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Request for the opening of a monitoring procedure in respect of Hungary

Report[1]
Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee)
Co-rapporteurs: Ms Kerstin LUNDGREN, Sweden, Alliance of Liberals and Democrats for Europe, and Ms Jana FISCHEROVÁ, Czech Republic, European Democrat Group

Summary

On 25 January 2011, a motion for a resolution on "Serious setbacks in the fields of the rule of law and human rights in Hungary" was tabled which contained a request to open a monitoring procedure in respect of Hungary. In its draft resolution on this subject, the Monitoring Committee outlines a number of worrisome developments with regard to the constitutional reform process in Hungary that raise serious questions with regard to the authorities' compliance with the fundamental principles of democracy, the protection of human rights and respect for the rule of law.

The erosion of democratic checks and balances as a result of the new constitutional framework in Hungary raises serious concerns. This new framework has excessively concentrated powers, increased discretion and reduced the accountability and legal oversight of numerous government institutions and regulatory bodies in Hungary. In addition, the committee expresses serious concerns about the curtailing of the powers and competences of the Constitutional Court and the willingness of the authorities to use the two-thirds majority in the parliament to circumvent Constitutional Court decisions. This also raises questions with regard to the respect for the principle of the rule of law.

When acceding to the Council of Europe, Hungary voluntarily committed itself to upholding the highest possible standards in relation to the functioning of democratic institutions, the protection of human rights and respect for the rule of law. Regrettably, the developments outlined in the report raise serious and sustained concerns about the extent to which the country is still complying with these obligations. The Monitoring Committee therefore recommends opening a monitoring procedure in respect of Hungary until such time as the concerns mentioned, *inter alia*, in the draft resolution and accompanying report, have been satisfactorily addressed.

1. Reference to committee: Doc. 12490, Reference 3744 of 11 March 2011.
Ms Fischerová resigned as rapporteur on 22 April 2013.

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A. Draft resolution[2]

1. The Parliamentary Assembly welcomes the report on the request to open a monitoring procedure in respect of Hungary, which was prepared following the motion for a resolution on "Serious setbacks in the fields of the rule of law and human rights in Hungary" (Doc. 12490). It takes note of, and supports the conclusions and recommendations of the European Commission for Democracy through Law (Venice Commission) on the Fundamental Law of Hungary and several Cardinal Acts, which were produced, *inter alia*, at the request of the Assembly's Monitoring Committee.

2. The constitution and related organic laws are the basis for the legal and democratic functioning of a country. They provide the basic democratic rules and the framework for the protection of the human rights of its citizens and the respect for the rule of law. In the view of the Assembly, a constitutional framework should therefore be stable and based on a wide social acceptance and large political consensus.

3. The Assembly regrets that the Hungarian Constitution and related cardinal laws were adopted in a hasty and opaque manner that disrespected proper democratic procedure and which, as a result, are not based on a consensus between the widest possible range of political forces in Hungarian society. This undermines the democratic legitimacy of the new Hungarian constitutional framework.

4. The Assembly considers that the excessive use of, and wide range of subjects regulated by, cardinal laws and provisions – which need a two-thirds majority to be changed – can be harmful to democratic principles. For the Assembly, this might be interpreted as an attempt by the current ruling majority to cement its values and policy preferences into the constitutional framework, with the purpose of controlling the direction of national policy far beyond the mandate that it has received from the Hungarian voters. The sheer number of institutions and regulatory bodies that have been set up or changed by the authorities underscores this intention. The control of the national policy and regulatory framework far beyond the current mandate of the authorities raises important questions about the compatibility of the new constitutional framework with the basic tenets of Article 3 of the Protocol to the European Convention on Human Rights (ETS No. 9 and ETS No. 5).

5. A constitutional framework should be based on broadly accepted values in society. The Assembly therefore regrets that the newly adopted constitutional framework includes several declarations and provisions that codify norms and values that are contentious and divisive in Hungarian society. This affects the democratic legitimacy and social acceptability of the constitutional framework, which is a matter for concern.

6. The Assembly is deeply concerned about the erosion of democratic checks and balances as a result of the new constitutional framework in Hungary. This new framework has excessively concentrated powers, increased discretion and reduced accountability and legal oversight of numerous government institutions and regulatory bodies in Hungary.

7. In the opinion of the Assembly, the curtailing of the powers and competences of the Constitutional Court – an important counter-balancing and stabilising institution in the Hungarian political system – is further evidence of the erosion of the system of checks and balances in Hungary. In this context, the fact that the ruling coalition has used its two-thirds majority in the parliament to circumvent Constitutional Court decisions and to reintroduce provisions in the constitution that were annulled by the Constitutional Court, has raised concerns.

8. Between May 2010 and the entry into force of the new Fundamental Law, on 1 January 2012, the previous constitution was amended 12 times. Since then, the new Fundamental Law has already been amended four times, the last time considerably. The constant changing of the constitution for narrow party political interests undermines the required stability of the constitutional framework. In addition, the Assembly wishes to underline that the main justification for a qualified two-thirds majority in constitutional matters is to protect the constitutional framework from frivolous changes by a ruling party and to ensure that the constitution is based on an as wide a consensus as possible between all political forces on the legal and democratic foundations of the State. The possession of a two-thirds majority does not relieve a ruling party or coalition from the obligation to seek consensus and to respect and accommodate minority views and interests. The will of the ruling coalition in Hungary to use its unique two-thirds majority to push through reforms is in contravention of these democratic principles.

9. The Assembly regrets the recent adoption of the so-called fourth amendment to the constitution against the recommendations of many national and international experts and against the explicit advice of Hungary's international partners. The fact that this fourth amendment knowingly contains a number of provisions that had

2. Draft resolution adopted by the committee on 25 April 2013.

previously been declared unconstitutional by the Constitutional Court of Hungary and/or flagged as being at variance with European principles and norms by the Venice Commission, is unacceptable and raises questions about the willingness of the current authorities to abide by European standards and norms.

10. The assessments of the constitution and several cardinal laws by the Venice Commission and Council of Europe experts raise a number of questions with regard to the compatibility of certain provisions with European norms and standards, including with the case law of the European Court of Human Rights. The Assembly urges the Hungarian authorities to reduce the number of areas that are regulated by Cardinal Acts and provisions and to take full advantage of the recommendations of the Venice Commission.

11. In addition, the Assembly calls upon the Hungarian authorities, with regard to:

11.1. the Act on Freedom of Religion and the Status of Churches, to:

11.1.1. remove the right to decide to recognise a religious denomination as a church from the competencies of the parliament, which is inherently a political body, and to ensure that such decisions are made by an impartial administrative authority on the basis of clear legal criteria;

11.1.2. establish clear legal criteria for the recognition of a church that are fully in line with international norms, including the case law of the European Court of Human Rights;

11.1.3. provide for the possibility to appeal any decision to grant, or reject, a request to be recognised as a church, before a normal court of law, both on substantial as well as on procedural grounds;

11.2. the Act on Elections of Members of the Parliament, to:

11.2.1. ensure that the election districts are drawn up by an independent authority on the basis of clear legal criteria;

11.2.2. ensure that the district boundaries themselves are not defined by law, especially not by a cardinal law. In addition, the Assembly recommends that the authorities seek a wide consensus between all political parties on the so-called compensation formula and to allow minority voters up until election day the choice of voting for a regular party or a minority list;

11.3. the Act on the Constitutional Court, to:

11.3.1. remove the limitation of the jurisdiction of the Constitutional Court on economic matters;

11.3.2. remove from the constitution the prohibition of the Constitutional Court to refer back to its case law from before 1 January 2012;

11.3.3. implement a mandatory cooling-down period between political activities and being elected to the Constitutional Court;

11.4. the Acts on the Judiciary, notwithstanding the improvements made to the relevant laws in co-operation with the Secretary General of the Council of Europe, to:

11.4.1. remove the possibility to transfer cases from the powers of the Chairperson of the National Judicial Office;

11.4.2. remove the possibility in the law for the Chairperson of the National Judicial Office to annul the outcome of a competition for the appointment of a judge;

11.4.3. to ensure that, by law, all decisions of the Chairperson of the National Judicial Office can be appealed before a court of law, both on substantial and on procedural grounds;

11.5. media legislation, to:

11.5.1. abolish registration requirements for print and online media;

11.5.2. separate, functionally and legally, the Media Council from the Media Authority;

11.5.3. ensure that, by law, all decisions of the Media Council or Media Authority can be appealed before a court of law, both on substantial and on procedural grounds.

12. The Assembly considers that each of the concerns outlined above is inherently serious in terms of democracy, the rule of law and respect for human rights. Taken separately, they would already warrant close scrutiny by the Assembly. In the present case, however, what is striking is the sheer accumulation of reforms that aim to establish political control of most key institutions while in parallel weakening the system of checks and balances.

13. When acceding to the Council of Europe, Hungary voluntarily committed itself to upholding the highest possible standards in relation to the functioning of democratic institutions, the protection of human rights and respect for the rule of law. Regrettably, the above-mentioned developments have raised serious and sustained concerns about the extent to which the country is still complying with these obligations. The Assembly therefore decides to open a monitoring procedure in respect of Hungary until such time as the concerns mentioned in, *inter alia*, this resolution and the accompanying report have been satisfactorily addressed.

B. Explanatory memorandum by Ms Lundgren and Ms Fischerová,[3] co-rapporteurs

1. Procedure

1. On 25 January 2011, Ms Marietta de Pourbaix-Lundin (Sweden, EPP/CD) and others tabled, through a motion for a resolution, an application to open a monitoring procedure in respect of Hungary. In this motion,[4] the authors argue that the future constitutional framework and the new media laws are undermining the rule of law and functioning of democratic institutions in Hungary to such an extent that the opening of a monitoring procedure by the Parliamentary Assembly is warranted. The need for opening a monitoring procedure was, in the view of the authors of the motion, also underscored by the reduced powers of the Hungarian Constitutional Court to scrutinise the new legislation and decisions by the government, as well as reports that civil servants were being dismissed as a result of their political views.

2. On 24 January 2011, the Bureau decided to hold a current affairs debate on the functioning of democracy in Hungary, which took place on 26 January 2011. During this debate, several members reiterated their concern that the new constitutional framework was being implemented without the required consultations and consensus and that it was reducing – and even abolishing – the necessary checks and balances between the different branches of power in the country.

3. According to Resolution 1115 (1997), as amended by Resolution 1431 (2005), an application to initiate a monitoring procedure – which may originate, *inter alia*, from a motion for a resolution or recommendation tabled by not less than 20 members of the Assembly, representing at least six national delegations and two political groups – is to be considered by the Monitoring Committee which, after the appointment of two co-rapporteurs and after carrying out the necessary investigations, will prepare a written opinion for the Bureau.[5] This opinion should contain a draft decision to open, or not, a monitoring procedure. If both the Monitoring Committee and the Bureau of the Assembly agree to open the monitoring procedure, or if they take divergent positions, the written opinion adopted by the Monitoring Committee shall be transformed into a report containing a draft resolution, which will be included for debate on the agenda of the next Assembly part-session. If both the Monitoring Committee and the Bureau of the Assembly agree that there is no need to open a monitoring procedure, such decision shall be recorded in the Progress Report of the Bureau and the Standing Committee, subject to confirmation by a vote of the Assembly during the discussion of the Progress Report.

4. Subsequently, on 25 March 2011, the Monitoring Committee appointed Ms Kerstin Lundgren (Sweden, ALDE) and Ms Jana Fischerová (Czech Republic, EDG) as co-rapporteurs for the opinion on the request for the opening of a monitoring procedure in respect of Hungary. In addition, the committee decided to ask for the opinion of the European Commission for Democracy through Law (Venice Commission) on the new constitution that, at that moment, was being debated in final reading in the Hungarian Parliament.

5. In total, three fact-finding visits were made to produce this opinion. The first visit took place from 6 to 8 July 2011. During that visit we met, *inter alia*, with: the Speaker of the Hungarian Parliament; the President of the Constitutional Court; the President of the Supreme Court; the Deputy Prime Minister and Minister of Justice; the Chair of the Committee on Culture and the Media; the Deputy Chair of the ad hoc committee to draft the new constitution; the Chair and members of the Hungarian delegation to the Assembly; representatives of all factions in the Hungarian Parliament; the Chair of the new Telecom and Media Authority; the Ombudsperson for Civil Rights; the Commissioner for data protection and freedom of information; the former Special Representative of the Organization for Security and Co-operation in Europe (OSCE) for the Freedom of the Media; as well as representatives of the civil society and diplomatic community in Hungary.[6]

6. In order to obtain additional information on the recently adopted cardinal laws, we made a second fact-finding visit to Hungary from 16 to 18 February 2012. During that visit, we met, *inter alia*, with the Speaker of the Hungarian Parliament, the Deputy Prime Minister and Minister of Public Administration and Justice, the Chair of the Constitutional Court, the Chair of the Curia, the Chair of the newly created National Judicial Office,

3. Ms Fischerová resigned as rapporteur on 22 April 2013.
4. Doc. 12490, motion for a resolution on "Serious setbacks in the fields of the rule of law and human rights in Hungary".
5. This is not the first time the Monitoring Committee has been asked to prepare an opinion on applications to initiate a monitoring procedure in respect of Council of Europe member States: opinions were prepared in respect of Greece (situation of the Muslim minority in western Thrace), Liechtenstein (constitutional amendments), the United Kingdom (electoral fraud), and Italy (monopolisation of electronic media and possible abuse of power).
6. The programme of the visit is available from the secretariat.

the Chair of the Central Election Commission (CEC), the Parliamentary Commissioner for Fundamental Rights, leaders of the political factions in the Hungarian Parliament, the Chair and members of the Hungarian national delegation to the Assembly, the Chair of the national association of journalists, the Chair of the Hungarian Bar Association, as well as representatives of civil society and the international community in Hungary.[7]

7. The third fact-finding visit took place from 25 to 27 February 2013. The main purpose of this visit was to clarify a number of outstanding issues, notably with regard to the recently tabled draft fourth amendment to the Fundamental Law, as well as to discuss our main findings with the authorities.[8]

8. The Fundamental Law of Hungary – the Constitution – was adopted on 18 April 2011 and came into force on 1 January 2012. The Fundamental Law sets the constitutional framework and main organising principles for Hungarian society but leaves the detailed regulation and implementation of these constitutional principles to a large number of cardinal acts, which require a super-majority vote of two thirds of MPs present to be adopted or amended.[9] The drafting of these cardinal laws only started after the adoption of the constitution. During our visit in July 2011, it became clear that it would be impossible to assess the new constitutional framework in Hungary – and its impact on the democratic functioning and respect of the rule of law – before these cardinal laws were adopted by the Hungarian Parliament. This considerably lengthened the time frame in which we were able to prepare our opinion for the committee. However, it also allowed us to follow more closely the actions of several international actors, most notably the European Commission, the European Parliament and the OSCE Representative for the Freedom of the Media.

9. The vast majority of the cardinal laws were adopted by, and indeed on, 31 December 2011, just before the entry into force of the new constitution. Several cardinal laws, as well as the manner in which they were adopted, created considerable controversy in Hungary and abroad, and questions were raised regarding their compatibility with international standards. In response, the Hungarian authorities requested the opinion of the Venice Commission on the cardinal acts on:

– the legal status and remuneration of judges and on the organisation and administration of courts;

– on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities;

– on the election of members of parliament.

