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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**(VENICE COMMISSION)**

# HUNGARY

# DRAFT OPINION

# ON THE CONSTITUTIONAL AMENDMENTS ADOPTED BY THE HUNGARIAN PARLIAMENT IN DECEMBER 2020

## On the basis of comments by

**Paolo CAROZZA (Member, the United States)**
**Regina KIENER (Member, Switzerland)**
**Ben VERMEULEN (Member, the Netherlands)**



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## I. Introduction

1. By letter of 5 February 2021, the Chairperson of the Committee on the Honouring of Obligations and Commitments (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe (PACE), requested an opinion of the Venice Commission "on the legislative and constitutional package adopted by the Hungarian Parliament in December 2020". As the translation of the relevant legislative texts was made available to the Commission with significant delay, this opinion will cover only the constitutional amendments (CDL-REF(2021)045), while a separate, subsequent opinion will address the legislative amendments.

2. Mr Paolo Carozza, Ms Regina Kiener and Mr Ben Vermeulen acted as rapporteurs for this opinion.

3. Due to the health situation, it was not possible to travel to Budapest. On 17, 18, 20 and 28 May 2021, the rapporteurs as well as Mr Serguei Kouznetsov and Ms Martina Silvestri from the Secretariat held online meetings with: the Ministry of Human Resources, the Ministry of Justice, the Ministry of Family Affairs, the Supreme Court (Kuria), the Data Protection and Freedom of Information Authority, the representatives of political parties from the parliamentarian majority (Fidesz and KDNP) and opposition (Jobbik and MSZP), as well as with civil society. The Commission is grateful to the authorities for the excellent organisation of these meetings.

4. This opinion was prepared in reliance on the English translation of the Ninth Amendment to the Fundamental Law of Hungary (CDL-REF(2021)045) and the Fundamental Law prior to the amendments (CDL-REF(2021)046). The translation may not accurately reflect the original version on all points. The English translation of the Omnibus Act, adopted in the same package as the Ninth Amendment, as well as several laws implementing the constitutional amendments, were not made available to the Venice Commission at the time of drafting this opinion.

*5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written comments from stakeholders. Following an exchange of views with representatives of the authorities, it was adopted by the Venice Commission at its … Plenary Session (…2021).*

## II. Background

6. The Ninth Amendment to the Fundamental Law of Hungary is a government-sponsored amendment.

7. On 10 November 2020, because of the ongoing COVID-19 pandemic, Hungary was in lockdown, ordered on the basis of the Second Authorisation Act adopted that same day. In the night of 10 November 2020, the Ninth Amendment to the Fundamental Law, together with an Omnibus Act (Act CLXV of 2020 amending 22 legislative Acts in the field of justice, hereafter "the Omnibus Act") and amendments to the election legislation (Act CLXVII of 2020) were submitted to Parliament.

8. The Ninth Amendment to the Fundamental Law was adopted by Parliament on 15 December 2020 and came into force on 23 December 2020 with 134 votes in favour, 45 against, and 5 abstentions, with few exceptions described below.

9. The constitutional amendment covers several areas:
   (1) issues of *marriage and family*, including *sexual identity* and the *raising of children* (Articles 1 and 3);
   (2) issues related to the *legislative process* (Article 2);
   (3) issues related to the *establishment of "public interest asset management foundations performing public duties" and the definition of public funds* (Articles 7 and 8);

(4) issues related to *exceptional situations* such as *war or state of emergency* (Articles 4, 6, 9, 10, 11). Article 12 contains transitional provisions.

10. Issues related to point (2), the *legislative process*, and the relevant parts of point (4), *exceptional situations* such as *war or state of emergency* (but not Article 10 on the Decision on Participation in Military Operations), will enter into force on 1st July 2023 and will be addressed together in Section F of this opinion.

11. The Venice Commission underlines from the outset that the impact of several provisions is difficult to assess without knowing the legislative changes that may be adopted implementing these provisions. The Commission remains at the disposal of the authorities for further consultations during the preparation of national legislative acts based on the new constitutional provisions.

## III. Analysis

### A. The process of adoption of the constitutional amendments

12. The Venice Commission notes that the Ninth Amendment to the Fundamental Law was submitted to Parliament as part of a major package introducing several legislative amendments, during a state of emergency declared earlier on that same day. The whole package was adopted by Parliament a few weeks later, without any public consultation, and came into force after one week only, with few exceptions mentioned above (para 10). Moreover, the Background information to the Ninth Amendment to the Fundamental Law (hereafter: explanatory memorandum) is very limited and consists of only three pages.

13. The Venice Commission recalls that according to Hungarian law, when a draft law or constitutional amendment is prepared by Ministers, public consultation is mandatory and requires publishing the draft online for the public to comment upon.[1] The swift procedure that has been followed, without any consultation, is not in line with the Venice Commission's recommendations in the Rule of Law Checklist, either,[2] nor is it compatible with the Commission's Report on Respect for democracy, human rights and the rule of law during states of emergency[3] and the Report on the Role of the opposition in a democratic Parliament.[4] No reason has been offered as to why this amendment should have been adopted through such a fast-track process. Nor are there reasons based on the content of the amendment or the situation at hand why it should be adopted during a state of emergency, when there is a real risk that no meaningful democratic discussion of government bills can take place, particularly when there are severe restrictions on the fundamental rights to gather, discuss, protest and demonstrate.[5] These considerations *a fortiori* apply to constitutional amendments.[6] Not least, the Venice Commission has warned against an "instrumental attitude" of Hungary's governing majority towards the Fundamental Law of Hungary:

> "The Constitution of a country should provide a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way in which it is implemented must create in the society the conviction that, by its very nature, the

[1] Act CXXI of 2020 on Public Participation in Preparing Laws, Articles 1 and 8 (1)-(2).
[2] Venice Commission, *Rule of Law Check List*, CDL-AD(2016)007, point 5.
[3] Venice Commission, *Report on Respect for democracy, human rights and the rule of law during states of emergency: Reflections*, CDL-AD(2020)014, para. 84.
[4] Venice Commission, *Report on the Role of the opposition in a democratic Parliament*, CDL-AD(2010)025, paras. 106 - 115.
[5] On 11 November 2020, the government introduced a blanket ban on demonstrations (Government Decree 484/2020. (XI. 10.), Articles 4(1) and 5(1)-(2)).
[6] Venice Commission, *Report on Constitutional Amendment*, CDL-AD(2010)001.

> constitution is a stable act, not subject to easy change at the whim of the majority of the day. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the 'political game' but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought." [7]

14. The Venice Commission reiterates the importance, in a democratic society, of ensuring an inclusive public debate and a meaningful participation of the opposition in the parliamentary discussions, notably when constitutional changes are at stake.[8]

### B. Marriage and family

15. The first part of the Fundamental Law of Hungary (the Constitution) sets out the "Foundations" (Articles A – U).

Article L paragraph (1) has been amended as follows (changes marked):

> (1) Hungary shall protect the institution of marriage as the union of *one* man and *one* woman [previously: a man and a woman] established by voluntary decision, and the family as the basis of the survival of the nation. Family ties shall be based on marriage or the relationship between parents and children. *The mother shall be a woman, the father shall be a man.*
> (2) Hungary shall support the commitment to have children.
> (3) The protection of families shall be regulated by a cardinal Act.

