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

26 February 2013

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

1. Excluding reference to CC decisions adopted prior the Fundamental Law

In its Opinion on the new Constitution of Hungary,[2] the Venice Commission expressed its concern regarding the following sentence of the Preamble of the Fundamental Law of Hungary: "We do not recognise the communist constitution of 1949, since it was the basis for tyrannical rule; therefore we proclaim it to be invalid." According to the Venice Commission, if this sentence is meant to have legal consequences, "*it can only be read as leading to ex tunc nullity (...) This may also be used as an argument for ignoring the rich case law of the Hungarian Constitutional Court which, although based on this »invalid« constitution, has played an important role in Hungary's development towards a democratic state governed by the rule of law.*"[3] During its visit to Budapest in May 2012, the Venice Commission was informed by the Hungarian authorities that the declaration of the invalidity of the 1949 Constitution "*should only be understood as a political statement*".[4]

In contrast to the statements of the Hungarian authorities above as presented to the Venice Commission, the governing majority now aims to ban referring to the case law of the CC developed since the transition by inserting the following into the closing provisions of the Fundamental Law: "*5. Decisions of the Constitutional Court and their reasonings delivered prior to the entering into force of the Fundamental Law cannot be taken into account when interpreting the Fundamental*

[1] Available in Hungarian at: http://www.parlament.hu/irom39/09929/09929.pdf.
[2] Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016.
[3] Opinion on the new Constitution of Hungary, § 35.
[4] Opinion on the new Constitution of Hungary, § 37.

Law."[5] (It shall be added that a recent proposal,[6] which was submitted to the Parliament by the Parliamentary Committee for Constitutional, Justice and Procedural Matters on 25 February 2013, would modify the text of the amendment in the following way: "5. *Decisions of the Constitutional Court delivered prior to the entering into force of the Fundamental Law become void. This provision does not concern the legal effects achieved by the preceding decisions.*" The proposal has not been voted on yet, and it would basically lead to the same consequences as the current text.)

The proposed amendment also **clearly contradicts the case law of the CC** as **established after the Fundamental Law came into force**, since e.g. in its Decision 22/2012. (V. 11.) the CC concluded the following: "*In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. […] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid. Statements of fundamental importance elaborated on by decisions of the Constitutional Court based on the previous Constitution serve obviously as guiding principles also in the decisions of the Constitutional Court interpreting the Fundamental Law. However, this does not mean that the content of the decisions based on the previous Constitution may be taken over mechanically, without observing them, but requires the comparison of the relevant rules of the previous Constitution and the Fundamental Law, and careful deliberation. If the result of the comparison is that the constitutional regulation is the same or is similar to a considerable extent, the content of the decision may be taken over. On the other hand, if certain provisions of the previous Constitution and the Fundamental Law are the same in terms of their content, it is not the take-over of the legal principles included in a previous Constitutional Court decision which needs to be reasoned, but, instead, reasons shall be provided for not taking them into consideration.*"[7] This argumentation was reiterated by the CC in subsequent decisions.[8]

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

Furthermore, it is hard to see what the aim of the governing majority was when proposing the ban apart from **"punishing" the CC for its unfavourable decisions**. The vice-president of the governing party Fidesz stated in this regard degradingly that the CC may *not "crib by taking an old decision, Ctrl+C, Ctrl+V, and say that it is ready"*.[9] The official reasoning attached to the proposed amendment states that the amendment aims to widen the possibilities of the CC when interpreting the Fundamental Law. According to the reasoning, this "*of course does not exclude the possibility that the [CC] comes to the same conclusion as before when interpreting certain provisions of the Fundamental Law, and at the same time it also ensures the possibility to make statements contradicting previous decisions in the context of the Fundamental Law as a whole*". However, if the aim presented above would have been the real motive of the submitting MPs, there would have been no need to propose an amendment in this regard at all, since the newly established case law of the CC complies with the goals expressed in the reasoning. Furthermore, the reasoning includes that by adopting the proposed amendment the CC simply would "not be bound" by its previous decisions – however, the text of the amendment clearly prohibits the use of previous decisions. It may be considered as