10. In addition, on 25 January 2012, the Monitoring Committee decided to ask the Venice Commission for opinions on the cardinal acts on:

– freedom of information;

– nationalities;

– the Constitutional Court;

– prosecution;

– family protection.

11. The opinions on the cardinal acts on the judiciary,[10] and freedom of religion,[11] as requested by the authorities, were adopted during the plenary session of the Venice Commission on 16 and 17 March 2012. The opinions on the cardinal acts on elections,[12] nationalities,[13] the Constitutional Court[14] and prosecution[15] were adopted during the plenary session of the Venice Commission on 15 and 16 June 2012. In addition, the opinion on the act on freedom of information was adopted during the plenary session of the Venice Commission on 12 and 13 October 2012.

7. The programme of the visit is available from the secretariat.
8. Ibid.
9. Hungary uses the term cardinal act for what is commonly known as an organic law.
10. CDL-AD(2012)001.
11. CDL-AD(2012)004.
12. CDL-AD(2012)012.
13. CDL-AD(2012)011.
14. CDL-AD(2012)009.
15. CDL-AD(2012)008.

12. Regrettably, on 20 April 2012, the Venice Commission declined our request for an opinion on the cardinal act on family protection on the grounds that it did not have the required expertise in the field of private law.

13. On 31 December 2011, the Hungarian Parliament adopted the Transitional provisions of the Fundamental Law of Hungary. In view of the large number of new provisions with an undetermined validity and doubts with regard to their transitional nature, on 13 March 2012, the Monitoring Committee requested an opinion of the Venice Commission on the Transitional Provisions. On 29 March 2012, the Venice Commission informed the committee that the transitional provisions had been challenged before the Constitutional Court and therefore the Venice Commission would only be able to provide an opinion after the Constitutional Court had reached its decision.[16] On 18 June 2012, the Hungarian Parliament adopted a first constitutional amendment to the new Fundamental Law in order to make the Transitional Provisions an integral part thereof. On 28 December 2012, the Constitutional Court annulled the majority of the provisions of the Transitional Provisions. The Venice Commission has therefore not adopted any opinion on the Transitional Provisions.

14. On 11 May 2012 the Council of Europe Directorate General for Human Rights and the Rule of Law published an expertise on the laws on "The freedom of the Press and the Fundamental Rules on Media Content" and on the "Media Services and Mass Media", and the Secretary General of the Council of Europe engaged in a dialogue with the Hungarian authorities in order to address the most problematic issues in the new legislation on the judiciary and the media.

15. We would like to emphasise the close and cordial co-operation we enjoyed with the Hungarian Parliament and especially with the Hungarian delegation to the Parliamentary Assembly of the Council of Europe. We are grateful for the excellent programmes during our visit and hospitality provided to our delegation. We would like to thank the non-governmental organisation (NGO) community in Hungary, and in particular the Hungarian Helsinki Committee, for their assistance. Lastly, we would like to thank the Ambassadors of Sweden and the Czech Republic for their hospitality.

2. Introduction

16. Against the backdrop of a financial crisis, which necessitated a bailout by the International Monetary Fund (IMF) in 2008, and of a very tense political climate, parliamentary elections took place on 11 and 25 April 2010.[17] As a result of these elections, the joint Fidesz/KDNP list won 262 of the 386 seats in the parliament. The incumbent Hungarian Socialist Party[18] won 59 seats, the left-wing liberal party "Politics can be different" (LMP) won 16 seats, and the right-wing Jobbik party won 47 seats. This outcome gave the Fidesz/KDNP a clear constitutional majority in the incoming parliament.[19]

17. Since 1989 and the fall of communism, this is only the second time that any government has had a two-thirds majority in Hungary. The only previous occasion was between 1994 and 1998, when a Socialist/Liberal coalition was in power.

18. Fidesz, and its leader, Viktor Orban, saw this overwhelming majority as a "revolution through the ballot box" which gave the coalition a clear mandate for profound change[20] in Hungary. New regulatory bodies were created, the management of the judiciary underwent a major overhaul, the Ombudsman institution was reformed, and a number of new autonomous authorities, notably the media regulatory bodies and an Agency for data Protection and Freedom of Information, were established. But the key element to achieve this change was the adoption of a new constitution for Hungary, which became the number one priority for the ruling coalition.

19. Given the magnitude of the reforms and the speed in which they were carried out, assessing the situation in Hungary has been a particularly challenging task, because things keep constantly changing. We will first deal with the legislative process, and give an overview of newly created institutions. Then we will devote a chapter to the process of constitutional reform. We will analyse the system of checks and balances to verify whether it

16. As is its usual practise, the Venice Commission does not comment on laws that are appealed to the courts in order not to interfere in the legal process.
17. Hungary has a mixed proportional election system in which the majoritarian races are decided in up to two rounds.
18. The Socialists had been in power for eight years as from the 2002 elections, after having lost to Fidesz in the 1998 to 2002 period.
19. However, it should be underscored that this two-thirds majority in parliament is based on 52.7% of the popular vote.
20. These changes were outlined in the so-called "system of national co-operation".

has been affected to a significant degree by the reforms and, finally, we will flag any substantial concerns, where they exist, with regard to a number of cardinal laws, basing ourselves on the findings of the Venice Commission.

2.1. Legislative activity

20. From 14 May 2010, date of parliament's constituent sitting, to the end of 2012, the Hungarian National Assembly became a "legislative factory": a total of 589 laws or amendments to laws were adopted. At mid-term, this is as much as during the four years of the previous legislature. This is remarkable, as there are only two ordinary sittings per year (from 1 February to 15 June, and from 1 September to 15 December[21]).

21. Bills can be tabled by the President, the government, parliamentary committees and by any individual MP. It is very rare for the President to submit a bill to parliament. Most of the bills are submitted by the government. As at 30 December 2012, the National Assembly of Hungary had adopted 371 bills upon submission by the government. According to the applicable legislation,[22] draft laws prepared by the government or ministries are subjected to a mandatory consultation process. This includes publishing the draft law on the web, allowing for the submission of any comment via e-mail. Another form of public consultation is targeted consultation with specific NGOs, Churches, bar association, universities, etc. No exact deadline is set, but the law provides that drafts shall be published in a way ensuring "adequate time" to assess them, express related opinions thereon and analyse the opinions submitted.

22. During our first visit in July 2011, we heard a number of complaints, substantiated by concrete examples[23], that the mandatory consultation process did not provide a real possibility for a meaningful public debate, notably because deadlines were extremely short. Neither the Bar Association nor the Supreme Court had been consulted with regard to the planned reforms of the judiciary.

23. Individual members' bills and committee bills are not covered by the mandatory consultation process. Individual members' bills are thus used to speed up the legislative process. Indeed their number soared and by mid-term had already more than doubled compared to the 2006-2010 legislature: Government MPs tabled 260 bills (of which 199 were adopted), opposition MPs tabled 354 bills (of which only one was adopted).[24] We heard many criticisms related to the fact that a large number of bills were submitted by individual MPs instead of the government because this allowed for a fast-track procedure for their adoption by parliament, thus not allowing sufficient time for debate and amendments. Another major criticism relates to the fact that many cardinal laws, constitutional amendments, or indeed the draft new Fundamental Law itself, were submitted as individual members' bills. We found it indeed questionable, to say the least, that so many important reforms were initiated by individual MPs.

24. All opposition parties, including Jobbik, which is in "constructive opposition", complained about being sidelined and ignored, with the Fidesz/KDNP using its two-thirds majority as a steamroller to force through its political agenda at record speed. Some important cardinal laws, such as the one on churches, were adopted with major changes introduced at the very last moment (so-called pre-final vote amendments).

25. We also heard complaints about amendments to the House Rules[25] which were adopted in late 2011 with a two-thirds majority. Article 125.1 of the House Rules now provides that instead of a four-fifths majority of MPs present, an exceptional urgent procedure can now be decided by a two-thirds majority. According to the new Articles 128/A to 128/D, such a procedure may be initiated by those submitting a bill a maximum of six times per parliamentary session (ordinary and extraordinary sessions). If two thirds of the MPs present agree, then amendments to the Bill can be submitted within three hours after the urgent procedure was agreed to and the bill voted on the next day.

21. In the same period, parliament also held 11 extraordinary sessions.
22. Act CXXXXI of 2010 on Social Participation in Preparing Laws.
23. Not more than one day was provided to comment on the draft law on the Prosecution service (29 pages) and the draft law on the status of prosecutors (97 pages).
24. From 2006 to 2010, government MPs tabled 127 individual bills (of which 49 were adopted), while opposition MPs tabled 236 (of which 15 were adopted). The comparison with the 1994-1998 legislature, where the Socialist-led coalition had a two-thirds majority, is quite telling: governmental MPs tabled 91 bills (of which 40 were adopted), whereas opposition MPs tabled 178 (of which seven were adopted).
25. The term used in the Hungarian Parliament for their rules of procedure.

2.2. New institutions and major reforms

26. To give an idea of the magnitude and scope of the reforms carried out by the ruling coalition in just over two years, here is a list of the institutions that were:

i. abolished or replaced:

- the Ombudsmen institution: previously it was composed of 4 Ombudsmen: 1 for civil rights, 1 for national minorities, 1 for future generations (environment) and 1 for data protection and freedom of information;
- the National Council of Judges and the Supreme Court;
- the previous existing media bodies.

ii. newly created or recomposed:

- the Budget Council[26] (now composed of the President of the National Bank, the Head of the State Audit Office, and the President of the Budget Council). The President of the State Audit Office is elected by parliament for 12 years, with a constitutional majority of two thirds of all MPs. The President of the National Bank and of the Budget Council are appointed by the President for six years. The new President of the National Bank who was appointed beginning of March 2013, is the former Minister of Economy and a member of the Fidesz parliamentary faction since 2006. Under Article 44 of the Fundamental Law, the adoption of the State Budget act requires the prior consent of the Budget Council;
- the National Election Committee is composed of five members elected by parliament and five members delegated by political parties represented in parliament. In June 2010, upon a proposal of a Fidesz MP, the 1997 Act on election procedure was amended to the effect that the National Election Committee is henceforth recomposed not only before every parliamentary election (namely every four years), but also before elections to the European Parliament and local elections. Since the next local elections were scheduled for October 2010, the mandate of the five members, elected in February 2010 for four years by the previous parliament, was terminated in July 2010;
- a new security force to protect the parliament was set up in 2012. The Parliamentary Guard was given a constitutional basis through an amendment to the Fundamental Law in March 2013;
- the National Authority for data protection and freedom of information replaces the Parliamentary Ombudsman for data protection and freedom of information. Its President is appointed by the President of Hungary for nine years**.** The mandate of the Ombudsman for data protection was terminated upon entry into force of the Fundamental Law, well before the end of his term. This was the object of an infringement procedure launched by the European Commission before the European Court of Justice, which is still pending;
- the Commissioner for Fundamental Rights, assisted by two Deputies, one in charge of minorities and the other one in charge of future generations. The Deputies can no longer independently lodge complaints with the Constitutional Court. All three are elected by parliament for a six-year mandate[27] (renewable), by a two-thirds majority. The previous Commissioner for Civil Rights, Mate Szabo, who had been elected by parliament for six years in 2007, took over as Commissioner for Fundamental Rights until the end of his term (September 2013), but the mandate of his Deputies is to end at the same time as his;
- the Curia replaces the Supreme Court. Its President is elected by parliament for nine years by a two-thirds majority. The incumbent's mandate was terminated upon entry into force of the Fundamental Law, well before the end of his mandate[28] (whereas all the other judges remained in place);

26. The Budget Council was first set up by Act LXXV of 2008, as part of the agreement with the IMF. Originally, it was composed of three members, each elected by parliament for nine years upon proposals made by the President of the Republic, the President of the State Audit Office and the President of the National Bank, respectively.

27. Upon proposal of the President as regards the Commissioner for Fundamental Rights, who then proposes candidates to parliament as regards his two deputies.

28. He had been elected for a six-year term in 2009.

– the National Judicial Office takes over the management of courts, done previously by the National Council of Judges chaired by the President of the Supreme Court. Its President is elected for nine years by parliament with a two-thirds majority;

– the Prosecutor General's mandate has been extended to nine years and, according to a constitutional amendment of 16 November 2010,[29] he is now elected by parliament with a two-thirds majority instead of a simple majority;

– the Media Authority, the Media Council and the Media Foundation:[30] the President of the Media authority, who also chairs the Media Council, is appointed by the Prime Minister for nine years whereas the Media Council (four members) is elected by parliament by a constitutional two-thirds majority.

27. Other major reforms include a new civil code, tax and pension reforms, a major overhaul of the judiciary and the media regulatory bodies, new laws on the security services, on the financing of universities, on elections, on minorities, on citizenship, on local self-government, etc. The scope of, the speed and manner in which these reforms were carried out, have raised concern in Hungary and internationally, because of a suspicion that the Fidesz/KDNP coalition aims at cementing its political choices well beyond the time-frame given to it by the electorate. The long mandates for a number of chairs of new institutions and the fact that all of them were appointed by the two-thirds majority the ruling coalition holds in parliament, also reinforces that impression.

3. Constitutional reform

28. The idea that the Hungarian Parliament should adopt a new constitution has been on the political agenda of the country since the fall of the Berlin Wall. After the fall of communism, the Constitution of Hungary was not repealed in its entirety, as was the case in other central and eastern European countries. Instead, the constitution in force, which dated from 1949, was amended by the Hungarian Parliament in 1989. The preamble of this amended constitution stated that the amended 1949 Constitution would temporarily remain in force until a new constitution was adopted.[31]

29. After 1989, the Constitution of Hungary was amended several times. However, for various political reasons – and reflecting the sensitivity of this issue – no new constitution was drafted until 2010, after the current Fidesz/KDNP coalition government came to power. For the current ruling coalition, the adoption of a completely new constitution was of immense symbolic value because it meant final closure of the communist era and a return to the "historical" constitution symbolised by the St Stephen Crown.

3.1. The amendments to the "old constitution"

30. Between May 2010 and the entry into force of the new Fundamental Law on 1 January 2012 (see below), the previous constitution was amended 12 times. On three occasions it was the government which submitted the amendments, while the remaining nine were submitted by individual MPs from the ruling coalition. We again note the remarkable speed of this process: as a rule, not more than two to four weeks elapsed between the date of submission and the promulgation of the amendments.[32]

31. The first amendment was promulgated on 25 May 2010, the day Victor Orban was sworn into office as the new Prime Minister: it provides for a maximum of 200 MPs in the future and for 13 reserved seats for minority representatives. The second amendment of 5 July 2010 changed the composition of the nomination committee for the election of constitutional court judges and repealed article 24.5 of the constitution that

29. Bill T/1247 tabled by the government (seventh amendment).

30. The Board of Trustees of the Public Service Media Foundation is composed of eight members with a nine-year mandate, elected by parliament with a two-thirds constitutional majority (three by ruling parties, three by opposition, the Chair and one member are delegated by the Media Council for nine years).

