MINISTRY OF PUBLIC ADMINISTRATION
AND JUSTICE

TIBOR NAVRACSICS
Minister

Mr. Thorbjorn Jagland
Secretary General

Council of Europe
Strasbourg

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Dear Secretary General,

With reference to our meeting last Monday and your letter dated 6 March 2013, I hereby would like to provide you with some additional written explanations to the Proposal on the Fourth Amendment to Fundamental Law of Hungary (hereinafter referred to as 'Proposal'). I will be available for any further information you may need.

General background

In December, 2012, the Constitutional Court annulled several provisions of the so called 'Transitional Provisions to the Fundamental Law', for formal, technical legal reasons, assessing that the Transitional Provisions contained rules which in fact were not transitional, but rather substantial ones. According to the Constitutional Court, these substantial rules, without incorporation into the main text of the Fundamental Law, could not be regarded as rules of constitutional value, even if the Parliament had the explicit intention to adopt the Transitional Provisions as legally equal to the Fundamental Law.

Following this decision of the Constitutional Court, the main aim of Proposal is to formally incorporate these rules, annulled for formal procedural reasons, into the text of the Fundamental Law itself. Besides, also in compliance with the Constitutional Court's ruling, the constituent Parliament wishes to incorporate in the Fundamental Law not only the annulled provisions but the Transitional Provisions in their entirety, also including the non-annulled parts of them.

That is why the Proposal is, 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. The 15-page amendment in fact comprises only a few new provisions and cannot be regarded as brand new rules without former precedents of identical or very similar rules on constitutional level.

I would like to emphasise that by transplanting the Transitional Provisions into the Fundamental Law the two-thirds parliamentary majority does not overrule the Constitutional Court, because in the decision of 45/2012 the Constitutional Court has not assessed substantial unconstitutionality of the Transitional Provisions. The Constitutional Court examined only the formal question of whether the rules of the Transitional Provisions are really transitional ones or not.

The Constitutional Court came to the conclusion that substantial rules in the Transitional Provisions are beyond the authorization provided for by the Fundamental Law and for this reason they are not valid. The Constitutional Court explicitly set out in its decision that "Following the decision of the Constitutional Court, it is the task and the responsibility of the constituent power to clear up the situation after the partial annulment. The Parliament shall make an evident and clear legal situation. The Parliament shall revise the subject matters of the annulled non-transitional provisions and decide on which matters should be re-regulated and on which level of legal sources. That is also for the Parliament to decide on which provisions to be re-regulated should be incorporated into the Fundamental Law and which should be laid down on level of [ordinary or cardinal] Acts." [Part V of the reasoning of the Constitutional Court decision of 45/2012. (XII. 29.)]

Transferring court cases

As regards the competence of the President of the National Judicial Office to transfer a case from one court to another the Proposal contains substantially the same provision as the Transitional Provisions comprised. However, this rule has been completed by one new additional guarantee according to which not any cases, but only cases (groups of cases) to be defined by a cardinal Act may be referred to a court in deviation from the general rules of competence. For this reason, the mere incorporation of this rule into the main text of the Fundamental Law does not affect at all the existence of legal guarantees promised to the Council of Europe (Venice Commission). These legal guarantees remain unchanged and they continue to be in force in the relevant Acts, according to which

- the National Judicial Council (self-governing body of the judges) shall determine the principles to be applied when appointing a proceeding court

- the President of the National Judicial Office shall publish the decision on the appointment of the proceeding court on the official and publicly available website of the courts and also directly inform the parties involved in the proceeding

- the parties involved in the case may lodge an appeal against the decision to the Curia (the decision of the Curia adjudicating the appeal shall also be published on the internet)

- there is a possibility for lodging a constitutional complaint to the Constitutional Court against the final decision of the Curia

The provision aims at ensuring the fundamental right to a court decision taken within a reasonable time and balancing the workload between courts. In theory there could be two ways to ensure the proportionate workload of courts: either the judges or the cases should be moved. The judges, because of their personal independence, may be transferred to another court only in case there is a vacancy in the relevant court. Thus this solution does not provide for a quick reaction to organizational problems caused by unbalanced workload. According to the other option the cases should be moved. The Fundamental Law chooses this option. Having regard that the Proposal defines the aim of the provision, the authorization for the President of the National Judicial Office will not legitimate the transfer of cases as soon as the aim (balanced distribution of caseload) has been achieved.

Besides, it should be noted that, by virtue of a motion for amendment to the Proposal, the Proposal would not give the possibility for the Supreme Prosecutor to file an indictment with a court other than a court of general competence. The Parliament supported this motion for amendment, so only the President of the National Judicial Office will have the possibility for moving the cases between courts.

Retirement age of judges and prosecutors

The Proposal does not affect the constitutional provisions in force which set out that with the exception of the President of the Curia and the Supreme Prosecutor, no judge and prosecutor may serve who is older than the general retirement age. The modification of these provisions is not necessary because the Fundamental Law does not refer to a concrete age, but only to a general retirement age, which can be specified also in a cardinal Act. The Government already submitted to the Parliament a bill which would define the general retirement age in compliance with the rulings of the Constitutional Court and the European Court of Justice. In the sense of the bill, the general retirement age would be gradually and proportionately reduced.

