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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**FOURTH AMENDMENT TO THE  
FUNDAMENTAL LAW  
OF HUNGARY  
AND  
TECHNICAL NOTE**

**Fourth Amendment to the Fundamental Law of Hungary  
(...2013)**

Parliament as constituent power, acting within its competence defined by Article 1(2) a) of the Fundamental Law, hereby amends the Fundamental Law as follows:

**Article 1**

Article L(1) of the Fundamental Law shall be replaced by the following provision:

“(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival. Family ties shall be based on marriage and the relationship between parents and children.”

**Article 2**

Article S(3) of the Fundamental Law shall be replaced by the following provision:

“(3) The Speaker of the House shall sign the adopted Fundamental Law or the adopted amendment thereof within five days and shall send it to the President of the Republic. The President of the Republic shall sign the Fundamental Law or the amendment thereof sent to him within five days of receipt and shall order its publication in the Official Gazette. If the President of the Republic finds a departure from any procedural requirement laid down in the Fundamental Law with respect to adoption of the Fundamental Law or any amendment thereof, the President of the Republic refers such departure to the Constitutional Court for a revision. Should the revision by the Constitutional Court not verify the departure from the requirements, the President of the Republic shall immediately sign the Fundamental Law or the amendment thereof, and shall order its publication in the Official Gazette.”

**Article 3**

The part of the Fundamental Law designated as “FOUNDATION” shall be supplemented by the following Article U:

“Article U

(1) The form of government established on the basis of the rule of law by the will of the nation by means of the first free elections in 1990 and the previous communist dictatorship are incompatible. The Hungarian Socialist Workers’ Party and its legal predecessors and other political organisations established to serve them in the spirit of communist ideology were criminal organisations, whose leaders have responsibility without statute of limitations for:

- a) maintaining and directing an oppressive regime, violating the laws and betraying the nation;
- b) eliminating with Soviet military assistance a democratic attempt based on a multi-party system in the years after World War II;
- c) establishing a legal order based on the exclusive exercise of power and unlawfulness;
- d) eliminating an economy based on the freedom of property and driving the country into debt;
- e) submitting the economy, national defence, diplomacy and human resources of Hungary to foreign interests;
- f) systematically devastating the traditional values of European civilisation;

g) depriving citizens and certain groups of citizens of, or seriously restricting their fundamental human rights, especially for murdering people, extraditing them to foreign power, unlawfully incarcerating them, carrying them off to forced labour camps, torturing them and submitting them to inhuman treatment; arbitrarily depriving citizens of their assets, restricting their rights to property; fully depriving citizens of their liberties, submitting the expression of political opinion and will to the state's constraint; discriminating people on the grounds of origin, world view or political conviction, impeding their advancement and success based on knowledge, diligence and talent; establishing and operating a secret police to unlawfully watch and influence the private lives of people;

h) suppressing with bloodshed, in cooperation with Soviet occupying forces, the revolution and war of independence, which broke out on 23 October 1956, the ensuing reign of terror and retaliation, and for the forced flight of two hundred thousand Hungarian people from their native land;

i) all politically motivated ordinary offences which were not prosecuted by the administration of justice due to political reasons.

Political organisations recognised legally during the democratic transition as legal successors of the Hungarian Socialist Workers' Party continue to share the liability of their predecessors as beneficiaries of their unlawfully accumulated assets.

(2) In consideration of Paragraph (1), the operation of the communist dictatorship shall be truthfully revealed and public sense of justice shall be ensured as laid down in Paragraphs (3)–(10).

(3) In order for the State to preserve the memory of the communist dictatorship, the Committee of National Memory shall operate. The Committee of National Memory shall explore the operation of the communist dictatorship in terms of power, the role of individuals and organisations holding communist power, and shall publish the results of its activity in a comprehensive report and other documents.

(4) The holders of power of the communist dictatorship shall tolerate factual statements, except for any wilful and essentially false allegations, about their roles and actions related to the operation of the dictatorship and their personal data related to such roles and actions may be disclosed to the public.

(5) Statutory pensions or any other benefits provided by the State to leaders of the communist dictatorship as defined by law may be reduced to a statutory extent; the arising revenues shall be used to mitigate the affronts caused by the communist dictatorship and to preserve the memory of victims as prescribed by law.

(6) There shall be no statute of limitations for the serious statutory crimes which were committed against Hungary or persons in the communist dictatorship in the name and interest of, or in agreement with, the party-state and which were left unprosecuted for political reasons by ignoring the criminal law in force at the time of perpetration.

(7) The crimes laid down in Paragraph (6) shall become statute-barred on the expiry of the period defined by the criminal law in force at the time of perpetration, to be calculated from the day when the Fundamental Law came into force, provided that they would have become statute-barred by 1 May 1990 under the criminal law in force at the time of perpetration.

(8) The crimes laid down in Paragraph (6) shall become statute-barred on the expiry of the period between the date of perpetration and 1 May 1990, to be calculated from the day when the Fundamental Law came into force, provided that they would have become statute-barred

between 2 May 1990 and 31 December 2011 under the criminal law in force at the time of perpetration and that the perpetrator was not prosecuted for the crime.

(9) No law may establish any new legal grounds for compensation providing financial or any other pecuniary benefits to individuals who were unlawfully deprived of their lives or freedom for political reasons and who suffered undue property damage from the state before 2 May 1990.

(10) The documents of the communist state party, the non-governmental and youth organisations established with its contribution and/or existing under its direct influence and of trade unions created during the communist dictatorship shall be the property of the State and shall be deposited in public archives in the same way as the files of bodies in charge of public duties.”

#### **Article 4**

(1) Article VII(2) and (3) of the Fundamental Law shall be replaced by the following provisions:

“(2) Parliament may pass cardinal Acts to recognise certain organisations engaged in religious activities as Churches, with which the State shall cooperate to promote community goals. The provisions of cardinal Acts concerning the recognition of Churches may be the subject of a constitutional complaint.

(3) The State and Churches and other organisations engaged in religious activities shall be separated. Churches and other organisations engaged in religious activities shall be autonomous.”

(2) Article VII of the Fundamental Law shall be supplemented by the following Paragraph (4):

“(4) The detailed rules for Churches shall be determined by cardinal Act. As a requirement for the recognition of any organisation engaged in religious activities as a Church, the cardinal Act may prescribe an extended period of operation, social support and suitability for cooperation to promote community goals.”

#### **Article 5**

(1) Article IX(3) of the Fundamental Law shall be replaced by the following provision:

“(3) For the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity, political advertisements shall be published in media services, exclusively free of charge. In the campaign period prior to the election of Members of Parliament and of Members of the European Parliament, political advertisements published by and in the interest of nominating organisations setting up country-wide candidacy lists for the general election of Members of Parliament or candidacy lists for the election of Members of the European Parliament shall exclusively be published by way of public media services and under equal conditions, as determined by cardinal Act.”

(1) Article IX of the Fundamental Law shall be supplemented by the following Paragraphs (4)–(6):

“(4) The right to freedom of speech may not be exercised with the aim of violating the human dignity of other people.

(5) The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion

which violates their community, invoking the violation of their human dignity as determined by law.