16. The explanatory memorandum to the Ninth Amendment of the Fundamental Law specifies that the proposal "follows biological evidence and not international trends or ideologies in relation to childbearing" and intends to establish a concept "based on the unchangeable nature of birth, according to which the mother is a woman and the father is a man". At the same time, the memorandum stresses that "[t]he Hungarian Government does not intend to attack or restrict the rights of any particular group. It should be emphasised – contrary to some critics – that the proposal does not introduce any new rules for same-sex partnerships, nor does it contain any restrictions, it only clarifies the concept of marriage and lays down a biological principle. The proposal does not change the legal institution of registered partnerships concerning same-sex couples. Registered partnerships will continue to enjoy the same protection in accordance with international standards, as all social groups are important to Hungary, as every Hungarian is a valuable member of the community, that we call Hungarian nation".

17. The amendment clarifies the original provision, establishing that marriage is "*the union of one man and one woman*", thereby precluding marriages of same-sex couples. On its own, this provision is in line with European human rights standards, notably, Article 12 of the ECHR. In general, the European Court of Human Rights has held "that States enjoy a wide margin of appreciation in this area but also that restrictions placed on the rights guaranteed under Article 12 of the Convention by national law must be imposed for a legitimate purpose and must not go beyond a reasonable limit to attain that purpose (*O'Donoghue and Others v. the United Kingdom*, 2010, § 84). In other words, they must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (*F. v. Switzerland*, 1987, § 32; *Schalk and*

[7] Venice Commission, *Opinion on the Fourth Amendment to the Fundamental Law of Hungary*, CDL-AD(2013)012, para. 137.
[8] See also PACE Resolution 1601(2008), *Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament*.

*Kopf v. Austria*, 2010, § 49)."[9] In the case *Schalk and Kopf v. Austria,*[10] the Court examined for the first time whether two persons of the same sex could claim the right to marry. The Court recognised that the institution of marriage had undergone major social changes since the adoption of the Convention but noted that there was still no European consensus regarding same-sex marriage. Although the Court no longer considered that the right to marry enshrined in Article 12 in all circumstances had to be limited to marriage between two persons of the opposite sex, it found that Article 12 of the ECHR did not impose an obligation on the States to grant a same-sex couple access to marriage.[11] These findings were largely confirmed in the case of *Chapin and Charpentier v France.*[12]

18. As already noted in its opinion on the new Constitution of Hungary,[13] the Commission concludes that the definition of marriage belongs to the Hungarian state and its constituent legislator. In addition to Hungary, marriage is defined as a union solely between a man and a woman in the constitutions of several Council of Europe member states, notably in Armenia, Bulgaria, Croatia, Georgia, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Serbia, Slovakia and Ukraine, as well as in Belarus.

19. During the online visit, the Hungarian authorities stressed that the amendment has no effect on the right of same-sex couples to register their partnership, which has been possible in Hungary since 2009. According to the authorities and highlighted in the explanatory memorandum, this right is not disputed and there will be no changes in the law with regard to this issue. This right of same-sex couples is in line with the case law of the ECtHR. For instance, in the case of *Vallianatos and Others v Greece,*[14] the ECtHR held that exclusion of same-sex couples from registering a civil union, a legal form of partnership available to opposite-sex couples, violates the Convention (Greece had enacted a law in 2008 that established civil unions for opposite-sex couples only). In the case of *Oliari and Others v. Italy,*[15] the Court established a positive obligation for member states to provide legal recognition for same-sex couples.

20. According to the 2020 amendment, in a parent-child relationship "*the mother is one woman and the father is one man*". Read in conjunction with the previous sentence ("*family ties shall be based on marriage or the relationship between parents and children*"), this provision implies that only heterosexual married couples can adopt children, whereas single adoptions and adoptions by same-sex couples are prohibited. On the basis of the information provided by the Hungarian interlocutors during the online meetings, it appears that the Omnibus Act, adopted in the same package of December 2020, indeed stipulates that only married couples should be allowed to adopt children and, by way of exception, single persons can adopt only by special permission of the Minister for Family Affairs.

21. The ECtHR case law considers "sexual orientation" as a protected distinctive feature under Article 14 ECHR (prohibition of discrimination), although the wording of Article 14 ECHR does not explicitly include this ground of discrimination. The ECtHR "*has stressed that discrimination based on sexual orientation was as serious as discrimination based on "race, origin or colour" (Vejdeland and Others v. Sweden, 2012, § 55). Where a difference in treatment was based on sexual orientation, the State's margin of appreciation is narrow (Kozak v. Poland, 2010, § 92; Karner v. Austria, 2003, § 41). Moreover, differential treatment based solely on considerations of sexual orientation was unacceptable under the Convention (E.B. v. France [GC], 2008, §§ 93*



[9] ECtHR, Guide on Article 12 of the European Convention on Human Rights: Right to marry, para. 3, available at https://www.echr.coe.int/Documents/Guide_Art_12_ENG.pdf
[10] ECtHR, *Schalk and Kopf v. Austria,* 24 June 2010.
[11] Ibid., paras. 61-63.
[12] ECtHR, *Chapin and Charpentier v France,* 9 June 2016.
[13] Venice Commission, *Opinion on the new Constitution of Hungary*, CLD-AD(2011)016, para 50.
[14] ECtHR, *Vallianatos and Others v Greece*, 7 November 2013.
[15] ECtHR, *Oliari and Others v. Italy*, 21 July 2015.

*and 96; Salgueiro da Silva Mouta v. Portugal, 1999, § 36; X and Others v. Austria [GC], 2013, § 99).*"[16]

22. As to the Hungarian Constitution, Article XV of the Fundamental Law states that "*Hungary shall guarantee the fundamental rights to everyone without discrimination based on any ground such as race, colour, sex, disability, language, religion, political or any other opinion, ethnic or social origin, wealth, birth or any other circumstance whatsoever*". In its opinion on the new Constitution, the Venice Commission remarked that "*Article XV lacks any mention of the prohibition of discrimination on the ground of sexual orientation*"[17] and it "*might create the impression that discrimination on this ground is not considered to be reprehensible.*"[18] However, the Commission relied on the "*assumption that the Hungarian Constitutional Court will interpret the grounds for discrimination in a manner according to which Article XV prohibits also discrimination on grounds of 'sexual orientation'*"[19] and it noted that "*the Hungarian Act CXXV of 2003 on Equal Treatment and Promotion of Equal Opportunities forbids discrimination based on factors that include sexual orientation and sexual identity in the fields of employment, education, housing, health and access to goods and services*."[20]

23. The compatibility of the new provision with Article 8 of the ECHR (right to respect for private and family life) and Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the ECHR mainly depends on whether the law of Hungary allows (1) for adoptions by *unmarried* opposite-sex couples or (2) for adoptions by *single* heterosexual parents. If this is not the case – in other words: if Hungary from the outset restricts adoptions to married couples consisting of one man and one woman – no violation of the ECHR can be found, at least not regarding the current jurisprudence of the ECtHR. However, problems with a view to the prohibition of discrimination under the ECHR would arise, should Hungary in its family law allow for adoptions by single, albeit only heterosexual parents, or for adoptions by unmarried, albeit only opposite-sex couples.

