Comments of the Government of Hungary on the Draft Opinion on the Fourth Amendment to the Fundamental Law of Hungary

This document contains the comments of the Government of Hungary on the draft opinion prepared by the rapporteurs[1] of the European Commission for Democracy through Law (the "Venice Commission") on the Fourth Amendment to the Fundamental Law of Hungary (the "Draft Opinion"). The comments below follow the structure of the Draft Opinion.

A. The protection of marriage and family (15-20.; 148.)

(1) First, it must be pointed out that contrary to the evaluation of the Draft Opinion, the last sentence of paragraph (1) of Article L) of the Fundamental Law does not contain a legal definition of the notion of family. Instead, it merely declares that the "*basis of family ties*" is marriage or the relationship between parents and children. Thus, the statement contained in Article L) is of a moral character, rather than of normative content. Consequently, this provision cannot be regarded as an exclusive definition and it does not preclude the statutory protection of family relations in a wider sense.

(2) Second, it also must be clarified that the new provision inserted into paragraph (1) of Article L) is not identical to the former Article 7 of the Act on the Protection of Families that had been annulled by the Constitutional Court by decision 43/2012. Unlike paragraph (1) of Article L) of the Fundamental Law, the Article annulled by the Court did contain a closed definition of family. Hence, the new provision under the Fourth Amendment does not amount to an "overruling" of the earlier decision of the Constitutional Court.

(3) The Hungarian Government believes that in order to properly assess the legal regime governing family affairs in Hungary no particular constitutional provision can be singled out, but the broad context within the Fundamental Law and under the relevant ordinary legislation must also be analysed in full. Thus, one must consider Article VI of the Fundamental Law which identifies a new right (not explicitly included in the previous constitution). Paragraph (1) of Article VI states that every person has a right to the protection of his or her private and family life, home, communications and good reputation. Moreover, Article II declares the inviolability of human dignity. This provision – also contained in the previous constitution – served as the basis of case-law of the Constitutional Court developed to afford legal protection to various forms of relationships (even in the absence of an express constitutional reference to the right to private and family life at that time). Articles II and VI combined thus offer a more comprehensive constitutional ground to guarantee any person's alternative choice of familial ties than under the previous regime.

(4) This is also demonstrated by the fact that Hungarian legal system does not follow a narrow interpretation of "family" at sub-constitution level. Both the Civil Code in force and the new Civil Code, recently adopted by Parliament (on 11 February 2013 as Act V of 2013), ensure consistency with the case-law of the European Court of Human Rights as regards family relationships. Besides, the legal institution of the registered partnership (of same-sex

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couples) regulated in a separate Act since 2009 continues to be in force also under the Fundamental Law.

(5) As a final point of correction it should be recalled that Paragraph 15 of the Draft Opinion is based on an erroneous translation of the Fundamental Law. The Draft Opinion uses "and", a conjunctive word, between the two main elements on which family ties are based ("marriage"/"relationship between parents and children"). The Hungarian text uses the word "illetve", which means "and/or" in English and is to be translated as "or"[2]. The correct sentence thus reads as follows: "Family ties shall be based on marriage *or* the relationship between parents and children".

B. Communist past (Article 3)

(6) As the Draft Opinion correctly notes most of Article U is of moral and political character. This is due to the fact that Article U is a concise version of the long preamble to the Transitional Provisions (that has been annulled by the Constitutional Court for formal reasons). It follows from this declarative and political character that for the most part it does not lay down hard and fast rules, but rather defines directions for further legislation.

(7) The need for such further legislation is on the one hand specifically mentioned by Article U. This is the case with paragraph (5) which calls for the reduction of special pension benefits under a separate act[3]. Similarly, by virtue of paragraph (6), the list of serious crimes concerned by the rules on statute of limitations, is to be defined by a separate act. Besides, it is needless to say that paragraph (6) of Article U can only serve as a basis of criminal punishment if there are implementing criminal law dispositions on statutory level. In this regard Act CCX of 2011 can by cited which specifies the conditions under which crimes committed under the communist regime can be prosecuted. As to the prosecution itself, the rules of ordinary criminal procedure apply (Act XIX of 1998).

(8) Importantly, these implementing legislation are sufficiently precise in terms of content and procedure. Consequently, contrary to the conclusion of the Draft Opinion, the Hungarian legal system does contain all the necessary guarantees to ensure that the case of each affected person is handled individually. Against that background, the general terms quoted by the Draft Opinion ("holders of power", "leaders") must be seen as a declaration of political guidance rather than directly applicable legal provisions. Thus the statement that Article U "attributes general responsibility for the past using general terms and vague criteria without any chance for an individual assessment" is unfounded.

(9) As to the timing of the introduction of the provisions on the communist past the criticism of the Draft Opinion (notably that it is too late to do that after twenty years) the following must be pointed out. The previous constitution was adopted by the last Communist Parliament (most certainly not based on free elections). The 1989 constitution was not a product of a nationwide political compromise or reconciliation, but was handed down by the monolithic ruling elite. Needless to say, that this constitution did not address the communist past by any measure. Moreover, the 1989 constitution was always meant to be provisional

[2] The correct translation, provided by the Hungarian authorities, has been published on the website of the Venice Commission on 23 April 2013 as document No CDL-REF(2013)016.
[3] It must be noted, that the translation of paragraph (5) of Article 5 refers to "statutory extent", while the original Hungarian text says "pensions or other benefits can be reduced to a level defined by an act of Parliament".

