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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT OPINION**  
**ON THE FOURTH AMENDMENT**  
**TO THE FUNDAMENTAL LAW**  
**OF HUNGARY**

**on the basis of comments by**

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## **I. Introduction**

1. By letter of 11 March 2013, the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, requested an opinion of the Venice Commission on the compatibility of the Fourth Amendment to the Fundamental Law of Hungary with the Council of Europe Standards.

2. By letter of 13 March 2013 to the Secretary General of the Council of Europe, the Minister for Foreign Affairs of Hungary, Mr János Martonyi, requested an opinion of the Venice Commission on the Fourth Amendment, with regard to the international commitments that derive from Hungary's membership of the Council of Europe.

3. On 12 April 2013, a delegation of the Venice Commission, composed of Mr Wolfgang Hoffmann-Riem, Ms Hanna Suchocka, Mr Kaarlo Tuori and Mr Jan Velaers, accompanied by Mr Thomas Markert and Mr Schnutz Dürr from the Secretariat, visited Budapest. The delegation met with (in chronological order) Mr Róbert Répássy, State Secretary of the Ministry of Public Administration and Justice, Mr László Sólyom former President of Hungary, Mr Tamás Gaudi-Nagy and Mr Csaba Gyüre (Jobbik party), Mr Bence Rétvári, State Secretary of the Ministry of Public Administration and Justice (KDNP) and Mr Imre Vas (Fidesz), Mr Attila Mesterházy fraction leader of the Hungarian Socialist Party (MSZP), Mr Gergely Bárándy (MSZP), Mr Gábor Galambos (MSZP), Mr Vilmos Szabo (MSZP), Mr Pal Schiffer (Politics can be different), Mr László Varju (Democratic Coalition), Ms Tímea Szabó (Together 2014) and Mr József Szájer Member of the European Parliament (Fidesz) as well as with the following NGOs: Hungarian Helsinki Committee, Hungarian Civil Liberties Union and the Eötvös Károly Institute.

4. On 15 May 2013, a delegation of the Venice Commission, composed of Mr Christoph Grabenwarter and Ms Hanna Suchocka, accompanied by Mr Thomas Markert and Mr Schnutz Dürr from the Secretariat met in Vienna with the independent experts Mr Delvolvé, Professor Emeritus at the University of Paris Panthéon-Assas, France, Mr Péter Kruzslicz, Assistant at the University of Szeged, Hungary, and Mr András Patyi, Rector of the National University of Public Service, Hungary, as well as with a delegation of the Hungarian Government, composed of Mr Krisztián Gáva, Deputy State Secretary for the Legislation of Public Law of the Ministry of Public Administration and Justice, Mr Gábor Baranyai, Deputy State Secretary of the Ministry of Foreign Affairs, and Ms Ágnes Kertész Head of the Legal Service of the Hungarian Permanent Representation to the European Union in Brussels. The present opinion takes into account the results of both visits.

5. The Venice Commission is grateful to the Hungarian authorities for the excellent co-operation in the organisation of the Budapest and the Vienna meetings. The Commission would like to thank the independent experts and the Hungarian authorities for the explanations provided.

6. *The present opinion was adopted by the Venice Commission at its ... plenary session (Venice, ...).*

## **II. Preliminary remarks**

7. On 11 March 2013, the Parliament of Hungary adopted the Fourth Amendment (CDL-REF(2013)014) to the Fundamental Law (CDL-REF(2013)016 – consolidated version). The Venice Commission has been requested to examine the Fourth Amendment from the point of view of its compatibility with Council of Europe standards and with regard to international commitments that derive from Hungary's membership of the Council of Europe.

8. The present opinion should be seen in the light of a number of earlier opinions on the Hungarian constitutional and legislative texts, which the Venice Commission provided since

2011. For the assessment of the Fourth Amendment, the following opinions are of particular relevance:

- Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary<sup>1</sup>;
- Opinion on the new Constitution of Hungary<sup>2</sup>;
- Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary<sup>3</sup>;
- Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary<sup>4</sup>;
- Opinion on Act CLI of 2011 on the Constitutional Court of Hungary<sup>5</sup>;
- Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary<sup>6</sup>;
- Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary<sup>7</sup>.

9. The Hungarian Government provided useful explanations on the Fourth Amendment in the form of a Technical Note (attached to the text of the Fourth Amendment in document CDL-REF(2013)014) and the more detailed Background Document on the Fourth Amendment to the Fundamental Law (CDL-REF(2013)019, hereinafter, the “Background Document”). During the meetings in Budapest, the representatives of the Hungarian Government also presented draft Bill no. T/10593 (CDL-REF(2013)017, hereinafter, “the Bill”), which is to implement the Fourth Amendment (CDL-REF(2013)014). This opinion does not deal with this draft law as such, but will refer to it when necessary in order to clarify how the Fourth Amendment will be implemented. This is also the approach used in the Background Document.

10. By contrast, this opinion will not examine Act XX of 2013<sup>8</sup>, which seems to address the issue of the retirement age of judges according to the Background Document, but which is beyond the scope of the Fourth Amendment.

11. The Technical Note and the Background Document insist that, for the most part, the Fourth Amendment results from an integration into the Fundamental Law of the Transitional Provisions, which had been annulled by Constitutional Court decision 45/2012<sup>9</sup> on formal grounds. In this respect, it is important to note that the Venice Commission had received a request for an opinion on the Transitional Provisions to the Fundamental Law<sup>10</sup>, but had postponed the preparation of such an opinion while an appeal against the Transitional Provisions was pending before the Constitutional Court. The Commission did not resume the work on that opinion after a large part of the Transitional Provisions was annulled by the Court. Nonetheless, several Articles of the Transitional Provisions had been criticised

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<sup>1</sup> Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011)001.

<sup>2</sup> Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016.

<sup>3</sup> Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001.

<sup>4</sup> Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)004.

<sup>5</sup> Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)009.

<sup>6</sup> Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)008.

<sup>7</sup> Adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), CDL-AD(2012)020.

<sup>8</sup> Referred to as proposal no. T/9598 in the earlier Technical Note.

<sup>9</sup> Decision 45/2012, 29.12.2012, *Magyar Közlöny* (Official Gazette), 2012/184, [CODICES: HUN-2012-3-010].

<sup>10</sup> Decision of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 13 March 2012.

already in the other opinions mentioned above and this opinion will refer to these points, where appropriate.

12. The Hungarian Government also provided an opinion on the Fourth Amendment, requested by the Minister of Foreign Affairs, Mr Martonyi, prepared by Messrs. Francis Delpérée<sup>11</sup>, Pierre Delvolvé<sup>12</sup>, and Eivind Smith<sup>13</sup>, which concludes that some provisions of the Fourth Amendment are in conformity with European standards, some could be interpreted in conformity with European standards and some provisions are “of a debatable nature” with regard to these standards. That opinion examines in detail the relevant case-law of the Court of Justice of the European Union and the European Court of Human Rights. It defines as the framework of its analysis the legislation of the European Union and the European Convention on Human Rights.<sup>14</sup>

13. In accordance with its general practice, the Venice Commission will examine the Fourth Amendment in the present opinion from a wider scope of reference. Hungary is bound by the Statute of the Council of Europe’s three main pillars, which are: human rights, democracy and the rule of law. The present opinion evaluates the Fourth Amendment from the point of view of its compatibility with all of those standards<sup>15</sup> and against the commitments that derive from Hungary’s membership of the Council of Europe<sup>16</sup>. In addition to human rights obligations and Council of Europe standards, these commitments include democratic principles, particularly checks and balances, and judicial independence as part of the rule of law.<sup>17</sup> Therefore, taking into account the legal context of the Fourth Amendment, the present Opinion will:

- (a) analyse the provisions of the Fourth Amendment individually and in the light of the relevant decisions of the Constitutional Court and,
- (b) examine systematically the effect which these provisions (taken together) have on the checks and balances and on the rule of law in Hungary.

14. This opinion is based on an English translation of the Fourth Amendment and the implementing Bill. The translation may not accurately reflect the original version on all points and, certain comments may result from problems in the translation.

### **III. Amendments to the Chapters “Foundation” and “Freedom and Responsibility” of the Fundamental Law**

#### **A. The protection of marriage and family (Article 1)**

15. Article 1 of the Fourth Amendment replaces Article L.1 of the Fundamental Law by the following provision:

*“Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival. Family ties shall be based on marriage and the relationship between parents and children.”*

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<sup>11</sup> Senator, Professor *Emeritus* at the Catholic University of Leuven, President of the International Academy for Constitutional Law.

<sup>12</sup> Member of the Institute, Professor *Emeritus* at the University of Paris Panthéon-Assas.

<sup>13</sup> Professor at the Institute of public and international law at the University of Oslo, President of the Division of Humanities and Social Sciences at the Norwegian Academy of Science and Letters, Vice-President of the International Association of Constitutional Law.

<sup>14</sup> Page 5 seq. (French version).

<sup>15</sup> The request to the Venice Commission by the Secretary General asks the Commission to examine the Fourth Amendment “from the viewpoint of its compatibility with Council of Europe standards”.

<sup>16</sup> Minister Martonyi’s request expressly relates to the “international commitments deriving from Hungary’s membership of the Council of Europe”

<sup>17</sup> Report on the Rule of Law, adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011), CDL-AD(2011)003rev, para. 55.

16. In its decision 43/2012<sup>18</sup>, which had already been based on the Fundamental Law, in force since 1 January 2012, the Hungarian Constitutional Court had annulled Section 7 of the Act on Protection of Families, which defined the concept of the family as a system of relations that generates an emotional and economic community of natural persons, based on the marriage of a man and a woman, next of kinship or adoptive guardianship. The Court has found this concept of a family too narrow. According to the Court's reasoning, the State should also protect long-term emotional and economic partnerships of persons living together (for example, those relationships in which the couples raise and take care of each other's children, or couples who do not have any children or are not able to have any children, grandchildren cared for by grandparents etc.).

17. As concerns the definition of family ties, the Background Document provided by the Hungarian Government insists that this provision only defines the 'basis' of family relations and not the term family itself and does not preclude the statutory protection of family relations in a wider sense.

18. Article L.1 not only states that family is "*the basis of national's survival*", but also that "*family ties are based on marriage and the relationship between parents*".

19. According to the case-law of the European Court of Human Rights, the definition of "marriage" as the union of a man and a woman falls within the margin of appreciation of the Hungarian authorities.<sup>19</sup>

20. Article L.1 of the Fundamental Law should not exclude other guarantees of family and family life. Article 12 ECHR guarantees the right of a man and a woman to marry. In the last decades, the European Court of Human Rights has gradually broadened the scope of Article 8 ECHR on the right to family life.<sup>20</sup>

## **B. Communist past (Article 3)**

21. Article 3 of the Fourth Amendment adds a new Article U to the Fundamental Law, which condemns the communist past of Hungary (Article U.1), calls for a truthful revelation of the operation of the communist dictatorship (Article U.2), establishes a Committee of National Memory (Article U.3), obliges holders of power of the communist dictatorship to tolerate factual statements about their role and actions (Article U.4), allows for the reduction of their statutory pensions and other benefits (Article U.5), prolongs the statute of limitations for unprosecuted crimes perpetrated during the communist dictatorship (Article U.6-8), rules out further compensation of the victims (Article U.9) and provides for the transfer of documents to public archives (Article U.10).

22. Recalling Resolution 1481 (2006) of the Parliamentary Assembly of the Council of Europe on the Need for International condemnation of crimes of totalitarian communist regimes<sup>21</sup>, the Venice Commission acknowledges and understands Hungary's intention of coming to terms with its Communist past.

23. The very long Article U.1 is similar to the political declarations that were adopted in many other post-communist states at the beginning of the political transformation. Provisions of this type seem to be more appropriate for the preamble of a Constitution because they have only

<sup>18</sup> Decision 43/2012 of 20.12.2012, Magyar Közlöny (Official Gazette), 2012/175; [CODICES: HUN-2012-3-009].