[5] Proposed amendment, Article 19.
[6] T/9929/46, available in Hungarian at: http://www.parlament.hu/irom39/09929/09929-0046.pdf.
[7] Decision 22/2012. (V. 11.) of the CC, Reasoning [40]-[41].
[8] See also: Decision 30/2012. (VI. 27.) of the CC, Reasoning [14].; Decision 34/2012. (VII. 17.) of the CC, Reasoning [33]; Decision 4/2013. (II. 21.) of the CC.
[9] See: http://www.origo.hu/itthon/20130130-megtiltja-a-puskazast-a-fidesz-az-alkotmanybirosagnak.html (30 January 2013).

well that the practical use of the new provision may also be that if the "court packing" by the governing party will be accomplished (which has a high chance, given the rules not requiring the consent of the opposition to propose and elect judges and the recent practice of the governing majority in selecting the new judges), the future CC will not have to bother with providing reasons for deviating from the previously established case law and e.g. provide reasons for lowering constitutional standards regarding certain human rights.

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

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

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

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

For a long time, the CC of Hungary was of the opinion that it may not review the constitutionality of the amendments to the Constitution/Fundamental Law, since in that way it would interfere with the constitution-making power of the Parliament. However, the decision adopted by the CC regarding the Transitional Provisions of the Fundamental Law in December 2012 meant a significant change in this regard, since in its Decision 45/2012. (XII. 29.) the CC came to the following conclusion: "*In certain cases the Constitutional Court may also examine the undiminished predominance of the content-related constitutional requirements, guarantees and values of the democratic state based on the rule of law, and their inclusion in the constitution.*"[10] This means that the CC vindicated for itself the power to review amendments to the Fundamental Law in light of the general standards of constitutionality and to abolish unconstitutional amendments.

Supposedly as a reaction to the CC's recent decision cited above, the proposed amendment[11] would include the following into the Fundamental Law under Article 24 (5): "*The Constitutional Court may only review the compliance of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements included in the Fundamental Law pertaining to the adoption and the promulgation of*

[10] Decision 45/2012. (XII. 29.) of the CC, Reasoning [117]-[118].
[11] Proposed amendment, Article 12 (4).

the Fundamental Law or its amendments." Furthermore, the amendment would explicitly exclude the possibility that the President of Hungary does not sign an amendment to the Fundamental Law but requests the review of its content from the CC. According to the amendment, the President only would be able to turn to the CC with respect to the compliance with the relevant procedural rules.[12] (Currently, the Fundamental Law does not include any rule on the President's possibilities with respect to constitutional amendments.) Thus, the proposed amendment **would prevent the CC from reviewing the content of proposed or adopted amendments to the Fundamental Law, which is in clear contradiction with the standpoint of the CC regarding the issue** as set out in its Decision 45/2012. (XII. 29.) cited above.

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

3. Extending the restriction of the CC's power

Article 37 (4) of the Fundamental Law restricts the powers of the CC by setting out that as long as state debt exceeds half of the Gross Domestic Product, the CC may review the constitutionality of Acts of Parliament on the central budget and its implementation, central taxes, duties, pension and healthcare contributions, customs and the central conditions for local taxes or annul these Acts exclusively on the basis of a violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and rights related to Hungarian citizenship. (The CC shall have the unrestricted right to annul the related Acts for non-compliance with the Fundamental Law's procedural requirements for drafting and promulgating laws.) This restriction of the CC's powers was first introduced by the governing majority in November 2010 (by amending the former Constitution) clearly as "retaliation", after the CC repealed legal provisions introducing a special tax of 98% on certain revenues.

The **Venice Commission** touched upon the above limitation of the CC's powers in its opinion on the Fundamental Law,[13] while in its subsequent opinion on Act CLI of 2011 on the Constitutional Court it stated that it regretted and **noted with serious concern that** the Government did not withdraw **the rule restricting the competence of the CC in budgetary matters**. Instead, the restriction **has even been extended by Article 27 of the Transitional Provisions, making the transitory restriction permanent** by stating not only that the exemption of certain acts from constitutional review is valid until the state debt falls below 50% of the Gross Domestic Product, but that Acts adopted in the "transitory" period will not be

[12] Proposed amendment, Article 11.