(6) The detailed rules governing freedom of the press and the body supervising media services, press products and the communications market shall be laid down in a cardinal Act.”

#### **Article 6**

Article X(3) of the Fundamental Law shall be replaced by the following provision:

“(3) Hungary shall protect the scientific and artistic freedom of the Hungarian Academy of Sciences and the Hungarian Academy of Arts. All institutions of higher education shall be autonomous in terms of the contents and methodology of research and teaching, and their rules of organisation shall be regulated by Act. Government shall determine, to the extent permitted by law, the rules of financial management of public institutions of higher education and shall supervise their financial management.”

#### **Article 7**

Article XI of the Fundamental Law shall be supplemented by the following Paragraph (3):

“(3) By virtue of an Act of Parliament, financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.”

#### **Article 8**

Article XXII of the Fundamental Law shall be replaced by the following provision:

“Article XXII

(1) Hungary shall strive to provide every person with decent housing and access to public services.

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

(3) In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.”

#### **Article 9**

Article XXIX(3) of the Fundamental Law shall be replaced by the following provision:

“(3) A cardinal Act shall determine the detailed rules relating to the rights of nationalities living in Hungary, the nationalities, the requirements for recognition as a nationality and the rules relating to the election of their local and national self-governments. By virtue of such cardinal Act, recognition as a nationality may be subject to national status of a specific period and to the initiative of a specific number of individuals who declare to be members of such nationality.”

#### **Article 10**

(1) Article 5(7) of the Fundamental Law shall be replaced by the following provision:

“(7) Parliament shall determine its rules of operation and the order of its debates in its Rules of Procedure adopted by a majority of two-thirds of the votes of the Members of Parliament present. In order to ensure the undisturbed operation of Parliament and to preserve its dignity, the Speaker of the House shall have law and order and disciplinary powers as defined by the Rules of Procedure.”

(1) Article 5 of the Fundamental Law shall be extended by the following Paragraph (9):

“(9) Parliament’s security shall be ensured by the Parliament Guard. The operation of the Parliament Guard shall be directed by the Speaker of the House.”

### **Article 11**

Article 9(3) i) of the Fundamental Law shall be replaced by the following provision:

*(The President of the Republic:)*

“i) may send the adopted Fundamental Law and any amendment thereof to the Constitutional Court for a review of conformity with the procedural requirements set in the Fundamental Law with respect to its adoption, and may send adopted Acts to the Constitutional Court for a review of conformity with the Fundamental Law or may return them to Parliament for reconsideration;”

### **Article 12**

(1) Article 24(2) b) of the Fundamental Law shall be replaced by the following provision:

*(The Constitutional Court shall:)*

“b) review immediately but no later than thirty days any legal regulation applicable in a particular case for conformity with the Fundamental Law upon the proposal of any judge;”

(2) Article 24(2) e) of the Fundamental Law shall be replaced by the following provision:

*(The Constitutional Court shall:)*

“e) review any legal regulation for conformity with the Fundamental Law upon an initiative to that effect by the Government, one-fourth of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights;”

(3) Article 24(4) and (5) of the Fundamental Law shall be replaced by the following provisions:

(4)

“(4) The Constitutional Court may only review or annul a legal provision not submitted to it for a review if its substance is closely related to a legal provision submitted to it for a review.

(5) The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. Such a review may be initiated by:

a) the President of the Republic in respect of the Fundamental Law and the amendment thereof, if adopted but not yet published,

b) the Government, a quarter of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights within thirty days of publication.”

(5) Article 24 of the Fundamental Law shall be supplemented by the following Paragraphs (6)–(9):

“(6) The Constitutional Court shall decide on the motion pursuant to Paragraph (5) out of turn, but within thirty days at the latest. If the Constitutional Court finds that the Fundamental Law or any amendment thereof does not comply with the procedural requirements defined in Paragraph (5), the Fundamental Law or the amendment thereof shall be:

a) renegotiated by Parliament in the case laid down in Paragraph (5) a),

b) annulled by the Constitutional Court in the case laid down in Paragraph (5) b).

(7) The Constitutional Court shall hear the legislator, the initiator of the Act or their representative and shall obtain their opinions during its procedure defined by cardinal Act if the matter affects a wide range of persons. This stage of the procedure shall be open to the public.

(8) The Constitutional Court shall be a body of fifteen members, each elected for twelve years by a two-third majority of the Members of Parliament. Parliament shall elect, with a majority of two-thirds of the votes of all Members of Parliament, a member of the Constitutional Court to serve as its President until the expiry of President’s mandate as a constitutional judge. Members of the Constitutional Court may not be members of a political party or engage in any political activity.

(9) The detailed rules for the competence, organisation and operation of the Constitutional Court shall be shall be laid down in a cardinal Act.”

### **Article 13**

(1) Article 25(4)–(7) of the Fundamental Law shall be replaced by the following provisions:

“(4) The organisation of the judiciary shall have multiple levels. Special courts may be established for particular groups of cases.

(5) The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The bodies of judicial self-government shall participate in the administration of the courts.

(6) Upon a proposal of the President of the Republic, Parliament shall elect a judge to serve as the President of the National Office for the Judiciary for a term of nine years. The election of the President of the National Office for the Judiciary shall require a two-third majority of the votes of the Members of Parliament.

(7) An Act may authorise other organs to act in particular legal disputes.”

(1) Article 25 of the Fundamental Law shall be supplemented by the following Paragraph (8):

“(8) The detailed rules for the organisation and administration of courts and for the legal status and remuneration of judges shall be regulated by cardinal Act.”

### **Article 14**

Article 27 of the Fundamental Law shall be supplemented by the following Paragraph (4):

“(4) To give effect to the fundamental right to a court decision taken within a reasonable time and to balance the workload across courts, the President of the National Office for the Judiciary may appoint, in the way defined by cardinal Act, a court other than a court of general competence but with the same powers to hear particular cases defined by cardinal Act.”

**Article 15**

Article 34(3) of the Fundamental Law shall be replaced by the following provision:

“(3) An Act or a government decree authorised by Act may exceptionally specify duties and powers relating to public administration for mayors, presidents of county representative bodies and for heads or clerks of offices of representative bodies.”

**Article 16**

Article 35(2) of the Fundamental Law shall be replaced by the following provision:

“(2) General elections of local representatives and mayors shall be held in October of the fifth year following the previous general election of local representatives and mayors.”

**Article 17**

(1) Article 37(5) of the Fundamental Law shall be replaced by the following provision:

“(5) In the case of the statutory provisions that came into force in the period while state debt exceeded half of the Gross Domestic Product, Paragraph (4) shall also be applicable to such period even if state debt no longer exceeds half of the Gross Domestic Product.”

(2) Article 37 of the Fundamental Law shall be supplemented by the following Paragraphs (6) and (7):

“(6) As long as state debt exceeds half of the Gross Domestic Product, if the State incurs a payment obligation by virtue of a decision of the Constitutional Court, the Court of Justice of the European Union or any other court or executive body for which the available amount under the State Budget Act is insufficient, a contribution to the satisfaction of common needs shall be established which shall be exclusively and explicitly related to the fulfilment of such obligation in terms of both content and designation.

