

# Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary

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## **Introduction**

On March 11 the Hungarian Parliament added the Fourth Amendment<sup>1</sup> to the country's 2011 constitution, reenacting a number of controversial provisions that had been annulled by the Constitutional Court, and rebuffing requests by the European Union, the Council of Europe and the US government that urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment also adds new restrictions on the Constitutional Court, inserts provisions that limit the application of constitutional rights and raises questions about whether concessions that Hungary made to European bodies last year in order to comply with European law are themselves now unconstitutional. These moves reopen serious doubts about the state of liberal constitutionalism in Hungary and Hungary's compliance with its international commitments under the Treaties of the European Union and under the European Convention on Human Rights.

On February 8, 2013, all the MPs of Hungary's governing coalition – which currently has the two-thirds majority in Parliament that is needed to pass constitutional amendments – submitted a major constitutional amendment as a “private member's bill” in the Parliament as the Fourth Amendment to the country's constitution of 2011, called the Fundamental Law.<sup>2</sup> According to Hungarian parliamentary procedure, government bills must go through a stage of social consultation before the bill is voted on. Social consultation requires the government to seek the views of interested civil society groups as well as with relevant government ministries about the effects of the proposed law. But private member's bills skip that requirement and can go straight to the floor of the Parliament for a vote. Even though the Fourth Amendment was introduced by all of the MPs in the government's parliamentary fraction and was voted on along strict party lines – with every member of the governing party's bloc voting yes and everyone else either voting no or boycotting the vote – the government avoided open political debate on the bill by using the private member's bill procedure.

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<sup>1</sup> See the “official” English text of the amendment provided by the government here:  
<http://www.venice.coe.int/webforms/documents/?pdf=CDL-REF%282013%29014-e>

<sup>2</sup> For the “official” English translation of the Fundamental Law, see:  
<http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

The government has said that this fifteen-page comprehensive amendment to the still-new constitution was necessary because of previous decisions by the Hungarian Constitutional Court, in particular a ruling issued at the very end of 2012. This decision held that those parts of the Transitional Provisions of the Fundamental Law that are not transitional in nature could not be deemed part of the constitution, and were therefore invalid.<sup>3</sup> (Some elements of the Transitional Provisions were previously reviewed and criticized by the Venice Commission.<sup>4</sup>) In his letter to Mr. Thorbjørn Jagland, Secretary General of the Council of Europe, dated March 7, 2013, Mr. Tibor Navracsics, the Hungarian Minister of Public Administration and Justice argued that the main aim of the Fourth Amendment was to formally incorporate into the text of the Fundamental Law itself the provisions that were annulled for formal procedural reasons.<sup>5</sup> He argued that the amendment is therefore, “to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated.” Mr. József Szájer, the Fidesz member of the European Parliament who served as the official representative of the Hungarian government at the hearing before the Commission on Security and Cooperation in Europe (U.S. Helsinki Commission) on March 19, 2013 went even further, claiming that the amendment was “basically a copy-paste exercise of a purely technical nature” done at the request of the Court itself.<sup>6</sup>

These statements are misleading. In its decision of December 28, 2012, the Constitutional Court did not review the substance of the Transitional Provisions,<sup>7</sup> since the petition of the ombudsman had not requested such a review. Instead of requesting that the nullified provisions be reinserted into the constitution as an

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<sup>3</sup> Decision 45/2012. (XII. 29.)

<sup>4</sup> See for instance Opinion 664/2012 on the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and legal Status of Churches, Denominations and Religious Communities

<sup>5</sup> The letter can be found at

<http://www.kormany.hu/download/c/ee/c0000/Letter%20from%20DPM%20Navracsics%2007-03-2013.pdf>

<sup>6</sup> Mr. Szájer’s testimony can be found at

[http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord\\_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914](http://www.csce.gov/index.cfm?FuseAction=ContentRecords.ViewTranscript&ContentRecord_id=539&ContentType=H,B&ContentRecordType=H&CFID=22872555&CFTOKEN=58422914).

<sup>7</sup> See the English translation:

<http://lapa.princeton.edu/hosteddocs/hungary/The%20Act%20on%20the%20Transitional%20Provision%20of%20the%20Fundamental%20Law.pdf>

amendment, the Court only said that, if the Parliament wanted a provision to be part of the constitution, it was not enough to declare that the Transitional Provisions had constitutional status. Instead, the Parliament had to use the formal procedure laid out in the constitution to make a constitutional amendment. The Court did not tell the government to put the annulled provisions back into the constitution.

In fact, the ruling on the Transitional Provisions made it possible for the Constitutional Court to review the substance of some of the cardinal laws that said the same thing as the corresponding parts of the Transitional Provisions.<sup>8</sup> Most of the provisions struck down by the Constitutional Court when it reviewed the Transitional Provisions were also embedded in cardinal laws that the Parliament had passed earlier, and with these provisions now “demoted” from constitutional status by the Court’s ruling, the Court then undertook to review the identical provisions in the cardinal laws. Among these reviewed and annulled laws was one on voter registration, which the Court found unconstitutional on substantive grounds because it constituted an unnecessary barrier to voting.<sup>9</sup>

At the time that the Fourth Amendment was submitted to the Parliament, a decision on the constitutionality of the cardinal law on the status of churches was expected and the Court did in fact issue its ruling on February 26, 2013<sup>10</sup> declaring unconstitutional parts of the law regulating the parliamentary registration of churches. These

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<sup>8</sup> This may be slightly confusing because identical legal content has often appeared in multiple places in the Hungarian legal order so we will explain it. In a number of the instances we will discuss in this brief, the government would first pass a cardinal (two-thirds) law regulating a particular matter. Then, if the Constitutional Court declared that statutory provision was unconstitutional or if a particular provision was submitted to the Constitutional Court for review so that the government might have anticipated that the Court would strike it down, the government would then amend the constitution to take these provisions from the cardinal act and insert them into the constitution directly, either through the Transitional Provisions (before December 2012) or through the Fourth Amendment (after the Constitutional Court declared that permanent constitutional amendments made through the Transitional Provisions unconstitutional). In cases where the cardinal law had not been declared unconstitutional before parts were added to the constitution, the cardinal law and the constitution duplicated each other. Therefore, when the Constitutional Court declared unconstitutional the permanent amendments made through the Transitional Acts, there were still often cardinal laws with identical content, which the Court would then review. While the Court declared in its decision on the Transitional Provisions that it had the *theoretical* power to review constitutional amendments on substantive grounds, it had not yet used that power before the Fourth Amendment took that power away. Therefore, when the Constitutional Court has declared legal provisions unconstitutional on substantive grounds, it has always done so in the context of reviewing a statute and not a constitutional amendment.

<sup>9</sup> Decision 1/2013. (I. 5.).

<sup>10</sup> Decision 6/2013. (III. 1.)

provisions had been first enacted as a law in July 12, 2011, were struck down by the Constitutional Court on procedural grounds in December 2011<sup>11</sup>, and then reinserted into the Transitional Provisions one week after the Constitutional Court struck down the law. This section of the Transitional Provisions was then struck by the Court again in December 2012 because the provision failed to guarantee procedural fairness in the parliamentary process through which churches were certified. Within a week, the annulled provisions were again added to a constitutional amendment, the Fourth Amendment, and this time it was insulated from Constitutional Court review by the section of the Fourth Amendment that prohibits the Court from substantively evaluating constitutional amendments.

The fact that the government was defeated in the voter registration and church registration cases shows that, even though the Fidesz government by that time had elected seven of the 15 judges with the votes of their own parliamentary bloc, these judges were still not in a reliable majority within the Court.<sup>12</sup> That may have provided a reason for the government to want to limit the Court's influence even further.

In response to these decisions, the Fourth Amendment elevated the annulled permanent provisions of the Transitional Provisions into the main text of the Fundamental Law, with the intention of excluding further constitutional review, while the amendment also prohibited the Constitutional Court from reviewing the substantive constitutionality of constitutional amendments. The Fourth Amendment therefore contained all of the annulled sections of the Transitional Provisions except the section on voter registration. Even though the Constitutional Court argued that the registration of churches by the Parliament does not provide a fair procedure for the applicants, this procedure will be constitutional in the future as the Fourth Amendment puts this procedure, previously declared unconstitutional, directly into

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<sup>11</sup> Decision 164/2011. (XII. 20.)

<sup>12</sup> Since it came to power in 2010, the Fidesz government changed the rules for nominating judges to the Court so that all of the recently elected judges have been elected by the Fidesz two-thirds majority in the parliament without needing (and generally without getting) the . The government expanded the number of judges on the Court from 11 to 15 to give themselves even more seats to fill. At the time that the Transitional Provisions and the Law on the Status of Churches were struck down by the Court in December 2012 and February 2013 respectively, seven of the 15 judges had been named by Fidesz since 2010. In February 2013, an eighth judge was added and in April 2013 a ninth Fidesz judge joined the bench.

the constitution itself and beyond the reach of the Constitutional Court. That effectively means an end of the freedom to establish new churches in Hungary.

The Fourth Amendment also put into the constitution and beyond the reach of the Constitutional Court the power of the President of the National Judicial Office (NJO) to move cases from the court to which a case is assigned by law to a different court anywhere in the country that is less crowded. While the Constitutional Court did not have the opportunity to review the substance of this provision for constitutionality, the Court had previously struck down a similar provision giving that power to the Prosecutor General.<sup>13</sup> The Venice Commission had criticized the power of the president of the NJO to move cases<sup>14</sup> and the Hungarian government had added some restrictions on this power through amendments to the relevant cardinal law in summer 2012.

A number of statutory provisions that were previously annulled by the Constitutional Court have also become part of the Fourth Amendment. One of them authorizes the legislature to set conditions for state support in higher education, such as requiring graduates of state universities to remain in the country for a certain period of time after graduation if the state has paid for their education. The Constitutional Court had declared this unconstitutional in December 2012 because it violates both the right to free movement and the free exercise of occupation. The European Commission has expressed its concern over this restriction on the movement of Hungarian students in an “EU Pilot” letter to the government of Hungary in November 2012.<sup>15</sup>

Another reversal of a declaration of unconstitutionality is the authorization for both the national legislature and local governments to declare homelessness unlawful in order to protect “public order, public security, public health and cultural values.”<sup>16</sup> The Constitutional Court had declared the prohibition of homelessness unconstitutional because it violated the human dignity of people who could not afford

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<sup>13</sup> Decision 166/2011 (XII. 20.)

<sup>14</sup> See Opinion 663/2012 on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts.

<sup>15</sup> <http://www.freehungary.hu/component/content/article/1-friss-hirek/1510-another-infringement-procedure-against-hungary.html>

<sup>16</sup> Fourth Amendment, Article 8.

a place to live.<sup>17</sup> But the power to make homelessness unlawful has now been placed into the constitution and beyond the reach of the Constitutional Court so it cannot be reviewed again.

At the end of 2012, the Court had annulled the definition of the family in the law on the protection of families because it was too narrow, excluding all families other than very traditional ones consisting of opposite sex married parents with children.<sup>18</sup> Now the Fundamental Law will define marriage as taking place only between men and women. It will also establish the parent-child relationship as the basis of the family, excluding not only same-sex marriage, but also all non-marital partnerships. The Fourth Amendment therefore overrules yet another Constitutional Court decision.

Under the old Constitutional Court jurisprudence, group libel laws were found to be an unconstitutional restriction on free speech.<sup>19</sup> The Fourth Amendment now entrenches in the constitution those parts of the new Civil Code that permit private actions to remedy group libel, not only in the case of the protection of racial, religious and other minorities, but also where there are offenses “against the dignity of the Hungarian nation.” Since the Fourth Amendment annuls all of the case law of the Constitutional Court from 1990-2011, the addition of this provision to the constitution is not a direct contradiction of a recent case, but it is a jarring reversal of something that had been taken for granted in Hungarian constitutional law.

Finally there is a set of amendments related to the power of the Constitutional Court itself, as a direct reaction to recent unwelcome decisions of the judges. The most alarming one annuls all Court decisions prior to when the Fundamental Law entered into force. At one level, this makes sense: old constitution, old decisions/new constitution, new decisions. But the Constitutional Court had already worked out a sensible new rule for the constitutional transition by deciding that in those cases where the language of the old and new constitutions was substantially the same, the opinions of the prior Court would still be valid and could still be applied. Otherwise, where the new constitution was substantially different from the old one, the previous

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<sup>17</sup> Decision 38/2012. (XI. 14.)

<sup>18</sup> Decision 43/2012. (XII. 20.)

<sup>19</sup> Decision 96/2008. (VII. 3.)

decisions would no longer be used. Constitutional rights are key provisions that are the same in the old and new constitutions – which means that, practically speaking, the Fourth Amendment annuls primarily the cases that defined and protected constitutional rights and harmonized domestic rights protection with European human rights law. Without those cases as touchstones, the government has undermined legal security when it comes to the protection of constitutional rights in Hungary.

In the following chapters we assess the most important elements of the Fourth Amendment that are, in our view, problematic.

## The definition of family (Article 1 of the Fourth Amendment)

As is true of so much of the Fourth Amendment to the Fundamental Law, the modification of Article L was drafted in reaction to the Constitutional Court's decision quashing the most crucial provisions of the cardinal law on the protection of families adopted in December 2011 (Act CCXI of 2011, hereinafter: Family Protection Act).

As discussed in our previous amicus brief on the Family Protection Act,<sup>20</sup> the definition of family reflected the extremely conservative approach of the governing coalition. Article 7 of the Act defined family as "the relationship between natural persons in an economic and emotional community that is based on a marriage between a woman and a man, or lineal descent, or family-based guardianship", and Article 8 excluded non-married couples from intestate inheritance.

The Family Protection Act was challenged before the Constitutional Court by the Commissioner for Fundamental Rights in May 2012.<sup>21</sup> The petition – prepared on the basis of an individual complaint – claimed that the Act was unconstitutional and also contradicted international law, the European Convention on Human Rights in particular. The ombudsman argued that the definition of family in Article 7 ignored many possible – and prevalent – relationships outside marriage, both of different and same-sex couples. Furthermore, Article 8 was in contradiction with other legislation in force, thus creating legal uncertainty. In response to the arguments raised against the provision on inheritance, the Constitutional Court – relying on an exceptionally used power – suspended the entry into force of Article 8 of the Family Protection Act on June 2012.<sup>22</sup>

The Constitutional Court delivered its decision on the merits of the case in December 2012. The Court found both Article 7 and 8 of the Family Protection Act unconstitutional.<sup>23</sup> The Court based its argumentation on a so-called sociological notion of family, which the Court defined as a "stable emotional and economic

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<sup>20</sup> Available at: <https://sites.google.com/site/amicusbriefhungary/>.

<sup>21</sup> AJB-4159/2012.

<sup>22</sup> Decision 31/2012.(VI. 29.).

<sup>23</sup> Decision 43/2012(XII. 20.).

community, based on mutual care and aimed at a common goal.” The Constitutional Court continued by emphasizing that

(e)ven if the legislator chooses to elevate and set as example a preferred form of partnership by giving an abstract statutory definition, it follows from its duty of institutional protection that other forms of partnership recognized by law shall be afforded the same level of protection (...) The level of legal protection (institutional protection) guaranteed by legal norms in other fields of law cannot be lowered (not even implicitly) through providing a general – and in this case very narrow – definition of family also mentioned in the Fundamental Law.”

The Court noted that its reasoning closely follows the case law of the European Court of Human Rights (ECtHR). By referring to a series of cases concerning the notion of family life guaranteed by Article 8 of the European Convention on Human Rights<sup>24</sup>, the Constitutional Court emphasized two major developments under the Convention: first, the “family life” is a historically evolving notion, and its existence is a question of fact rather than of legal classification; and second, same-sex couples also fall within the protection of family life under Article 8. It follows from this argument that the exclusion of registered same-sex couples from intestate inheritance is “revoking rights that results in discrimination without any legitimate justification,” and thus it is also unconstitutional. In conclusion, the Constitutional Court agreed with the arguments put forward by the authors of this amicus in their earlier opinion on the cardinal laws adopted under the new Fundamental Law, including the Family Protection Act: not only did the Constitutional Court find the exclusionary definition of families unconstitutional, but it found also that the law contradicts rights protected by the European Convention on Human Rights.

Rather than accepting the decision of the Constitutional Court and its understanding of European human rights law, the Hungarian Parliament included a similarly exclusionary definition of family in the Fourth Amendment to the Fundamental Law. Following the amendment, Article L of the Fundamental Law not only defines

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<sup>24</sup> For example: *X., Y. and Z. v. the United Kingdom* 21830/93 (22 April 1997); *K. and T. v. Finland* 25702/94 (12 July 2011); *Schalk and Kopf v. Austria* 30141/04 (24 June 2010); and *Kozak v. Poland* 13102/02 (2 March 2010).

marriage as the union of a man and a woman, but also says that “(f)amily ties shall be based on marriage and the relationship between parents and children.” This definition further narrowed the already-narrow definition in the Family Protection Act; while it acknowledges family relationship between parents and children even outside marriage, it does not recognize non-married parents’ relationship to each other as a family tie. Unlike the Family Protection Act, the text of the Fundamental Law does not provide a definition of parent-child relationship, but its explanatory memorandum contains reference to the same relationships as mentioned in the Family Protection Act even though the obvious reference of the new provision is different. Further uncertainty arises from the fact that the Hungarian text uses a term (“*illetve*”) that leaves the interpretation of the two conditions’ relationship open to doubt.