31. See also the opinion of the Venice Commission on the new Constitution of Hungary (CDL-AD(2011)016), paragraphs 6-8.

32. The third amendment provided for the creation of deputy mayors, the sixth amendment introduced a three-year cooling period for members of the armed forces, police and security services before standing for elections, and the eleventh amendment regulates the free of charge transmission of local municipalities' property to the State and municipalities.

required a four-fifths majority of MPs to adopt procedural rules for the preparation of a new constitution. The fourth amendment of 6 July 2010 added two new paragraphs to Article 61, paving the way for the setting up of new media regulatory bodies and making all laws related to the media cardinal laws.

32. The fifth amendment of 11 August 2010 (Bill T/579 introduced by the government), provided a constitutional basis for introducing the possibility of retroactive taxation. A law was then adopted creating a retroactive 98% taxation of severance payments made to public officials upon their dismissal.[33] This law was declared unconstitutional by the Constitutional Court on 28 October 2010, following which, by way of the eighth amendment dated 19 November 2010, the powers of the Constitutional Court to review budgetary and tax matters were severely curtailed (see below). The government then reintroduced a bill providing for the same retroactive taxation for five years. This was again annulled by the Constitutional Court on 10 May 2011, as being contrary to human dignity.

33. The seventh amendment submitted by the government added a whole new chapter constitutionalising the Financial Supervisory Authority. The ninth constitutional amendment of 23 December 2010 creates the National Media and Info-communications Authority and specifies that its president is to be appointed by the Prime Minister for a nine-year term.

34. The tenth amendment of 14 June 2011 was particularly controversial because it provided for retroactive curtailment of special pension schemes, such as early retirement pensions, and their replacement by social allowances that would henceforth be taxable. This led to huge demonstrations and the lodging of over 8 000 applications to the European Court of Human Rights.

35. Although the Fundamental Law already provided that the composition of the Constitutional Court would be increased from 11 to 15 members as of 1 January 2012, the tenth amendment (14 June 2011) to the old constitution states that this increase should take effect already on 1 September 2011 and that the new members and the President should be elected by 31 July 2011. Five[34] new members were thus elected on 27 June 2011, including one sitting Fidesz MP who was one of the proponents of the amendment. Finally the 12th amendment of 1 December 2011 provided that the president of the Curia should be elected until 31 December 2011.

3.2. The adoption process of the Fundamental Law

36. In June 2010, the parliament set up an ad hoc parliamentary committee for the drafting of the new constitution. This ad hoc committee was given until 31 December 2010 to make proposals on the fundamental principles of a new constitution and submitted a concept paper to parliament on 20 December 2010. However, in parallel, members of the ruling majority were developing a draft for the new constitution, behind closed doors. This draft was subsequently tabled in the Hungarian Parliament on 14 March 2011. This procedure effectively sidelined the ad hoc committee for the drafting of a constitution, whose concept paper was relegated to a working document in the constitutional drafting process.[35] However, in all fairness, we should note that part of the opposition[36] had already ceased to participate in the work of the ad hoc committee in protest over the limitations to the powers of the Constitutional Court, which were enacted by a constitutional amendment, adopted by the ruling majority on 16 November 2010.

37. The opposition had called for a referendum to be organised on the new constitution. This was rejected by Fidesz who countered that the two-thirds majority gained in the elections had given it a clear mandate to change the constitution. In order to increase the legitimacy of the constitutional reform process a “National Consultation” was launched in February 2011. A questionnaire was sent to all eligible voters at the beginning of March 2011, asking them to reply to 12 questions within two weeks.

33. According to new laws adopted with a two-thirds majority in 2010 on dismissal of civil servants and government officials, no reasons needed to be given for their dismissal. This was found to be unconstitutional by the Constitutional Court by decisions dated 18 February 2011.

34. One of them was filling a vacant seat.

35. By Resolution 9/2011 of 7 March 2011, upon proposal of MPs from the ruling coalition, the parliament requested members of parliamentary groups and independent MPs to submit their bill on a new constitution before 15 March 2011, with or without taking into consideration the proposal of the ad hoc parliamentary committee.

36. The Hungarian Socialist Party and the LMP (“Politics can be different”) withdrew from the ad hoc committee in October 2010 and Jobbik withdrew in November.

38. Hungarian citizens were not asked for their opinion on a draft constitution. Instead they were asked for their opinion on the following 12 topics: 1) the relation between fundamental rights and obligations; 2) the restriction of public debt; 3) whether the constitution should enhance the role of the family, public order, labour and health; 4) the need for a "family voting system" which would allow parents to vote on behalf of their minor children; 5) whether the State should ban the levying of taxes on expenses related to child rearing; 6) the protection of future generations; 7) the conditions of public procurements; 8) the togetherness of Hungarians across borders; 9) the protection of natural diversity and national treasures; 10) the protection of land and water; 11) whether life imprisonment should be included in the Criminal Code; and 12) the obligation to testify before a parliamentary commission.

39. It is clear from the above that this questionnaire was more an opinion poll on various topics, many of them not related to constitutional issues at all. In total only around 900 000 persons of the 8 million persons to whom a questionnaire was sent replied. The results of this questionnaire were not made public. It is to be noted that the questionnaire was sent out to the public early March, while the draft constitution was tabled on 14 March. It is therefore doubtful that the results of this questionnaire could have been tabulated in time to make any useful contribution to the constitutional drafting process. This questionnaire can therefore under no circumstances be seen as a proper civil consultation let alone as a valid alternative to a referendum.

40. The new constitution was adopted in the Hungarian Parliament by the Fidesz/KDNP coalition[37] on 18 April 2011. It was signed into force by the President of Hungary on 25 April 2011, less than one and a half months after it was introduced in parliament. The lack of transparency in the drafting process and the short time frame for the adoption of the new constitution were criticised by the Venice Commission[38] as well as by Hungarian civil society. We strongly concur with this negative assessment of the adoption process. A constitution sets the rules of the game for the democratic and legal functioning of a country and creates the framework for the protection of the rights of its citizens. European democratic tradition therefore dictates that the adoption of a constitution be based on an as wide a consensus as possible and only after a proper in-depth consultation of society. The opaque drafting process, the lack of proper parliamentary debate and adequate consultation of Hungarian society, as well as the lack of a wide consensus on the text and indeed overall direction of the new constitution, undermine the democratic legitimacy of the new Fundamental Law of Hungary.

41. We should like to refer to the extensive analysis of the new constitution contained in the opinion of the Venice Commission[39] that was prepared upon the request of the Monitoring Committee. This opinion lists several positive aspects of the new constitution, but also a number of serious concerns and shortcomings. We will not reproduce its findings *in extenso* but restrict ourselves to highlighting some of its main findings that are of particular relevance for this opinion.

42. The adoption of the new constitution stirred a lot of controversy, including among Hungary's neighbours. To a large extent, this controversy was related to the – in many ways unique and outspoken – preamble to the constitution. This preamble contains a number of explicit and sometimes contentious political declarations and statements. A number of these declarations are based on moral and ethical norms that are debatable and not shared by everyone in society. However, we do not wish to be drawn into a debate on the merit of the statements in the preamble, or the moral and ethical norms that underpin them. That falls outside the scope of this opinion.

43. The authorities have emphasised on several occasions that the preamble is primarily a set of political declarations that will in no way reduce the established protection of individual human rights granted under the European Convention on Human Rights (ETS No. 5, "the Convention") and other international human rights instruments that Hungary is Party to. However, like the Venice Commission,[40] we would like to stress that a constitution should avoid attempting to codify values and norms that are controversial and about which justifiably different opinions and concepts exist within society. This is especially important in the light of the provision in the Constitution[41] that requires that the entire constitution be interpreted in the light of the declarations made in the preamble. This could cause problems in the future if the provisions of the constitution or cardinal acts are interpreted in a very narrow manner on the basis of such politically charged definitions.

37. The vote on the new constitution was boycotted by the opposition parties.
38. See CDL-AD(2011)016, paragraphs 10-13, and CDL(2011)001, paragraphs 14-19.
39. CDL-AD(2011)016.
40. Ibid., paragraph 38.
41. Fundamental Law of Hungary, Article R, paragraph 3.

44. According to Article D of the constitution, “Hungary shall bear responsibility for the fate of Hungarians living beyond its borders”. This provision has caused, understandably, some consternation among Hungary’s neighbours and other countries with a sizeable ethnic Hungarian minority. The authorities have formally stated that this article should be interpreted as an obligation to support and assist Hungarian ethnic minorities abroad – in co-operation with the home State – in preserving their identity and culture. They stressed that this provision does not provide – and cannot be interpreted as, providing – a basis for extra-territorial decision-making by the Hungarian authorities.[42] Any other interpretation by the Hungarian authorities would be at odds with the country’s international obligations and, in our view, unacceptable from a Council of Europe perspective.

45. As indicated above, the adoption process of the new constitution was controversial and characterised by accusations that the authorities were sidestepping common democratic procedure and using their constitutional majority to force their political views upon the political minority. The controversial manner in which the constitution was adopted was repeated during the adoption of the Cardinal Acts and indeed raises questions about the authorities’ commitment to democratic procedures and willingness to respect checks and balances.

46. There are two main justifications for a two-thirds majority to adopt or change the constitutional framework. Firstly, to protect it from frivolous changes by a ruling party for narrow partisan self-interest and, secondly, to ensure an as wide a consensus as possible between all political forces over the legal and democratic foundations of the State. The fact that the current ruling coalition in Hungary has a two-thirds majority in the parliament does not relieve it of its obligation to seek an as wide a consensus as possible between all the political parties, nor from its obligation to consult the society on the main tenets of the constitutional framework.[43] We can only regret that such an inclusive constitution-making process did not take place.

3.3. The excessive use of cardinal laws and cardinal provisions

47. As mentioned, the Fundamental Law sets the normative constitutional framework for the country. The detailed regulation and implementation of these constitutional principles is delegated to a large number – excessively large in the view of the Venice Commission and other constitutional experts – of cardinal acts. These cardinal laws are already adopted and can only be changed with a two-thirds majority vote. This underscores the importance of the cardinal acts when assessing the constitutional framework in Hungary. This is especially true in the light of the vagueness of several constitutional provisions, which lack legal clarity and allow for the possibility of overly broad interpretation. This was one of the main concerns noted in the Venice Commission’s opinion on the Constitution[44].

48. The Fundamental Law contains around 26 subjects where reference is made to further detailed legislation to be adopted later, the so-called cardinal laws, which require a two-thirds majority of all MPs present to be adopted or amended. We were told by the authorities that cardinal laws have existed since 1989 and were in fact reduced in number by the new Fundamental Law.

49. However, there are a number of areas made cardinal by the Fundamental Law, which were not cardinal according to the old constitution, such as the laws on family protection, passive right to vote, provisions on parliament’s regular sessions, on the supervisory activities of parliamentary committees, on autonomous regulatory bodies, on general taxation and the pension system, on the operation of the National Bank, on the system of financial supervision, on the Budget Council, on State property and national assets. Furthermore, a constitutional amendment adopted on 21 December 2012 (so-called third amendment) has added to this list all laws relating to the use and property of land and forests.

50. It should be noted that the previous constitution already contained an excessively high number of references to cardinal laws: many cardinal laws in the new Fundamental Law were also cardinal according to the old constitution (laws on the judiciary, churches, police, defence forces, citizenship, elections, minorities, State audit office, local self-government, or the Parliament’s House Rules). Around 30 cardinal laws have been adopted to date, several upon a private member’s bill. Major structural and substantial changes have been made, affecting almost all areas of Hungarian society.

42. See also the position of the government of Hungary on the opinion on the new Constitution of Hungary adopted by the Venice Commission (CDL(2011)058).
43. Especially given the fact that this two-thirds majority is based on only a slight (52.7%) majority of the popular vote.
44. CDL-AD(2011)016, paragraphs 28, 57 and 60.

51. In general, we are concerned that the excessive use and scope of Cardinal Laws will undermine democratic practice in Hungary. This is further compounded by the manner in which most of these Cardinal Laws were prepared and adopted in the Hungarian Parliament, as we have outlined above.

52. The lack of mandatory consultation was compounded by the heavy workload of the parliament that resulted from the need to adopt the large number of (partly or wholly) cardinal acts that were required by the new Fundamental Law. On 29 November 2011, one month before entry into force of the new Fundamental Law, only seven of the 19 Cardinal Acts had been adopted, ten were introduced and under discussion, while two still needed to be introduced in the parliament. As a result of this workload, cardinal acts were adopted in record time, reportedly without much deliberation or discussion. A considerable number of cardinal acts were adopted on 31 December 2011, several hours before the new constitution came into force. In addition, the ruling majority adopted a special procedure in parliament which allowed the fast-track adoption of the cardinal acts.

53. At least five Cardinal Laws were introduced by a private member's' initiative, including on such sensitive issues as family protection, religious freedom and the status of churches, as well as the election of members of parliament and their remuneration. In our view, cardinal laws on such sensitive and potentially controversial matters should have been subject to a proper social consultation process. Instead, these laws were introduced and discussed in such a short time frame that it inhibited proper preparation by the members of parliament.[45]

54. The extensive use of cardinal laws, with the super majority they require to be changed, is, in our view, as well as that of a number of other interlocutors – including the Venice Commission – highly problematic. The excessive number and the large scope of the laws that require a two-thirds super majority to be changed can only be interpreted as an attempt by the current ruling majority to cement its policy preferences in the constitution of the country. This allows them to set the national policy far beyond the term of the mandate that they were given by the Hungarian electorate.

55. As noted by the Venice Commission: "Cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law"[46] but left to the normal political process and decided upon by simple majority. Unless another party or coalition obtains a two-thirds majority in a future election, the cementing of these policies in the cardinal laws will give the Fidesz coalition the *de facto* veto right over the policies of the next government. The Venice Commission rightly notes that this seems to be at odds with Article 3 of the Protocol to the European Convention on Human Rights (ETS No. 9).[47] Moreover, as under these conditions negotiations to change or adapt policies are likely to be long and protracted, the excessive use of the two-thirds majority requirement will undermine the required flexibility needed for normal policy making and could result in systemic political instability and conflict.

56. In order to avoid an erosion of democratic standards and practices, the authorities are urged to restrict the use and scope of the cardinal laws to those areas where a strong justification for the use of a two-thirds majority exists and to regulate cultural, religious, moral, socio-economic and financial provisions and policies by normal law.

3.4. The Transitional Provisions to the Fundamental Law

57. On 31 December 2011, just one day before the entry into force of the Fundamental Law, the Hungarian Parliament adopted the Transitional Provisions of the Fundamental Law of Hungary, which total 32 provisions, including a long declaration and several articles dealing with the transition from communist dictatorship to democracy. They contain a large number of provisions that are valid for an undetermined period and are to all effects and purposes in fact considered to be an integral part of the constitution. The reason that the ruling coalition decided to integrate these new provisions in the transitional provisions and not in constitutional amendments – as would have been proper procedure – is, according to several interlocutors, mostly symbolic, as amending the constitution would undermine the notion of perfection that the authorities wished to embellish in the Fundamental Law.

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45. For example the draft Act on Family Protection was tabled by four individual members on Friday 2 December 2011 and placed on the agenda of the Committee on Monday 5 December 2011. It was adopted in plenary on 23 December 2011, exactly three weeks after it was first introduced.

