What would you do? (A)

Is there any problem with the following situations, in terms of constitutional democracy or the rule of law?

If yes, which institutions would you turn to, and which ones would you avoid in the following cases? Which legal procedures do you think would be helpful, and which would be useless in a particular case?

Why? Assess the potential advantages and disadvantages of using the following mechanisms for the particular cases.

Answer the questions above separately for each case.

<table>
<thead>
<tr>
<th>Police</th>
<th>Ombudsperson</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil courts</td>
<td>Venice Commission</td>
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<td>Constitutional Court</td>
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<td>European Court of Human Rights</td>
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<td>Equal Treatment Authority</td>
<td>Electoral commissions</td>
</tr>
<tr>
<td>National Authority for Data Protection and Freedom of Information</td>
<td></td>
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</tbody>
</table>

Case 1

2 months before the municipal elections, the governing party decides to change the system of municipal representation in Budapest, the capital, where it has the worst odds to win seats. The bill is introduced with a motion for urgent legislation, so it is passed without much debate at all. In the new system, the districts of Budapest become electoral districts: each delegates one member to the Municipal Assembly of Budapest. However, districts have varying population: some have 6 times as many enfranchised inhabitants as others.

Case 2

A Hungarian elementary school, operated by a church, opens a building in a poor neighborhood with overwhelmingly Roma population. Parents are happy that they can finally take their children to a school nearby: they save on transportation costs, and they don't have to face conflicts with the non-Roma population (e.g., other schoolchildren or their parents). As a results, nearly all students attending this unit of the school are Roma. (The same school has another building, in a different location, which has mostly non-Roma students.) The church running the Roma-only school claims they are giving an opportunity for parents who wish to provide their children with religious education; parents sign a declaration that they want religious education.

Case 3

According to the previous Hungarian constitution, the ombudsperson for data protection was an independent national data protection authority, with a fixed-term mandate. However, Hungary has a new constitution from 2012, which does not establish the same mandate. Instead, it creates the National Authority for Data Protection and Freedom of Information, with a similar function. Thus, the ombudsperson has to leave office before the expiry of his term.
Institutions in Context

(1) What is the new institution / regulation described in the text?

(2) What does / can the new institution do, or what is the gist of the new regulation?

(3) What is the justification given for the new institution / regulation?

(4) What is the likely effect of the new institution / regulation? Why?
The Refugee Crisis

- **Parliament**: governing parties propose the new bill with a motion for urgency, no debate
- **Ombudsperson**: signs joint declaration with other ombudspersons from Visegrad countries, but finds no violations of intl. human rights law
- **Courts (Immigration & Criminal)**: no discretion to apply the new laws, they can only turn to the Const. Court if they think laws are unconstitutional
- **Constitutional Court, ECtHR**: cannot take action before a victim turns to it, but victims who are deported are unlikely to turn to it
- **CJEU**: no jurisdiction, except Dublin III
- **Press**: cannot access refugee camps

Harrassment of NGOs

- **Ombudsperson**: doesn’t take sides, notes that the opinions of all parties to intl. treaties should be taken into consideration when interpreting them
- **Gov. Audit Office**: refuses to provide reasons for investigations, doesn’t tell who ordered them – acts out of its statutory authorization, launches extremely biased report
- **Police**: uses improportionate actions
- **National public media**: stigmatizes NGOs, conveys government’s messages – commercial TV channels stay fairly apolitical, no contrary views conveyed

More general tendencies behind

- **Break-down of checks and balances**: Government-appointed or –friendly, formally independent institutions;
- **Rule of law requirements not respected**: Overstepping statutory authorizations, Non-Compliance with international law,
- **Courts’ sphere of control limited**
- Legislative procedure lacks guarantees that would also protect the quality of law and human rights
Amendment of Act LV of 1993 on Hungarian Citizenship

Under Article 6(3) of the Hungarian Constitution, “The Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary.” Over the past 20 years, Hungarians living around the world and in the Carpathian Basin formulated the need, from time to time, for a simplified naturalisation procedure similar to the practice of other countries as a significant assistance in maintaining relations with Hungary and preserving their Hungarian identity.

On 26 May 2010 the Hungarian National Assembly approved with an overwhelming majority the amendment of Act LV of 1993 on Hungarian citizenship and introduced a simplified naturalisation procedure.

Every state is free to decide whom it accepts as a citizen, thus this amendment does not violate any international law and fully complies with the European Convention on Nationality passed by the Council of Europe in 1997.

The arrangement introduced by this amendment is familiar and applied increasingly frequently in various countries both in and outside the European Union.

The pre-amendment version of the Hungarian Citizenship Act also granted preferential acquisition of Hungarian citizenship. As has been the case so far, the procedure shall commence upon individual request, with Hungarian authorities processing each application in the context of a well regulated procedure.

This new regulation has simplified the procedure and reduced the administrative burden. Every non-Hungarian citizen is eligible for preferential naturalisation if

- he or any of his ancestors was a Hungarian citizen or if he serves reason to believe his or her origin is from Hungary,
- he proves his knowledge of the Hungarian language,
- he has no criminal record and is not under prosecution,
- his naturalisation does not violate the public and national security of Hungary.

Simplified naturalisation does not mean that a citizen automatically becomes an elector. Suffrage is subject to a registered residence in Hungary. The simplified procedure does not automatically provide a Hungarian passport; every citizen must apply for one in a special procedure after acquisition of citizenship. Simplified naturalisation is merely a possibility. To apply for citizenship is a matter of individual discretion.

Applications for naturalisation may be filed with

- any Hungarian registrar,
- any regional directorate of the Office of Immigration and Naturalisation, or
- any consular officer at Hungary’s foreign diplomatic missions.

Applications shall be adjudged by the President of the Republic on recommendation of the Minister of Public Administration and Justice.
A new organisation to face new challenges

Assisting both the President and the Authority will be the Bureau of the National Media and Infocommunication Authority - the Director-General of which is appointed by the President - and the Vice Presidents, also appointed by the President of the Authority. As an autonomous entity of the National Media and Infocommunication Authority, the Media Council is scheduled for inauguration in autumn, with the purpose of functioning as the legal successor of the National Radio and Television Commission within the Authority's organisational framework. Subject to a two-thirds majority vote of MPs present, the Council's President and its four Members shall be elected by the Parliament for a term of nine years. Complaints regarding the breach of unbiased information shall be reviewed by the Media Council's Grievance Committee.

The establishment of a new authority is likely to bring an end to the widespread debate that has been ongoing for nearly a decade and a half, one of its key issues being the integration of two, often overlapping government agencies (the National Radio and Television Commission and the National Communications Authority) into a single organisation. Expert studies on this subject all seem to acknowledge that merging the two authorities will have multiple advantages: a more rational distribution of resources yields improved efficiency, the elimination of redundancy results in cost savings, and a single organisation allows for more efficient co-operation between complementary and support functions.

Having undergone significant transformations itself, the media and communications market has also warranted the birth of the new agency, as well as the administrative and supervisory overhaul of communications. The convergence of certain types of media, that is the blurring of boundaries between conventional media content and that transmitted by communications devices, and the interoperability thereof, will inevitably result in the convergence of regulatory and supervisory authorities, thereby facilitating the more effective provision of services at an economical yet more advanced level. It is in the interest of the National Media and Infocommunication Authority that the organisational restructuring specified by pertaining legislation be organised promptly and efficiently. During this period of restructuring, the authority shall continue operation as usual.

The National Media and Infocommunication Authority intends to cultivate, with market participants, the media and the general public using communications services alike, a relationship that is based on fairness and co-operation, under full compliance with constitutional and legislative provisions that regulate its scope of authority. With respect to market participants and service providers, the Authority deems it essential to establish a transparent supervisory and regulatory system, one that functions with less bureaucracy and guarantees freedom of competition while also firmly enforcing compliance with statutory provisions. In the future, the protection of consumers and consumer rights will be a priority, as well as the enhanced presence of civil control within a public service supervisory organisation. To that end, the politically independent Public Service Commission and the office of the Communications and Media Ombudsman have been established.
Media regulation, as far as its goals and system are concerned, is constitutional

The decision of the Constitutional Court adopted today on the one hand confirms that the goals and system of the media regulation are in compliance with the Constitution, on the other hand it calls upon the legislature to make certain clarifications and add certain further provisions to the Press Freedom Act and the Media Act.

The decision confirms that the registration obligation of printed and online press products is a rule complying with the Constitution. The decision of the Constitutional Court acknowledges that the majority of the content related rules applicable to press products, such as the protection of the constitutional order, the prohibition of hate speech, the rules prohibiting the offensive representation of people in vulnerable or humiliating situations, the protection of minors and the advertising rules, are in full compliance with the constitutional requirements, and thus can be imposed on the press and the media services (television, radio).

However, according to the decision, certain other media service rules, such as the protection of human dignity, human rights, privacy and the rights of the person making a statement, when applied regarding the press products, need to be clarified supplemented and detailed. According to the reasoning provided by the Constitutional Court, this is required because television and radio have a much greater impact on the audience than press products.

The decision makes it clear that it is constitutional if the regulatory tasks related to the printed and online press are performed by the National Media and Infocommunications Authority and the Media Council. The Constitutional Court underlines in its decision that prior to adoption of the new media regulation, the journalists' sources were not protected in Hungary during criminal proceedings. The new regulation changed this and introduced the protection of journalists' sources. However, the decision of the Constitutional Court requires that further constitutional requirements are to be added to the rule and the respective procedural rules need to be modified as well.

The decision expresses its objections to the provision of the Media Act regulating data provision outside the regulatory procedure. This less bureaucratic way of data provision, also known from the area of telecommunications law, could have reduced the number of regulatory procedures and could have guaranteed a faster administration for the clients.

The institution of the Media and Communications Commissioner will probably be changed as well as a result of the decision of the Constitutional Court, since the Constitutional Court expressed certain criticism in connection with the competence of the Media and Communications Commissioner regarding the media market participants. Although the institution of the Commissioner has proved during the past twelve months that the Commissioner can effectively provide assistance in remedying those harms to interests caused by the media service providers which affect a considerable part of the audience.

The decision of the Constitutional Court adopted today does not affect on the merits the way the law has been applied in practice by the Office and the Media Council of the National Media and Infocommunications Authority during the media administration procedures. One of the major goals of this law application is and remains to promote the freedom of speech and the freedom of the press. The
legislature has a half year to implement and integrate in the respective legal regulations the clarifications requested by the Constitutional Court.