Hungarian legislative initiatives taken in recent months serve as ample evidence for the far-reaching impact of such an exclusionary definition. In parliamentary debates, the definition of family in the Family Protection Act was used as an argument for removing references to registered partnership from the new Civil Code that otherwise will contain all basic provisions of family law.<sup>25</sup> Furthermore, the rights of cohabiting partners concerning inheritance, alimony, and use of common apartment were also removed from the bill.<sup>26</sup>

This notion of family also infiltrates other fields of law, such as media and education. According to Act CXC of 2011 on public education, it is the task of the teacher to “make students familiar with and respect family values.”<sup>27</sup> Act CLXXXV of 2010 on media services and mass media defines - among others - the aim of public broadcast to “respect the institution of marriage and family values.”<sup>28</sup> Read together with the Fundamental Law’s exclusionary definition of family, these provisions might result in limiting freedom of expression with regard to LGBT people in the media, as well as encouraging ignorant and often discriminatory views on same-sex and other not marriage-based relationships in school curricula.

The narrow definition of family has been the subject of heavy criticism from both non-governmental and inter-governmental organizations. In its recent concluding

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<sup>25</sup> Amendment no. T/7971/106 of 2012.

<sup>26</sup> Amendment no. T/7971/211 of 2012.

<sup>27</sup> Article 62 (1) e).

<sup>28</sup> Article 83 (1) c).

observation on Hungary's periodic reports, the Committee on the Elimination of Discrimination against Women recommended the Government to “(a)mend its law in line with the Constitutional Court's view that the definition of family is too narrow and ensure that further amendments of the relevant laws will be in conformity with this as well as the Committee's General recommendation No. 21 (1994) on equality in marriage and family relations.”<sup>29</sup> In a harsh statement, Human Rights Watch heavily criticized the government for bypassing the rulings of the Constitutional Court and reintroducing provisions in the Fundamental Law that had been found unconstitutional by the Court before.<sup>30</sup> Similarly, Amnesty International called on revising the Fourth Amendment as the narrow definition of family – in their view – unreasonably discriminates on the basis of sexual orientation and family status.<sup>31</sup>

While the practical implication of this newly introduced constitutional provision is yet to be seen, the amendment fits into a series of attempts to use the Fundamental Law not to protect fundamental human rights, but rather to inscribe into the constitutional framework a particular – Christian-conservative – set of values.

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<sup>29</sup> CEDAW/C/HUN/CO/7-8 Concluding observations on the combined seventh and eighth periodic reports of Hungary adopted by the Committee at its fifty fourth session (11 February – 1 March 2013).

<sup>30</sup> Hungary: Constitution Changes Warrant EU Action. <http://www.hrw.org/news/2013/03/12/hungary-constitution-changes-warrant-eu-action>.

<sup>31</sup> [http://www.amnesty.hu/amnesty-international/emberi-jogaink/alaptorveny\\_modositas4\\_20130309](http://www.amnesty.hu/amnesty-international/emberi-jogaink/alaptorveny_modositas4_20130309).

## **The communist past and the statute of limitations (Article 3 of the Fourth Amendment)**

Article 3 of the Fourth Amendment adds a lengthy and primarily declaratory provision as New Article U of the Fundamental Law,<sup>32</sup> which, after 23 years of solid democracy and a working system of the rule of law, deems it timely and appropriate to revisit the settlements made during the immediate transition from communist dictatorship to democracy.

New Article U first states the obvious: that a government based on the principles of rule of law and separation of powers and the prior communist regime are diametrically opposed and irreconcilable.

Thus truism is followed by a mix of (i) verbal exorcisms of the pre-1989 Hungarian Communist Party and its satellite organizations, (ii) authorization of adverse treatment of communist-period leaders, and (ii) rules that reopen the statute of limitations covering serious crimes committed during the communist period that had not been subject to prosecution on account of political motives.

New Article U(1) states that the pre-1989 Communist Party (the Hungarian Socialist Workers' Party) and its satellite organizations that supported the communist ideology had been “criminal organizations” whose leaders carry a liability which is, in the words of this Article, “without statute of limitations.” A few Sections below this, in Sections 7 and 8, that broad statement is contradicted by provisions that define a mechanism for the interruption and tolling of the statute of limitations for these non-prosecuted communist-period crimes.

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<sup>32</sup> Article 3 of the Fourth Amendment is very long and it creates a new Article U in the constitution. In the Fourth Amendment version, all of the internal markings within the article identify only how the New Article U will be numbered, once added to the constitution. As a result, this section refers to the various parts of the “new Article U” to help refer readers to the proper part of Article 3 of the Fourth Amendment.

The new Article U refers to “criminal organizations” in a way that makes it precisely *not* a term of art or a definition of a legal construct in Hungarian penal law. The Fundamental Law refers to a “*bűnöző szervezet*” but Hungarian criminal law only attaches criminal penalties to a “*bűnszervezet*.” Both terms translate into “criminal organization” in English, but one carries criminal liability and the other is undefined in law. It is therefore, at a minimum, unclear what legal effects are intended by this term in the Fundamental Law.

Furthermore, a very broad and general liability is deemed to exist for a number of past deeds, which include destroying post-WWII Hungarian democracy with the assistance of Soviet military power, the unlawful persecution, internment and execution of political opponents, the defeat of the 1956 October Revolution, destroying the legal order and private property, creating national debt, “devastating the value of European civilization” and all criminal acts that were committed with political animus and had not been prosecuted by the criminal justice system for purely political motives. As with the term for criminal organization, however, the sort of “liability” referred to the new Article U(1) does not have any formal legal referent anywhere else in Hungarian law. The liability in this section, like *bűniüző szervezet* in the preceding section, *sounds* legal but does not directly reference any other provision in Hungarian law. Its purpose and meaning are undefined and so its legal effects are unclear.

A separate paragraph extends this elusive liability to all political organizations that have been deemed to be the legal successors of the pre-1989 Communist Party. This paragraph states that, because the successor parties have shared in the unlawfully accumulated assets of their predecessors, they should share the liabilities of these predecessors as well. But which parties and organizations are singled out by this designation is at the present moment impossible to tell because there are no standards for determining which organizations shall count as successors.

New Articles U(2) and U(3) call for the remembrance of the communist past and create a new national committee to document national memory in this regard. New Article U(4) provides that the former communist leaders are public persons in respect to their past political actions and as such, except for deliberate lies and untrue

statements, must tolerate public scrutiny and criticism. These former communist leaders must tolerate disclosure of personal data linked to their functions and actions.

New Article U(5) provides grounds for new legislation that reduces the pensions and other benefits of specific leaders of the communist dictatorship. This provision appears to contradict Constitutional Court decision 43/1995 (VI. 30), which held that people could not be denied pension payments after they had paid as they were required to do into the state pension scheme. But that decision has been annulled by the Fourth Amendment, too.

New Article U, Sections (6) through (8) relate to the tolling and interruption of the statute of limitations for specific serious crimes that Article U(1) seems to say that are time barred. There is as of yet no law that defines which crimes are serious enough to justify removal of all time limitations on prosecutions and which remaining crimes are therefore subject only to the newly reset clock for prosecutions. To be sure, there are specific crimes in the Hungarian Penal Code (crimes against humanity, genocide, etc.) to which no statute of limitations apply. Manslaughter and homicide are, however, crimes which had at all times in the past 100 years have been time-limited with regard to prosecution. The interruption and tolling relate to serious crimes that were punishable under the penal laws in effect at the time they were committed and which had not been prosecuted for political motives. But it is clear that this part of the Fourth Amendment also implies that there will be crimes newly released from a time-bar for prosecution.

If the statute of limitations ran out before May 2, 1990 (the date when the first freely elected Parliament was formed), then Article U(7) provides that the statute of limitation that was in effect at the time of the commission of the criminal act will start again from the date of the entry into effect of the new Fundamental Law on January 1, 2012. If the statute of limitations would have tolled *after* May 2, 1990, then Article U(8) provides that the statute of limitations' clock, which would start again on January 1, 2012, would be set only for the period of the time that the statute of limitations ran before May 2, 1990. As the reasoning explains, the extension of time to prosecute these crimes includes only the time that fell under the communist regime.

Articles U(6) and (8) might appear to be sensible and constitutionally permissible provisions when the transition from communist rule to democracy occurred. But the Constitutional Court had declared precisely this sort of extension of the statute of limitations unconstitutional in 1992,<sup>33</sup> though the Court at that time also noted that prosecutions of internationally defined crimes, which had no statute of limitations could proceed.<sup>34</sup>

The Fourth Amendment's Article 3 therefore seeks directly to reverse yet another prior Constitutional Court decision. But, of course, since the Fourth Amendment annuls all Court decisions prior to 2012, this now-reversed decision would have been abolished anyway. But, as we will see below, the Fourth Amendment's Article 19 provides 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." The legal effect of the 1992 decision was to bar the statute of limitations from being reset at the time of the transition. So in this case both the legal effect and the decision itself are reversed.

That said, to reverse course now after 23 years puts those who may be prosecuted long after the fact at a very distinct disadvantage. More than two decades is a very long period of time after which to question the legal framework of the statute of limitations for the types of criminal acts in question. Such provisions may not run afoul the time-honored doctrine of "*nullum crimen sine lege*," but they may nonetheless constitute violations of rights to fair and timely legal process.

What could be the purpose of reopening these cases now through a removal of the statute of limitations? New Article U(9) eliminates one purpose, which is compensating the victims of the communist period. This article specifically rules out any new laws that might provide compensation to individuals for harms caused to them during the very period that will be reexamined through these cases.

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<sup>33</sup> Decision 11/1992 (III.5)

<sup>34</sup> Decision 53/1993(X.13)

## **The parliamentary recognition of churches (Article 4 of the Fourth Amendment)**

The Fourth Amendment of the Hungarian Fundamental Law contains a comprehensive revision of the constitution's Article VII on freedom of religion and state-church relations.

Most importantly, as a new rule, the amendment authorizes Parliament to recognize as churches only those religious organizations with which the state wishes to cooperate in order to achieve community goals (new Article VII(2), first sentence).

The amendment also describes those conditions that Parliament may elaborate in a cardinal law in determining whether to award official church status to a religious organization, conditions such as significant duration of operations, level of social support and the ability to cooperate with the state in order to achieve community goals (new Article VII (4)).

Finally, changes to the cardinal law on religion are made the subject of a constitutional complaint (new Article VII(2), second sentence).

The new constitutional amendment raises several concerns from a constitutional and human rights perspective. First, Article VII of the Fundamental Law as amended authorizes Parliament to award church status to religious organizations on the basis of political discretion, and not as a measure that enables or ensures the exercise of freedom of religion as a fundamental right. Second, in Article VII (4) the discretion of Parliament in recognizing religious organizations as churches is formulated in a manner that raises serious concerns regarding state neutrality in matters of religion because it conditions recognition of a church on its cooperation with the state. Third, the legal remedy opened with regard to Parliament's decisions on the status of churches is insufficient under the Hungarian Fundamental Law itself.

These concerns echo reservations about the Hungarian church recognition regime as a whole, as the Venice Commission already formulated in its Opinion 664/2012 of March 19, 2012 (CDL-AD(2012)004) on Hungary's 2011 Law on Freedom of

Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities. The Constitutional Court annulled parts of the law in its recent decision 6/2013 (III.1.). The Constitutional Court's decision declared unconstitutional those parts of the cardinal law on churches that relied on a parliamentary procedure that itself had no guarantees of fundamental fairness. The conclusions of these were reached in light of the well established case law of the European Court of Human Rights under Articles 9 and 11 of the Convention.

For the most part, the amendment reinstates those Article 21(1) of the Transitional Provisions which were invalidated by the Constitutional Court in December 2012<sup>35</sup> for being procedurally unconstitutional amendments. Like its predecessor (i.e. Article 21(1) of the Transitional Provisions), the newly amended Article VII of the Fundamental Law seeks to create a constitutional basis (complete with authorization for further lawmaking) for the already existing church recognition regimes, as regulated by Act CCVI of 2011 (Herein after: 2011 church law).

The legal regime for church recognition was already reviewed by the Venice Commission in its Opinion 664/2012 of March 19, 2012 (CDL-AD(2012)004). Article VII of the Fundamental Law mirrors the underlying philosophy of the 2011 church law. Nonetheless, although the amendment to Article VII of the Fundamental Law was adopted a year after the Venice Commission's opinion on Hungary's 2011 law on churches, and the Hungarian government was familiar with the position of the Commission, the reasons attached to the bill did not mention the Venice Commission's concerns about the central conceptions of Hungary's new church recognition system, nor did the debate in Parliament address them.

Furthermore, drawing on the opinion of the Venice Commission, the Hungarian Constitutional Court also raised several objections about Hungary's new church recognition regime in a decision where it found the key provisions of the 2011 church law substantively unconstitutional.<sup>36</sup> The Constitutional Court's decision was made on February 26, 2013, and the only modification the drafters made to the draft Fourth

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<sup>35</sup> Decision 45/2012 (XII. 29.)

<sup>36</sup> Decision 6/2013 (III. 1.)

Amendment introduced into the Parliament on February 8, 2013 was the opportunity to file a constitutional complaint with respect to changes in the cardinal laws on religion, which was declared by the Constitutional Court itself as an insufficient remedy. Therefore, the drafters of the amendment did not have the benefit of learning the Constitutional Court's concerns about the cornerstones of the new church recognition regime because added the amendment to the constitution before the Court could decide.<sup>37</sup>

Finally, the Fourth Amendment was introduced following the submission of a case to the ECtHR in which nine previously registered Hungarian churches challenged the 2011 church law under the Convention.<sup>38</sup> While the impact of the constitutional amendment on the pending case and the fate of its applicants are unclear, the pending case is evidence that the Hungarian government was made aware about the impact of the new church registration regime from the perspective of religious communities that lost their church status under the new Hungarian regime.

The Hungarian government's submission to the ECtHR in this case was dated February 27, 2013 and yet the document does not mention that the government was poised to pass the Fourth Amendment adding the very provision being challenged in this case to the Fundamental Law itself.<sup>39</sup> The government's submission to the ECtHR also downplayed the criticism of this law by the Venice Commission, saying instead that: "Even the Venice Commission, critical of many aspects of that legislation [the 2011 church law] concluded that 'the Act constitutes a liberal and generous framework for the freedom of religion,'" before the government then passed off much of the criticism of the law in the Venice Commission's report as having been based on a mistake.<sup>40</sup>

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<sup>37</sup> This decision therefore continues a pattern in which the government has responded to Court decisions before they are announced. This has caused some both inside and outside of the Court to complain about leaks to the government of the Constitutional Court's deliberations.

<sup>38</sup> Application no. 70945/11, Magyar Keresztény Mennonita Egyház and Jeremias Izsák-Bács against Hungary.

<sup>39</sup> Because the Fourth Amendment had been submitted already to the Parliament on February 9, 2013 and all of its initiatives pass the Parliament with little alteration, the government would have known that this would happen.

<sup>40</sup> See the Submission of the Hungarian Government at <http://lapa.princeton.edu/hosteddocs/hungary/2013.03-05-korm%C3%A1nyv%C3%A1llasz.angol.pdf> at p. 28.

Under Article VII(2) of the Fundamental Law as amended by the Fourth Amendment, Parliament's discretion in awarding church status to religious communities by a qualified majority decision (i.e. the two-thirds parliamentary vote required for a cardinal law) is now reaffirmed. The discretionary nature of this decision is confirmed by making Parliament's decision dependent on whether it wishes to cooperate with a religious organization in order to achieve community goals.

In the February 2013 decision of the Constitutional Court on the church law, the Court went as far as saying that entrusting Parliament with the decision of church recognition was “particularly worrisome”<sup>41</sup> because leaving church recognition in Parliament’s hands by definition entails a political decision. Responding to the argument of the government that Parliament was also in charge of recognizing national minorities, the Constitutional Court noted that under the Fundamental Law national minorities are “constituent parts of the state,” while churches were meant to operate separately from the state. The Constitutional Court emphasized throughout its decision that the procedure for church recognition needs to adhere to requirements of procedural fairness, in compliance with European human rights jurisprudence and also with Article XXIV of the Fundamental Law.

The Constitutional Court’s decision clearly mirrored the concerns of the Venice Commission. In its Opinion 664/2012, the Commission expressed its worries about the absence of neutral and impartial procedure governing the recognition of churches (para. 72). Reflecting on the first implementation of the new law, the Commission found that the criteria used for recognition were unclear and the procedure followed was not transparent.

Article VII(2) of the Fundamental Law as amended by the Fourth Amendment does not seek to remedy any of these concerns, but instead confirms Parliament’s discretionary power in recognizing those churches from among the previously legally registered ones with which it wishes to cooperate further. In this respect, it is worth

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<sup>41</sup> Decision 6/2013 (III. 1.)

recalling that, when it comes to the re-registration of previously recognized churches, ECtHR jurisprudence requires the state to provide very weighty reasons for denying registration in the new procedure if the affected church had not otherwise violated the law (i.e. apart from operating without the required new registration while waiting for their re-registration process to conclude).<sup>42</sup>

This requirement of ‘very weighty reasons’ is clearly not met when Parliament’s key criterion for recognizing churches is its (or the state’s, invariably) own decision to cooperate further with a religious organization for community objectives. After all, Parliament’s decision to choose its social partners when it pursues community objectives is clearly not expected to meet constitutional criteria or human rights standards. This new constitutional provision does not have the freedom of religion at the core of its concerns; it authorizes the Parliament to choose partner churches for its own purposes without requiring consideration of the free exercise of religion.