(7) The method for the calculation of state debt and the Gross Domestic Product, as well as those relating to the implementation of the provisions of Article 36 and Paragraphs (1) to (3) shall be laid down in an Act.”

**Article 18**

The part of the Fundamental Law designated as “CLOSING PROVISIONS” shall be replaced by the following provision:

“CLOSING AND MISCELLANEOUS PROVISIONS”

**Article 19**

(1) Point 3 of the Fundamental Law shall be replaced by the following provision:

“The transitional provisions related to the entry into force of the Fundamental Law are contained in Points 8 to 26.”

(2) Point 5 of the Fundamental Law shall be replaced by the following provision:

“5. Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.”



## Article 20

The part of the Fundamental Law designated as "CLOSING PROVISIONS" shall be supplemented by the following Points 6 to 26:

"6. The 25<sup>th</sup> day of April shall be Fundamental Law Day to commemorate the publication of the Fundamental Law.

7. The first general election of local representatives and mayors after the entry into force of the Fundamental Law shall take place in October 2014.

8. The coming into force of the Fundamental Law shall not prejudice the effect of laws made, regulatory means of public law organisations and other legal instruments of state control issued, individual decisions made and international legal commitments undertaken before its coming into force.

9. The legal successor of the body assigned remits and powers under Act XX of 1949 on the Constitution of the Republic of Hungary shall be the body assigned remits and powers under the Fundamental Law.

10. The name Republic of Hungary may be used as a reference to Hungary after the coming into force of the Fundamental Law pursuant to the legal provisions effective as of 31 December 2011 until transition to the name laid down in the Fundamental Law can occur according to the principles of responsible financial management.

11. The entry into force of the Fundamental Law shall not affect the mandate of Parliament, the Government and local government representative bodies and persons appointed or elected before the effective date of the Fundamental Law, with the exceptions laid down in Points 12–18.

12. The following provisions of the Fundamental Law shall also be applicable to the mandate of the following persons:

- a) Articles 3 and 4 to the Parliament and Members of Parliament in office,
- b) Articles 12 and 13 to the President of the Republic in office,
- c) Articles 20 and 21 to the Government in office and all Government members in office,
- d) Article 27(3) to all court secretaries in office,
- e) Article 33(2) to the Presidents of all county assemblies and
- f) Article 35(3)–(6) to all local representative bodies and mayors in office.

13. The calculation of the period laid down in Article 4(3) f) of the Fundamental Law shall start on the effective date of the Fundamental Law.

14. (1) The legal successor of the Supreme Court, the National Council of Justice and their Presidents shall be the Curia in terms of delivering judgements and the President of the National Office for the Judiciary in terms of the administration of courts, with the exception defined by cardinal Act.

(2) The mandate of the President of the Supreme Court and the President and members of the National Council of Justice shall terminate when the Fundamental Law takes effect.

15. (1) The lowest age requirement laid down in Article 26(2) of the Fundamental Law shall apply to any judge appointed according to a call for applications announced after the effective date of the Fundamental Law, with the exception laid down in Paragraph (2).

(2) Regarding appointments without a call for applications as defined by law, the lowest age requirement shall apply to judges appointed after the coming into force of the Fundamental Law.

16. The position of Parliamentary Commissioner for Citizens' Rights shall be designated as the Commissioner for Fundamental Rights after the effective date of the Fundamental Law. The legal successor of the Parliamentary Commissioner for Citizens' Rights, the Parliamentary Commissioner for National and Ethnic Rights and the Parliamentary Commissioner for Future Generations shall be the Commissioner for Fundamental Rights. The Parliamentary Commissioner for National and Ethnic Rights in office shall be the Deputy of the Commissioner for Fundamental Rights responsible for protecting the rights of nationalities living in Hungary after the effective date of the Fundamental Law; the Parliamentary Commissioner for Future Generations in office shall be the Deputy of the Commissioner for Fundamental Rights responsible for protecting the interests of future generations when the Fundamental Law takes effect; their mandate shall be terminated when the mandate of the Commissioner for Fundamental Rights is terminated.

17. The mandate of the Commissioner for Data Protection shall be terminated with the coming into force of the Fundamental Law.

18. The position of the President of the County Assembly shall be designated as the President of the County Representative Body for the purposes and from the coming into force of the Fundamental Law. The county representative body defined by the Fundamental Law shall be the legal successor of the county assembly.

19. (1) The provisions of the Fundamental Law shall also be applicable to all matters in progress, with the exceptions laid down in Paragraphs (2)–(5).

(2) Article 6 of the Fundamental Law shall be applicable from the first session of Parliament to be held after the coming into force of the Fundamental Law.

(3) A procedure launched upon a motion filed with the Constitutional Court by an originator who no longer has the right to file motions under the Fundamental Law before the coming into force of the Fundamental Law shall terminate, provided that the procedure is to be transferred to the remit of another body that has competence after the effective date of the Fundamental Law. The originator may resubmit the motion according to the conditions defined by cardinal Act.

(4) All agreements and entitlements to support existing as of 1 January 2012 and all procedures in progress aimed at the conclusion of agreements or at the provision of support shall be subject to Articles 38(4) and 39(1) of the Fundamental Law according to the conditions of the Act which contains such provision.

(5) The third sentence of Section 70/E(3) of Act XX of 1949 on the Constitution of the Republic of Hungary in force as of 31 December 2011 shall be applicable to the benefits which qualify as pension until 31 December 2012 under the rules in force as of 31 December 2011 with respect to any change in their conditions, nature and amount, and to their transformation to other benefits or to their termination.

20. Sections 26(6), 28/D, 28/E and 31(2) and (3) of Act XX of 1949 on the Constitution of the Republic of Hungary in force as of 31 December 2011 shall be applicable to all matters in progress at the time of the coming into force of the Fundamental Law after the coming into force of the Fundamental Law.

21. The contribution of nationalities living in Hungary to the work of Parliament as defined by Article 2(2) of the Fundamental Law shall be ensured for the first time with respect to the work of the National Assembly formed after the first general elections of the Members of Parliament after the coming into force of the Fundamental Law.

22. The coming into force of the Fundamental Law shall not affect any decision of Parliament or the Government made before its coming into force under Act XX of 1949 on the Constitution of the Republic of Hungary concerning the domestic or foreign deployment of Hungarian Defence Forces, the deployment of foreign armed forces in or from the territory of Hungary or the stationing of the Hungarian Defence Forces abroad or of foreign armed forces in Hungary.

23. A declared

a) state of national crisis shall be subject to the provisions of the Fundamental Law on the state of national crisis,

b) state of emergency shall be subject to the provisions of the Fundamental Law on the state of emergency if it was declared due to armed acts aimed at overturning constitutional order or at the exclusive acquisition of power and serious mass acts of violence threatening life and property, committed with arms or by armed persons,

c) state of extreme danger shall be subject to the provisions of the Fundamental Law on the state of extreme danger if it was declared due to a natural disaster or industrial accident massively endangering life or property,

d) state of preventive defence shall be subject to the provisions of the Fundamental Law on the state of preventive defence,

e) state under Section 19/E of Act XX of 1949 on the Constitution of the Republic of Hungary shall be subject to the provisions of the Fundamental Law on unexpected attacks, and

f) state of danger shall be subject to the provisions of the Fundamental Law on the state of danger.

