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## **WORKING DOCUMENT 2**

on the situation of Fundamental Rights: standards and practices in Hungary  
(pursuant to the EP resolution of 16 February 2012) - Fundamental principles  
and fundamental rights

Committee on Civil Liberties, Justice and Home Affairs

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## I. Introduction

This working document provides an overview of the Fundamental Law of Hungary adopted on 18 April 2011 and entered into force on 1 January 2012. A number of its provisions are considered against the background of the fundamental values commonly shared by EU Member States and of the Council of Europe, as well as against legal principles enshrined in the EU Treaties, the Charter of Fundamental Rights of the European Union (Charter), the European Convention on Human Rights (ECHR), and the relevant case-law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). The Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011<sup>1</sup> and the position of the government of Hungary thereon transmitted on 6 July 2011<sup>2</sup> are taken into account.

## II. European common values

European common values can be defined as a shared understanding of democracy, fundamental legal principles, such as the rule of law, and fundamental rights upon which the European integration process is founded. International agreements, EU Treaties, as well as ECtHR and CJEU case law provide core elements of this common understanding.

Although the first Treaties did not contain an explicit provision on fundamental rights, the CJEU confirmed by jurisprudence early on the existence of a body of general principles and values forming an integral part of the common legal order. In the early seventies the CJEU held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures. It based their existence on common constitutional traditions of the Member States (*Internationale Handelsgesellschaft*<sup>3</sup>) and international treaties to which all Member States have collaborated or are signatories (*Nold*<sup>4</sup>), including the ECHR. Consequently, EU general principles do not merely represent political commitments but constitute legal parameters to assess the EU legal order and national legal orders.

In the course of the seventies and eighties the reference to fundamental principles of democracy, rule of law and respect for human rights has not only been invoked in case law but by the institutions as well. In its Declaration of Copenhagen on democracy the European Council declared that respect for human rights and democracy are "*essential elements of membership of the European Communities*"<sup>5</sup>. Since the entry into force of the Maastricht Treaty, the common legal principles of "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law" have been enshrined in the Treaties<sup>6</sup>. The adoption of the Charter in 2000 further contributed to the visibility of the European common values. The Lisbon Treaty gave the Charter the same legal value as the Treaties (Article 6 (1) TEU).

Following the entry into force of the Lisbon Treaty, Article 2 TEU enshrining the Copenhagen criteria proclaims that "*the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*". It further adds that "*these values are common to the Member States*". Article 6(3) TEU also consolidates the above mentioned case-law by

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<sup>1</sup> Opinion no. 621/2011. CDL-AD(2011)016.

<sup>2</sup> CDL(2011)058.

<sup>3</sup> Case 11/70 [1970] ECR 1161.

<sup>4</sup> Case 4/73 [1974] ECR 491.

<sup>5</sup> European Council Declaration on democracy, Copenhagen, 8 April 1978, Bull. EC no. 3, 1978.

<sup>6</sup> Then Article F of the Treaty on the European Union.

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

The respect of this set of fundamental values forming legal standards applies to both, cross border and purely internal situations, meaning that it applies to any exercise of public authority in the EU legal space.<sup>1</sup> The protection of basic fundamental rights applies regardless of the limitation of Article 51(1) of the EU Charter as regards situations where Union law is being applied, as Article 2 TEU is not bound by the limitation of Article 51(1) of the Charter.<sup>2</sup> Such a reasoning is being confirmed by the CJEU referring to the "*genuine enjoyment of the substance of the rights attaching to the status of the EU citizen*" even in a purely internal situation.<sup>3</sup> This also confirms the notion of the so called "*civis europaeus sum*" stated two decades ago by Advocate General Jacobs in the case *Konstantinidis*.<sup>4</sup>