In addition to adding the intention to cooperate with religious organizations for community objectives as a selection criterion in the amended Article VII(2) of the Fundamental Law, this condition was also included in amended Article VII(4) among the criteria of qualification for church status. This supplements other criteria for church status, specifying that a church might have to be established in Hungary for certain length of time before it could be recognized and that it might have to show it had a certain level of social support. Given that it is hard to show that a church has been established or has a certain number of members *before* a church has been allowed to be officially recognized, these combined criteria create a circular set of qualifying conditions.

The Venice Commission has already assessed the membership and the duration requirement of the 2011 church law, and also some other conditions of church status, but it did not have an opportunity to assess this new condition of state cooperation yet.

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<sup>42</sup> Church of Scientology Moscow v Russia, (2008) 46 E.H.R.R. 16, 304 at 327 (§ 96); Moscow Branch of the Salvation Army v Russia, (2007) 44 E.H.R.R. 46, 912 at 935 (§ 96)..

In this respect the state cooperation condition is most problematic from a human rights perspective because the state's willingness to cooperate with a religious organization is not simply a solely discretionary criterion, but also openly invites the state to prefer certain religious organizations or communities above others on the basis of its own views of the helpfulness of specific churches to state goals. This criterion requires the state to abandon its neutral stance towards religious communities.

This requirement clearly runs counter to the state's duty of neutrality and impartiality as required under Article 9, a duty that has been consistently upheld in the well-established case law of the ECtHR.<sup>43</sup> While the ECtHR is mindful of national differences in church-state relations across the member states, the requirement of neutrality and impartiality under Article 9 does not cease in countries with established churches or strong cooperationist regimes. Therefore, Hungarian government's historically stronger ties with certain religious communities do not absolve it from neutrality and impartiality towards others.

Article VII(2) of the Fundamental Law as amended by the Fourth Amendment opened Parliament's decision on church recognition for challenge by constitutional complaint (Article XXVIII(7), Fundamental Law) before the Constitutional Court. The decision to add this possibility to the Fundamental Law may, on its face, appear to address both the Venice Commission's<sup>44</sup> and the Constitutional Court's<sup>45</sup> concerns about the lack of an effective remedy against Parliament's decision. Note that this opportunity was not included in the original draft of the amendment, but was introduced by a separate rider<sup>46</sup> while the bill was already being debated in the Parliament.

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<sup>43</sup> Most recently: Eweida and others, Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, Judgment of 15 January 2013, § 81 Manoussakis and Others v. Greece, judgment of 26 September 1996, Reports 1996-IV, p. 1365, § 47; Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 78, ECHR 2000-XI

<sup>44</sup> Opinion 664/2012, para 84

<sup>45</sup> Decision 6/2013 (III. 1.)

<sup>46</sup> Amendment no 51 to House Bill T/9929.

While this afterthought might be commendable, in its decision on the 2011 church law, the Constitutional Court dealt with the effectiveness of the constitutional complaint as a remedy under the Fundamental Law. The Constitutional Court found that since a constitutional complaint may only be launched to contest the compatibility of a legal norm with the Fundamental Law, the Constitutional Court will not be able to review the legality of the recognition process or the facts which the process relies on through the mechanism of a constitutional complaint.<sup>47</sup>

But while the Constitutional Court can review the law upon a constitutional complaint, it is unclear who would bring such a case. When the Parliament agrees to recognize a church, it must amend the cardinal law to add the name of the church to the list. And that change to the law could be the subject of a constitutional complaint, but it would fail because the complainant would have been benefited and not harmed by the change. By contrast, when the Parliament rejects a church's petition to be recognized, it announces this result through a parliamentary "order" (*határozat*), which cannot be challenged through a constitutional complaint as it is not a normative act (*jogszabály*) falling within the jurisdiction of the Court. As a result, the provision added to the constitution through the Fourth Amendment that appears to grant some appeal from the Parliament's discretionary decision to award recognition to a church is merely illusionary. It provides an avenue for appeal where none is needed and it blocks an appeal where petitioners would need one.

Arguably, the lack of access to court against a decision to deny church status to religious communities violates ECtHR jurisprudence which since 1974 has required under Article 6(1) access to court outside the criminal process.<sup>48</sup> More specifically, in the freedom of religion context, the ECtHR found that lack of access to court in a dispute over church property violated the Convention.<sup>49</sup>

As a result, it is fair to conclude that constitutional complaint mechanism introduced in Article VII(2) of the Fundamental Law with its latest amendment does not provide

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<sup>47</sup> Decision 6/2013 (III. 1.).

<sup>48</sup> Golder v the United Kingdom, (1979-80) 1 E.H.R.R. 524.

<sup>49</sup> Sambata Bihor Greek Catholic Church v. Romania, (unreported) Application no. 48107/99, Judgment of 12 January 2011).

an effective remedy against a governmental decision (denying) church recognition, as required by European human rights law.

## Constraints on political advertising (Article 5 of the Fourth Amendment)

Article 5 of the Fourth Amendment restricts political advertising. The clause introduces a general ban on paid political advertising at all times in all media services that reach their audience through electronic devices.<sup>50</sup> A further restriction applies only in political campaign periods that start fifty days before election day. During this campaign period, the leading political parties—those that set up national candidacy lists—will under no circumstances be able to place political advertisements in the private media but are restricted to public media for campaign advertisements. This also means that other parties and candidates that do not have national lists will, however, be able to use private channels.<sup>51</sup> Since the public broadcast media have much smaller audiences than the private channels, this confines the most crucial political advertising to the least-watched channels.

This section is among the clauses of the Fourth Amendment that would certainly be annulled by the Constitutional Court were they not restricted through the Fourth Amendment in their ability to review amendments for substantive unconstitutionality. In this case, the text of the amendment is also in direct violation of decision of the Constitutional Court from January 2013 that declared unconstitutional this same restriction.<sup>52</sup> As with many substantive clauses of the amendment, the rationale of this clause is to restrict fundamental rights.

It is hard to understand and interpret the amendment without the applicable legal context. The “cardinal act” mentioned in the amendment is the Act on Electoral

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<sup>50</sup>The text of the amendment could be interpreted as excluding all other means of political advertising, including posters. However, the amendment follows the terminology of the Act no. CLXXXV of 2010 on media services and mass communication that defines “media services” with reference to media content reaching the audience via some type of electronic device, see § 203, 40 of the Act. Political advertising, in turn, is defined as media content propagating a party, a political movement, the government or the name, goals, activities, slogan and logo of the same. See § 203, 55.

<sup>51</sup>Given some politically loyal media conglomerates, political experts consider the possibility of smaller parties or allied movements using this instrument to support parties otherwise excluded from private broadcasting channels. Róbert László, 'Jönnek a kertévé-pártok' [Commercial TV parties are coming], *Választásrendszer.hu*, 21 March 2013. Available at

<http://www.valasztasirendszer.hu/?p=1941771> (last visited on 30 March 2013)

<sup>52</sup>Decision 1/2013. (I. 7.)

Procedure.<sup>53</sup> The Act, in § 151, contains the “archetype” of the clause limiting political campaign that is now made part of the constitution through the Fourth Amendment. In its original form, the Act did not include the specific clause limiting political campaign advertising.<sup>54</sup> When it was first introduced, the text gave the National Electoral Commission—the chief body supervising national elections—wide discretion in deciding on the actual distribution of political advertising space, on the amount, timing, and the number of appearances, albeit “under similar conditions” for all entities.<sup>55</sup> The seven members of the Commission are elected by a two-third majority by the Parliament, which, under the present distribution of seats, means that the Commission has an all-government composition. Following an amendment to the electoral procedure law, the section limiting political advertising defined the obligation to divide broadcast time equally among parties across different media service providers.<sup>56</sup> This is the version, adopted by the Parliament in 2011 that was sent to the President of the Republic.<sup>57</sup>

The President of the Republic considered this restriction in the Electoral Procedure Act (among others) unconstitutional and referred the law to the Constitutional Court for review. The Constitutional Court agreed. In its decision, the Court found that the ban was both a discriminatory and disproportionate limitation of freedom of expression and freedom of the press. It was discriminatory because parties with national lists are treated differently from those without national lists. And it was disproportionate because in an effort to control political advertising, it restricted this advertising to too narrow a set of outlets. When the governing majority reintroduced

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53The draft was introduced by government MPs as private members' bill, a practice widely criticised, e.g. by the Hungarian Constitutional Court. This method largely contributed to the lack of time and adequate consultation that has been pointed out by the Venice Commission as well, in connection with the adoption of the Fundamental Law.

54*Draft Act no. T/8405 on Electoral Procedure*, 18 September 2012, § 151. Available at <http://www.parlament.hu/irom39/08405/08405.pdf> (last visited on 30 March 2013)

55*Consolidated Draft Act no. T/8405 on Electoral Procedure*, 18 September 2012, § 151 (4). Available at <http://www.parlament.hu/irom39/08405/08405-0065.pdf> (last visited on 30 March 2013)

56*Draft Amendment no. T/8405/69*, 25 November 2012, 7, § 151 (4). Available at <http://www.parlament.hu/irom39/08405/08405-0069.pdf> (last visited on 30 March 2013)

57*Act no. T/8405/73 on Electoral Procedure*, adopted by the Parliament and sent to the President of the Republic, 1 December 2012, 7, § 151 (4). Available at <http://www.parlament.hu/irom39/08405/08405-0073.pdf> (last visited on 30 March 2013)

the rule and elevated it to the level of the constitution, this act rejected the arguments of both the President and the Court.<sup>58</sup>

The Court noted that the ban excludes media services that reach the largest portion of the society, namely private television broadcasting companies. The Court, with regard to the freedom of expression and the important role of media, analysed the aim of the limitation and concluded the limitation only to public broadcasting outlets cannot serve the goal of reducing campaign spending or ensuring a balanced campaign. The decision notes that the limitation is disproportionate and discriminatory also considering the failure to introduce similar constraints in areas other than (electronic) media services.<sup>59</sup> The Court further found that the ban on political advertising in cinemas (also included in the original law though not in the constitutional amendment) has an even weaker connection with the stated aims of the Act, if any, and it annulled the clauses in question, among others.

The Constitutional Court did not cite European standards on legitimate constraints in political advertising, although it had used ECtHR jurisprudence when deciding on the unconstitutionality of voter registration. It is true that there is no European consensus on political advertising.<sup>60</sup> Still, we can find applicable ECtHR case law. In the case of *TV Vest AS and Rogaland Pensjonistparti v. Norway* the Court found a violation in a

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58Note that, despite this, the President of the Republic signed the Fourth Amendment into law. He claimed that under the Fourth Amendment, which was ironically not law until he signed it, he had no discretion to refuse to sign constitutional amendments.

59Transparency International Hungary drew the attention to the corruption risks that the amendment entails. They highlight that billboard advertising—a decisive portion of which is in the hands of businesspersons closely aligned with the governing majority—is not limited (as media services) or subject to control (as printed media). Transparency International Hungary, 'A választási eljárási törvény korrupciós kockázatai' [The corruption risks of the Act on Electoral Procedure], *Választásirendszer.hu*, 23 January 2013. Available at <http://www.valasztasirendszer.hu/?p=1941684> (last visited on 30 March 2013) More specifically on the amendments following the decision of the Constitutional Court and the adoption of the Fourth Amendment of the Fundamental Law: Transparency International Hungary, *Most már a választások tisztsága a tét – újra a választási eljárási törvényről* [Now the fairness of the elections is at stake. Once more on the Act on Electoral Procedure], blog post, 26 March 2013.

Available at:

[http://korrupcio.blog.hu/2013/03/26/most\\_mar\\_a\\_valasztasok\\_tisztsaga\\_a\\_tet\\_ujra\\_a\\_valasztasi\\_eljarsi\\_torvenyrol](http://korrupcio.blog.hu/2013/03/26/most_mar_a_valasztasok_tisztsaga_a_tet_ujra_a_valasztasi_eljarsi_torvenyrol) (last visited on 30 March 2013)

60As is also shown by the relevant recommendations of the Council of Europe Committee of Ministers , for a list, see: Venice Commission (European Commission for Democracy through Law), *Opinion on the Need for a Code of Good Practice in the Field of Funding of Electoral Campaigns*, CDL-AD(2011)020 , 16 June 2011. Available at

[http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD\(2011\)020-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2011)020-e) (last visited on 30 March 2013)

broadcasting ban on political advertising comparable to the restrictions of the Fourth Amendment.

Perhaps most importantly, however, the Court was not persuaded that the ban could achieve the desired legitimate aims of the law, which involved reducing both the costs of political campaigns and dependence on donors as well as ensuring a fair, impartial campaign and the integrity of democratic processes. While the law before the Constitutional Court differed in at least two important aspects—all-time as opposed to campaign-time prohibition and general ban as opposed to selective restrictions—the reasons in favour of the Fourth Amendment given by the Hungarian government, to “reduce the campaign cost and create equal opportunities,” are practically the same. The conclusion of the ECtHR evaluating the blanket ban remains valid: “These are undoubtedly relevant reasons, however, the Court is not convinced that these objectives were sufficient to justify the interference complained of.”<sup>61</sup> Apart from interference with Article 10 of the ECHR, disproportionality and discrimination can be valid concerns from the side of the interests of private media service providers in connection with their rights under Article 16 of the Charter of Fundamental Rights of the European Union.

Following the decision of the Constitutional Court, the Act was again adopted by Parliament with the necessary modifications. The amendments that normally serve to make sure that the Act complies with the decision of the Constitutional Court, however, now reintroduce, with minor changes, the text of the original unconstitutional limitation, based on the similar rule injected into the body of the Fundamental Law by the Fourth Amendment. The Draft Amendment maintains the requirement of “equal conditions” and equal division of broadcast time as well as the power of the National Electoral Council to decide on the actual division, timing and occurrences of political advertising. The discrimination between the two sets of candidates and parties—those with national candidacy list and those without one—also remains.<sup>62</sup> In short, the Fourth Amendment overrides a decision of the Constitutional Court and, relying on this constitutional amendment, new provisions

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<sup>61</sup> *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 70–71, ECHR 2008.

<sup>62</sup> *Draft Amendment no. T/8405/75*, 21 March 2013, 24, § 151 (4). Available at <http://www.parlament.hu/irom39/08405/08405-0075.pdf> (last visited on 30 March 2013)

are being inserted into the Law on Electoral Procedure that would restore a very similar regime for political advertising that the Constitutional Court declared unconstitutional just a few months ago.

Given the assessment of proportionality and discrimination by both the Constitutional Court and the ECtHR, it is not surprising that the Government wished to protect the reintroduced regulation from all sides, which may provide another reason why the Fourth Amendment also includes in Article 12 (2) a prohibition on the Constitutional Court's review of constitutional amendments for their substantive unconstitutionality.

## **Political speech subjected to a limitation based on the dignity of the nation and dignity of public officials (Article 5 of the Fourth Amendment)**

The “official translation” of the Fourth Amendment speaks about “freedom of speech,” though in the Hungarian original it is “freedom of expression.” The provisions newly added to the free expression clause of the Fundamental Law through Article 5 of the Fourth Amendment provide reason for suspicion already at the first glance: with these additions, the number of paragraphs of the constitutional provision about freedom of expression amounts to six, or half a page, an unusually long passage for granting a fundamental right. This is all the more remarkable, given that the Fundamental Law has a distinct provision which regulates in general the potential scope and manner of restricting fundamental rights.<sup>63</sup>

After the limitations on political advertising mentioned in the last section, the subsequent amendment,<sup>64</sup> spells out that the exercise of freedom of speech (expression) cannot aim at violating the human dignity of others. Following that, the next provision<sup>65</sup> spells out that the exercise of freedom of speech (expression) cannot aim at violating the dignity of the Hungarian nation, or national, ethnic, racial or religious communities.

According to the terse reasoning originally submitted to the Parliament as an explanation of the bill (reasoning, by the way, which is substantially different from the “Technical Note” that the Hungarian government appended to its official translation of the Fourth Amendment), this amendment

aims at securing at the constitutional level that human dignity should provide the border of freedom of expression, and it wishes to provide a constitutional

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<sup>63</sup> See Article I (3): The rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.

<sup>64</sup> New Article IX(4) of the Fundamental Law.

<sup>65</sup> New Article IX(5) of the Fundamental Law.

basis for the possibility of sanctioning hateful expressions through private law remedies in cases where the dignity of communities is violated.<sup>66</sup>

The relevant previous jurisprudence of the Constitutional Court made clear that the efficient limitation of hate speech cannot be secured at the level of statutes, thus amending the constitution is an appropriate action to take. The amendment therefore provides a constitutional framework for the regulation of speech violating the dignity of the listed communities.