24. It is relevant to note that until the amendment adopted in December 2020, single persons could adopt without special permission, and this included persons in a civil partnership (opposite-sex or same-sex couples living together, a *de facto* situation recognised by the civil code without providing any specific rights or protections) or persons in a registered partnership (an institution reserved for same-sex couples providing rights similar to a marriage with the exception of adoption), as long as they adopted as individuals and not as a couple. During the online visit, the Ministry of Family Affairs clarified that an individual registered in a same-sex partnership could not be considered eligible for adoption anymore because he or she cannot be considered a "single person". Therefore, if this information is confirmed, it seems that the new amendment, in conjunction with the legal changes brought about by the Omnibus Act, does have an impact on same-sex registered partnerships, by excluding that specific category from the right to adopt as a single parent upon exceptional consent of the Minister of Family Affairs.

25. In the case of *Gas and Dubois v. France,*[21] a case concerning two cohabiting women, one of whom had been refused a simple adoption order in respect of the other's child, the Court held that there had been no violation of Article 14 taken in conjunction with Article 8 of the ECHR. The Court saw notably no evidence of a difference in treatment based on the applicants' sexual orientation, as opposite-sex couples in a civil partnership were likewise prohibited from obtaining a simple adoption order.

[16] ECtHR, Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention: Prohibition of discrimination, para. 154, available at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf
[17] CLD-AD(2011)016, op. cit., para. 76.
[18] CLD-AD(2011)016, op. cit., para. 79.
[19] CLD-AD(2011)016, op. cit., para. 79.
[20] CLD-AD(2011)016, op. cit., para. 80.
[21] ECtHR, *Gas and Dubois v. France*,15 March 2012.

26. In the case of *X and Others v. Austria,*[22] the ECtHR held that the Austrian courts' refusal to grant one of the partners of a stable same-sex relationship the right to adopt the son of the other partner without severing the mother's legal ties with the child (second-parent adoption) amounted to a violation of Article 14 taken in conjunction with Article 8 of the ECHR, on account of the difference in treatment of the applicants in comparison with unmarried opposite-sex couples in which one partner wished to adopt the other partner's child. The ECtHR further held that there had been no violation of Article 14 taken in conjunction with Article 8 when the applicants' situation was compared with that of a *married couple* in which one spouse wished to adopt the other spouse's child. The Court underlined that the Convention did not oblige States to extend the right to second-parent adoption to unmarried couples. Furthermore, the case was to be distinguished from the case *Gas and Dubois v. France* (see above), in which the Court had found that there was no difference of treatment based on sexual orientation between an unmarried opposite-sex couple and a same-sex couple as, under French law, second-parent adoption was not open to any unmarried couple, be they homosexual or heterosexual.

27. In the case of *E.B. v. France,*[23] the applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment which had been based on her sexual orientation and had interfered with her right to respect for her private life. The Court held that there had been a violation of Article 14 in conjunction with Article 8 of the ECHR. The domestic authorities had based their decision largely on the lack of a paternal referent in the applicant's household, which was not a legitimate reason. Also, the influence of her homosexuality on the assessment of her application had not only been established but had also been a decisive factor.

28. In sum, an in-depth and definitive assessment of these amendments to the Hungarian Constitution can only be made when the corresponding legal texts implementing them are available. Even if Hungary has considerable discretionary powers in the area in question, special attention would be required if the constitutional amendments were to be used as an opportunity to withdraw existing laws on the protection of individuals who are not heterosexuals, or to amend these laws to their disadvantage.

29. As mentioned above, the Omnibus Act establishes that only married couples are allowed to adopt children and any exceptions can only be granted on a case-by-case basis by the Minister of Family Affairs; these rules would generally exclude same-sex couples, single persons and non-married opposite-sex couples from adoption. According to the information provided by the Ministry of Family Affairs, single persons may exceptionally adopt upon consent of the Minister, but this no longer includes individuals in a same-sex registered partnership because they are not "single".

30. According to civil society and media information, this is in line with a general trend of exclusion and degradation of non-heterosexual persons in Hungary. In May 2020, the Hungarian Parliament banned legal gender recognition.[24] In October 2020, a ministerial decree[25] made it extremely difficult for single persons or non-married same-sex or opposite-sex couples to adopt children. In addition, when in September 2020, "Wonderland Belongs to Everyone", a children's book with fairy tales featuring members of various vulnerable groups (LGBTQI, Roma, persons with disabilities) was published, the publisher was verbally attacked by various extreme right-wing decision-makers and public figures, and an extreme right-wing MP shredded a copy of the book at a press conference. On 4 October, the Prime Minister made a distinction between "Hungarians" and "homosexuals" in a radio interview,[26] and stated: "A regards homosexuality,

[22] ECtHR, GC, *X and Others v. Austria*, 19 February 2013.
[23] ECtHR, GC, *E.B. v. France*, 22 January 2008.
[24] Act XXX of 2020 on the Amendment of Certain Laws Related to Public Administration and on Donating Property
[25] Decree 35/2020. (X. 5.) EMMI of the Minister of Human Capacities, Article 4(5).
[26] For the full interview in English, see: http://www.miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-sunday-news/

Hungary is a patient, tolerant country. But there is a red line that must not be crossed, and this is how I would sum up my opinion: 'Leave our children alone.'"[27]

31. Against this background, there is a real and immediate danger that the amendments will further strengthen an attitude according to which non-heterosexual lifestyles are seen as inferior, and that they will further fuel a hostile and stigmatising atmosphere against LGBTQI people.

32. Moreover, the new prerogative of the Minister of Family Affairs to exceptionally give consent for a single person to adopt seems to confer an arbitrary power to the Minister, in the absence of any specific criteria for such consent. During the online visit, the Ministry of Family Affairs underlined that the principle of non-discrimination is to be followed in all administrative decisions, which need to be reasoned and can be challenged in court. However, the risk remains that the ministerial decisions will be taken in light of the "spirit of the amendments", notably interpreting the notion of family as necessarily including a mother (woman) and a father (man), as well as referring to the new provision of Article XVI(1) of the Fundamental Law which protects the right of children to an upbringing that is in accordance with the values based on the constitutional identity and Christian culture (see section D below). This may potentially translate in a *de facto* discrimination based on sexual orientation.

33. The Venice Commission therefore recommends the Hungarian authorities to be extremely careful in the interpretation and application of the constitutional amendments in a way that the principle of non-discrimination on all grounds, including sexual orientation, is fully implemented in line with international standards and Hungarian constitutional and legislative guarantees, for example by establishing clear non-discriminatory criteria in the statutory law to be applied in deciding on adoption by single persons.

### C. Children, legal gender recognition

34. The second part of the Constitution deals with "Freedom and responsibility" (Articles I – XXXI).

Article XVI paragraph (1) has been amended as follows (changes marked):

> *(1)* Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. *Hungary shall protect the right of children to a self-identity corresponding to their sex at birth and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.*
>
> (2) Parents shall have the right to choose the upbringing to be given to their children.
>
> (3) Parents shall be obliged to take care of their minor children. This obligation shall include the provision of schooling for their children.
>
> (4) Adult children shall be obliged to take care of their parents if they are in need.