46. CDL-AD(2011)016, paragraph 145.

47. "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

58. To our regret, we note that a number of transitional provisions are the result of the questionable practice of the current authorities to bypass Constitutional Court decisions by amending the constitution.[48] On 9 November 2012, the Transitional Provisions were amended to add a provision on prior registration as a pre-condition of the right to vote, in order to provide a constitutional basis for the Cardinal Law on Election Procedure, which was adopted by parliament on 26 November 2012.[49]

59. As the Constitutional Court invalidated most of the Transitional Provisions on 28 December 2012, the fourth amendment tabled – again – by individual Members' bill on 8 February 2013 aims to include the annulled provisions through a procedure of formal constitutional amendments.

3.5. Amendments to the Fundamental Law

60. Since its entry into force on 1 January 2012, the Fundamental Law has already been amended four times. The first amendment to the constitution was adopted on 18 June 2012, and aimed to formally make the Transitional Provisions part of the Fundamental Law, by re-adopting them with a two-thirds constitutional majority of all MPs. On 19 June 2012, parliament adopted a second constitutional amendment annulling Article 30 of the Transitional Provisions on a possible merger of the Central Bank and the financial supervisory authority (this had been requested by the European Commission, who had threatened Hungary with infringement proceedings before the European Court of Justice should the independence of the National Bank of Hungary be curtailed in any way). A third constitutional amendment was passed on 21 December 2012 providing that laws regulating property rights of agricultural land and forests and integrated agricultural production were to become cardinal laws.

61. A fourth amendment to the Fundamental Law was tabled by individual MPs from the ruling coalition on 8 February 2013. This amendment contains 14 articles, incorporating into the Fundamental Law the provisions found unconstitutional by the Constitutional Court in its judgment on the Transitional Provisions, but also adding a number of other articles to the Fundamental Law in areas which should either not be regulated at constitutional level at all, or raising legal provisions to constitutional level to prevent their future examination and possible annulment by the Constitutional Court. Other provisions clearly aimed to provide a constitutional basis allowing parliament to re-enact laws that were previously declared unconstitutional by the Constitutional Court. The competences of the Constitutional Court were also further curtailed (see section 4.2.1).

62. The frequent changing of the constitution for narrow party preferences, especially if they are meant to bypass previous unfavourable Constitutional Court decisions, is, in our view, at odds with the principle of the rule of law. This view is not shared by the authorities: they consider, firstly, that they had no other option, in order to implement the Court's decision, other than to incorporate all the articles of the Transitional Provisions into the Fundamental Law itself (so-called consolidation of the text). This is not correct, since the Constitutional Court clearly stated that parliament could either incorporate the said Transitional measures into the Fundamental Law, or decide to regulate matters at another level of legal norms.

63. Secondly, they believe that as the supreme constituent power, parliament is legitimately entitled, in a democratic society, to adopt any constitutional amendment it pleases, even if it contradicts or overrules a decision of the Constitutional Court. We were told for example by the Speaker that parliament had no intention of abiding by a decision of the Constitutional Court of 21 February 2013 annulling a provision of the Criminal Code that prohibits the use of symbols of totalitarian regimes, and this despite two judgments of the European Court of Human Rights,[50] which found a violation of Article 10 of the European Convention on Human Rights in cases concerning the prohibition of the five-pointed red star.

64. The authorities stand on this may be formally correct, but a two-thirds majority does not give them a free ride, and most importantly does not allow them to bypass such an important part of the system of checks and balances. In a democratic society, speed and volume in law-making cannot come at the expense of quality, which only broad consultation and proper judicial review can ensure.

48. The Constitutional Court had found a number of provisions in several Cardinal Laws to be unconstitutional. With the coming into force of the new constitution on 1 January 2012 the scope for review by the Constitutional Court is considerably reduced.

49. This law was challenged before the Constitutional Court by the President of the Republic, who refused to enact it. On 7 January 2013, the Constitutional Court annulled a number of provisions, notably on the prior registration and on rules concerning campaign financing. The ruling coalition then gave up the idea of introducing prior voter registration.

50. Judgments in the cases of *Vajnai v. Hungary* (8 July 2008) and *Franatolo v. Hungary* (3 November 2011).

65. Despite calls made by the Secretary General of the Council of Europe to postpone the vote on the fourth amendment, in order to give the Venice Commission an opportunity to study it, and despite serious concerns expressed by the President of the European Commission, several European Union member States, including Germany, and the United States, the fourth amendment was adopted by parliament on 11 March 2013. We also consider this amendment to be very problematic, but will flag at this stage only our major concerns, since the Hungarian Government and the Council of Europe Secretary General have requested an opinion of the Venice Commission. We hope this detailed opinion will be available as soon as possible.

4. Checks and balances

66. In a democratic society, checks and balances are provided mainly by a fair and free election system, an independent and impartial judiciary, independent institutions providing oversight of government actions and guaranteeing human rights, such as the Ombudsman, free media and laws aimed at protecting human rights.

67. The Hungarian Government requested the opinion of the Venice Commission on the acts on the judiciary, freedom of religion and the election law. In addition, on our proposal, the Monitoring Committee sent five more acts, on freedom of information, nationalities, the prosecution, the constitutional court and on family protection, to the Venice Commission for opinion. We selected these laws for opinion because their adoption had, rightfully or not, created a certain amount of controversy in Hungarian society or because a number of interlocutors had flagged these acts as potentially problematic. We therefore felt that it would be appropriate, as well as helpful, for the Hungarian authorities and lawmakers to have an independent and impartial assessment of these acts. Their inclusion therefore does not automatically mean that we as rapporteurs had serious reservations about the substance of these laws. Neither does the fact that a cardinal act has not been sent to the Venice Commission for opinion mean that they do not contain provisions that could be problematic in the light of Council of Europe standards or norms.

4.1. Cardinal Act CCIII on the Election of the Members of the Parliament of Hungary

68. The Cardinal Act CCIII on the Election of the Members of the Parliament of Hungary was adopted by the parliament on 23 December 2011. It replaces the Cardinal Act on Election of Members of the Parliament of 1989. This law defines the legal framework for the elections and sets the constituency boundaries. It should be seen in conjunction with the Act on Electoral Procedure, which regulates the conduct of the elections itself. The Act on Electoral Procedure was adopted on 26 November 2012. This law created quite a controversy as it introduced active voter registration for elections. However the legal basis for this provision was struck down by the Constitutional Court when it annulled most of the transitional provisions. The President of Hungary subsequently announced that active voter registration would not be introduced before the next elections.

69. The Act on the Election of Members of Parliament was introduced in the parliament as a private members' bill and therefore not subject to the social consultation procedure that would have taken place if this bill had been proposed by the government. In addition, the vote on this act was boycotted by the main opposition parties in protest against the lack of consultation and transparency during the drafting of this law.

70. The manner in which this law was introduced into the parliament and adopted is of serious concern to us. This law defines the election system of the country as well as the formula for the allocation of mandates. In addition, it delimits the election constituencies. As it is, this new act considerably changes the legal framework for elections in Hungary. European democratic principles demand that electoral legislation is based on a broad social consultation and an as wide a consensus as possible between the electoral stakeholders. The lack of transparency surrounding the drafting of this act, as well as the lack of a wide consensus among the stakeholders about the act and its main tenets, could undermine public trust in the legitimacy and fairness of the election system and the parliament that results from it.

71. On 20 January 2012, the authorities requested the opinion of the Venice Commission on Act CCIII on the Election of Members of Parliament of Hungary. As is its usual practice with regard to election legislation, the Venice Commission and the Office for Democratic Institutions and Human Rights of the OSCE (OSCE/ODIHR) prepared a joint opinion that was adopted by the Venice Commission during its plenary session on 15 and 16 June 2012.

72. The act on the elections of members of parliament maintained the mixed proportional–majoritarian election system in Hungary. However, the new act drastically reduced the number of mandates from 386 to 199.[51] This reduction of MPs is in line with general public opinion in Hungary that clearly favoured a smaller parliament. Following this reduction of mandates, the percentage of majoritarian mandates in the parliament

has increased slightly, from 45.6% to 53.3%. In the proportional system, there is a 5% threshold for individual parties, a 10% threshold for a joint party list and a 15% threshold for electoral lists of more than two parties. This threshold is excessively high[52] and should be reduced.

73. As was the case in the previous electoral law, a compensatory system is used for the allocation of proportional mandates. The rationale for such a compensatory system is to ensure that there is a correlation between the overall number of mandates (both proportional and majoritarian) won by a party and its overall support in the country, as measured by the results of the proportional race.

74. The new Cardinal Act on the Election of the Members of the Parliament of Hungary changes the compensatory allocation mechanism. Under the previous mechanism, votes that were not used in the allocation of proportional mandates and the votes of candidates that lost in the majoritarian races were taken into account in the compensatory allocation mechanism. However, under the new system, the surplus of votes for the candidates winning a majoritarian[53] seat will also be taken into account in the allocation mechanism. As a result of this new mechanism, the new election system in Hungary is less proportional than the previous system.

75. As mentioned by the Venice Commission, there are no international standards recommending a specific method or degree of proportionality regarding the distribution of seats.[54] However, democratic standards demand that there is a positive correlation between the votes obtained and the number of seats allocated. Moreover, as mentioned, the rationale behind a compensatory allocation mechanism is to increase the proportionality of the distribution of the seats and not to reduce it.

76. Given the lack of a broad consensus between the electoral stakeholders on the electoral legislation, this new allocation mechanism is of serious concern to us. The lack of consensus and possibility for skewed outcomes could negatively affect the public trust in the fairness and democratic legitimacy of the election system.

77. Before the adoption of the new Cardinal Act on the Election of the Members of the Parliament of Hungary, the boundaries of the electoral districts had not been changed since 1989. As a result, the size of the majoritarian constituencies varied so excessively that it violated the principle of the equality of the vote. This was noted by the Constitutional Court of Hungary[55] which stated that deviations in the size of the election districts had created an unconstitutional situation as it violated the principle of equal voting rights that was enshrined in the Hungarian Constitution. Also the OSCE/ODIHR Election Assessment mission for the 2010 elections in Hungary underlined the excessive variation between the sizes of the constituencies, in contradiction to international standards.

78. As a result of the reduction in the number of Members of Parliament in the new election law, as well as in order to address the excessive variations in the sizes of the constituencies, the boundaries of the election districts were redrawn. In addition, the new act specifies that the maximum deviation in the number of voters should not deviate more than 15%[56] between constituencies at the national level. If the variation is more than 15% the parliament has to amend the constituency boundaries.

79. The precise boundaries of the constituencies are defined in the law itself and can therefore only be changed with a two-thirds majority vote by the parliament. This means that a one-third minority of the parliament can veto the redrawing of the constituency boundaries, irrespective of the fact that the law stipulates that these have to be redrawn if their sizes deviate more than 15% from each other. As a result, the delimitation of constituency boundaries can easily become the subject of political bartering, which in turn could compromise the trust in the fairness of this process.

80. The fact that the constituency boundaries are drawn up by the parliament is also highly problematic. International democratic standards dictate that constituency boundaries should be drawn up by an independent and impartial body, in a transparent process, on the basis of clear and widely accepted criteria. The parliament,

51. Of these 199 seats, 93 are allocated via the proportional compensatory systems and 106 via the single mandate majoritarian system.
52. When applied to the median threshold in Council of Europe member States.
53. In other words, the difference, minus one seat, gained by the winning candidate and the next highest scoring candidate in that particular constituency.
54. CDL-AD(2012)012, paragraphs 21 and 22.
55. Constitutional Court Decision 22/2005.
56. 20%.

for obvious reasons, has a clear interest in how the constituency boundaries are drawn and therefore cannot be considered as an impartial and independent body. Moreover, the new act is not clear with regard to the actual drawing-up process and fails to set clear and impartial criteria on the basis on which the constituency boundaries should be drawn. As a result, the delimitation process lacks the required transparency and clarity.

81. During our meeting with the Chair of the Central Election Commission, in February 2012, we were informed that the CEC was given no indication about the basis and criteria by which the constituency boundaries were established, or by whom they were drafted. The CEC had been neither involved nor consulted on this issue. This lack of transparency undermines trust in the democratic process as is evident from the recurrent allegations of gerrymandering that are made in this respect.

82. The manner in which constituency boundaries are drafted is clearly at variance with accepted democratic norms and principles. Echoing recommendations of the Venice Commission and the OSCE/ODIHR, we urge the authorities to establish an independent and impartial commission to establish and review on a periodic basis, the constituency boundaries on the basis of clear and widely accepted legal criteria.

83. The new Cardinal Act on the Election of the Members of the Parliament of Hungary gives Hungarian citizens abroad the right to vote in the proportional part of the elections but not in the majoritarian races. We welcome the fact that the Hungarian diaspora has been given the right to vote in national elections, which increases the universality of suffrage[57] and follows the overall trend in Europe in this regard. It should be noted that Hungary has a very sizable diaspora[58] and that these citizens, not resident in Hungary, could have a considerable impact on the composition of the new parliament.

84. In a welcome development, the law contains special provisions that aim to foster the participation of national minorities[59] in the work of the parliament. The act allows the registration of special minority electoral lists by minority groups for local self-governments. The registration requirement for such a minority list is the signatures of 1% of the registered voters of that minority, with a maximum of 1 500 signatures. In addition, the 5% threshold is waived for such lists.

85. Voters who are registered as belonging to a recognised minority may vote for the majoritarian candidate in the district of residence and for the proportional party list or for the minority list(s) pertaining to their minority, if any are established. This choice is made when a person registers as belonging to a minority. This could limit the choice for the minority voters during a given election, especially if only one list competes for the minority in question. This in turn could potentially skew the outcome of an election. As mentioned in the Venice Commission's opinion on this act[60], it would be far better if members of a minority could decide on election day whether they wish to vote for the national party or for the minority lists.

4.2. The Constitutional Court (Cardinal Act CLI of 2011 on the Constitutional Court)

86. In Hungary, since 1989, the Constitutional Court has played a fundamental role in providing checks and balances. The Hungarian system provides for a uni-cameral parliament and the Constitutional Court therefore plays an important correcting role. It is thus very worrying to observe the ruling majority's decisions, which clearly aim to reduce the competences of the Constitutional Court.

4.2.1. Curtailing the competences of the Constitutional Court

87. Cardinal Act CLI of 2011 on the Constitutional Court was adopted in 14 November 2011. The changes to the legal framework for the Constitutional Court were one of the more controversial aspects of the constitutional reform in Hungary and raised concerns about diminishing checks and balances. In this respect, it is especially regrettable that this act was not drafted by the government, but by a parliamentary committee, and therefore not subject to wide public scrutiny and consultation.