According to the near homogeneous jurisprudence of Hungarian domestic courts, personality rights violations can only be established if victim can be directly or indirectly (but in either case personally) implicated by the conduct of the perpetrator. Thus, if someone considers himself to be the addressee of the hate speech, but he cannot be individually identified as a specific target of the hateful expression, he is deprived of the possibility of a private-law remedy. That is why the amendment needed to establish that the exercise of freedom of expression cannot aim at violating the dignity of the Hungarian nation, national, ethnic, racial or religious communities, because under the legal standard that existed before this amendment, there would be no such cause of action. It thereby enables the pressing of claims when hateful speech violates the dignity of communities. The bill therefore provides a remedy in private law for the victims of personality rights violations suffered because of their group identity.

The explanatory (called “technical”) Note offered to the Venice Commission, which is written in the first person singular by an undisclosed author, provides somewhat different reasons for the law. First of all, the Note refers to the decision 36/1994 (VI. 24) of the Constitutional Court to support the view that “human dignity, which is under constitutional protection, may put a limit on the freedom of expression.” This justification is rather ironic as the cited Constitutional Court decision was annulled along with every other Constitutional Court decision from 1990 to 2011 by this very same constitutional amendment. In any case, however, the inclusion of the new limiting paragraph is either redundant because Hungarian law already permitted

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<sup>66</sup> House Bill T/9929.

restriction on freedom of expression in the name or human dignity or aims at lowering the protection of freedom of expression from what had been established under the old constitution.

It is arguably redundant because human dignity is protected by the Fundamental Law as inviolable (Article II), and because Article I of the Fundamental Law allows restricting “a fundamental right to allow the exercise of another fundamental right or to defend any constitutional value.” Thus, there is no need to add anything else to the constitution that says that human dignity can form a limit to the exercise of freedom of expression.

It is therefore likely that any reasonable body interpreting the amendment, and ultimately the Constitutional Court, will construe the modification of the freedom of expression provision through the Fourth Amendment as a change in the earlier state of law. As a result, it is likely that the amendment will be interpreted as *lowering*, not at increasing, the standard of protection accorded to freedom of expression.

Technically, this lowering can be accomplished in one of two ways. First, an interpreter could claim that the new paragraphs form an exception from the second and third prongs of the general limitation clause of Article I(3) of the Fundamental Law which allow for restriction “only to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.” That would clearly run counter to international human rights standards, especially the jurisprudence of the ECtHR, because it would permit limits not “necessary in a democratic society.” Otherwise the amendment itself would not have been necessary.

Secondly, lowering the protection of freedom of expression can be technically realized also by enlarging the scope of human dignity from the individual to the group, which would defy twenty years of constitutional jurisprudence. But enlarging the application of human dignity beyond the individual to the group poses many challenges to the realization of individual rights, even beyond the limitations that this extension poses to free expression.

Lowering the protection of freedom of expression is certainly occurring with regard to the “dignity of communities” (new Article IV(5)). Contrary to what the “Technical Note” might suggest, this has not to date been an acceptable constitutional reason for limiting freedom of expression either in Hungary or in Europe generally, or in Germany in particular. The jurisprudence of the Constitutional Court in this regard was, with one or two minor exceptions, quite consistent. In 2000, however, the Court relied on a group libel rationale when it upheld the criminalisation of totalitarian symbols. But since then the Court consistently rejected the existence of a constitutional claim protecting the “dignity of communities.” The Court’s jurisprudence in this matter culminated in decision 4/2013 (II. 21.), which declared unconstitutional the law banning the display of extremist symbols on the grounds that it violated the free expression clause. This recent decision was a reversal of its earlier decision on extremist symbols, bringing it much more into line with the rest of its own jurisprudence over the last 20 years. The new decision was also clearly influenced by similar rulings at the ECtHR in regard to Hungarian law.<sup>67</sup> That explains why limitations on free expression in the name of communal dignity have to be written into the text of the constitution now.

It has to be noted that the German Federal Constitutional Court is specifically cautious about recognizing the ability of members of indefinite, large groups to become victims of hate speech with possibilities for legal redress (see, especially, the Tucholsky ruling<sup>68</sup>), exactly because such a recognition of communal claims runs the risk of eliminating criticism of government. This argument is independent of whether the applicable sanction is embedded in private or in criminal law. Such endeavours also stretch the concept of inviolable human dignity to an extent that it loses all its meaning. Through this extension of the idea, human dignity turns from a value to be protected into a limit to be enforced. The dignity-protecting German Federal Constitutional Court would not go that far. That said, the Holocaust denial case<sup>69</sup> is about false statements of facts (which until that point was speech not even covered by

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<sup>67</sup> Vajnai v Hungary, Application no. 33629/06, Judgment of 8 July 2008, Fratonoló v. Hungary, Application no. 29459/10, Judgment of 3 November, 2011, Fáber v. Hungary, Application no. 40721/08, Judgment of 24 July 2012.

<sup>68</sup> BVerfGE 93, 266 (1994).

<sup>69</sup> BVerfGE 90, 241 (1994).

the scope of freedom of expression) instead of expressions of opinion, and it is exactly the falseness, not the “hurting” nature of the Holocaust denial that violates the dignity of the survivors: denying the Holocaust denies a piece of the identity of the survivors and of their and the victims’ relatives. The German Court otherwise finds violation of human dignity by expression in cases where persons (as individual members of a group like Poles<sup>70</sup> or as concrete individuals like Joseph Strauß<sup>71</sup>) are equated with animals or are in other ways declared subhuman. It is thus not the outrage, disgust or pain which renders an expression subject to limits in the name of human dignity, but the denial of *humanity or personality of an individual* that comes from reducing them to a member of a group in a totalizing manner. Human dignity in Europe generally protects the individual personality, not a “community,” and certainly not the majority community or the political nation as the Hungarian constitutional amendment now does.

Verbal attacks on racial, ethnic or religious or sexual minorities might be regulated because of the expression’s consequences, such as disorder, violence, etc. or erosion of the constitutional state (along the lines of militant-democracy arguments). But even in this regard the ECtHR has elaborated careful standards which strongly limit the ability of the state to regulate political speech. For instance, in Stankov,<sup>72</sup> the ECtHR spelled out that speech advocating secession is protected by the Convention. The constitutional guarantee of free expression should thus secure that such controversial speech is protected.

By contrast, however, the Hungarian constitution now encourages (or even requires in one interpretation) that the *dignity of the Hungarian nation* be respected and protected. What would be a violation of the dignity of the Hungarian nation, if not the secessionist argument that it is in fact two (or more) nations, which then should part ways? In general, limitations on free speech rights are tolerated in European human rights law when the limited speech of the majority permits a dissident claim to be heard or when disadvantaged minority groups might be nontrivially threatened by the

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<sup>70</sup> BVerfG, 2 BvR 2179/09(2009).

<sup>71</sup> BVerfGE 75, 369 (1987)

<sup>72</sup> Stankov and the United Macedonian Organisation Ilinden v. Bulgaria, Application nos. 29221/95, 29225/95, Judgment of 2 October 2001.

speech. In the Hungarian case, however, the opposite is occurring. Individual free expression can now be limited in the name of majoritarian and governmental interests, which are precisely the threats that freedom of expression needs to be protected from.

In fact, the Fundamental Law tends to imply a cultural concept of the nation already from its preamble and other declarations throughout the text. As a result, the situation might be even worse: one part of the population (ethnic minorities) might not be entitled to criticize the majority cultural nation any longer. Such an interpretation is all the more likely as the Penal Code's provision about violence against a member of a community has often been applied in the context where Roma injure non-Roma Hungarians. Parallel to this, condemnations for hate crimes are conspicuously rare when they are directed against Roma as members of a community. In such a political context, a constitution could do better than to give constitutional sanction to the prejudicial practice, and to even expand it to the field of civil law remedies. Contrary to the "Technical Note," it is not a defensible constitutional argument to say that if a bad solution is included in the Criminal Code, then it has to be included in the Civil Code as well, and then sanctioned at the constitutional level. Coherence has its virtues in law but not when coherence consolidates a serious and unjustified limitation on fundamental rights.

The protection of the dignity of the "Hungarian nation" is of course also problematic as it might have a chilling effect on political speech, which would then induce self-censorship in public matters, which is the very core of freedom of expression according to the previous Hungarian Constitutional Court, the ECtHR and most constitutional-democratic courts. Making matters worse, there is no exception for political criticism or for freedom of art in this new provision.

In addition, under new constitutional Article IX(4), the general dignity limitation on freedom of expression, also points in the direction of limiting political speech. While human dignity has been conceived as being a limit on the exercise of freedom of expression in previous constitutional jurisprudence, it was also clear since the very decision cited by the "Technical Note" that public officials, politicians, and other public persons have to tolerate more criticism than private persons, even slander. Derogatory value statements about authorities, officials or politicians cannot be

punished *at all* according to this constitutional jurisprudence, and even derogatory false statements of facts against them can be punished only if they resulted from actual malice or negligent violation of professional standards.<sup>73</sup> But with the abolition of the earlier case law of the Constitutional Court, it is no longer clear if that interpretation is still good law, despite the fact that the key case that the government points to as authority for this statement has been annulled by the Fourth Amendment. In fact, the Fourth Amendment may well aspire to overrule this jurisprudence so as to make space for the Civil Code's new standard to be elevated into the constitution.

According to § 2:44 of the new Civil Code (entitled: *The protection of personality rights of public figures*), exercise of rights securing the free discussion of public affairs can only limit the personality rights of public figures without violating human dignity in pursuit of a considerable public interest and then only to the extent necessary and proportionate. This provision does not aim at finding a fair balance between the two claims (as in ECtHR jurisprudence, or a praktische Konkordanz as in German jurisprudence). Instead, here the speaker is put in the position of “the state,” the usual “defendant” in human rights law: he or she can only “limit” the personality right of another if it is necessary and proportionate to an undefined public interest. This solution turns upside down the relation between freedom of expression and personality rights of politicians compared with what it had been before this point, in contrast now with both the jurisprudence of the ECtHR,<sup>74</sup> and the now-annulled jurisprudence of the Constitutional Court.

As we can see, therefore, the amendments to the freedom of expression provision of the new Fundamental Law carry the very real risk of turning the formerly protective jurisprudence on its head. Between placing new limits on freedom of expression where group dignity and the “dignity of the nation” are involved and nullifying the entire jurisprudence of the Constitutional Court before 2012, the Fourth Amendment clears the ground so that the new constitution is harmonized with the troubling new Civil Code rather than the other way around.

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<sup>73</sup> Decision of 36/1994. (VI. 24.) AB.

<sup>74</sup> See only Lingens v. Austria (1986) 8 EHRR 407

## **Curtailing institutional autonomy in higher education (Article 6 of the Fourth Amendment)**

Introduced by Article 6 of the Fourth Amendment, new Article X(3) of the Fundamental Law of Hungary increases the possibility of direct government control of public higher education institutions by adding a sentence to the existing constitutional clause guaranteeing the autonomy of the higher education:

“Government shall determine, to the extent permitted by law, the rules of financial management of public institutions of higher education and shall supervise their financial management.”

This should be read in conjunction with the previous sentence, which was not affected by the amendment:

“All institutions of higher education shall be autonomous in terms of the contents and methodology of research and teaching, and their rules of organization shall be regulated by Act.”

The amendment upsets the delicate balance between the legitimate scope of state intervention that flows from public financing and the guarantees of institutional autonomy that are necessary for universities to function properly. It potentially risks the individual rights protected under the auspices of autonomy, like freedom of thought, expression, arts and sciences as well as the right to education (in conformity with one's convictions) as enshrined in Articles 9 and 10 of the European Convention on Human Rights and Article 2 of Protocol No. 1; Articles 10, 11, 13 and 14 of the Charter of Fundamental Rights of the European Union; Articles 18 and 19 of the International Covenant on Civil and Political Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights.

University autonomy forms part of a long-standing common European tradition. As Dr. Per Nyborg, chairman of the Committee for Higher Education and Research of the Council of Europe concluded, “increased institutional autonomy implies that most

details can be left to institutions to decide themselves and when laws are revised with this in mind, it will also allow for future changes.” Furthermore, “[w]ith the proper balance between institutional autonomy and accountability, an effective law on higher education may only regulate what is essential to regulate and which cannot effectively be regulated in any other way.”<sup>75</sup> The chairman also noted that, while “institutional autonomy is a key element in the Bologna Process,”<sup>76</sup> the goal should not be “to maximize autonomy, but to establish a proper balance with accountability to society. To find out how far a university enjoys autonomy in relation to the state, and whether the relationship departs from a proper balance of interests, we have to look at all dimensions of the state-institution relationship”<sup>77</sup>

As a report of the Directorate-General for Education and Culture of the European Commission concludes, institutional autonomy, a “bounded concept, is a highly contested concept and has many faces.”<sup>78</sup> We can register “a general tendency towards increasing spending autonomy leading to full freedom in the internal allocation of resources” of higher education institutions together with “a development towards greater transparency and simplicity in the funding mechanisms,”<sup>79</sup> and a trend to decrease “direct governmental interference in higher education in certain areas matched by attempts to strengthen institutional autonomy accordingly.”<sup>80</sup>

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75Dr. Per Nyborg, Chairman, Committee for Higher Education and Research, Council of Europe, *Institutional autonomy. Relations between state authorities and higher education institutions*, 2002, p. 4. Available at [http://www.see-educoop.net/education\\_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf](http://www.see-educoop.net/education_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf) (last visited on 29 March 2013)

76Dr. Per Nyborg, Chairman, Committee for Higher Education and Research, Council of Europe, *Institutional autonomy. Relations between state authorities and higher education institutions*, 2002, p. 4. Available at [http://www.see-educoop.net/education\\_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf](http://www.see-educoop.net/education_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf) (last visited on 29 March 2013)

77Dr. Per Nyborg, Chairman, Committee for Higher Education and Research, Council of Europe, *Institutional autonomy. Relations between state authorities and higher education institutions*, 2002, p. 2. Available at [http://www.see-educoop.net/education\\_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf](http://www.see-educoop.net/education_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf) (last visited on 29 March 2013) Note that the Committee's mandate includes a focus on “self-government of academic institutions within a democratic society”, p. 4.

78The extent and impact of higher education governance reform across Europe. Final report to the Directorate-General for Education and Culture of the European Commission, Part One: Comparative Analysis and Executive Summary, 2007, p. 12 and 19. Available at [http://ec.europa.eu/education/more-information/doc/gov1\\_en.pdf](http://ec.europa.eu/education/more-information/doc/gov1_en.pdf) (last visited on 29 March 2013)

79Rates of return and funding models in Europe. Final report to the Directorate-General for Education and Culture of the European Commission , January 2007, p. 138–139. Available at [http://ec.europa.eu/education/more-information/doc/rates\\_en.pdf](http://ec.europa.eu/education/more-information/doc/rates_en.pdf) (last visited on 29 March 2013)

80The extent and impact of higher education governance reform across Europe. Final report to the Directorate-General for Education and Culture of the European Commission , Part One: Comparative Analysis and Executive Summary, 2007, p. 13. Available at [http://ec.europa.eu/education/more-information/doc/gov1\\_en.pdf](http://ec.europa.eu/education/more-information/doc/gov1_en.pdf) (last visited on 29 March 2013)

The Higher Education and Research Division of the Council of Europe emphasized, in its higher education policy recommendations, “[i]nstitutional autonomy is essential for ensuring academic freedom, which constitutes one of the core values of higher education.”<sup>81</sup> This also means that autonomy is not an end in itself.

It follows that striking the balance between competing interests is an ongoing challenge. While a considerable financial and economic independence is the material basis of institutional autonomy, autonomy should come with adequate guarantees for responsibility and transparency. In general, public authorities are responsible for maintaining a legal framework within which institutional autonomy can function, allowing adequate flexibility.

Notwithstanding the complexity of the question of institutional autonomy,<sup>82</sup> independence of higher educational institutions is a well-established concept in Europe. The Magna Charta Universitatum, a text adopted by university rectors in 1988 underlines that “[t]he university is an autonomous institution at the heart of societies”, arguing that “Universities’ independence and autonomy ensure that higher education and research systems continuously adapt to changing needs, society’s demands and advances in scientific knowledge”.<sup>83</sup>

State intrusion can take many forms, and the question is whether, in practice, national governments have a decisive role in the internal decisions of universities that would trump autonomy. “In the extreme case, the state could negate autonomy through any one of these mechanisms, [e.g.] through appointments. Or it could be done by

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<sup>81</sup>Directorate of school, out-of-school and higher education, Higher Education and Research Division, Council of Europe, *Higher Education Governance between democratic culture, academic aspirations and market forces. Considerations and recommendations*, Strasbourg, 22–23 September 2005, p. 3. Available at [http://www.coe.int/t/dg4/highereducation/Governance/GOV\\_recommendations\\_EN.pdf](http://www.coe.int/t/dg4/highereducation/Governance/GOV_recommendations_EN.pdf) (last visited on 29 March 2013)

<sup>82</sup>Recent developments include a concern beyond state interference, addressing challenges to autonomy and economic independence from various sources.

<sup>83</sup>“Magna Charta Universitatum”: *The Bologna Declaration of 19 June 1999. Joint declaration of the European Ministers of Education*. Available at [http://www.magna-charta.org/library/userfiles/file/BOLOGNA\\_DECLARATION.pdf](http://www.magna-charta.org/library/userfiles/file/BOLOGNA_DECLARATION.pdf) (last visited on 29 March 2013)

strangulation by overall regulatory pressure: By a series of measures that individually could be justified but taken together would be oppressive.”<sup>84</sup>

The Fundamental Law already restricted the possible scope of institutional autonomy, compared to earlier the constitutional status quo. Even the Fundamental Law of one year ago, however, gave a much greater scope to the autonomy of universities than the Fourth Amendment does. “Institutions of higher learning” are now autonomous merely in regards to “the contents and methodology of research and teaching” while “their rules of organization” are now to be regulated by an Act. This shift towards more government control was realized in the new law on higher education, adopted in 2011, which, in turn, forms part of a general trend of heavy centralization and a distrust in autonomous structures and bodies upon which the government has limited influence.