<sup>19</sup> ECtHR: Schalk and Kopf vs. Austria, 22.11.2010, application no. 30141/04, para. 58;

Gas and Dubois v. France, 15.03.2012, application no. 25951/07, para. 66;

X and others vs. Austria, 19.02.2013, application no. 19010/07, paras. 105-110.

<sup>20</sup> ECtHR: Schalk and Kopf vs. Austria, 22.11.2010, application no. 30141/04, paras. 91 and 94;

X and others vs. Austria, 19.02.2013, application no. 19010/07, para. 95.

<sup>21</sup> *Assembly debate* on 25 January 2006 (5th Sitting), *adopted by the Assembly* on 25 January 2006 (5th Sitting).

marginal normative character. In fact, even before the Fourth Amendment the Preamble of the Fundamental Law already contained a provision stating: *“We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship”*.

24. As concerns the normative provisions on the criminal and civil responsibility of the political organisations involved in the communist regime and their leaders, as well as successor organisations, the provisions implementing Article U, in particular Article U.6, should primarily be assessed in light of the criminal-law principle of legality, enshrined in Article 7 of the ECHR and the principle of equality.

25. In the Background Document, the Hungarian Government insists that a similar law regarding the calculation of the statute of limitations was adopted in the early 1990s in Germany.

26. The Commission is aware that special provisions were enacted in several European states, which were directed against the restoration of former regimes that brought dictatorship and terror over the country and its population. However, the particular background pertaining to each of these states should be taken into account. While it is true that in Austria a special constitutional law banning all forms of national-socialist activities was enacted,<sup>22</sup> it has to be borne in mind that this happened immediately after World War II and the end of the Nazi regime. In Germany, the provisions referred to by the Hungarian Government were adopted immediately after the German reunification and not on a constitutional, but on an ordinary-law level.

27. The time of adoption of these kind of provisions is of relevance. In a recent opinion on lustration, the Venice Commission discussed whether provisions on individual responsibility should be introduced more than 20 years after the democratic transformation: *“Introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. Revenge should not prevail over protecting democracy. It follows in the Commission’s view that applying lustration measures more than 20 years after the end of the totalitarian rule requires cogent reasons. The Commission recalls nevertheless that every democratic state is free to require a minimum amount of loyalty from its servants and may resort to their actual or recent behaviour to relieve them from office or refrain from hiring them.”*<sup>23</sup>

28. The main problem of Article U lies in the fact that it does not foresee any procedure that permits the examination of each individual case, but attributes responsibility for the past by using general terms (“holders of power”, “leaders”) and vague criteria without any chance for an individual assessment. Procedural safeguards and clear criteria are required, in accordance with the relevant European rule of law standards, and in particular in the light of Articles 6, 7 and 8 ECHR.<sup>24</sup>

29. The Commission is of the view that questions of individual responsibility in general and limitation periods in particular should be regulated by the penal code or other ordinary law,

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<sup>22</sup> Verbotsgesetz 1947, BGBl. 1947/25; some provisions were enacted already in 1945.

<sup>23</sup> CDL-AD(2012)028, *Amicus Curiae* Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security (“Lustration Law”) of “the former Yugoslav Republic of Macedonia”, adopted by the Venice Commission At its 93rd Plenary Session (Venice, 14-15 December 2012), para. 17.

In this respect it worth to repeat what the Polish Constitutional Court held in its decision on the Polish lustration law: “the goal of lustration shall consist, above all, in the protection of democracy against reminiscences of totalitarianism, while the secondary goal thereof, subordinated to the realisation of the primary goal, shall be the individual penalisation of persons who undertook collaboration with the totalitarian regime”.

<sup>24</sup> See also the opinion of Messrs. Delpérée, Delvolvé and Smith.

rather than directly by the Constitution. If they are to be kept at the level of the Fundamental Law, then these provisions must at least allow for sufficient flexibility with regard to proportionality, taking into account the individual circumstances of each concrete case.

### C. The recognition of churches (Article 4)

30. Article 4 of the Fourth Amendment amends Article VII of the Fundamental Law and provides rules on the recognition of churches, according to which Parliament may recognise, in a cardinal act, *“certain organisations engaged in religious activities as Churches, with which the State shall cooperate to promote community goals”*.<sup>25</sup> In addition, amended Article VII.4 provides that *“as a requirement for the recognition of any organisation engaged in religious activities as a Church, the cardinal Act may prescribe an extended period of operation, social support and suitability for cooperation to promote community goals”*.<sup>26</sup>

31. The Venice Commission recalls that in its decision 6/2013<sup>27</sup>, taken already on the basis of the Fundamental Law in force since 1 January 2012, the Hungarian Constitutional Court declared that some of the provisions of the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, were contrary to the Fundamental Law and annulled them. The Court criticised the lack of an obligation to provide an appealable reasoned decision in case of a rejection of the request for recognition,. The decision by Parliament could thus result in a political decision rather than one based on the applicable criteria. In the absence of a deadline for Parliament to decide, no legal remedy was available. The new provisions introduced by Article 4 result in the possibility to disregard decision 1/2013.

32. In its Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary<sup>28</sup>, the Venice Commission had stated:

*“72. The Venice Commission is worried specifically about the absence in the Act of procedural guarantees for a neutral and impartial application of the provisions pertaining to the recognition of churches”*<sup>29 [38]</sup>.

*73. Requests for acceding to church status have to be submitted directly to the Religious Affairs Committee of the National Assembly, which, eventually, submits a bill regarding the recognition to the National Assembly. The Bill of Recognition has to be adopted by a two-third majority of the Assembly.*

*74. According to the latest information at the disposal of the rapporteurs, Parliament adopted a Bill of Recognition on 29 February 2012, with 32 recognized churches<sup>39</sup>. It is entirely unclear to the rapporteurs and to the outside world, how and on which criteria and materials the Parliamentary Committee and Members of Parliament were able to discuss this list of 32 churches, to settle the delicate questions involved in the definition of religious activities and churches supplied in the Act, within a few days, without falling under the influence of popular prejudice.*

*....*  
*76. The foregoing leads to the conclusion that the recognition or de-recognition of a Religious community (organization) remains fully in the hands of Parliament, which inevitably tends to be more or less based on political considerations. Not only because*

<sup>25</sup> Article VII.2 of the Fundamental Law.

<sup>26</sup> Article VII.4 of the Fundamental Law.

<sup>27</sup> Decision 6/2013 of 1.3. 2013.

<sup>28</sup> CDL-AD(2012)004, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012).

<sup>29 [38]</sup> See ECHR, Metropolitan Church of Bessarabia v. Moldova, para. 116: *“in exercising its regulatory power . . . in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial.”*



*Parliament as such is hardly able to perform detailed studies related to the interpretation of the definitions contained in the Act, but also because this procedure does not offer sufficient guarantees for a neutral and impartial application of the Act. Moreover, it can reasonably be expected that the composition of Parliament would vary, i.e. change after each election, which may result in new churches being recognized, and old ones de-recognized at will, with potentially pernicious effects on legal security and the self-confidence of religious communities.*

*77. It is obvious from the first implementation of the Act, that the criteria that have been used are unclear, and moreover that the procedure is absolutely not transparent. Motives of the decisions of the Hungarian Parliament are not public and not grounded. The recognition is taken by a Parliamentary Committee in the form of a law (in case of a positive decision) or a resolution (in case of a negative decision). This cannot be viewed as complying with the standards of due process of law.*

33. In the Background Document, the Hungarian Government insists on the fact that parliamentary recognition of churches does not prevent other religious communities from freely practising their religions or other religious convictions as churches in a theological sense in the legal form of an “organisation engaged in religious activities”.

34. In the Commission's view, this statement leaves doubts concerning its scope. It must be kept in mind that religious organisations are not only protected by the Convention when they conduct religious activities in a narrow sense. Article 9.1 ECHR includes the right to practice the religion in worship, teaching, practice and observance. According to the Convention, religious organisations have to be protected, independently of their recognition by the Hungarian Parliament, not only when they engage in religious activity *sensu stricto*, but also when they, e.g., engage in community work, provided it has – according to settled case law – “some real connection with the belief”<sup>30</sup>. Article 9 in conjunction with Article 14 ECHR obliges the “State [...] to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom”<sup>31</sup>.

35. The Background Document does not address the issue of an appeal against non-recognition. The amended Article VII.2 refers to a remedy against the incorrect application of the recognition criteria: “The provisions of cardinal Acts concerning the recognition of Churches may be the subject of a constitutional complaint.” During the meeting in Budapest, the delegation of the Venice Commission was informed that such a remedy would be introduced, but that it would be limited to the control of the recognition procedure in Parliament. It seems that such a Bill is currently being discussed in the Hungarian Parliament. A merely procedural remedy is, however, clearly insufficient in view of the requirement of Article 13, taken together with Article 9 ECHR. Article VII.2 of the Fundamental Law provides substantive criteria and a review of the procedure applied does not allow for a verification of whether these criteria were followed by Parliament.

36. The Fourth Amendment to the Fundamental Law confirms that Parliament, with a two-thirds majority, will be competent to decide on the recognition of churches. In addition, the new criterion “*suitability for cooperation to promote community goals*” lacks precision and leaves too much discretion to Parliament which can use it to favour some religions. Without precise criteria and without at least a legal remedy in case the application to be recognised as a Church is rejected on a discriminatory basis, the Venice Commission finds that there is no sufficient basis in domestic law for an effective remedy within the meaning of Article 13 ECHR.

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<sup>30</sup> See already European Commission of Human Rights, *Arrowsmith v. the United Kingdom*, Application no. 7050/75, Decision of 16 May 1977, para 3.

<sup>31</sup> ECtHR, *Religionsgemeinschaft der Zeugen Jehovas v. Austria*, Application no. 40825/98, Judgment of 31 July 2008, para. 97.

#### **D. Media access for political parties (Article 5.1)**

37. Article 5.1 of the Fourth Amendment replaces Article IX.3 of the Fundamental Law and provides that “*political advertisements shall be published in media services, exclusively free of charge*” and “*political advertisements published by and in the interest of nominating organisations setting up country-wide candidacy lists for the general election of Members of Parliament or candidacy lists for the election of Members of the European Parliament shall exclusively be published by way of public media services and under equal conditions*”. Sections 146-148 of the Act on Electoral Procedure of 2012 implement this provision (CDL-REF(2013)018).

38. This provision overrules decision 1/2013<sup>32</sup> of the Constitutional Court, annulling Section 151 of the Act on Electoral Procedures during the electoral campaign, which specified that all parties can advertise only within highly restricted time-limits and that they are allowed to use public TV and radio stations only during political campaign. The Court found that “the prohibition is a significant restriction of expressing political opinion in the course of the election campaign” and “with regard to the aim of allowing the free formation and the expression of the voters’ will” and found it “gravely disproportionate”<sup>33</sup>.

39. In the Background Document, the Hungarian Government explains that the goal of this provision is to ensure the publication of political advertising for political parties with nationwide support on an equal basis and free of charge. Referring to the judgment of the European Court of Human Rights in the case of “TV Vest AS & Rogaland Pensjonistparti v. Norway”<sup>34</sup>, the Government points out that paid political advertising is prohibited in a number of European countries.

40. In its judgment in the case of TV Vest As & Rogaland Pensjonistparti v. Norway, the ECtHR indeed assessed a general ban of political advertising on television. The Court was of the opinion that “there was not (...) a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants’ exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities. Accordingly, there has been a violation of Article 10 of the Convention.”<sup>35</sup>

41. In its recent decision in the case of Animal Defenders International v. the United Kingdom, the ECtHR acknowledged “the lack of European consensus on how to regulate paid political advertising in broadcasting”<sup>36</sup> and stated that the UK Government “had more room for manoeuvre when deciding on such matters as restricting public interest debate.” The Court considered that convincing reasons had been given for the ban on political advertising in the United Kingdom and that it had not amounted to a disproportionate interference with the applicant NGO’s right to freedom of expression.