These common values go hand in hand with the EU commitment to diversity, translated into the obligation for the Union to respect "*the equality of Member States before the treaties as well as their national identities*" as stated in Article 4(2) TEU. In the framework of the Treaties respect for '*national identities*' and for '*different legal systems and traditions of the Member States*'<sup>5</sup> are intrinsically associated with the principles of '*sincere cooperation*'<sup>6</sup> '*mutual recognition*'<sup>7</sup> and thus *mutual trust*. This means that a proper equilibrium has to be established between the respect for national identities and the implications of being an EU Member State, including the respect for common fundamental values enshrined in the Treaties, the Charter, the ECHR, and in the relevant case-law of the CJEU and ECtHR. Such an understanding presents an indispensable condition for ensuring effective mutual recognition and cross-border cooperation between national authorities built on mutual trust about respecting the same set of fundamental values, and thus creating a genuine and functioning European area of justice. The paramount existence and importance of the European common values is further confirmed by the special procedure providing for political monitoring of the respect for these fundamental values, set out in Article 7 TEU.

Therefore, an EU Member State is bound when drafting its national constitution by several layers of standards: (1) international standards stemming from being a member of the international community (provisions of the UN Charter); (2) standards of being a member of Council of Europe (complying with the ECHR requirements, and especially as regards the prohibition of death penalty in accordance with Protocols 6 and 13 to the ECHR); (3) standards from being an EU Member State respecting the EU Charter when applying EU law and respecting in general the set of fundamental values as expressed in Article 2 TEU when applying legal authority, regardless of the existence of a cross-border situation or application of EU law.

### **III. Level of regulation of fundamental principles and institutional settings**

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<sup>1</sup> See also A. von Bogdandy and others, *Reverse solange - Protecting the essence of fundamental rights against EU Member States*, *Common Market Law Review* 49, 2012, pp. 489-519.

<sup>2</sup> Whereby the CJEU interprets the application of EU law in a broad sense - see, for example, case C-260/89, *ERT*.

<sup>3</sup> See in that regard case C-34/09, *Gerardo Ruiz Zambrano*.

<sup>4</sup> Case C-168/91.

<sup>5</sup> See Article 67 TFEU.

<sup>6</sup> Article 4(3) TEU.

<sup>7</sup> Articles 81 and 82 TFEU.

A new Constitution representing the Fundamental Law of Hungary entered into force on 1 January 2012. The draft Fundamental Law was prepared by FIDESZ/KDNP elected representatives and introduced before the Hungarian Parliament on 14 March 2011. The Hungarian Parliament adopted it one month later, namely on 18 April 2011. As pointed out by the Venice Commission,<sup>1</sup> the drafting, deliberation and adoption of the new constitution were affected by tight time frames and restricted possibilities for a genuine dialogue between all political forces and the civil society. Considering that a constitution provides for a commonly accepted legal and institutional order of a society, the process of preparation and adoption of the Fundamental Law in Hungary raised concerns regarding lack of transparency, openness and inclusiveness.<sup>2</sup>

Furthermore, the new Constitution establishes a general framework for key sectors using broad language and leaving the majority of substantial questions to cardinal laws. The Hungarian Constitution makes in that regard more than 50 references to cardinal laws regulating important societal matters and institutional settings such as the judiciary (Article 25(7)), family policy (Article L), the rights of nationalities (Article XXIX §3), the designation of ministries and other public administration organs (Article 17 §4), etc. Cardinal laws require the support of a qualified majority of two-thirds of the members of parliament for adoption and amendment.

The use of cardinal laws to regulate fundamental principles raises legal questions for two main reasons. Firstly, in the absence of clear wording in the Constitution, such laws must be drafted extremely careful in order to safeguard fundamental guarantees (e.g. the independence of the judiciary). Secondly, the extensive use of cardinal laws may limit the impact a new legislator can have following an election<sup>3</sup>. In this regard, Article 3 of the Protocol 1 to the ECHR clarifies that elections should guarantee the "*expression of the opinion of the people in the choice of the legislature*". It follows that parliaments must be able to respond in a flexible manner to new societal challenges. The Venice Commission therefore recommended restricting the scope of cardinal laws to areas where there are strong justifications for requiring a two-thirds majority.<sup>4</sup>

#### **IV. Fundamental rights and freedoms**

The Chapter on "Freedom and Responsibility" (Articles I-XXXI) of the Fundamental Law governs fundamental rights and freedoms. The first sentence of Article I § 3 reads: "(3) *The rules for fundamental rights and obligations shall be determined by special Acts*". No guidelines are provided as regards the scope and content of these special acts. The vagueness of the Constitution's provisions on a number of fundamental rights and the reference to special acts raises questions as regards the level of protection of fundamental rights, as well as compliance with international human rights instruments.