20 December 2011
COMMENTS OF THE GOVERNMENT OF HUNGARY ON THE DRAFT OPINION ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW OF HUNGARY


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

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

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

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

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

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1 Mr Christoph GRABENWARTER (Member, Austria), Mr Wolfgang HOFFMANN-RIEM (Member, Germany), Ms Hanna SUCHOCKA (Member, Poland), Mr Kaarlo TUORI (Member, Finland), Mr Jan VELAERS (Member, Belgium)
couples) regulated in a separate Act since 2009 continues to be in force also under the Fundamental Law.

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

B. Communist past (Article 3)

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

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

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

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

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2 The correct translation, provided by the Hungarian authorities, has been published on the website of the Venice Commission on 23 April 2013 as document No CDL-REF(2013)016.

3 It must be noted, that the translation of paragraph (5) of Article 5 refers to “statutory extent”, while the original Hungarian text says “pensions or other benefits can be reduced to a level defined by an act of Parliament”.
III. C. The recognition of churches (30-36.)

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

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

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

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

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

(15) The parliamentary procedure under paragraph (2) of Article VII of the Fundamental Law is only necessary where a religious organisation strives for a special relationship with the state. The nature of that relationship is characterised by the following: participation in community goals by the organisation and the granting by the state of financial and other
benefits to the religious organisation at issue (comparable to the “Kirche des öffentlichen Rechts“ in Germany). The parliamentary procedure results in the enlisting in the annex to the act on churches of the particular religious organisation.

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

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

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

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

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

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

(21) Political campaign in the various media is regulated as follows in Hungary. First of all, internet, print media and cinema political advertising is not constrained by law (during electoral campaigns however all media outlets must register with the National Audit Office their price lists and publish them). Political propaganda on posters, fliers, billboards remain
free. Even within commercial radio and television political talk-shows, news programmes, analyses, etc. come under no restriction. The only restriction that applies is with regard to commercial radio and TV advertising. This, as underlined in the Background Document, is driven by the legitimate demand that the differences in the financial power of parties should not distort the electoral campaign.

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

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

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

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

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

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

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

4 “If the expression relates to the whole of the community and to an unquestionable, substantial attribute of the members of the community, and the expression may, in the extreme, question the existence itself of the community, the person belonging to the community may rightfully expect protection on behalf of the legal system. This may mean a necessary limitation of the freedom of expression, but is only constitutional if it is proportional to the aim it seeks to achieve.” (decision 96/2008 of the Constitutional Court).
(28) The conclusions of the Draft Opinion that the limitations in the new paragraph (5) of Article IX of the Fundamental Law are too wide and not sufficiently precise, fail to take account of the fact that the civil law instruments will not be regulated by the provisions of the Fundamental Law, but will evidently be defined in concrete legal form by ordinary statutory provisions (Title 8 of the Background Document sets out in detail the statutory provisions not yet in force).

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

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

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

(32) Finally, two of the conclusions of the Draft Opinion deserve special attention. First, it must be underlined that the above measures have never been used, nor could they be in the future, to the protection of the institutions of the state. “Hungarian nation” in this provision means the community of natural persons that share a common national identity and may in no circumstances be construed to encompass state organs or certain elements of the institutions of the state. Such an interpretation would be contrary to the prohibition laid down in paragraph (3) of Article I of the Fundamental Law according to which “a fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.”

(33) Secondly, in the final conclusions (paragraph 148) the Draft Opinion appears to misinterpret completely the nature of the new paragraph (5) of Article IX of the Fundamental Law. It seems to see the hate speech clause of the Fundamental Law (and the Civil Code) as
an instrument to protect the *views* of minorities or the majority (underlining that protecting the dignity of the Hungarian nation undermines the protection of minority views). The conceptual basis and the implementing mechanisms of paragraph (5) of Article IX is completely alien to that line of reasoning. The Hungarian Fundamental Law aims to protect the dignity of communities of natural persons and to offer appropriate civil law remedies against any type of hate speech. If the conclusions of the Draft Opinion are applied consistently there is tolerable hate speech and intolerable hate speech, a truly discriminatory approach.

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

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

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

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

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

(37) Contrary to paragraph 62 of the Draft Opinion, paragraph (3) of Article XI of the Fundamental Law cannot prevent the review by the Constitutional Court of legislation adopted by Parliament on the financial support to students. The phrasing of the provision itself excludes this interpretation, since it offers only an opportunity for the legislator to introduce measures within the scope of the provision of the Fundamental Law. The Constitutional Court has all powers to carefully examine and evaluate the necessity and the proportionality of the obligations prescribed by the legislator.
(38) Besides, the constitutional provision also lays down clearly the necessary level of regulation („in an Act of Parliament”), fully in line with the Constitutional Court decision 32/2012 mentioned in the Draft Opinion.

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

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

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

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

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

IV. A. The role of the President of the National Judicial Office (67-72, 149)
(43) The Draft Opinion notes in paragraph 70 that the powers of the President of the National Judicial Office have already been substantially curtailed in view of the previous opinions of the Venice Commission. It is going to be even further reduced as a result of the elimination of the transfer of cases (see paragraph 45 below). Moreover, the Fourth Amendment does no more than includes two completely neutral and descriptive sentences into the Fundamental Law that merely reinstate the institution within its existing boundaries in the context of the organisational section on the judiciary. These are aimed to strengthen the independence of the constitutional status of the institution, rather than expand its powers. Against that context it is difficult to see why this move gives rise to statements such as “the progress achieved through the dialogue with the Secretary General is jeopardised by the Fourth Amendment” (paragraph 71).

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

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

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

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

(46) First, unlike it is suggested by paragraph 90, the Fourth Amendment is not one of a series of constitutional amendments affecting the decisions of the Constitutional Court. In fact, the first three amendments to the Fundamental Law did not concern the decisions of the Court at all5 (also see paragraph 68 below).

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

5 - The First Amendment to the Fundamental Law, adopted on 18 June 2012, clarified the constitutional status of the Transitional Provisions as well as deleted the possibility to adopt a cardinal legislation on the merger – under a new institution – of the National Bank of Hungry and the Financial Supervisory Authority.
- The Second Amendment to the Fundamental Law, adopted on 9 November 2012, introduced a requirement into the Transitional Provisions concerning mandatory registration of voters. This amendment only affected the Transitional Provisions and was subsequently annulled by the Constitutional Court.
- The Third Amendment to the Fundamental Law, adopted on 21 December 2012, provided for the adoption of the fundamental provisions relating to the ownership of agricultural land and forests by cardinal laws.
introduction of already annulled legal rules. A material distinction must therefore be drawn between overruling the Constitutional Court’s decision, on the one hand, and revisiting the subject matter of certain such decisions, on the other.

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

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

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

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

(51) Before reflecting on the comments of the Draft Opinion the status of the previous case-law of the Constitutional Court must be clarified. As a starting point it must be
underlined that case-law of the Constitutional Court developed before the entry into force of the Fundamental Law is not rendered “void”, as suggested by paragraph 105 of the Draft Opinion. The second sentence of point 5 of the Closing and Miscellaneous Provisions clearly states that the legal effects of the earlier rulings remain intact.

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

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

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

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

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

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

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

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

(58) The Hungarian Government does not recall the various arguments it had submitted in support of the limitations on the powers of the Constitutional Court to review budgetary laws.
Suffice it to remind here that the restrictions on budget review are temporary in nature and limited in scope and that the Court has
- unlimited ex ante review of all budget-related legislative acts;
- unlimited ex post review of all legal acts other than acts of Parliament (e.g. government decrees);
- full ex ante and ex post review of all budget-related legislative acts from a procedural point of view;
- full ex ante and ex post review of all budget-related legislative acts with regards to their compliance with international treaty obligations.

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

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

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

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

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

In connection with the newly established powers of the President of the Curia and the Supreme Prosecutor, it is not obvious why the Draft Opinion presumes the abuse of power in their case. The Hungarian Government does not see any reason why these officials would not exercise their rights within their statutory competences.
V. G. Special tax in case of court judgments leading to payment obligations (128-134.; 151.6.)

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

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

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

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

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

(67) It must also be recalled that the Draft Opinion erroneously states in paragraph 140 that the rules of the Fundamental Law established by the Fourth Amendment further restrict the scope of action of future governments (and are therefore in line with a previous tendency) by elevating provisions in the Fundamental Law that are not of constitutional level (homelessness, provisions relating to the communist regime, student contracts, financial management of universities). The draft opinion fails to acknowledge the fact that the rules incorporated in the Fundamental Law merely create the possibility of regulation (enabling provisions) therefore they do not restrict the room for manoeuvre of future governments which will have the possibility to adopt a different regulation on a lower level as they wish.
Instrumental use of the Constitution (141-143.)

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

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

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

Conclusions

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

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

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

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

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

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

(75) The Draft Opinion unfoundedly claims that the Fourth Amendment undermines the functioning of the Constitutional Court, a statement that it derives from a number of points: a) the removal of the possibility of the Constitutional Court to refer to its earlier case-law; b) the special tax in case of court judgments (including that of the Constitutional Court) leading to
payment obligations; c) the Government’s “systematic approach” of “overriding Constitutional Court decisions by constitutionalising provisions declared unconstitutional”; d) limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation which has budgetary incidence, even when budgetary problems have subsided.

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

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

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

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

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

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

(78) In conclusion, the Hungarian Government finds that due to the rather high number of factual errors and misunderstandings contained therein, furthermore, due to the lack of a comprehensive analysis of all the relevant accompanying Hungarian regulation, the Draft
Opinion on the Fourth Amendment of the Fundamental Law needs to be properly revised. As a consequence, the unfounded claims and the disproportionately severe conclusions regarding - in particular - the state of the independence of the judiciary, the constitutional review and the constitutional checks and balances in Hungary needs to be fundamentally revised. Hungary is therefore ready, to provide further information to and cooperate with the Venice Commission in order for it to arrive at an incontestable and balanced assessment accurately describing the legal effects of the provisions of the Fourth Amendment.