42. The Venice Commission notes that the ECtHR, in balancing, on the one hand, the applicant NGO’s right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities’ desire to protect the democratic

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<sup>32</sup> Decision 1/2013, 07.01.2013.

<sup>33</sup> Chapter IV, section 1.2.

<sup>34</sup> European Court of Human Rights, 11.12.2008, TV Vest As & Rogaland Pensjonistparti v. Norway, Application no. 21132/05.

<sup>35</sup> Para. 78.

<sup>36</sup> 22 April 2013, Application no. 48876/08.

debate and process from distortion by powerful financial groups with advantageous access to influential media, paid specific attention to the fact “that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the ban, which was enacted with cross-party support without any dissenting vote. The proportionality of the ban was also examined in detail in the High Court and the House of Lords.”

43. The European Court of Human Rights also pointed out that the British ban on paid political advertising was balanced by the fact that political parties could freely advertise for themselves through party political, party election and referendum campaign broadcasts. Thus the Court took into account that in a party-based democracy political parties need to be able to disseminate their views before elections. There are almost no provisions like the British ones in Hungary. Therefore the situation in Great Britain is quite different from that in Hungary.

44. The Commission underlines that limits on political advertising have to be seen against the legal background of the particular Member State. Where political advertising in electoral campaigns is concerned, limitations have to be justified in a convincing way as to their necessity in a democratic society. According to the Hungarian authorities the ban on political advertising on private television during the electoral campaign strives “for the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity”<sup>37</sup>. The Venice Commission attaches great importance to the assessment by the Hungarian Constitutional Court’s decision 1/2013 where the Court pointed out that political advertising, besides influencing voters, also informs them and where it stressed that a prohibition of political advertising on commercial television targets exactly the type of media that reaches voters in the widest range.<sup>38</sup>

45. The Venice Commission stresses that one has to take a particular look at the effects of the amended Article IX.3 of the Fundamental Law. Since the Government usually has a better chance of public appearances, the governing parties’ positions will already be promoted indirectly through media coverage of governmental activities and statements. Since Article IX.3 does not oblige public media services to make room for a large number of political advertisements, there is a risk that public media services will restrict political advertising in times of elections, thus making it difficult for the opposition to effectively promote their positions. The prohibition of paid advertising prior to elections will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage.

46. The amended Article IX.3 provides that only “nominating organizations setting up countrywide candidacy lists for the general election of members of Parliament or candidacy lists for election of Members of the European Parliament” shall be published by way of public media services and equal conditions. If this implies that parties which do not set up nationwide candidacy lists will not have access to public media at all, Article 14 taken together with Article 10 ECHR would be violated if no objective and reasonable justification were given for this unequal treatment.

47. At the meeting in Vienna, the Hungarian authorities have confirmed that they are ready to exclude elections to the European Parliament from the scope of the limitations of Article IX.3 of the Fundamental Law, which would then apply only to domestic elections. The Commission does not see any objective justification for such a distinction, which is in effect arbitrary. The

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<sup>37</sup> Article IX.3 of the Fundamental Law.

<sup>38</sup> Decision 1/2013 of 26 February 2013, p. 22, an English translation is available at [http://www.mkab.hu/letoltesek/en\\_0001\\_2013.pdf](http://www.mkab.hu/letoltesek/en_0001_2013.pdf).

proposal seems to aim to avoid a conflict with European Union Law<sup>39</sup>. Under Council of Europe electoral standards, the reasons that induce the Hungarian authorities to exclude the European elections from the scope of Article IX.3 also apply to the national parliamentary elections.

48. Finally, as concerns the level of regulation, Article IX.3 of the Fundamental Law is one of the provisions introduced by the Fourth Amendment containing rather detailed rules which might require amending from time to time and are therefore usually regulated by ordinary laws. Raising such provisions to the level of the Constitution withdraws them from constitutional review.

### **E. Limitation of the freedom of speech (Article 5.2)**

49. Article 5.2 of the Fourth Amendment adds a paragraph 5 to Article IX of the Fundamental Law, stating that

*“The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion which violates their community, invoking the violation of their human dignity as determined by law.”*

50. While the Background Document refers to decision 30/1992 of the Constitutional Court<sup>40</sup>, which points out that the dignity of communities may serve as a constitutional limit on the freedom of expression, Article IX.5 seems to effectively overrule several decisions of the Constitutional Court:

- In the same decision 30/1992, the Court found that by penalising any kind of act which could incite hatred among the general public against the Hungarian nation, any national, ethnic or racial group or certain groups of the population, the Criminal Code violated the constitutional principle of legal certainty, since the provision in question was not clearly defined and specific. A clear expression of the legislative intent concerning the content of the unlawful act is a constitutional requirement.
- In decision 18/2004, the Court held that when regulating hate speech, the legislator should take into account that the freedom of speech may be limited by criminal sanctions only in cases of what is known as the most dangerous conduct, that is to say, behaviour capable of stirring up such intense emotions in the majority of the people and, which upon giving rise to hatred, might result in the endangering of fundamental rights, which, in turn, could lead to the disturbance of the social order and public peace (this danger must be clear and present).<sup>41</sup>
- In decision 95/2008, the Court found that the legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are "capable of whipping up intense emotions in the majority of people", that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.<sup>42</sup>

51. The Background Document points out that this provision was adopted as a means to fight racist speech (directed against the Roma community) and anti-Semitic speech in Hungary. The Venice Commission welcomes this intention by the Hungarian legislator. The Background Document refers to Recommendation R (97) 20 of the Committee of Ministers of the Council of Europe, which calls upon member States to combat hate speech, which is criminalised in a

<sup>39</sup> One could argue that exempting only elections to the European Parliament is not sufficient even under EU law, since elections to the national parliament are in fact decisive for both the selection of the national representative in the European Council as well as in the EU Commission.

<sup>40</sup> Decision 30/1992, 26.05.1992, *Magyar Közlöny* (Official Gazette), 53/1992, [CODICES: HUN-1992-S-002].

<sup>41</sup> Decision 18/2004, 25.04.2004, *Magyar Közlöny* (Official Gazette), 2004/70, [CODICES: HUN-2004-1-004].

<sup>42</sup> Decision 95/2008, 03.07.2008, *Magyar Közlöny* (Official Gazette), 2008/98, [CODICES: HUN-2008-2-005].

number of European countries. As concerns the specific protection of the Hungarian nation, the Government explains that its defamation was penalised traditionally in Hungary. Similar provisions exist in other European countries.

52. The Commission points out that as it limits freedom of speech, Article IX.5 must be in compliance with the limitation clause of Article 10.2 ECHR, in particular with the condition that a limitation on the freedom of expression must be “foreseen by law”.

53. As regards the prohibition to exercise the right to freedom of speech with the aim of “violating the dignity of any ethnic, racial or religious community”, it may be considered necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance<sup>43</sup>. However, it is doubtful whether every exercise of the freedom of speech aimed at “violating the dignity of any ethnic, racial or religious community” is hate speech of the type mentioned. The terms used in the amendment have potential for such a wide scope of application that they lack the clarity and precision needed to be in compliance with the condition that a limitation of the freedom of speech has to be “foreseen by law”.

54. Article IX paragraphs 4-5 (as amended) fail to depict the scope of prohibition sufficiently narrowly. There is no indication in the wording that the clause is only aimed at the protection of those communities and their members which are mentioned in the Background Document. On the contrary, the introduction of the “dignity of the Hungarian nation” into article IX.5 (a concept, it should be noted, that is unrelated to the *human* dignity mentioned in article IX.4) creates the risk that freedom of speech in Hungary could, in the future, be curtailed mainly to protect majority instead of minority views. Besides this, the term “*violating the dignity of the Hungarian Nation*” raises doubts in view of recent jurisprudence of the European Court of Human Rights.<sup>44</sup> This provision might also be applied to curtail criticism on the Hungarian institutions and society which could be incompatible with the condition that a limitation has to be necessary in a democratic society.

## **F. Autonomy of institutions of higher education (Article 6)**

55. Article 6 of the Fourth Amendment replaces Article X.3 of the Fundamental Law. It provides, on the one hand, that all institutions of higher education shall be autonomous in terms of contents and methodology of research and teaching, but on the other hand it creates a basis for legislation regulating their organisation and for the Government to determine, to the extent permitted by law, the rules of financial management and to supervise their financial management.

56. This Article seems to contradict decision 69/2009<sup>45</sup> of the Constitutional Court in which the Court stated that the economic autonomy of universities may be limited but, as it serves as a guarantee of the realisation of the freedom of sciences, the more an economic activity is linked to the science, the greater its constitutional protection of autonomy .

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<sup>43</sup> European Court of Human Rights, 06.07.2006, case of Erbakan v. Turkey, application no 59405/00, para. 56, original text in French: « *A cet égard, la Cour souligne que la tolérance et le respect de l'égalité de tous les êtres humains constituent le fondement d'une société démocratique et pluraliste. Il en résulte qu'en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d'expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l'intolérance (y compris l'intolérance religieuse), si l'on veille à ce que les « formalités », « conditions », « restrictions » ou « sanctions » imposées soient proportionnées au but légitime poursuivi* ».

<sup>44</sup> See ECtHR, Case of Altug Taner Akçam v. Turkey, application no. 27520, judgment of 25 October 2011, para. 93 where the Court found that a criminal law provision aimed at protecting “the Turkish nation” was “too wide and vague and thus the provision constitutes a continuing threat to the exercise of the right to freedom of expression. In other words, the wording of the provision does not enable individuals to regulate their conduct or to foresee the consequences of their acts”.

<sup>45</sup> Decision 62/2009, 16.06.2009.

57. In the Background Document, the Government insists that this provision only relates to the financing of universities from the central budget and does not affect the predominance of the freedom of research and education.

58. Financial regulations for universities are an issue usually regulated by ordinary law. Raising this provision to the constitutional level has the effect of preventing review by the Constitutional Court.

### **G. Financial support to students (Article 7)**

59. Article 7 of the Fourth Amendment amends Article XI of the Fundamental Law, paragraph 3 of which reads as follows: *“By virtue of an Act of Parliament, financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.”*

60. In its decision 32/2012, the Constitutional Court had annulled the Government decree, albeit on formal grounds, stating that student grants have to be regulated on the level of law (an act of parliament). However, the reasoning of the decision shows that there were also serious doubts about substantive constitutionality. The Court found that the obligation for students having obtained state scholarships to work in Hungary after graduation for a period equal to double their period of study within 20 years directly affected the right to freely choose a job or profession of Article XII.1 of the Fundamental Law, also taking into account Article 45 of the EU Treaty on the free movement of workers and the relevant case law of the European Court of Justice<sup>46</sup>.

61. In the Background Document, the Government argues that this provision does not restrict the freedom of movement, because students are free to either choose financial support from the Government and to accept the conditions or not. The financial support by the Government would be the equivalent of a waiver of tuition fees, which exist in other countries. Even after having received the grant, students could choose to work abroad and reimburse the financial support received. Instead of grants students who wished to work abroad could also opt for the “Student Loan 2”, which has no restriction on the place of work and which has to be reimbursed only 20 years after graduation. Given that decision 32/2012<sup>47</sup> annulled the Government decree on formal grounds only, the Article 7 of the Fundamental Law cannot be seen as overruling it.

62. From the point of view of the Venice Commission in the framework of this Opinion, the most important issue is the level of regulation. Article XI.3 of the Fundamental Law is one of the

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<sup>46</sup> Joined Cases C-11/06 and C-12/06 Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren, European Court Reports 2007 Page I-09161. In this decision the European Court of Justice stated: “25. Next, it should be recalled that national legislation which places certain nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State constitutes a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (see Case C-406/04 De Cuyper [2006] ECR I-6947, paragraph 39; Tas Hagen and Tas, paragraph 31; and Schwarz and Gootjes-Schwarz, paragraph 93). 26. Indeed, the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State can be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his State of origin penalising the mere fact that he has used those opportunities (see, to that effect, Case C-224/98 D’Hoop [2002] ECR I-6191, paragraph 31; Case C-224/02 Pusa [2004] ECR I-5763, paragraph 19; and Schwarz and Gootjes-Schwarz, paragraph 89).”