Further curtailment of institutional autonomy can be criticized on substantive grounds, but would not be in itself pose a problem for constitutionality. However, the very fact that this clause was added to the Fundamental Law shows the governing majority's acknowledgment that the planned extension of state control might not be upheld under the existing constitutional framework, despite other attempts to limit the scope of constitutional constraints in various ways.<sup>85</sup>

The amendment that specifically addresses institutional autonomy in higher education raises the legitimate fear that the government seeks to extend the possible scope of intrusion beyond the earlier constitutional limits, effectively trumping the guaranteed autonomy of the institutions. Although a direct reference to autonomy of the higher education and its institutions was lacking in the previous constitution, the Constitutional Court developed the key constitutional guarantees in its case law. Earlier decisions of the Constitutional Court concluded that the right to higher

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84Dr. Per Nyborg, Chairman, Committee for Higher Education and Research, Council of Europe, *Institutional autonomy. Relations between state authorities and higher education institutions*, 2002, p. 2. Available at [http://www.see-educoop.net/education\\_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf](http://www.see-educoop.net/education_in/pdf/bologna-institut-autonom-oth-enl-t02.pdf) (last visited on 29 March 2013)

85These include invalidation Constitutional Court case law from 1990 to 2011, set forth in the Fourth Amendment (see below the section of present brief on the annulment of previous case law), the earlier constitutional amendments that permitted expanding the number of judgeships as well as packing the Constitutional Court, and the curtailment of institutional autonomy already in the Fundamental Law.

education is part of the right to human dignity and that the functioning of higher education institutions is the institutional guarantee of the right to culture.<sup>86</sup> The Court further stated that the autonomy of higher education institutions is the fundamental guarantee of the scientific and educational freedom and maintaining this autonomy is a state obligation.<sup>87</sup> This decision listed economic autonomy—the power to adopt a budget, to use financial sources—as inherent part of institutional autonomy. The Court interpreted academic freedom as including an active obligation of the state to provide for adequate institutional guarantees of pursuing academic activities without external interference. There is legitimate role for the state to set up a framework that encourages institutions to use their resources in an effective way. However, influence on economic decisions cannot go as far as emptying the exercise of autonomous powers.

Most importantly, the Court addressed in its prior case law the issue of autonomy in economic matters, and concluded that the establishment of a separate body—the University Economic Council—exercising veto power in financial matters, with limited scope, is incompatible with institutional autonomy. The Court opined that this can also interfere with autonomy in scientific and educational matters. The Court found a violation despite the fact that the Senate, the main autonomous decision-making body of the university elected the majority of the Council members, because members appointed by the Minister of Education could also vote.<sup>88</sup>

The Fourth Amendment goes beyond this unconstitutional regulation in two respects: government control can be extended to all financial matters and the government can directly and fully exercise this power which is, accordingly, completely taken away from the autonomous bodies of the university.

We do not know how deep this direct state control in financial matters can go, vetoing or taking over individual, departmental decisions on spending, hiring, promotion, financing research etc. A lot will depend on the actual regulation based on the amendment, but it is already clear that opening the possibility of direct state

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86Decisions 35/1995. (VI. 2.), and 62/2009. (VI. 16.) respectively.

87Decision 41/2005. (X. 27.).

88Decision 39/2006. (IX. 27.).

supervision in general, not limited to exceptional cases, upsets the delicate balance between responsibility and autonomy in higher education, and endorses manual steering instead of using only government powers to set up a legal-financial framework.

According to the 'Technical Note' of the Government as well as the original 'official motivation' to the amendment, the new rule "may not affect the autonomy of research and education", which is hard to imagine as these activities largely depend on financing. It can be argued, in light of the budgetary austerity measures and ministerial decisions in the recent years<sup>89</sup> that the amendment only maintains the already established direct influence of government actions by removing an important column from the building of constitutional guarantees. But that is not an argument in favor of the amendment.

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89There were already important means of government control in place that were only reinforced with the new Act on Higher Education of 2011, as noted earlier. The new possibility for state control can reinforce existing attitudes of submission to government decisions and of informal pressures as well as the impact of state interference through formal channels like centralized decisions on key admission numbers or privileged status of certain institutions. Paradoxically, while we saw increasing centralization, state subventions for higher education dropped in the last five years by more than half. See: Hungarian Rectors' Conference, *Data and facts on Hungarian higher education. State subvention in real value, 2008–2013*. Available at <http://www.mrk.hu/wp-content/uploads/2013/02/2008-2013-Állami-támogatás-reálérték.pdf> (last visited on 29 March 2013) We should note that this happened with a decrease in the number of students, albeit by a considerably smaller degree.

## **Constitutionalizing “student contracts” (Article 7 of the Fourth Amendment)**

According to Article 7 of the Fourth Amendment, Article XI of the Fundamental Law (on the right to education) is supplemented with the following paragraph:

- (3) An Act of Parliament may set as a condition for receiving financial aid at a higher educational institution the participation in, for a defined period, employment or enterprise that is regulated by Hungarian law.

The problems concerning this provision are manifold.

First, the proliferation of constitutional regulation is a problematic tendency that the current government has habitually endorsed. This means that detailed policies like this one are not left to ordinary politics but are instead cemented in the Fundamental Law.<sup>90</sup>

Second, as with other provisions of the Fourth Amendment, its aim is to overcome a foreseeable annulment of existing legislation by the Constitutional Court, thus it is a form of preventive-retaliation to earlier constitutional concerns raised by the Court. As the analysis of three leading Hungarian human rights NGOs<sup>91</sup> points out, the so-called “student contracts” were originally introduced by a Government Decree in January 2012, setting out that in exchange for the state contributing the costs of university education, students are obliged to work in Hungary for a certain period of time after obtaining their degree, otherwise they will be obliged to return the costs of their studies. Upon the request of the Ombudsman of Hungary, the Government Decree referred to above was abolished by the Constitutional Court in its decision 32/2012 (VII. 4). The Constitutional Court based its decision only on formal reasons

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<sup>90</sup> Student organisations for example claim it to be a constitutional nonsense and internationally unprecedented to regulate detailed rules on the conditions of entering higher education in the constitution.

See

[http://hallgatoihalozat.blog.hu/2013/02/09/about\\_the\\_rule\\_of\\_law\\_declaration\\_of\\_the\\_hungarian\\_student\\_network\\_and\\_the\\_hungarian\\_high\\_school\\_net](http://hallgatoihalozat.blog.hu/2013/02/09/about_the_rule_of_law_declaration_of_the_hungarian_student_network_and_the_hungarian_high_school_net)

<sup>91</sup> See the opinion of the Hungarian Helsinki Committee, the Eötvös Károly Institute and the Hungarian Civil Liberties, [http://helsinki.hu/wp-content/uploads/Appendix\\_1\\_Main\\_concerns REGARDING THE 4th Amendment TO THE Fundamental Law of Hungary.pdf](http://helsinki.hu/wp-content/uploads/Appendix_1_Main_concerns REGARDING THE 4th Amendment TO THE Fundamental Law of Hungary.pdf)

and, therefore, did not examine the substantive constitutionality of the student contract.

On the day this decision of the Constitutional Court was announced, the parliamentary committee dealing with educational matters proposed an amendment to the pending law on higher education, reintroducing the rules of the former Government Decree on student contracts without any change. Consequently, it is now included in Act CCIV of 2011 on National Higher Education that students have to work in Hungary double the time of the period of their studies within the first 20 years after obtaining their degree, otherwise they are obliged to refund the costs of their studies. As a result, if a student gets a five-year university degree, as is normal in Hungary, the student would have to work in Hungary for ten years to pay the state back for its scholarship. As the three aforementioned NGOs pointed out in a letter sent to Council of Europe Secretary General Jagland and European Commission Vice-President Reding, decisions of the Constitutional Court have definitely served as a *casus belli* for the governing majority and they aim to amend the Fundamental Law in order to exclude the further constitutional review of certain topics.

Third, substantive concerns under Hungarian constitutional law can also be raised against the provision. As the Ombudsman's petition to the Constitutional Court states, and the Court's assessment also implies, these measures not only put indigent students, who are not able to pay for their studies, in a disadvantageous situation, but also disproportionately restrict the rights of students to choose their occupation freely. Furthermore, students undertake a long-term obligation when signing the contract, while the state shall only "strive" to ensure adequate working possibilities.<sup>92</sup> Based on the reasons above, the Ombudsman of Hungary requested the Constitutional Court to review the rules on student contracts on the merits; the decision is pending. Since the Constitutional Court only ruled on formal, technical aspects of the legislation and held that the act on national higher education unconstitutionally authorised the government

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<sup>92</sup> In February 2013, overall unemployment in Hungary was at about 11% but the youth unemployment rate was at 28%. See "Hungary's Unemployment Rate Rises To 8-Month High" at <http://www.rttnews.com/2064406/hungary-s-unemployment-rate-rises-to-8-month-high.aspx>. Youth who *want* to stay in the country cannot find work. Under such circumstances, it is not clear that students who *have* to stay in the country can find work either.

to lay down substantive elements of the student contracts, and the subject matter should have been regulated by an Act of Parliament, the Ombudsman submitted another petition, repeating its opinion that obliging students with state grants to sign a contract restricts their rights to freely choose an occupation and participate in higher education, and requested the Court to rule on the substance of the case. On the requests of the National Conference of Student Self-governments, Fundamental Rights Commissioner (ombudsman) Máté Szabó argued the regulation puts unnecessary and disproportionate restrictions on the fundamental rights of students in higher education and infringes the requirement of equal treatment, and student contracts constitute a restriction on the rights of students to self-determination and their right to freely choose their work and profession.<sup>93</sup> The incorporation of this provision into the Fundamental Law creates severe internal inconsistencies and interpretational difficulties concerning these constitutional rights. As the three aforementioned NGOs pointed out in a letter sent to Council of Europe Secretary General Jagland and European Commission Vice-President Reding, “this manner of constitution-making undermines the stability and enforceability of the Fundamental Law.”<sup>94</sup>

Fourth, concerns under EU law can also be raised against the provision. In his petition to the Constitutional Court, the Ombudsman also referred to the fact that, when assessing the rules on student contracts, the principle of the freedom of movement of workers within the European Union and Article 15 of the Charter of Fundamental Rights of the European Union should also be taken into account.<sup>95</sup> Given that the Constitutional Court has been asked to rule on this matter again, it may be concluded that, through the proposed amendment to the Fundamental Law, the governing party aims to overcome possible constitutional problems related to the student contracts by creating an express constitutional basis for the restriction of the students’ rights to move and to freely choose their occupation. According to the European Lawyers for Democracy and Human Rights:

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<sup>93</sup> AJB-2834/2012, [http://www.ajbh.hu/allam/eng/aktual/20120416\\_2.htm](http://www.ajbh.hu/allam/eng/aktual/20120416_2.htm)

<sup>94</sup> <http://helsinki.hu/en/newest-amendment-to-the-fundamental-law-of-hungary-would-seriously-undermine-the-rule-of-law>

<sup>95</sup> See also <http://www.eoi.at/d/Sonderberichte%20-%20Brosch%C3%BCren/Ungarn/hu-The%20Constitutional%20Court%20proceedings%20and%20the%20Ombudsman's%20Activity%20in%202012.pdf>

the restriction of students of higher education, who seek public grants, to work abroad from Hungary after finishing their studies, limits their freedom of movement severely. This amendment contradicts Article 15 p. 2 EUChHR, under which every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State. As well this amendment violates the freedom of movement granted under Article 45 p.1 EUChHR, it violates as well the freedom of movement under Article 21 TFEU.<sup>96</sup>

In regard to the original legislation, Allan Päll, Chair of the European Students' Union (ESU) called student contracts a modern enactment of serfdom,<sup>97</sup> and called upon the European Commission to take action and immediately start a thorough investigation into its compliance with EU law.<sup>98</sup> EU Commissioner for Social Policy, Employment and Inclusion Lászlo Andor promised an investigation in the case,<sup>99</sup> and a pilot investigation has been launched.<sup>100</sup>

With respect to EU Law, the opinion of Advocate General Eleanor Sharpston in the joined cases of Laurence Prinz v. Region Hannover and Philipp Seeberger v. Studentenwerk Heidelberg<sup>101</sup> are particularly instructive. The cases concern Germany, where students who are EU citizens may apply for funding of their studies in another Member State. However, for funding for the full duration of their studies abroad, they have to show three years of uninterrupted residence in Germany immediately before commencing those studies, otherwise, they can receive funding only for the first year of such studies. The Advocate General argued that „EU law does not oblige Member

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<sup>96</sup> <http://www.eldh.eu/publications/publication/eldh-declaration-concerning-the-fourth-amendment-of-the-hungarian-constitution-152/>

<sup>97</sup> He also added that „the Hungarian government is just cutting down on education like a blind butcher while on top of this limiting the freedom of their students after their graduation. This should be brought to an end as soon as possible otherwise Hungary risks becoming an open prison.” <http://www.esu-online.org/news/article/hungaryhook/567/>, <http://lists.esu-online.org/pipermail/presslist.unitedkingdom/2012-February.txt>

<sup>98</sup> <http://www.erdon.ro/eu-seeks-information-on-hungarys-new-student-contracts/2131580>

<sup>99</sup> <http://www.esu-online.org/asset/News/6001/1756461.PDF>

<sup>100</sup> <http://www.accessmylibrary.com/article-1G1-309960186/eu-seeks-information-hungary.html>, <http://www.erdon.ro/eu-seeks-information-on-hungarys-new-student-contracts/2131580>,

<http://www.budapesttimes.hu/2012/12/03/eu-inquiry-into-student-contracts-opens/>

<sup>101</sup> C-523/11 and C-585/11

States to award funding for studies pursued either within their territory or elsewhere. However, if they do so, the funding must comply with EU law such as the right of EU citizens to move and reside freely within the territory of the Member States.”<sup>102</sup> She concluded that the three-year rule constituted a restriction on the free movement rights of EU citizens:

By its very nature, such a residence requirement is likely to discourage an EU citizen from exercising his right to move to another Member State. ... If such a restriction may, in principle, be justified by the economic objective of avoiding an unreasonable burden which could have consequences for the overall level of assistance,<sup>103</sup> it is not sufficient for a Member State merely to assert, without more, that the measure pursues such an objective. The Member State must, rather, assess the actual or potential risks arising from making particular types of funding available. Based on that assessment, it may then determine what would be an unreasonable financial burden and define measures aimed at avoiding or limiting the risk that such a burden will be created.<sup>104</sup>

According to Advocate General Sharpston, whether the three-year rule is appropriate for achieving the economic objective will depend on whether the risk is reduced to a reasonable level by the application of the three-year rule. And whether the rule is proportionate in relation to that objective will depend on whether it imposes no greater restriction than is needed to bring the financial burden within the limits of the reasonable. To make that assessment, the national courts have to know (i) what is considered to be an unreasonable financial burden and (ii) what the quantitative impact of the three-year rule on that burden is estimated to be.<sup>105</sup>

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<sup>102</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0523:EN:HTML>

<sup>103</sup> See Judgments in Case [C-209/03, Bidar](#), see also Press Release [No 25/05](#), and in Joined Cases [C-11/06 and C-12/06, Morgan and Bucher](#), see also Press Release [No 77/07](#).

<sup>104</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0523:EN:HTML>

<sup>105</sup> For relevant case law, see for example Commission c. Austria (C-147/03), Bressol (C-73/08), Bosman (C-415/93), Zanotti (34 C-56/09), Morgan (C-11-12/06), Laysterie du Saillant (C-9/02), Kranemann (C-109/04), D’Hoop (C-224/98), Terhoeve (C-18/95), Graf (C-190/98). Also see Susanne K. Schmidt: The Path-dependency of Case Law and the Free Movement of Persons, paper presented at the EUSA Twelfth Biennial International Conference, Boston, 2011, [http://euce.org/eusa/2011/papers/5b\\_schmidt.pdf](http://euce.org/eusa/2011/papers/5b_schmidt.pdf).

The “student contract” provision has been inserted into the Fourth Amendment in an attempt to shield it from constitutional review in Hungary, even though it infringes both the freedom of movement of people and also their ability to freely choose an occupation. Moreover, the restriction of students to the territory of Hungary for their employment for up to ten years<sup>106</sup> violates the rights guaranteed in the European Charter of Fundamental Rights, particularly Article 15(2) to work anywhere in the EU.

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<sup>106</sup> While Article 7 of the Fourth Amendment does not insert the precise term of years that a student would have to remain in country to work in exchange for each year of student fellowship, the number actually used in the Government Decree of January 2012 is two years required work in Hungary for every one year of higher education that the government funded. A normal five-year degree would therefore incur ten years of obligation to work in Hungary.