35. The first substantial amendments to the rights and duties set out in Article XVI of the Constitution is the right of children to "self-identity according to their sex at birth". According to the explanatory memorandum, "sex at birth is a gift or a factor that cannot be changed: it is a biological principle. Human dignity thus includes the right of every child to self-identity according to their sex at birth, part of which is to be protected against mental or biological interference affecting their physical and mental integrity".

[27] Explanatory material provided by the Helsinki Committee.

36. As a result, the amendment restricts children's gender identity to their sex as registered at birth. The effect is that legal gender recognition of trans and intersex people is unconstitutional and therefore impossible. It remains open whether medical gender-reassignment remains possible; however, even if so, the acquired gender will not be recognised if it differs from the sex at birth.

37. In the view of the Venice Commission, these consequences of the constitutional amendment are not compatible with international human rights standards. Various international human rights bodies have asserted that all individuals have a "right to a self-identity" based not only on their "sex at birth" (as the amendment suggests), but also on the basis of their "gender," the socially constructed characteristics and roles for women and men.[28] Under the ECHR, gender identity is recognised as a component of personal identity, falling under the right to respect for private life.[29]

38. Already in 2002, in the case of *Christine Goodwin v. the United Kingdom,*[30] the Court found a violation of Article 8 notably on the basis that a European and international consensus existed favouring the legal recognition of a transgender person's acquired gender. The Goodwin case raised the issue of whether or not the respondent State had failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transgender, to respect for her private life, in particular through the lack of legal recognition given to her gender reassignment. The Court held that there has been a failure to respect the applicant's right to private life since there were no significant factors of public interest to weigh against the interest of the applicant in obtaining legal recognition of her gender reassignment.[31]

39. Since then, the Court has regularly dealt with the issue. According to current case-law, Article 8 of the ECHR is applicable to the question of the legal recognition of the gender identity of transgender people who have undergone gender reassignment surgery,[32] the conditions for access to such surgery,[33] and the legal recognition of the gender identity of transgender people who have not undergone, or do not wish to undergo, gender reassignment treatment.[34]

40. Next to Article 8 of the ECHR, the non-discrimination clause of Article 14 of the ECHR prohibits discrimination on the ground of gender identity under the category of 'sex' or 'other status'. In this respect, the ECtHR has developed a constant jurisprudence, which allows applicants subjected to discrimination based on their sexual orientation and/or gender identity to claim a violation of Article 14 of the ECHR in conjunction with another substantive right of the



[28] On the basis of Article 2, CRC, the CRC Committee stressed that States parties must address discrimination against vulnerable or marginalised groups of children including children who are lesbian, gay, transgender or transsexual (CRC, General Comment No. 13, The right of the child to freedom from all forms of violence, paras. 60 and 72(g)). On the basis of Article 5 and 2 (f) CEDAW, the CEDAW Committee recognised that discrimination suffered by women is "inextricably linked" with other factors that affect women including gender identity (General Recommendation No. 27, Older women and protection of their human rights, para. 13; General Recommendation No. 28, The core obligations of States parties under article 2 CEDAW, para. 18). On the basis of Article 2 CESCR, CESCR Committee explicitly recognised that a person's gender identity is among the prohibited grounds of discrimination enshrined in Article 2 (2) ICESCR (General Comment No. 20 Article 2 (2), Non-discrimination in economic, social and cultural rights, para. 32). For more details, see *Born free and equal*, *Sexual Orientation and Gender identity in International Human Rights Law*, United Nations, Office of the High Commissioner for Human Rights, New York and Geneva, 2012, available at: https://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf (last accessed on 16 June 2021).

[29] At European level, ECtHR, *Van Kück v. Germany*, 12 June 2003. European Court of Justice (ECJ), *P v S and Cornwall County Council*, 30 April 1996; *A.P., Garçon and Nicot v. France*, 6 April 2017, paras. 95-96.

[30] ECtHR, *Christine Goodwin v. the United Kingdom*, 11 July 2002.

[31] Ibid., para. 93.

[32] Among others, ECtHR, GC, *Hämäläinen v.Finland*, 16 July 2014, para. 68.

[33] Among others, ECtHR, *Van Kück v. Germany*, op. cit., paras. 59 ff; ECtHR, *L. v. Lithuania*, 11 September 2007, paras. 56-57; ECtHR, *Schlumpf v.Switzerland*, 5 June 2009, para.107.

[34] ECtHR, *A.P., Garçon and Nicot v. France*, 6 April 2017, paras. 95-96.

ECHR.[35] Moreover, Protocol 12 nowadays guarantees non-discrimination irrespective of the ground of discrimination.

41. During the online visit, the Hungarian authorities stated that any legal document reporting the sex of an individual, such as the ID or passport, is based on the sex identified in the birth certificate, which has to be established shortly after the birth of the child and can never be changed afterwards, not even in the case of change of sex by surgical treatment. In addition, the Commission notes that in the case of intersex children, the effects of an immediate and irrevocable assignment of the sex at birth remain unclear.

42. The Venice Commission notes with concern that this situation is worrisome and that the amendment raises serious questions regarding the healthy development of a child's individual identity and his/her sexuality and may result in discrimination on the basis of sexual orientation and gender identity. The Commission therefore recommends to repeal the amendment "*Hungary shall protect the right of children to a self-identity corresponding to their sex at birth*" or to ensure that the amendment does not have the effect of denying the rights of transgender people to legal recognition of their acquired gender identity. It also recommends that the system of birth registration and subsequent legal recognition of gender identity comply with the non-discrimination requirements of both international human rights law and applicable Hungarian non-discrimination norms, which are to be applied in a strict manner.

### D. Children and parents: education and upbringing

43. The second change of Article XVI paragraph 1 of the Fundamental Law provides for an education "according to the values based on the constitutional identity and Christian culture" of Hungary (changes marked).

> (1) Every child shall have the right to the protection and care necessary for his or her proper physical, mental and moral development. *Hungary shall protect the right of children to a self-identity corresponding to their sex at birth and shall ensure an upbringing for them that is in accordance with the values based on the constitutional identity and Christian culture of our country.*

44. According to the explanatory memorandum, "the proposal provides a clear basis for all members of the younger generation to learn about, preserve and pass on Hungary's national identity, sovereignty and the role of Christianity in preserving nationhood. It should be emphasized that the latter elements are not new in the Fundamental Law, and these values based on the Christian culture of Hungary do not mean a commitment to a religion, but to the system of historical and cultural traditions that has developed in Hungary over the past 1,000 years. The provision of such education also means that the state has to maintain an institutional system that is able to provide this, but at the same time does not exclude the operation of other value-based educational institutions in accordance with the Fundamental Law. This principle shall in no way affect the exercise of the right to freedom of conscience and religion, which includes the freedom to choose and to change one's religion or belief".

45. The provision on parents' right to choose the upbringing to be given to their children (Article XVI paragraph 2) indeed remains unchanged. The same holds true for the provision on freedom of thought, conscience and religion, set out in Article VII paragraph 1 of the Constitution (this right includes the freedom to choose or change one's religion or other belief, and the freedom of everyone to manifest, abstain from manifesting, practice or teach his or her religion or other belief through religious acts, rites or otherwise, either individually or jointly with others, either in public or in private life). Furthermore, Article XV paragraph 2 of the Constitution guarantees the

[35] ECtHR, GC, *X and Others v. Austria, op. cit.*; ECtHR, *Taddeucci and McCall v. Italy*, 30 June 2016; ECtHR, *Sousa Goucha v. Portugal*, 22 March 2016.

fundamental rights to everyone without discrimination on grounds that correspond with Article 14 ECHR.