<sup>47</sup> Decision 32/2012 of 04.07.2012, Magyar Közlöny (Official Gazette), 2012/85 [CODICES: HUN-2012-2-005].

provisions of the Fourth Amendment that contains detailed rules which are usually regulated by law and should not be part of a Constitution. Raising such provisions to the level of the Constitution has the effect of preventing review by the Constitutional Court.

## **H. Incrimination of homelessness (Article 8)**

63. Article 8 of the Fourth Amendment replaces Article XXII of the Fundamental Law and its new paragraph 3 provides: *“In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.”*

64. The Venice Commission notes that, in decision 38/2012 of 14 November 2012<sup>48</sup>, the Hungarian Constitutional Court reviewed the Petty Offence Act and stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity ensured by Article II of the Fundamental Law, and can neither be justified by the removal of homeless people from public areas nor by providing an incentive for such persons to avail themselves of the social care system. In the Court’s view, homelessness is a social problem which the State must handle in the framework of social administration and social care instead of punishment. The new Article XXII.3 contradicts this decision.

65. The Government argues, in the Background Document, that Article XXII.3 of the Fundamental Law is only an enabling clause and that it neither aims to criminalise homeless people nor contains a general prohibition regarding homelessness. The Government insists that only permanent living in specific areas can be prohibited, when this is necessary in the interest of protecting public order, public safety, public health and cultural values. The Constitutional Court (as concerns national legislation) and the Curia (as concerns municipal regulations) would ensure compliance with these criteria. The Government points out that in Belgium and in the Czech Republic legislation prohibits people to set up and live in tents in inhabited areas and cities.

66. From the point of view of the Venice Commission in the framework of this Opinion, the most important issue is the level of regulation. Article XXII.3 of the Fundamental Law is one of the provisions of the Fourth Amendment that contains detailed rules which are usually regulated by law and should not be part of a Constitution. Raising such provisions to the level of the Constitution has the effect of preventing review by the Constitutional Court.

## **IV. The rule of law and independence of the judiciary**

### **A. The role of the President of the National Judicial Office (Article 13)**

67. Article 13 of the Fourth Amendment replaces Article 25.4 to 25.7 of the Fundamental Law. Paragraph 5 provides:

*(5) The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The bodies of judicial self-government shall participate in the administration of the courts.”*

*(6) Upon a proposal of the President of the Republic, Parliament shall elect a judge to serve as the President of the National Office for the Judiciary for a term of nine years. The election of the President of the National Office for the Judiciary shall require a two-third majority of the votes of the Members of Parliament.”*

68. The Background documents insists that the PNJO operates under effective control of the National Judicial Council, as the supreme judicial self-government body, and of Parliament. The

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<sup>48</sup> Decision 38/2012, 14.11.2012, Magyar Közlöny (Official Gazette), 2012/151, [CODICES: HUN-2012-3-006].

Document also refers to criticism of the situation in Germany where the Minister of Justice appoints judges following consultation with the judicial selection committee.

69. In two earlier Opinions<sup>49</sup> the Venice Commission strongly criticised the extensive powers of the President of the National Judicial Office (PNJO) and the lack of appropriate accountability. The Commission emphasised the need to enhance the role of the National Judicial Council as a control instance.

70. While on the legislative level the situation had been improved in the framework of the dialogue between the Secretary General of the Council of Europe and the Hungarian authorities both by reducing the powers of the PNJO and by increasing those of the National Judicial Council and by making the PNJO more accountable<sup>50</sup>, the Fourth Amendment goes in the opposite direction and raises the position of the PNJO to the constitutional level. The PNJO now has the power to exercise the “central responsibilities of the administration of the courts” and “*bodies of judicial self-government*” merely “*participate in the administration of the courts*”. The supreme body of judicial self-government, the National Judicial Council, is not even mentioned in the Fundamental Law.

71. Article 11.4 of the Transitional Provisions (CDL-REF(2012)018) had merely defined the PNJO as the legal successor of the Supreme Court and the National Council of Justice “for the administration of courts with the exception defined by the relevant cardinal Act”. Following its negative evaluation of the cardinal law, it is unclear to the Venice Commission for which reason the position of the PNJO has been confirmed in the Fundamental Law, without any indication of the necessary limitations and the checks and balances to which it must be subject. The Venice Commission cannot but repeat its criticism.

72. The progress achieved through the dialogue with the Secretary General<sup>51</sup> is jeopardised by the Fourth Amendment. The Fourth Amendment represents a step back and provides the PNJO with additional legitimacy without providing for additional accountability. Even the Bill no. T/10593 does not contain any provisions which would provide for increased accountability for the PNJO or for strengthening the National Judicial Council as called for by the Venice Commission.

## **B. The transfer of cases by the President of the NJO (Article 14)**

73. Article 14 of the Fourth Amendment supplements Article 27 of the Fundamental Law by the following paragraph 4:

*“In the interest of the enforcement of the fundamental right to a court decision within a reasonable time and a balanced distribution of caseload between the courts, the President of the National Judicial Office may designate a court, for cases defined in a cardinal Act and in a manner defined also in a cardinal Act, other than the court of general competence but with the same jurisdiction to adjudicate any case.”*

74. Already in its decision 166/2011<sup>52</sup> the Constitutional Court had found the transfer of cases by the Supreme Prosecutor to be contrary to the European Convention on Human Rights. In order to overcome that decision, this transfer had been ‘constitutionalised’ in Article 11.4 of the

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<sup>49</sup> CDL-AD(2012)001, Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), para. 118;

CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), para. 88.

<sup>50</sup> CDL-AD(2012)020, para. 86.

<sup>51</sup> *ibid.*

<sup>52</sup> Judgment no. 166/2011 of 20 December 2011.



Transitional Provisions.<sup>53</sup> The Fourth Amendment includes into the Fundamental Law the transfers of cases by the PNJO, which had been introduced in Article 11.3 of the Transitional Provisions. The Commission welcomes that the Fourth Amendment does not provide for transfers by the Supreme Prosecutor himself (see below on this point).

75. In the Background Document, the Government insists that according to the Bill only groups of cases can be transferred and that the PNJO can no longer decide on the transfer of individual cases. The selection of receiving courts depends on case statistics and the Curia is in charge of reviewing the transfer.

76. The transfer of cases has been strongly criticised by the Venice Commission: *“The system of the transferring of cases is not in compliance with the principle of the lawful judge, which is essential to the rule of law; it should be revised. Pending a solution of this problem, no further transfers should be made.”*<sup>54</sup>

77. For the assessment of the impact of the Fourth Amendment on the transfer of cases it is indeed important to take into account Bill no. 10593, which indicates how the Governmental majority intends to implement the amended Article 27.4 of the Fundamental Law, although the task the Venice Commission has is to examine the Fourth Amendment and not the not-yet-adopted implementing legislation.

78. The Bill replaces Chapter V of Act CLXI of 2011 on the Organisation and Administration of Courts (AOAC) and provides for a revised procedure on the transfer of cases - upon request of the chair of a Court which is overburdened the PNJO can:

*“appoint the court or courts which shall proceed in place of the court covered by the motion for a fixed term but for maximum one year in a resolution adopted in agreement with the NJC (hereinafter referred to as ‘resolution of appointment’). The chair of the court affected by the appointment shall be consulted. The President of the NJO may only appoint a court where the workload in the given phase of cases did not reach the national average on the last day of the calendar six-month period preceding the submission of the motion (31 December or 30 June). The President of the NJO shall determine the period of the appointment in his/her resolution of appointment in such a way that the initial date thereof shall not fall earlier than the 90th day following the adoption of the resolution. The NJC shall exercise its right of agreement related to the resolution of appointment at its meeting held after the adoption thereof.”*<sup>55</sup> and

*“If the court receives a case falling into the case group determined in the resolution during the period stated in the resolution of appointment, the court shall forthwith forward the documents of the case to the court appointed in the resolution. The official communication regarding the forwarding of documents shall be published on the central website.”*<sup>56</sup>

79. Even though the English translation of Article 62.1 AOAC refers to the appointment of a court for the assessment of “a case”, it seems that the PNJO would not assign the receiving court in individual cases, but only define groups of cases, all of which would be transferred during a fixed period. If this is the case, it is to be welcomed. To remove any doubt, the wording of Article 62.1 should refer to ‘groups of cases’ rather than a ‘case’ or ‘cases’.

80. Nonetheless the system of transfer of cases remains deeply problematic for several reasons:

1. The PNJO has discretion in the choice of the ‘receiving court’. The PNJO is only limited by the fact that this court has to have a caseload below the national average<sup>57</sup>. This

<sup>53</sup> See in this point CDL-AD(2012)001, para. 90.

<sup>54</sup> CDL-AD(2013)001, para. 92.

<sup>55</sup> Article 62.4 AOAC (as amended by the Bill).

<sup>56</sup> Article 62.9 AOAC (as amended by the Bill).

<sup>57</sup> Article 62.4 AOAC (as amended by the Bill).

- means that the PNJO can freely choose among half of all Hungarian courts which are below the average.
2. The new Article 62.4 provides that the PNJO cannot appoint only one receiving court but several. There is no indication in the Bill on how a decision would be made to which of the receiving courts a specific case would be sent. This would create legal uncertainty, incompatible with the principle of the rule of law.
  3. The Fourth Amendment no longer allows the Supreme Prosecutor to decide in which court he or she would bring charges. This is to be welcomed. However, Article 62.2 AOAC would still allow the Supreme Prosecutor to apply to the PNJO for the appointment of a receiving court in specific groups of cases. The workload of a court should be assessed by the chair of that court and not by the prosecutor, who is a party to the proceedings. As already set out by the Commission, “this competence of the Prosecutor General needs to be removed”.<sup>58</sup> Even the mere application to the PNJO violates the principle of equality of arms, which is an important element of the rule of law.
  4. Article 63.1 AOAC provides that “a person who substantiates his/her legal interest” can appeal to the PNJO against the PNJO’s decision to transfer a group of cases within 30 days of the publication of the decision. The remedial value of this provision seems very doubtful, because only a person who expects his or her case to be pending 90 days (Article 62.4 AOAC) after the PNJO’s decision is published on the site is likely to be able to substantiate his or her legal interest. In criminal law this seems nearly excluded altogether. Even in civil or commercial law only people who expect their case to be pending between the next 3 (the 90 day period) to 15 months (the end of the period of transfer after a maximum of 1 year – Article 64.2 AOAC) and who regularly follow announcements at the central court site will be able to bring an appeal.
  5. More worrying still is that, according to Article 62.9 AOAC, the transfer of an individual case is only announced on the central web-site. Parties are not informed of the transfer of their case (civil or penal). They have only 8 days to appeal against this transfer to the Curia and the Curia can only verify whether the individual transfer “complies with the resolution of appointment” by the PNJO but the Curiae cannot control that resolution itself. There is “no excuse” (Article 64.1 AOAC) and no reinstatement of this deadline is possible. Already in its opinion on the Judiciary, the Commission stated that the parties have to be notified<sup>59</sup> but the new procedure did not heed this criticism by the Commission. The absence of a notification of the parties and the impossibility to obtain reinstatement if the deadline could not be respected for valid reasons (e.g. serious illness etc.) are in clear contradiction to the principle of a fair trial. Consequently, the appeal against the transfer of cases of Article 64.1 AOAC cannot be considered to be an effective remedy.