[13] Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), CDL-AD(2011)016, § 98.

subject to full and comprehensive supervision by the CC even when the budget situation has improved beyond that target.[14]

The above article of the Transitional Provisions was abolished by the CC by its Decision 45/2012. (XII. 29.), claiming that it was not a transitional provision in character. However, the proposed **amendment would reintroduce the provision making the restriction of the CC's powers permanent into the Fundamental Law** under Article 37 (5).[15]

It should be added at this point that Article 29 of the Transitional Provision, which set out that – as long as the state debt exceeds half of the Gross Domestic Product – whenever the state incurs a payment obligation deriving from a decision of the CC, the Court of Justice of the European Union or any other court or an organ which applies the law, and the amount previously earmarked by the central budget for performing such obligation is insufficient, a special contribution shall be established, will also be introduced into the Fundamental Law under Article 37 (6).[16] Moreover, the original text of the provision is modified in a way that the special contribution may be established even if it would be possible to cover the respective payment on the expense of the general reserves of the central budget.

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

The administration of the court system of Hungary has been re-regulated by Act CLXI of 2011 on the Organisation and Administration of Courts, and the former judicial body in charge of administrating courts has been replaced by a one-person decision-making mechanism, the **President of the newly established National Judicial Office** (NJO). The reform model chosen and the extensive powers of the NJO's President were criticized by the **Venice Commission** in both of its related opinions,[17] and it was **stated that** since the President of the NJO (who is elected by the Parliament) **is *„an external actor from the viewpoint of the judiciary, it cannot be regarded as an organ of judicial self-government*".**[18] **Leaving this assessment out of consideration, the proposed amendment includes the President of the NJO in the Fundamental Law** and includes under Article 25 (5) that he/she "*manages the central administrative affairs of the courts*".[19]

The Venice Commission concluded in its second opinion on the Hungarian laws on judiciary, issued in October 2012, that despite the amendments adopted by the Parliament after the Venice Commission's first respective opinion, "*the powers of the President of the NJO remain very extensive to be wielded by a single person and their effective supervision remains difficult*".[20] From the issues which should be addressed, the Venice Commission indicated that one of pressing nature is the NJO's President's right to transfer cases.

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[14] Opinion on Act CLI of 2011 on the CC of Hungary adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)009, § 38.
[15] Proposed amendment, Article 17.
[16] Proposed amendment, Article 17.
[17] Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001; Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), CDL-AD(2012)020.
[18] Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary, § 51.
[19] Proposed amendment, Article 13.
[20] Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 88.

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

In its second opinion regarding the Hungarian laws on judiciary, the Venice Commission concluded the following regarding the transfer of cases: *„**As the transitional character of the system is not guaranteed** by providing a precise time-limit when the transferring of cases will finally end and as it seems impossible to elaborate objective criteria for the selection of cases, the Venice Commission **strongly disagrees with the system of transferring cases because it is not in compliance with the principle of the lawful judge**, which is an essential component of the rule of law."*[21] However, despite the international criticism, the proposed **amendment would create the constitutional basis of the right of the NJO's President to transfer cases** by inserting the former rule of the Transitional Provisions into the Fundamental Law – however, with some changes:

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

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

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

5. The right of the Prosecutor General to transfer cases

An amendment of the Code of Criminal Procedure adopted in July 2011 authorised prosecutors to press charges before a court other than the legally designated court – upon the decision of the Prosecutor General – if it was deemed necessary for the sake of the speed of the proceedings in the so-called "priority cases". The later – prematurely – removed President of the Supreme Court challenged the above amendment of the Code of Criminal Procedure concerning "priority cases" before the CC, and the respective provisions were abolished by the CC in December 2011 by

[21] Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 74.

Decision 166/2011. (XII. 20.). In its decision, **the CC set out that the right of the Prosecutor General to transfer cases also violates Article 6 (1) of the European Convention on Human Rights** (ECHR). The CC argued that transferring cases to another court would only be compatible with the ECHR if the respective substantive and procedural legal rules are set out by using foreseeable, clear and objective criteria, no (or minimal) room is left for discretion and if the "*actual decision may be made by the own institutions of the independent and impartial judicial system*". Since these requirements were not complied with, the respective rules infringed the right to a fair trial as enshrined by the ECHR.

As a reaction to the decision of the CC above, the Parliament **inserted** the Prosecutor General's right to transfer cases – **extending it to all criminal cases – into the Transitional Provisions** of the Fundamental Law under Article 11 (3), only days after the CC's decision was reached. Since under the relevant legal provisions, prosecutors are subordinated to the Prosecutor General and any of them may be instructed by the Prosecutor General, Article 11 (3) above meant that the Prosecutor General may instruct any prosecutor in any criminal case to press charges before a court other than the legally designated one.

