



Hungarian Helsinki Committee



EÖTVÖS KÁROLY  
POLICY INSTITUTE



HUNGARIAN CIVIL LIBERTIES UNION

## Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary

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On 8 February 2013, members of the governing coalition, having two thirds of the seats in the Hungarian Parliament, submitted a proposal<sup>1</sup> to amend the Fundamental Law of Hungary in force since 1 January 2012. The proposal was adopted by the Parliament as the Fourth Amendment to the Fundamental Law on 11 March 2013.<sup>2</sup> As described in detail below, the Fourth Amendment undermines the rule of law in Hungary by continuing the practice of inserting provisions into the Fundamental Law which had been previously found unconstitutional by the CC; including provisions in the Fundamental Law which violate international standards; and further weakening the control exercised by the Constitutional Court (CC) over the Parliament.

### 1. Declaring void CC decisions adopted prior to the Fundamental Law

In its Opinion on the new Constitution of Hungary,<sup>3</sup> the Venice Commission expressed its concern regarding the following sentence of the Preamble of the Fundamental Law of Hungary: “We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid.” According to the Venice Commission, if this sentence is meant to have legal consequences, “*it can only be read as leading to ex tunc nullity (...) This may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which, although based on this »invalid« constitution, has played an important role in Hungary’s development towards a democratic state governed by the rule of law.*”<sup>4</sup> During its visit to Budapest in May 2012, the Venice Commission was informed by the Hungarian authorities that the declaration of the invalidity of the 1949 Constitution “*should only be understood as a political statement*”.<sup>5</sup>

**In contrast to the statements of the Hungarian authorities above as presented to the Venice Commission, the amendment initiated by the governing majority declares that CC**

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<sup>1</sup> Submitted text and reasoning available in Hungarian at: <http://www.parlament.hu/irom39/09929/09929.pdf>.

<sup>2</sup> The adopted text of the Fourth Amendment is available here in Hungarian: <http://www.parlament.hu/irom39/09929/09929-0055.pdf>.

<sup>3</sup> Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016.

<sup>4</sup> Opinion on the new Constitution of Hungary, § 35.

<sup>5</sup> Opinion on the new Constitution of Hungary, § 37.

**decisions based on the old Constitution are void, and, thus practically bans referring to the case law of the CC developed since the transition** by inserting the following into the closing provisions of the Fundamental Law: “5. *Decisions of the Constitutional Court delivered prior to the entering into force of the Fundamental Law become void. This provision does not concern the legal effects achieved by the preceding decisions.*”

It shall be added that the first version of the proposal would have included the following provision into the Fundamental Law: “5. *Decisions of the Constitutional Court and their reasonings delivered prior to the entering into force of the Fundamental Law cannot be taken into account when interpreting the Fundamental Law.*”<sup>6</sup> The submitted text was amended in the course of the parliamentary debate as cited above upon the proposal of the Parliamentary Committee on Constitutional Matters submitted on 25 February 2013.<sup>7</sup> However, the first version of the text would have led to the same consequences as the adopted one. It does not matter in this regard that the adopted text says that the “legal effects” of the CC decisions remain intact, since this only means that the amendment does not concern the fact that certain legal provisions were annulled by the CC, or that the CC ordered that unconstitutional provisions shall not be applied in certain individual cases, etc. In addition, the wording of the adopted text is quite unfortunate and is basically a legal nonsense, since it is hard to imagine how CC decisions can become “void”, especially if their legal effects remain intact. But, to sum it up, it is clear that the amendment abolishes CC decisions and, consequently, ceases the possibility to refer to them and use them in the course of interpreting the Fundamental Law.