81. In addition, the Bill provides that very complex types of cases can be transferred: civil cases involving a claim of at least 400 million HUF or “lawsuits instituted by a government control organ” (Article 62.6 AOAC) and “acts of misconduct committed by office holders”, “criminal offences committed against the fairness of public life” or if “there are strong grounds for suspecting that the criminal offence was committed by a member of the representative body of a local government, mayor, deputy mayor, senior worker of the office of the representative body, Member of Parliament or state leader”, if “there are strong grounds for suspecting that the criminal offence was committed by a senior worker of a centrally financed institution, a central state administration organ or the regional agencies of these”, “criminal offences committed against the fairness of international public life”, “involvement in organised crime” or in an organised fashion (Article 62.7 AOAC). The Venice Commission has already strongly criticised this choice of cases: “they can be considered to be the least fit for transfer. They require

<sup>58</sup> CDL-AD(2012)008, Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), para. 84 and CDL-AD(2012)020, para. 73.

<sup>59</sup> CDL-AD(2012)020, para. 91.1.

specific expertise which the small, 'under-burdened' courts often lack. In addition, because of their general social or political significance, exactly in these cases - in, for instance, high-publicity corruption cases - the right to a lawful judge is especially important".<sup>60</sup> Transferring these types of high-profile cases, which also tend to have political connotations, will lead to doubts on the reason for such transfers.

82. A provision on the transfer of cases was included in Articles 11.3 and 11.4 of the Transitional Provisions<sup>61</sup>; however it provided that the transfer of cases could take place only "*until a balanced distribution of caseload between the courts has been realised*". A key element of the dialogue between the Secretary General of the Council of Europe and the Hungarian authorities was that the transfer of cases should be replaced by structural measures, i.e. appointment of judges in Budapest, provision of sufficient court rooms in Budapest, etc.<sup>62</sup> However, neither Article 27.4 of the Fundamental Law introduced by the Fourth Amendment nor the provisions of the Bill provide for any time-limit for the transfer procedure of cases. This means that the transfer of cases, which had been strongly criticised by the Venice Commission in its opinions, has not only been raised to the constitutional level but it also has been made permanent.

83. In the Background Document, the Hungarian Government also refers to Article 46a of the Law on the Organisation of Courts of the Netherlands, according to which in case of insufficient capacity in one court district, the Minister of Justice can designate another court for a certain category of cases for a maximum period of three years, which can be prolonged for one more year. The Minister has to hear the judicial council and in case of the transfer of criminal cases he has to hear also the prosecutorial council. However, the situation in the Netherlands and Hungary is not comparable. Even if this Dutch provision lacks objective criteria, it also has the advantage that the judicial council has to be consulted in each instance of a transfer designation. In Hungary, the National Judicial Council can only adopt general principles to be applied by the President of the NJO when appointing a proceeding court (Article 103 AOAC). 33 cases have already been transferred notwithstanding the incessant calls by the Venice Commission and other European bodies to stop this practice. As shown above, even the revised system of transfer of cases is flawed and cannot be justified by a simple reference to the practice in another Council of Europe member state.

84. , In conclusion, the Fourth Amendment both constitutionalises and institutionalises the system of transfer of cases, which had been heavily criticised by the Venice Commission. The improvements foreseen in the draft implementing legislation are not sufficient to remove the concerns related to the remaining and even newly created problems.

## **V. Constitutional Court**

85. Since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy; first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of these courts was to overcome the legacy of the previous regimes and to protect human rights violated by these regimes. Instead of the

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<sup>60</sup> CDL-AD(2013)020, para. 71.

<sup>61</sup> Article 11.4: "In the interest of the enforcement of the fundamental right to a court decision within a reasonable time guaranteed by Article XXVIII(1) of the Fundamental Law, and until a balanced distribution of caseload between the courts has been realised, the Supreme Prosecutor, as the head and director of the prosecution service which operates as a contributor to the administration of justice under Article 29 of the Fundamental Law, may instruct that charges be brought before a court other than the court of general competence but with the same jurisdiction. This provision shall not affect the right of the President of the National Office for the Judiciary guaranteed by paragraph (3), or the right of certain prosecution services to bring charges before any court which operates within their area of competence." (emphasis added).

<sup>62</sup> CDL-AD(2012)020, para. 62.

principle of the unity of power, which excluded any control over Parliament<sup>63</sup>, the system of the separation of powers was introduced. In place of the supreme role of Parliament (being under complete control of the communist party), the new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views.

86. The Fourth Amendment affects the role of the Constitutional Court in several ways. As shown above, a number of provisions override earlier decisions of the Constitutional Court. Other provisions directly change the jurisdiction of the Court and affect its functioning.

### **A. The overruling of the Constitutional Court's decisions**

87. The Hungarian Government argues that Parliament was obliged by the Constitutional Court, which had annulled the Transitional Provisions in its decision 45/2012, to reintroduce the provisions of the Fourth Amendment into the Fundamental Law itself.

88. However, in decision 45/2012, the Transitional Provisions were “*partly annulled for a formal reason*”<sup>64</sup> but the Court did not oblige Parliament to readopt the annulled provisions as part of the Fundamental Law. It held that “*[t]he Parliament must review the regulatory subjects of the annulled non-transitional provisions, and it has to decide about which ones need repeated regulation, on what level of the sources of law.*”<sup>65</sup>

89. A number of provisions of the Transitional Provisions were flawed and this had already been criticised, *inter alia*, by the Venice Commission. Nonetheless, these provisions were maintained or even reinforced. In addition, the Fourth Amendment does not limit itself to readopt the Transitional Provisions. As demonstrated above, it overrules recent decisions of the Constitutional Court in numerous cases.<sup>66</sup>

90. In this respect, a consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment follows this pattern. Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of “constitutionalisation” of provisions of ordinary law excludes the possibility of review by the Constitutional Court.

91. The Constitutional Court itself found this in its decision 45/2012, point 2.2: “*However, at the same time, petitions by individual members of the Parliament induced serious amendments of the Constitution such as narrowing down the scope of competence of the Constitutional Court, the possibility to levy extra taxes with retroactive force of five years, decreasing the number of the members of the Parliament, putting the National Media and Infocommunications Authority.*

<sup>63</sup> In the previous system in Poland (where the Constitutional Tribunal existed since 1985), until 1990 all decisions taken by the Constitutional Court annulling legislative provision had to be verified (voted upon) by Parliament. Every decision of the Constitutional Court could be overruled by Parliament as the supreme organ of state power.

<sup>64</sup> Chapter V.

<sup>65</sup> Chapter V, emphasis added.

<sup>66</sup> Article L.1 of the Fundamental Law relates to decision 43/2012 (family ties); Article VII of the Fundamental Law - decision 1/2013 (recognition of churches); Article IX.3 of the Fundamental Law - decision 1/2013 (limitation of media access for political parties); Article IX.5 of the Fundamental Law - decisions 30/1992, decision 18/2004, 95/2008 (freedom of speech); Article X.3 of the Fundamental Law - decision 69/2009 (autonomy of universities); Article XI.3 of the Fundamental Law - decision 32/2012 (student grants); Article XXII.3 of the Fundamental Law - decision 38/2012 (homeless).

*In some instances, the subject of the provisions incorporated in the Constitution falls outside the scope of subjects that should be regulated in the Constitution (e.g. the obligation to pay tax on severance payments, levied ex post facto). In a short period of time, numerous provisions that fell outside the regulatory scope of the Constitution have been incorporated into the Constitution, and the frequent amendments have made it difficult to follow and identify the Constitution's normative text in force. The amendments referred to above resulted in developing a new practice of constitutional amendments that fundamentally differs from the traditions of public law and the established practice, and it jeopardised the stability and the endurance of the Constitution as well as the principles and the requirements of a constitutional State under the rule of law."*

92. Since the elections in 2010, first the previous Constitution was amended on numerous occasions in order to shield legislation from constitutional control, then the Transitional Provisions to the Fundamental Law were used for that purpose:

1. Already in 2010, Parliament amended Article 70/I.2 of the Constitution in order to provide constitutional cover for a law retroactively taxing bonuses received contrary to 'good-morals' by former high-ranking government officials. When the Constitutional Court found that bonuses paid on the basis of the law in force could not be considered against 'good morals' (decision 184/2010<sup>67</sup>), Parliament amended Article 70/I.2 of the Constitution a second time in order to expressly allow retroactive taxation and readopted a law on this basis. In decision 37/2011<sup>68</sup>, the Court again annulled the legislative provision because of a violation of human dignity.
2. Article 46.3 of the Constitution was amended in 2010 in order to overcome decision 1/2008 of the Constitutional Court<sup>69</sup>, which had annulled a legislative provision allowing trainee judges to hand down judgments.
3. By introducing Article 11.4 of the Transitional Provisions, Parliament provided a constitutional basis to re-enact the legislative provision allowing the Supreme Prosecutor to transfer cases, which had been annulled by decision 166/2011<sup>70</sup> of the Constitutional Court.
4. In order to overcome decision 164/2011<sup>71</sup>, in which the Constitutional Court annulled the Church Act for procedural reasons because the Act had been adopted with last minute amendments contrary to the House Rules of Parliament, Parliament first amended its House Rules to allow for the introduction of last minute amendments instead of readopting the law in conformity with the legislative procedure. Parliament then readopted the law under the revised House Rules and gave it a constitutional protection by introducing rules on church recognition in Article 21.1 of the Transitional Provisions.
5. When the Commissioner for Human Rights appealed to the Constitutional Court and questioned the constitutional character of the Transitional Provisions, Parliament adopted the First Amendment to the Fundamental Law in order to shield them from review by the Constitutional Court.

93. The representatives of the Hungarian Government have correctly pointed out that it is a sovereign decision of the constituent power – in Hungary Parliament with a two-thirds majority – to adopt a Constitution and to amend it. In itself, the possibility of constitutional amendments is an important counterweight to a constitutional court's power over legislation in a constitutional democracy, as well as an important element in the delicate system of checks and balances which defines a constitutional democracy. Nevertheless, this approach can only be justified in particular cases, based on thorough preparatory work, wide public debate and large political consensus – as in general is necessary for constitutional amendments.

<sup>67</sup> Decision 184/2010 of 28.10.2010, *Magyar Közlöny* (Official Gazette), 2010/165, [CODICES: HUN-2010-3-009].

<sup>68</sup> Decision 37/2011 of 10.05.2011, *Magyar Közlöny* (Official Gazette), 2011/49 [CODICES: HUN-2011-2-005].

<sup>69</sup> Decision 1/2008 of 11.01.2010.

<sup>70</sup> Decision 166/2011 of 20.12.2011, *Magyar Közlöny* (Official Gazette), 2011/155 [CODICES: HUN-2011-3-008].

<sup>71</sup> Decision 164/2011 of 20.12.2011, *Magyar Közlöny* (Official Gazette), 2011/155 [CODICES: HUN-2011-3-006].

94. In the discussions in Budapest, representatives of the governmental majority agreed that in some cases the Constitutional Court had indeed been overruled, but pointed out that this also had happened for example in Austria, where Parliament had resorted to constitutional amendments in order to overcome decisions of the Constitutional Court. In the opinion of the Venice Commission, however, while this example is indeed correct, it has to be pointed out that in 1988 the Austrian Constitutional Court stated that a repeated constitutionalisation of unconstitutional law could be seen by the Court as a total revision of the Constitution, which could not be adopted as a simple constitutional amendment with a two-thirds majority under Article 33.4 of the Austrian Constitution<sup>72</sup>. Indeed, later the Constitutional Court had annulled a constitutional amendment.<sup>73</sup> Thus the Austrian Constitutional Court finally retained control over whether constitutional amendments violate fundamental principles.

95. According to European standards, in particular the Statute of the Council of Europe, Hungary is obliged to uphold democracy, the protection of human rights and the rule of law. The sovereignty of the Hungarian Parliament is therefore limited in international law.

96. The Venice Commission is concerned that the approach of shielding ordinary law from constitutional review is a systematic one. This results in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution. This is a problem both from the point of view of the rule of law, but even more so from the point of view of the principle of democracy. Checks and balances are an essential part of any democracy. The reduction (budgetary matters<sup>74</sup>) and, in some cases, complete removal ('constitutionalised' matters) of the competence of the Constitutional Court to control ordinary legislation according to the standards of the Fundamental Law results in an infringement of democratic checks and balances and the separation of powers.