88. The changes in the legal framework for the Constitutional Court started already before the adoption of the new Fundamental Law. Following a number of Constitutional Court decisions that annulled provisions of a number of laws, the ruling majority adopted, in November 2010, a controversial constitutional amendment that

57. CDL(2012)012, paragraph 42.
58. The number of Hungarian citizens living outside Hungary that are eligible to vote is estimated to be 3 million, in comparison to 8 million voters who actually live in Hungary.
59. Or nationalities in the parlance of the Cardinal Act on Nationalities.
60. CDL-AD(2012)012, paragraphs 46-49.

seriously limited the competences of the Court. According to this amendment, the Constitutional Court can only review the constitutionality of Acts and decisions related to the central budget, central taxes, stamp duties and contributions, custom duties and central requirements related to local taxes when these violated the right to life and human dignity, freedom of thought and religion, protection of data or the right to Hungarian citizenship. This substantially weakens the role of the Constitutional Court in the institutional framework of checks and balances. In addition, the limitation of the Court's competences on economic criteria, to a small subset of rights guaranteed in the constitution, weakens the human rights regime and respect for the rule of law.[61]

89. In the view of the Venice Commission, such restrictions of the competences of the Constitutional Court "run counter to the obvious aim of the constitutional legislature in the Hungarian Parliament to enhance the protection of fundamental Rights in Hungary".[62]

90. The provisions that curtailed the competences of the Constitutional Court in relation to Acts and decisions related to the central budget, central taxes, stamp duties and contributions, custom duties and central requirements related to local taxes, were maintained in the Fundamental Law that was adopted on 18 April 2011. However, the Fundamental Law limited this restriction of competences conditional to the State debt exceeding 50% of gross domestic product (GDP).[63] To our surprise, the Transitional Provisions of the Fundamental Law of Hungary state that the Constitutional Court will still not be able to review such acts and decisions even when the budgetary situation has improved and the State debt has been reduced to below 50% of the GDP. This provision was subsequently struck out when the Constitutional Court annulled most of the Transitional Provisions. It has been reintroduced in the fourth amendment (Article 17). This is indicative of the authorities' wish to limit the Constitutional Court's oversight of its policies and decisions on a permanent basis and not only in specific budgetary circumstances.

91. The Cardinal Act on the Constitutional Court abolished the system of *actio popularis* that had been a hallmark of the constitutional justice system of Hungary. Under this system, each individual person, NGO, or even foreigners had the right to request an *ex post* review of the constitutionality of an act or its implementation, even without being directly affected by it. The abolishment of *actio popularis*, which was one of the stated aims of the authorities for the reform of the constitutional justice system, has been widely criticised in Hungary and seen as an attempt to weaken the system of checks and balances.

92. In its opinion on three legal questions arising from the process of drafting a new Constitution in Hungary, the Venice Commission stressed that *actio popularis* cannot be regarded as a European standard and its existence is rather an exception among Council of Europe member States.[64] Although it acknowledges that *actio popularis* provides for the broadest guarantee of a comprehensive constitutional review, it bears the risk of completely overburdening the Constitutional Court, as arguably was the case in Hungary.[65]

93. In order to compensate for the abolishment of *actio popularis*, the system of *ex post* direct individual complaints – where the individual is directly affected has been extended to cover both legal acts and their implementation as well as court decisions based on them.

94. *Ex post* reviews of legal acts can be initiated by the government, one-fourth of the members of parliament as well as by the Commissioner for Fundamental Rights (Ombudsman).[66] The latter was added to the list of entities that can initiate an *ex post* review of legal acts on the recommendation of the Venice Commission in order to compensate for the abolition of the *actio popularis* system. Civil society interlocutors initially expressed some doubts about the possibility for the Commissioner for Fundamental Rights to effectively initiate an *ex post* review of an Act before the Constitutional Court in the absence of cases of individuals whose rights were violated by the Act in question.[67]

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61. The possibility that a law could suddenly be declared unconstitutional when Hungarian debt is reduced to less than 50% of the GDP, in our view, undermines the principle of legal stability.

62. CDL-AD(2011)001.

63. Currently the State debt is approximately 80% of the GDP. Given the economic reality of the country, combined with the international financial crisis, it is very unlikely that the debt of the Hungarian State will go below 50% of the GDP in the foreseeable future.

64. CDL-AD(2011)001, paragraph 57.

65. Reportedly the Constitutional Court in Hungary received an average of 1 600 *actio popularis* petitions each year.

66. According to the fourth amendment, the Prosecutor General and the President of the Curia have been added to this list.

67. See also the Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and Key Cardinal Laws drafted by a number of eminent legal experts and civil society representatives in Hungary.

95. However, these fears turned out to be unfounded as was evident from the number of reviews of cardinal acts by the Constitutional Court that were requested by the Commissioner for Fundamental Rights (over 25). This also underscores the fundamental role of this institution in the system of checks and balances in Hungary, especially in the situation when it would be difficult for a political force that does not belong to the current ruling majority to obtain the required quorum to initiate a constitutional review of a legal act. It is, however, to be noted that the current Commissioner for Fundamental Rights was elected in 2007 with cross-party support for a six-year term. His mandate ends in September 2013 and it remains to be seen whether the next one will also have the same proactive attitude when it comes to submitting complaints to the Constitutional Court.

96. The fourth amendment to the Fundamental Law further limits the powers of the Constitutional Court: it will only be able to review constitutionality of the Fundamental Law or amendments thereto, in case of violation of the procedural requirements set out in the Fundamental Law with respect to its adoption and promulgation. Such a review may be Initiated by the President,[68] by the government, a quarter of MPs, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights. The Constitutional Court must take a stand within 30 days. This means that substantial review, even to the limited extent it had been practised by the Constitutional Court so far, is no longer possible.

97. Article 20 of the fourth amendment repeals all the Constitutional Court rulings delivered before the entry into force of the Fundamental Law. Prohibiting the Constitutional Court from referring to its case law if it pre-dates the entry into force of the Fundamental Law (namely any case law before 1 January 2012) is clearly unacceptable. It is also unnecessary since the Constitutional Court had already stated in a number of decisions[69] that it would rely on its case law only in relation to provisions in the Fundamental Law that were substantially the same as in the old constitution.

4.2.2. Independence of the Constitutional Court

98. The Fundamental Law does not explicitly provide for the independence of the Constitutional Court or for the judiciary in general. The Venice Commission has recommended that such a provision should be included in the Fundamental Law, but the Hungarian authorities have not taken this up.[70] In this context, it is also to be regretted that the Cardinal Act CLI of 2011 does not explicitly provide for the independence of the Constitutional Court.

99. Following constitutional amendments in 2010, the Cardinal Act on the Constitutional Court increases the number of judges on the court from 11 to 15.[71] It limits judges' mandates to one term of 12 years.[72] In addition, the President of the Constitutional Court is no longer chosen by the members of the court from among their midst but directly elected by the parliament with a two-thirds majority. The fact that the Cardinal Act now excludes the re-election of judges has strengthened the independence of the judges in the Court.

100. Judges in the Constitutional Court are elected with a two-thirds majority by the parliament. The candidates for the Constitutional Court are appointed by a parliamentary committee that is composed of all political factions on the basis of their numerical strength in the parliament. Under the previous constitution, all political factions had the same strength in the nominating committee, ensuring that candidates could count on a large consensus among the political forces in the country.[73] In the current composition of the parliament – where the ruling majority has a constitutional majority – the qualified majority needed to elect a Constitutional Court judge is not a sufficient guarantee against the politicisation of the Constitutional Court. It is strongly recommended that additional safeguards are adopted in the appointment process to guard against possible politicisation of the court.

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68. The fourth amendment furthermore limits the power of the President to initiate *ex ante* proceedings before the Constitutional Court. He can now only ask for a review of conformity with the procedural requirement set in the Fundamental Law with respect to its adoption.
69. See decisions 22/2012, 30/2012, 34/2012 and 4/2013.
70. CDL-AD(2012)009, paragraphs10 -11.
71. In 1989, the Constitutional Court was established with 15 judges. A 1994 constitutional amendment changed the number of judges to 11 as of 10 December 1994.
72. Previously judges could serve multiple nine-year terms.
73. On a number of occasions, however, no consensus was reached and seats on the Constitutional Court remained vacant.

101. We have heard no criticism of the Constitutional Court, which seems to date to perform its role as the guardian of the constitution independently from the current ruling majority. Only one decision, on the lowering of the mandatory retirement age for judges, was taken by seven votes to seven, with the President's vote tipping the decision in favour of annulling this provision. Most other decisions of the Constitutional Court were adopted by 10 votes to 5, i.e. by a clear majority. We note, however, that the dissenting five members very often were precisely those judges who were elected by the current ruling majority. We heard that by March 2013 the Constitutional Court will have eight judges (out of 15) elected by the current two-thirds Fidesz-KDNP coalition. We can only hope that this new composition will not affect the ability of the Court to reach its decisions based on legal reasoning not affected by party political preferences.

4.2.3. Overruling the Constitutional Court

102. In the past two years, we have witnessed a very worrying trend: many provisions of Cardinal or other Acts annulled by the Constitutional Court were simply re-enacted by way of constitutional amendments:

– After the Court annulled provisions which allowed for retroactive 98% taxation of severance benefits for civil servants, it was stripped of the power to review all issues related to taxation and budgetary matters;

– After the Court, upon request of the then President of the Supreme Court, annulled a provision of the Criminal Code allowing the Prosecutor General to choose a court for dealing with a given case, the same provision was re-enacted in the Transitional Provisions to the Fundamental Law. The same power in civil cases was given by the Transitional Provisions to the President of the National Judicial Office. Both these transfer powers again appeared in the draft fourth amendment (Articles 14 and 15), but the adopted version now only constitutionalises this power for the President of the National Judicial Office;

– After the Court annulled the law on churches for procedural reasons, the same were re-enacted in the Transitional Provisions. The law on churches, upon a request by the Commissioner for Fundamental Rights and 17 churches who had been refused registration, was again annulled on substantial grounds on 27 February 2013, but the fourth amendment continues to provide that church registration will be carried out by parliament;

– The Constitutional Court, on 16 July 2012, declared the retroactive lowering of the mandatory retirement age for judges, prosecutors and notaries from 70 to 62 as unconstitutional. This had forced over 300 judges into retirement. The same provisions were re-enacted in the Transitional Provisions;

– The European Court of Justice, on 6 November 2012, also ruled that this was a violation of European Union anti-discrimination laws. These two rulings have not been fully implemented to date;

– On 20 December 2012, upon request of the commissioner for Fundamental Rights, the Court struck down a number of provisions of the Family Protection Law related to inheritance rights and the narrow definition of family: the fourth amendment again uses the same restrictive definition of family;

– On 12 November 2012, the Constitutional Court annulled provisions of the Minor Offences Act on "permanent living in public places" which made the fact of being homeless a criminal offence. Article 8 of the fourth amendment provides again precisely for that possibility;

– After most of the Transitional Provisions were annulled by the Constitutional Court on 28 December 2012, upon request of the Fundamental Rights Commissioner, most of them were re-enacted by way of constitutional amendments contained in the fourth amendment;

– The Transitional Provisions were amended on 9 November 2012 to add an obligation of prior voter registration as a condition for the right to vote. This was done to provide a constitutional basis for the Law on Election Procedure which was adopted on 26 November. This law was, however, challenged before its promulgation by the President, and the Constitutional Court struck down both prior voter registration and a number of provisions restricting campaign financing and publicity (decision of 7 January 2013). The fourth amendment (Article 5) reintroduces limits to political election advertisements;

– In June 2012, the Constitutional Court annulled a government decree on student contracts (obliging students who benefited from state subsidised higher education to work in Hungary after their diploma). On 4 July 2012, the Higher Education Law was amended to include the text of the annulled decree. Article 7 of the fourth amendment now provides a constitutional basis for making financial support to students conditional on employment or entrepreneurial activities.

103. In any State governed by the rule of law, it is of fundamental importance to abide by judgments of the highest court of the land in order to guarantee legal certainty and uphold respect for fundamental rights. The fact that the Fidesz/KDNP coalition currently enjoys the rare privilege of a constitutional majority does not, in our view, allow them to blatantly disregard the correcting mechanism that the Constitutional Court provides, especially in a situation where, like in Hungary, there is no second chamber of parliament which could possibly act as a counter-balance and correct mistakes made.

4.3. Cardinal Acts on the judiciary

104. The judiciary is mostly covered by two Cardinal Acts: Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of the courts. Given the similarity in underlying issues, we will also discuss the Cardinal Acts on the "Prosecution Service" (CLXIII) and on the "Status of the Prosecutor General, Prosecutors, and other prosecution employees and the prosecution career" (CLXIV) under this sub-heading. The Cardinal Acts on the judiciary are one of the most controversial aspects of the constitutional reform process in Hungary and have raised serious concerns both domestically and abroad. This was underscored by the start of an infringement procedure by the European Commission on aspects of the law as well as the subsequent decision by Commissioner Reding to challenge some provisions before the European Court of Justice.

105. On 20 January 2012, the Minister of Foreign Affairs of Hungary requested an opinion from the Venice Commission on several cardinal laws including those concerning the judiciary. In addition, on 25 January 2012, the Monitoring Committee decided to ask the opinion of the Venice Commission on, *inter alia*, the cardinal laws concerning the prosecution. The opinion on the judiciary[74] was adopted by the Venice Commission at its plenary meeting on 16 and 17 March 2012, while the opinion on the prosecution service[75] was adopted at its plenary meeting on 15 and 16 June 2012.

106. In its opinion, the Venice Commission harshly criticised the cardinal acts on the judiciary. It noted that the cardinal acts radically changed the justice system and introduced a system of judicial administration that is unique in Europe. While acknowledging the need for reform of the justice system, the opinion concluded that this new system, in numerous aspects and especially with regard to the independence of the judiciary, was in contradiction with European standards and problematic from the point of view of the right to a fair trial as provided by Article 6 of the European Convention on Human Rights.[76]

107. The opinion of the Venice Commission emphasised three main areas of concern: the concentration of powers in the hands of the President of the National Judicial Office; the early retirement of judges and the – allegedly politically motivated – discriminatory treatment of the President of the Supreme Court, who was the only member of this institution who was not maintained in his functions when the Supreme Court was renamed Curia after the adoption of the new constitution.

4.3.1. The excessive powers vested in the president of the National Judicial Office

108. A key area of concern was the concentration of powers in the hands of the President of the newly created National Judicial Office (NJO). The cardinal act vested this person, *inter alia*, with full powers to appoint or dismiss judges, appoint or dismiss the court presidents, transfer judges to other courts (with or without their consent) and to transfer cases from one court to another.[77] The Venice Commission considered that these powers were largely discretionary and lacked accountability as the cardinal act did not provide for legally established criteria nor oblige the President of the NJO to reason his/her decisions or allow for a judicial review of them.

109. The concerns with regard to the concentration of powers are compounded by the fact that the cardinal act vests all these powers in the person of the President of the NJO and not in the institution as such. The President of the NJO is elected by the parliament with a qualified two-thirds majority for a period of nine years. As a result, a relatively small minority in the parliament can block the election of a new President of the NJO, who would remain in office until a successor has been chosen. The vice-presidents of the NJO are appointed by the President of the NJO, who can also initiate their removal from office. In addition, the President of the NJO can only be removed from office by the parliament with a two-third majority, on the basis of a motion for

74. CDL-AD(2012)001.
75. CDL-AD(2012)008.
76. CLD-AD(2012)001, paragraphs 117-120.
77. For a full breakdown of all powers of the President of the NJO, see CDL-AD(2012)001, paragraphs 33 and 34.

dismissal proposed by the President of the Republic or the National Judicial Council (NJC).[78] However the NJC is composed of judges who in many ways are dependent on the President of the NJO who is an *ex officio* member of the NJC. As a result of these provisions, the overall accountability of the President of the NJO is clearly insufficient, which affects the democratic legitimacy of this post.[79]

4.3.2. The sudden lowering of the retiring age

110. Prior to the judicial reforms, the mandatory retirement age for judges was 70.[80] Article 12 of the Transitional Provisions and the Cardinal Act on the Judiciary changed this provision and lowered the mandatory retirement age to 62. This change is remarkable in light of the fact that the government had indicated that it wished to raise the general mandatory retirement age from 62 to 65. The change of the mandatory retirement age resulted in the mass lay-off of around 270 judges, many of them in senior positions.