(even by its own preamble). The reason why such provisions were not adopted in 1990 (as in the case of some other newly established democracies) is rooted in the special constitutional evolution of the country, notably that the political circumstances to adopt a comprehensively new constitution did not arise until 2010.

III. C. The recognition of churches (30-36.)

(10) As to the practice of religious activities and the status of various religious organisations in Hungary the following must be pointed out.

(11) Neither the Fundamental Law nor the rules of the applicable cardinal act limit the freedom of religion. They do not limit religious activities performed within or outside of organisational frameworks. In Hungary, everyone has the freedom to choose his or her religion or other belief, and to manifest it. This right is ensured under paragraph (1) of Article VII of the Fundamental Law, the content of which is in line with Article 9 (1) ECHR. Freedom of religion based on this latter provision was protected by paragraphs (1) and (2) of Article of the former constitution, and this regulation has not been modified by the Fundamental Law or by its Fourth Amendment. Furthermore, in its reasoning to decision 6/2013 the Constitutional Court recognised that the freedom of religion is indeed ensured in Hungary.

(12) As a starting point for the evaluation of the status of various religious organisations it must be underlined that the well-established jurisprudence of the Constitutional Court (since decision 8/1993) makes it clear that (i) the neutral guarantee of the free practice of religion and (ii) the granting by the state special status to religious organisations (e.g. through registration of churches) are two different matters. In the latter the state enjoys a wide margin of appreciation. The fact that countries may differentiate (not discriminate!) among various religious organisations (churches) is also recognised by the Venice Commission in its 2004 Guidelines for Review of Legislation Pertaining to Religion and Belief: "[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination" (Chapter II.B.3). It is on that basis that the Venice Commission found – in its opinion CDL-AD(2011)016 – Article VII of the Fundamental Law to be in line with Article 9 ECHR.

(13) Importantly, the Draft Opinion does not take into account the new rules that are being deliberated in Parliament with a view to defining the status of religious organisations. These contain important changes vis-à-vis the previous regime partly annulled by the Constitutional Court.

(14) First, as under the existing regime, any group of believers can – subject to certain formal conditions – apply for registration by the authorities as a special type of religious association. The religious organisations thus registered can call themselves a church at will. Worship, teaching, practice and observance by the members of this organisation is not limited by law or the authorities.

(15) The parliamentary procedure under paragraph (2) of Article VII of the Fundamental Law is only necessary where a religious organisation strives for a special relationship with the state. The nature of that relationship is characterised by the following: participation in community goals by the organisation and the granting by the state of financial and other

benefits to the religious organisation at issue (comparable to the "Kirche des öffentlichen Rechts" in Germany). The parliamentary procedure results in the enlisting in the annex to the act on churches of the particular religious organisation.

(16) As to the objectivity of conditions and procedural guarantees linked to the parliamentary procedure the following new developments must be emphasised. First, upon the application of the religious organisation, the competent minister carries out an assessment whether the applicant fulfils the precise criteria laid down by law. In case of a negative assessment the minister issues a formal resolution that can be challenged before an administrative court in accordance with the regular procedure. If the minister confirms the fulfilment of all legal criteria, he submits a proposal for recognition by Parliament. If Parliament finds that the religious organisation is able to cooperate for community purposes with the state it enlists in the act. If Parliament rejects the recognition, it must deliver a reasoned resolution. The negative decision of the Parliament may be challenged before the Constitutional Court in a special procedure established for these reviews. The Constitutional Court assesses the decision of the Parliament with regard to the lawfulness of the procedure, including the requirements for motivation. These provisions provide the Constitutional Court with a broad margin of discretion to review the parliamentary decision thus challenged.

(17) By way of conclusion the following must be underlined:
- the exercise of the freedom of religion is not constrained by law in Hungary;
- any religious organisation can call itself a church;
- a parliamentary procedure is only necessary for those religious organisations that apply for a special privileged relationship with the state;
- the granting of this privileged status is subject to judicial control through the entire procedure by the ordinary administrative courts or by the Constitutional Court.

III. D. Media access for political parties (37-48., 148.)

(18) First, it must be pointed out that contrary to the assessment of the Draft Opinion the Fourth Amendment does not overrule decision 1/2013 of the Constitutional Court. As it is demonstrated below the restriction under the Fourth Amendment are much narrower than those adjudicated by the Court in January 2013 (e.g. not covering print, internet media, etc.).

(19) In fact, the Fourth Amendment contains only the core of the legislative provisions governing of political campaign activity through the various media. To get the full the picture the applicable provisions of Act CLXXXV of 2010 on Media Services and Mass Media as well as Act XXXVI of 2013 on the Electoral Procedure must also be considered.

(20) This is all the more necessary as the Draft Opinion (paragraph 44) concludes that the limits on paid political advertisements in Hungary may result in the lack of information for the voters. This, coupled with the presumed "dominant position of the Government in the media coverage" (paragraph 45), deprives opposition parties to air their views effectively. In the opinion of the Hungarian Government the opposite is true.

(21) Political campaign in the various media is regulated as follows in Hungary. First of all, internet, print media and cinema political advertising is not constrained by law (during electoral campaigns however all media outlets must register with the National Audit Office their price lists and publish them). Political propaganda on posters, fliers, billboards remain

free. Even within commercial radio and television political talk-shows, news programmes, analyses, etc. come under no restriction. The only restriction that applies is with regard to *commercial* radio and TV advertising. This, as underlined in the Background Document, is driven by the legitimate demand that the differences in the financial power of parties should not distort the electoral campaign.