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Strasbourg, 17 June 2013
Opinion 720 / 2013
CDL-AD(2013)012
Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

ON THE FOURTH AMENDMENT TO THE FUNDAMENTAL LAW
OF HUNGARY

Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)

on the basis of comments by

Mr Christoph GRABENWARTER (Member, Austria)
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
Ms Hanna SUCHOCKA (Member, Poland)
Mr Kaarlo TUORI (Member, Finland)
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I. **Introduction**

1. By letter of 11 March 2013, the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, requested an opinion of the Venice Commission on the compatibility of the Fourth Amendment to the Fundamental Law of Hungary with the Council of Europe Standards.

2. By letter of 13 March 2013 to the Secretary General of the Council of Europe, the Minister for Foreign Affairs of Hungary, Mr János Martonyi, requested an opinion of the Venice Commission on the Fourth Amendment, with regard to the international commitments that derive from Hungary's membership of the Council of Europe.

3. On 12 April 2013, a delegation of the Venice Commission, composed of Mr Wolfgang Hoffmann-Riem, Ms Hanna Suchocka, Mr Kaarlo Tuori and Mr Jan Velaers, accompanied by Mr Thomas Markert and Mr Schnutz Dürr from the Secretariat, visited Budapest. The delegation met with (in chronological order) Mr Róbert Répássy, State Secretary of the Ministry of Public Administration and Justice, Mr László Sólyom former President of Hungary, Mr Tamás Gaudi-Nagy and Mr Csaba Gyüre (Jobbik party), Mr Bence Rétváry, State Secretary of the Ministry of Public Administration and Justice (KDNP) and Mr Imre Vas (Fidesz), Mr Attila Mesterházy fraction leader of the Hungarian Socialist Party (MSZP), Mr Gergely Bárándy (MSZP), Mr Gábor Galambos (MSZP), Mr Vilmos Szabo (MSZP), Mr Pal Schiffer (Politics can be different), Mr László Varju (Democratic Coalition), Ms Timea Szabó (Together 2014) and Mr József Szájer Member of the European Parliament (Fidesz) as well as with the following NGOs: Hungarian Helsinki Committee, Hungarian Civil Liberties Union and the Eötvös Károly Institute.

4. On 15 May 2013, a delegation of the Venice Commission, composed of Mr Christoph Grabenwarter and Ms Hanna Suchocka, accompanied by Mr Thomas Markert and Mr Schnutz Dürr from the Secretariat met in Vienna with the independent experts Mr Delvolvé, Professor Emeritus at the University of Paris Panthéon-Assas, France, Mr Péter Kruzslicz, Assistant at the University of Szeged, Hungary, and Mr András Patyi, Rector of the National University of Public Service, Hungary, as well as with a delegation of the Hungarian Government, composed of Mr Krisztián Gáva, Deputy State Secretary for the Legislation of Public Law of the Ministry of Public Administration and Justice, Mr Gábor Baranyai, Deputy State Secretary of the Ministry of Foreign Affairs, and Ms Ágnes Kertész Head of the Legal Service of the Hungarian Permanent Representation to the European Union in Brussels. The present opinion takes into account the results of both visits.

5. The Venice Commission is grateful to the Hungarian authorities for the excellent cooperation in the organisation of the Budapest and the Vienna meetings. The Commission would like to thank the independent experts and the Hungarian authorities for the explanations provided.

6. The present opinion was discussed at the Sub-Commission on Democratic Institutions on 13 June 2013 and, following an exchange of views with the Minister of Foreign Affairs of Hungary, Mr Martonyi, was subsequently adopted by the Venice Commission at its 95th plenary session (Venice, 14-15 June 2013).

II. **Preliminary remarks**

7. On 11 March 2013, the Parliament of Hungary adopted the Fourth Amendment (CDL-REF(2013)014) to the Fundamental Law (CDL-REF(2013)016 – consolidated version). The Venice Commission has been requested to examine the Fourth Amendment from the point of view of its compatibility with Council of Europe standards and with regard to international commitments that derive from Hungary's membership of the Council of Europe.
8. The present opinion should be seen in the light of a number of earlier opinions on the Hungarian constitutional and legislative texts, which the Venice Commission provided since 2011. For the assessment of the Fourth Amendment, the following opinions are of particular relevance:

- Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary;  
- Opinion on the new Constitution of Hungary;  
- 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;  
- Opinion on Act CLI of 2011 on the Constitutional Court of Hungary;  
- 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;  
- Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary.

9. The Hungarian Government provided useful explanations on the Fourth Amendment in the form of a Technical Note (attached to the text of the Fourth Amendment in document CDL-REF(2013)014) and the more detailed Background Document on the Fourth Amendment to the Fundamental Law (CDL-REF(2013)019, hereinafter, the “Background Document”). During the meetings in Budapest, the representatives of the Hungarian Government also presented draft Bill no. T/10593 (CDL-REF(2013)017, hereinafter, “the Bill”), which is to implement the Fourth Amendment (CDL-REF(2013)014). In accordance with its mandate, this Opinion does neither evaluate this draft law or other ordinary Hungarian legislation, nor does it evaluate the Fourth Amendment in the general context of its implementing legislation. However, it will sometimes refer to ordinary laws.

10. The Technical Note and the Background Document insist that, for the most part, the Fourth Amendment results from an integration into the Fundamental Law of the Transitional Provisions, which had been annulled by Constitutional Court decision 45/2012 on formal grounds. In this respect, it is important to note that the Venice Commission had received a request for an opinion on the Transitional Provisions to the Fundamental Law, but had postponed the preparation of such an opinion while an appeal against the Transitional Provisions was pending before the Constitutional Court. The Commission did not resume the work on that opinion after a large part of the Transitional Provisions was annulled by the Court. Nonetheless, several Articles of the Transitional Provisions had been criticised already in the other opinions mentioned above and this opinion will refer to these points, where appropriate.

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1 Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), CDL-AD(2011)001.  
3 Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)001.  
4 Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), CDL-AD(2012)004.  
5 Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012), CDL-AD(2012)009.  
9 Decision of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe of 13 March 2012.
11. The Hungarian Government also provided an opinion on the Fourth Amendment, requested by the Minister of Foreign Affairs, Mr Martonyi, prepared by Messrs. Francis Delpéréé, Pierre Delvolvé, and Eivind Smith, which concludes that some provisions of the Fourth Amendment are in conformity with European standards, some could be interpreted in conformity with European standards and some provisions are "of a debatable nature" with regard to these standards. That opinion examines in detail the relevant case-law of the Court of Justice of the European Union and the European Court of Human Rights. It defines as the framework of its analysis the legislation of the European Union and the European Convention on Human Rights.

12. In accordance with its general practice, the Venice Commission will examine the Fourth Amendment in the present opinion from a wider scope of reference. Hungary is bound by the Statute of the Council of Europe’s three main pillars, which are: human rights, democracy and the rule of law. The present opinion evaluates the Fourth Amendment from the point of view of its compatibility with all of those standards and against the commitments that derive from Hungary’s membership of the Council of Europe. In addition to human rights obligations and Council of Europe standards, these commitments include democratic principles, particularly checks and balances, and judicial independence as part of the rule of law. Therefore, taking into account the legal context of the Fourth Amendment, the present Opinion will:
   (a) analyse the provisions of the Fourth Amendment individually and in the light of the relevant decisions of the Constitutional Court and,
   (b) examine systematically the effect which these provisions (taken together) have on the checks and balances and on the rule of law in Hungary.

13. As a response to the draft of this Opinion, the Hungarian Government transmitted “Comments of the Government of Hungary on the Draft Opinion of the Venice Commission on the Fourth Amendment to the Basic Law of Hungary” (hereinafter “the Government Comments”) and a “Note on Arguments that could be Opposed against the Draft Opinion of the Venice Commission on the Fourth Amendment to the Basic Law of Hungary” by Mr Delvolvé. A major point made in these texts is that in several cases, the Fourth Amendment only contains “enabling clauses” and that the implementing legislation could attenuate the scope and effects of the constitutional provisions. However, this Opinion examines the Fourth Amendment itself and not the implementing legislation, which has not been submitted for opinion. The Commission evaluates these “enabling clauses” as concerns their scope, taking a risk oriented approach. In some cases, the Constitutional Court could even find unconstitutional implementing legislation that does not follow the direction given in the Fundamental Law.

14. This opinion is based on an English translation of the Fourth Amendment and the implementing Bill. The translation may not accurately reflect the original version on all points and, certain comments may result from problems in the translation.

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10 Senator, Professor Emeritus at the Catholic University of Leuven, President of the International Academy for Constitutional Law.
11 Member of the Institute, Professor Emeritus at the University of Paris Panthéon-Assas.
12 Professor at the Institute of public and international law at the University of Oslo, President of the Division of Humanities and Social Sciences at the Norwegian Academy of Science and Letters, Vice-President of the International Association of Constitutional Law.
13 Page 5 seq. (French version).
14 The request to the Venice Commission by the Secretary General asks the Commission to examine the Fourth Amendment “from the viewpoint of its compatibility with Council of Europe standards”.
15 Minister Martonyi’s request expressly relates to the “international commitments deriving from Hungary’s membership of the Council of Europe”
III. Amendments to the Chapters “Foundation” and “Freedom and Responsibility” of the Fundamental Law

A. The protection of marriage and family (Article 1)

15. Article 1 of the Fourth Amendment replaces Article L.1 of the Fundamental Law by the following provision:

“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 or the relationship between parents and children.”

16. In its decision 43/2012, which had already been based on the Fundamental Law, in force since 1 January 2012, the Hungarian Constitutional Court had annulled Section 7 of the Act on Protection of Families, which defined the concept of the family as a system of relations that generates an emotional and economic community of natural persons, based on the marriage of a man and a woman, next of kinship or adoptive guardianship. The Court has found this concept of a family too narrow. According to the Court’s reasoning, the State should also protect long-term emotional and economic partnerships of persons living together (for example, those relationships in which the couples raise and take care of each other’s children, or couples who do not have any children or are not able to have any children, grandchildren cared for by grandparents etc.).

17. As concerns the definition of family ties, the Background Document provided by the Hungarian Government insists that this provision only defines the ‘basis’ of family relations and not the term family itself and does not preclude the statutory protection of family relations in a wider sense.

18. Article L.1 not only states that family is “the basis of nation’s survival”, but also that “family ties are based on marriage or the relationship between parents”.

19. According to the case-law of the European Court of Human Rights, the definition of “marriage” as the union of a man and a woman falls within the margin of appreciation of the Hungarian authorities.