111. The retroactive lowering of the retirement age on questionable grounds[81] raised concerns domestically and internationally. The Hungarian Ombudsman appealed the retroactive lowering of the retirement age to the Constitutional Court of Hungary. On 16 July 2012, the Constitutional Court ruled that the retroactive lowering of the mandatory retirement age was unconstitutional as it undermined the independence of the judiciary, and ordered the government to reinstate the judges concerned.

112. On 17 January 2012, the European Commission launched an accelerated infringement procedure against Hungary, *inter alia* with regard to the lowering of the mandatory retirement age. The Commission found that the lowering of the mandatory retirement age for judges and prosecutors constituted age discrimination for this category of workers. The Commission provided two reasoned opinions to the Hungarian Government. However, the replies from the Hungarian authorities failed to satisfy the Commission, which, on 25 April 2012, lodged a case with the European Court of Justice against the lowering of the retirement age for Hungarian judges. On 6 November 2012, the European Court of Justice sided with the European Commission and ruled that the lowering of the retirement age for judges amounted to unjustified age-based discrimination outlawed by the EU Directive on equal treatment for employment and labour (Directive 200/78/EC).

4.3.3. The dismissal of the President of the Supreme Court

113. The Curia that was established by the Fundamental Law is the legal successor to the Supreme Court of Hungary.[82] The Cardinal Act on the Judiciary therefore provides that all judges of the Supreme Court can serve until the end of their mandate. However, an exception was made for the President of the Supreme Court, who needed to be re-elected. In addition, a new election criterion for the President of the Supreme Court was adopted. According to this new criterion, a candidate must have at least five years' experience as a judge in Hungary. Time served on international tribunals is not taken into account.

114. The unequal treatment of the President of the Supreme Court is highly questionable. These new provisions are widely seen as being solely adopted to dismiss the sitting President of the Supreme Court, Mr Baka, who in the past had been critical of the government's policies of judicial reform and who had successfully challenged a number of government decisions and laws before the Constitutional Court.[83] Mr Baka was the Hungarian judge on the European Court of Human Rights from 1991 to 2007, and was elected President of the Supreme Court by the Hungarian Parliament in June 2009. Mr Baka had not previously served a five-year term as a judge in Hungary, and was therefore, despite his 17 years of experience as a judge on the European Court of Human Rights, ineligible for the post of President of the Curia. The widespread perception that these legal provisions were adopted against a specific person is strengthened by the fact that, in June 2011, the parliament adopted a decision that suspended all appointment procedures for judges until

78. The NJC is the body of judicial self-government in Hungary. It is fully composed of judges but its powers were considerably reduced following the latest reform of the judiciary.
79. See also CDL-AD(2012)001, paragraphs 37-43.
80. The minimum retirement age for judges was 62, but they had the option to remain in office until the mandatory retirement age of 70.
81. See, for example, CDL-AD(2012)001 paragraphs 105-106, and Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and Rule of law in Hungary, International Bar Association, paragraphs 3.41-3.42.
82. Article 11 of the Temporary Provisions of the Fundamental Law.
83. The previous constitution gave the President of the Supreme Court the right to ask for a review by the Constitutional Court of laws or decisions he or she deemed problematic. This has just been re-instated with the fourth amendment to the Fundamental Law that was adopted on 11 March 2013.

1 January 2012, when Mr Baka's would no longer be in office. This despite the backlog in cases that is often mentioned by the authorities as one of the underlying reasons for the reform of the judiciary. As mentioned by the Venice Commission,[84] generally formulated legal provisions that are in reality directed against a specific person or persons are contrary to the rule of law. In addition, the politically motivated dismissal of the President of a Supreme Court could have a chilling effect that could threaten the independence of the judiciary.

4.3.4. Action taken by the Secretary General of the Council of Europe

115. Following the adoption of opinion CDL-AD(2012)001 by the Venice Commission on the Cardinal Acts on the judiciary, the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, entered into talks with the Hungarian authorities on the manner in which the Venice Commission's opinion could be implemented. In order to address the most urgent issues, Mr Jagland proposed that the Hungarian authorities initially focus on three priority areas:[85]

– introducing provisions that would subject the excessive discretionary powers of the President of the NJO to judicial review;

– revising the procedure for the appointment of the President of the NJO in order to prevent the incumbent's mandate from being extended indefinitely by a small minority blocking the appointment of a successor;

– structural measures to strengthen the court system with a view to ensuring that there is no longer a need to transfer cases and to ensure that as long as the transfer of cases is necessary, this will be done on the basis of objective legal principles and with appropriate judicial oversight.

116. However, as emphasised by the Venice Commission: "It was clear that the focus on these three priority areas would not mean that other recommendations of the Venice Commission should not be implemented, but that the three priority areas should be addressed as a matter of urgency".[86]

117. As a result of consultations between the Secretary General and the Hungarian Government, a package of amendments to the two Cardinal Acts on the judiciary was tabled by the authorities. These amendments were adopted on 2 July 2012. Given that these amendments do not necessarily address all the issues raised by the Venice Commission and the Secretary General, the Monitoring Committee decided, on 28 June 2012, to request an opinion of the Venice Commission on these amendments and, in particular, on the question whether these amendments addressed all the substantial concerns of the Venice Commission regarding the Cardinal Acts on the judiciary, as voiced in opinion CDL-AD(2012)001. This opinion[87] was subsequently adopted by the Venice Commission at its plenary meeting on 12 and 13 October 2012.

118. The amendments have not changed the manner by which the President of the NJO is appointed, or by which he or she can be dismissed. The Hungarian authorities had furthermore promised to amend the relevant legislation in order to clearly specify that the President of the NJO would be holding this position for one single nine-year term, non-renewable. An amendment to this effect submitted by the Minister of Justice in March 2012 was however withdrawn on 18 June 2012. We hope that the Bill submitted to parliament on 29 March 2013 will finally deal with this problem.

119. Also, in the event that parliament fails to agree on a successor with a two-thirds majority, the Vice-President will be appointed interim President. However, the Vice-President is appointed by the President of the NJO. We therefore concur with the Venice Commission that it would have been preferable to give the National Judicial Council the power to appoint an interim President.[88]

120. The amendments to a large extent address the concerns regarding the excessive concentration of discretionary powers in the hands of the President of the NJO without the required accountability and transparency.

121. The powers of the President of the NJO in the appointment of new judges or court leaders are no longer discretionary. If the NJO President wishes to deviate from the appointment or review board he or she needs to have the consent of the NJC and can only do so on the basis of criteria established by the latter. In addition,

84. CDL-AD(2012)001, paragraphs 112-115.
85. CDL-AD(2012)020, paragraph 9.
86. Ibid., paragraph 10.
87. CDL-AD(2012)020.
88. Ibid., paragraph 15.

these decisions can be appealed in a court of justice. These are important improvements of the legislation. We were informed, however, that the President of the NJO still has the power to annul a vacancy notice for judicial appointment, even after candidates have submitted their applications and been ranked by the NJC. This is clearly problematic.

122. The Cardinal Acts on the judiciary drastically curtailed the role of the NJC, the body of judicial self-government in Hungary, in the administration of the court system. The amendments to a large extent addressed this shortcoming. The powers of the NJC have been strengthened, including with respect to the appointment of judges and the administration of the judiciary.[89] However, it should be noted that the NJC is still functionally dependent on the NJO and has a continuous rotation system for its presidents, which weakens its capacity to oversee and control the NJO and its President.

123. Court presidents and heads continuously monitor the administration of justice in the courts under their responsibility, including on compliance with rulings of higher courts and judgments, contrary to theoretical issues and grounds. In its opinion CDL-AD(2012)001, the Venice Commission considered that this continuous supervision could have a chilling effect on the independence of the judges, especially in the context of the uniformity procedure where the Curia can publish obligatory decisions and authorities rulings that are binding on the courts. Regrettably, this concern was not addressed in the amendments to the Cardinal Acts on the judiciary.

124. In a positive change, as a result of the amendments, a judge that needs to be transferred on a permanent basis has the opportunity to choose between the available judicial posts at courts of the same level. Only if the judge does not accept any of the posts offered to him can the President of the NJO transfer the judge to a post of his or her own choosing. In addition, this decision can now be appealed in an administrative or labour court. It is important that the law explicitly provides for the possibility of a full review on both the procedure and the substance of the decision to transfer a judge without his consent. The Cardinal Acts on the judiciary also allow for the chair of a tribunal to "reassign judges without their consent to a judicial position at another post on a temporary basis out of service interests every three years for a maximum of a year". The Venice Commission has criticised this provision as overly broad and excessive. This criticism was unfortunately not substantially addressed in the amendments.

4.3.5. The transfer of cases

125. A crucial area of concern was the excessively large and discretionary powers given to the President of the NJO to transfer cases from one court to another, based on the overly broad criterion of "adjudicating cases within a reasonable period of time". This power was given a constitutional basis by its inclusion in the Transitional Provisions to the Fundamental Law on 31 December 2011, but its duration was limited "until a balance distribution of case-load has been realised". After the Constitutional Court annulled most of the provisions of the Transitional Provisions, the power of the President of the NJO to transfer cases has again been reintroduced through the fourth amendment, but on a permanent basis.

126. The amendments to the cardinal acts only marginally address the substantial criticism of the Venice Commission on this provision. Following the amendments, the law now specifies that the transfer of cases is an exception and that the NJC will determine the principles that should be applied by the NJO President when appointing a preceding court. However, the President is not bound by these principles. In addition, the principles to be developed by the NJC only pertain to the criteria for the selection of the preceding court and not on the selection of cases that will be transferred. Similarly, the judicial review is limited to the selection of the preceding court and does not cover the selection of cases itself. In the case of the selection of the preceding court, the legal overview is restricted to compliance with legal provisions and not with the substantial criteria for the selection of cases, as drawn up by the NJC. In addition, the cardinal acts allow the President of the NJO to assign a case to another court even if the Curia has annulled a previous appointment decision in the same case.[90]

127. If allowed at all, the transfer of cases should only take place exceptionally and on the basis of clearly established and objective criteria. Furthermore, the transfer of cases, both with respect to the selection of cases as well as with respect to the selection of the receiving court, should be open to legal review, the conclusions

89. See CDL-AD(2012)020, paragraph 31, for a non-exhaustive lists of powers that have been transferred.
90. CDL-AD(2012)020, paragraphs 60-72.

of which should be binding on the President of the NJO. The current possibilities for legal review, as introduced by the amendments, are clearly deficient. We wish to highlight that the transfer of cases does not solve the underlying structural under-capacity of the courts in Budapest.[91]

128. The Hungarian Parliament should introduce such a comprehensive judicial overview on the transfer of cases without delay. The current situation is at variance with the principle of a fair trial as provided by Article 6 of the European Court of Human Rights. In addition, we would like to highlight that, in its opinion on the amendments, the Venice Commission emphasised that in general it "strongly disagrees with the system of transfer of cases because it is not in compliance with the principle of a lawful judge, which is an essential component of the rule of law".[92]

129. The amendments to the cardinal acts regrettably do not address the controversial lowering of the mandatory retirement age of judges or the pre-term dismissal of the President of the Supreme Court of Hungary.

130. The Cardinal Acts on the prosecution service establish a strong and independent prosecution service. However, the cardinal acts could be improved by establishing an equally strong system of checks and balances, which is currently not sufficiently well developed in the legislation. As with the Cardinal Acts on the judiciary, a major concern is the fact that the Transitional Provisions[93] give the Prosecutor General the right to allocate a case to a different court than the court of general competence. The possibility for a prosecutor to select the court where a case will be heard is at variance with the principle of a fair trial, as meant by Article 6 of the Convention. This possibility should therefore be withdrawn from the Prosecutor General, even if he has never made use of it until now.[94]

131. This provision was struck down when the Constitutional Court annulled most of the Transitional Provisions on 28 December 2012. We note that the same provision was reintroduced in the fourth amendment (Article 15), tabled on 8 February 2013.

132. We welcome the fact that this provision was not adopted by the parliament during its deliberations on the fourth amendment, as the ruling coalition decided to withdraw the relevant draft article 15.

4.4. Media legislation

133. On 9 November 2010, the Hungarian Parliament adopted Act CIV on "The Freedom of the Press and the Fundamental Rules on Media Content" and on 30 December 2010 it adopted Act CLXXXV on "Media Services and the Mass Media". These Media Acts, which were adopted after a long and charged adoption process, have a far-reaching impact on the media landscape in Hungary. They attracted widespread criticism both inside and outside Hungary, as they were seen as undermining the independence of the media and limiting the right to freedom of expression.

134. In response to the concerns that were expressed, Dunja Mijatovic, the OSCE Representative on Freedom of the Media, commissioned an independent legal assessment of the media law package.[95] The conclusions of this assessment were damning. According to the report, the Media Acts established "a system for media content regulation (including Internet- and ICT-delivered media content) going in its sweep and reach beyond almost anything attempted in democratic countries and beyond the limits of what is accepted in the international debate as an appropriate and justified approach to regulating new communication services, and on the other, as introducing – often in disregard or violation of the needs of a democratic system of social communication and of the letter and spirit of international standards – stricter regulation, more pervasive

91. Most requests for cases to be transferred originate from the Budapest-capital regional Court, predominantly in economic cases. A total of 42 cases were transferred in 2012, according to information we received from the President of the NJO in February 2013.

92. CDL-AD(2012)020, paragraph 74.

93. Article 11.4 of the Transitional Provisions. This article reintroduced in the constitution a provision of the Cardinal Act on the judiciary that was judged unconstitutional by the Constitutional Court of Hungary on 20 December 2011.

94. CDL-AD(2012)008, paragraph 83, and CDL-AD(2012)020, paragraph 73.

95. Comprising the Acts CIV and CLXXXV, as well as Act T359, amending the previous constitution and Act LXXXII of 2010, amending certain acts on media and telecommunications.

controls and limitations on freedom of expression".[96] Emphasising that the media package exceeded "what is justified and necessary in a democratic society", the report recommended thoroughly reconsidering and amending this package of legislation.

135. European Commissioner Kroes expressed her strong reservations with regard to the media Acts and indicated that several provisions in this law seemed to be non-compliant with EU law, in particular the Audio-visual Media Directive, the Treaty on the Functioning of the European Union on the freedom of establishment and the freedom to provide services[97], as well as Article 11 of the European Union Charter of Fundamental Rights. The European Parliament, on 10 March 2011, expressed its concerns with regard to the media legislation and called upon the Hungarian authorities to fundamentally reconsider and amend the media legislation package.[98] On 9 February 2012, the Commission indicated that it would consider starting Article 7 procedures if Hungary continued to flout EU law.