(22) Contrary to Paragraph 45 of the Draft Opinion, the allotted time (600 minutes) for political advertising in public media is unequivocally regulated in the Act on Electoral Procedure (Section 147). Therefore there is no risk that public media services would restrict political campaigning in times of elections. Moreover, the legislation favours smaller parties in so far as air time is allocated on an equal footing among all national parties. As political advertisements are aired free of charge this has a positive equalising effect, rather than an exclusive effect as the Draft Opinion suggests.

(23) Also, it must be pointed out that under the Act on Electoral Procedure individual candidates as well as parties not able to present a nationwide candidacy list are allocated free air time on a proportionate basis. Therefore, violation of Article 14 and Article 10 ECHR is inconceivable.

(24) Hungary maintains that these restrictions do not go beyond what is already applied in one way or another in a number of Member States of the Council Europe, e.g. France, Italy, Poland, etc.

(25) Finally, with regard to the political advertisements during the elections to the European Parliament (Paragraph 47), the Hungarian Government will withdraw the draft amendment to the implementing law on electoral procedures. As a result, the same rules will continue to apply to both national and European Parliament elections, in full conformity with the Fundamental Law.

III. E. Limitation of the freedom of speech (49-54, 148)

(26) The conclusion of the Draft Opinion that the new paragraph (5) of Article IX of the Fundamental Law overrules the constitutional principles established in the decisions of the Constitutional Court referred to therein is incorrect. The Draft Opinion does not take into account the fact that the decisions of the Constitutional Court at issue dealt exclusively with the limitation of the freedom of expression by way of criminal law. To the contrary, the provision of the Fundamental Law in question lays down the foundations of a civil law claims mechanism that may be used against hate speech directed at certain groups of society.

(27) Title 8 of the Background Document sets out in detail the findings of the Constitutional Court with which the provisions of the Fundamental Law are in outmost accordance and which substantiate that the Constitutional Court has also found the limitation of free speech by means of civil law claims based on the dignity of communities to be constitutional.[4]

[4] „If the expression relates to the whole of the community and to an unquestionable, substantial attribute of the members of the community, and the expression may, in the extreme, question the existence itself of the community, the person belonging to the community may rightfully expect protection on behalf of the legal system. This may mean a necessary limitation of the freedom of expression, but is only constitutional if it is proportional to the aim it seeks to achieve." (decision 96/2008 of the Constitutional Court).

(28) The conclusions of the Draft Opinion that the limitations in the new paragraph (5) of Article IX of the Fundamental Law are too wide and not sufficiently precise, fail to take account of the fact that the civil law instruments will not be regulated by the provisions of the Fundamental Law, but will evidently be defined in concrete legal form by ordinary statutory provisions (Title 8 of the Background Document sets out in detail the statutory provisions not yet in force).

(29) In this regard the following should be emphasised again. Section 2:54 (5) of Act V of 2013, on the new Civil Code, which enters into force on 15 March 2014, concretises the provisions included in the Fundamental Law. According to this, "in the event of any legal injury made before great publicity, to some essential trait of his or her personality, in relation to him or her belonging to the Hungarian nation or to some national, ethnic, racial or religious community, severely offensive to the community or unreasonably insulting in its manner of expression, any member of the community is entitled to enforce his or her personality right within thirty day terms. With the exception of surrendering the material advantage achieved through the infringement, any member of the community may enforce any sanction of the infringement of personality rights." Under the Civil Code the party affected may, among others, ask the court to declare the infringement, to issue an injunction to stop the infringement, to seek damages, etc.

(30) The conclusions of the Draft Opinion that criticise the protection of the dignity of the Hungarian nation and express a concern that this may be used as an unsubstantiated limitation of the freedom of expression are unfounded. On the one hand, the draft Opinion fails to take note of the fact that the limitation in question will be applied within the framework of personality rights under civil law, therefore a violation may only be found on the basis of the well-established case law in this field. On the other hand, the Hungarian legal system has already defined several offences that are meant to penalise certain hate crimes that cover the Hungarian nation as well (incitement against a community, desecration of national symbols). Against that background, the Fourth Amendment does not create a novel situation.

(31) Moreover, the Draft Opinion fails to give a conceptual explanation on the question why, if the law recognises the dignity of certain groups of society, this is any different on a value or moral basis from the recognition of the fact that the society as a whole, i.e. the Hungarian nation may not possess dignity worthy of protection.

(32) Finally, two of the conclusions of the Draft Opinion deserve special attention. First, it must be underlined that the above measures have never been used, nor could they be in the future, to the protection of the institutions of the state. "Hungarian nation" in this provision means the community of natural persons that share a common national identity and may in no circumstances be construed to encompass state organs or certain elements of the institutions of the state. Such an interpretation would be contrary to the prohibition laid down in paragraph (3) of Article I of the Fundamental Law according to which "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."

(33) Secondly, in the final conclusions (paragraph 148) the Draft Opinion appears to misinterpret completely the nature of the new paragraph (5) of Article IX of the Fundamental Law. It seems to see the hate speech clause of the Fundamental Law (and the Civil Code) as

an instrument to protect the *views* of minorities or the majority (underlining that protecting the dignity of the Hungarian nation undermines the protection of minority views). The conceptual basis and the implementing mechanisms of paragraph (5) of Article IX is completely alien to that line of reasoning. The Hungarian Fundamental Law aims to protect the dignity of communities of natural persons and to offer appropriate civil law remedies against any type of hate speech. If the conclusions of the Draft Opinion are applied consistently there is tolerable hate speech and intolerable hate speech, a truly discriminatory approach.