### **The illegality of homelessness (Article 8(3) of the Fourth Amendment)**

The Act on Petty Offenses, which was adopted in 2011 and came into force in 2012, makes it a ‘petty criminal offense’ to reside habitually in public spaces or to store belongings there. Habitual offenders risk being imprisoned or fined. The Hungarian Constitutional Court in 2012 annulled this provision of the Act.<sup>107</sup> According to the decision, this legislation ‘criminalised’ homelessness as a social situation and breached the principle of the rule of law. The reasoning of the decision relied on the interpretation of fundamental rights by the Constitutional Court contained in decisions that have since been annulled by the Fourth Amendment.

The Court in its 2012 decision stated that homelessness is a social problem that should be dealt with by the state by means of social intervention and social assistance rather than punishment. According to the decision, declaring homeless persons dangerous to society and punishing them is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law.<sup>108</sup> This interpretation of the Fundamental Law followed from the earlier reading of fundamental rights by the Court, which put the right to human dignity on the top of the hierarchy of fundamental rights, connected it with equality and defined human dignity as an essential character of humanity.<sup>109</sup> The Court underlined in several of its decisions that everybody must be treated as persons with equal dignity and it had required that all members of society have equal fundamental rights. Legal equality in this reading implies that the state is responsible for the equal treatment of all persons residing in its territory.

After the Constitutional Court had rendered its decision, the Hungarian Prime Minister announced that the government intended to prohibit homelessness in the Fundamental Law, which would put the issue beyond the reach of the Constitutional Court again. The Fourth Amendment Article 12(3) prohibits the Court from

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<sup>107</sup> Decision 38/2012. (XI. 14.)

<sup>108</sup> „Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception.” Article II /FREEDOM AND RESPONSIBILITY/

<sup>109</sup> See for instance decision 23/1990. (X. 31.) on capital punishment, and decision 64/1991. (XII. 17.) on the regulation of abortion.

reviewing constitutional amendments for their substantive violation of constitutional principles – such as, for example, human dignity.

The Fourth Amendment modified the text of the Fundamental Law as the Prime Minister indicated, overruling the decision of the Constitutional Court. While the initial Article CCII of the Fundamental Law said only that “Hungary shall strive to provide every person with decent housing and access to public services,” the amendment adds two new sections to that article:

- (2) The State and local governments shall also contribute to creating the conditions of decent housing by striving to provide accommodation to all homeless people.
- (3) 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.

The juxtaposition of these two articles creates a cruel contradiction. While the new Article XII(2) requires the state and local governments to “strive” to provide accommodations, it is the homeless persons themselves who pay the price in Article XXII(3) if the governments fail in their striving. By putting into the constitution the power of the national and the local governments to “declare illegal” living in public places, the government places the burden of inadequate housing directly on those who suffer already from having no place to live.

According to Special Rapporteurs on Poverty and Housing within the Office of the UN High Commissioner for Human Rights, Hungary currently has about 30,000 homeless people. By the time that the Constitutional Court declared unconstitutional the prior law, the government had collected \$125,000 USD in fines paid by homeless

people, according to the UNCHR report.<sup>110</sup> In addition to paying these fines, homeless people also had their property confiscated.

As the Hungarian Ombudsman pointed out there are documented cases where homeless people do not have access to shelter and where shelters reject applicants by sometimes arbitrary selection (especially burdening foreigners who do not speak Hungarian, including recognized refugees).<sup>111</sup>

The Fourth Amendment modified Article XII in the Fundamental Law so that it no longer supports the former moral reading of the constitution that was based on personal autonomy, freedom and equality. The limitation of the rights of homeless people particularly reinforces the anti-egalitarian character of the Fundamental Law. The text of the amendment is in direct conflict with an earlier interpretation of the Fundamental Law by the Constitutional Court and with the rights of human dignity:

The right to human dignity in Constitution, Art. 54(1) was a natural right of which no one could be deprived. Such right included, *inter alia*, the right to free personal development, to self-determination, to privacy or the general freedom of action. It was a "mother right," a subsidiary fundamental right which might be relied upon to protect an individual's autonomy when no particular, specified fundamental right was applicable.<sup>112</sup>

Moreover, the law has a discriminatory impact on those living in poverty and belonging to disadvantaged social groups. It also misinterprets the right to housing. Since Article XXII goes against the moral concept behind fundamental rights protection, it violates internationally protected fundamental rights named in binding international fundamental rights conventions.

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<sup>110</sup> "Hungary is entrenching the criminalization of homelessness – UN experts on poverty and housing" available at

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13206&LangID=E>

<sup>111</sup> Report of the Commissioner for Fundamental Rights, No. AJB-1692/2010, <http://www.ajbh.hu/-/ahajlektalan-menekultekrol>

<sup>112</sup> See first in decision 8/1990. (IV. 22.)

The International Covenant on Civil and Political Rights (ICCPR, 1966) of the United Nations in its Preamble recognizes the centrality of human dignity. Article 1 of the European Charter of Fundamental Rights proclaims that “human dignity is inviolable.” Article II of the Hungarian Fundamental Law says the same.

According to these provisions, the recognition and protection of inviolable human dignity shall not depend on decent housing or on property. It must be respected as an inalienable right of all humans. But according to amended Article XXII of the Fundamental Law, the rights of homeless people may be restricted by law in order to protect other social values, in particular “public order, public security, public health and cultural values.” While some fundamental rights have been limited in the name of public order, security and health, it is highly unusual to restrict a fundamental right in order to protect “cultural values.” The human dignity of the individual, which stands at the pinnacle of human rights protection, should not be limited in this way.

The amended provision on the right to housing therefore rejects “the equal and inalienable rights of all members of the human family;”<sup>113</sup> homeless people are deprived of fundamental rights only because they are in a disadvantaged situation. One of the possible interpretations of this provision of the Fundamental Law is that it restricts the inviolable dignity of homeless people.

The possible criminalization of homeless people also discriminates against people on the grounds of poverty. The European Convention on Human Rights states in Article 14 that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” While the ECHR does not specifically mention poverty, its other specifically listed grounds of impermissible discrimination are weighted heavily toward statuses over which people have no control. Poverty is one such status.

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<sup>113</sup> The International Covenant on Civil and Political Rights (CCPR, 1966)

Poverty in Hungary is not randomly distributed. While the general unemployment rate in Hungary is currently about 11%, the unemployment rate among Roma is certainly in excess of 70% and some sources indicate that it may be higher than 90% in some parts of Hungary.<sup>114</sup> Household surveys by international development organizations have found that 44% of Roma with homes have no indoor plumbing or electricity. While a count of Roma homeless is not available, it is not hard to see that the homelessness problem is very likely to be overwhelmingly a Roma problem. Making homelessness illegal, then, has drastically unequal effects on majority and minority communities in Hungary.

There is no doubt that the criminalisation by the legislator of a status that is disproportionately occupied by a disadvantaged minority group violates the ban on discrimination and infringes the Charter of Fundamental Rights and other international obligations. Moreover, new Paragraph 3 of Article XXII of the Fundamental Law stipulates the legislator's entitlement to punish homelessness as part of the right to decent housing.

Hungary is obliged under the European Social Charter (Council of Europe), and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) to engage in the progressive realization of the right to adequate housing. Article 34 of the Charter on Fundamental Rights of the European Union provides also that in order to combat social exclusion and poverty, the EU recognises and respects the right to social and housing assistance. The new Article XII(2) of the Fundamental Law commits the government to working to attain accommodation for all as its international obligations would require, but the new Article XII(3) subjects the homeless to punishment in the meantime.

The Preamble of the European Social Charter mentions as its aim that the states shall secure to their populations the specified social rights in order to improve their standard of living and their social well-being. The social rights are to be addressed by improving social well-being and not by criminal proceedings against those who have

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<sup>114</sup> Immigration and Refugee Board of Canada, Hungary: Situation of Roma, including employment, housing, health care, and political participation June 2012, available at <http://www.unhcr.org/refworld/country,IRBC,,HUN,,5036010888,0.html>.

not attained these rights. Article 2 of the UN Convention on Economic, Social and Cultural Rights imposes a duty on all parties to „take steps [...] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” The punishment of homeless persons and the confiscation of their property is surely not a legislative measure that moves toward full realisation of the social rights and the permission for this legislation in the constitution directly contradicts both rights elsewhere in the constitution and Hungary’s international legal obligations.

As the Hungarian Constitutional Court has stated in its now-overturned decision, homelessness is a social issue and not a criminal one. The real aim of the right to adequate housing is to secure living in security, peace and dignity. Paragraph 3 of Article XXII violates the spirit of international conventions on economic, social and cultural rights and the same law, in its previous life as a statute, also once violated the new Hungarian Constitution as well.

## **Limitations on the recognition of nationalities (Article 9 of the Fourth Amendment)**

The Fourth Amendment also complements the provisions of the Fundamental Law concerning nationalities. Article XXIX(1) of the Fundamental Law recognizes nationalities as “constituent parts of the state” and attaches a series of individual and collective rights to this status including, in Article XXIX(2), the right to establish local and national self-governments. Article XXIX(3) contemplates a scheme through which nationalities other than the Hungarian one will be officially recognized and it is this part of the article that is amended by Article 9 of the Fourth Amendment.

The amendment adds the following sentence to Article XXIX(3) of the Fundamental Law:

By virtue of such cardinal Act, recognition as a nationality may be subject to national status of a specific period and to the initiative of a specific number of individuals who declare to be members of such nationality.

The amendment explicitly indicates that the recognition of a group as a nationality can be limited to those groups that have held national status already for a certain period of time, which appears to limit the ability of new groups to Hungary to claim such status. In addition, the recognition of a nationality may be made contingent on a minimum number of members of the nationality residing in Hungary, which limits the ability of smaller groups to claim nationality status.

This may not sound terribly important, until one recognizes the rights that may not be claimed unless one is a member of a recognized nationality. The rights to “freely use their native languages and to the individual and collective uses of names in their own language, to promote their own cultures and to be educated in their native languages”<sup>115</sup> are contingent on the recognition of a nationality. In addition, the new election framework<sup>116</sup> envisions that voters will be able to declare an identity as a member of a nationality and thereby trade their party list vote for a vote that could be used to vote for a party representing that nationality. But the collective rights of

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<sup>115</sup> Fundamental Law, Article XXIX(1).

<sup>116</sup> Act CCIII of 2011.

education in one's own language and the preservation of cultural identity, as well as the right to establish local and minority self-governments, are privileges limited to those whose nationalities have been recognized.

The Fourth Amendment's addition to this article in the Fundamental Law puts more restrictions on the sorts of groups that can claim nationality status. A cardinal act will determine the specifics, which are not in the constitution, but given the strongly ethnic conception of the nation that runs all of the way through the constitution, which starts with the declaration that the constituent power in the constitution is the "Hungarian nation," the worry is that the recognition of new nationality groups may be limited unduly by these restrictions.

## **Powers of the Speaker of the Parliament, and the Parliamentary Guard (Article 10 of the Fourth Amendment)**

The Fourth Amendment's Article 10 authorizes the Speaker to preserve the dignity of the Parliament, as he/she 'shall have law and order and disciplinary powers as defined by the Rules of Procedure'. With this, the authorization has a constitutional status, confirming his increased disciplinary powers over members of Parliament and entrenching his position as the head of an independent military force that comes with his office.

Before the recent constitutional changes, the general powers of the Speaker had been included in the House Rules of the Parliament.<sup>117</sup> But recently, new disciplinary powers of the Speaker have added also to Cardinal Law on the Parliament.<sup>118</sup> Recent disruptions in the Hungarian Parliament by members of the far-right Jobbik party resulted in a change of parliamentary procedure giving the Speaker of the Parliament increased disciplinary powers over unruly MPs. According to these recent amendments to the Cardinal Law on the Parliament as well as to the parliamentary House Rules, the Speaker may order the removal of anyone from the chamber for a violation of the dignity of the Parliament or a violation of order in the Parliament. Such a violation could include speaking out of turn repeatedly or using profane language. The Speaker has the discretion to determine what behavior is inappropriate.

Before the Speaker may remove an MP from the Parliament, however, he must call for a vote of the Parliament, even in cases when an MP uses force or the threat of force in the chamber. If Parliament does not have a quorum, the Speaker can decide to remove the MP on his own decision. However, during the next session Parliament has to vote on the legality of the actions to remove an MP. In all cases, the Speaker has to warn the MP before acting. If the Speaker decides to remove the MP, the Parliamentary Guard escorts the MP out. If an MP was previously banned from a session, the Parliamentary Guard may be given the responsibility to block the person from re-entering. The Fourth Amendment raises the general power of the Speaker to discipline MPs to constitutional status.

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<sup>117</sup>Decree of Parliament 46/1994. (IX. 30.).

<sup>118</sup> Act CCIX of 2012.

The Fourth Amendment allows the Speaker to exercise disciplinary action against MPs “in order to ensure the undisturbed operation of Parliament and to preserve its dignity.” The “dignity” of the institution begs for a definition that would limit the discretion of the Speaker. By entrenching the Speaker’s “law and order and disciplinary powers,” the constitution now contains a power with potential for abuse. The Law on the Parliament requires MPs to vote on expulsion, which is a check on the speaker. And the Law on the Parliament also provides for an appeal of an expulsion decision to the Disciplinary Committee of the Parliament, which is another check. But with the current Parliament having a two-thirds vote for whatever its own Speaker decides, these limitations may not be much of a check at the moment. Even with a simple majority, which any Speaker will have, both a majority vote and a committee process will be in the hands of the governing parties.

While of course order is essential to the accomplishment of parliamentary work, the worry is that the Speaker, backed by his party, has the right to remove opposition MPs from the chamber based on vague standards.

The potential for abuse of this power is increased by the Fourth Amendment’s Article 10(2), which puts the Speaker in sole command of a new Parliamentary Guard. The Parliamentary Guard was created by a law in April 2012<sup>119</sup> that broke up the old Republican Guard that was responsible for guarding all top state officials. The old Republican Guard was part of the Hungarian police, bound by its laws and under its general command structure.

By contrast, the new Parliamentary Guard, which has about 350 members, is not within the general command structure of the police or the military but is a separate unit that is accountable to the Speaker alone. (This is part of a general proliferation of security forces that are not under the command of either the military or the police but that are instead accountable to specific members of the government.) Unlike the old Republican Guard, the new Parliamentary Guard’s operations are not clearly covered by the police law . The new Guard’s members may not only carry weapons, but they

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<sup>119</sup> Act XXXVI of 2012.

are also given very wide powers to protect the Parliament. Some of the Guard's powers seem not well suited for this purpose. For example, the members of the Guard may "act in private homes," though it is not clear why they would need to do so since the Parliament never meets in private homes. Members of the Parliamentary Guard may also make audio and video recordings of people in public places, search vehicles, luggage and clothes, and use both handcuffs and teargas.

These capacities are not in the constitution, of course, but a listing of the Parliamentary Guard's powers provide some sense of the tool that is now given the Speaker of the Parliament to wield as he is also gaining the new powers to discipline MPs. Under the Fourth Amendment, the Speaker of the Parliament now has the entrenched power to discipline MPs, but he also has an armed guard responsible to no one but him to accomplish this task.

## **Ban on substantive review of constitutional amendments (Article 12 of the Fourth Amendment)**

Section (5) of Article 24 of the amended Fundamental Law bans the Constitutional Court from reviewing constitutional amendments for substantive conflicts with constitutional principles, and allows only review for conformity with the procedural requirements with respect to an amendment's adoption and promulgation.

In his letter to Mr. Thorbjørn Jagland, Secretary General Council of Europe, Mr. Tibor Navracsics, Minister of Public Administration and Justice explains:

The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements regulated in the Fundamental Law. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case-law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/2011, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice.

Unfortunately none of these arguments are correct.

A great number of petitions reached the Constitutional Court concerning the November 2010 constitutional amendments that sought to curtail the Court's powers in fiscal and budget matters.<sup>120</sup> The restriction of the Court's jurisdiction was instituted in retaliation for a decision that the Court made, declaring unconstitutional a

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<sup>120</sup> Act CXIX of 2010

98% retroactive tax on “exit bonuses”<sup>121</sup> given to state employees in the preceding five years. In their decision 61/2011(VII. 13), the justices of the Constitutional Court refused to perform a review of the substance of these amendments. At the same time, however – and this was the first time in the Court’s judicial practice – they undertook an investigation, despite the lack of explicit competence to do so, into the constitutional validity of these amendments by examining the procedure that led to their adoption, even though the justices did not find the petition well-grounded in this regard. The three dissenting justices, however, believed that an examination of the substance of the amendments was also necessary, and two of them would have nullified the impugned constitutional amendments, which they deemed – albeit to differing degrees – unconstitutional on substantive grounds.

The Court’s majority reasoning was to a significant degree based on a conservative thesis that since the Hungarian Constitution did not contain any immutable provisions, the Constitutional Court did not have a standard against which to assess the substance of the constitutional amendments. In the world, only a minority of constitutions contain explicit “eternal clauses,” however. The most famous is undoubtedly the German *Grundgesetz*’s Article 79 (3), but even this provision lacks an explicit jurisdictional rule that would authorize the Federal Constitutional Court to protect the immutable constitutional provisions during the process through which constitutional amendments are enacted. It was the justices of the Court in Karlsruhe who endowed themselves with this power by construing the *Grundgesetz* accordingly. The same was true of most judicial bodies which – acting as guardians of their respective constitutions and in the process of reviewing constitutional amendments – derived this jurisdiction for themselves even without an “eternal clause.” The most prominent example is the Indian Supreme Court’s doctrine on the “basic structure” of the Constitution, which the Court has used as a basis for conducting a review of constitutional amendments even without an “eternal clause” and without express constitutional authorization to do so.