## **B. Previous Case-Law (Article 19)**

97. Article 19 of the Fourth Amendment introduces point 5 of the Closing and Miscellaneous Provisions, which states that "*Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.*"

98. The Background Document explains that this means that, notwithstanding the 'repeal' of the decisions of the Constitutional Court decisions given before 1 January 2012, they do not lose their binding force and laws annulled by the Court do not enter into force again. However, the Constitutional Court would no longer be able (and obliged) to refer to these decisions. In substance, the Court could come to the same conclusions, but without referring to its earlier case-law. From the Government's point of view, this provision is even regarded as broadening the margin of manoeuvre of the Constitutional Court, because the Constitutional Court will be more free to decide whether it would like to simply repeat the legal reasoning of its former decisions or develop new arguments without being bound by the case-law developed on the basis of the previous Constitution.

99. The Commission fears that Point 5 of the Closing and Miscellaneous Provisions will result in legal uncertainty. Previous decisions of the Constitutional Court are guidance not only for the Constitutional Court itself, but also for the ordinary courts who rely on the Constitutional Court's case-law for their own interpretation of constitutional issues. While, over time, the Constitutional

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<sup>72</sup> Decision G72/88; G102/88; G103/88; G104/88; G122/88; G123/88; G124/88; G125/88; G126/88; G136/88; G143/88; G151/88; G152/88; G153/88; G154/88; G155/88; G156/88; G157/88; G158/88; G159/88; G160/88 of 29.09.1988, VfSlg 11.829..

<sup>73</sup> Decision G 12/00, G 48-51/00 of 10 March 2001, VfSlg 16.327, p 18.

<sup>74</sup> See below, chapter D.

Court itself may be able to come to the same conclusions as in previous decisions, ordinary courts lack this essential point of reference with immediate effect.

100. Already in its opinion on the new Constitution, the Venice Commission expressed its concern that the Preamble's reference to the invalidity of the 1949 Constitution could be "*used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which, although based on this 'invalid' constitution, has played an important role in Hungary's development towards a democratic state governed by the rule of law*".<sup>75</sup>

101. From a functional perspective, the task of constitutional courts can be described as safeguarding the supremacy of the Constitution by providing an interpretation of it, which leads to a coherent development of law on the basis of the principles contained in the Constitution. Earlier case-law, even adopted on the basis of constitutional provisions, which are no longer in force, is an important source for this coherent development of the law. In Hungary, many human rights principles have been formed over years and have found their expression in the practice of the Constitutional Court. The decision of the Constitutional Court of Hungary on the abolition of the death penalty<sup>76</sup> was ground breaking and acclaimed world-wide. It served as inspiration for the abolition of the death penalty by the Constitutional Courts of South Africa<sup>77</sup>, Lithuania<sup>78</sup>, Albania<sup>79</sup> and Ukraine.<sup>80</sup>

102. It is a misconception that it is good for constitutional courts to have a wide margin of appreciation. They should not take arbitrary decisions, but provide for constitutional coherence through decisions based on the Constitution and previous case-law. Furthermore, any constitutional court is free to deviate from its former decisions, provided it does so in a reasoned way.

103. Even if the constituent power were concerned that by referring to its earlier case-law, the Constitutional Court could be perpetuate the old Constitution and would thus impair the effect of the new Fundamental Law, the complete removal of the earlier case-law would be neither adequate nor proportionate. Following any constitutional amendment, it is the task of constitutional courts to limit their reference to those provisions and principles that have not been affected by an amendment.

104. There is no evidence that the Hungarian Constitutional Court has not respected these limits. On the contrary, in its decision 22/2012<sup>81</sup>, which was given when the Fundamental Law was already in force, the Constitutional Court argued that the Constitutional Court might use the arguments included in its previous decisions, adopted before the Fundamental Law came into force, "*[...] provided that this was possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution*". This shows that the Constitutional Court was well aware of these limits. There was no need to deprive the Constitutional Court of the possibility to refer to prior case-law. The Hungarian Constitutional Court was not legally bound by its former case-law and could have further developed arguments and principles or have them replaced by new ones, if necessary, depending on the contents of the new Fundamental Law.

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<sup>75</sup> CDL-AD(2011)016, para. 35.

<sup>76</sup> Decision 23/1990, 31.10.1990, Magyar Közlöny, 107/1990 [CODICES: HUN-1990-S-003].

<sup>77</sup> Decision CCT 3/94 of 6.6.1995, State v. Makwanyane and another, South African Law Reports 391 (CC) [CODICES: RSA-1995-3-002].

<sup>78</sup> Decision 2/98 of 9.12.1998, Valstybes Zinios, 109-2004 of 11.12.1998 [CODICES: LTU-1999-1-003].

<sup>79</sup> Decision 65 of 10.12.1999, Fletorja Zyrtare, 33, 1301, [CODICES: ALB-1999-3-008].

<sup>80</sup> Decision 11-rp/99 of 29.12.1999, Ophitsiynyi Visnyk Ukrayiny, 4/2000 [CODICES: UKR-2000-1-003].

<sup>81</sup> Decision 22/2012 of 11-05-2012, Magyar Közlöny (Official Gazette), 57/2012 [CODICES: HUN-2012-2-004].

105. The Venice Commission therefore cannot support the Hungarian authorities' argument that the Constitutional Court should be more free to decide. As shown, there was no justification to declare the Constitutional Court's former case-law void in order to enable the Constitutional Court to renew its jurisdiction in cases where it is necessary. It is inherent in a Constitutional Court's approach to interpret a constitution on the basis of its provisions and the principles contained in it. These principles transcend the constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. It is these principles which are reflected in the case-law of the Constitutional Court since its establishment.

106. The Hungarian authorities also refer to the fact that the adoption of the Constitution of Poland in 1997 removed the final and binding character of decisions of the Constitutional Tribunal taken on the basis of the earlier, Small Constitution<sup>82</sup>. However, the legal context of the two situations needs to be clearly distinguished. In Poland, the decision on the constitutionality was left to one chamber of Parliament, the *Sejm*, which indeed could override individual decisions in concrete cases, but not all decisions were overruled automatically *en bloc*. The whole heritage of the Constitutional Tribunal case-law is still being taken into account by the Polish Constitutional Tribunal in dealing with new cases. Most importantly, both the Constitution and the transitional provisions to the Law on the Constitutional Court reduced the effect of these restrictions both in time and in scope.<sup>83</sup>

107. In Hungary, the removal of the earlier case-law of the Constitutional Court concerns all cases and is not limited in time. Furthermore, it has to be seen in the context of a systematic limitation of the position of the Constitutional Court and its ability to control the other State powers at a time when the governmental majority frequently amended first the Constitution, then the Transitional Provisions and finally the Fundamental Law in order to override decisions of the Constitutional Court.

108. Moreover, the Fundamental Law itself calls for continuity with regard to constitutional issues and seeks to link to the past – except for the Communist era. Hence, the numerous references to the “historical constitution” in its Preamble, but even more clearly in its Article R.3, which states that “*the Fundamental Law shall be interpreted in accordance with [...] the achievements of our historical constitution*”. Even though the concept of the historical

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<sup>82</sup> Article 239.1 of the Polish Constitution reads: “*Within 2 years of the day on which the Constitution comes into force a judgment of the Constitutional Tribunal of the non-conformity to the Constitution of statutes adopted before its coming into force shall not be final and shall be required to be considered by the Sejm which may reject the judgment of the Constitutional Tribunal by a two-third majority vote in the presence of at least half of the statutory number of Deputies. The foregoing provision shall not concern judgments issued in response to questions of law submitted to the Constitutional Tribunal.*”

<sup>83</sup> Article 89 of the transitional provisions of the Law on Constitutional Tribunal of Poland reads as follows: “1. *Within a period of two years from the day on which the Constitution of the Republic of Poland, enacted on 2 April 1997, comes into force, the judicial decisions of the Tribunal referring to non-conformity to the Constitution of the statutes enacted prior to its coming into force shall not be final and shall be subject to examination of the Sejm, which may reject the judicial decision of the Tribunal by a majority of two-thirds of the votes of at least a half of the statutory number of deputies. This provision shall not apply to judgements given following questions of law addressed to the Tribunal.*

2. *The Sejm shall examine the judicial decision, specified in paragraph 1, not later than within a period of six months from the day of submission thereof by the President of the Tribunal.*

3. *The Sejm shall, if it considers the judicial decision to be well founded, introduce appropriate amendments to the act being the subject of the judicial decision or repeal it, in whole or in part, within the time limit specified in paragraph 2.*

4. *A judicial decision of the Tribunal, referring to non-conformity of an act to the Constitution which has not been considered by the Sejm within a period of six months from the date of its submission to the Sejm by the President of the Tribunal or which has been subject to consideration but the Sejm has not introduced amendments to or repealed the provisions which are in non-conformity to the Constitution, shall be final and shall result in the repeal of the act or the provisions in question on the date of the publication in the Dziennik Ustaw of the Republic of Poland of the announcement of the President of the Tribunal concerning loss of their effect.*”



constitution remains rather vague, it can hardly be denied that the previous democratic Constitution of 1989 and its interpretation by the Constitutional Court are part of this concept.

### C. Review of constitutional amendments (Article 12.3)

109. Article 12.3 of the Fourth Amendment amends Article 24.5 of the Fundamental Law, which reads: “*The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. ...*”

110. The Hungarian Government argues that this provision broadens the jurisdiction of the Constitutional Court, because prior to the Fourth Amendment the Court had no competence to review constitutional amendments at all, i.e. not even from a procedural point of view. In this respect, the Government refers to case-law of the Constitutional Court excluding judicial of constitutional provisions.<sup>84</sup>

111. These arguments do not take into account the decision 45/2012<sup>85</sup> in which the Constitutional Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality. While the wording of Article 24 of the Fundamental Law in the non-amended version specified the power of the Constitutional Court to examine “*any piece of legislation*” for conformity with the Fundamental Law and, arguably, constitutional amendments were not originally considered ‘pieces of legislation’ by the drafters of the Fundamental Law, the Court clearly developed this understanding further in decision 45/2012.

112. The idea that a Constitutional Court should not be able to review the content of provisions of Fundamental Law is common ground as a general rule in many member States of the Council of Europe.<sup>86</sup> In its Opinion on the Revision of the Constitution of Belgium, the Commission stated:

“49. [...] Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The *Conseil Constitutionnel* argued ‘that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)’ Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

50. Most constitutional systems operate on the assumption that all constitutional provisions have a similar normative rank, and that the authority which revises the Constitution has the authority to thereby modify pre-existing, other constitutional provisions. The result is that, in general, one constitutional provision cannot be ‘played out’ against another one. The absence of a judicial scrutiny of constitutional revisions is owed to the idea that the constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a *constituante*. The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority).

51. It is a matter of balancing the partly antagonist constitutional values of popular sovereignty and the rule of law whether to allow for rule-of-law induced barriers against constitutional revision, or for judicial scrutiny. Most Constitutions have placed a prime on popular sovereignty in this context. The Belgian proceedings are well within the corridor

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<sup>84</sup> The Constitutional Court itself presents a review of its case-law in decision 45/2011, point 2.11.

<sup>85</sup> Decision 45/2012, 29.12.2012, *Magyar Közlöny* (Official Gazette), 2012/184, [CODICES: HUN-2012-3-010].

