. The fact that a legal rule exists for a long time and has never been applied does not solve the problem that „unwelcome" CC members can be removed in the future based on this rule. A wrong rule will not become a good one just because it exists for a long time.

4. As far as **the ex ante constitutional review of norms is concerned, the Venice Commission pointed out that if ex ante review is widely available it can make the CC become part of a political game** (Opinion § 24).

> The Government argued in its answer that the exceptional application of ex ante review of norms is ensured by two factors. First, the majority of the Members of Parliament present must agree on the initiative. Secondly, the examination of the compatibility of a whole act with the Fundamental Law in general cannot be requested. The Government also called attention to the fact that during the five months that have passed since the Fundamental Law came into force no initiative for an ex ante review has been submitted to the CC.

The Venice Commission is right in saying that the ex ante review is a dangerous tool. However, it is clear from the Government's answer that it did not understand the point of the issue: **the fact that a parliamentary majority is needed to initiate a procedure is not a guarantee against the possibility that the CC's ex ante review procedure becomes part of a political game**. This system only prevents the parliamentary minority from involving the CC in political debates. However, those against whom the independence of the CC should really be protected, namely the majority, are not restricted at all from doing so. It is especially controversial that when arguing for the possibility to narrow the possibility of ex post review of norms the Government used the argument that ex ante review will be a much more efficient instrument in terms of constitutional protection.

5. Regarding the constitutional complaint process, the Opinion recommends clarifying the procedures. The main critique of the Venice Commission is that the three types of complaints (normative constitutional complaint [Article 26 (1)], full constitutional complaint [Article 27], exceptional normative constitutional complaint [Article 26 (2)]) are ambiguous because of their wording and their *differentia specifica*. The relationship between the different threshold-criteria of each procedure is also judged to be difficult by the Commission. These inconsistencies in the ACC should be clarified by legislative amendments, without reducing their scope, in order to guarantee access to the complaints (Opinion § 26-28). The restriction of complaints filed against other than judicial decisions in Article 29 of the ACC should be also reformulated (Opinion § 30).

In its response the Government provides a lengthy explanation as regards the differences between the complaint against a legislative rule and a judicial decision to justify its assertion that the wording of these procedures is clear. The Government also stresses that under Article 28 of the ACC the CC is not bound by the complaint/actual request, hence the procedures are permeable. According to the Government the meaning of this rule is to ensure that petitioners shall not suffer any disadvantage because of the wrong indication of the legal ground of the complaint.

We agree with the Government that the present rules well differentiate between the several types of constitutional complaint: the complaint against a regulation can easily be separated from that of against a judicial decision. [Since the Venice Commission did not refer to the Transitional Provisions of the Fundamental Law, neither will we deal with the difficulties arising from the interpretation and application of Article 22 (1).] **At the same time we disagree with the view that the permeability of the procedures makes the actual form of the complaint or the cited unconstitutionality irrelevant. The practice of the CC clearly shows that it uses all procedural opportunities to refuse to reach in-merit judgments in case of complaints.** This can be illustrated with a case in which the complaint was filed against both a law and a judicial decision grounded on that law. The complaint was refused on the sole ground that it had not clearly indicated the provision that establishes the competence of the CC to adjudicate the petition, but actually it had indicated two alternative grounds for the complaint at the same time [Articles 26 (1) and (2) of the ACC] (Decision IV/2485/2012 of the CC).

The rule which restricts the scope of constitutional complaints to judicial decisions was not commented on by the Government.

6. The Venice Commission also criticised Article 26 (3) of the ACC, which **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**. According to the Venice Commission it is incoherent to give the power to defend individual interests to the Prosecutor General, who is called upon to defend the public interest, since he or she could easily face a situation where these interests conflict. While such powers do not contradict European standards, the Venice Commission suggested that Hungarian authorities should consider vesting them in the Commissioner for Fundamental Rights. (Opinion § 29)

> According to the Government, this kind of a right of public prosecutors is a traditional element of the Hungarian legal system. Public prosecutors represent public interest by instituting proceedings in individual cases when persons are not in a position to protect their own rights but would be entitled to do so. Moreover, the Government argues, the Prosecutor General may only turn to the CC if the prosecution office was a party to the court proceedings on which the case is based. Other actors, like the Commissioner for Fundamental Rights, have no such possibility in court proceedings; therefore, they are not in the position to initiate a constitutional complaint procedure.

The Government's argument based on the tradition ignores the old critique concerning the functioning of the public prosecution in the constitutional system. Indeed, Soviet-type constitutions empower public prosecution to defend public interest and in this regard it generally has competences like the criticised one. Although this competence has been part of the Hungarian legal system for a long time, it should not be maintained, exactly because of its controversial nature. **Such competences originate from those times when the institutional framework of the protection of fundamental rights was not established in Hungary. But the evolution of this framework resulted in institutions, like the Commissioner for Fundamental Rights referred to also by the Venice Commission, with the very function of protecting rights in individual cases**.

7. In spite of the temperate tone of the Venice Commission's opinion, it is clear that expanding the scope of the rules, which constrain the CC's control over the laws is sharply criticised. **The Venice Commission regrets and notes with serious concern that the Government did not withdraw the rule restricting the competence of the CC in budgetary matters. Instead, the restriction has even been extended by the Transitional Provisions, making the transitory restriction permanent by stating not only that the exemption of certain acts from constitutional review is 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 CC even when the budget situation has improved beyond that target.** (Opinion § 38)

> The Government justifies upholding the restriction of competence by the need to establish and preserve economic balance. It emphasised that the restriction does not apply to ex ante constitutional review, and it is also possible for the CC to review laws with respect to the violation fundamental rights not falling under the scope of the restriction, for example with respect to the violation of human dignity. The Government argues that the extension of the restriction is aimed at preventing the loss of the recently-achieved economic balance.

From a constitutional point of view, the insincere false arguments of the Government are indefensible. If the CC has no full competence, or, in other words, there is no way to address the CC in case of certain fundamental rights violations, the Fundamental Law of Hungary conceptually ceases to be a constitution, since it is unable to function as the ultimate ground of enforcing constitutional rights. If fundamental rights may not be defended with effective means by a Constitutional Court, then they are only favours of the actual parliamentary majority. In this regard the Fundamental Law is the successor of the Stalinist constitution.

8. Regarding the **widely-criticised rule declaring legal representation mandatory** in complaint procedures, the Venice Commission states that **whereas this provision aims to raise the quality of complaints, it is not counterbalanced by either providing free legal aid or granting financial assistance**. (Opinion § 43)

> The Government explains that legal aid is in crisis in Hungary, and because of this including constitutional complaints in the legal aid system may be considered only after the comprehensive revision of the system. It also adds that when assessing the availability of representation for constitutional complaints, it must also be kept in mind that the circle of those allowed to represent clients in front of the CC are defined broadly, including those with bar exam working for NGOs and firms' legal advisors.

The Government's response clearly reflects budgetary considerations instead of constitutional ones. The real problem, as stressed in the Venice Commission's Opinion, that **the compulsory legal representation draws the constitutional complaint away from the ordinary forms of legal remedy and works against the due process**, was disregarded by the Government.