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THE NEW HUNGARIAN CONSTITUTION AND EUROPE

Posted on 25 Luglio 2011 by [Katalin Kelemen](#)

The [new Hungarian Constitution](#) has not yet entered into force and Europe's two leading international organisations (the Council of Europe and the European Union) have already issued an opinion about it, demanding some changes to be done.

The Council of Europe gave its first opinion in the drafting stage of the new Constitution ([Opinion no. 614/2011](#) of 28 March 2011), related to three specific legal questions, on request by the Hungarian government. The working group of the Venice Commission, composed of five members, had to answer questions concerning: 1) the incorporation in the new Constitution of provisions of the EU Charter of Fundamental Rights; 2) the role and significance of the ex ante review among the competences of the Constitutional Court; 3) the role and significance of the actio popularis in the ex post constitutional review. Yet the Commission did not limit itself to answer these three questions, but commented also the process of the adoption of the Constitution, expressing harsh criticism over the lack of dialogue between the government and the opposition and the tight schedule established for its adoption that prevented an extensive public debate on the proposed text.

Relating to the first question the Commission points out (par. 20-33 of the

Opinion) that the incorporation of the EU Charter could lead to legal complications, as the interpretation of the Charter by the Court of Justice of the EU might deviate from the one provided by the Hungarian Constitutional Court, and it could raise even problems of incompatibility with EU law. After an exhaustive analysis of the problem, the Commission concludes that it would be more advisable to consider the EU Charter as a starting point and source of inspiration in drafting the human rights and fundamental freedoms chapter of the new Constitution, rather than incorporating it. The Hungarian government seems to have followed to Commission's suggestion, since the text adopted on 18 April by the Hungarian Parliament does not contain any explicit reference to the Charter.

As to the second issue, the Opinion observes that there is no common European standard as regards the initiators and the concrete modalities of the ex ante review (par. 35). However, it elaborates on the question and concludes that in the Hungarian context ex ante review should be retained (par. 41) and, as a matter of principle, the entitlement to submit a request for binding preventive review should be awarded restrictively, possibly only to the President of the Republic (par. 42-43). Instead the Hungarian Constitution adopts a different solution, and the entitlement to submit a request for ex ante review is given also to the proponent of the bill, to the Government and to the Speaker of the House. However, a filter is introduced, as the Parliament has to give its consent to the submission (Article 6(2) of the Constitution).

Finally, as regards the third question concerning the abolition of *actio popularis*, the Venice Commission acknowledges the aim to avoid the overburdening of the Court with an unmanageable amount of petitions (par. 59), and welcomes the intention to extend the mechanism of ex post direct individual complaint to include complaints not only against a normative Act (as has been the case until now) but also against the violation of subjective fundamental rights through an individual act (par. 62). Therefore, the Commission does not object the abolition of *actio popularis* if it is accompanied by the introduction of a full-fledged constitutional complaint (par. 64). In this the Hungarian Constitution

follows the opinion the Commission (see Article 24). It does follow, however, the suggestion to introduce an indirect access mechanism through which individual questions would reach the Constitutional Court via an intermediary body, such as the Ombudsman (par. 66).

A second and more complete opinion was delivered by the Venice Commission after the adoption of the final text, this time on the initiative of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe. In its [Opinion no. 618/2011](#) of 20 June 2011, written on the basis of comments by the same five persons as in the case of the previous Opinion issued in March, the Commission evaluates numerous selected points of the final text adopted on 18 April. It contains comments to several provisions of the Constitution. The opinion relies on discussions with representatives of the Hungarian Parliament, of the Constitutional Court and of Hungarian civil society. A group of ten Hungarian legal scholars presented a 40-page long [amicus curiae](#) to the Commission in which they explain their concerns about the new Constitution of their country. They deal with several issues, among which the questionable legitimacy of constitution-making solely by the governing majority, the lack of market economy guarantees and the weakening of the protection of fundamental rights, that in their opinion characterize the new Hungarian fundamental law.

In its conclusion, the Commission's Opinion notes that Hungary's form of government has not been changed and it welcomes the introduction of a full-fledged constitutional complaint in the Hungarian system of constitutional review as recommended in the previous Opinion (par. 142). On the other hand, the Commission points out again its concerns about the lack of transparency of the constitution-making process (par. 144) and criticizes the significant number of matters relegated to cardinal laws requiring a two-thirds majority, including issues which are usually decided by simple majority (par. 145). Furthermore, the Commission expresses concerns over 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 (par. 146). It also disapproves of the introduction of life imprisonment without parole

which, according to the Commission, could raise issues of compatibility with international norms (par. 147).

Finally, also the European Union, through its Parliament, issued an opinion on the new Hungarian Constitution. A [Joint Motion](#) adopted on 5 July 2011 (by 331 votes to 274) calls on the Hungarian authorities to address the issues and concerns raised by the Venice Commission and to implement its recommendations (see its text in Italian [on this blog](#)). In particular and among others, the European Parliament invites Hungary to

- adopt only the basic and clearly defined scope of cardinal laws regulating the tax and pension systems, family policies and cultural, religious and socio-economic policies, allowing future governments and democratically elected legislatures to take autonomous decisions on these policies;
- revise the current mandate of the Budget Council;
- restore the right of the Constitutional Court to review budget-related legislation without exception;
- revise the provision on the lower mandatory retirement age for judges.

A dubious point of the European Parliament's resolution is its par. 1(h) in which it invites the Hungarian authorities to “make sure that the incorporation of the EU Charter of Fundamental Rights into the new Constitution does not cause problems of interpretation and overlapping competences between domestic courts, the new Hungarian Constitutional Court and the European Court of Justice”. This point is unclear as far as the final text adopted by the Hungarian Parliament on 18 April does not contain any provision which would provide for the incorporation of the Charter (see also above).

In this Joint Motion the European Parliament calls upon the European Commission to conduct a thorough review and analysis of the new Constitution and of the cardinal laws to be adopted in Hungary in the future in order to check that they are consistent with the *acquis communautaire*. Consequently, an opinion by the European Commission is to be expected in the near future.