<sup>86</sup> Report on Constitutional Amendment, CDL-AD(2010)001, para. 227.

of diverse European approaches to this balancing exercise and do not overstep the limits of legitimate legal solutions.<sup>87</sup>

113. As pointed out in that Opinion, in some states constitutional courts are able to review constitutional amendments under certain circumstances, as for instance in Austria, Bulgaria, Germany or Turkey.<sup>88</sup> Article 288 of the Constitution of Portugal provides substantial limits for constitutional amendments and their conformity with these limits can be controlled by the Constitutional Court.<sup>89</sup> In 2009, the Constitutional Court of the Czech Republic annulled a constitutional amendment shortening the term of office of the Chamber of Deputies.<sup>90</sup> A special case is the adoption of the Constitution of South Africa, which was certified by the Constitutional Court as being in conformity with constitutional principles agreed beforehand.<sup>91</sup>

114. In Austria, the Constitutional Court is able to examine constitutional provisions as to whether they are in compliance with the fundamental principles of the Constitution. For instance, in 2001, the Austrian Constitutional Court declared void a constitutional law provision as it prevented the Constitutional Court from controlling the constitutionality of that provision<sup>92</sup>. In Bulgaria, constitutional amendments can be reviewed as to whether they change the "form of state structure or form of government"<sup>93</sup>. The Fundamental Law of Germany contains unamendable provisions and the Constitutional Court can review whether these provisions have been infringed.<sup>94</sup> In Turkey too, the Constitution contains unamendable provisions<sup>95</sup>. Article 148 of the Turkish Constitution provides that the Constitutional Court is limited to control the procedure of adoption of constitutional amendments, but it seems that the Court has a wider interpretation of its power to review constitutional amendment. In all these cases, the constitution has an inner hierarchy (unamendable provisions or basic principles) and 'ordinary constitutional law' is reviewed against these higher provisions or principles.<sup>96</sup>

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<sup>87</sup> Opinion on the Revision of the Constitution of Belgium, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)010.

<sup>88</sup> Report on Constitutional Amendment, CDL-AD(2010)001, paras. 230 *et seq.*

<sup>89</sup> See the Court's report for the 1st Assembly of the Conference of Constitutional Jurisdictions of the Portuguese-Speaking Countries (CJCPLP), available at: <http://www.tribunalconstitucional.pt/tc/content/files/conferencias/cjcplp201005/201005-portugal.pdf>, p.23.

<sup>90</sup> The Court held that the term "statute" in Article 87.1.a of the Czech Constitution, which allows the Constitutional Court to repeal statutes or their provisions if they are inconsistent with the constitutional order also applied to constitutional acts. Constitutional amendments have to follow essential requirements for a democratic state governed by the rule of law under Article 9.2 of the Czech Constitution (Decision PI. US 27/09 of 10.09.2009, *Sbírka zákonu* (Official Gazette), no. 6/2009 Coll [CODICES: CZE-2009-3-007]).

<sup>91</sup> Decision CCT 23/96 of 06.09.1996, Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996, *South African Law Reports* 744 (CC) [CODICES: RSA-1996-3-016].

<sup>92</sup> Dec. 11.10.2001, G 12/00, VfSlg 16.327/2001. [CODICES: AUT-2001-1-003].

<sup>93</sup> The amendment of such provisions is the competence of the Grand National Assembly, not ordinary Parliament, Article 158.A.iii of the Constitution of Bulgaria. Decision 03/04 of 05.07.2004, *Darzhaven vestnik* (Official Gazette), 61, 13.07.2004 [CODICES: BUL-2004-2-001]; Decision 07/05 of 01.09., *Darzhaven vestnik* (Official Gazette), no. 74, 13.09.2005 [CODICES: BUL-2005-3-004]; decision 06/06 of 13.09.2006, *Darzhaven vestnik* (Official Gazette), 78, 26.09.2006 [CODICES: BUL-2006-3-002].

<sup>94</sup> Article 79.3 of the Fundamental Law of Germany reads: "*Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.*", see Decision 1 BvR 1452/90, 1 BvR 1459/90, 1 BvR 2031/94 of the Federal Constitutional Court of 18.04.1996 [CODICES: GER-1996-1-009].

<sup>95</sup> Article 4 of the Turkish Constitution reads: "*The provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed.*"

<sup>96</sup> Report on Constitutional Amendment, CDL-AD(2010)001, paras. 230 *et seq.*; As a further background document, the Hungarian Government has provided a legal expertise on the Fourth Amendment which recognises that in rare cases constitutional courts can control constitutional amendments when they violate human dignity [Rechtsgutachten zur Verfassungs- und Europarechtskonformität der Vierten Verfassungsnovelle zum ungarischen Grundgesetz vom 11./25. März 2013, Prof. Rupert Scholz, Berlin 18 April 2013, p. 21 [available in German only].

115. Such an inner hierarchy is not a European standard, although it is a feature that arises more and more in States where Constitutional Courts are competent to annul unconstitutional laws. In the specific context of the Hungarian Fundamental Law, the Venice Commission notes, however, that the Hungarian Constitutional Court seems to have cautiously suggested such a hierarchy within the Fundamental Law: “... *the constituent power may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law*” and “...*the amendments of the Fundamental Law may not result in any insoluble conflict within the Fundamental Law. The coherence of contents and structure is a requirement of the rule of law stemming from Article B) para. (1) of the Fundamental Law, to be guaranteed by the constituent power*”.<sup>97</sup> It seems that the Court even found a hierarchy stemming from international law: “*Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the ius cogens, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law.*”<sup>98</sup>

116. As concerns the review of the procedure of the adoption of constitutional amendments, in its decision 45/2012, the Constitutional Court insisted “*on its established practice, with regard to this case as well, of examining the Parliament’s decision-making process concerning its validity under public law – i.e. from the point of view whether the Parliament had fully complied with the procedural rules (contained earlier in the Constitution and now regulated in the Fundamental Law) – irrespectively of whether it has acted as the constituent or the legislative power.*” The Court confirmed this position in its decision II/648/2013: “*The Constitutional Court extended the scope of their conclusions with regard to the invalidity under public law of the legislative process to apply to each constitutional provision and to their amendment; the Court also determined that the competence of the Constitutional Court to review constitutional provisions or constitutional amendments from the aspect of invalidity under public law cannot be excluded.*”

117. Seen against this entire development, the argument that the control powers of the Constitutional Court have been widened by the Fourth Amendment cannot be followed. The Fourth Amendment confirms the case-law of the Constitutional Court in the domain of procedural review, while negating further developments in decision 45/2012. The Constitutional Court seems to have accepted this development in its recent decision II/648/2013 where it held that “*The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorisation to that effect.*” However, in that decision the Court also held that “*the Constitutional Court shall moreover consider the obligations Hungary undertook in its international treaties or those that follow from membership in the EU, along with the generally acknowledged rules of international law, and the basic principles and values reflected therein. All of these rules – with special regard to their values that are also incorporated into the Fundamental Law – constitute such a unified system (of values), that shall not be disregarded neither in the course of constitution-making or legislation, nor in the course of constitutional review conducted by the Constitutional Court.*”

#### **D. Review of budgetary laws (Article 17.1)**

118. According to Article 37.4 of the Fundamental Law in force before the Fourth Amendment, as long “*as state debt exceeds half of the Gross Domestic Product*”, the Constitutional Court

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<sup>97</sup> Point III.6.

<sup>98</sup> Point IV.7.

was competent to review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Fundamental Law exclusively in case of a 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”*. In contrast, the Constitutional Court has the right to annul these acts because of non-compliance with the procedural requirements set forth in Fundamental Law.

119. The Venice Commission had already expressed its serious concern<sup>99</sup> about a similar amendment to the previous Constitution in its Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary *„With regard to the Constitutional Court and its specific role in a democratic society, it should be pointed out that a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court’s competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament ‘to enhance the protection of fundamental rights in Hungary’”*<sup>100</sup>.

120. In its opinion on the new Constitution of Hungary, the Commission repeated this criticism in respect of the Fundamental Law<sup>101</sup> and the Opinion on the Constitutional Court Act.<sup>102</sup> In the Opinion on the new Constitution, the Venice Commission stated that such a limitation of the Constitutional Court’s powers to review gave the impression that capping the national budget at 50 per cent of the Gross Domestic Product was seen as such an important aim that it might even be reached by unconstitutional laws.<sup>103</sup>

121. Article 17 of the Fourth Amendment introduces a new provision as Article 37.5 of the Fundamental Law: *“In the case of the statutory provisions that came into force in the period while state debt exceeded half of the Gross Domestic Product, Paragraph (4) shall also be applicable to such period even if state debt no longer exceeds half of the Gross Domestic Product”*. This means that the constitutional review of financially relevant laws adopted during times of budgetary difficulties is not only excluded during these difficulties but even later, when the budgetary problems have subsided. Thus laws which potentially contradict the Fundamental Law are permanently shielded from control by the Constitutional Court.

122. The Venice Commission again repeats its serious concern about the limitation of the competence of the Constitutional Court to review legislation. Shielding potentially unconstitutional laws from review is a direct attack on the supremacy of the Fundamental Law of Hungary. The Commission is particularly worried that the Fourth Amendment has given up the link of that provision to continued budgetary difficulties and thus has institutionalised this exception. This provision reinforces the assessment that the Fourth Amendment results in reducing the position of the Constitutional Court as guarantor of the Fundamental Law and its principles, which include European standards of democracy, the protection of human rights and the rule of law.

### **E. 30 day limit for the review of requests from ordinary courts (Article 12.1)**

123. Article 12.1 of the Fourth Amendment changes Article 24.2.b of the Fundamental Law, which now provides that the Constitutional Court shall: *“b) review immediately but no later*

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<sup>99</sup> CDL-AD(2011)001, para. 9.

<sup>100</sup> CDL-AD(2011)001, para. 54.

<sup>101</sup> CDL-AD(2011)016, para. 98.

<sup>102</sup> CDL-AD(2012)009, para. 38.

<sup>103</sup> CDL-AD(2011)016, para. 123.

*than thirty days any legal regulation applicable in a particular case for conformity with the Fundamental Law upon the proposal of any judge”.*

124. This means that in concrete review cases, originating from any ordinary judge, the Constitutional Court has to fit its whole procedure, including the handing down of the decision within a 30-day limit. While the Fundamental Law imposes such a short period, Section 12 of the Bill amends Section 57 of Act CLI of 2011 on the Constitutional Court and provides that the Constitutional Court has to inform the author of the challenged legal rule (paragraph 1a) and *“(1b) If the author of the legal rule or the initiator of the law wishes to inform the Constitutional Court of his/her position on the case, also with regard to whether the case concerns a wide group of individuals, he/she shall send his/her position to the Constitutional Court within 30 days of the notification under paragraph (1a), or in the case of urgent proceedings, within 15 days, ...”*. Consequently, even in urgent cases, the Court has to fit in a 15-day period for the author of the legal rule within the very short 30-day period.

125. Even without such a further complication, a 30-day period for the examination of the constitutionality of a legal provision appears to be extremely difficult to meet, especially in the context of the introduction of individual appeals to the Constitutional Court, which results in a substantial additional work-load. While it is understandable that the Hungarian authorities wish to provide for speedy proceedings before the ordinary courts, this should not be done in a way that renders ineffective constitutional review as an essential element of checks and balances.

#### **F. Request for abstract control by the Curia and the Supreme Prosecutor (Article 12.2)**

126. Article 12.2 of the Fourth Amendment, changes Article 24.2.e of the Fundamental Law, which now reads [the Constitutional Court shall]:

*“e) review any legal regulation for conformity with the Fundamental Law upon an initiative to that effect by the Government, one-fourth of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights;”*

127. This means that now, in addition to *the Government and one-fourth of the Members of Parliament*, both the Curia and the Supreme Prosecutor can make abstract requests for the control of the legislation to the Constitutional Court. However, there is a danger that this competence may drag the Curia (as well as the Supreme Prosecutor) into the political arena. Normally, requests for review in concrete cases should provide sufficient opportunity of access to the Constitutional Court. If this abstract access were maintained, it might be useful to tie it to the case-law uniformisation procedure. This would avoid casting doubt on the independence of the Curia if it appealed to the Constitutional Court without having a specific reason for doing so.<sup>104</sup>

#### **G. Special tax in case of court judgments leading to payment obligations (Article 17.2)**

128. Article 17.2 of the Fourth Amendment adds a new paragraph 6 to Article 37 of the Fundamental Law:

*“As long as state debt exceeds half of the Gross Domestic Product, if the State incurs a payment obligation by virtue of a decision of the Constitutional Court, the Court of Justice of the European Union or any other court or executive body for which the available amount under the State Budget Act is insufficient, a contribution to the*

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<sup>104</sup> On this procedure, see CDL-AD(2012)001, para. 69. seq. In this context the Commission notes that the “supervision” of judges by the court president has not been addressed, neither in the Fourth Amendment nor the Bill.