20. Article L.1 of the Fundamental Law should not exclude other guarantees of family and family life. Article 12 ECHR guarantees the right of a man and a woman to marry. In the last decades, the European Court of Human Rights has gradually broadened the scope of Article 8 ECHR on the right to family life.

B. Communist past (Article 3)

21. Article 3 of the Fourth Amendment adds a new Article U to the Fundamental Law, which condemns the communist past of Hungary (Article U.1), calls for a truthful revelation of the operation of the communist dictatorship (Article U.2), establishes a Committee of National Memory (Article U.3), obliges holders of power of the communist dictatorship to tolerate factual statements about their role and actions (Article U.4), allows for the reduction of their statutory

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17 The Government Comments point out that the Hungarian text of Article L.1 uses the word “illetve”, which means “and/or” in English and should be translated as “or”.
19 ECtHR: Schalk and Kopf vs. Austria, 22.11.2010, application no. 30141/04, para. 58; Gas and Dubois v. France, 15.03.2012, application no. 25951/07, para. 66; X and others vs. Austria, 19.02.2013, application no. 19010/07, paras. 105-110.
20 ECtHR: Schalk and Kopf vs. Austria, 22.11.2010, application no. 30141/04, paras. 91 and 94; X and others vs. Austria, 19.02.2013, application no. 19010/07, para. 95.
pensions and other benefits (Article U.5), prolongs the statute of limitations for unprosecuted crimes perpetrated during the communist dictatorship (Article U.6-8), rules out further compensation of the victims (Article U.9) and provides for the transfer of documents to public archives (Article U.10).

22. Recalling Resolution 1481 (2006) of the Parliamentary Assembly of the Council of Europe on the Need for International Condemnation of Crimes of Totalitarian Communist Regimes21, the Venice Commission acknowledges and understands Hungary's intention of coming to terms with its Communist past.

23. The very long Article U.1 is similar to the political declarations that were adopted in many other post-communist states at the beginning of the political transformation. Provisions of this type seem to be more appropriate for the preamble of a Constitution because they have only marginal normative character. In fact, even before the Fourth Amendment the Preamble of the Fundamental Law already contained a provision stating: "We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship".

24. As concerns the normative provisions on the criminal and civil responsibility of the political organisations involved in the communist regime and their leaders, as well as successor organisations, the provisions implementing Article U, in particular Article U.6, should primarily be assessed in light of the criminal-law principle of legality, enshrined in Article 7 of the ECHR and the principle of equality.

25. In the Background Document, the Hungarian Government insists that a similar law regarding the calculation of the statute of limitations was adopted in the early 1990s in Germany.

26. The Commission is aware that special provisions were enacted in several European states, which were directed against the restoration of former regimes that brought dictatorship and terror over the country and its population. However, the particular background pertaining to each of these states should be taken into account. While it is true that in Austria a special constitutional law banning all forms of national-socialist activities was enacted,22 it has to be borne in mind that this happened immediately after World War II and the end of the Nazi regime. In Germany, the provisions referred to by the Hungarian Government were adopted immediately after the German reunification and not on a constitutional, but on an ordinary-law level. They contain clear maximum time limits as a consequence of which the prosecution of most crimes committed during Eastern Germany's communist past is already time-barred since the year 2000. Article U.7 and U.8 (as amended) provide, on the contrary, for a restart of limitation periods on the day the Fundamental Law enters/entered into force, i.e. 1 January 2012 - that is more than twenty years after Hungary liberated itself from Communist rule.

27. The time of adoption of these kind of provisions is of relevance. In a recent opinion on lustration, the Venice Commission discussed whether provisions on individual responsibility should be introduced more than 20 years after the democratic transformation: "Introducing lustration measures a very long time after the beginning of the democratization process in a country risks raising doubts as to their actual goals. Revenge should not prevail over protecting democracy. It follows in the Commission's view that applying lustration measures more than 20 years after the end of the totalitarian rule requires cogent reasons. The Commission recalls nevertheless that every democratic state is free to require a minimum amount of loyalty from its

22 Verbotsgesetz 1947, BGBl. 1947/25; some provisions were enacted already in 1945.
servants and may resort to their actual or recent behaviour to relieve them from office or refrain from hiring them."23

28. The main problem of Article U lies in the fact that it does not foresee any procedure that permits the examination of each individual case, but attributes responsibility for the past by using general terms ("holders of power", "leaders") and vague criteria without any chance for an individual assessment. The Government Comments point out that Article U is of a "moral and political" character and "defines directions" for criminal responsibility, which would be established not directly on the basis of Article U, but on the basis of ordinary legislation. The subject of this Opinion is the Fourth Amendment. Article U is not part of the Preamble of the Fundamental Law but an operative provision of it. No implementing legislation has been submitted for an opinion to the Venice Commission. As pointed out above, this Opinion evaluates "enabling clauses" as concerns the risks they pose. Furthermore, the Constitutional Court could even find unconstitutional implementing legislation that does not follow the "directions" given in the Fundamental Law. Therefore, procedural safeguards and clear criteria are required, in accordance with the relevant European rule of law standards, and in particular in the light of Articles 6, 7 and 8 ECHR.24

29. The Commission is of the view that questions of individual responsibility in general and limitation periods in particular should be regulated by the penal code or other ordinary law, rather than directly by the Constitution. If they are to be kept at the level of the Fundamental Law, then these provisions must at least allow for sufficient flexibility with regard to proportionality, taking into account the individual circumstances of each concrete case.

C. The recognition of churches (Article 4)

30. Article 4 of the Fourth Amendment amends Article VII of the Fundamental Law and provides rules on the recognition of churches, according to which Parliament may recognise, in a cardinal act, "certain organisations engaged in religious activities as Churches, with which the State shall cooperate to promote community goals".25 In addition, the amended Article VII.4 provides that "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".26

31. The Venice Commission recalls that in its decision 6/201327, taken already on the basis of the Fundamental Law in force since 1 January 2012, the Hungarian Constitutional Court declared that some of the provisions of the Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities, were contrary to the Fundamental Law and annulled them. The Court criticised the lack of an obligation to provide an appealable reasoned decision in case of a rejection of the request for recognition. The decision by Parliament could thus result in a political decision rather than one based on the applicable criteria. In the absence of a deadline for Parliament to decide, no legal remedy was available. The new provisions introduced by Article 4 result in the possibility to disregard decision 6/2013.

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23 CDL-AD(2012)028, Amicus Curiae Brief on the Law on determining a criterion for limiting the exercise of public office, access to documents and publishing, the co-operation with the bodies of the state security ("Lustration Law") of "the former Yugoslav Republic of Macedonia", adopted by the Venice Commission At its 93rd Plenary Session (Venice, 14-15 December 2012), para. 17.
24 See also the opinion of Messrs. Delpérée, Delvolvé and Smith.
25 Article VII.2 of the Fundamental Law.
26 Article VII.4 of the Fundamental Law.
32. While the original version of Article VII of the Fundamental Law had been found in line with Article 9 ECHR in the Opinion on the new Constitution of Hungary\(^{28}\), it is the procedure of parliamentary recognition of churches that has been raised to the level of constitutional law in Article VII.2. The Commission had criticised this procedure in its 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:

“72. The Venice Commission is worried specifically about the absence in the Act of procedural guarantees for a neutral and impartial application of the provisions pertaining to the recognition of churches\(^{29}\). [38] 73. Requests for acceding to church status have to be submitted directly to the Religious Affairs Committee of the National Assembly, which, eventually, submits a bill regarding the recognition to the National Assembly. The Bill of Recognition has to be adopted by a two-third majority of the Assembly.

74. According to the latest information at the disposal of the rapporteurs, Parliament adopted a Bill of Recognition on 29 February 2012, with 32 recognized churches\(^{39}\). It is entirely unclear to the rapporteurs and to the outside world, how and on which criteria and materials the Parliamentary Committee and Members of Parliament were able to discuss this list of 32 churches, to settle the delicate questions involved in the definition of religious activities and churches supplied in the Act, within a few days, without falling under the influence of popular prejudice.

76. The foregoing leads to the conclusion that the recognition or de-recognition of a Religious community (organization) remains fully in the hands of Parliament, which inevitably tends to be more or less based on political considerations. Not only because Parliament as such is hardly able to perform detailed studies related to the interpretation of the definitions contained in the Act, but also because this procedure does not offer sufficient guarantees for a neutral and impartial application of the Act. Moreover, it can reasonably be expected that the composition of Parliament would vary, i.e. change after each election, which may result in new churches being recognized, and old ones de-recognized at will, with potentially pernicious effects on legal security and the self-confidence of religious communities.

77. It is obvious from the first implementation of the Act, that the criteria that have been used are unclear, and moreover that the procedure is absolutely not transparent. Motives of the decisions of the Hungarian Parliament are not public and not grounded. The recognition is taken by a Parliamentary Committee in the form of a law (in case of a positive decision) or a resolution (in case of a negative decision). This cannot be viewed as complying with the standards of due process of law.\(^{30}\)

33. In the Background Document, the Hungarian Government insists on the fact that parliamentary recognition of churches does not prevent other religious communities from freely practising their religions or other religious convictions as churches in a theological sense in the legal form of an “organisation engaged in religious activities”.

\(^{28}\) ...Also, as stated by the Venice Commission in its 2004 Guidelines for Review of Legislation Pertaining to Religion and Belief, “[l]egislation that acknowledges historical differences in the role that different religions have played in a particular country’s history are permissible so long as they are not used as a justification for ongoing discrimination” (Chapter II.B.3). Against this background, Article VII is in line with Article 9 ECHR.\(^{28}\)\(^{29}\)\(^{30}\); CDL-AD(2011)016, para. 73.

\(^{29}\) See ECTHR, Metropolitan Church of Bessarabia v. Moldova, para. 116: “in exercising its regulatory power [...] in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial.”