III. F. Autonomy of the institutions of higher education (55-58.)

(34) First, the new constitutional provisions do not contradict the findings of the Constitutional Court's decision 62/2009 (erroneously marked in the draft opinion as 69/2009). The passage cited in the Draft Opinion ("the economic autonomy of universities may be limited but, as it serves as a guarantee of the realisation of the freedom of sciences, the more an economic activity is linked to the science, the greater its constitutional protection of autonomy") has a rather permissive context in the decision. Notably, „(…) Autonomy does not exclude the allowed legislative restrictions of autonomous powers. Acts may settle rules of restrictive nature in order to create financial efficiency and reasonable organisational structure. It is not unconstitutional to supervise the scientific and educational activities of institutions of higher education from an economical and institutional rationalisation aspect, or to determine economical requirements by the founder of the institution (…)."

(35) The autonomy with regard to the contents and methodology of research and teaching is guaranteed for all institutions of higher education under the Fundamental Law. The governmental responsibility for the finances of state-run colleges and universities is merely a consequence of the fact that these institutions form a part of the state, and their operation is financed from the central budget. The Draft Opinion does not question the need for regulation and supervision of financial management of institutions of higher education, and since these institutions are part of the state's institutional and budgetary system, there seems to be no valid reason of denying the role of governmental organs in ensuring the lawful and accountable financial management of them.

(36) As to the level of regulation the Draft Opinion itself admits that financial rules for universities are usually regulated by ordinary acts. As the Fundamental Law only contains an enabling provision, the implementing ordinary legislation come under constitutional review as any other laws. Consequently, nothing prevents the Constitutional Court from examining and – if it were to find them unconstitutional – annulling legislative or governmental measures which are of a financial nature but interfere with the freedom of sciences.

III. G. Financial support to students (59-62.)

(37) Contrary to paragraph 62 of the Draft Opinion, paragraph (3) of Article XI of the Fundamental Law cannot prevent the review by the Constitutional Court of legislation adopted by Parliament on the financial support to students. The phrasing of the provision itself excludes this interpretation, since it offers only an opportunity for the legislator to introduce measures within the scope of the provision of the Fundamental Law. The Constitutional Court has all powers to carefully examine and evaluate the necessity and the proportionality of the obligations prescribed by the legislator.

(38) Besides, the constitutional provision also lays down clearly the necessary level of regulation („in an Act of Parliament”), fully in line with the Constitutional Court decision 32/2012 mentioned in the Draft Opinion.

(39) While it does not hold direct relevance for the Draft Opinion, it is important to emphasize that the legislative provisions in question introduce a three-tier system of financial support for students. As a general rule every student is free to finance his tuition at his own devices. Secondly, students may apply for a preferential student loan to cover their tuition fee in full. Thirdly, the state allocates every year a national quota for state-funded scholarships. Those applying for such bursaries are bound to work in Hungary for a period equal to the duration of their scholarship within 20 years following graduation.

III. H. Incrimination of homelessness (63-55.)

(40) The Draft Opinion ignores the full text of the constitutional provision at issue. First and foremost, the Fourth Amendment creates, in Article XXII, a completely new set of obligations on the state and local governments to tackle homelessness. Paragraph (1) calls for the provision of decent housing and for the access of public services for all. A new paragraph (2) places an obligation on the central and local governments to cooperate with a view to creating the necessary conditions to provide shelter for all homeless persons. In addition, a new paragraph (3) allows local governments to designate limited zones where habitual living can be banned. These three provisions constitute a comprehensive package that requires constitutional regulation. This was the reason behind the level of regulation, rather than, as the Draft Opinion assumes the avoidance of review by the Constitutional Court. In fact, as all implementing rules will be adopted by ordinary acts (or decrees of local governments) the Constitutional Court will enjoy full powers to assess their consistency with the Fundamental Law.

(41) It also must be pointed out that the new implementing legislative framework, tabled to Parliament, creates a system that is substantially different from that annulled by the Constitutional Court by decision 32/2012. Neither the new provisions of the Fundamental Law, nor those of the implementing legislation can be seen to amount to an “incrimination of homelessness”.

(42) The new regime will comprise of the following main elements:

- habitual living can be banned by local governments only based upon precisely defined public order considerations listed in the Fundamental Law (i.e. the protection of public order; public security; public health and cultural assets);
- a person (irrespective of being homeless or not) living in the designated zone not respecting this regulation must be expressly called upon by the authorities to leave the area;
- only if the person fails to follow the official instruction can the authorities initiate contravention procedure (as a general rule sanctioned by public work).

IV. A. The role of the President of the National Judicial Office (67-72, 149)

(43) The Draft Opinion notes in paragraph 70 that the powers of the President of the National Judicial Office have already been substantially curtailed in view of the previous opinions of the Venice Commission. It is going to be even further reduced as a result of the elimination of the transfer of cases (see paragraph 45 below). Moreover, the Fourth Amendment does no more than includes two completely neutral and descriptive sentences into the Fundamental Law that merely reinstate the institution within its existing boundaries in the context of the organisational section on the judiciary. These are aimed to strengthen the independence of the constitutional status of the institution, rather than expand its powers. Against that context it is difficult to see why this move gives rise to statements such as "the progress achieved through the dialogue with the Secretary General is jeopardised by the Fourth Amendment" (paragraph 71).