24. (1) A person prohibited from public affairs under a final sentence at the time of the coming into force of the Fundamental Law shall not have suffrage while the sentence is in effect.

(2) A person under guardianship restricting or excluding his capacity under a final judgement at the effective date of the Fundamental Law shall not have suffrage until such guardianship is terminated or until a court determines the existence of his or her suffrage.

25. (1) Section 12(2) of Act XX of 1949 on the Constitution of the Republic of Hungary, which was in force on 31 December 2011, shall be applicable to the delivery of any local government property to the state or any other local government until 31 December 2013.

(2) Section 44/B(4) of Act XX of 1949 on the Constitution of the Republic of Hungary, which was in force on 31 December 2011, shall be applicable until 31 December 2012. After 31 December 2011, an Act or a government decree by authority of an Act may delegate administrative remits and powers to clerks.

(3) Section 22(1) and (3)–(5) of Act XX of 1949 on the Constitution of the Republic of Hungary, which was in force on 31 December 2011, shall be applicable until the coming into force of the cardinal Act laid down in Article 5(8) of the Fundamental Law. Parliament shall adopt the cardinal Act laid down in Articles 5(8) and 7(3) of the Fundamental Law by 30 June 2012.

(4) Until 31 December 2012, a cardinal Act may make the adoption of certain Parliamentary decisions subject to qualified majority.

26. The following laws shall be repealed:

- a) Act XX of 1949 on the Constitution of the Republic of Hungary,
- b) Act I of 1972 on the amendment to Act XX of 1949 and the revised and restated text of the Constitution of the People's Republic of Hungary,
- c) Act XXXI of 1989 on the amendment to the Constitution,
- d) Act XVI of 1990 on the amendment to the Constitution of the Republic of Hungary,
- e) Act XXIX of 1990 on the amendment to the Constitution of the Republic of Hungary,
- f) Act XL of 1990 on the amendment to the Constitution of the Republic of Hungary,
- g) the Amendment to the Constitution dated 25 May 2010,
- h) the Amendment to the Constitution dated 5 July 2010,
- i) the Amendments to the Constitution dated 6 July 2010,
- j) the Amendments to the Constitution dated 11 August 2010,
- k) Act CXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
- l) Act CXIX of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
- m) Act CLXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
- n) Act LXI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary required for the drafting of certain temporary provisions related to the Fundamental Law,
- o) Act CXLVI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary, and
- p) Act CLIX of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary."

## **Article 21**

(1) In the Fundamental Law,

- a) in the part designated as "NATIONAL AVOWAL", the text "The nationalities living with us" shall be replaced by the text "We proclaim that the nationalities living with us", the text "communist dictatorships" shall be replaced by the text "the communist dictatorship", the text "the basis of our legal order: it shall be a covenant" shall be replaced by the text "the basis of our legal order, it shall be an alliance",

- b) in Article F(2), the text “counties” shall be replaced by the text “the capital, counties”, the text “cities and towns” shall be replaced by the text “in the capital, cities and towns”,
  - c) in Article P(2), the text “agricultural plant” shall be replaced by the text “family farms and other agricultural plants”,
  - d) in Article T(1), the text “in the Fundamental Law” shall be replaced by the text “the Fundamental Law and in the Fundamental Law”,
  - e) in Article XV(4), the text “legal equality” shall be replaced by the text “equality of opportunity and social inclusion”,
  - f) in Article XV(5), the text “children” shall be replaced by the text “families, children”,
  - g) in Article XVII(2), the text “or hold strikes” shall be replaced by the text “including the right of employees to discontinue work”,
  - h) in Article XIX(1), the text “disability” shall be replaced by the text “disability, handicap”,
  - i) in Article 1(2) e), the text “the Supreme Prosecutor” shall be replaced by the text “the President of the National Office for the Judiciary, the Supreme Prosecutor”,
  - j) in Article 5(4), the text “under the Rules of Procedure” shall be replaced by the text “under the provisions of the Rules of Procedure”,
  - k) in Article 5(6), the text “under the Rules of Procedure” shall be replaced by the text “under the provisions of the Rules of Procedure”,
  - l) in Article 9(3) j), the text “the Supreme Prosecutor” shall be replaced by the text “the President of the National Office for the Judiciary, the Supreme Prosecutor”,
  - m) in Article 9(3) l), the text “the President of the Hungarian Academy of Sciences” shall be replaced by the text “the President of the Hungarian Academy of Sciences and the President of the Hungarian Academy of Arts”,
  - n) in Article 13(2), the text “wilful” shall be replaced by the text “the wilful”,
  - o) in Article 24(3) a), the text “c) and e)” shall be replaced by the text “c), e) and f)”,
  - p) in Article 24(3)c), the text “f)” shall be replaced by the text “g)”,
  - q) in Article 26(2), the text “the President of the Curia” shall be replaced by the text “the President of the Curia and the President of the National Office for the Judiciary”,
  - r) in Article 29(1), the text “The Supreme Prosecutor and prosecution services” shall be replaced by the text “The Supreme Prosecutor and prosecution services shall be independent”, the text “enforcing the State’s demand for punishment” shall be replaced by the text “exclusively enforcing the State’s demand for punishment as public accuser”,
  - s) in Article 29(2), the text “By statutory definition, (...) prosecution services” shall be replaced by the text “prosecution services”,
  - t) in Article 29(2) a), the text “exercise rights” shall be replaced by the text “exercise rights as defined by law”,
  - u) in Article 29(2) d), the text “defined by law” shall be replaced by the text “as defender of the public interest defined by the Fundamental Law or law”,
  - v) in Article 32(5), the text “metropolitan or county” shall be replaced by the text “metropolitan and county”, the text “legislative obligation” shall be replaced by the text “obligation to pass decrees or take decisions”, the text “legislative obligation” shall be replaced by the text a “obligation to pass decrees or take decisions”, the text “local ordinance” shall be replaced by the text “local ordinance or local government decision”.
  - w)
- (2) The Transitional Provisions of the Fundamental Law of Hungary (31 December 2011) shall be repealed.

**Article 22**

- (1) This Amendment to the Fundamental Law shall come into force on the first day of the month after its publication.
- (2) Parliament shall adopt this Amendment to the Fundamental Law pursuant to Articles 1(2) a) and S(2) of the Fundamental Law.
- (3) Simultaneously with the publication of this Amendment to the Fundamental Law, the revised and restated text of the Fundamental Law shall be published in the Official Gazette.
- (4) Articles 20 and 21(2) is without prejudice to the legal effect produced by the Transitional Provisions of the Fundamental Law of Hungary (31 December 2011) prior to the entry into force of the Fourth Amendment to the Fundamental Law of Hungary (... 2013).

## **The recent proposal for a fourth constitutional amendment**

### 1. General background

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

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

That is why the Proposal is, to a great extent, merely a technical amendment to the Fundamental Law, and most of its provisions do not differ from the former text of the Transitional Provisions or they are directly linked thereto. Accordingly, the significance and novelty of this Proposal should not be overestimated. The 15-page amendment in fact comprises only a few new provisions and cannot be regarded as brand new rules without former precedents of identical or very similar rules on constitutional level. The amendment concerns only 7 per cent of the text of the Fundamental Law.