The amendment **clearly contradicts the case law of the CC as established after the Fundamental Law came into force**, since e.g. in its Decision 22/2012. (V. 11.) the CC concluded the following: “*In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. [...] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid. Statements of fundamental importance elaborated on by decisions of the Constitutional Court based on the previous Constitution serve obviously as guiding principles also in the decisions of the Constitutional Court interpreting the Fundamental Law. However, this does not mean that the content of the decisions based on the previous Constitution may be taken over mechanically, without observing them, but requires the comparison of the relevant rules of the previous Constitution and the Fundamental Law, and careful deliberation. If the result of the comparison is that the constitutional regulation is the same or is similar to a considerable extent, the content of the decision may be taken over. On the other hand, if certain provisions of the previous Constitution and the Fundamental Law are the same in terms of their content, it is not the take-over of the legal principles included in a previous Constitutional Court decision which needs to be reasoned, but, instead, reasons shall be provided for not taking them into consideration.*”<sup>8</sup> This argumentation was reiterated by the CC in subsequent decisions.<sup>9</sup>

Accordingly, the amendment is in clear contradiction with the decisions of the CC adopted after the Fundamental Law came into force, which in itself may result in a **discrepancy within the new constitutional order established by the Fundamental Law**.

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<sup>6</sup> Fourth Amendment, Article 19.

<sup>7</sup> T/9929/46, text and reasoning available in Hungarian at: <http://www.parlament.hu/irom39/09929/09929-0046.pdf>.

<sup>8</sup> Decision 22/2012. (V. 11.) of the CC, Reasoning [40]-[41].

<sup>9</sup> See also: Decision 30/2012. (VI. 27.) of the CC, Reasoning [14].; Decision 34/2012. (VII. 17.) of the CC, Reasoning [33]; Decision 4/2013. (II. 21.) of the CC.

Furthermore, it is hard to see what the aim of the governing majority was when proposing the ban apart from **“punishing” the CC for its unfavourable decisions**. The vice-president of the governing party Fidesz stated in this regard degradingly that the CC may not *“crib by taking an old decision, Ctrl+C, Ctrl+V, and say that it is ready”*.<sup>10</sup> The official reasoning attached to the first version of the amendment states that the amendment aims to widen the possibilities of the CC when interpreting the Fundamental Law. According to the reasoning, this *“of course does not exclude the possibility that the [CC] comes to the same conclusion as before when interpreting certain provisions of the Fundamental Law, and at the same time it also ensures the possibility to make statements contradicting previous decisions in the context of the Fundamental Law as a whole”*. (This argumentation is repeated by the reasoning of the proposal submitted by the Parliamentary Committee on Constitutional Matters.) However, if the aim presented above would have been the real motive of the submitting MPs, there would have been no need to propose an amendment in this regard at all, since the newly established case law of the CC complies with the goals expressed in the reasoning. It may be considered as well that the practical use of the new provision may also be that if the “court packing” by the governing party will be accomplished (which has a high chance, given the rules not requiring the consent of the opposition to propose and elect judges and the recent practice of the governing majority in selecting the new judges), the future CC will not have to bother with providing reasons for deviating from the previously established case law and e.g. provide reasons for lowering constitutional standards regarding certain human rights.

At this point it shall be emphasized that referring to the case law – or providing reasons for deferring from it – is necessary also in order to make it clear that a certain interpretation of a constitutional provision or standard is not arbitrary, but it stems from and is embedded in the practice of the CC. Providing reasons for a certain interpretation by referring to the case law of the CC contributes to a coherent practice and interpretation regarding constitutional standards, the lack of which threatens the rule of law.

The official reasoning attached to the first version of the amendment also includes that the amendment aims to ensure that *“the provisions of the Fundamental Law are interpreted together with the context of the Fundamental Law, independently from the system of the previous Constitution”*. This, taken together with the fact that the adopted version of the text expressly abolishes CC decisions, reinforces the concern that the governing party aims to break with the constitutional tradition of the last two decades and **abolish constitutional requirements established by the CC on the basis of the old Constitution**. Consequently, the amendment **denies continuity with the period between 1989-1990 and 2011 in terms of constitutionality**. It shall also be recalled at this point that **the amendment has an effect on all persons and institutions**, including e.g. ordinary courts and the Ombudsperson. Accordingly, the amendment would negatively affect all bodies responsible for the protection of rule of law and human rights.