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<sup>1</sup> CDL-AD(2011)001, Venice Commission Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, 28 March 2011, paragraphs 16-19.

<sup>2</sup> See on this point CDL-AD(2011)016, Venice Commission Opinion on the new Constitution of Hungary, 20 June 2011, para.11.

<sup>3</sup> See Venice Commission Opinion, para. 24.

<sup>4</sup> Venice Commission Opinion, para. 27. See also CDL (2011)058, Position of the Government of Hungary on the opinion of the new Constitution of Hungary, p. 2: "*While it is true that the new Constitution contains 50 references to cardinal laws, the actual number of subjects to be regulated by cardinal laws (adopted by two-third majority) has been reduced from 28 to 26 subjects in the new Constitution. In consequence, the scope of cardinal laws has been narrowed.*"

These remarks apply for instance to the constitutional provision on the freedom of press<sup>1</sup>, which is not formulated as an individual's right, but as a state obligation.<sup>2</sup> Furthermore, the regulation of detailed rules for the freedom of the press and its supervision is explicitly left to a cardinal act without any guidelines on the purposes, contents and limits of such a law<sup>3</sup>. The Venice Commission recommended a clarification that constitutional guarantees contain individual rights<sup>4</sup>.

There is also concern about the level of protection for national and ethnic minorities laid down in Article XXIX of the Constitution, which does not make a reference to an explicit obligation on the part of the state<sup>5</sup>, about admitting life imprisonment without parole in cases of wilful and violent offences<sup>6</sup> (Article IV) and about the failure to explicitly mention in the Constitution the abolition of the death penalty<sup>7</sup>. The ban of the death penalty is explicitly established in both the EU Charter of Fundamental Rights and Protocols 6 and 13 to the

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<sup>1</sup> See Article 10 of the ECHR and Article 11 of the EU Charter of Fundamental Rights.

<sup>2</sup> Article IX of the Fundamental Law. "(1) Every person shall have the right to express his or her opinion. (2) Hungary shall recognise and defend the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion. (3) The detailed rules for the freedom of the press and the organ supervising media services, press products and the infocommunications market shall be regulated by a cardinal Act."

<sup>3</sup> See Position of the Government of Hungary, p. 6: "*The Constitution – in its Article IX – declares that every person has the right to express his or her opinion. Such a formulation of the freedom of expression is fully in line with the relevant Article of the ECHR (Article X). At the same time, Article IX makes it an obligation for the State to recognise and defend the freedom and diversity of the press, and to ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion...There is no explicit formulation of an individual's right to freedom of the press in the ECHR either – such a right is to be drawn from the individual right to freedom of expression.*"

<sup>4</sup> See Venice Commission Opinion, para 74.

<sup>5</sup> See Venice Commission Opinion, para. 82. See also Position of the Government of Hungary, p. 7: "*Article XXIX, read in conjunction with the relevant preambular provisions, includes a broad commitment of the State for the protection of its nationalities. The Preamble states that nationalities living with us form part of the Hungarian political community and are constituent parts of the State and that the members of the Hungarian nation undertake to protect and safeguard the languages and cultures of nationalities living in Hungary... Definition of the detailed rules for the rights of nationalities living in Hungary and the rules for the elections of their local and national self-governments is delegated to a cardinal Act.*" See also Venice Commission opinion 671/2012 on the Act on the rights of nationalities, para. 13-20.