Later on, the **Venice Commission** also expressed its concerns regarding the issue in both in its opinion on the law on the Prosecution Service of Hungary[22] and in its second opinion on the laws on judiciary, in which it recalled that ***"this competence of the Prosecutor General needs to be removed".***[23] Finally, **Article 11 (3) of the Transitional Provisions was also abolished by the CC** in its Decision 45/2012. (XII. 29.), since it was not considered of a transitional nature.

However, despite the ruling included in Decision 166/2011. (XII. 20.) of the CC, the clear contradiction with the ECHR and the suggestions of the Venice Commission, **the governing majority decided to uphold the right of the Prosecutor General to transfer cases**. Accordingly, the proposed amendment would insert the abolished rule of the Transitional Provisions into the Fundamental Law. Furthermore, similarly to the proposed provisions on the right to transfer cases of the President of the NJO, the amendment **would also abolish the transitional character** of the system of transferring cases by the Prosecutor General.

Original text of the Transitional Provisions Article 11 (4)	*Text of the proposed amendment, Article 15 [To be included in the Fundamental Law as Article 29 (3)]*
In the interest of the enforcement of the fundamental right to a court decision within a reasonable time as provided in Article XXVIII (1) of the Fundamental Law, until a balanced caseload in courts has been realized, the Prosecutor General, as the leader and manager of the Office of the Prosecutor based on Article 29 of the Fundamental Law, may order to press charges before a court other than the court of general competence but with the same jurisdiction. This provision does not affect the	In the interest of the enforcement of the fundamental right to a court decision within a reasonable time, the Prosecutor General may, in a manner defined by a cardinal Act and in cases defined in a cardinal Act, order to press charges before a court other than the court of general competence but with the same jurisdiction. This provision does not affect the right of the President of the National Judicial Office defined in Article 27(4) and the rights of the individual prosecutions to press charges

[22] Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)008.
[23] Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 73.

right of the President of the National Judicial Office as granted in Paragraph (3) and the rights of the individual prosecutions to press charges before any courts within their territorial jurisdiction.	before any courts within their territorial jurisdiction.

Underlined words indicate the deleted and the new elements of the provision.

It shall be added that a recent proposal,[24] which was submitted to the Parliament by the Parliamentary Committee for Constitutional, Justice and Procedural Matters on 25 February 2013, would repeal Article 15 of the proposed amendment, thus the Prosecutor General's right to transfer cases would not be enacted in the Fundamental Law. The proposal has not been voted on yet.

6. Narrowing the notion of family

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

However, the proposed amendment would supplement Article L (1) with the following sentence: *"Marriage and the parent-child relationships are the basis of the family."* Adopting this amendment **would severely narrow the constitutional notion of family** and would result that only those who fall under this new, restricted notion would be able to rely on constitutional protection. Accordingly, **the Fundamental Law itself would provide for discrimination between different relationships,** which means that laws discriminating between cohabitations on the basis of the new, restrictive constitutional definition of a family may not be considered unconstitutional in the future.

7. Allowing the ban of certain political advertisements

In the beginning of January 2013, the CC abolished Article 151 (1) of the new Election Procedure Act, which set out that "[i]n the campaign period, political advertisements may only be published in the public media". In its Decision 1/2013. (I. 7.) the CC declared the latter rule unconstitutional, emphasizing that the rule in question would "*cease the possibility of publishing political advertisements exactly regarding in the media reaching society to the widest extent. Thus, the ban is a considerable restriction on political speech as performed in the course of the election campaign.*"[25] Furthermore, it was concluded that the ban "d*oes not serve the aim of balanced information, and even may lead to an opposite result. Indeed, the provision bans the publishing of political advertisements – which, besides influencing the voters, also inform them – precisely in case of the type of media which reaches voters in the widest range.*"[26]

[24] T/9929/46, available in Hungarian at: http://www.parlament.hu/irom39/09929/09929-0046.pdf.
[25] Decision 1/2013. (I. 7.) of the CC, Reasoning [93].
[26] Decision 1/2013. (I. 7.) of the CC, Reasoning [98].

Despite the statements of the CC cited above, Article 5 of the proposed amendments intends to include the following provision into the Fundamental Law under Article IX (3): *"In order to guarantee the conditions for the formation of a democratic public opinion, nation-widely supported political parties and other organizations that nominate candidates must be provided free and equal access, as defined in a cardinal Act, to political advertising in public media outlets before elections for Members of Parliament and Members of the European Parliament. Cardinal Act may limit the publication of other forms of political advertisements."* The first sentence of this new provision provides equal access to public media outlets only to parties with "nation-wide support", while the last sentence of the **proposed amendment would create the constitutional basis for banning the publishing of political advertisements in the commercial media, which is in contradiction with the standards established by the CC**.