To sum it up, it may be concluded that the amendment is a **purely arbitrary restriction on the CC, which seriously undermines the CC’s independence and reputation**, and gives room to deferring from the fundamental principles established by the CC in the last two decades. Altogether, these developments may **violate the principle of the rule of law and decrease the level of the protection of fundamental rights**.

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<sup>10</sup> See: <http://www.origo.hu/itthon/20130130-megtiltja-a-puskazast-a-fidesz-az-alkotmanybirosagnak.html> (30 January 2013).

## **2. Prohibiting the CC from examining the substantive constitutionality of proposed amendments to the Fundamental Law**

For a long time, the CC of Hungary was of the opinion that it may not review the constitutionality of the amendments to the Constitution/Fundamental Law, since in that way it would interfere with the constitution-making power of the Parliament. However, the decision adopted by the CC regarding the Transitional Provisions of the Fundamental Law in December 2012 meant a significant change in this regard, since in its Decision 45/2012. (XII. 29.) the CC came to the following conclusion: “*In certain cases the Constitutional Court may also examine the undiminished predominance of the content-related constitutional requirements, guarantees and values of the democratic state based on the rule of law, and their inclusion in the constitution.*”<sup>11</sup> This means that the CC vindicated for itself the power to review amendments to the Fundamental Law in light of the general standards of constitutionality and to abolish unconstitutional amendments.

Supposedly as a reaction to the CC’s recent decision cited above, the Fourth Amendment<sup>12</sup> includes the following into the Fundamental Law under Article 24 (5): “*The Constitutional Court may only review the compliance of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements included in the Fundamental Law pertaining to the adoption and the promulgation of the Fundamental Law or its amendments.*” Furthermore, the amendment explicitly excludes the possibility that the President of Hungary does not sign an amendment to the Fundamental Law but requests the review of its content from the CC. According to the amendment, the President is only able to turn to the CC with respect to the compliance with the relevant procedural rules.<sup>13</sup> (The original version of the Fundamental Law does not include any rule on the President’s possibilities with respect to constitutional amendments.) Thus, the Fourth Amendment **prevents the CC from reviewing the content of proposed or adopted amendments to the Fundamental Law, which is in clear contradiction with the standpoint of the CC regarding the issue** as set out in its Decision 45/2012. (XII. 29.) cited above.

Furthermore, the Fourth Amendment **ensures that the Fundamental Law may be amended according to actual political needs** by the (current) governing majority also in the future and that the **formal constitutionality of any disputable governmental measure may be easily established** by amending the Fundamental Law and creating a formally constitutional basis for laws and measures going against basic rule of law standards – a method already used by the current governing coalition. Thus, the amendment creates a firm legal basis for the governing majority’s existing unconstitutional practice and enables the Parliament to include such provisions in the Fundamental Law which e.g. violate human rights and are not in compliance with international standards. The Fourth Amendment also results that **if the governing majority has two-thirds of the seats in the Parliament the CC is rendered meaningless.**

## **3. Extending the restriction of the CC’s power**

Article 37 (4) of the Fundamental Law restricts the powers of the CC by setting out that as long as state debt exceeds half of the Gross Domestic Product, the CC may review the constitutionality of Acts of Parliament on the central budget and its implementation, central taxes, duties, pension and healthcare contributions, customs and the central conditions for local taxes or annul these Acts exclusively on the basis of a violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and rights related to Hungarian citizenship. (The CC shall have the unrestricted right to annul the

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<sup>11</sup> Decision 45/2012. (XII. 29.) of the CC, Reasoning [117]-[118].

<sup>12</sup> Fourth Amendment, Article 12 (3).

<sup>13</sup> Fourth Amendment, Article 11.

related Acts for non-compliance with the Fundamental Law's procedural requirements for drafting and promulgating laws.) This restriction of the CC's powers was first introduced by the governing majority in November 2010 (by amending the former Constitution) clearly as "retaliation", after the CC repealed legal provisions introducing a special tax of 98% on certain revenues.