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<sup>121</sup> Exit bonuses were sums of money paid to state employees upon leaving their jobs. Everyone from schoolteachers to high-level civil servants received these payments.

In the last days of 2011, the Hungarian Parliament enacted the so called Act on the Transitional Provisions to the Fundamental Law, which the government claimed had constitutional status. These Transitional Provisions supplemented the new constitution even before it went into effect. At the very end of 2012, the Constitutional Court in its decision 45/2012 (XII. 29) ruled that those parts of the Transitional Provisions of the Fundamental Law that were not transitional in nature could not be deemed part of the constitution, and were therefore invalid. This decision did not review the substantive constitutionality of the Transitional Provisions, since the petition of the ombudsman asked for an exclusively formal review and therefore the substantive question was not referred to the Court. But the majority of the justices this time emphasized in the reasoning that it is the constitutional responsibility of the Court to protect the unity of the constitution, and to ensure that the text of the constitution can be clearly identified. The justices added that an amendment of the constitution cannot create an unresolvable inconsistency in the text of the constitution. Therefore they argued: “In certain cases, the Constitutional Court can examine the continuous realization of the substantial constitutional requirements, guarantees and values of the democratic state governed by rule of law, and their incorporation into the constitution.” In this decision, therefore, the Court held that it had the power to review constitutional amendments for their substantive constitutionality.

As we can see, the formal review power in the case of constitutional amendments isn't a new competence for the Constitutional Court, since the Court has derived this from its competences both under the old, as well as under the new, constitution. While the Court had in the past said it did not have the power to review amendments to the constitution on substantive grounds, the Court in its decision 45/2012 has indeed changed its opinion, taking the power to review future constitutional amendments for their substantive conflict with basic constitutional principles. Therefore the Fourth Amendment's ban on substantive review of constitutional amendments is a direct reaction to this decision of the Constitutional Court from December 2012. The real reason for this ban is to prevent the Court from evaluating on substantive grounds the Fourth Amendment or any subsequent amendment. The ban on substantive review of constitutional amendments in the Fourth Amendment has therefore allowed the government to escape review by inserting any previously declared unconstitutional provision directly into the constitution. This move abolished the difference between

ordinary and constitutional politics, between statutory legislation and constitution making. Now the government's two-thirds majority is above any power that might constrain it. It can, constitutionally speaking, now do anything it wants.

## **The competencies of the President of the National Judicial Office (Article 13 and 14 of the Fourth Amendment)**

The Fourth Amendment entrenches *in the constitution itself* powers of the president of the National Judicial Office (NJO) that the Venice Commission has previously criticized as excessive. In Article 13(1) of the Fourth Amendment, the president of the NJO is given the power to perform the central responsibilities of administration while the judicial self-governing organizations merely participate in this task. In addition, Article 14 of the Fourth Amendment gives the president of the NJO the power to move particular cases from the courts to which they have been assigned by law to any other court of her choosing.

Despite the fact that the Hungarian government modified the cardinal laws on the judiciary in summer 2012 to take into account some of concerns that the Venice Commission had expressed in its opinion on the acts on the judiciary,<sup>122</sup> the Fourth Amendment reverts to the broad language that the Venice Commission had previously found problematic when it first encountered these provisions in the original cardinal laws on the judiciary. While the restrictions on the powers of the president of the National Judicial Office are still in place, those restrictions exist in lower-level laws that are not of constitutional status.

The independence of the Hungarian judiciary has been a persistent concern since the Fundamental Law and its associated cardinal laws came into effect in 2012. The Venice Commission noted in its initial review of the Fundamental Law that independence of the judiciary was insufficiently protected in the constitution itself.<sup>123</sup> The Venice Commission at that time recommended that a clearer statement of the independence of the judiciary as a whole be included in the cardinal laws on the judiciary, though it also noted that explicit commitments to separation of powers and

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<sup>122</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, Adopted by the Venice Commission at its 90<sup>th</sup> Plenary Session (Venice, 16-17 March 2012), Opinion 663/2012, Strasbourg, 19 March 2012. (Hereinafter Opinion on the Judiciary)

<sup>123</sup> Opinion on the Fundamental Law of Hungary, Adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session, 17-18 June 2011. Opinion no. 621 / 2011, Strasbourg, 20 June 2011. Para. 102.

the right to a fair trial helped in assuring that the constitution intended to protect the judiciary as an institution. The Fourth Amendment, despite the fact that it is nearly one-third as long as the whole constitution, fails to add an explicit guarantee of the independence of the judiciary to the constitution itself.

At the time of its initial review of the Fundamental Law, the Venice Commission understood that a fundamental reorganization of the judiciary was underway and the Commission expressed regret that the independence of the judiciary was insufficiently protected in the constitution that provided the backdrop for this reform. Rather than reassuring domestic and international audiences of the independence of the judiciary, the cardinal laws on the judiciary that provided the framework for judicial reform instead raised additional areas for concern. Even though one of the new cardinal laws nominally complied with the Venice Commission's recommendation that the institutional independence of the judiciary be reaffirmed, other provisions seemed to limit that independence.

Of particular concern was the creation of a new office, the National Judicial Office (NJO) headed by a single president elected by the Parliament for nine years. When it first encountered this nine-year term in the cardinal law establishing the NJO, the Venice Commission expressed concern that the term was too long.<sup>124</sup> But the Fourth Amendment adds that nine-year term to the constitution itself. The Venice Commission warned when it reviewed the cardinal law that such a long term of office must be accompanied by serious controls on the occupant's powers. But even though the Venice Commission expressed "strong doubts that this control is sufficiently provided by the cardinal laws"<sup>125</sup> that it initially reviewed, there may be even more reason to be worried about a constitutional provision that simply entrenches the office and its nine-year term without also including any of the oversight provisions that the Hungarian government later added to the cardinal laws in an attempt to meet the Venice Commission's concerns.

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<sup>124</sup> Opinion on the Judiciary at para. 30.

<sup>125</sup> Opinion on the Judiciary at para 30.

After the first Venice Commission report on the judiciary, in summer 2012, the Hungarian government added to the cardinal laws on the judiciary some limitations on the powers of the president of the NJO. The Venice Commission, in its review of these amendments, had welcomed the changes that indicated that the president of the NJO would be ineligible to be reelected for a second term.<sup>126</sup>

The Venice Commission also welcomed the modifications of the cardinal laws that required the president of the NJO to give reasons for her decisions in controversial cases and that permitted the Parliament be able to ask for information from her office. The Venice Commission also expressed its satisfaction with the amendments to the law that gave judges a path for judicial review of the personnel decisions of the president of the NJO.<sup>127</sup>.

The Venice Commission has rightly criticized the Hungarian government before for putting too much detail into laws that are too hard to change. But when the constitution gives a particular office the almost absolute power to one person to perform the central responsibilities of administration, it is unclear whether any restrictions or controls on that power are constitutional. Laws inconsistent with powers granted in the constitution may well be found to be unconstitutional because they interfere with the powers granted without qualification in the constitution.

Most importantly, however, the Venice Commission had insisted after its first review of the cardinal laws on the judiciary that more self-governing powers be restored to the judiciary itself. In the initial cardinal law on the judiciary,<sup>128</sup> the President of the NJO was given the power to hire, fire, promote, demote and discipline all of the judges of the ordinary courts, without any substantial oversight from any other institution and in particular without active engagement of the formerly self-governing judiciary itself. The Venice Commission as a result had previously expressed “serious

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<sup>126</sup> 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 92<sup>nd</sup> Plenary Session (Venice, 12-13 October 2012), Opinion no 683/2012, Strasbourg, 15 October 2012. (Hereinafter Opinion on the Revised Judiciary.), para. 15.

<sup>127</sup> Opinion on the Revised Judiciary, para. 23-29.

<sup>128</sup> Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary (AOAC).

doubts about the reform model chosen, which concentrates these very large competencies in the hands of one individual person.”<sup>129</sup>

The revisions to the cardinal law on the organization and administration of the judiciary had gone some way toward giving the judiciary more powers to govern itself though, even then, the Venice Commission had expressed disappointment that the powers given to the judiciary were not greater. In particular, the Venice Commission was critical of the way that the body exercising a check on the powers of the president of the NJO, the National Judicial Council (NJC), was constituted because the judges who rotated onto this council were not guaranteed to have the relevant powers of control. The Venice Commission was still critical its October opinion because the system through which the input of judges would be assured was still too weak.<sup>130</sup>

The Fourth Amendment does not empower the judiciary any further in its oversight of the president of the NJO even while it entrenches in the constitution her dominant powers for managing the judiciary. The amendment may, in fact, weaken the control that the judges are now guaranteed. It states that the judiciary shall “participate” in the management of the courts, but “participation” is a weak term. The NJC may “participate” but be consistently overridden by the president of the NJO and there is nothing in the constitution that gives the judges any more power than that. Therefore, the various *stronger* restrictions on the president of the National Judicial Office – for example, that she must pick the person for a vacant judgeship or for a leadership role in a court who is ranked first by the judicial council or that she must get approval from the judicial council for her choice of someone else on the list – may be inconsistent with her almost absolute power in the constitution to manage the courts with the “participation” of judges. “Participation” does not imply anything as strong as a veto, which is what the reforms of summer 2012 gave to the National Judicial Council in some matters.

As a result, it is not clear whether the concessions that the Hungarian government made to the opinion of the Venice Commission in summer 2012 are consistent with

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<sup>129</sup> Opinion on the Judiciary at para. 25.

<sup>130</sup> Opinion on the Revised Judiciary, para. 35.

the constitution as modified by the Fourth Amendment. The president of the NJO has a nine-year term and the power to perform the central responsibilities of the administration of the judiciary. The constitutional amendment does not strengthen the position of the judges in their own self-governance.

The Venice Commission saved its strongest criticisms in its opinion last October for the continued competency of the president of the NJO to move specific cases from the courts to which they were assigned by law to other courts, especially because the only constraint was “the vague criterion of ‘adjudicating cases within a reasonable amount of time’.”<sup>131</sup> Even with the reforms that were instituted in summer 2012 to give the NJC some power to set guidelines for the exercise of this power, the Venice Commission was still highly critical of this feature of the law, finding that the system of transferring cases, even with these modifications, “is not in compliance with the principle of the lawful judge, which is an essential component of the rule of law.”<sup>132</sup>

The Venice Commission will not be heartened to see that the power of the president of the NJO to transfer individual cases to specific courts other than the ones to which have been assigned by law has now been added to the constitution by the Fourth Amendment’s Article 14. Moreover, the very same “vague” language that the Venice Commission criticized as a rationale for such a system, that such transfers be made to ensure balance across courts, has been reproduced without modification.

This power to move cases is qualified in the constitution by two references to cardinal acts, one of which controls the procedure through which the president of the NJO selects a court to hear a case that she has decided to move. The other seems to define the sorts of cases that she can move. The cardinal act still says that the National Judicial Council may develop guidelines for this process and even that the president of the affected court must initiate the transfer. But given that these various “safeguards” were held by the Venice Commission to be not enough to cure the problem when the Commission reviewed the legal framework governing the judiciary in October 2012, they are no more likely to be attractive now as a provision referenced

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<sup>131</sup> Opinion on the Revised Judiciary, para. 60.

<sup>132</sup> Opinion on the Revised Judiciary, para. 74.

indirectly by the constitution. The Venice Commission has previously pronounced this whole system of transferring cases, even with the safeguards added to the cardinal law, a violation of the rule of law.

It is a serious challenge to the principle of the lawful judge when a political official has the power to determine which court hears each individual case in the system, especially when that same official has such widespread powers to hire, fire, promote, demote, discipline and move any individual judge in the system.

Combined with the fact that the Fundamental Law itself has no explicit guarantee of the independence of the judiciary as an institution, the Fourth Amendment's constitutional changes affecting the organization of the judicial power in Hungary raise serious questions about whether the judiciary can still operate independently from politics.

## **Tax and budget laws permanently exempt from constitutional review (Article 17 of the Fourth Amendment)**

Article 17(1) of the Fourth Amendment to the Fundamental Law amends Article 37 of the Fundamental Law, more sharply limiting the Constitutional Court's jurisdiction to review budget and tax laws. Article 37 (4) of the Fundamental Law prevented the Constitutional Court from reviewing fiscal measures – which includes „the State Budget and its implementation, the central tax type, duties, pension and healthcare contributions, customs and the central conditions for local taxes” – for as long as the state debt exceeds 50% of GDP.<sup>133</sup> An exception was created to permit constitutional review in the event that the fiscal measures breached a certain few rights, but not the rights that would be most likely to be breached with fiscal measures (like the right to property, the right to fair procedure and the right to be treated free of unfair discrimination). The Constitutional Court may only review fiscal measures if they breach „the right to life, human dignity, right to protection of personal data, freedom of thought, conscience and religion and with the rights related to Hungarian citizenship” but not other rights.

Article 17(1) of the Fourth Amendment extends this limitation on the jurisdiction of the Constitutional Court in perpetuity, as it bars the Constitutional Court from *ever* reviewing such fiscal measures even when the state debt drops below 50% of GDP, as long as the debt was above that level at the time that the law in question was passed.

This limit on judicial review dates back to November 2010 when the Parliament used its two-thirds majority to pass a constitutional amendment to limit the Constitutional Court's review of tax and budget laws. The amendment was passed after the Constitutional Court found unconstitutional a 98% retroactive tax, enacted by the governing party and levied on the final compensation packages granted to state employees under the previous government.<sup>134</sup> The Court has from the beginning of its

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<sup>133</sup> The current debt to GDP ratio was 81.4% in 2012 and in fact it has not been below 50% since before Hungary entered the EU in 2004. See <http://www.tradingeconomics.com/hungary/government-debt-to-gdp>. It is unlikely to be below 50% for the foreseeable future.

<sup>134</sup> Decision 184/2010. (X. 28.)

existence stated that retroactive legislation violates the constitutional principle of the rule of law, and the Court did so again in this case.

The government responded to this decision by amending the constitution to overrule the decision of the Court, first by amending the old constitution then in force and then by adding this provision to the Fundamental Law passed the following year. Once the constitutional amendment was enacted, Parliament again passed the law that retroactively taxed the leaving bonuses of government employees who left government service between 2005 and 2010, while the previous government was in office. Despite this limit placed on its jurisdiction, the Court, in a second decision, again found that the government violated the constitutional provision on human dignity with the retroactive tax but, because of the amendment, felt it must allow the government to apply the retroactive tax after the constitutional amendment limiting the Court's jurisdiction took effect.<sup>135</sup> Before that time, however, the Court insisted, the government could not institute a retroactive tax.

This limit on judicial review was the first in a series of constitutional amendments that retaliated against decisions by the Constitutional Court. But it was not the last. We have already noted the long list of Constitutional Court decisions specifically overturned by the Fourth Amendment alone.

After public criticism of this limitation on the jurisdiction of the Court, the final version of the Fundamental Law introduced a new limit on this limited jurisdiction. According to Article 37(4) of the Fundamental Law, the Court was not barred from reviewing tax and budget laws forever, but only when the public debt-to-GDP ratio is above 50%. However, the reasoning section of the Fundamental Law offered no explanation as to why this particular threshold for judicial review was introduced in the constitution.

It is true that Hungary has had persistent struggles with high levels of public debt. The goal to reduce public debt appeared in the Fundamental Law through the mandate of that Parliament may not pass a state budget which allowed the debt-to GDP ratio to

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<sup>135</sup> Decision 37/2011. (V. 10.)

exceed 50%.<sup>136</sup> The average public debt-to-GDP ratio in the European Union stands slightly higher than the 82% in Hungary, so the reduction of the ratio to 50% may be too strict a standard.<sup>137</sup> The introduction of this constitutional provision implies that the government sees the reduction of public debt as an imperative that ranks above the enforcement of a number of different basic rights and the constitution's commitment to the rule of law. Even if this were a sensible policy from an economic perspective, it is not clear why the debt-to-GDP ratio should be set at a number so low that it is virtually impossible to achieve, and why this limitation should be set in the constitution as a limit on the Constitutional Court's jurisdiction.

The rule-of-law provision in the constitution has allowed the previous Constitutional Court to protect the public from quick financial shocks. When the Government attempted to suddenly and significantly reduce welfare support for families in 1995, the Court said that the Government needed to provide sufficient time for families to adjust to the change in welfare support and ruled that the lack of time coupled with the magnitude of reduction violated the rule of law.<sup>138</sup> Given that the constitutional limit on judicial review extends to the budget and all forms of taxes and contributions, there is now a danger that there is no constitutional protection against sudden and dramatic redistributions of welfare through changes in spending and/or taxation.

Article 17(1) of the Fourth Amendment now extends limitation on the jurisdiction of the Court in budget and tax matters so that it will forever apply to laws that are passed when the debt-to-GDP ratio is above 50% even if that ratio comes under the threshold 50% at a later time. Since the Fundamental Law came into force, the fundamental rules of taxation and the pension system are promulgated in cardinal Acts that can only be modified with a two-third majority in Parliament. That strongly limits the ability of future governments to manage its debt.