I would like to emphasise that by transplanting the Transitional Provisions into the Fundamental Law the two-thirds parliamentary majority does not overrule the Constitutional Court, because in the decision of 45/2012 the Constitutional Court has not assessed substantial unconstitutionality of the Transitional Provisions. The Constitutional Court examined only the formal question of whether the rules of the Transitional Provisions are really transitional ones or not. The Constitutional Court came to the conclusion that substantial rules in the Transitional Provisions are beyond the authorization provided for by the Fundamental Law and for this reason they are not valid. The Constitutional Court explicitly set out in its decision that "Following the decision of the Constitutional Court, it is the task and the responsibility of the constituent power to clear up the situation after the partial annulment. The Parliament shall make an evident and clear legal situation. The Parliament shall revise the subject matters of the annulled non-transitional provisions and decide on which matters should be re-regulated and on which level of legal sources. That is also for the Parliament to decide on which provisions to be re-regulated should be incorporated into the Fundamental Law and which should be laid down on level of [ordinary or cardinal] Acts." [Part V of the reasoning of the Constitutional Court decision of 45/2012. (XII. 29.)] It should be underlined that overwhelming majority of the provisions in the Proposal does not restrict at all the margin of manoeuvre of future governments not having two-thirds majority in the Parliament for amending the Fundamental Law. The Proposal sets out its provisions in a way which provides a possibility, but does not oblige the future legislator to enact rules with a content aimed at by the present ruling parties.

### 2. Provisions of the Proposal concerning the Constitutional Court

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

The Proposal contains that constitutionality of the Fundamental Law itself and any amendments thereto may be examined by the Constitutional Court from a procedural point of view, in order to check their compliance with procedural law requirements. This is a new competence for the Constitutional Court, because under the Fundamental Law so far it had no legal possibility at all for any review of the amendments to the Fundamental Law. The provision is in accordance with the case-law of Constitutional Court based on the former Constitution under which, for the last time in decision 61/201\*, the Constitutional Court explicitly reinforced that it had no power to review in merits the amendments to the Constitution. Neither did the decision of 45/2012 on the Transitional Provisions overrule this former practice. Besides, the Proposal sets out a time limit of 30 days for this examination so as to avoid long-term uncertainty about the legal validity of norms of constitutional level. It must be noted that there is no constitution in Europe expressly stating that a Constitutional Court may even have the power to revise the constitution (or fundamental law) itself and only a few constitutions contain 'unchangeable provisions'. Therefore it is a noticeable element of the Proposal as it gives the right for the President to initiate the examination of the amendments to the Fundamental Law even before promulgation.

The Proposal builds in the Fundamental Law some principles of Constitutional Court procedure in line with the present practice of Constitutional Court (e.g. other party should also be heard; Court procedure is bound to the motion) and reinforces the publicity of the Court's procedure. This regulation is common in Europe and several countries provide for these core principles in their constitutions (eg. publicity, hearing of parties in Cyprus, Ireland, etc.). Deadlines for the Court procedure, as introduced by the Proposal, can also be found in many European constitutions (eg. in France, Ireland, Poland, etc.).

Having regard to the possible new contexts of the Fundamental Law as compared to the previous Constitution, the Proposal explicitly states that Constitutional Court decisions made before the entry into force of the Fundamental Law (1 January 2012) shall cease to be in force. This draft provision does not affect the force of the Constitutional Court decisions in the sense that laws formerly nullified by these decisions will not come into force again, nor does it mean that the Constitutional Court may not come to the same conclusion in a specific future case as in a case before the Fundamental Law. However, it means that should the Constitutional Court intend to use its previous assessments, it would not be enough to merely referring back to a former decision, but it would be obliged to give a detailed legal reasoning in the light of the Fundamental Law. It should also be noted that this draft provision can also be regarded as a rule broadening the margin of manoeuvre of the Constitutional Court, because the Court will be more free to decide whether it would like to simply repeat the legal reasoning of its former decisions or work out new arguments not bound by the case-law built on the previous Constitution. It should also be noted that such a provision is not by any means exceptional in European constitutions. In fact, Article 239 (3) of the Polish Constitution (1997) declares: „On the day on which the Constitution comes into force, resolutions of the Constitutional Tribunal on interpretation of statutes shall lose their universally binding force (...)"

The Proposal does not comprise a new restriction on the competences of the Constitutional Court by introducing a new Article 37 (5) in the Fundamental Law. On the contrary, this new Article repeats the provision already included in the Transitional Provisions, with an important modification: in fact the Constitutional Court will have the power to 'pro futuro' abolish 'financial' laws enacted even in the period of the restriction rule when the state debt no longer exceeds half of the GDP. Therefore this provision can be seen as a clarifying one which expands the rights of the Court concerning the transition from the temporary state debt rule. (The original provision of

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



the Transitional Provisions maintained the restriction even after the transitional period for the acts enacted before.)

### 3. Provisions of the Proposal concerning the judicial system

#### a) Transferring court cases

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

- the National Judicial Council (self-governing body of the judges) shall determine the principles to be applied when appointing a proceeding court
- the President of the National Judicial Office shall publish the decision on the appointment of the proceeding court on the official and publicly available website of the courts and also directly inform the parties involved in the proceeding
- the parties involved in the case may lodge an appeal against the decision to the Curia (the decision of the Curia adjudicating the appeal shall also be published on the internet)
- there is a possibility for lodging a constitutional complaint to the Constitutional Court against the final decision of the Curia

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

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

#### b) Retirement age of judges and prosecutors

The Proposal does not affect the constitutional provisions in force which set out that with the exception of the President of the Curia and the Supreme Prosecutor, no judge and prosecutor may serve who is older than the general retirement age. The modification of these provisions is not necessary because the Fundamental Law does not refer to a concrete age, but only to a general retirement age, which can be specified also in a cardinal Act. Therefore the Government submitted to the Parliament Proposal no. T/9598, which defines the general retirement age judges, prosecutors and notaries in compliance with the rulings of the Constitutional Court and the European Court of Justice. In the sense of Proposal no. T/9598, the general retirement age

would be gradually and proportionately reduced. The Parliament has already discussed Proposal no. T/9598 and the final vote took place on 11th March. According to Proposal no. T/9598, including its approved amendments, the upper age limit for judges and prosecutors will be 65 from 1st January 2023, after a transitional period that is aligned with that of the Act on old age social security pension. Before 1st January 2023 an appropriate transitional period will be provided for. During this period the upper age limit for judges and prosecutors will be lowered according to a scale which corresponds to the scale of the increase of the social security retirement age.

During the transitional period (before 1st January 2023) upon reaching his/her retirement age the judge will be entitled to decide whether, until he/she reaches the upper age limit,

- remains at his/her post (the service relation is upheld),
- transfers to a "reserve pool" (the service relation is upheld with particularities) or
- retires.