IV. B. The transfer of cases by the President of the NJO (73-84., 149-150.)

(44) On 7 June 2013 the Hungarian Government announced that it will eliminate the transfer, with a view to ensuring the balanced case-load of the courts, of cases from the Hungarian legal system. To that end the Government will submit a proposal to repeal paragraph (4) of Article 27 of the Fundamental Law in accordance with the necessary legislative procedures to the Parliament, to delete accordingly Chapter V (Sections 62-64), section 76(4) point b) and Section 102 (2a) point b) of Act CLXI of 2011 on the Organisation and Administration of Courts, Section 47 of Act III of 1952 on the Civil Procedure, Section 20/A of Act XIX of 1998 on Criminal Procedure, moreover, to revise Sections 1, 2, 14, 16, 17, 27 as well as to delete Section 15 of Bill No. T/10593 on the implementation of the Fourth Amendment to the Fundamental Law. This will however not affect the case transfers already carried out.

V. A. The overruling of the Constitutional Court's decisions (87-96.)

(45) The Draft Opinion concludes that there is systematic tendency in Hungary to overrule the decisions of the Constitutional Court, and the Fourth Amendment is an example of that process. That conclusion is unfounded.

(46) First, unlike it is suggested by paragraph 90, the Fourth Amendment is not one of a series of constitutional amendments affecting the decisions of the Constitutional Court. In fact, the first three amendments to the Fundamental Law did not concern the decisions of the Court at all[5] (also see paragraph 68 below).

(47) Second, it has already been demonstrated above in relation to the various individual issues that while the Fourth Amendment did address matters that had previously been adjudicated by the Constitutional Court, none of the new provisions can be considered as a re-

[5] - The First Amendment to the Fundamental Law, adopted on 18 June 2012, clarified the constitutional status of the Transitional Provisions as well as deleted the possibility to adopt a cardinal legislation on the merger – under a new institution – of the National Bank of Hungry and the Financial Supervisory Authority.
- The Second Amendment to the Fundamental Law, adopted on 9 November 2012, introduced a requirement into the Transitional Provisions concerning mandatory registration of voters. This amendment only affected the Transitional Provisions and was subsequently annulled by the Constitutional Court.
- The Third Amendment to the Fundamental Law, adopted on 21 December 2012, provided for the adoption of the fundamental provisions relating to the ownership of agricultural land and forests by cardinal laws.

introduction of already annulled legal rules. A material distinction must therefore be drawn between *overruling* the Constitutional Court's decision, on the one hand, and *revisiting* the subject matter of certain such decisions, on the other.

(48) In detail, it must be pointed out:

- Article VII - decision 1/2013 (recognition of churches): the concept of the annulled provisions was completely different from that of the Fundamental Law and the new legal regulation under preparation (see point III. C.);
- Article L (1) – decision 43/2012 (family ties): there is no direct link between the old and new provisions. The text in the Fundamental Law cannot be regarded as a definition (and therefore it does not exclude the legal protection of family relations in a wider sense, for more details see point III. A.);
- Article IX (3) – decision 1/2013 (media access for political parties): the annulled provisions contained much broader restrictions;
- Article IX (5) – decisions 30/1992, 18/2004, 95/2008 (freedom of speech): the Court addressed criminal sanctions relating to racial incitement, while the Fundamental Law introduces a civil rights claims mechanisms for hate speech;
- Article X (3) – decision 69/2009 (autonomy of universities): the new rules simply authorise the legislator to adopt rules on the financial management of state universities, does not address the autonomy of higher education;
- Article XI (3) of the Fundamental Law – decision 32/2012 (student grants): the decision of the Court was merely based on formal grounds (level of regulation is insufficient by government decree), and the new legislation is also fundamentally different;
- Article XXII (3) – decision 38/2012 (homelessness): the new system covers much narrower restrictions on habitual living that before, obligation is imposed on the state and local governments to cooperate to eliminate homelessness.

(49) It is also to be noted that the legislator incorporated several elements of the case-law of the Constitutional Court into the Fundamental Law (definition of marriage, division of powers, necessity-proportionality test in Constitutional Court procedure, state's monopoly of the use of force, the way to adopt generally binding rules of conduct) and certain provisions have been drafted with regard to the decisions of the Constitutional Court (e.g. the competence of the Constitutional Court to examine the Fundamental Law, residing in public places, church regulation).

(50) Finally, Hungary would like to recall that in a previous opinion the Venice Commission already took a stand on the question of a constitutional revision which goes against a decision of the Constitutional Court: „The constitutional revision follows, inter alia, the judgment of the Belgian Constitutional Court No. 73/2003, of 26 May 2003. It might be considered as aiming in particular at reversing some effects of this judgment. There is however no general standard saying that a constitutional revision cannot go against a decision of a constitutional court. This would make the Constitution as interpreted by the Constitutional Court intangible." (CDL-AD(2012)010).

V. B. Previous case-law (97-108.)

(51) Before reflecting on the comments of the Draft Opinion the status of the previous case-law of the Constitutional Court must be clarified. As a starting point it must be

underlined that case-law of the Constitutional Court developed before the entry into force of the Fundamental Law is not rendered "void", as suggested by paragraph 105 of the Draft Opinion. The second sentence of point 5 of the Closing and Miscellaneous Provisions clearly states that the legal effects of the earlier rulings remain intact.