46. The relevance of the constitutional identity and Christian culture was already highlighted in the Preamble (the National Avowal) of the new Constitution (2011), which declares "that one thousand years ago our first king, Saint Stephen, set the Hungarian State on solid foundations, and made our country a part of Christian Europe". The preamble further acknowledges "the role of Christianity in preserving our nation" but also stresses the respect for "all religious traditions that may exist in our country". In its 2011 opinion on the new Constitution, the Venice Commission, referring to these sentences, did not perceive particular problems. The Commission observed that it "would be difficult to neglect the importance, for Hungary, of these factors and their particular role in building and preserving the Hungarian state and nationhood. One can note, as far as the religious aspect is concerned that while stressing the major role of Christianity in Hungary, the Preamble also states that "we value the various traditions of our country". Such a statement is of key importance. It should be adequately taken into account in the future application of the Constitution and should be extended to the protection of all religions, religious traditions and other convictions of conscience."[36]

47. However, in 2018, by the Seventh amendment to the Fundamental Law, Article R paragraph 4 was introduced, stating that "the protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State", thereby transforming the preambular formula into a binding rule. The new Article XVI paragraph 1 can be regarded as a specification of this obligation in the sphere of upbringing and education.

48. Conformity with international human rights standards will depend on whether and how the legislature interprets and applies these provisions. There is a risk that these provisions may be regarded as allowing or even obliging the state to infringe the educational rights of parents in order to enforce an upbringing in conformity with the values of the constitutional identity and Christian culture. When implementing Article R paragraph 4 and Article XVI paragraph 1 of the Fundamental law, the right to education, as guaranteed in Article 2 of Protocol No. 1 to the ECHR, as well as the freedom of religion and belief (Article 9 ECHR) and the principle of non-discrimination (Article 14) might be at stake when it comes to the free choice of education, the respect for parental convictions and the principles of equality and non-discrimination. Education in Hungary is predominantly public education. It could be tempting for the state to use public education for ideological goals, to favour the most influential 'philosophy of life', for instance by promoting in education specific values of the Hungarian constitutional identity and Christian culture.

49. Under Article 9 of the ECHR (the freedom of thought, conscience and religion) the issue of stigmatisation of children of other religions than Christianity or children with no religious background (agnostics) in schools and public life might arise. In the case of *Grzelak v. Poland,*[37] a child whose parents were declared agnostics did not attend religious instruction during his schooling; although his parents systematically requested the school authorities to organise a class in ethics for him, no such class was provided throughout his entire schooling at primary and secondary level because there were not enough pupils interested. The child's school reports and certificates contained a straight line instead of a mark for "religion/ethics". The Court held that there had been a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 9 (freedom of religion) of the Convention with respect to the child, finding in particular that the absence of a mark for "religion/ethics" on his school certificates throughout the entire period of his schooling had amounted to his unwarranted stigmatisation, in breach of his right not to manifest his religion or convictions.

[36] CDL-AD(2011)016, op. cit., para. 32.
[37] ECtHR, *Grzelak v. Poland*,15 June 2010.

50. Another issue that might arise in the future could be related to sex education in State schools. Under the principles derived from the Court's case law on Article 2 of Protocol No. 1, sex education lessons cannot be considered to infringe on the parental right to education unless they pursue an aim of indoctrination which may be regarded as not respecting the religious and philosophical convictions of the parents. In the case of *A.R. and L.R. v. Switzerland,*[38] the ECtHR noted in particular that one of the aims of sex education was the prevention of sexual violence and exploitation, which posed a real threat to the physical and mental health of children and against which they had to be protected at all ages. It also stressed that one of the objectives of State education was to prepare children for social realities, and this tended to justify the sexual education of very young children attending kindergarten or primary school. The Court thus found that school sex education, as practised in a specific Swiss canton pursued legitimate aims.

51. Furthermore, the Venice Commission stresses that, while no obligation for States to provide sex education in schools can be derived from the ECHR, where sex education is provided, this must be non-discriminatory and neutral, therefore it should be respectful of diversity, in terms of religious views but also when it comes to the plurality of sexual orientations and identities, and it should not condemn gender change or homosexuality.

52. In sum, the state must ensure an objective and pluralist curriculum and avoid indoctrination in public education.[39] For instance, in the case of *Folgerø and Others v. Norway,*[40] the ECtHR had to decide on a change in the Norwegian primary school curriculum, as two separate subjects – Christianity and philosophy of life – had been replaced by a single subject covering Christianity, religion and philosophy, known as KRL. The applicants (members of the Norwegian Humanist Association) had unsuccessfully attempted to have their children entirely exempted from attending KRL. The ECtHR held that there had been a violation of Article 2 (right to education) of Protocol No. 1 to the Convention. It found, in particular, that the curriculum of KRL gave preponderant weight to Christianity by stating that the object of primary and lower secondary education was to give pupils a Christian and moral upbringing. The option of having children exempted from certain parts of the curriculum was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life, and the potential for conflict was likely to deter them from making such requests. At the same time, the Court pointed out that the intention behind the introduction of the new subject that by teaching Christianity, other religions and philosophies together, it would be possible to ensure an open and inclusive school environment, was in principle consistent with the principles of pluralism and objectivity embodied in Article 2 of Protocol No. 1.

53. As the corresponding constitutional freedom of education, the freedom of religion and belief and the principles of equality and non-discrimination enshrined in the Fundamental Law remain unchanged, it is not easy to estimate the actual scope of the new Article XVI paragraph 1, and of Article R paragraph 4 of the Fundamental law. The authorities have emphasised that these provisions are not discriminatory and do not infringe fundamental freedoms and equality. The main rule of the state education system is the public school, which according to Hungarian legislation is neutral on matters of religion and morality[41] - although it is not devoid of values, which are shaped by Hungary's Christian culture.[42] Religious education is not part of the public school's curriculum, but left to churches. Nor is it obligatory, but provided for at the request of parents: the public school only has to provide time for religious instruction and teaching facilities.[43]



[38] ECtHR, *A.R. and L.R. v. Switzerland*,19 December 2017.
[39] ECtHR, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, 7 December 1976.
[40] ECtHR, *Folgerø and Others v. Norway*, 29 June 2007.
[41] Act CXC/2011 on the system of National Public Education, § 74(3).
[42] As the explanatory memorandum explains, the fact that these values are 'based on the Christian culture of Hungary does not mean a commitment to a religion, but to the system of historical and cultural traditions that has developed in Hungary over the past 1.000 years".
[43] Balázs Gerencsér, 'State and Church – Education in Hungary', in Jan de Groof et al. (eds.), *Religion, Law and Education: Tensions and Perspectives*, Wolf Legal Publishers, Oisterwijk 2017. 102-103.

According to the Constitutional Court, the state is only obliged to establish and maintain non-ideological schools.[44] However, religious schools are not excluded from the school system or from state funding, although they are still the exception.