The same applies to judges the service relation of which had been terminated on the basis of the regulation subsequently annulled by the Constitutional Court and to prosecutors the service relation of which had been terminated during 2012 on the basis of the new regulation. The judges and prosecutors will be entitled by virtue of the law to decide, without the need to initiate legal proceedings, whether they wish to be reinstated, transfer to the reserve pool or remain retired. Judges who have held the position of president of chamber shall be automatically reinstated in these positions, while other court leader positions will only be reinstated – upon request of the judge concerned – if the position has not been occupied in the meantime. No other restrictions will apply to the reinstatement or new appointments to leader positions. The judges in question will not have to undergo an aptitude test in order to be reinstated. Reinstated judges will be entitled to their full salary for the time that has elapsed from the termination. In the case of former court leaders who cannot be reinstated in these positions, the remuneration relating to the position will be granted for the original term of appointment as court leader. Any damage in excess of the remuneration may be claimed before court.

Reinstatement in the previous „service quarters” means in fact that the judge in question will be reinstated to the same court, in the same position previously held (see above the question of presidents of chambers and other leader positions), and will work in the same field of law. Their service relation will be considered to be uninterrupted (which is relevant to promotions and grades of salary). The term „service quarters” is a misleading translation of the terminus technicus used by the Hungarian legislation [beosztási hely], in the context of the legislation it is clear that this terms refers to the former position (same court, same position, same field of law).

The “reserve pool” would be a temporary institution (until 1st January 2023), it would be available for the period between the social security retirement age and the (gradually decreasing) upper age limit. If the judges choose the “reserve pool”, the service relation of the judge or prosecutor transferred to the “reserve pool” is upheld, during the period of reserve, the judge or prosecutor transferred to the “reserve pool” shall be entitled to a supplementary remuneration that, added to the old age pension ensures a remuneration equivalent to 80% of the previous remuneration. If actual judicial activity/work is executed, the remuneration shall be equivalent to the previous remuneration. The judge or prosecutor transferred to the “reserve pool” may be called to execute actual judicial activity/work for a period the maximum of which is fixed by law – 2 years in a 3 year period.

The judges the service relation of which had been terminated on the basis of the regulation subsequently annulled by the Constitutional Court and prosecutors the service relation of which had been terminated during 2012 on the basis of the new regulation, who do not wish their service relation to be reinstated and wish to retire shall be entitled by virtue of the law to a lump sum compensation equivalent to 12 month's salary. Any damages in excess may be claimed before court.

#### 4. Provisions of the Proposal concerning the Churches

In addition to the individual or collective exercise of the right to freedom of religion by all persons and organisations, the Proposal also contains a rule according to which the State may provide special “Church” status with additional rights for organisations engaged in religious activities. That is for the Parliament to recognise these Churches provided that they meet the requirements set out in a cardinal Act. These requirements will be defined according to the new Article VII (4) of the Fundamental Law which enumerates permanent operation, social support and eligibility for cooperation as requirements of recognition.

This provision has been transplanted from the former Transitional Provisions. However, by virtue of a motion for amendment adopted by the Parliament, it defines a new possible element among the criteria of recognition. This new criterion is the eligibility for cooperation with the State in order to achieve community goals, having regard that the aim of this special “Church” status is that the denominations recognised as Churches may practice their activities for community goals more efficiently. The criterion of suitability for cooperation necessarily provides a certain margin of appreciation for the Parliament. However, this margin is reasonable for the Parliament to have the right to freely select (based on objective, reasonable criteria) the denominations which it regards suitable for cooperating with the State. The detailed rules on the recognition shall be laid down in a cardinal Act.

When deciding on suitability for cooperation, the Parliament may not assess the entity of the denominations from a theological aspect. The recognition does not concern the own theological determination of denominations. Denominations whose request has been denied by the Parliament can operate as a church, in theological terms, by their own internal law. The definition in the state law for the special “Church” status does not correspond with the theological definition of the Church; this distinction also follows from the separation of State and denominations.

Providing or denying the special “Church” status does not concern the right of the denominations to freedom of religion as set out in Article 9 and 14 of the European Convention on Human Rights. This right follows from Article VII (1) of the Fundamental Law therefore it is not concerned by the eventual lack of parliamentary recognition. Those denominations whose request is denied by the Parliament can freely profess their religion or any other belief as a Church, but not as a recognized Church. The law ensures a specific legal status for these denominations named as “association engaged in religious activities as a primary goal”. Although this legal status has a name similar to civil association, it provides more guarantees for the denominations than other non-religious associations. This legal status allows for these denominations to obtain (higher) state subsidies for the operation of its educational, health, social and other institutions. Denominations not recognised as Churches shall not be supervised or controlled by the State and they shall be autonomous. The new Article VII (3) of the Fundamental Law makes it clear that the separated operation applies to both Churches having the special “Church” status and any other denominations, without reference to professing their religion or any other belief either individually or commonly.

The distinction between recognised and non-recognised Churches has also been found constitutional by the Constitutional Court. The Court has stated that there is no constitutional requirement for all Churches should have the same entitlements or the cooperation of the State should be of the same extent with every denomination provided that the distinctions are based on reasonable grounds. The Proposal aims to serve the Constitutional Court’s decision by establishing the special “Church” status in the Fundamental Law, setting out objective and reasonable conditions for making distinction between denominations and providing a legal remedy, called constitutional complaint, against the regulations of recognition.

As regards the recognition rules, it should be noted that similar or more rigorous system can be found in Lithuania, Austria, Belgium and Spain. In Lithuania the Parliament, the Seimas may

recognize denominations. The Seimas may recognize the denominations which have been operating for at least 25 years as an association. If the Parliament denies the recognition, the request could be tabled only after 10 years. In Hungary 20 years operation is required and a renewed request may be tabled after 1 year. In Austria the competence of recognition belongs to a minister besides the Parliament may recognize any denominations in an Act, as happened for example in the case of Syrian Orthodox Church. In Belgium recognition must be enacted in a federal law and there is no legal remedy against denying recognition. The non-recognized Churches operate as public association. Historical Churches in Spain have an enacted contract with the State; requests of other denominations are considered by the Ministry of Justice. Moreover there are some members of the European Union who has defined a prevailing religion in its constitutions. (For example in Denmark and Finland the Evangelical Lutheran Church, in Greece the Eastern Orthodox Church of Christ, in Malta the Roman Catholic Apostolic Church) After the adoption of the Proposal the statutory provisions will also be reviewed in the light of the decision of the Constitutional Court. The amendment will re-regulate the procedure of recognition.

## 5. Fighting against hate speech

The Proposal supplements the rules of the Fundamental Law on freedom of expression with two significant elements.

The first amendment – according to which the exercise of freedom of expression shall not be aimed at the violation of human dignity – incorporates the practice elaborated earlier by the Constitutional Court in the Fundamental Law. In its decision no. 36/1994, the Constitutional Court stated explicitly as a principle that „human dignity, which is under constitutional protection, may put a limit on the freedom of expression”. Hence the Proposal only enrolls this constitutional principle in the Fundamental Law and does not overrule the constitutional interpretations, stipulated by the Constitutional Court prior to the adoption of the Proposal, regarding, for instance, the constitutional frames of the free criticism of politicians.