(52) Moreover, neither the text of the Fundamental Law, nor the Background Document supports the conclusion in paragraph 104 and 151.2 that the Constitutional Court is barred from referring to its earlier case-law. In its recent decisions (i.e. adopted after the entry into force of the Fourth Amendment) the Constitutional Court indeed refers to its previous case-law extensively (e.g. decision 12/2013, decision 3109/2013, decision 3104/2013).

(53) The provision of the Fourth Amendment that the earlier rulings of the Constitutional Court are no longer in force (and are not annulled or void!) is more of a symbolic nature and has limited practical significance. Even in the own interpretation of Constitutional Court this provision does not create a source of uncertainty. All the more so, as the Fundamental Law makes it clear in Article R) that the so-called "historic constitution" constitutes a source of interpretation of the Fundamental Law. As the Draft Opinion also recognises (paragraph 108) the rich case-law of the Hungarian Constitutional Court is part of that tradition, thus can be freely used in constitutional jurisdiction (unless it goes against the Fundamental Law itself). This way the Court is able to ensure constitutional coherence through its decisions adopted over two decades.

V. C. Review of constitutional amendments (109-117.)

(54) The assessment in the Draft Opinion concerning the review of the procedural validity of constitutional amendments contains a number of contradictory conclusions.

(55) On the one hand, the Draft Opinion notes that the constituent power incorporated two decades of consistent jurisdiction, under which "The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorisation to that effect." (see lastly decision 12/2013).

(56) On the other hand, the Draft Opinion appears to see the Fourth Amendment as a legislative intervention against an interpretation gradually developed by the Constitutional Court to expand its own powers to review constitutional amendments from a substantive point of view (paragraph 111).

(57) The Hungarian Government in that context only recalls the various opinions of the Venice Commission to the effect that there is no general rule or practice authorising constitutional courts to overtake the role of the constituent power (CDL-AD(2012)010). The Hungarian Government merely intends to remain in that tradition, as do several European states.

V. D. Review of budgetary laws (118-122.)

(58) The Hungarian Government does not recall the various arguments it had submitted in support of the limitations on the powers of the Constitutional Court to review budgetary laws.

Suffice it to remind here that the restrictions on budget review are temporary in nature and limited in scope and that the Court has

- unlimited ex ante review of all budget-related legislative acts;
- unlimited ex post review of all legal acts other than acts of Parliament (e.g. government decrees);
- full ex ante and ex post review of all budget-related legislative acts from a procedural point of view;
- full ex ante and ex post review of all budget-related legislative acts with regards to their compliance with international treaty obligations.

(59) Moreover, the Constitutional Court may continue to review the infringement of the individual fundamental rights defined in the Fundamental Law, as it could be seen in recent decisions (in the case of the 98% tax). Thus, the rule restricting the Constitutional Court does not prevent the body, for instance, from reviewing fiscal laws with reference to the infringement of the right to human dignity. Therefore, the Constitutional Court is able to fulfil its most important function of protecting fundamental rights.

(60) As regards the introduction by the Fourth Amendment of an additional paragraph (5) to Article 37 the Draft Opinion completely misinterprets the meaning of that provision (paragraph 121). In fact, this rule has been transplanted from the Transitional Provisions in a modified form. The real meaning of the new provision is that once the level of state debt falls below 50% of the GDP the Constitutional Court may review budgetary laws in full adopted even during that moratorium. The only limitation is that it may only quash such laws with *ex nunc* effect, i.e. no retroactive jurisdiction is possible as far as the effects of the decisions are concerned.

V. E. 30 day limit for the review of requests from ordinary courts (123-125.)

(61) It should be highlighted that the time limit of 30 days has been present in other proceedings of the Constitutional Court also to date and it therefore does not represent an excessive burden for the body. It should also be noted that according to the well-established case-law of the European Court of Human Rights, proceedings in a Constitutional Court are to be taken into account for calculating the relevant period of "reasonable time" (within which a court decision should be delivered) where the result of such proceedings is capable of affecting the outcome of the dispute before the ordinary courts. (See e. g. Ruiz-Mateos v. Spain, 23 June 1993). However, the Hungarian Government decided to take into account the considerations relating to the need for en effective constitutional review in this particular procedure as well. For this reason, the Government will submit a proposal to extend the 30 days limit to 90 days and to amend paragraph (2b) of Article 24 of the Fundamental Law accordingly.

V. F. Request for abstract control by the Curia and the Supreme Prosecutor (126-127.)

(62) In connection with the newly established powers of the President of the Curia and the Supreme Prosecutor, it is not obvious why the Draft Opinion presumes the abuse of power in their case. The Hungarian Government does not see any reason why these officials would not exercise their rights within their statutory competences.

V. G. Special tax in case of court judgments leading to payment obligations (128-134.; 151.6.)

(63) On 7 June 2013 the Hungarian Government announced that it will propose the deletion of paragraph (6) of Article 37 by amending the Fundamental. In this case, strengthening the rules of Act CXCIV of 2011 on the Economic Stability of Hungary (AES) will be necessary to recover unexpected losses and unforeseeable expenditure. The rules amending the AES will be formulated in a general manner without reference to any court decision and will not oblige the legislator to link the measures to be taken to the cause of the unforeseeable budgetary expenditure.