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

A recent proposal, submitted by an individual MP to the Parliament on 25 February 2013,[30] would entirely ban political campaigning in the commercial media and would allow only parties and organizations having a list of MPs to vote on. This change would further aggravate the violation of the freedom of political speech.

8. Providing a constitutional basis for criminalizing homelessness

Criminalizing homelessness has been a recurring aim of the governing coalition, both on central and local governmental level. For example, the new Petty Offence Act, which was adopted in 2012, set out that living on public premises and storing related personal property on public premises constituted a petty offence, and those living in public premises may have been punished with a fine or with confinement. "Anti-homeless" rules were also criticized by UN experts on extreme poverty and on housing who called on Hungary to reconsider the legislation on criminalizing homelessness.[31]

In its Decision 38/2012. (XI. 14.) the CC abolished, among others, the respective provisions of the Petty Offence Act, stating that criminalizing the status of homelessness is unconstitutional, since it violates human dignity: "[*N*]*or the removal of homeless persons from public premises, nor urging them to draw on social maintenance may not be considered such a legitimate, constitutional aim which would substantiate that the living of homeless persons on public premises is declared a petty offence. Homelessness is a social problem,*

[27] Application no. 21132/05, Judgment of 11 December 2008.
[28] *TV Vest As and Rogaland Pensjonistparti v. Norway,* §§ 59-60.
[29] *TV Vest As and Rogaland Pensjonistparti v. Norway,* § 73.
[30] T/9929/48, available in Hungarian at: http://www.parlament.hu/irom39/09929/09929-0048.pdf
[31] See: Hungary's homeless need roofs, not handcuffs – UN experts on poverty and housing, 15 February 2012, http://www.europe.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9994&LangID=E.

which shall be dealt with by the state with the means of social administration and social maintenance instead of punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare [homeless persons] dangerous to the society and punish [them]."[32]

However, the proposed amendment does not take into consideration the arguments of the CC cited above and **enables the Parliament or local governments to criminalize homelessness** by including the following provision into the Fundamental Law under Article XXII (3): *"An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values."*[33] This is again **in clear contradiction with the principles established by the CC**. On the other hand, the amendment sets out that the State and local governments shall "strive" to guarantee housing for every homeless person, which does not mean an obligation on the authorities.

9. Provisions violating the freedom of religion and the principle of separation of State and Church

On 30 December 2011, the Parliament adopted a new Church Law,[34] which entered into force already on 1 January 2012, and significantly altered the system of the registration regarding churches. According to the Church Law, **all churches except those listed in the annex of the Church Law were deprived of their acquired and established rights, and their legal status as a church was transformed into that of a civil association**. As a result, more than 300 denominations lost their legal status and either filed a request for re-registration, or initiated a procedure to transform into civil associations, or ceased activity. (The annex of the Church Law currently lists 27 denominations as registered churches.) In contrast to the status of a church, a civil association does not enjoy the same rights and privileges with regard to taxation, employment, education, performing religious service in public institutions, disclosure of information, etc. As declared by the Venice Commission, the Church Law "***induces, to some extent, an unequal and even discriminatory treatment*** *of religious beliefs and communities, depending on whether they are recognised or not*".[35] This would also constitute a violation of Article 14 of the European Convention on Human Rights, taken in conjunction with Article 9.

The Church Law also includes requirements to obtain legal status as a church, such as the **requirement of existence for at least 100 years internationally or 20 years in Hungary as a civil association, which is an overly excessive condition violating Article 9 of the European Convention on Human Rights.**[36] Denominations may be recognized as church by the Parliament with the votes of two thirds of the MPs. (Thus the Church Law's annex shall be amended every time a new church is included.) However, requirements included in the Church Law do not bind the Parliament, thus the Parliament's decision on granting the status of a church is an arbitrary one, and the lack of normative criteria of recognition **breaches the principle of separation of State and Church**. Furthermore, obviously there is no right of appeal against the decision on the recognition, and if the Parliament does not register a denomination it is not compelled to provide a reason for its decision. The Venice Commission stated in this regard in its