<sup>6</sup> According to the Venice Commission Opinion, para. 69: "*Article IV of the new Hungarian Constitution fails to comply with the European human rights standards if it is understood as excluding the possibility to reduce, de facto and de jure, a life sentence.*" See Position of the Government of Hungary, p. 6: "*As regards life imprisonment without parole, it was introduced in the Constitution upon the clear wish of the Hungarian electorate, as expressed during the national consultation on the new Constitution. The Constitution merely contains a strict restriction of its usage: such a grave punishment may only be imposed for committing wilful and violent offences. The President may grant pardon to any condemned person.*" Although the imposition of a sentence of life imprisonment on an adult offender is not in itself prohibited by or incompatible with Article 3, the ECtHR has also held that the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (see, inter alia, *Nivette v. France*, no. 44190/98, ECHR 2001-VII, *Stanford v. the United Kingdom*, no. 73299/01, 12 December 2002; and *Kafkaris v. Cyprus*, no. 21906/04, 12 February 2008).

<sup>7</sup> Although Hungary has ratified both Protocol 6 and Protocol 13 to the ECHR. See Venice Commission Opinion, 20, para. 68. See also Position of the Government of Hungary, p. 6: "*Although the Constitution omits a specific reference to the abolition of death penalty, already in 1990, the Constitutional Court declared... this form of punishment unconstitutional... There is no legal requirement to explicitly declare the abolition of death penalty in the Constitution, since there is no constitutional way to introduce death penalty in the Hungarian legal system.*" As regards the importance of the abolition of the death penalty see also the 2006 Parliamentary Assembly of the Council of Europe's Recommendation 1760 and Resolution 1560, whereby a clear national indication on the abolition of the death penalty forms an important part of the fight against its use.

ECHR.

As stressed by the Venice Commission, "*constitutions contain provisions regulating issues of the highest importance for the functioning of the state and the protection of the individual fundamental rights. It is thus essential that the most important related guarantees are specified in the text of the Constitution, and not left to lower level norms*"<sup>1</sup>. In this respect, it is crucial that the interpretation of constitutional provisions on fundamental rights and freedoms is carried out in compliance with the binding European standards, in particular the ECHR and Charter and related case-law.

## V. Separation of powers

A democratic institutional framework based on the principle of separation of powers and on checks and balances is an essential condition for ensuring mutual confidence within the EU and to apply to mutual recognition as the core principle of judicial cooperation in civil and criminal matters (Articles 81 and 82 TFEU). The provisions of the Hungarian Constitution, which limit the powers of parliament and of the constitutional court in certain fields, are therefore sources of concern as they might adversely affect mutual confidence.

A limitation of parliamentary powers has been introduced in the field of budgetary matters as the newly established non-parliamentary Budget Council appears to have a power of 'veto' over the State budget.<sup>2</sup> Adoption of the budget is usually the core competence and exclusive privilege of parliament and allows for the implementation of the political program. As recalled by the Venice Commission making the decision dependent on another authority with limited democratic legitimacy may negatively impact upon the democratic legitimacy of budgetary decisions.<sup>3</sup> According to Article 23 of the Fundamental Law parliament may set up autonomous regulatory bodies to perform and exercise particular responsibilities and competences of the executive branch by means of a cardinal law, whereby this might lead to a restriction of the parliament's power, as pointed out by the Venice Commission<sup>4</sup>.

At the same time several problems with the two cardinal laws on the judiciary<sup>5</sup> have been highlighted by the Venice Commission as regards the extensive role of the Head of judicial administration (President of the NJO) and his relationship with the national Judicial Council, as well as regards probationary periods and transfer of judges and appointment of cases.<sup>6</sup> These problems related directly to the important question of the independence and impartiality of the judiciary. Several changes have been introduced by the Hungarian parliament remedying the raised issues, although it still seems that the probationary period can be as long as 6 years.<sup>7</sup> At the same time the Venice Commission expressed concerns

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<sup>1</sup> See Venice Commission Opinion, para. 148.