*satisfaction of common needs shall be established which shall be exclusively and explicitly related to the fulfilment of such obligation in terms of both content and designation.”*

129. The Background Document insists that, in view of the EU convergence criteria to be met for a future introduction of the Euro, unexpected expenses due to national or European court decisions need to be counterbalanced. Even without this provision, Parliament would at any moment have the right to introduce new taxes. Any new tax would have to be in conformity with the requirements of the Fundamental Law (in particular legal certainty and the prohibition of discrimination). Such special taxes would even facilitate the necessary implementation of court decisions.

130. However, it should normally be possible to find funds in the budget. In case of a violation of the Constitution or European Law, the Government will not be forced to cover the costs within the budget. The burden will instead be directly transferred to the Hungarian citizens as taxpayers. Article 37.6 thus enables the Hungarian Government to circumvent the disciplining effect of Constitutional and other Court decisions which trigger payment obligations.

131. A special charge concerning payment obligations caused by a court decision has an important symbolic value: it may result in pressure on the judges who will be seen as responsible for the special tax while in fact the fault lies in an act of the Government or of Parliament that was unconstitutional or contrary to European law or standards. This pressure seriously endangers the judges' independence.

132. The Commission acknowledges the difficult fiscal problems which Hungary is currently facing, but strongly objects to the Government's reasoning that Article 37.6 of the Fundamental Law can and should be interpreted as (part of) an answer to those problems.

133. The Commission recalls that Hungary is, according to Article B.1 of the Fundamental Law, a state governed by the rule of law. It is at the very core of the rule of law concept that the people trust "their" courts. A special tax may lead to an aversion against the courts as a whole or against the national Constitutional Court or European courts. Article 37.6 of the Fundamental Law creates the risk of a loss of acceptance of the court system while the aim should be for people to accept court decisions as indispensable for the functioning of the rule of law. A court that tries to remedy a violation of the Constitution or of European Law or standards contributes to the functioning of the legal order.

134. Finally, Article 37.6 of the Fundamental Law may lead to an arbitrary imposition of such taxes. While it reads "*a contribution [...] shall be established*", it is quite obvious that not every court decision resulting in budgetary expenditure can lead to a special tax and in fact it seems that Article 29.1 of the Transitional Provisions of 31 December 2011, which had the same content, was never applied in practice. There are no criteria when a special tax should be imposed and thus each court has to face the danger that its judgment will be singled out for such a tax.

## **VI. Constitutionalism**

### **A. Use of cardinal laws**

135. In addition to amending the constitution(s), the governmental majority adopted numerous cardinal laws with the present two-thirds majority, which may be difficult to amend by subsequent – less broad - majorities. This wide use of cardinal laws to cement the economic, social, fiscal, family, educational etc. policies of the current two-thirds majority, is a serious threat to democracy.

136. In its opinion on the new Constitution of Hungary the Venice Commission stated: *“The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-thirds majority have of cementing its political preferences and the country’s legal order.”*<sup>105</sup>

137. In its opinion on the New Constitution, the Venice Commission expressed its hope that there would be *“co-operation between the majority coalition and the opposition in the preparation of the implementing legislation”*. In its reply to the Opinion, the Government fully subscribed to this idea.<sup>106</sup> However, the visit of the delegation of the Commission showed that the cardinal laws were adopted or amended in a rushed way, often introduced by individual members of Parliament, thus avoiding the scrutiny foreseen for governmental proposals. This hasty adoption often did not even allow for adequate consultation of the opposition and civil society.

138. In the Background Document, the Government argues that the total number of cardinal laws did not change as compared to the previous Constitution. The Commission does not dispute this figure. However, what matters is not the number of cardinal laws, but the issues on which they are enacted and the degree of detail of the provisions raised to ‘cardinal level’. Instead of declaring only basic principles within in these laws as cardinal, whole laws including numerous detailed regulations have been raised to cardinal status *en bloc*. The Commission strongly criticised this practice, but to no avail. Instead of reducing the amount of cardinal provisions, the closing provisions of the Bill again declare large parts of the Bill itself as cardinal in order to be able to amend various cardinal laws.

139. *“Elections, which, according to Article 3 of the First Protocol to the European Convention on Human Rights, should guarantee the ‘expression of the opinion of the people in the choice of the legislator’, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and ‘detailed rules’ on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.”*<sup>107</sup>

140. The tendency of ensuring that following elections future majorities cannot legislate in many areas because they will be bound by cardinal laws is even reinforced by the Fourth Amendment. A number of provisions, which are now included in the Fundamental Law, have no constitutional character and should not be part of the Constitution (e.g. homelessness, criminal provisions on the communist past, financial support to students, financial control of universities). In addition to shielding these provisions from control by the Constitutional Court, this ensures that future governmental majorities in Parliament without a two-thirds majority cannot change these policies.

## **B. Instrumental use of the Constitution**

141. Already in its Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, the Venice Commission expressed its concern regarding the constitution-making process in Hungary<sup>108</sup>. During the various visits of its delegation, the Commission learned about the lack of transparency of the process of the adoption of the new Constitution and the inadequate involvement of the Hungarian society. The Commission

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<sup>105</sup> CDL-AD(2011)016, para. 24.

<sup>106</sup> CDL(2011)058, Position of the government of Hungary on the opinion on the new constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011, p. 2.

<sup>107</sup> CDL-AD(2011)016, para. 24.

<sup>108</sup> CDL-AD(2011)001, paras. 16-19.

criticised the absence of sincere consultation and noted with regret that the consensus among political forces and within society generally required for the legitimacy of a constitution was absent.

142. The Fundamental Law entered into force 1 January 2012. Since then, the Constitution has already been amended four times. Before the entry into force of the new Constitution, the previous Constitution was amended 12 times after the elections of 2010. Frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates. As the Commission formulated recently in respect of Romania, "*[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections.*"<sup>109</sup>

143. During the visit in Budapest and in the documentation provided, the Hungarian Government referred to parliamentary sovereignty as if it were the ultimate instance of legitimacy and no further checks applied. The Commission never denied the sovereign right of Parliament to adopt the constitution or to amend it, but it criticized the procedure and methods of doing so in Hungary. The Constitution of a country should provide a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way in which it is implemented must create in the society the conviction that, by its very nature, the constitution is a stable act, not subject to easy change at the whim of the majority of the day. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the 'political game', but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought.

## **VII. Conclusions**

144. The Fourth Amendment to the Fundamental Law has changed the Constitution in a number of aspects, as concerns individual human rights, as concerns the ordinary judiciary and as concerns the role of the Constitutional Court of Hungary.

145. In constitutional law, perhaps even more than in other legal fields, it is necessary to take into account not only the face value of a provision, but also to examine its constitutional context. The mere fact that a provision also exists in the constitution of another country does not mean that it also 'fits' into any other constitution. Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control

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<sup>109</sup> CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), para. 74.



mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the constitution of one's own country. Each constitution is a complex array of checks and balances and each provision needs to be examined in view of its merits for the balance of powers as a whole.

146. The Venice Commission notes that the draft legislation implementing the Fourth amendment contains positive elements, notably:

- The Supreme Prosecutor can no longer decide on the transfer of cases to other courts. However, he or she can still request such a transfer from the President of the National Judicial Office.
- The President of the National Judicial Office can no longer transfer individual cases but can only designate groups of cases to be transferred.
- The introduction of an explicit provision on the power of the Constitutional Court to review the amendments to the Fundamental Law on procedural grounds.

147. However, the Fourth Amendment itself brings about or perpetuates shortcomings in the constitutional system of Hungary. The main concerns relate to the ordinary judiciary, and to the role of the Constitutional Court. In the field of human rights in general, several issues are regulated in a manner disregarding earlier decisions by the Constitutional Court.

148. These constitutional amendments are not only problematic because constitutional control is blocked in a systematic way, but also in substance because these provisions contradict principles of the Fundamental Law and European standards. In particular:

- the definition of family ties does not take into account the case-law of the European Court of Human Rights;
- the provisions on the communist past attribute responsibility in general terms, without any individual assessment;
- the absence of precise criteria for the recognition of churches and of an effective legal remedy against the decision not to recognise;
- the limitations on advertising have a disproportionate effect on opposition parties and completely exclude non-nationwide parties from access from media coverage; and
- the provisions on the dignity of communities are too vague and the specific protection of the "dignity of the Hungarian nation" creates the risk that freedom of speech in Hungary could, in the future, be curtailed not in order to protect minority, but *majority* views.

149. In the field of the judiciary, the Fourth Amendment constitutionalises the overwhelming position of the President of the National Judicial Office as compared to the National Judicial Council, which is not even mentioned in the Fundamental Law. Furthermore, the procedure of transfer of cases remains a main concern. In its previous opinions, the Venice Commission had already strongly criticised the procedure of transfer of cases. Even if there are improvements (advance definition of the categories of cases, removal of final decision by the Supreme Prosecutor), the remaining problems (and new ones) are serious:

- the discretion of the PNJO to select the receiving courts;
- the legal uncertainty resulting from the possibility to appoint several receiving courts;
- the possibility for the Supreme Prosecutor to apply for the transfer of cases;
- the absence of an effective remedy against the transfer;
- the choice to transfer complex cases, also in politically sensitive areas.

150. Instead of phasing out this system, which had been heavily criticised as being contrary to the rule of law and the principle of a fair trial under Article 6 of the European Convention on Human Rights, the Fourth Amendment has made it a permanent feature of the Hungarian judicial system. The transfer of cases remains a flawed system and should be replaced by structural measures to strengthen overburdened courts.

151. Like other Central and East European countries, Hungary introduced the separation of powers and checks and balances in its Constitution and Hungary established a Constitutional Court. This Court quickly became renowned in Europe and abroad for its decisions advancing constitutional principles. The Fourth Amendment seriously affects the role of the Constitutional Court of Hungary in a number of ways:

1. A series of provisions of the Fourth Amendment override earlier decisions of the Constitutional Court. Overriding Constitutional Court decisions by 'constitutionalising' provisions declared unconstitutional is a systematic approach, which was applied already to the old Constitution, then to the Transitional Provisions and now to the Fundamental Law itself. It threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances.
2. The removal of the possibility to refer to its earlier case-law unnecessarily interrupts the continuity of the Court's case-law on a body of principles, which transcend the Constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.
3. In light of the specific case-law of the Constitutional Court, which was already adopted on the basis of the Fundamental Law in force, the provision on the control of the procedure of adoption of constitutional amendments cannot be seen as widening the Court's jurisdiction.
4. Instead of removing the limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation which has a budgetary incidence, the Fourth Amendment perpetuates this system which shields potentially unconstitutional laws from constitutional review even when budgetary problems have subsided.
5. Procedural limitations threaten to bog down the Constitutional Court and may result in a reduced level of constitutional control.
6. The special tax which could result from decisions by the Constitutional Court (but also those of the European Courts) threatens to undermine the acceptance of such decisions by the public.

152. Taken together, these measures amount to an attack on constitutional justice and on the supremacy of the basic principles contained in the Fundamental Law of Hungary. The limitation of the role of the Constitutional Court negatively affects all three pillars of the Council of Europe: the separation of powers as an essential tenet of democracy, the protection of human rights and the rule of law.

153. The Venice Commission stresses that the Hungarian Fundamental Law should not be seen as a political instrument. The crucial distinction between ordinary and constitutional politics and the subordination of the former to the latter should not be disregarded, lest democracy and the rule of law be undermined in Hungary.

154. In conclusion, the Fourth Amendment perpetuates problems of the independence of the judiciary, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances. Together with the *en bloc* use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics.

155. The Venice Commission remains at the disposal of the Hungarian authorities for assistance in this and other areas.