The **Venice Commission** touched upon the above limitation of the CC's powers in its opinion on the Fundamental Law,<sup>14</sup> while in its subsequent opinion on Act CLI of 2011 on the Constitutional Court it stated that it regretted and **noted with serious concern that** the Government did not withdraw **the rule restricting the competence of the CC in budgetary matters**. Instead, the restriction **has even been extended by Article 27 of the Transitional Provisions, making the transitory restriction permanent** by stating not only that the exemption of certain acts from constitutional review is valid until the state debt falls below 50% of the Gross Domestic Product, but that Acts adopted in the "transitory" period will not be subject to full and comprehensive supervision by the CC even when the budget situation has improved beyond that target.<sup>15</sup>

The above article of the Transitional Provisions was abolished by the CC by its Decision 45/2012. (XII. 29.), claiming that it was not a transitional provision in character. However, the **Fourth Amendment reintroduces the provision making the restriction of the CC's powers permanent into the Fundamental Law** under Article 37 (5).<sup>16</sup>

It should be added at this point that Article 29 of the Transitional Provision, which set out that – as long as the state debt exceeds half of the Gross Domestic Product – whenever the state incurs a payment obligation deriving from a decision of the CC, the Court of Justice of the European Union or any other court or an organ which applies the law, and the amount previously earmarked by the central budget for performing such obligation is insufficient, a special contribution shall be established, is also introduced into the Fundamental Law under Article 37 (6).<sup>17</sup> Moreover, the original text of the provision is modified in a way that the special contribution may be established even if it would be possible to cover the respective payment on the expense of the general reserves of the central budget.

#### **4. The President of the National Judicial Office and his/her right to transfer cases**

The administration of the court system of Hungary has been re-regulated by Act CLXI of 2011 on the Organisation and Administration of Courts, and the former judicial body in charge of administrating courts has been replaced by a one-person decision-making mechanism, the **President of the newly established National Judicial Office (NJO)**. The reform model chosen and the extensive powers of the NJO's President were criticized by the **Venice Commission** in both of its related opinions,<sup>18</sup> and it was **stated that** since the President of the NJO (who is elected by the Parliament) is *„an external actor from the viewpoint of the*

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<sup>14</sup> Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016, § 98.

<sup>15</sup> Opinion on Act CLI of 2011 on the CC of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)009, § 38.

<sup>16</sup> Fourth Amendment, Article 17.

<sup>17</sup> Fourth Amendment, Article 17.

<sup>18</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 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001; Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), CDL-AD(2012)020.

*judiciary, it cannot be regarded as an organ of judicial self-government*".<sup>19</sup> Leaving this assessment out of consideration, the **Fourth Amendment** includes the **President of the NJO in the Fundamental Law** and includes under Article 25 (5) that he/she “*manages the central administrative affairs of the courts*”.<sup>20</sup>

The Venice Commission concluded in its second opinion on the Hungarian laws on judiciary, issued in October 2012, that despite the amendments adopted by the Parliament after the Venice Commission’s first respective opinion, “*the powers of the President of the NJO remain very extensive to be wielded by a single person and their effective supervision remains difficult*”.<sup>21</sup> From the issues which should be addressed, the Venice Commission indicated that one of pressing nature is the NJO’s President’s right to transfer cases.

The **right to transfer cases** (i.e. reassign them to another court instead of the court originally competent on the basis of the procedural law, regulated in details by Act CLXI of 2011 on the Organisation and Administration of Courts) is based on Article 11 (3) of the Transitional Provisions of the Fundamental Law, which states that the President of the NJO may execute its power to reassign cases “*until a balanced distribution of caseload between courts has been realized*”. This **rule of the Transitional Provisions was also abolished by the CC** in its Decision 45/2012. (XII. 29.), since it was not considered as a transitional provision in character.