34. In the Commission’s view, this statement leaves doubts concerning its scope. It must be kept in mind that religious organisations are not only protected by the Convention when they conduct religious activities in a narrow sense. Article 9.1 ECHR includes the right to practice the religion in worship, teaching, practice and observance. According to the Convention, religious organisations have to be protected, independently of their recognition by the Hungarian Parliament, not only when they engage in religious activity sensu stricto, but also when they, e.g., engage in community work, provided it has – according to settled case law – “some real connection with the belief”\(^{31}\). Article 9 in conjunction with Article 14 ECHR obliges the “State […] to remain neutral and impartial in exercising its regulatory power in the sphere of religious freedom”.\(^{32}\)

35. The Background Document does not address the issue of an appeal against non-recognition. The amended Article VII.2 refers to a remedy against the incorrect application of the recognition criteria: “The provisions of cardinal Acts concerning the recognition of Churches may be the subject of a constitutional complaint.” During the meeting in Budapest, the delegation of the Venice Commission was informed that such a remedy would be introduced, but that it would be limited to the control of the recognition procedure in Parliament. It seems that such a Bill is currently being discussed in the Hungarian Parliament but was not submitted to the Venice Commission for an opinion. A merely procedural remedy is, however, clearly insufficient in view of the requirement of Article 13, taken together with Article 9 ECHR. Article VII.2 of the Fundamental Law provides substantive criteria and a review of the procedure applied does not allow for a verification of whether these criteria were followed by Parliament.

36. The Fourth Amendment to the Fundamental Law confirms that Parliament, with a two-thirds majority, will be competent to decide on the recognition of churches. In addition, the new criterion “suitability for cooperation to promote community goals” lacks precision and leaves too much discretion to Parliament which can use it to favour some religions. Without precise criteria and without at least a legal remedy in case the application to be recognised as a Church is rejected on a discriminatory basis, the Venice Commission finds that there is no sufficient basis in domestic law for an effective remedy within the meaning of Article 13 ECHR.

D. Media access for political parties (Article 5.1)

37. Article 5.1 of the Fourth Amendment replaces Article IX.3 of the Fundamental Law and provides (1) that “political advertisements shall be published in media services, exclusively free of charge” and (2) that “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”. This second regulation forbids any, even unpaid, political advertising by these organisations in commercial media services prior to elections. Sections 146-148 of the Act on Electoral Procedure of 2012 implement this provision (CDL-REF(2013)018).

38. This provision was adopted on the constitutional level as a reaction to decision 1/2013\(^{33}\) of the Constitutional Court, annulling Section 151 of the Act on Electoral Procedures during the electoral campaign, which specified that all parties can advertise only within highly restricted time-limits and that they are allowed to use public TV and radio stations only during political campaign. The Court found that “the prohibition is a significant restriction of expressing political opinion in the course of the election campaign” and “with regard to the aim of


\(^{33}\) Decision 1/2013, 07.01.2013.
allowing the free formation and the expression of the voters’ will” and found it “gravely disproportionate”\textsuperscript{34}.

39. In the Background Document, the Hungarian Government explains that the goal of this provision is to ensure the publication of political advertising for political parties with nationwide support on an equal basis and free of charge. Referring to the judgment of the European Court of Human Rights in the case of TV Vest AS & Rogaland Pensjonistparti v. Norway\textsuperscript{35}, the Government points out that paid political advertising is prohibited in a number of European countries.

40. In its judgment in the case of TV Vest As & Rogaland Pensjonistparti v. Norway, the ECtHR indeed assessed a general ban of political advertising on television. The Court was of the opinion that “there was not […] a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants’ exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities. Accordingly, there has been a violation of Article 10 of the Convention.”\textsuperscript{36}

41. In its recent decision in the case of Animal Defenders International v. the United Kingdom, the ECtHR acknowledged “the lack of European consensus on how to regulate paid political advertising in broadcasting”\textsuperscript{37} and stated that the UK Government “had more room for manoeuvre when deciding on such matters as restricting public interest debate.” The Court considered that convincing reasons had been given for the ban on political advertising in the United Kingdom and that it had not amounted to a disproportionate interference with the applicant NGO’s right to freedom of expression.

42. The Venice Commission notes that the ECtHR, in balancing, on the one hand, the applicant NGO’s right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities’ desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media, paid specific attention to the fact “that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. There was an extensive pre-legislative review of the ban, which was enacted with cross-party support without any dissenting vote. The proportionality of the ban was also examined in detail in the High Court and the House of Lords.”

43. The European Court of Human Rights also pointed out that the British ban on paid political advertising was balanced by the fact that political parties could freely advertise for themselves through party political, party election and referendum campaign broadcasts. Thus the Court took into account that in a party-based democracy political parties need to be able to disseminate their views before elections. There are almost no provisions like the British ones in Hungary. Therefore the situation in Great Britain is quite different from that in Hungary.

44. The Commission underlines that limits on political advertising have to be seen against the legal background of the particular Member State. Where political advertising in electoral campaigns is concerned, limitations have to be justified in a convincing way as to their necessity in a democratic society. According to the Hungarian authorities the ban on political

\textsuperscript{34} Chapter IV, section 1.2.
\textsuperscript{36} Para. 78.
\textsuperscript{37} 22 April 2013, Application no. 48876/08.
advertising on private television during the electoral campaign strives “for the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity.” The Venice Commission cannot agree that this is a sufficient justification for the prohibition of any political advertising in commercial media services prior to elections.

45. The Venice Commission attaches great importance to the assessment by the Hungarian Constitutional Court’s decision 1/2013 where the Court pointed out that political advertising, besides influencing voters, also informs them and where it stressed that a prohibition of political advertising on commercial television targets exactly the type of media that reaches voters in the widest range. Indeed one has to take a particular look at the effects of the amended Article IX.3 of the Fundamental Law. Since the Government usually has a better chance of public appearances, the governing parties’ positions will already be promoted indirectly through media coverage of governmental activities and statements. The prohibition of any political advertising in commercial media services, which are more widely used in Hungary than the public service media will deprive the opposition parties of an important chance to air their views effectively and thus to counterweigh the dominant position of the Government in the media coverage.

46. The amended Article IX.3 provides that only “nominating organizations setting up countrywide candidacy lists for the general election of members of Parliament or candidacy lists for election of Members of the European Parliament” shall be published by way of public media services on equal conditions. According to Article 127.8 of the Act on Electoral Procedure of 2012 (CDL-REF(2013)018), parties which do not set up nationwide candidacy lists and independent candidates have 1/30 of the air time available to a national list per candidate. A constitutional guarantee also for non-nationwide lists and independent candidates would be welcome.

47. Finally, as concerns the level of regulation, Article IX.3 of the Fundamental Law is one of the provisions introduced by the Fourth Amendment containing rather detailed rules which might require amending from time to time and are therefore usually regulated by ordinary laws. Raising such provisions to the level of the Constitution withdraws them from constitutional review.

**E. Limitation of the freedom of speech (Article 5.2)**

48. Article 5.2 of the Fourth Amendment adds a paragraph 5 to Article IX of the Fundamental Law, stating that

“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.”

49. While the Background Document refers to decision 30/1992 of the Constitutional Court, which points out that the dignity of communities may serve as a constitutional limit on the freedom of expression, Article IX.5 seems to have been adopted on the constitutional level as a reaction to several decisions of the Constitutional Court:

- In the same decision 30/1992, the Court found that by penalising any kind of act which could incite hatred among the general public against the Hungarian nation, any national,

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38 Article IX.3 of the Fundamental Law.
ethnic or racial group or certain groups of the population, the Criminal Code violated the constitutional principle of legal certainty, since the provision in question was not clearly defined and specific. A clear expression of the legislative intent concerning the content of the unlawful act is a constitutional requirement.

- In decision 18/2004, the Court held that when regulating hate speech, the legislator should take into account that the freedom of speech may be limited by criminal sanctions only in cases of what is known as the most dangerous conduct, that is to say, behaviour capable of stirring up such intense emotions in the majority of the people and, which upon giving rise to hatred, might result in the endangering of fundamental rights, which, in turn, could lead to the disturbance of the social order and public peace (this danger must be clear and present).  

- In decision 95/2008, the Court found that the legislature may only resort to criminal law to restrict free expression in extreme cases. These are the so-called most dangerous acts that are "capable of whipping up intense emotions in the majority of people", that endanger fundamental rights with a prominent place among constitutional values, and which pose a clear and present danger of a breach of the peace.

50. The Background Document points out that this provision was adopted as a means to fight racist speech (directed against the Roma community) and anti-Semitic speech in Hungary. The Venice Commission welcomes this intention by the Hungarian legislator. The Background Document refers to Recommendation R (97) 20 of the Committee of Ministers of the Council of Europe, which calls upon member States to combat hate speech, which is criminalised in a number of European countries. As concerns the specific protection of the Hungarian nation, the Government explains that its defamation was penalised traditionally in Hungary. Similar provisions exist in other European countries.

51. The Commission points out that as it limits freedom of speech, Article IX.5 must be in compliance with the limitation clause of Article 10.2 ECHR, in particular with the condition that a limitation on the freedom of expression must be "foreseen by law".

52. As regards the prohibition to exercise the right to freedom of speech with the aim of "violating the dignity of any ethnic, racial or religious community", it may be considered necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify hatred based on intolerance. However, it is doubtful whether every exercise of the freedom of speech aimed at "violating the dignity of any ethnic, racial or religious community" is hate speech of the type mentioned. The terms used in the amendment have potential for such a wide scope of application that they lack the clarity and precision needed to be in compliance with the condition that a limitation of the freedom of speech has to be "foreseen by law".

53. Article IX paragraphs 4-5 (as amended) fail to depict the scope of prohibition sufficiently narrowly. There is no indication in the wording that the clause is only aimed at the protection of those communities and their members which are mentioned in the Background Document. On the contrary, the introduction of the "dignity of the Hungarian nation" into article IX.5 (a concept, it should be noted, that is unrelated to the human dignity mentioned in article IX.4) raises

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43 European Court of Human Rights, 06.07.2006, case of Erbakan v. Turkey, application no 59405/00, para. 56, original text in French: "A cet égard, la Cour souligne que la tolérance et le respect de l’égalité de tous les êtres humains constituent le fondement d’une société démocratique et pluraliste. Il en résulte qu’en principe on peut juger nécessaire, dans les sociétés démocratiques, de sanctionner voire de prévenir toutes les formes d’expression qui propagent, incitent à, promeuvent ou justifient la haine fondée sur l’intolérance (y compris l’intolérance religieuse), si l’on veille à ce que les « formalités », « conditions », « restrictions » ou « sanctions » imposées soient proportionnées au but légitime poursuivi."
doubts in view of recent jurisprudence of the European Court of Human Rights. This provision might also be applied to curtail criticism of the Hungarian institutions and office holders which could be incompatible with the condition that a limitation has to be necessary in a democratic society.