VI. A. Use of cardinal Acts (135-140.)

(64) As already pointed out several times by the Hungarian Government the existence of cardinal laws in the Hungarian constitutional system is nothing new. The previous constitution – adopted in 1989 – contained more or less the same number and the same range of subject matters to be regulated by two-third majority. Thus, the presence of these laws is not a token of the arrogance of the ruling coalition, but a steady feature of the Hungarian constitutional order. Only in a few areas does the Fundamental Law introduce new requirements for cardinal laws, mainly in relation to the prudent management of the state budget and state assets.

(65) The Hungarian Government disagrees with the concerns of the Draft Opinion as regards the subject matter and the degree of detail of the cardinal acts. There is no basis to believe that certain new issues to be regulated in cardinal acts will deprive future governments from being able to conduct a responsible and efficient economic and social policy. Contrary to what the Draft Opinion states, these cardinal acts are typically short pieces of legislation mainly laying down fundamental principles designed to be followed by other regulations which can be passed by a simple majority. Hungary finds it misleading to refer in paragraph 138 of the Draft Opinion to the closing provisions of Bill no. T/10593 as an example of expanding the range of cardinal provisions requiring two-thirds majority in the Parliament.

(66) Bill no. T/10593 contains only amending provisions to existing cardinal acts it and does not increase the number of cardinal provisions at all. It is obvious that amending provisions will merely change existing provisions and since they concern cardinal provisions, technically they must also be adopted by two-thirds. Closing provisions of the Bill highlight the cardinal nature of these amendments in order to serve transparency, and by doing so, they increase by no means the amount of cardinal provisions.

(67) It must also be recalled that the Draft Opinion erroneously states in paragraph 140 that the rules of the Fundamental Law established by the Fourth Amendment further restrict the scope of action of future governments (and are therefore in line with a previous tendency) by elevating provisions in the Fundamental Law that are not of constitutional level (homelessness, provisions relating to the communist regime, student contracts, financial management of universities). The draft opinion fails to acknowledge the fact that the rules incorporated in the Fundamental Law merely create the possibility of regulation (enabling provisions) therefore they do not restrict the room for manoeuvre of future governments which will have the possibility to adopt a different regulation on a lower level as they wish.

Instrumental use of the Constitution (141-143.)

(68) In response to the recurring criticism mounted by the Draft Opinion concerning the frequent and “instrumental” amendment of constitutional rules in Hungary, the following must be recalled. The Fundamental Law has been amended four times thus far. Two of these concern new enabling provisions, one amendment was made at the request of the European Commission. These were all minor changes with very limited political content. Even, the second amendment – that solely concerned the Transitional Provisions – is no longer in force as it has been subsequently annulled by the Constitutional Court (see footnote 5 above).

(69) The Fourth Amendment is of a different character in so far as it affects a wide range of issues. It must be recalled again however that this was made necessary by a decision of the Constitutional Court that annulled the Transitional Provisions on formal grounds. Otherwise there was no independent political will to undertake a comprehensive constitutional revision. The Fourth Amendment was adopted through all necessary procedure, involving the necessary parliamentary debate and transparency, ensuring the rights of the opposition.

(70) It appears that the Draft Opinion considers that constitutions should be pure legal texts that are adopted by the full consensus of parliament and society. In the opinion of the Hungarian Government constitutions cannot be detached from the political and social circumstances of their adoption and are thus necessarily political products reflecting a of political reality.

Conclusions

(71) The Venice Commission submitted its Draft Opinion on the Fourth Amendment of the Fundamental Law of Hungary (*CDL(2012)023-e*) to the Hungarian Government on 29 May 2013. While Hungary appreciates that - upon its requests - the Venice Commission was ready to prepare an assessment with regard to the international commitments that derive from Hungary’s membership of the Council of Europe, nevertheless, the Hungarian Government finds that the Draft Opinion has a number of serious shortcomings that need to be addressed properly in order to arrive to an accurate, balanced and fair evaluation of the Fourth Amendment.

(72) As explained in detail previously, a significant number of the problems raised in the Draft Opinion derive from *factual errors or misunderstandings,* such as in the case of the protection of marriage, where the Fundamental Law does not provide a legal definition of the notion of family. It rather refers to the basis of family ties, thus it does not preclude the statutory protection of family relations in a wider sense, and hence it does not contradict with the case-law of the European Court of Human Rights. Another pronounced example concerns the regulation of political advertisements, where the Draft Opinion suggests, that the relevant Hungarian regulation excludes non-nationwide parties from media coverage. This is again factually incorrect, as political parties which do not set up nationwide candidacy lists and even independent candidates will have access to public media as regulated in the Act on Electoral Procedure. Similarly, the Draft Opinion is wrong to imply that the Fundamental Law removed the possibility of the Constitutional Court to refer to its earlier case-law or that the provisions on the communist past attribute responsibility in general terms. As a consequence

of these factual errors, the Draft Opinion repeatedly arrives at inaccurate and wrong conclusions, which, taken together, qualitatively change the overall assessment.

(73) It is important to note furthermore, that the majority of the points raised in the Draft Opinion concern enabling clauses of the Fundamental Law, therefore, their proper impact cannot be determined without an adequate analysis of the provisions of the accompanying Hungarian legislation. Regrettably, *the Draft Opinion fails in most cases to take into account the relevant (draft) implementing legislation* and it is even more striking, that it very often gives its own, predominantly unfavourable (a priori) interpretation of the provisions of the Fourth Amendment. This in consequence leads to a systematic prejudgment, thus questioning profoundly the principle of impartiality. This is particularly evident in the relevant parts of the Draft Opinion concerning the "incrimination of homelessness", the financial support to students or the recognition of churches.