The aim of the second innovation of the Proposal is to secure that individuals belonging to a community may bring a civil law action before the court because of hate speech concerning their community. The Constitutional Court emphasised several times – for the first time in decision no. 30/1992 – that „dignity of communities may put a constitutional limit on freedom of expression”. Though the Constitutional Court laid down that dignity of communities cannot be interpreted as a fundamental right, it recognised that individuals belonging to a community have the unalienable right to be protected by law against offences injuring their human dignity, such as hate speech concerning one’s community (decision no. 96/2008 of the Constitutional Court). It has to be mentioned that this latter decision of the Constitutional Court explicitly stated that it may be in conformity with the Constitution to provide the possibility for bringing a civil law action before the court because of hate speech concerning one’s community. Thus it is not the Proposal that introduces the theory of this legal remedy in the Hungarian constitutional system. The reason for this provision is the recently increased occurrence of hate speech against Jewish and Roma people in the public debates: the Parliament is committed to put an end to racist, anti-Semite speeches in the public discourse. It should be noted that the recommendation of the Council of Europe on „Hate Speech” [Recommendation No. R (97) 20] adopted in 1997 contains a proposal, which encourages governments of member states to „enhance the possibilities to combat hate speech through civil law, for example by allowing interested non-governmental organisations to bring civil law actions, providing for compensation for victims of hate speech and providing for the possibility of court orders allowing victims a right of reply or ordering retraction”.

It is relevant to underline that in Europe at least 14 countries penalize hate speech including Belgium, France, Germany, Switzerland, Sweden, the Netherlands, the United Kingdom, or Serbia and Croatia among the neighbours of Hungary. For instance according to the German criminal code the incitement to hatred against segments of the population (like national, ethnic,

racial or religious groups) is punishable with imprisonment (insulting, maliciously maligning, or defaming ).

Instead of criminal punishment, which is dominant in European legislations, in the case of the Proposal the constitutional power leaves it to instruments of the civil law to provide remedy for certain forms of hate speech. It has to be emphasized that civil law courts will have to consider by each case, whether a violation of personality rights occurred and in the course of the civil law process the courts have to take into account the specific requirements of the lawsuits referring to personality rights. One has to take into consideration that the Constitutional Court will have the opportunity henceforward to annul the rules adopted in any law if those are not in line with the Fundamental Law.

Regarding to the legal protection of the personality rights of the members of the Hungarian nation it has to be taken into account that under the Hungarian Criminal Code the hate crimes against the members of the Hungarian nation are traditionally penalized. The criminal offence of incitement against a community [Section 269. § of the Criminal Code (Act IV of 1978)] has been including since 15 October 1989 also the offences committed against the Hungarian nation. It appeared in the definition of the criminal offence of violence against a member of a community on 15 June 1996 that any person who assaults somebody else because he or she belongs or is supposed to belong to a national group commits this crime. It is apparent therefore that the Hungarian criminal law penalizes hate crimes committed not only against minority groups but also against the Hungarian nation, as well as the members of the Hungarian nation. So the Proposal merely reflects to these legal traditions enabling to bring a civil law action before the court because of hate crime concerning also the Hungarian nation.

Ultimately it has to be mentioned that the representatives of the communities, which would be protected by the new legal instruments to be introduced by the Proposal, have welcomed the innovations (Egységes Magyarországi Izraelita Hitközség és a Tett és Védelem Alapítvány).

## 6. Provisions of the Proposal concerning the higher education

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

The Proposal gives a possibility for the legislator to adopt an Act which provides for a state subsidy only for those students in higher education who assume the obligation of being employed, for a certain proportionate period after (but not necessarily directly after) finishing their studies, by a Hungarian employer. The underlying principle of the amendment is that exercising the right to education with a state subsidy (with the help of the Hungarian taxpayers) should serve the interests of both the individual and the community. The reason for setting out this provision in the Fundamental Law and not only in an ordinary law is that it has a close link to several fundamental rights and represents a symbolical message of responsibility towards the community. The Proposal cannot be regarded to overrule the Decision 32/2012 of the Constitutional Court, since this decision did not examine the substantive constitutionality of the rules which may be derived, by virtue of the Proposal, from the Fundamental Law. The decision of the Constitutional Court has been based on only formal reason stating that a government decree has not been an adequate level for regulating this subject matter.

It should be emphasised that the state-financed students are obviously not prevented from being employed outside Hungary after their graduation, but in such case, they must pay the tuition fee subsequently. Under the relevant Act, such payment obligation becomes due twenty years after

graduation, and the student may be authorised upon request to make partial payment for a term of ten or fifteen years depending on the amount of grant. Another essential point is that a student with a (partial) grant who has only completed a part of domestic employment must only repay the amount which covers the non-completed portion. It should also be emphasised that the term of employment shall include the disbursement period of the pregnancy and child bearing aid, child care aid and child care allowance and the period when the former student is a job seeker and is hence entitled to a benefit. In addition, the Act defines further cases of exemption.

In order to help the students who need financial assistance, but would not like to make a commitment to work in Hungary for a definite period, the Government elaborated a reduced-rate, preferential loan construction (Student Loan 2).

It should also be highlighted that in a number of European countries (e.g. Portugal, Netherlands, United Kingdom, Italy) the higher education is only available for those paying a tuition fee. The Hungarian legislation aims at providing a possibility for avoiding tuition fee, while ensuring the proper financing of higher education and the social responsibility.

The Hungarian higher education is open to all applicants, admission is based on merit. The „student contract” is only one of the different ways in which young people may participate in higher education. All training programs are open to young people in self-financed form, eventually financed from student loan. The conclusion of the student contract is voluntary, based on free choice.

The student contract must include measures that are proportional with the public policy objectives. The public policy objective is a requital of state scholarship for the general public. The diploma of the student is the result of the investment of tax payers, which results in private benefits, on the other hand, public benefits of these investments must also be ensured. This is also in the interest of the sustainability of the financing of state scholarship. The public benefit is the work done, service voluntarily rendered for the benefit of the Hungarian society. It is incorrect to assume that the aim of the provisions is to restrict the free movement of workers. On the basis of the student contract one may choose not to repay the scholarship but to meet the obligation by employment. The decision is always in the hands of the student, there are always more options available. No legal rule obliges him/her to work in Hungary; no sanctions are foreseen in case he/she chooses not to work in Hungary, but in this case, the scholarship has to be repaid. In other words, the financial support offered by the student contract is a conditional recoverable subvention.

## 7. Provisions of the Proposal concerning the electoral campaign advertisings

In order to reduce the campaign cost and create equal opportunities for the parties, the Proposal and a motion for its amendment set out new rules for political advertisings. The Proposal prohibits paid political advertising both in public and commercial media including television and radio channels. This general rule for political advertisements extends both for the electoral campaign period and the period outside the campaign. However, the Proposal does not intend to prevent political advertising from being published by broadcasters free of charge and on equal basis. Besides, the Proposal does not affect at all the publication and dissemination of posters, leaflets and other similar materials.