136. The then Council of Europe Human Rights Commissioner, Thomas Hammarberg, also expressed his concerns about what he termed the "corrosive cumulative impact"[99] of the new media legislation on the freedom of the media and freedom of expression in Hungary. His report highlights his concerns with regard to, *inter alia*, the "politically unbalanced regulatory machinery with disproportionate powers and lack of full judicial supervision", threats to the independence of the public broadcasters, infringements of the rights of journalists to protect sources, as well as attempts of a priori content regulation.[100]

137. Responding to domestic and international criticism, a number of amendments were introduced. These amendments limited the requirements for balanced coverage to broadcast media only; specified that foreign broadcasters could not be fined under the Hungarian media law for incitement to hatred; clarified that on demand media providers only have to register after they began offering media services; and clarified the provision that media content may not "cause offence" in such a manner that this is limited to discrimination or incitement to hatred. While these amendments were welcomed as a positive step in the right direction, they were seen as being insufficient to address all the substantial shortcomings and concerns with regard to the media laws. On 19 December 2011, the Constitutional Court of Hungary issued a ruling[101] in which it declared unconstitutional the provisions which extended the scope of the media law to the online and printed press as well as the provisions that obliged broadcasters to provide the Media Authority with any and all information it requested. In addition, it ruled that the powers of the newly established Commissioner for Media and Communications were unconstitutional as being an unjustified restriction of the freedom of the press, and annulled the provisions that would have obliged journalists to reveal their sources in legal proceedings. The court gave the legislator until 31 May 2012 to introduce amendments to the media legislation in line with the ruling of the court.

138. On 11 May 2012, the Council of Europe Directorate General for Human Rights and the Rule of Law published an expert assessment of the Hungarian media legislation, including on the proposed amendments to the media laws following the decision of the Constitutional Court. EU Commissioner Kroes welcomed this expertise which confirmed the concerns of the European Commission with regard to the media legislation in Hungary.

139. The expertise emphasised that in order to be brought into line with European democratic standards, any regulatory system for the media should be capable of guaranteeing and, equally important, be seen to be guaranteeing, the independence of this regulatory system from political influence and control. The key to this independence of the regulatory body is the manner in which it is appointed. However, in the case of Hungary, the Council of Europe assessment established that the process for appointments to the media regulatory bodies[102] "do not ensure political independence or neutrality".[103] In addition, it noted that existing safeguards

96. Analysis and assessment of a package of Hungarian Legislation and Draft Legislation on Media and Telecommunications, commissioned by the Office of the OSCE Representative on Freedom of the Media, September 2010, pp. 5-6.
97. Articles 49 and 56.
98. EP Resolution P&_TA(2011)0094 on Media Law in Hungary.
99. ComDH(2011)10, paragraph 6.
100. Ibid., paragraph 3.
101. Decision 1746/B/2010. The complaint was brought to the Constitutional Court through an *actio popularis* initiated by NGOs and several members of parliament. The decision of the Constitutional Court was reached less than three weeks before the *actio popularis* was abolished with the coming into force of the new Fundamental Law.
102. The Media Council, the Board of Trustees of the Public Service Foundation and the Public Service Board.
103. Expertise by Council of Europe Experts on Hungarian Media Legislation, pp. 5-6.

in the act were seriously undermined by the fact that the ruling coalition holds a two-thirds constitutional majority in parliament. It therefore recommended a thorough reformulation of the appointment process to the media regulatory bodies.

140. The new media laws extend to the printed and online media the obligation for media providers to register with the Media Council, in addition to the usual linear broadcasting media. This obligation caused considerable disquiet among, *inter alia*, national and international media outlets as well as international organisations. While licensing audio-visual media that use scarce broadcasting frequencies is accepted under the European Convention on Human Rights, the mandatory registration of print and online media – beyond simple tax or business registration – is contrary to the principles of proportionality established by the case law of the European Court of Human Rights. This mandatory registration of online and printed media was not annulled by the Hungarian Constitutional Court decisions, and the amendments introduced by the Hungarian authorities do not address the concerns expressed in this respect.[104] We therefore recommend that the requirement for printed and online media to register with the Media Authority be abolished.

141. Of special concern for the Council of Europe experts are the provisions in the media law that aim to establish government control over both content and dissemination of information provided by media outlets. The law establishes that a person has the right to receive "proper" information on public affairs. Moreover, media providers are obliged to provide "authentic", "comprehensive", "factual", "objective" and "balanced"[105] information about public affairs. These criteria are subjective and open to interpretation, which leaves excessive discretion to the regulatory authority. This in turn raises serious questions about the compatibility of such provisions with the principle of freedom of expression as guaranteed by Article 10 of the Convention. These provisions should be completely revised in order to remove any ambiguity or discretion on the part of the media authority in interpreting these clauses. Moreover, any interference with regard to the content of news coverage by broadcasters should be eliminated, with the exception of the obligations for an impartial and balanced news provision by the public broadcaster.

142. In the view of the Council of Europe experts, the regulation of the public service media is another area of concern. Several provisions in the media law, especially with regard to the appointment and composition of the oversight bodies, undermine the independence of the public broadcaster and open it to undue political influence.[106]

143. Independent and impartial media regulatory authorities are essential for the protection of the freedom of expression and the exercise of free speech, as guaranteed in Article 10 of the Convention. In this context the criticism and concerns raised by the Council of Europe experts in relation to the regulatory framework for the media in Hungary[107] are very worrisome.

144. The National Media and Info-communications Authority consists of several interrelated bodies, the most important of which are the President of the Authority, the Media Council and the Office of the Authority. The President of the Authority is directly appointed by the Prime Minister, who has full discretion in this choice, for a nine-year term.[108] The vice-presidents of the authority are in turn directly appointed, for an indefinite term, by the President of the Authority. The Media Council is appointed by the parliament. However, according to the media law, the President of the Authority is the only candidate for the position of Chair of the Media Council. If the parliament fails to elect the President as Chair of the Media Council, he or she will still chair the Media Council, but in this case without voting rights. All other members are appointed by the parliament on the basis of nominations by a Nominations Committee that is comprised of members of all factions in the parliament. Each member on this committee has a weighted vote corresponding to the numerical size of his or her faction in the parliament. The Nominations Committee should strive to make its nominations on the basis of consensus, but if it fails to do so, it can decide with a two-thirds majority of the weighted votes. Under the current composition of the parliament, this *de facto* guarantees full control of the ruling majority over the Media Council. The appointment mechanism of the Media Council and President of the Authority is insufficient to guarantee the independence of the Media Authority from political interests and control. This problem is

104. Ibid., pp. 12-15.
105. Following the 19 December 2011 decision of the Constitutional Court the balanced coverage requirement is only valid for linear (broadcast) media.
106. Expertise by Council of Europe Experts on Hungarian Media Legislation, pp. 24-27.
107. Ibid., pp. 34-40.
108. Originally this term was renewable an unlimited number of times. However, as a result of the talks between the Hungarian authorities and the Secretary General of the Council of Europe, the appointment of the President of the Authority will be limited to a single non-renewable nine-year term.

compounded by the integration of the licensing media oversight functions in one single media authority – a unicum in Europe – and the automatic designation of the President of the Authority as Chair of the Media Council. It is strongly recommended that the licensing and media oversight functions are split into two functionally separate and independent bodies and that the appointment procedure for these bodies is reviewed so as to ensure the *de facto* political independence of its members.

145. In addition to these four crucial issues, the assessment raises a number of other concerns about areas in the media legislation that are at odds with European standards. The Hungarian Government should comprehensively address the concerns outlined in the assessment of the Council of Europe expertise if it does not wish to be seen as falling short with regard to its responsibilities under Article 10 of the Convention.

146. In his letter to the Minister of Justice of Hungary of 29 November 2012, the Secretary General of the Council of Europe indicated that further amendments to the Hungarian Media Acts were necessary in order to guarantee the independence of the media. To that end, he suggested separating the functions of President of the Media Authority and Chair of the Media Council, to have these persons elected by parliament and not appointed by the Prime Minister and to limit the term of office to one mandate. In his response of 19 December 2012, the Minister of Justice informed the Secretary General that the authorities accepted his suggestion to limit the term of office of the President of the Media Authority to one mandate, but rejected the proposal to separate the function of the chair of the Media Council from the President of the Media Authority or to review the appointment procedure for this post. The integral implementation of the proposals of the Secretary General would have been an important step towards ensuring the independence of the media regulatory bodies. We therefore regret that his proposal was not fully implemented by the authorities.

147. The Secretary General requested an assessment from the Council of Europe media experts of the amendments proposed by the Hungarian authorities. The experts welcomed as an improvement that the requirement for news coverage to be “comprehensive, factual, up-to-date objective and balanced”, was a change to the requirement that news coverage should be balanced. The experts noted that the proposed changes to the mandate of the President of the Media Authority do not affect her mandate other than, if the amendments are adopted, limit her term of office to a single mandate. In addition, the functions of the Chair of the Media Council and President of the Media Authority have not been separated, contrary to previous recommendations of the expert group and the Secretary General. The assessment questions whether the proposed appointment mechanism can completely avoid the possibility of political appointments and recommends that the mandates of the members of the Media Council should be limited to one term. The experts express their hope that these amendments will be followed by subsequent steps to bring the rest of the media legislation into line with European standards.

148. We were informed subsequently to our visit in February 2013 that, on 25 March, parliament had adopted amendments to the media laws: according to these amendments, the Head of the Media Authority will be appointed by the President of Hungary upon proposal of the Prime Minister and his/her mandate will expire after nine years, without any possibility of renewal.

5. Other cardinal Laws

5.1. Cardinal Act CXII of 2011 on Informational Self-determination and Freedom of Information

149. Cardinal Act CXII of 2011 on Informational Self-determination and Freedom of Information was adopted by the Hungarian Parliament on 26 July 2011. The draft for this act was proposed by the government and was therefore subject to the mandatory social consultation process. It replaces Act LXIII of 1992 on the Protection of Personal Data. This cardinal act, as was the case of the previous bill, regulates in one single act the two informational rights: the right to protection of personal data and the right to freedom of access to information. This approach, which is relatively unique in Europe, allows for a comprehensive and coherent approach to the regulation of these two issues. At the same time, these two concepts may occasionally be in conflict with each other, which may give rise to application and interpretation problems.

150. Under the previous law, the oversight of the implementation of, and adherence to, the principles of data protection and freedom of information was exercised by an Ombudsperson for data protection and freedom of information, who was elected by the parliament for a period of five years. The new act abolished this post of ombudsman and replaced it with a National Authority for Data Protection and Freedom of Information. This was heavily criticised by domestic and international actors, who expressed their concern that the law and new

authority were diminishing the independence of the oversight structure that was already in place.[109] Following this criticism, which culminated in the launch of infringement proceedings by the European Union in January 2012, the act was amended several times to address the concerns expressed.

151. At the request of the Monitoring Committee, the Venice Commission prepared an opinion on Cardinal Act CXII of 2012, as amended, before it came into force on 1 June 2012. The opinion[110] of the Venice Commission was adopted at its plenary session on 12 and 13 October 2012.

152. The amendments to the law secured the independence of the oversight body to a considerable extent.[111] The act establishes that tasks can only be given to the authority by a law. In addition, it has given the authority budgetary autonomy. The law now provides clear criteria for the dismissal of the President of the Authority and for the possibility to appeal any dismissal proceedings before the courts. Moreover, strict conditions and incompatibilities are introduced for the position of the President.

153. From the perspective of guaranteeing the independence of the National Authority for Data Protection and Freedom of Information, the appointment procedure of its President remains of concern. The President of the Authority is appointed for a nine-year term by the President of the Republic upon nomination by the Prime Minister. Parliament is thus completely excluded from the nomination procedure. This potentially undermines the independence of the President of the Authority, given the fact that the Prime Minister and President in most cases will belong to the same party and the ruling majority.

154. In its opinion, the Venice Commission concludes that Act CXII of 2011 on informational self-determination and freedom of information is, as a whole "complying with applicable European and international standards".[112]

5.2. Cardinal Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities

155. Cardinal Act CCVI replaced Cardinal Act C on the freedom of religion and status of churches. The old act, which is nearly identical to the new one, was adopted on 11 July 2011. However, at the end of 2011, it was leaked to the press that the Constitutional Court would invalidate this Act on procedural grounds. In reaction, on 19 December 2011, the parliament withdrew Act C of 2011[113] just before it was invalidated by the Constitutional Court.[114] A new draft was introduced in parliament on 23 December 2011 as a private member's bill and adopted on 30 December 2011. It came into force already on 1 January 2012. In order to prevent the Constitutional Court from annulling it on substantial grounds, the Church Law was given a constitutional basis through a reference made to it in the Transitional Provisions adopted on 31 December 2011.

156. On 20 January 2012, the Hungarian authorities requested the Venice Commission's opinion on this act. This opinion, CDL-AD(2012)004, was adopted by the Venice Commission at its 90th plenary session on 16 and 17 March 2012.

157. The previous law[115] on the freedom of religion and status of churches, which dated from 1990, contained very liberal conditions for the registration of a church.[116] As a result, over 300 organisations were registered as a church by the end of 2011. Reportedly, several of these organisations registered as a church only to benefit from tax and economic benefits, rather than to pursue religious activities. It is therefore understandable that the authorities wished to address this abuse of the overly inclusive registration process. However, concerns have been raised over a number of retroactive and discriminatory provisions, as well as over the new registration process and criteria to be used.

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109. In its opinion (CDL-AD(2012)023), the Venice Commission also questions the validity of the arguments to abolish the Ombudsperson in favour of a national authority.
110. CDL-AD(2012)023.
111. Ibid., paragraphs 30-34.
112. Ibid., paragraph 79.
113. This was done via an amendment appended to the act on national minorities (Act CLXXIX of 2011 on the Rights of Nationalities, paragraph 241).
114. Decision 164/2011 (XII. 20.) AB Decision.
115. Act IV of 1990.
116. 100 people could request registration as a church, as long as they presented a charter of the church and a declaration that it was founded with the intention of pursuing religious activities.

158. As mentioned in the Venice Commission's opinion, this act provides a liberal and adequate legal framework for the protection of the right to freedom of religion and beliefs. However, on a number of important issues, the law falls short of international standards.[117]

159. A key concern with regard to this cardinal act is the provision that a "Church, denomination or religious community (hereafter referred to as "church") shall be an autonomous organisation *recognisedby the National Assembly*".[118] According to international standards, freedom of religion includes the right to enjoy this religion in community with others and without the need for a formal recognition by a State authority. The obligation to obtain recognition by the Hungarian Parliament as a condition to register a church is therefore considered to be a restriction of the principle of freedom of religion.[119]

160. While it is legitimate to demand registration of a church for it to obtain certain privileges and economic benefits from the State, the case law of the European Court of Human Rights has clearly established that the State should be strictly neutral in granting such recognition. The decision to grant, or refuse, registration should therefore be based on clearly established impartial criteria. In addition, such decisions should be well reasoned and demonstrate that there are proper grounds for denying a request for recognition.

161. In light of the above, the fact that, according to this act, churches have to be recognised by the Hungarian Parliament with a two-thirds majority vote is highly problematic. Even though the law contains a set of recognition criteria – some of which are problematic and will be discussed below – the parliament is sovereign in its decision-making. Its motives for a decision are not public and do not have to be reasoned. The recognition procedure is therefore not only opaque, it is also arbitrary, as it depends on the political preferences of the required two-thirds majority in the parliament. In this respect, the Venice Commission raises the issue of legal security and continuity, which could be undermined as the composition of the parliament is likely to vary over time, which could result in changing *de facto* standards for registration and de-registration of churches.