54. The Venice Commission concludes that this part of the new Article XVI paragraph 1 of the Constitution may be considered consistent with European standards if the constitutional principles and education laws are thus effectively implemented. In order to do that, the public-school system must provide an objective and pluralist curriculum, avoiding indoctrination and discrimination on all grounds including sexual orientation, respecting parental convictions and their freedom to choose between religious and non-religious classes.

### E. Public interest asset management foundation performing a public duty and Public Funds

55. Article 38 of the Constitution deals with the property of the State and local governments. Article 7 of the Ninth Amendments modifies it as follows (changes marked):

> (1) The property of the Hungarian State and of municipal governments shall be considered national assets. National assets shall be managed and protected for the purpose of serving the public interest, satisfying common needs and preserving natural resources, taking also into account the needs of future generations. The requirements for safeguarding and protecting national assets, and for the prudent management thereof, shall be laid down in an implementing act.
>
> (2) The scope of exclusive ownership and economic activity deemed to be the sole domain of the State, as well as the limits and conditions for the alienation of national assets of special import for national economy considerations shall be defined by an implementing act with regard to the objectives referred to in Paragraph (1).
>
> (3) National assets may be transferred only for purposes specified by law, with the exceptions defined by law, taking costs and benefits into account.
>
> (4) Contracts for the transfer or utilisation of national assets may only be concluded with an organization that is able to satisfy the requirement of transparency in terms of ownership structure, organisation, and the activities relating to the management of the alienated or utilised national assets.
>
> (5) Economic operators owned by the State or municipal governments shall conduct business prudently and independently, in accordance with the relevant legislation, under the requirements of legality, efficiency and effectiveness.
>
> (6) *The establishment, operation and termination of, and the performance of public duty by, a public interest asset management foundation performing public duty shall be regulated in a cardinal Act*."

56. The explanatory memorandum states that: "With this addition, the Government expresses the separation of public and private relations in the interest of the stability of long-term social processes and of legal certainty; The new constitutional provision would strengthen the independence of these foundations from the executive by guaranteeing legal certainty, long-lasting legal stability and institutional independence with a political agreement".

[44] Decision of the Constitutional Court No. 22/1997. See the explanatory memorandum: 'the state has to maintain an institutional system that is able to provide this, but at the same time does not exclude the operation of other value-based educational institutions in accordance with the Fundamental Law'.

57. The scope of these provisions remains unclear, and the explanatory memorandum does not elucidate further the nature of this new institution, the "public interest asset management foundation performing public duty", whether public or private, nor the rules governing the functioning which are to be established in a Cardinal Act.

58. The Venice Commission wonders why such a complex institution of private law, although managing public funds, needs to be set out in the Fundamental Law and why its specifications are to be regulated by a Cardinal Act, which requires a two-thirds majority to be adopted or modified, making it difficult for any future lawmaker to reverse the effects of the amendments, that is, to reclaim the transferred assets and to reverse the reorganisation of the management of the foundations at stake.

59. The explanatory memorandum declares that "(b)y including it in the Fundamental Law, the Government's proposal would recognise the outstanding social value-creating role and independence of public interest asset management foundations performing public duty; the purpose of the regulation is to protect these organisations, universities and other institutions, and to guarantee their operation for they are the cornerstones of higher education and talent management".

60. The Commission recalls its previous considerations in the Opinion on the new Constitution of Hungary:

> "The Venice Commission wishes to underline that a constitutional culture which clearly separates constitutional issues from ordinary politics and sees the constitution as a commonly accepted framework for ordinary democratic processes - with their understandable and even healthy political disagreements - is a precondition for a fully successful and legitimate constitution-making process."[45]

and

> "the Venice Commission finds that a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. In its view, there are issues on which the Constitution should arguably be more specific. These include for example the judiciary. On the other hand, there are issues which should/could have been left to ordinary legislation and majoritarian politics, such as family legislation or social and taxation policy. The Venice Commission considers that parliaments should be able to act in a flexible manner in order to adapt to the new framework conditions and face new challenges within society. Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have, and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order. Elections, which, according to Article 3 of the First Protocol to the ECHR, should guarantee the "expression of the opinion of the people in the choice of the legislator", would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and "detailed rules" on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk. This also increases the risk, for the future adoption of eventually necessary reforms, of long-lasting political conflicts and undue pressure and costs for society."[46]

The Venice Commission recognises, as declared by the explanatory memorandum, that the role of universities as "cornerstones of higher education and talent management" have an

[45] CDL-AD(2011)016, op. cit., para. 12.
[46] Ibid., para. 24.

"outstanding social value" which may be acknowledged by the Constitution. However, it does not seem justified to define their organisational format in the Fundamental Law, especially when it takes the features of a civil law institution, nor is it appropriate to bridle their operational functioning through organic laws that require a reinforced majority for any simple modification.

61. Moreover, the newly added paragraph (6) seems to conflict with the preceding paragraph (5), therefore implying that these foundations are not "Economic operators owned by the State" and consequently they would not be bound by the provision requiring them to "conduct business prudently and independently, in accordance with the relevant legislation, under the requirements of legality, efficiency and effectiveness".

62. During the online meetings, the Hungarian authorities referred to the new foundations as private entities but claimed that they would still have the same duties as public entities in terms of transparency and accountability. Reportedly, such obligations derive from Article 39(2) of the Constitution, inasmuch as these foundations receive and manage public funds; hence they have a duty to abide by the principles of transparency and of corruption-free public life, they are publicly accountable for the management of those funds, and the data relating to those funds are recognised as data of public interest. Moreover, these foundations are "public interest" entities and they "perform public duties", therefore, all funds managed by the new foundations, even those of private origin, have to be reported upon as long as these funds are used for performing public duties, according to Chapter II and IV of the Act CXII of 2011 on informational self-determination and freedom of information of Hungary.

63. Despite these explanations, the legal status of the "public interest asset management foundations performing public duty" and the corresponding rights and duties of these entities remain unclear to the Venice Commission. The Commission notes that the line distinguishing the performance of public from other duties is not well defined and it is not clear who/what will specify it further. Will it be the Cardinal Act regulating each foundation? Or rather the board of trustees managing each foundation? And what are the guarantees of transparency and accountability applying to the board of trustees?

64. During the online meetings, the national authorities described the board of trustees as an organ initially composed of persons appointed by the government. The board of trustees from then on appoints its successors by means of co-optation. The question arises why the independence of these bodies (mostly universities) must be strengthened at this moment in time, even more so as the amendment aims to guarantee an "institutional independence with a political agreement". Several interlocutors expressed concerns regarding the political dependence of the boards of trustees installed by the government and the risk of interference with the management of institutions of higher education, especially in light of the high number of universities that underwent such change of model in 2021 (more than 30) and the lack of criteria and safeguards for the nomination of the trustees (no rules on conflict of interest, no incompatibility with public functions or political affiliation, etc.). Furthermore, they stressed that the newly installed boards of trustees would be outside the scope of democratic oversight. That would even be the case under a new government, because the governance of the foundations is regulated in Cardinal Acts, that can only be amended by a two-third majority.