In its second opinion regarding the Hungarian laws on judiciary, the Venice Commission concluded the following regarding the transfer of cases: „***As the transitional character of the system is not guaranteed by providing a precise time-limit when the transferring of cases will finally end and as it seems impossible to elaborate objective criteria for the selection of cases, the Venice Commission strongly disagrees with the system of transferring cases because it is not in compliance with the principle of the lawful judge, which is an essential component of the rule of law.***”<sup>22</sup> However, despite the international criticism, the **Fourth Amendment creates the constitutional basis of the right of the NJO’s President to transfer cases** by inserting the former rule of the Transitional Provisions into the Fundamental Law – however, with some changes:

<i>Original text of the Transitional Provisions Article 11 (3)</i>	<i>Text of the Fourth Amendment, Article 14 [To be included in the Fundamental Law as Article 27 (4)]</i>
<p>In the interest of the enforcement of the fundamental right to a court decision within a reasonable time <u>as provided in Article XXVIII (1) of the Fundamental Law, until a</u> balanced distribution of caseload between courts <u>has been realized</u>, the President of the National Judicial Office may designate a court other than the court of general competence but with the same jurisdiction to adjudicate <u>any</u> case.</p>	<p>In the interest of the enforcement of the fundamental right to a court decision within a reasonable time and a balanced distribution of caseload between the courts, the President of the National Judicial Office may designate a court, <u>for cases defined in a cardinal Act and in a manner defined also in a cardinal Act</u>, other than the court of general competence but with the same jurisdiction to adjudicate the case.</p>

*Underlined words indicate the deleted and the new elements of the provisions.*

<sup>19</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, § 51.

<sup>20</sup> Fourth Amendment, Article 13.

<sup>21</sup> Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 88.

<sup>22</sup> Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 74.

As the table above shows, the Fourth Amendment does not only uphold the NJO President's right to transfer cases, but **also abolishes the transitional character of the system of transferring cases**. This move is in clear contradiction with the standpoint of the Venice Commission, and aggravates the violation of the principle to a lawful judge.

## 5. Narrowing the notion of family

The original text of Article L) of the Fundamental Law did not restrict the notion of family to those in a marriage and to parent-child relationships. This kind of wide interpretation of Article L) was also confirmed by the CC in its Decision 43/2012. (XII. 20.), in which it abolished the restrictive notion of family as enshrined in Act CCXI of 2011 on the Protection of Families. The CC stated that it does not follow from Article L) of the Fundamental Law that those in a partnership who take care of and raise each other's children, different-sex couples without a child due to different reasons and many other forms of long-standing emotional and economic cohabitations, which are based on mutual care and fall within the wider, more dynamic, sociological notion of a family would not be covered by the state's objective positive obligation to provide constitutional protection for families.

However, the Fourth Amendment<sup>23</sup> supplements Article L (1) with the following sentence: *"Marriage and the parent-child relationships are the basis of the family."* This amendment **severely narrows the constitutional notion of family** and results that only those who fall under this new, restricted notion will be able to rely on constitutional protection. Accordingly, **the Fundamental Law itself provides for discrimination between different relationships**, which means that laws discriminating between cohabitations on the basis of the new, restrictive constitutional definition of a family may not be considered unconstitutional in the future.

## 6. Banning political advertisements in the commercial media

In the beginning of January 2013, the CC abolished Article 151 (1) of the new Election Procedure Act, which set out that "[i]n the campaign period, political advertisements may only be published in the public media". In its Decision 1/2013. (I. 7.) the CC declared the latter rule unconstitutional, emphasizing that the rule in question would *"cease the possibility of publishing political advertisements exactly regarding in the media reaching society to the widest extent. Thus, the ban is a considerable restriction on political speech as performed in the course of the election campaign."*<sup>24</sup> Furthermore, it was concluded that the ban *"does not serve the aim of balanced information, and even may lead to an opposite result. Indeed, the provision bans the publishing of political advertisements – which, besides influencing the voters, also inform them – precisely in case of the type of media which reaches voters in the widest range."*<sup>25</sup>

Despite the statements of the CC cited above, Article 5 of the Fourth Amendment includes the following provision into the Fundamental Law under Article IX (3): *"In order to guarantee adequate information necessary for the formation of a democratic public opinion and in order to guarantee equal opportunities, political advertisements may be published in the media exclusively free of charge. Before the election of Members of Parliament and Members of the European Parliament, in the campaign period, political advertisements may be published by and in the interest of those organisations nominating candidates which set up a national list of candidates for the general elections of Members of Parliament or setting up a list of candidates for the election of Members of the European Parliament – as defined in a Cardinal Act – exclusively via public media outlets, under equal conditions."* (It shall be added that the text cited is the result of changes

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<sup>23</sup> Fourth Amendment, Article 1.