(74) Even against the background of all this, the general conclusion of the Draft Opinion stressing that *"... the Fourth Amendment perpetuates problems of the independence of the judiciary, seriously undermines the possibilities of constitutional review in Hungary ...*" is not only disproportionate but completely unfounded. As regards *the conclusion concerning the independence of the judiciary,* the Draft Opinion seems to build its very severe and unfounded conclusion on two issues: a) the role of the President of the National Judicial Office (NJO) and b) the issue of transfer of court cases.

a) Concerning the NJO, it must be noted that its President is responsible for the administration of the courts. It should therefore only be natural to strengthen its independence, which has been the aim of introducing the election criteria in the Fundamental Law. Furthermore, the Fourth Amendment did not in any way effect paragraph (1) of Article 26 of the Fundamental Law clearly providing, that "*Judges shall be independent and only subordinated to laws, and may not be instructed in relation to their judicial activities. Judges may only be removed from office for the reasons and in a procedure defined by a cardinal Act. Judges shall not be affiliated to any political party or engage in any political activity*.";

b) As concerns the transfer of court cases, the Hungarian Government has decided that it is ready to eliminate this institution from the Hungarian legal system**.** To that end, the Government will submit a proposal to delete Article 27(4) of the Fundamental Law in accordance with the necessary legislative procedures to the Parliament, to delete accordingly Chapter V (Sections 62-64), Section 76(4) point b) and Section 103 (2a) point b) of Act CLXI of 2011 on the Organisation and Administration of Courts, Section 47 of Act III of 1952 on the Civil Procedure, Section 20/A of Act XIX of 1998 on Criminal Procedure, moreover to revise Sections 1, 2, 14, 16, 17, 27 as well as to delete Section 15 of Bill No. T/10593 on the implementation of the Fourth Amendment to the Fundamental Law. Therefore, the rather long part of the Draft Opinion concerning the transfer of court cases – which it describes as "a main concern" and which "in its previous opinion the Venice Commission had already strongly criticised" - had become irrelevant.

(75) The Draft Opinion unfoundedly claims that the Fourth Amendment undermines the functioning of the Constitutional Court, a statement that it derives from a number of points: a) the removal of the possibility of the Constitutional Court to refer to its earlier case-law; b) the special tax in case of court judgments (including that of the Constitutional Court) leading to

payment obligations; c) the Government's "systematic approach" of "overriding Constitutional Court decisions by constitutionalising provisions declared unconstitutional"; d) limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation which has budgetary incidence, even when budgetary problems have subsided.

a) The provision declaring that the earlier rulings of the Constitutional Court are no longer in force but retain their legal effects does not, in any way, prevent the Constitutional Court from referring to its previous case-law (this has been also confirmed in practice), nor does it exclude the possibility that the Constitutional Court arrives at conclusions similar to previous ones when interpreting a given provision of the Fundamental Law. The Draft Opinion is - yet again - factually wrong in its assessment;

b) As regards the issue of special tax in case of court judgments leading to payment obligations, the Hungarian Government has decided to adopt a proposal in order to delete the relevant Article of the Fundamental Law, thus rendering the comments of the Draft Opinion redundant;

c) There is no evidence to the claim of the Draft Opinion that the Hungarian Government "overruled systematically" previous decisions of the Constitutional Court, in fact it incorporated several elements of the case-law of the Constitutional Court into the Fundamental Law (e.g. the protection of marriage; division of powers; necessity-proportionality test in Constitutional Court procedures; state's monopoly of the use of force; the way to adopt generally binding rules of conduct; etc.).

d) Contrary to the conclusion of the Draft Opinion, the rule in question allows, once the level of state debt falls below 50% of the GDP, the Constitutional Court to review budgetary laws in full. The only limitation is that it may only quash such laws with *ex nunc* effect, i.e. no retroactive jurisdiction is possible as far as the effects of the decisions are concerned.

(76) All this has been confirmed by the President of the Hungarian Constitutional Court, Mr. Péter Paczolay as well, who publicly stated on 23 May 2013 that: "*... I have given an overview of the experience gained so far from the new competences and the rules of procedure of the Constitutional Court to the Prime Minister, in summing-up: the new Act on the Constitutional Court enables efficient constitutional jurisdiction…*"

(77) A recurring criticism of the Draft Opinion (paragraph 48., 58., 62., 68.) regarding the contested provisions is that they unduly regulate subject matters that require statutory regulation on the level of the Fundamental Law, preventing thereby constitutional review by the Constitutional Court. The Draft Opinion fails to take note of the fact however, that in every country, the constituent power has a wide margin of discretion in the decision whether, based on the historical, social and political situation, certain questions represent an importance that belong to the national and constitutional identity of a country and therefore are to be raised on a constitutional level.

(78) In conclusion, the Hungarian Government finds that due to the rather high number of factual errors and misunderstandings contained therein, furthermore, due to the lack of a comprehensive analysis of all the relevant accompanying Hungarian regulation, the Draft

Opinion on the Fourth Amendment of the Fundamental Law needs to be properly revised. As a consequence, the unfounded claims and the disproportionately severe conclusions regarding - in particular - the state of the independence of the judiciary, the constitutional review and the constitutional checks and balances in Hungary needs to be fundamentally revised. Hungary is therefore ready, to provide further information to and cooperate with the Venice Commission in order for it to arrive at an incontestable and balanced assessment accurately describing the legal effects of the provisions of the Fourth Amendment.

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