65. In this context, the Venice Commission underlines the significant role of universities in a democratic society as privileged places for the education of each new generation, the discovery of new knowledge and innovation, the development of rational and critical thinking, freedom of inquiry and argumentation. Hence, the Commission highlights the importance of guaranteeing their political, cultural and intellectual independence and institutional autonomy. The ECtHR has repeatedly recognised the importance of academic freedom protected under article 10 of the

ECHR.[47] The UN Committee on Economic, Social, and Cultural Rights has emphasised, in the General Comment on Article 13 (right to education), that: "*[t]he enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability*".[48]

66. Moreover, in its opinion on National tertiary education in Hungary, the Venice Commission highlighted that "*the state not only has the duty to prevent any undue interference with the right to education (expression, association) and the right to academic teaching and scientific research, but also has the obligation to act in a way that actively guarantees the free exercise of these rights, not only those rights laid down in the relevant ECHR and ICESCR provisions, but also enshrined in the constitutional provisions, like Article X - on freedom of scientific research and university autonomy- and Article XI - on the right to education*".[49] The submission of public universities to the management of a board of trustees, initially appointed by the government and subsequently released from democratic supervision, risks threatening their academic freedom and weakening their autonomy. This development represents a dangerous trend as it resonates with the recent unfortunate withdrawal of a prestigious university from Budapest.[50]

67. Considering the above, the Venice Commission invites the Hungarian authorities to take into consideration the role of universities as places of free thought and argumentation, adequately guaranteeing their academic freedom and autonomy, and warns against the risk of removing public funds and public tasks from democratic control, also taking into account the new definition of public funds.

68. Article 39, as amended by Article 8 of the Ninth amendment, reads as follows (changes marked):

> (1) Support or contractual payments from the central budget may only be granted to organisations of which the ownership structure, the organisation and the activity aimed at the use of the support is transparent.
>
> (2) Every organisation managing public funds shall be obliged to publicly account for its management of public funds. Public funds and national assets shall be managed according to the principles of transparency and the purity of public life. Data relating to public funds and national assets shall be data of public interest.
>
> (3) *Public funds shall be the revenues, expenditures and claims of the State*.

69. The Government in its explanatory memorandum explains that the proposal defines the concept of public funds, "since different interpretations have emerged in the practice of constitutional and other bodies, and it will therefore be defined clearly, unambiguously and comprehensively for the whole structure of the state; the definition would cover all constitutional,

[47] *Hertel v. Switzerland*, Application no. 25181/94, 25 August 1998; *Wille v. Liechtenstein* Application no. 28396/95, 28 October 1999; *Stambuk v. Germany*, Application no. 37928/97, 17 October 2002; *Lombardi Vallauri v. Italy,* Application no. 39128/05, 20 October 2009; *Sorguç v. Turkey*, Application No. 17089/03, 23 June 2009; *Sapan v Turkey*, Application no. 44102/04, 6 July 2010; *Mustafa Erdoğan v. Turkey* (Applications nos. 346/04 and 39779/04), 27 May 2014.

[48] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13, E/C.12/1999/10, paras. 38-40.

[49] Venice Commission, *Opinion on Act XXV of 4 April 2017 on the amendment of Act CCIV of 2011 on National Tertiary Education*, CDL-AD(2017)022, para. 67.

[50] The Central European University relocated from Budapest to Vienna in 2018 after the government's refusal to sign an agreement allowing the university to continue operations in Hungary.

state and local government bodies and institutions; the aim of the legislator is to conclude disputes concerning public funds and to provide guarantees of the transparency rules laid down in the Fundamental Law".

70. Yet, several interlocutors, during the online meetings and through written submissions, affirmed that the jurisprudence had been sufficiently consistent in the interpretation of the term "public funds" and expressed their fear that the new definition is narrower than the one regularly applied by the courts, with the effect that different entities using funds originating from the State budget could refuse freedom of information requests regarding how the funds had been spent, claiming that those funds had lost their public nature.

71. The Venice Commission notes that the new definition does not dismiss private entities managing public funds from their duties of accountability, which are clearly set out in Article 39 (2) of the Fundamental Law. Nonetheless, the publicity of these funds, and the corresponding guarantees of transparency, may become more uncertain after a second transfer of such "public money" to another entity. One effect of the amendment may be that the inner workings of the newly established foundations and their revenue and expenditure could be considered as "private" and therefore shielded from civil society and media scrutiny, as they are not subject to freedom of information requests by the citizens and the media, thus undermining the state's transparency and freedom of information.

72. The Venice Commission suggests reconsidering the inclusion of public interest asset management foundations performing public duties in the Fundamental Law and regulating it instead by statutory law, clearly setting out all relevant duties of transparency and accountability for the management of their funds (public and private), as well as appropriate safeguards of independence for the composition and functioning of the board of trustees.

### F. Legislative process and Exceptional situations (state of war, state of emergency, state of danger)

73. Articles 2, 4-6, 9, and 11 of the Ninth Amendment make a variety of changes to the Fundamental Law of Hungary relating to declarations of war, control of the Hungarian Defence Forces, and the "special legal order" that pertains to state of war, state of emergency and state of danger. All these provisions do not go into effect until 1st July 2023, so that (according to the explanatory memorandum) in order to provide "adequate preparation time" for their implementation.

74. Articles 6 and 9 of the Ninth Amendment appear to make only changes that conform the language of the amended articles to the new provisions on the special legal order in Articles 48-54, they do not make any substantive amendments to the Fundamental Law. Article 5 of the Ninth Amendment does the same but also introduces a provision that "For war situation to be declared and peace to be made, the votes of two thirds of the Members of the National Assembly shall be required". The same applies to Articles 2 and 4 of the Ninth Amendment, that require a Cardinal Act (majority of two thirds) where the current Fundamental Law refers to simple implementing acts.

75. The most substantial changes all come through Article 11 of the Ninth Amendment, which amends Articles 48-56 of the Fundamental Law. To a large extent, the amendments repeat, simplify, and reorganise many of the previous provisions on states of exceptional law-making. But in several respects, they also introduce significant changes.

76. In the current Fundamental Law, different variations of a "special legal order" can apply in six different circumstances: national crisis, state of emergency, state of preventive defence, state of terrorist threat, unexpected attack, and state of danger. The Ninth Amendment reduces these to only three categories, specified in Article 48: state of war, state of emergency, and state of

danger. The Venice Commission welcomes this change, insofar as it simplifies and makes clearer when exceptional states apply, making the law more accessible and understandable, and less subject to abuse.

77. The subsequent articles go on to define the rules applicable to states of war (Article 49), states of emergency (Article 50), and states of danger (Article 51). Once again, decisions that require a simple majority of the National Assembly under the current Fundamental Law, such as the decision to authorise the Government to extend the state of danger, will require a two thirds majority following the Ninth Amendment (Article 50(3)). The Venice Commission acknowledges the consistency of these provisions with its Recommendation on the Respect for democracy, human rights and the rule of law during states of emergency:

> "84. Participation of the opposition in the approval of the declaration of the state of emergency, and/or through ex post scrutiny of the emergency decrees or any extension of the period of emergency should be ensured. A qualified majority could be required for the prolongation of the state of emergency beyond the original period. All political parties should be involved in the discussion before a possible decision to postpone elections […]."[51]

78. Articles 52 and 53 establish common rules for the so-called "special legal order", while Article 54 and 55 set out common rules for the state of war and the state of emergency, and Article 56 provides specific rules for special legal order applicable to the National Assembly and the President of the Republic. However, most of these provisions leave the specification of most details to Cardinal Acts, which could eventually raise some serious questions regarding the scope of the powers of the State during states of exception. For instance, Article 52(5) states:

> (5) The detailed rules to be applied during the period of special legal order shall be laid down in a cardinal Act.