As regards the electoral campaign period, the Proposal obliges the public (non-commercial) broadcasters to ensure free airtime on equal basis for political advertisings. This solution, excluding paid political advertisings and, as a positive obligation, ensuring free airtime on equal basis in campaign period is similar to the method followed by a number of European countries (e. g. France) as also presented by the European Court of Human Rights in its judgement 'TV Vest AS & Rogaland Pensjonistparti v. Norway' in 2008. In this case, where the facts were not identical to the rules laid down in the Proposal not prohibiting the political advertising in the

media, the Court noted that there was no European consensus in this area and accepted that lack of consensus spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate.

#### 8. Provisions of the Proposal concerning the family relationship

The Proposal highlights the marriage and the 'parent-child' relationship as bases of the traditional family relationship. According to the constituent Parliament, the protection of the traditional family is of special importance, as this is the basis of the survival of the nation. However, this provision does not exclude the protection of other family models, which may also be and at the same time, following from other constitutional provisions, must be regulated in form of Acts. Article VI of the Fundamental Law, a new provision in force since 1 January 2012 as compared to the former Constitution, provides that everyone shall have the right to have their private and family life, home, communications and good reputation respected. Besides, Article II of the Fundamental Law sets out that human dignity shall be inviolable. In the Hungarian constitutional context human dignity, also protected under the former Constitution, has a high relevance concerning the different kind of partnerships, cohabitation and family models, since, in lack of an explicit general protection of private and family life in the former Constitution, this was the right from which the need for the recognition and respecting various partnerships (for example registered partnership for same-sex couples) could be derived. The notion of human dignity and in addition to this the new Article VI of the Fundamental Law continues to require protection also for persons not covered by the traditional notion of family. In essence this system is similar to that of the European Convention on Human Rights, which, for example, highlights the right of a man and a woman to marry in its Article 12, but also provides for protection of other partnerships under its Article 8. The above-mentioned provisions of the Fundamental Law and also its Article Q requiring a harmony between international law and national law are guarantees for that Proposal is without prejudice to the respect and non-discrimination of people not covered by the legal concept of a traditional family.

Besides, it should also be emphasised that the Proposal only defines the basis for family ties, not family itself. As regards the relationship between parents and children, it is most often based on descent but may also arise from adoption and adoptive guardianship. The Proposal does not prevent anyone from having a child either in biological ways or in legal ways of adoption. Nor does it exclude that a person, who has no biological or legal relationship with a child, may be considered as a member a family (in legal terms), if he or she lives in a factual partnership with a person having a child.

To underpin that concerns regarding the Proposal and its possible consequences are unfounded, it should be noted that the Hungarian Parliament has recently adopted the new Civil Code, which provides extensive rights, even more extensive ones than the former Civil Code, for those living in partnerships without marriage, and does not affect the rules on same-sex couples' registered partnership adopted in 2009, under the socialist government.

#### 9. Provisions of the Proposal concerning the use of public areas (homelessness)

The Proposal neither aims to criminalize homeless people nor does it contain general prohibition regarding homelessness. The Proposal provides the State and the local governments with a constitutional possibility of regulation: the Proposal entitles them to prohibit permanent living in specific areas (but only in certain and not all areas) of public spaces, when necessary in the interest of protecting public order, public safety, public health and cultural values.

Besides providing the State and the local governments with a constitutional possibility of regulation, the Proposal – taking into account the decision of the Constitutional Court [38/2012. (XI. 14.)] – determines guarantees. The right to adopt a restrictive regulation by the State and

local governments is not unconditional, it can be used solely under the condition that *the interest of protecting public order, public safety, public health and cultural values necessitates it*.

For example, if in Budapest the local government decides to prohibit permanent living at railway stations, metro stations or at public areas around the Parliament, the municipal ordinances will probably prove to be constitutional. However, a prohibition referring to an inhabited area without any cultural values will probably be unconstitutional, and the Constitutional Court or the Curia (Supreme Court) will repeal such municipal ordinances.

The second guarantee requirement is that a prohibition of permanent living may be issued only to specific areas, *but only to certain and not all areas of public spaces*. If the prohibition extends to the whole territory of the local government, the Constitutional Court or the Curia (Supreme Court) will repeal the prohibition as unconstitutional municipal ordinance.

The third guarantee requirement is that the prohibition must have a legal form (law or municipal ordinances), which can be challenged before the Constitutional Court or the Curia (Supreme Court). The Constitutional Court or the Curia (Supreme Court) can review these rules without any restrictions. If the laws or municipal ordinances do not correspond to the Fundamental Law, the Constitutional Court or the Curia (Supreme Court) will repeal those.

In Europe there are several countries which prohibit permanent living of homeless people in certain areas of public spaces. In Belgium, for example, the law prohibits people to set up and live in tents in inhabited areas and cities. Similar restrictions are applied in the Czech Republic. Finally, it is very important to note, that the Proposal obliges the State and the local governments to ensure accommodation for all homeless people.

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

#### 10. Provisions of the Proposal concerning the communist dictatorship

In adopting the provisions of the Transitional Provisions about the communist dictatorship, the proposal sets out some general considerations and provides that a realistic revelation of the functioning of communist dictatorship and society's sense of justice shall be ensured according to specific normative provisions as set out in the proposal. In other words, the proposal implies nothing more than the Transitional Provisions: setting up the Committee of National Memory, considering the holders of power of the dictatorship in the same way as public figures in order to realistically revealing the past, the possibility to reduce the outstandingly high benefits of certain (former) leaders of the dictatorship and excluding statutory limitation for certain serious crimes committed in the name, interest or with the approval of the party state in the period of communist dictatorship. The latter proposal does not violate the principle of "nullum crimen sine lege" as it only covers acts committed during the communist dictatorship which were punishable by the Criminal Code in force at the time the crimes were perpetrated but were left unprosecuted due to a political interest of the party state. Also, the proposal takes into consideration the period between 2 May 1990 and the coming into force of the Fundamental Law. Specifically, the democratic state is only given as much additional time to prosecute the affected crime after the coming into force of the Fundamental Law as it was deprived of during the period of the communist dictatorship.



In addition, the proposal provides that the documents of the successive communist state parties and of the organisations established with their contribution and/or existing under their influence shall be deposited in public archives.

#### 11. Extraordinary taxes

The Proposal describes the – narrowly defined – cases in which levying an extraordinary tax shall be deemed necessary. This provision has been transplanted from the former Transitional Provisions.

First of all, it shall be emphasized that the provision concerned is applicable only until the level of state debt is above 50 percent of the annual GDP. The reason of the limitation is that when the country's fiscal situation is not yet stable, expenditures stemming from unforeseen decisions beyond the competence of the government (particularly decisions of domestic or international courts) shall be balanced immediately with revenues in order to meet the euro convergence criteria for budget deficit and debt-to-GDP ratio.

However, the proposal limits the application of extraordinary taxation for the mentioned purpose. If the state budget contains enough resources to fulfil the financial duties determined in the decision (which can be achieved also by rearrangement of budgetary expenses), the taxation may be avoided.

Moreover, the eventual application of the Proposal's mentioned provision confers no additional right to the legislator as the Parliament is able to pass a law introducing a new kind of tax at any time. Additionally, the extraordinary nature of the tax does not mean that ordinary guarantees of taxation can be set aside. The law adopted upon the provision concerned shall also meet the procedural and substantive requirements defined in the Fundamental Law (e.g. legal certainty, non-discrimination).