<sup>24</sup> Decision 1/2013. (I. 7.) of the CC, Reasoning [93].

<sup>25</sup> Decision 1/2013. (I. 7.) of the CC, Reasoning [98].

proposed in the course of the parliamentary debate by an individual MP of the Fidesz.<sup>26</sup>) Thus, the Fourth Amendment **bans the publishing of political advertisements in the commercial media by and in the interest of the strongest (opposition) parties** (i.e. those which are capable of setting up a national list of candidates, for which they need candidates in at least altogether 27 out of the 106 individual voting districts in at least nine counties and in Budapest), **which is in contradiction with the standards established by the CC.**

Furthermore, on the one hand, it is highly improbable that commercial media outlets would allow not only political parties but anyone to advertise free of charge. On the other hand, in the campaign period public service media, which has specifically low ratings, plays much less role than commercial media. This has importance in the light of the fact that the amendment, neither the ban nor the requirement of equal conditions, does not cover political advertisements on public billboards. Since billboards are as significant in the campaign period as commercial media would be, and the market of billboards is dominated by business groups close to the governing parties, it is improbable as well that the requirement of equal conditions in the public media will actually result in equal opportunities.

The provision of the Fourth Amendment as cited above **also violates Article 10 of the European Convention on Human Rights.** In the case *TV Vest As and Rogaland Pensjonistparti v. Norway*,<sup>27</sup> which dealt with the general ban of political advertisements in television, the European Court of Human Rights (ECtHR) reiterated that according to its case-law there is little scope under Article 10 (2) of the European Convention on Human Rights for restrictions on political speech or on debate on questions of public interest and that “*the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference*” in case of restricting political speech.<sup>28</sup> In the latter case, the ECtHR assessed the fact that the applicant party was at a disadvantage compared with major parties which had obtained edited broadcasting coverage.<sup>29</sup> On the basis of this line of reasoning, the Fourth Amendment does not meet the standards established by the case law of the ECtHR either.

## **7. Providing a constitutional basis for criminalizing homelessness**

Criminalizing homelessness has been a recurring aim of the governing coalition, both on central and local governmental level. For example, the new Petty Offence Act, which was adopted in 2012, set out that living on public premises and storing related personal property on public premises constituted a petty offence, and those living in public premises may have been punished with a fine or with confinement. “Anti-homeless” rules were also criticized by UN experts on extreme poverty and on housing who called on Hungary to reconsider the legislation on criminalizing homelessness.<sup>30</sup>

In its Decision 38/2012. (XI. 14.) the CC abolished, among others, the respective provisions of the Petty Offence Act, stating that criminalizing the status of homelessness is unconstitutional,

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<sup>26</sup> T/9929/48, submitted on 25 February 2013. The text of the proposal and its reasoning is available in Hungarian at: <http://www.parlament.hu/irom39/09929/09929-0048.pdf>. The first version of the provision went as follows: “*In order to guarantee adequate information necessary for the formation of a democratic public opinion, nation-widely supported political parties and other organizations that nominate candidates must be provided free and equal access, as defined in a cardinal Act, to political advertising in public media outlets before elections for Members of Parliament and Members of the European Parliament. Cardinal Act may limit the publication of other forms of political advertisements.*”

<sup>27</sup> Application no. 21132/05, Judgment of 11 December 2008.

<sup>28</sup> *TV Vest As and Rogaland Pensjonistparti v. Norway*, §§ 59-60.

<sup>29</sup> *TV Vest As and Rogaland Pensjonistparti v. Norway*, § 73.