Similarly, Article 53(1) reads:

> (1) During the period of special legal order, the Government may adopt decrees by means of which it may, as provided for in a cardinal Act, suspend the application of certain Acts, derogate from the provisions of Acts and take other extraordinary measures.

Likewise, Article 54(8) provides:

> (8) The detailed rules to be applied after the Government initiates the declaration of state of war or state of emergency shall be laid down in a cardinal Act.

Consequently, the Venice Commission is not in a position to assess definitively the scope of these provisions and their impact on the system of checks and balances of the State without knowing the content of the corresponding legal texts. It invites the Hungarian authorities to carry out an inclusive and consultative process with all relevant stakeholders for the adoption of the above-mentioned Cardinal Acts and it stands ready to provide assistance on this matter.

79. A last substantive change is that the current constitution requires the creation of a National Defence Council to exercise substantial powers when in a national crisis, but the Ninth Amendment does away with the National Defence Council in all circumstances and vests its powers in the Government. The Venice Commission notes that the National Defence Council was intended to be a more broadly representative body (composed of the President of the Republic, the Speaker of the National Assembly, the leaders of parliamentary groups, the Prime Minister, the ministers and the Chief of the Defence Staff) than the Government. While these

[51] CDL-AD(2020)014, op. cit., para. 84.

amendments do not seem, as such, incompatible with the Rule of Law or basic principles and standards of constitutional democracies, the concentration of emergency powers in the hands of the executive cannot be considered an encouraging sign, notably in the absence of any clarification in the explanatory memorandum for the *ratio* or the necessity of such modification.

## IV. Conclusion

80. The Venice Commission has been requested by the PACE Monitoring Committee to prepare an opinion on the constitutional and legislative amendments adopted by the Hungarian Parliament in December 2020. This opinion focuses on the constitutional amendments.

81. The Ninth Amendment to the Fundamental Law of Hungary covers several areas:

(1) issues of *marriage and family*, including questions of *sexual identity* and *upbringing of children* (Articles 1 and 3)
(2) issues related to the *legislative process* (Article 2);
(3) issues related to the *establishment of "public interest asset management foundations performing public duties" and the definition of public funds* (Articles 7 and 8);
(4) issues related to *exceptional situations* such as *war or state of emergency* (Articles 4, 6, 9, 10, 11). Article 12 concerns transitional law.

82. These amendments came into force on 23 December 2020, with the exception of issues related to point (2), the *legislative process*, and most of point (4), *exceptional situations* such as *war or state of emergency* (but not Article 10 on the Decision on Participation in Military Operations), that will enter into on 1 July 2023.

83. The Venice Commission highlights that the impact of several provisions is difficult to assess without knowing the legislative changes that may be adopted following such provisions. The scope of most of the amendments is unclear and their conformity with human rights, rule of law and democratic standards will largely depend on the laws, regulations, and policies implementing the constitutional provisions. The Commission stands ready to assist the Hungarian authorities during the preparation of national legislative acts based on the new constitutional provisions, should they wish to receive such assistance.

84. The Venice Commission notes with concern that the amendments were adopted during a state of emergency, without any public consultation, and the explanatory memorandum consists of only three pages. The Venice Commission considers that this swift procedure is not in line with its recommendations in the Rule of Law Checklist, nor is it compatible with the Commission's report on the role of the opposition and Report on Respect for democracy, human rights and the rule of law during states of emergency and the Report on the Role of the opposition in a democratic Parliament.

85. The Venice Commission stresses that this speed and the lack of meaningful public consultations are particularly worrisome when they concern constitutional amendments and it recalls its previous warning against an "instrumental attitude" of Hungary's governing majority towards the Fundamental Law, which should not be seen as a political instrument.

86. The Venice Commission would like to make the following *key recommendations*:

a. As concerns the amendment to Article L paragraph (1) of the Fundamental Law (regarding marriage as the union of one man and one woman, and the addition that "*The mother shall be a woman, the father shall be a man"*), its compatibility with Article 8 of the ECHR (right to respect for private and family life) and Article 14 (prohibition of discrimination) taken in conjunction with Article 8 of the ECHR mainly depends on the fact whether the law of Hungary

allows (1) for adoptions by *unmarried* opposite-sex couples or (2) for adoptions by *single* heterosexual parents. If this is not the case, no violation of the ECHR can be found, at least not regarding the current jurisprudence of the ECtHR. However, problems with a view to the prohibition of discrimination under the ECHR would arise, should Hungary in its family law allow for adoptions by single, albeit only heterosexual parents, or for adoptions by unmarried, albeit only opposite-sex couples. This constitutional amendment should not be used as an opportunity to withdraw existing laws on the protection of individuals who are not heterosexuals, or to amend these laws to their disadvantage.

b. As concerns the prerogative of the Minister of Family Affairs to provide or refuse a consent for exceptional single persons adoptions, the Commission recommends that the interpretation and application of the constitutional amendments, especially in the drafting of the implementing legislation, should be carried out in a way that the principle of non-discrimination on all grounds, including on the basis of sexual orientation and gender identity, is thoroughly implemented.

c. The amendment "*Hungary shall protect the right of children to a self-identity corresponding to their sex at birth*" should be repealed or modified to ensure that it does not have the effect of denying the rights of transgender people to legal recognition of their acquired gender identity. It also recommends that the system of birth registration and legal recognition of gender identity comply with the non-discrimination requirements of both international human rights law and applicable Hungarian non-discrimination norms, which are to be applied in a strict manner.

d. The amendment *"Hungary […] shall ensure an upbringing for [the children] that is in accordance with the values based on the constitutional identity and Christian culture of our country"* may be considered consistent with European standards only if the constitutional principles and education laws are effectively implemented. In order to do that, the public-school system must provide an objective and pluralist curriculum, avoiding indoctrination and discrimination on all grounds, including sexual orientation, respecting parental convictions and their freedom to choose between religious and non-religious classes

e. Article 7 of the Ninth Amendments relating to Article 38 of the Constitution and introducing in the Fundamental Law the "public interest asset management foundations" performing public duties should be reconsidered; these foundations should rather be regulated by statutory law, clearly setting out all relevant duties of transparency and accountability for the management of their funds (public and private), as well as appropriate safeguards of independence for the composition and functioning of the board of trustees. These laws should take into account the significant role of universities as places of free thought and argumentation, providing for all due measures to guarantee the proper safeguard of academic independence and institutional autonomy.

f. Articles 6 and 9, and 11 of the Ninth Amendment amending the Fundamental Law of Hungary relating to declarations of war, control of the Hungarian Defence Forces, and the "special legal order" that pertains to state of war, state of emergency and state of danger mainly leave the specification of most details to Cardinal Acts, which could eventually raise some serious questions regarding the scope of the powers of the State during states of exception.

g. As concerns the abolition of the National Defence Council and the entrusting of its powers to the Government – which is less broadly representative – while it is not contrary as such to European standards it leads to a concentration of emergency powers in the hands of the executive which cannot be considered an encouraging sign, notably in the absence of any clarification in the explanatory memorandum for the *ratio* or the necessity of such modification.

87. The Venice Commission remains at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.