Churches

In addition to the individual or collective exercise of the right to freedom of religion by all persons and organisations, the Proposal also contains a rule according to which the State may provide special "Church" status with additional rights for organisations engaged in religious activities. That is for the Parliament to recognise these Churches provided that they meet the requirements set out in a cardinal Act. This provision has been transplanted from the former Transitional Provisions. Having regarding to a recent Constitutional Court decision, the Parliament adopted a motion for amendment to the Proposal in order to ensure a legal remedy (constitutional complaint) against parliamentary decisions denying the Church status.

Constitutional Court

The Proposal extends the circle of those entitled to initiate ex-post constitutionality review (in abstracto) of laws before the Constitutional Court; by virtue of the Proposal not only the ombudsman, but also the President of the Curia (Supreme Court) and the Supreme Prosecutor could turn to the Constitutional Court.

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. 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 61/20111, 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. Besides, the Proposal sets out a time limit of 30 days for this examination so as to avoid long-term uncertainty about the legal validity of norms of constitutional level.

[1] „The Constitutional Court may not revise and annull any provisions of the Constitution. Once a provision has been adopted by two-thirds majority of the Members of Parliament and has become part of the Constitution, it is *per definitionem* excluded to assess that this provision is in contradiction with the Constitution. (…) In the system of checks and balances the Constitutional Court has no unlimited power. That is why the Constitutional Court has no competence to review the Constitution and new norms amending the Constitution without an explicit authorization by the Constitution." [61/2011. (VII. 13.)]

The Proposal builds in the Fundamental Law some principles of Constitutional Court procedure in line with the present practice of Constitutional Court (e.g. other party should also be heard; Court procedure is bound to the motion).

Having regard to the possible new contexts of the Fundamental Law as compared to the previous Constitution, the Proposal explicitly states that Constitutional Court decisions made before the entry into force of the Fundamental Law (1 January 2012) shall cease to be in force. This draft provision does not affect the force of the Constitutional Court decisions in the sense that laws formerly nullified by these decisions will not come into force again, nor does it mean that the Constitutional Court may not come to the same conclusion in a specific future case as in a case before the Fundamental Law. However, it means that should the Constitutional Court intend to use its previous assessments, it would not be enough to merely referring back to a former decision, but it would be obliged to give a detailed legal reasoning in the light of the Fundamental Law. It should also be noted that this draft provision can also be regarded as a rule broadening the margin of manoeuvre of the Constitutional Court, because the Court will be more free to decide whether it would like to simply repeat the legal reasoning of its former decisions or work out new arguments not bound by the case-law built on the previous Constitution.

The Proposal does not comprise a new restriction on the competences of the Constitutional Court by introducing a new Article 37(5) in the Fundamental Law. This new Article merely repeats the provision already included also in the Transitional Provisions and only aims at clearly regulating the transition from the period concerned by the special state debt rule to the future period in which the state debt no longer exceeds half of the GDP.

Fighting against hate speech

The Proposal explicitly lays down that human dignity of communities may put a limit on freedom of expression, and individuals belonging to a community may bring a civil law action before the court because of hate speech concerning their community. The reason for this provision is the recently increased hate speech against Jewish and Roma people in the public debates.

Higher education

In order to the efficient management of public funds, the Proposal gives a power for the Government to supervise the financial management of state institutions of higher education financed from the State Budget. However, the Proposal explicitly sets out the autonomy of the higher education in the field of research and education, so the financial supervision to be exercised within the framework of a parliamentary Act may not affect the autonomy of research and education.

The Proposal gives a possibility for the legislator to adopt an Act which provides for a state subsidy only for those students in higher education who assume the obligation of being employed, for a certain proportionate period after finishing their studies, by a Hungarian employer. The underlying principle of the amendment is that exercising the right to education with a state subsidy (with the help of the Hungarian taxpayers) should serve the interests of both the individual and the community. The reason for setting out this provision in the Fundamental Law and not only in an ordinary law is that it has a close link to several fundamental rights and represents a symbolical message of responsibility towards the community. It should be emphasised that the state-financed students are obviously not prevented from being employed outside Hungary after their graduation, but in such case, they must pay the tuition fee subsequently. In order to help the students who need financial assistance, but would not like to make a commitment to work in Hungary for a definite period, the Government elaborated a reduced-rate, preferential loan construction.

Electoral campaign advertisings

In order to reduce the campaign cost and create equal opportunities for the parties, the Proposal and a motion for its amendment ensure for the electoral campaign advertisings to be published free of charge and on equal basis in the public media, while excluding the possibility for publishing electoral campaign advertisings on non-public television and radio channels. This provision is similar to the French regulation concerning political advertisements in the campaign period.

Family relationship

The Proposal highlights the marriage and the 'parent-child' relationship as bases of the traditional family relationship. However, this provision does not exclude the protection of other modern forms of cohabitation; other family models may also be regulated in form of Acts.

Use of public areas

The Proposal does not criminalize homeless people and nor does it contain general prohibition regarding homelessness. On the contrary the Proposal obliges the State and the local governments to ensure accommodation for all unsheltered people. Taking into account the accommodation provided for by the State and local governments, the Proposal entitles them to prohibit permanent living in certain parts (but only in certain and not all parts) of public areas where necessary in the interests of protecting public order, public safety, public health and cultural values. The prohibition must have a legal form which can be challenged before the Constitutional Court.

Yours sincerely,

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