<sup>30</sup> See: Hungary’s homeless need roofs, not handcuffs – UN experts on poverty and housing, 15 February 2012, <http://www.europe.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9994&LangID=E>.



since it violates human dignity: “[N]or the removal of homeless persons from public premises, nor urging them to draw on social maintenance may not be considered such a legitimate, constitutional aim which would substantiate that the living of homeless persons on public premises is declared a petty offence. Homelessness is a social problem, which shall be dealt with by the state with the means of social administration and social maintenance instead of punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare [homeless persons] dangerous to the society and punish [them].”<sup>31</sup>

However, the Fourth Amendment does not take into consideration the arguments of the CC cited above and **enables the Parliament or local governments to criminalize homelessness** by including the following provision into the Fundamental Law under Article XXII (3): “An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values.”<sup>32</sup> This is again **in clear contradiction with the principles established by the CC**. On the other hand, the amendment sets out that the State and local governments shall “strive” to guarantee housing for every homeless person, which does not mean an obligation on the authorities.

#### **8. Provisions violating the freedom of religion and the principle of separation of State and Church**

On 30 December 2011, the Parliament adopted a new Church Law,<sup>33</sup> which entered into force already on 1 January 2012, and significantly altered the system of the registration regarding churches. According to the Church Law, **all churches except those listed in the annex of the Church Law were deprived of their acquired and established rights, and their legal status as a church was transformed into that of a civil association**. As a result, more than 300 denominations lost their legal status and either filed a request for re-registration, or initiated a procedure to transform into civil associations, or ceased activity. (The annex of the Church Law currently lists 27 denominations as registered churches.) In contrast to the status of a church, a civil association does not enjoy the same rights and privileges with regard to taxation, employment, education, performing religious service in public institutions, disclosure of information, etc. As declared by the Venice Commission, the Church Law “**induces, to some extent, an unequal and even discriminatory treatment of religious beliefs and communities, depending on whether they are recognised or not**”.<sup>34</sup> This would also constitute a violation of Article 14 of the European Convention on Human Rights, taken in conjunction with Article 9.

The Church Law also includes requirements to obtain legal status as a church, such as the **requirement of existence for at least 100 years internationally or 20 years in Hungary as a civil association, which is an overly excessive condition violating Article 9 of the European Convention on Human Rights**.<sup>35</sup> Denominations may be recognized as church by the Parliament with the votes of two thirds of the MPs. (Thus the Church Law’s annex shall be amended every time a new church is included.) However, requirements included in the Church Law do not bind the Parliament, thus the Parliament’s decision on granting the status of a church is an arbitrary one, and the lack of normative criteria of recognition **breaches the principle of separation of State and Church**. Furthermore, obviously there is no right of appeal against the

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<sup>31</sup> Decision 38/2012. (XI. 14.) of the CC, Reasoning [53].

<sup>32</sup> Fourth Amendment, Article 8.

<sup>33</sup> Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities

<sup>34</sup> Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)004, § 110.

<sup>35</sup> See e.g.: *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (Application no. 40825/98, Judgment of 31 July 2008).

decision on the recognition, and if the Parliament does not register a denomination it is not compelled to provide a reason for its decision. The Venice Commission stated in this regard in its opinion issued in March 2012 that the Church Law “*sets a range of requirements that are excessive and based on arbitrary criteria with regard to the recognition of a church. In particular, the requirement related to the national and international duration of a religious community and the recognition procedure, based on a political decision, should be reviewed.*”<sup>36</sup>

The constitutional basis for the Church Law was Article 21 (1) of the Transitional Provisions of Hungary which set out that the Parliament shall identify the recognised churches and determine the criteria for recognition of denominations as churches, such as operation for a certain length of time, a certain number of members, historical traditions and social support. However, Article 21 (1) of the Transitional Provisions was also abolished by the CC in its Decision 45/2012. (XII. 29.), since it was not considered as transitional in nature. Furthermore, it shall be mentioned as a recent development, that in its Decision 6/2013. (III. 1.), delivered on 26 February 2013 the CC established that the rules of the Church Law regarding the recognition of denominations by the Parliament are unconstitutional, since they allow a body with an essentially political character (i.e. the Parliament) instead of the impartial courts to decide on individual cases related to fundamental rights which should be subject to legal deliberation. The CC annulled the affected provisions with a retroactive effect as of their coming into force on 1 January 2012 and declared that they could not have been applied, thus existing denominations did not lose their status as a church.