<sup>2</sup> Article 44(3) of the Fundamental law: "*The adoption of the State Budget Act shall be subject to the prior consent of the Budget Council in order to meet the requirements set out in Article 36(4)-(5).*"

<sup>3</sup> See Venice Commission Opinion, para. 129.

<sup>4</sup> See Venice Commission Opinion, para. 90. See also Position of the Government of Hungary, p. 8: "*Such autonomous bodies need to report to the Parliament on an annual basis and in consequence, their activity, i.e. the exercise of delegated powers, remains subject to proper scrutiny by the legislature. Moreover, Article 23 explicitly states that the decrees issued by the heads of autonomous regulatory bodies may not conflict with any higher ranking legal norm, including Acts of Parliament.*"

<sup>5</sup> Act CLXI of 2011 and Act CLXII of 2011 as well as their amendment adopted (proposal No. T/6393).

<sup>6</sup> See Opinion 663/2012 on the judiciary, as well as the reply of the Hungarian government and the recent legislative changes.

<sup>7</sup> See Committee on Civil Liberties, Justice and Home Affairs, Working Document 1 on the situation of Fundamental Rights: standards and practices in Hungary (Pursuant to EP resolution of 16 February 2012) –

about too far reaching prosecutorial powers, such as the obligation on business entities to provide documents on the request of a prosecutor, to enter private premises, a far reaching supervisory role in administrative procedures, de non-existence of a prosecutorial council, etc.<sup>1</sup>

As regards the constitutional court Article 37(4) of the new Constitution limits the power to review the constitutionality of the Acts on the State Budget and its implementation to the fields explicitly listed ("*violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship[...]*") thus leaving without a sanction breaches of other fundamental rights. As strongly recommended by the Venice Commission the court shall be entitled to assess the compliance of all laws with the human rights guaranteed at constitutional level, particularly the right not to be discriminated against (Article 14 of the ECHR; Article 21 of the Charter) and the right not to be unduly deprived of possessions (Article 1 of Protocol 1 to ECHR; Article 17 of the Charter).<sup>2</sup> The Constitution also obliges the constitutional court to respect the '*principle of balanced, transparent and sustainable budget management*'.<sup>3</sup> This appears to give budget management priority in the weighing of interests in cases of potential infringements of fundamental rights. The Venice Commission stated that although financial considerations can be taken into account in interpreting and applying norms, they cannot overcome constitutional guarantees.<sup>4</sup>

The questions raised above in several essential fields, such as the reduced competences of the constitutional court in the field of tax laws, the limitation of parliamentary powers in relation to budgetary matters together with the prominent role of the budget council in this field<sup>5</sup>, the provisions on the judiciary and the prosecutorial service raise concerns to adversely effect the correct functioning of the checks and balances system of a democratic state.

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Independence of the Judiciary, 26 June 2012, p. 3, including the comments sent by the Government of Hungary.

<sup>1</sup> See Opinion 668/2012 on the prosecution service, as well as regards the remarks of the HUNgarian government to the draft opinion.

<sup>2</sup> Venice Commission Opinion, para. 127.

<sup>3</sup> Art. N § 3.

<sup>4</sup> See Venice Commission Opinion, para. 51. See also Position of the Government of Hungary, p. 4: "*The provision of the new Constitution stating that "in the course of performing their duties, the Constitutional Court, courts, local governments shall be obliged to respect the principle of balanced, transparent and sustainable budget management" is strictly applicable to their administrative management as public institutions, and it cannot be understood as an interpretation principle to be applied in the context of carrying out their genuine tasks (in the case of the Constitutional Court: in the context of its constitutional review task).*"

<sup>5</sup> See Position of the Government of Hungary, p. 9: "*The competences, procedures, organisation and operation of the Constitutional Court will be regulated in detail by cardinal law, giving further clarification to the matters raised by the Venice Commission. Introducing a two-third majority requirement for the adoption of laws regulating issues, such as social and taxation policy, and the establishment of the Budget Council reflect a firm ambition to stabilize public finances. Stable public finances and a predictable tax and social security system are the cornerstones of a modern sustainable national economy.*"