F. Autonomy of institutions of higher education (Article 6)

54. Article 6 of the Fourth Amendment replaces Article X.3 of the Fundamental Law. It provides, on the one hand, that all institutions of higher education shall be autonomous in terms of contents and methodology of research and teaching, but on the other hand it creates a basis for legislation regulating their organisation and for the Government to determine, to the extent permitted by law, the rules of financial management and to supervise their financial management.

55. The introduction of this article on the constitutional level seems to be a reaction to decision 62/2009 of the Constitutional Court in which the Court stated that the economic autonomy of universities may be limited but, as it serves as a guarantee of the realisation of the freedom of sciences, the more an economic activity is linked to the science, the greater its constitutional protection of autonomy.

56. In the Background Document, the Government insists that this provision only relates to the financing of universities from the central budget and does not affect the predominance of the freedom of research and education. However, this restriction cannot be derived from the Fourth Amendment itself.

57. Financial regulations for universities are an issue usually regulated by ordinary law. Raising this provision to the constitutional level has the effect of preventing review by the Constitutional Court.

G. Financial support to students (Article 7)

58. Article 7 of the Fourth Amendment amends Article XI of the Fundamental Law, paragraph 3 of which reads as follows: “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.”

59. In its decision 32/2012, the Constitutional Court had annulled the Government decree, albeit on formal grounds, stating that student grants have to be regulated on the level of law (an act of parliament). However, the reasoning of the decision shows that there were also serious doubts about substantive constitutionality. The Court found that the obligation for students having obtained state scholarships to work in Hungary after graduation for a period equal to double their period of study within 20 years directly affected the right to freely choose a job or profession of Article XII.1 of the Fundamental Law, also taking into account Article 45 of the EU Treaty on the free movement of workers and the relevant case law of the European Court of Justice.

44 See ECtHR, Case of Altug Taner Akçam v. Turkey, application no. 27 20, judgment of 2 October 2011, para. 93 where the Court found that a criminal law provision aimed at protecting "the Turkish nation" was "too wide and vague and thus the provision constitutes a continuing threat to the exercise of the right to freedom of expression. In other words, the wording of the provision does not enable individuals to regulate their conduct or to foresee the consequences of their acts".


46 Joined Cases C-11/06 and C-12/06 Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren, European Court Reports 2007 Page I-09161. In this decision the European Court of Justice stated: "25. Next, it should be recalled that national legislation which places certain nationals of the Member State concerned at a disadvantage simply because they have exercised their freedom to move and to reside in another
60. In the Background Document, the Government argues that this provision does not restrict the freedom of movement, because students are free to either choose financial support from the Government and to accept the conditions or not. The financial support by the Government would be the equivalent of a waiver of tuition fees, which exist in other countries. Even after having received the grant, students could choose to work abroad and reimburse the financial support received. Instead of grants students who wished to work abroad could also opt for the “Student Loan 2”, which has no restriction on the place of work and which has to be reimbursed only 20 years after graduation. Given that decision 32/2012\textsuperscript{47} annulled the Government decree on formal grounds only, the Article 7 of the Fundamental Law cannot be seen as a reaction to it.

61. From the point of view of the Venice Commission in the framework of this Opinion, the most important issue is the level of regulation. Article XI.3 of the Fundamental Law is one of the provisions of the Fourth Amendment that contains detailed rules which are usually regulated by law and should not be part of a Constitution. Raising such provisions to the level of the Constitution has the effect of preventing review by the Constitutional Court.

**H. Homelessness (Article 8)**

62. Article 8 of the Fourth Amendment replaces Article XXII of the Fundamental Law which now provides:

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(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.
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63. The Venice Commission welcomes that paragraphs 1 and 2 of Article XXII introduce an obligation of the State and local governments to strive for the protection of homeless persons. As concerns Article XXII.3, the Venice Commission notes that, in decision 38/2012 of 14 November 2012\textsuperscript{48}, the Hungarian Constitutional Court reviewed the Petty Offence Act and stated that the punishment of unavoidable living in a public area fails to meet the requirement of the protection of human dignity ensured by Article II of the Fundamental Law, and can neither be justified by the removal of homeless people from public areas nor by providing an incentive for such persons to avail themselves of the social care system. In the Court's view, homelessness is a social problem which the State must handle in the framework of social administration and social care instead of punishment. Introducing the new Article XXII.3 on the constitutional level is a reaction to this decision.

64. The Government argues, in the Background Document, that Article XXII.3 of the Fundamental Law is only an enabling clause and that it neither aims to criminalise homeless people nor contains a general prohibition regarding homelessness. The Government insists that only permanent living in specific areas can be prohibited, when this is necessary in the

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\textsuperscript{47} Decision 32/2012 of 04.07.2012, Magyar Közlöny (Official Gazette), 2012/85 [CODICLES: HUN-2012-2-005].

\textsuperscript{48} Decision 38/2012, 14.11.2012, Magyar Közlöny (Official Gazette), 2012/151, [CODICES: HUN-2012-3-006].
interest of protecting public order, public safety, public health and cultural values. The Constitutional Court (as concerns national legislation) and the Curia (as concerns municipal regulations) would ensure compliance with these criteria. The Government points out that in Belgium and in the Czech Republic legislation prohibits people to set up and live in tents in inhabited areas and cities.

65. From the point of view of the Venice Commission in the framework of this Opinion, important issues are the vagueness of the criteria as well as the level of regulation. Article XXII.3 of the Fundamental Law is one of the provisions of the Fourth Amendment that contains detailed rules which are usually regulated by law and should not be part of a Constitution. Raising such provisions to the level of the Constitution has the effect of preventing review by the Constitutional Court.

IV. The rule of law and independence of the judiciary

A. The role of the President of the National Judicial Office (Article 13)

66. Article 13 of the Fourth Amendment replaces Article 25.4 to 25.7 of the Fundamental Law. Paragraph 5 and 6 provide:

“(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.”

67. The Background documents insists that the PNJO operates under effective control of the National Judicial Council, as the supreme judicial self-government body, and of Parliament. The Document also refers to criticism of the situation in Germany claiming that there the Minister would appoint judges following consultations with the Judicial Selection Committee. However, the Federal Minister can only appoint federal judges in accordance with the selection committee (Richterwahlausschuss), see Article 95.2 of the German Fundamental Law.

68. In two earlier Opinions the Venice Commission strongly criticised the extensive powers of the President of the National Judicial Office (PNJO) and the lack of appropriate accountability. The Commission emphasised the need to enhance the role of the National Judicial Council as a control instance.

69. While on the legislative level the situation had been improved in the framework of the dialogue between the Secretary General of the Council of Europe and the Hungarian authorities both by reducing the powers of the PNJO and by increasing those of the National Judicial Council and by making the PNJO more accountable, the Fourth Amendment goes in the opposite direction and raises the position of the PNJO to the constitutional level. The PNJO now has the power to exercise the “central responsibilities of the administration of the courts” and “bodies of judicial self-government” merely “participate in the administration of the courts”. The supreme body of judicial self-government, the National Judicial Council, is not even mentioned in the Fundamental Law.

50 CDL-AD(2012)020, para. 86.
70. Article 11.4 of the Transitional Provisions (CDL-REF(2012)018) had merely defined the PNJO as the legal successor of the Supreme Court and the National Council of Justice "for the administration of courts with the exception defined by the relevant cardinal Act". Following its negative evaluation of the cardinal law, it is unclear to the Venice Commission for which reason the position of the PNJO has been confirmed in the Fundamental Law, without any indication of the necessary limitations and the checks and balances to which it must be subject. The Venice Commission cannot but repeat its criticism.

71. The progress achieved through the dialogue with the Secretary General is jeopardised by the Fourth Amendment. The Fourth Amendment represents a step back and provides the PNJO with additional legitimacy without providing for additional accountability. Even the Bill no. T/10593 does not contain any provisions which would provide for increased accountability for the PNJO or for strengthening the National Judicial Council as called for by the Venice Commission.

B. The transfer of cases by the President of the NJO (Article 14)

72. Article 14 of the Fourth Amendment supplements Article 27 of the Fundamental Law by the following paragraph 4:

"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 any case."

73. Already in its decision 166/2011 the Constitutional Court had found the transfer of cases by the Supreme Prosecutor to be contrary to the European Convention on Human Rights. In order to overcome that decision, this transfer had been ‘constitutionalised’ in Article 11.4 of the Transitional Provisions. The Fourth Amendment includes into the Fundamental Law the transfers of cases by the PNJO, which had been introduced in Article 11.3 of the Transitional Provisions. The Commission welcomes that the Fourth Amendment does not provide for transfers by the Supreme Prosecutor him- or herself.

74. The transfer of cases has been strongly criticised by the Venice Commission: “The system of the transferring of cases is not in compliance with the principle of the lawful judge, which is essential to the rule of law; it should be revised. Pending a solution of this problem, no further transfers should be made.”

75. The Government Comments (para. 44) state that on 7 June 2013, the Hungarian Government announced that the system of transfers of cases will be eliminated on the constitutional and the legislative level. The Venice Commission warmly welcomes this intention of the Government to introduce a parliamentary procedure and hopes that Parliament will soon be able to adopt this proposal.

V. Constitutional Court

76. Since World War II, constitutional courts were typically established in Europe in the course of a transformation to democracy; first in Germany and Italy, then in Spain and Portugal and finally in Central and Eastern Europe. The purpose of these courts was to overcome the legacy
of the previous regimes and to protect human rights violated by these regimes. Instead of the principle of the unity of power, which excluded any control over Parliament, the system of the separation of powers was introduced. In place of the supreme role of Parliament (being under complete control of the communist party), the new system was based on the principle of checks and balances between different state organs. As a consequence, even Parliament has to respect the supremacy of the Constitution and it can be controlled by other organs, especially by the Constitutional Court. Constitutional justice is a key component of checks and balances in a constitutional democracy. Its importance is further enhanced where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views.

77. The Fourth Amendment affects the role of the Constitutional Court in several ways. As shown above, a number of provisions were raised to the constitutional level as reactions to earlier decisions of the Constitutional Court. Other provisions directly change the jurisdiction of the Court and affect its functioning.

A. Adoption of provisions on the constitutional level as a reaction to Constitutional Court decisions

78. The Hungarian Government argues that Parliament was obliged by the Constitutional Court, which had annulled the Transitional Provisions in its decision 45/2012, to reintroduce the provisions of the Fourth Amendment into the Fundamental Law itself.