As a response to the decision of the CC abolishing the respective rules of the Transitional Provisions the Fourth Amendment **includes in Article VII of the Fundamental Law that denominations may be recognized as churches by the Parliament in a cardinal law** (i.e. with two-thirds of the votes of MPs present) and that a cardinal law may set out as a condition for recognizing a denomination as a church that it has been operating for a considerable period of time, that it has societal support and that is “suitable” to cooperate with in the interest of community objectives.<sup>37</sup>

Thus, the Fourth Amendment **upholds the violation of the principle of separating State and Church** by setting out that churches may be recognized by the Parliament and **continues to discriminate between denominations**. Accordingly, **the Fourth Amendment goes against the suggestions of the Venice Commission**.

As a result of a proposal submitted by the Parliamentary Committee on Constitutional Matters in the course of the parliamentary debate on 28 February 2013,<sup>38</sup> Article VII (4) of the Fundamental Law will also set out the following: “*Against the provisions of the cardinal Act concerning the recognition of churches a constitutional complaint may be filed.*” However, this provisions does not ensure effective remedy in the view of the CC, which, in its Decision 6/2013. (III. 1.) annulling provisions of the Church Law, concluded the following: “The Constitutional Court notes that the possibility of filing a constitutional complaint under Article 26 (2) of the Constitutional Court Act (...) may not be considered an effective remedy as required by Article XXVIII (7) of the Fundamental Law, since the Constitutional Court does not review the facts as established by the Parliament in the course of the individual recognition procedures or the lawfulness of the procedure, but reviews

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<sup>36</sup> Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, § 108.

<sup>37</sup> Fourth Amendment, Article 4.

<sup>38</sup> T/9929/51, text and reasoning in Hungarian available at: <http://www.parlament.hu/irom39/09929/09929-0051.pdf>.

only the compliance with the Fundamental Law of the law which is applied in the course of the decision related to the recognition or which takes direct affect.”<sup>39</sup>

#### **9. Abolishing the autonomy of universities in financial matters**

By inserting in Article X (3) that “*within the limits of an Act of Parliament, the Government sets the financial order of the state’s higher educational institutions and the Government supervises their financial management*”,<sup>40</sup> **the Fourth Amendment entirely abolishes the autonomy of universities in financial questions.**

#### **10. “Student contracts” requiring domestic employment in exchange for state contribution to the costs of studies**

According to the Fourth Amendment, Article XI of the Fundamental Law 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.*”<sup>41</sup> As far as the background of this provision is concerned, it shall be recalled that the so-called “**student contracts**” were originally introduced by a **Government Decree** in January 2012, setting out that in exchange for the state contributing to 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 CC** in its Decision 32/2012. (VII. 4.), however, based only on formal reasons, and, thus, not examining the substantive constitutionality of the student contract. On the day the above decision of the CC was announced, the parliamentary committee dealing with educational matters proposed an amendment to the Bill on higher education, **reintroducing the rules of the former Government Decree on student contract 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. The provisions above 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. Based on the reasons above, the Ombudsman of Hungary requested the CC to review the rules on student contracts on the merits; the decision is pending. In its petition, the Ombudsman also referred to the fact that when assessing the rules on student contract, 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 shall also be taken into account.

Based on the above, it may be concluded that through the Fourth 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 freely choose their occupation.**

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<sup>39</sup> Decision 6/2013. (III. 1.) of the CC, Section VI. 3.3.3.

<sup>40</sup> Fourth Amendment, Article 6.

<sup>41</sup> Fourth Amendment, Article 7.