162. The parliament takes its decision on the registration of a church by a two-thirds majority. A decision to register takes the form of a law which is annexed to Act CCVI of 2011. A decision not to register a church takes the form of a resolution. These resolutions cannot be reviewed by a court, therefore appeal and redress against a decision not to grant registration, are not possible.[120] In addition, religious communities that are refused registration as a church cannot make a new request for recognition for a one-year period after the registration request was denied.

163. On 29 February 2012, the parliament adopted a bill that recognised a total of 27 churches.[121] However, it is not clear on which grounds and criteria the parliament made its decision to recognise these communities. This highlights the lack of transparency of the entire registration process.

164. The registration process for churches clearly falls short of European standards and norms. In order to comply with European standards, we recommend that registration be either done by the courts or by the Ministry of the Interior/Justice, on the basis of clear and impartial legally established criteria. A decision not to grant recognition should be appealable in court. The comments and reservations voiced by the Venice Commission in its opinion on this law should be fully addressed.

165. Several of the criteria for recognition that are mentioned in the cardinal act are problematic. According to these criteria, any religious community wishing to be registered as a church should have existed for at least 20 years in Hungary or at least 100 years internationally. The Venice Commission guidelines stipulate that it "is not appropriate to require lengthy existence in the State before registration is permitted".[122] Also, the European Court of Human Rights has struck down lengthy existence requirements for the registration of churches. In the case of *Kimlya and Others v. Russia*,[123] the Court ruled that a 15-year existence requirement was excessive. It is therefore clear that the 20 years' existence required by the Act on freedom of religion runs counter to established case law of the European Court of Human Rights.

117. CDL-AD(2012)004, paragraph 107.
118. Act CCVI of 2011, Article 7.1. Our own highlighting.
119. CDL-AD(2012)004, paragraph 32.
120. We note with satisfaction that the possibility to appeal to the Constitutional against a registration refusal has been included in the fourth amendment to the Fundamental Law (Article 4).
121. This amendment recognised 13 Churches in addition to the 14 that were recognised in the original act.
122. CDL-AD(2004)02, paragraph F-1.
123. Applications Nos. 76836/01 and 32782/03, judgment of 3 December 2009.

166. The Act allows for a request for registration to be denied on the grounds of national security. As mentioned by the Venice Commission,[124] national security is not a legitimate restriction on the freedom of religion or beliefs under the European Convention on Human Rights.[125] This provision should be removed from the law.

167. Another crucial area of concern in the Cardinal Act on freedom of religion was the deregistration of churches when the new act was adopted. All, except the 14 churches mentioned in the original law, were required to reapply for registration as a church. This deregistration process is discriminatory, raises questions about retroactive application of provisions in the law, as well as of legal continuity and raises concerns with regard to the case law of the Court. The deregistration process should be considered as a limitation of the freedom of religion that can only be justified under narrow international legal standards.[126] It should be underscored that the Venice Commission guidelines for laws affecting religious beliefs explicitly state that "provisions that operate retroactively or fail to protect vested interests (for example by requiring reregistration of religious entities under new criteria) cannot but be questioned".[127]

168. On 12 August 2012, the Hungarian Ombudsman, Máté Szabó, asked the Constitutional Court to overturn the Cardinal Act on freedom of religion on the grounds that it violated the separation between Church and State. In his view, the requirement that churches need to be recognised by parliament violates the separation between church and State, as well as the principle of fair procedure, and lacks legal remedy. On 28 December 2012, the Constitutional Court annulled the provisions in the Transitional Provisions that gave the parliament the power to decide on the registration of churches as well as the criteria on which such decisions would be based, and on 26 February 2013, it annulled on substance a number of provisions of the Cardinal Act on churches. However, the ruling majority re-entered the same provisions via the fourth amendment adopted on 11 March 2013. Registration of churches by parliament will thus continue.

5.3. Cardinal Act CLXXIX of 2012 on the Rights of Nationalities

169. Cardinal Act CLXXIX if 2011 on the Rights of National Minorities was adopted on 19 December 2011. The draft for this act was proposed by the government. It was therefore subject to the mandatory social consultation process. We welcome that this act was drafted by the government and that a social consultation process took place on such a potentially sensitive subject as minority rights. This clearly has benefited the quality of the act. At the request of the Monitoring Committee, the Venice Commission prepared an opinion[128] on this law which was adopted during its 91st plenary session on 15 and 16 June 2012.

170. According to the 2001 census, approximately 4.34% of the population identifies itself as belonging to a national or ethnic minority. The law on minorities of 1993, which was in place before the adoption of Cardinal Act CLXXIX of 2011, was considered to be a very progressive law. However, the provisions that regulated minority self-government elections were widely seen as open to abuse.

171. A major change introduced by the new law is the move from the concept of ethnic and national minorities towards the concept of nationalities. According to the opinion of the Venice Commission[129], the new act confirms Hungary's commitment to the protection of its minorities, in line with international standards and norms. The act provides comprehensive protection mechanisms for both individual and collective minority rights. However, the law is complex and excessively detailed. The latter is of some concern given the fact that this act has cardinal status and therefore can only be changed by a two-thirds majority. As we mentioned in our general assessment of the constitutional framework, such a level of detail should be left to ordinary laws in order to ensure the required flexibility for day-to-day policy making.

172. The law consolidates and strengthens the area of minority self-government, especially with regard to the elections for minority self-government, which was an area much criticised in the previous legislation. In this respect, the Fundamental Law of Hungary of 2011[130] stipulates that nationalities shall participate in the work of the parliament, which shall be regulated by a cardinal act. This provision is regulated in the Cardinal Act on the Election of Members of the Parliament, which we will discuss below.

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124. DCL-AD(2012)004, paragraph 68.
125. Article 9.2.
126. CDL-AD(2012)004, paragraph 90.
127. CDL-AD(2004)028, paragraph F-1.
128. CDL-AD(2012)011.
129. Ibid.
130. Article 2.2 of the Fundamental Law of Hungary.

5.4. Cardinal Act CXI of 2011 on the Protection of Families

173. The Cardinal Act CXI of 2011 on the Protection of Families was adopted on 23 December 2011. It was introduced as a private members' bill on 2 December 2011 and therefore not subject to the social consultation procedure that would have taken place if this bill had been proposed by the government. This is of concern given the sensitive subject matter that this act deals with, as well as the controversy created by its strong position on a number of moral and value-based issues.

174. The Monitoring Committee asked the Venice Commission to provide an opinion on the Cardinal Act on the Protection of Families. Regrettably, on 20 April 2012, the Venice Commission declined this request on the ground that it did not have the required expertise in the field of private law.

175. The Act on the Protection of Families takes strong and often controversial positions on moral and value-based issues. While this opinion is not the place to discuss the merits of such positions, we would like to emphasise that, in its opinion on the constitution, the Venice Commission rightfully stressed that "cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law",[131] but left to the normal political process and decided upon by simple majority. This reservation is equally valid for this act on the protection of families.

176. The Act on the Protection of Families introduces a very restrictive definition of family. According to the cardinal law, this definition is to be used in all other legislation, regardless of purpose. However, the definition seems to be inconsistent with lower-level legislation. Without wanting to enter into a discussion on the merits of this definition, we are concerned that such a restrictive interpretation could lead to discriminatory legislation at the lower level and therefore be at odds with international human rights law and with Hungary's obligations to the Council of Europe.

177. The Cardinal Act on the Protection of Families contains a provision that obliges media providers to accord respect to the institution of marriage and the value of family and parenting. As mentioned in the Council of Europe expert opinion on the media laws, a narrow interpretation of this provision would "not only violate freedom of expression under Article 10 of the Convention, but will also interfere with the right of freedom of conscience protected by Article 9 [of the Convention]".[132] The opinion therefore recommends that this provision be removed from the cardinal act. We fully support this recommendation.

178. The Ombudsman of Hungary requested a ruling of the Constitutional Court on the constitutionality of the Act on Family Protection. On 20 December 2012, the Constitutional Court of Hungary ruled that the definition of family was too restrictive and that the provisions contained in this act dealing with inheritance were unconstitutional as they were not in conformity with the Civil Code of Hungary (which provides for equality between marriage and civil partnerships). In the view of the Constitutional Court, this violated the principle of legal certainty that is guaranteed by the Hungarian Constitution. This ruling gives credence to our concerns about the inconsistency of this cardinal act with lower-level legislation, as well as Hungary's international human rights obligations.

179. We note with concern that the fourth amendment to the Fundamental Law reintroduced this very restrictive definition of the family on 11 March 2013.

6. Conclusions

180. This report has outlined a number of worrisome developments and serious concerns with regard to the constitutional reform process in Hungary. These concerns are mirrored by those we encountered in relation to the reform of the media legislation. We will therefore deal with these issues together in our conclusions.

181. The manner in which the constitution and cardinal acts were adopted was opaque, disrespected proper democratic procedure and was not based on wide consensus between, and consultation with, the widest possible range of political forces in Hungarian society. This adoption process undermines the democratic legitimacy of the new Fundamental Law. In addition, the constitution and cardinal acts contain several provisions and declarations that are based on moral and ethical norms that are controversial and contentious

131. CDL-AD(2011)016, paragraph 145.
132. Expertise by Council of Europe experts on Hungarian Media Legislation, 11 May 2012, p. 21.

in Hungarian society. Without wishing to enter into a debate on these declarations and provisions, we wish to underscore that a constitutional framework should avoid codifying values and norms that are controversial and about which justifiably different opinions and concepts exist within a society.

182. The old constitution was changed 12 times by the current ruling coalition. Transitional provisions adopted just before entry into force of the new Fundamental Law considerably amended or supplemented it. In addition, the new Fundamental Law has already been amended four times, the last time *inter alia* to reintroduce transitional provisions that were struck down by the Constitutional Court. The constant changing of the constitutional framework has turned it into an instrument of political power instead of a framework for the organisation of State and government. This has further undermined the democratic legitimacy of the new constitutional framework.

183. The Constitutional framework is based on an excessive use of – overly detailed – cardinal acts and cardinal provisions in normal acts which need a qualified two-third majority to be adopted or changed. This excessive use of cardinal laws and provisions can only be interpreted as an attempt by the ruling majority to cement its policy preferences in the constitutional framework of the country. This in turn allows the current ruling majority to define the national policy far beyond the term of mandate that they were given by the Hungarian electorate.

184. This wish to exert control over the Hungarian society far beyond its democratic mandate is also clear from the sheer number of institutions and regulatory bodies that were either newly established or thoroughly reformed by the ruling majority. This, by using its two-thirds majority in parliament, allowed the ruling majority to bring these bodies firmly under its political control. The long mandates and the realistic possibility that parliament will not be able, in the future, to appoint with the required two-third majority, the successors for the leadership positions in these bodies, will allow the current ruling majority to exert *de facto* control over, *inter alia*, the media regulator, the central bank, the budgetary council, the judiciary, the ombudsman, after its current mandate has ended, as well as the Constitutional Court.

185. This cementing of policy preferences in the constitutional framework and political control over nominally independent institutions and regulatory bodies will render future elections meaningless, as a new government will be unable to change the legislation adopted by its predecessor in a large number of areas, unless it also musters a two-third majority. This is a potential source of systemic political and constitutional instability. Any party or party coalition with more than one third of the votes in parliament will have a *de facto* veto over the national policy and negotiations to change and adopt policies will therefore in all likelihood be long and protracted.

186. The new constitutional framework has seriously eroded the system of democratic checks and balances in Hungary. Power has been excessively concentrated and excessive discretion in decision-making given to a number of key positions within crucial regulatory or oversight bodies. At the same time, the accountability of these persons has diminished, as has the possibility for appeal and legal overview of their decisions, which in many cases are now limited to procedural aspects only.

187. Nowhere is the erosion of the system of checks and balances more clear than in the systematic curtailing of the powers and competences of the Constitutional Court. The Constitutional Court has an important counter-balancing and moderating role in the legal-political system in Hungary, especially in the context of its unicameral political system. Therefore, the curtailing of its powers and competences has a direct and negative impact on the democratic functioning of the political system in the country. In addition, in any State governed by the rule of law, it is of fundamental importance to abide by the judgments of the highest court of the land. In this respect, the fact that the ruling coalition on several occasions misused its two-thirds majority to reintroduce provisions that the Constitutional Court had previously ruled as unconstitutional, is of serious concern.

188. In this respect, we would like to underscore that the main justifications for a qualified two-thirds majority in constitutional matters is to protect the constitutional framework from frivolous changes by a ruling party for narrow partisan self-interest and to ensure that the constitution is adopted or amended only on the basis of an as wide a consensus as possible between all political forces over the legal and democratic foundations of the State. The willingness of the current ruling coalition to use its unique qualified majority – especially given that this constitutional majority is based on only slightly less than 53% of the popular vote – in contravention of these principles in order to impose its will and to circumvent Constitutional Court rulings, raises questions with regard to the respect for democratic principles and the rule of law. Similarly, the boycotting of the deliberations and voting on the new constitutional framework by the opposition raises questions about the political and democratic culture in the current parliament.

189. The opinions of the Venice Commission that were prepared on the Fundamental Law and several cardinal acts, as well as other reputable expert assessments and domestic and international court decisions outlined in this opinion, have shown that the new constitutional framework is, in several aspects, at variance or contradicts European standards – including the European Convention on Human Rights – as well as case law of the European Court of Human Rights and European Union law. This is, for example, the case with regard to cardinal legislation regarding elections, the judiciary, the recognition of churches, as well as family and social affairs. In addition, Constitutional Court judgments have indicated that some of these acts violate the Hungarian Fundamental Law and constitutional guarantees as well.

190. We recognise that over the last two years a number of amendments have been made to the legislation that, to some extent, have addressed a number of domestic and international concerns. However, it should be noted that these changes were made under strong and concerted international pressure, including the threat of sanctions, and that, in most cases, the fundamental concerns and criticisms were decidedly left unaddressed by the authorities.

191. This raises questions with regard to the willingness to abide by European standards, as well as democratic principles and the rule of law. In our view, the lack of willingness of the current authorities to abide by these crucial principles was made clear with the adoption of the so-called fourth amendment to the constitution. This amendment was adopted against the recommendations of many international and national experts and personalities, as well as against the explicit advice of Hungary's European partners. The fact that this amendment knowingly reintroduces several provisions that had previously been ruled as unconstitutional, or deemed incompatible with European standards and the case law of the European Court of Human Rights, is in our view unacceptable and incompatible with Hungary's obligations as a member of the Council of Europe.

192. We believe that each of the concerns outlined in this opinion is inherently serious in terms of democracy, rule of law and respect for human rights. Taken separately, they would already warrant close scrutiny by the Assembly. In the instant case, however, what is striking is the sheer accumulation of reforms that aim to establish political control of most key institutions while in parallel purposefully weakening the system of checks and balances, including by bypassing and eviscerating the Constitutional Court.

193. As a member of the Council of Europe, Hungary is obliged to uphold the highest possible standards in relation to the functioning of its democratic institutions, the protection of human rights and respect for the rule of law. These are obligations Hungary voluntarily committed itself to when it acceded to the Council of Europe. The developments described in this opinion raise serious and sustained concerns about the extent to which the country is still complying with, and the willingness of the authorities to live up to, these fundamental principles. Therefore, we see no other possibility than to recommend the opening of a monitoring procedure in respect of Hungary until the concerns outlined in this opinion have been satisfactorily addressed in the view of the Assembly.