79. However, in decision 45/2012, the Transitional Provisions were “partly annulled for a formal reason” but the Court did not oblige Parliament to readopt the annulled provisions as part of the Fundamental Law. It held that “the Parliament must review the regulatory subjects of the annulled non-transitional provisions, and it has to decide about which ones need repeated regulation, on what level of the sources of law.”

80. A number of provisions of the Transitional Provisions were flawed and this had already been criticised, *inter alia*, by the Venice Commission. Nonetheless, these provisions were maintained or even reinforced. In addition, the Fourth Amendment does not limit itself to readopt the Transitional Provisions. As demonstrated above, additional issues were raised to the constitutional level as a reaction to recent decisions of the Constitutional Court in numerous cases.

81. In this respect, a consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment follows this pattern. Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of ‘constitutionalisation’ of provisions of ordinary law excludes the possibility of review by the Constitutional Court.

55 In the previous system in Poland (where the Constitutional Tribunal existed since 1985), until 1990 all decisions taken by the Constitutional Court annulling legislative provision had to be verified (voted upon) by Parliament. Every decision of the Constitutional Court could be overruled by Parliament as the supreme organ of state power.
56 Chapter V.
57 Chapter V, emphasis added.
58 Article L.1 of the Fundamental Law relates to decision 43/2012 (family ties); Article VII of the Fundamental Law - decision 1/2013 (recognition of churches); Article IX.3 of the Fundamental Law - decision 1/2013 (limitation of media access for political parties); Article IX.5 of the Fundamental Law - decisions 30/1992, decision 18/2004, 95/2008 (freedom of speech); Article X.3 of the Fundamental Law - decision 69/2009 (autonomy of universities); Article XI.3 of the Fundamental Law - decision 32/2012 (student grants); Article XXII.3 of the Fundamental Law - decision 38/2012 (homeless).
82. The Constitutional Court itself found this in its decision 45/2012, point 2.2: “However, at the same time, petitions by individual members of the Parliament induced serious amendments of the Constitution such as narrowing down the scope of competence of the Constitutional Court, the possibility to levy extra taxes with retroactive force of five years, decreasing the number of the members of the Parliament, putting the National Media and Infocommunications Authority. In some instances, the subject of the provisions incorporated in the Constitution falls outside the scope of subjects that should be regulated in the Constitution (e.g. the obligation to pay tax on severance payments, levied ex post facto). In a short period of time, numerous provisions that fell outside the regulatory scope of the Constitution have been incorporated into the Constitution, and the frequent amendments have made it difficult to follow and identify the Constitution’s normative text in force. The amendments referred to above resulted in developing a new practice of constitutional amendments that fundamentally differs from the traditions of public law and the established practice, and it jeopardised the stability and the endurance of the Constitution as well as the principles and the requirements of a constitutional State under the rule of law.”

83. Since the elections in 2010, first the previous Constitution was amended on numerous occasions in order to shield legislation from constitutional control, then the Transitional Provisions to the Fundamental Law were used for that purpose:

1. Already in 2010, Parliament amended Article 70/I.2 of the Constitution in order to provide constitutional cover for a law retroactively taxing bonuses received contrary to ‘good morals’ by former high-ranking government officials. When the Constitutional Court found that bonuses paid on the basis of the law in force could not be considered against ‘good morals’ (decision 184/201059), Parliament amended Article 70/I.2 of the Constitution a second time in order to expressly allow retroactive taxation and readopted a law on this basis. In decision 37/201160, the Court again annulled the legislative provision because of a violation of human dignity.

2. Article 46.3 of the Constitution was amended in 2010 in order to overcome decision 1/2008 of the Constitutional Court61, which had annulled a legislative provision allowing trainee judges to hand down judgments.

3. By introducing Article 11.4 of the Transitional Provisions, Parliament provided a constitutional basis to re-enact the legislative provision allowing the Supreme Prosecutor to transfer cases, which had been annulled by decision 166/201162 of the Constitutional Court.

4. In order to overcome decision 164/201163, in which the Constitutional Court annulled the Church Act for procedural reasons because the Act had been adopted with last minute amendments contrary to the House Rules of Parliament, Parliament first amended its House Rules to allow for the introduction of last minute amendments instead of readopting the law in conformity with the legislative procedure. Parliament then readopted the law under the revised House Rules and gave it a constitutional protection by introducing rules on church recognition in Article 21.1 of the Transitional Provisions.

5. When the Commissioner for Human Rights appealed to the Constitutional Court and questioned the constitutional character of the Transitional Provisions, Parliament adopted the First Amendment to the Fundamental Law in order to shield them from review by the Constitutional Court.

84. The representatives of the Hungarian Government have correctly pointed out that it is a sovereign decision of the constituent power – in Hungary Parliament with a two-thirds majority – to adopt a Constitution and to amend it. In itself, the possibility of constitutional amendments is

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an important counterweight to a constitutional court’s power over legislation in a constitutional democracy, as well as an important element in the delicate system of checks and balances which defines a constitutional democracy. Nevertheless, this approach can only be justified in particular cases, based on thorough preparatory work, wide public debate and large political consensus – as in general is necessary for constitutional amendments.

85. In the discussions in Budapest, representatives of the governmental majority agreed that in some cases Parliament had reacted to decisions of the Constitutional Court by amending the Fundamental Law, but pointed out that this also had happened for example in Austria, where Parliament had resorted to constitutional amendments in order to overcome decisions of the Constitutional Court. In the opinion of the Venice Commission, however, while this example is indeed correct, it has to be pointed out that in 1988 the Austrian Constitutional Court stated that a repeated constitutionalisation of unconstitutional law could be seen by the Court as a total revision of the Constitution, which could not be adopted as a simple constitutional amendment with a two-thirds majority under Article 33.4 of the Austrian Constitution. Indeed, later the Constitutional Court annulled a constitutional amendment. Thus the Austrian Constitutional Court finally retained control over whether constitutional amendments violate fundamental principles.

86. According to European standards, in particular the Statute of the Council of Europe, Hungary is obliged to uphold democracy, the protection of human rights and the rule of law. The sovereignty of the Hungarian Parliament is therefore limited in international law.

87. The Venice Commission is concerned that the approach of shielding ordinary law from constitutional review is a systematic one. This results in a serious and worrisome undermining of the role of the Constitutional Court as the protector of the Constitution. This is a problem both from the point of view of the rule of law, but even more so from the point of view of the principle of democracy. Checks and balances are an essential part of any democracy. The reduction (budgetary matters) and, in some cases, complete removal ('constitutionalised' matters) of the competence of the Constitutional Court to control ordinary legislation according to the standards of the Fundamental Law results in an infringement of democratic checks and balances and the separation of powers.

B. Previous Case-Law (Article 19)

88. Article 19 of the Fourth Amendment introduces point 5 of the Closing and Miscellaneous Provisions, which states that “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.”

89. The Background Document explains that this means that, notwithstanding the ‘repeal’ of the decisions of the Constitutional Court decisions given before 1 January 2012, they do not lose their binding force and laws annulled by the Court do not enter into force again. However, the Constitutional Court would no longer be able (and obliged) to refer to these decisions. In substance, the Court could come to the same conclusions, but without referring to its earlier case-law. From the Government's point of view, this provision is even regarded as broadening the margin of manoeuvre of the Constitutional Court, because the Constitutional Court will be more free to decide whether it would like to simply repeat the legal reasoning of its former decisions or develop new arguments without being bound by the case-law developed on the

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64 Decision G72/88; G102/88; G103/88; G104/88; G122/88; G123/88; G124/88; G125/88; G126/88; G136/88; G143/88; G151/88; G152/88; G153/88; G154/88; G155/88; G156/88; G157/88; G158/88; G159/88; G160/88 of 29.09.1988, VfSlg 11.829.
66 See below, chapter D.
basis of the previous Constitution. The Government Comments (para. 52) point out that since the entry into force of the Fourth Amendment the Constitutional Court has already referred to its previous case-law.\footnote{See the recent decision II/3484/2012 of 12 June 2013.}

90. The Commission fears that Point 5 of the Closing and Miscellaneous Provisions will result in legal uncertainty. Previous decisions of the Constitutional Court are guidance not only for the Constitutional Court itself, but also for the ordinary courts who rely on the Constitutional Court’s case-law for their own interpretation of constitutional issues. While, over time, the Constitutional Court itself may be able to come to the same conclusions as in previous decisions, ordinary courts lack this essential point of reference with immediate effect.

91. Already in its opinion on the new Constitution, the Venice Commission expressed its concern that the Preamble’s reference to the invalidity of the 1949 Constitution could be “\textit{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}”.\footnote{CDL-AD(2011)016, para. 35.}


93. It is a misconception that it is good for constitutional courts to have a wide margin of appreciation. They should not take arbitrary decisions, but provide for constitutional coherence through decisions based on the Constitution and previous case-law. Furthermore, any constitutional court is free to deviate from its former decisions, provided it does so in a reasoned way.

94. Even if the constituent power were concerned that by basing itself on its earlier case-law, the Constitutional Court could perpetuate the old Constitution and would thus impair the effect of the new Fundamental Law, the complete removal of the earlier case-law would be neither adequate nor proportionate. Following any constitutional amendment, it is the task of constitutional courts to limit their reference to those provisions and principles that have not been affected by an amendment.

95. There is no evidence that the Hungarian Constitutional Court has not respected these limits. On the contrary, in its decision 22/2012\footnote{Decision 22/2012 of 11-05-2012, Magyar Közlöny (Official Gazette), 57/2012 [CODICES: HUN-2012-2-004].}, which was given when the Fundamental Law was already in force, the Constitutional Court argued that the Constitutional Court might use the arguments included in its previous decisions, adopted before the Fundamental Law came into force, “\textit{[...]} provided that this was 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”. This shows that the Constitutional Court was well aware of these limits. There was no need to enact a provision that could be read as depriving the Constitutional Court of the possibility to base itself on its prior case-law. The Hungarian Constitutional Court was not legally bound by its former case-law and could have further developed arguments and principles or have them replaced by new ones, if necessary, depending on the contents of the new Fundamental Law.