While the debt-to-GDP ratio will likely remain above 50% for the near future, Article 17(1) could be an issue in the long-run if Hungary reaches the target below 50% debt-to-GDP ratio and the ratio ends up fluctuating around 50%. The authors of the

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<sup>136</sup> Fundamental Law Art. 36(4). If the Parliament passes such a budget, it may be vetoed by the Budget Council. Fundamental Law Art. 44(3).

<sup>137</sup> Source: World Bank. 2010 data.

<sup>138</sup> Decision 43/1995. (VI. 30.). This is another decision that has been nullified by the Fourth Amendment's cancellation of the pre-2012 jurisprudence of the Constitutional Court.

constitution must have envisioned the debt-to-GDP ratio might remain around 50% in the long-run since the constitutional requirement to reduce the debt will also no longer apply when the debt-to-GDP ratio falls below 50%. Unexpected fluctuations in growth and debt could push future debt-to-GDP ratios back above the 50% mark, triggering the enforcement of Article 37(4) and Article 17 of the Fourth Amendment. Each time the ratio rises above 50%, the government will have the authority to pass tax laws or budgets that will be forever exempt from constitutional review. That also means the Constitutional Court will have to look at the debt-to-GDP ratio whenever it reviews a relevant law to assess whether it has the jurisdiction for a full judicial review.

Article 17(1) of the Fourth Amendment may therefore add to legal uncertainty in the event the debt-to-GDP ratio fluctuates around 50% because people can expect the laws to be subject to different conditions of judicial review depending on where the ratio stood when the law was passed. The provision could also create perverse incentives for future governments to increase spending when the debt-to-GDP ratio falls below 50% and rely on taxes when it climbs above 50%. In addition, a sudden default by the government on its obligations which significantly reduces the debt could also mean that any laws passed prior to default that were subject to the limit on constitutional review will also remain exempt from full constitutional review.

Currently, there is no definition as to what debt-to-GDP figures the Court should rely on when it reviews whether it can perform a complete judicial review of a law. Given that 42% of the government debt is denominated in foreign currency,<sup>139</sup> the debt-to-GDP ratio could be quite volatile as it is heavily influenced by GDP growth and fluctuations in the value of the Hungarian forint relative to major foreign currencies.

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<sup>139</sup> Source: Government Debt Management Agency (ÁKK). <http://www.akk.hu/object.ec5b874e-f167-41a1-a025-965e25485e72.ivy>

## **Special taxes for paying fines incurred as the result of violating legal obligations (Article 17 of the Fourth Amendment)**

Article 17 of the Fourth Amendment anticipates that the Hungarian government may incur fines as the result of failing to comply with EU Law or European human rights law, or even for failing to comply with Hungarian law. Given that Hungary has been experiencing persistent budget shortfalls, the financial consequences of such fines were of concern to the drafters of the Fourth Amendment. The Fourth Amendment provides a constitutional basis for passing through all such legal fines as special taxes on the Hungarian population, corporations doing business in Hungary or on any other taxable object in Hungary. Several features are legally remarkable about this provision.

First, the provision anticipates that Hungary may well be in breach of European or domestic law. Constitutions usually anticipate that a state will be law-abiding and they do not customarily place into their framework instructions for what shall happen if the government violates its legal obligations. We know of no other constitution that provides for such a possibility.

Second, the provision explicitly names the ECJ as a potential source of such fines and provides a mechanism through which the state budget itself would be bypassed in paying these fines. The ECJ already has before it a number of infringement actions brought against the current Hungarian government for policies that the constitution has now entrenched, and the European Commission has signaled it is anticipating more such actions. The primary mechanism for the enforcement of EU law in the Member States has been the ECJ's capacity to levy fines at a rate that will cause compliance. If the Hungarian government can pass off all such fines as a special tax to any taxable entity within its reach, the state budget itself will not feel the pain of the sanctions. Instead, the sanctions will pass "through" the state directly to those whom the state can tax. The purpose of EU sanctions through infringement actions, which is to strongly push a state to comply with EU law, will therefore be evaded.

Third, Article 17 requires that when a pass-through tax is levied, the tax be "designated" by explaining the institution to which the fine is to be paid. If a tax is

levied against the Hungarian population and is labeled as the “EU tax,” it is very likely to cause anger and resentment of the Hungarian public against the EU institutions that created the fine. The same would be true if the tax were labeled the “European Court of Human Rights” tax or the “Constitutional Court” tax. The law requires such designations, which are designed to announce the purpose of the tax by “blaming” the institution that levied the fine for the tax rather than encouraging the Hungarian government to take responsibility for its own policies.

Fourth, this amendment should be considered in the context in which it is inserted in the Basic Law. This amendment modifies Article 37 of the Fundamental Law and it follows a clause that removes the jurisdiction of the Constitutional Court from reviewing any fiscal measure – which includes both budget and taxes – as long as the national debt exceeds 50% of GDP. That 50% threshold is the same as the one that applies in this case of “pass-through” taxes; as long as the national debt exceeds 50% of GDP, the government may organize special taxes to pay the fines. As the last section demonstrated, this is a goal unlikely to be reached in any foreseeable future, therefore we can anticipate that the government will possess this power in practical terms for a long time. The combination of the limitations on Constitutional Court jurisdiction with this new section of the constitution means, therefore, that under any circumstance in which the government will be able to pass on fines as taxes, the Constitutional Court will also not be able to review these taxes for constitutionality.

The Constitutional Court may review fiscal measures under such circumstances only when they violate certain listed rights, but not when they violate other rights. The Court may review budget and tax measures that violate the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and rights connected to Hungarian citizenship. The Court may not review taxes that infringe rights that are far more likely to be infringed with tax measures – like the right to property, the right against discriminatory treatment, the prohibition against retroactive legislation or the guarantee of fair judicial procedure. If those rights – or any others besides those explicitly listed in Article 37(4) of the Fundamental Law – are infringed, the Constitutional Court is constitutionally barred from acting to protect the right where a tax is concerned.

Under these circumstances, for example, there would be no domestic constitutional remedy if the European Court of Human Rights fined Hungary in a case involving discrimination against Roma and the Hungarian government chose to pay the fine by levying a special tax only on Roma taxpayers. Similarly, there would be no domestic constitutional remedy if the ECJ fined Hungary for having violated EU law by imposing special taxes on certain sectors of the economy where internationally owned businesses are concentrated and Hungary decided to pay the fine by further taxing those sectors. And so on. The Hungarian government has already done those things (discriminated against Roma according to the ECtHR, taxed sectors of the economy where the foreign-owned businesses are concentrated so that this is currently under review by the Commission). But, of course, Hungary has not yet been fined for these things while the Fourth Amendment is in place. In each example mentioned, however, no institution within Hungary would have the power to prevent the government from levying a tax on precisely the population whose mistreatment resulted in the fine in the first place. In fact, there would be no constitutional remedy in the country for *any* selective tax that was established as a result of Hungary's violation of its legal obligations given that the right against non-discrimination is not one of the rights that can be protected by the Constitutional Court in such a case.

Finally, as this unusual constitutional provision becomes known, one might worry that this provision would work as a deterrent to international and domestic institutions that would otherwise fine Hungarian government for non-compliance, knowing that the tax will be passed on to others. Would the ECJ feel as free to fine Hungary for non-compliance with EU law if it knew that, as a result, the fine would be passed on to potentially vulnerable populations that would be angry with the EU? Would the ECtHR hesitate also? Could this unusual constitutional clause work to immunize Hungary from sanctions that might be issued if the state budget, rather than taxable populations, were to bear their costs? If Hungary can hold vulnerable populations as human shields in front of a European body threatening sanctions, will this allow Hungary to escape the sanctions?

## **On the applicability and binding effect of Constitutional Court decisions delivered before the entry into force of the Fundamental Law (Article 19 of the Fourth Amendment)**

According to Article 19 of the Fourth Amendment, “the decisions of the Constitutional Court delivered before the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.”<sup>140</sup>

It is unclear how, as a matter of constitutional law, decisions of the Constitutional Court, which have already discharged their legal effects could be declared as no longer binding. In this regard, a distinction should be drawn between decisions of the Constitutional Court concerning the constitutionality of legislative instruments and ordinary judicial decisions delivered in individual cases, as the former defines with general effect the applicability and validity of legislative instruments of general application. The binding character of ordinary judicial decisions delivered in previous cases deciding individual legal disputes is for the courts to assess, as only they are endowed with jurisdiction and expertise to determine in the light of the facts and the circumstances of the case before them whether previous judicial decisions should be followed. The decisions of the Constitutional Court on the constitutionality of legislative instruments have an undoubtedly different character. They originate from general constitutional benchmarks, which were developed as a result of the interpretation of the constitution. Such Constitutional Court decisions fill constitutionalism with content and shape its meaning independent from the actual intentions of the *pouvoir constitutionnel*. The autonomy of that interpretative function makes the Constitutional Court an institution capable of influencing the operation of the democratic political system.

Even in this light, it is questionable whether decisions of the Constitutional Court delivered in a constitutional review of legislative instruments would have a similar temporal binding effect as legislative instruments. The text of the said provision of the Fourth Amendment of the Fundamental Law, even if it performs a rationally

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140 Article 19(2) of the Fourth Amendment of Hungary’s Fundamental Law

explainable legal solution, seems to suggest that the binding effect of Constitutional Court decisions should share the fate of the previous constitution (the former 1989 constitution) on the basis of which they were delivered.

Requiring the Constitutional Court to refrain from following or borrowing the reasoning used in its former decisions is absurd in legal terms, as the reasoning supporting individual Constitutional Court decisions formally has no binding legal effect. In this light, it is safe to assume that the formalistic language of the Fourth Amendment to the Fundamental Law, focusing on the binding effect of Constitutional Court decisions, aims in fact at the *principles* on the basis of which the reasoning of the Constitutional Court was constructed, which principles render the reasoning delivered in individual cases applicable in subsequent cases before the Constitutional Court. The summary declaration that 20 years of constitutional jurisprudence no longer have any binding effect is a direct challenge against the constitutional principles, which were integral to the rule of law system that was created under the 1989 constitution.

According to the original act in the Parliament, this constitutional provision was said to be necessary in order to enable the Constitutional Court “to produce, in the context of the Fundamental Law as a whole, principles which depart from its previous jurisprudence.”<sup>141</sup> It argued that a modification of the Fundamental Law was necessary to empower the Constitutional Court to break down the constraints on its jurisdiction and discretion which followed from previous jurisprudence, and which “instead of imposing interpretative restraints furthers the liberty of the Constitutional Court in the interpretation of the Fundamental Law.”<sup>142</sup>

This provision of the Fourth Amendment represents a direct challenge to the principle developed fully in recent decisions concerning the limits of the *pouvoir constitutionnel* and the powers of Parliament, which maintains the continuity of the former constitution and the Fundamental Law. The principle was defined with clarity in Decision 22/2012. (V. 11.), which held that

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141 Bill T/9929/46 of the Committee on Constitutional Matters (25 February 2013). Page 8.

142 Bill T/9929/46 of the Committee on Constitutional Matters (25 February 2013). Page 8.

The Constitutional Court in its current practice is entitled to rely on the reasoning relating to constitutional matters developed in decisions which were delivered before the entry into force of the Fundamental Law, provided that this is not excluded by individual provisions of the Fundamental Law which contradict or depart from the provisions of the former Constitution. (...) The constitutional jurisprudence on fundamental values, on fundamental rights and freedoms and on constitutional institutions, which have not been altered fundamentally in the Fundamental Law, remains binding. As a result, the principles laid down in the decisions delivered on the basis of the former Constitution must be taken into account in the decisions interpreting the Fundamental Law. (...) In case the former Constitution and the Fundamental Law contain substantively equivalent provisions, the Constitutional Court shall provide justification not for following the principles laid down in previous jurisprudence but for departing from those principles.<sup>143</sup>

This principle provided the basis for the decisions which declared the proposed system of electoral registration unconstitutional,<sup>144</sup> and which assessed the recent constitutional petition concerning the right to freedom of assembly<sup>145</sup>. The principle was developed further in decision 45/2012. (XII. 29.) on the proposed Transitional Provisions of the Fundamental Law when the Court stated that

(a) the substantive and procedural requirements in constitutional law under the Fundamental Law must not be lower than in the period under the former Constitution. The requirement of the rule of law must be given effect in the same way in the present circumstances and should be followed in the future. (...) The values, principles and guarantees which have already been recognized under the rule of law must not be undermined and enforcing compliance with them must not be relaxed.<sup>146</sup>

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143 Decision 22/2012 (V. 11.)

144 Decision 1/2013 (I. 7.)

145 Decision 3/2013 (II. 14.)

146 Decision 45/2012 (XII. 29.) This reasoning first appeared in the separate opinion of justice Kiss to Decision 61/2011 (VII. 13.)

These decisions define the doctrine of continuity, emphasizing the continuity of constitutionalism between the former constitution and the new Fundamental Law. This doctrine enabled the Constitutional Court to depart from its previous viewpoint and to recognize in Decision 45/2012. (XII. 29.) that is constitutionally possible for the Constitutional Court to declare an amendment of the new constitution unconstitutional. The Fourth Amendment of the Fundamental Law was adopted to eliminate this possibility.

The Fourth Amendment of the Fundamental Law follows the doctrine of discontinuity of the Fundamental Law as advocated by the justices appointed by the current government. The doctrine was given recognition, in particular, in the separate opinions of Justices Balsai and Pokol:

The Fundamental Law (...) created a new basis for the substance of fundamental rights available to individuals. Individuals may only exist in communities, and thus in exercising those rights, beyond the autonomy of individuals, the interests of those communities and the nation must be taken into account. It must be emphasised that in this framework the previous constitutional jurisprudence on the protection of fundamental rights and its system of reasoning, based on the former Constitution which lacked such definition for the basis for the protection of fundamental rights, in many respects must be reconsidered in decisions delivered under the Fundamental Law.<sup>147</sup> (...)

The protection of fundamental rights must always be provided with reference to the capacities and abilities of societies, which may change and may require lowering the protection of the rights of individuals, and this must not be resisted by the Constitutional Court by prohibiting the reduction of the standard of protection of fundamental rights under the constitution.<sup>148</sup>

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147 Separate opinion of Justice Pokol in decision 1/2013 (I. 7.)

148 Separate opinion of Justice Pokol in decision 4/2013 (II. 21.)

The constitutional exclusion of the binding effect of 20 years of constitutional jurisprudence gives recognition to the viewpoint of the justices advocating the doctrine of discontinuity. It is unlikely, however, that the justices will be able to provide a clean slate for the Constitutional Court as the elimination of the Court's pre-2012 jurisprudence does not affect the binding effect of Decision 22/2012 and the subsequent case law delivered under the Fundamental Law, which was also recognized by Justice Pokol. The cause of disagreement within the Constitutional Court has always been whether, in individual cases, the provisions of the former Constitution could be regarded as equivalent with the provisions of the Fundamental Law in light of the changes that the Fundamental Law has made. There is no evidence that any individual member of the Constitutional Court has ever argued for a complete elimination of the previous jurisprudence from the practice developed under the Fundamental Law.

Article 19 of the Fourth Amendment of the Fundamental Law corresponds with the opinion of the two-thirds political majority in Parliament, which does not recognize the possibility of the Constitutional Court declaring an amendment to the constitution as unconstitutional. It is based on the argument that there is no formal difference between the *pouvoir constitutionnel* and the power to amend the constitution, and that amendments to the constitution from the *pouvoir constitutionnel* should not be open to a control of constitutionality under the existing constitution. In any event, the current parliamentary supermajority believes the Constitutional Court is under a constitutional obligation to give effect to the new institutional arrangements and values of the Fundamental Law. The doctrine of discontinuity is inseparable from this political opinion, which is expressed specifically in the argument that the standard of protection for fundamental rights developed under the former constitution could be lowered when necessary to meet the new requirements of the new constitutional order. The value system and the identity of the Fundamental Law should be determined on this basis, which according to the opinion of the majority in Parliament was undermined by the binding nature of the constitutional jurisprudence delivered under the former constitution, and which constitutional problem should be remedied by declaring that jurisprudence no longer binding.

The majority in Parliament does not regard the Constitutional Court as its adversary, rather its aims is to influence the Constitutional Court by legal means to actively support its activities in government. The critical problem in Hungary is that, in the current Parliament, the easily mobilised *pouvoir constitutionnel* places the Constitutional Court under constant political and legal pressure and responds to unfavourable decisions in the form of constitutional amendments. It thus challenges the monopoly of the Constitutional Court in the interpretation of the constitution as laid down in the Fundamental Law.

The doctrine of discontinuity and the related political practices concerning the operation of the Constitutional Court aim to distance Hungarian constitutionalism not only from the achievements of the past 20 years but also from European practices in the protection of fundamental rights, which had heavily influenced the practice of the Constitutional Court under the former Constitution. Article 19 of the Fourth Amendment to the Fundamental Law read together with another provision of that amendment, which excludes the substantive control of constitutional amendments and empowers the Constitutional Court to review only compliance with the procedural requirements laid down in the Fundamental Law for its amendment, prevents the Constitutional Court from setting any constitutional limits on the majority in the current Parliament, which at any time may act as the *pouvoir constitutionnel*. The abolition of the prior constitutional case law makes uncertain the realization of generally recognized fundamental rights that are recognized in the Fundamental Law, even though they are constitutional essentials in any democratic European state based on the rule of law.