[32] Decision 38/2012. (XI. 14.) of the CC, Reasoning [53].
[33] Proposed amendment, Article 8.
[34] Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities
[35] Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)004, § 110.
[36] See e.g.: *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (Application no. 40825/98, Judgment of 31 July 2008).

opinion issued in March 2012 that the Church Law *"sets* ***a range of requirements that are excessive and based on arbitrary criteria*** *with regard to the recognition of a church. In particular, the* ***requirement related to the national and international duration of a religious community and the recognition procedure, based on a political decision, should be reviewed.****"*[37]

The constitutional basis for the Church Law was Article 21 (1) of the Transitional Provisions of Hungary which set out that the Parliament shall identify the recognised churches and determine the criteria for recognition of denominations as churches, such as operation for a certain length of time, a certain number of members, historical traditions and social support. However, Article 21 (1) **of the Transitional Provisions was also abolished by the CC** in its Decision 45/2012. (XII. 29.), since it was not considered as transitional in nature. As a response the proposed amendment **would include in** Article VII of **the Fundamental Law that denominations may be recognized as churches by the Parliament in a cardinal law** (i.e. with two-thirds of the votes of MPs present) and that a cardinal law may set out as a condition for recognizing a denomination as a church that it has been operating for a considerable period of time and that it has societal support.[38]

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

As a recent development, it shall be mentioned that in its decision delivered on 26 February 2013 (IV/2352/2012.) the CC established that the rules of the Church Law regarding the recognition of denominations by the Parliament are unconstitutional, since they allow a body with an essentially political character (i.e. the Parliament) instead of the impartial courts to decide on individual cases related to fundamental rights which should be subject to legal deliberation. The CC annulled the affected provisions with a retroactive effect as of their coming into force on 1 January 2012 and declared that they could not have been applied, thus existing denominations did not lose their status as a church.

10. Abolishing the autonomy of universities in financial matters

By inserting in Article X (3) that *"within the limits of an Act of Parliament, the Government sets the financial order of the state's higher educational institutions and the Government supervises their financial management"*,[39] **the amendment entirely abolishes the autonomy of universities in financial questions**.

11. "Student contracts" requiring domestic employment in exchange for state contribution to the costs of studies

According to the proposed amendment, Article XI of the Fundamental Law shall be supplemented with the following paragraph: *"(3) An Act of Parliament may set as a condition for receiving financial aid at a higher educational institution the participation in, for a defined period, employment or*

[37] Opinion on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities of Hungary, § 108.
[38] Proposed amendment, Article 4.
[39] Proposed amendment, Article 6.

enterprise that is regulated by Hungarian law."[40] As far as the background of this provision is concerned, it shall be recalled that the so-called **"student contracts" were originally introduced by a Government Decree** in January 2012, setting out that in exchange for the state contributing the costs of university education, students are obliged to work in Hungary for a certain period of time after obtaining their degree, otherwise they will be obliged to return the costs of their studies. Upon the request of the Ombudsman of Hungary, the Government Decree referred to above **was abolished by the CC** in its Decision 32/2012. (VII. 4.), however, based only on formal reasons, and, thus, not examining the substantive constitutionality of the student contract. On the day the above decision of the CC was announced, the parliamentary committee dealing with educational matters proposed an amendment to the Bill on higher education, **reintroducing the rules of the former Government Decree on student contract without any change.** Consequently, it is now included in Act CCIV of 2011 on National Higher Education that students have to work in Hungary double the time of the period of their studies within the first 20 years after obtaining their degree, otherwise they are obliged to refund the costs of their studies. The provisions above not only **put indigent students**, who are not able to pay for their studies, **in a disadvantageous situation,** but also **disproportionately restrict the rights of students to choose their occupation freely**. Furthermore, students undertake a long-term obligation when signing the contract, while the state shall only "strive" to ensure adequate working possibilities. Based on the reasons above, the Ombudsman of Hungary requested the CC to review the rules on student contracts on the merits; the decision is pending. In its petition, the Ombudsman also referred to the fact that when assessing the rules on student contract, the principle of the freedom of movement of workers within the European Union and Article 15 of the Charter of Fundamental Rights of the European Union shall also be taken into account.

Based on the above, it may be concluded that through the proposed amendment to the Fundamental Law **the governing party aims to overcome possible constitutional problems related to the student contracts by creating an express constitutional basis for the restriction of the students' rights to freely choose their occupation**.

[40] Proposed amendment, Article 7.