96. The Venice Commission therefore cannot support the Hungarian authorities’ argument that the Constitutional Court should be more free to decide. As shown, there was no justification to repeal the Constitutional Court's former case-law in order to enable the Constitutional Court to renew its jurisdiction in cases where it is necessary. It is inherent in a Constitutional Court's approach to interpret a constitution on the basis of its provisions and the principles contained in it. These principles transcend the constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law. It is these principles which are reflected in the case-law of the Constitutional Court since its establishment.

97. The Hungarian authorities also refer to the fact that the adoption of the Constitution of Poland in 1997 removed the final and binding character of decisions of the Constitutional Tribunal taken on the basis of the earlier, Small Constitution. However, the legal context of the two situations needs to be clearly distinguished. In Poland, the decision on the constitutionality was left to one chamber of Parliament, the Sejm, which indeed could override individual decisions in concrete cases, but not all decisions were overruled automatically en bloc. The whole heritage of the Constitutional Tribunal case-law is still being taken into account by the Polish Constitutional Tribunal in dealing with new cases. Most importantly, both the Constitution and the transitional provisions to the Law on the Constitutional Court reduced the effect of these restrictions both in time and in scope.

98. In Hungary, the removal of the earlier case-law of the Constitutional Court concerns all cases and is not limited in time. Furthermore, it has to be seen in the context of a systematic limitation of the position of the Constitutional Court and its ability to control the other State powers at a time when the governmental majority frequently amended first the Constitution, then the Transitional Provisions and finally the Fundamental Law in reaction to decisions of the Constitutional Court.

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75 Article 239.1 of the Polish Constitution reads: “Within 2 years of the day on which the Constitution comes into force a judgment of the Constitutional Tribunal of the non-conformity of the Constitution of statutes adopted before its coming into force shall not be final and shall be required to be considered by the Sejm which may reject the judgment of the Constitutional Tribunal by a two-third majority vote in the presence of at least half of the statutory number of Deputies. The foregoing provision shall not concern judgments issued in response to questions of law submitted to the Constitutional Tribunal.”

76 Article 89 of the transitional provisions of the Law on Constitutional Tribunal of Poland reads as follows: “1. Within a period of two years from the day on which the Constitution of the Republic of Poland, enacted on 2 April 1997, comes into force, the judicial decisions of the Tribunal referring to non-conformity to the Constitution of the statutes enacted prior to its coming into force shall not be final and shall be subject to examination of the Sejm, which may reject the judicial decision of the Tribunal by a majority of two-thirds of the votes of at least a half of the statutory number of deputies. This provision shall not apply to judgements given following questions of law addressed to the Tribunal.
2. The Sejm shall examine the judicial decision, specified in paragraph 1, not later than within a period of six months from the day of submission thereof by the President of the Tribunal.
3. The Sejm shall, if it considers the judicial decision to be well founded, introduce appropriate amendments to the act being the subject of the judicial decision or repeal it, in whole or in part, within the time limit specified in paragraph 2.
4. A judicial decision of the Tribunal, referring to non-conformity of an act to the Constitution which has not been considered by the Sejm within a period of six months from the date of its submission to the Sejm by the President of the Tribunal or which has been subject to consideration but the Sejm has not introduced amendments to or repealed the provisions which are in non-conformity to the Constitution, shall be final and shall result in the repeal of the act or the provisions in question on the date of the publication in the Dziennik Ustaw of the Republic of Poland of the announcement of the President of the Tribunal concerning loss of their effect.”
Moreover, the Fundamental Law itself calls for continuity with regard to constitutional issues and seeks to link to the past – except for the Communist era. Hence, the numerous references to the “historical constitution” in its Preamble, but even more clearly in its Article R.3, which states that “the Fundamental Law shall be interpreted in accordance with […] the achievements of our historical constitution”. Even though the concept of the historical constitution remains rather vague, it can hardly be denied that the previous democratic Constitution of 1989 and its interpretation by the Constitutional Court are part of this concept.

C. Review of constitutional amendments (Article 12.3)

100. Article 12.3 of the Fourth Amendment amends Article 24.5 of the Fundamental Law, which reads: "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. …"

101. The Hungarian Government argues that this provision broadens the jurisdiction of the Constitutional Court, because prior to the Fourth Amendment the Court had no competence to review constitutional amendments at all, i.e. not even from a procedural point of view. In this respect, the Government refers to case-law of the Constitutional Court excluding judicial review of constitutional provisions.\(^\text{77}\)

102. These arguments do not take into account the decision 45/2012\(^\text{78}\) in which the Constitutional Court indicated a possible competence to review constitutional amendments from the perspective of substantive constitutionality. While the wording of Article 24 of the Fundamental Law in the non-amended version specified the power of the Constitutional Court to examine "any piece of legislation" for conformity with the Fundamental Law and, arguably, constitutional amendments were not originally considered ‘pieces of legislation’ by the drafters of the Fundamental Law, the Court clearly developed this understanding further in decision 45/2012.

103. The idea that a Constitutional Court should not be able to review the content of provisions of Fundamental Law is common ground as a general rule in many member States of the Council of Europe.\(^\text{79}\) In its Opinion on the Revision of the Constitution of Belgium, the Commission stated:

“49. […] Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued ‘that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution).’ Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

50. Most constitutional systems operate on the assumption that all constitutional provisions have a similar normative rank, and that the authority which revises the Constitution has the authority to thereby modify pre-existing, other constitutional provisions. The result is that, in general, one constitutional provision cannot be ‘played out’ against another one. The absence of a judicial scrutiny of constitutional revisions is owed to the idea that the constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a constituant. The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority).

\(^{77}\) The Constitutional Court itself presents a review of its case-law in decision 45/2011, point 2.11.

\(^{78}\) Decision 45/2012, 29.12.2012, Magyar Közlöny (Official Gazette), 2012/184, [CODICES: HUN-2012-3-010].

51. It is a matter of balancing the partly antagonist constitutional values of popular sovereignty and the rule of law whether to allow for rule-of-law induced barriers against constitutional revision, or for judicial scrutiny. Most Constitutions have placed a prime on popular sovereignty in this context. The Belgian proceedings are well within the corridor of diverse European approaches to this balancing exercise and do not overstep the limits of legitimate legal solutions.80

104. As pointed out in that Opinion, in some states constitutional courts are able to review constitutional amendments under certain circumstances, as for instance in Austria, Bulgaria, Germany or Turkey.81 Article 288 of the Constitution of Portugal provides substantial limits for constitutional amendments and their conformity with these limits can be controlled by the Constitutional Court.82 In 2009, the Constitutional Court of the Czech Republic annulled a constitutional amendment shortening the term of office of the Chamber of Deputies.83 A special case is the adoption of the Constitution of South Africa, which was certified by the Constitutional Court as being in conformity with constitutional principles agreed beforehand.84

105. In Austria, the Constitutional Court is able to examine constitutional provisions as to whether they are in compliance with the fundamental principles of the Constitution. For instance, in 2001, the Austrian Constitutional Court declared void a constitutional law provision as it prevented the Constitutional Court from controlling the constitutionality of that provision.85 In Bulgaria, constitutional amendments can be reviewed as to whether they change the "form of state structure or form of government".86 The Fundamental Law of Germany contains unamendable provisions and the Constitutional Court can review whether these provisions have been infringed.87 In Turkey too, the Constitution contains unamendable provisions.88 Article 148 of the Turkish Constitution provides that the Constitutional Court is limited to control the procedure of adoption of constitutional amendments, but it seems that the Court has a wider interpretation of its power to review constitutional amendment. In all these cases, the constitution has an inner hierarchy (unamendable provisions or basic principles) and 'ordinary constitutional law' is reviewed against these higher provisions or principles.89

83 The Court held that the term "statute" in Article 87.1.a of the Czech Constitution, which allows the Constitutional Court to repeal statutes or their provisions if they are inconsistent with the constitutional order also applied to constitutional acts. Constitutional amendments have to follow essential requirements for a democratic state governed by the rule of law under Article 9.2 of the Czech Constitution (Decision Pl. US 27/09 of 10.09.2009, Sbirka zákonu (Official Gazette), no. 6/2009 Coll [CODICES: CZE-2009-3-007]).
87 Article 79.3 of the Fundamental Law of Germany reads: "Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited.", see Decision 1 BvR 1452/90, 1 BvR 1459/90, 1 BvR 2031/94 of the Federal Constitutional Court of 18.04.1996 [CODICES: GER-1996-1-009].
88 Article 4 of the Turkish Constitution reads: "The provision of Article 1 of the Constitution establishing the form of the State as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed."
89 Report on Constitutional Amendment, CDL-AD(2010)001, paras. 230 et seq.; As a further background document, the Hungarian Government has provided a legal expertise on the Fourth Amendment which recognises that in rare cases constitutional courts can control constitutional amendments when they violate...
106. Such an inner hierarchy is not a European standard, although it is a feature that arises more and more in States where Constitutional Courts are competent to annul unconstitutional laws. In the specific context of the Hungarian Fundamental Law, the Venice Commission notes, however, that the Hungarian Constitutional Court seems to have cautiously suggested such a hierarchy within the Fundamental Law: “... the constituent power may only incorporate into the Fundamental Law subjects of constitutional importance that fall into the subjective regulatory scope of the Fundamental Law” and “...the amendments of the Fundamental Law may not result in any insoluble conflict within the Fundamental Law. The coherence of contents and structure is a requirement of the rule of law stemming from Article B) para. (1) of the Fundamental Law, to be guaranteed by the constituent power”. It seems that the Court even found a hierarchy stemming from international law: “Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the ius cogens, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic States under the rule of law.”

107. As concerns the review of the procedure of the adoption of constitutional amendments, in its decision 45/2012, the Constitutional Court insisted “on its established practice, with regard to this case as well, of examining the Parliament’s decision-making process concerning its validity under public law – i.e. from the point of view whether the Parliament had fully complied with the procedural rules (contained earlier in the Constitution and now regulated in the Fundamental Law) – irrespectively of whether it has acted as the constituent or the legislative power.” The Court confirmed this position in its decision II/648/2013: “The Constitutional Court extended the scope of their conclusions with regard to the invalidity under public law of the legislative process to apply to each constitutional provision and to their amendment; the Court also determined that the competence of the Constitutional Court to review constitutional provisions or constitutional amendments from the aspect of invalidity under public law cannot be excluded.”

108. Seen against this entire development, the argument that the control powers of the Constitutional Court have been widened by the Fourth Amendment cannot be followed. The Fourth Amendment confirms the case-law of the Constitutional Court in the domain of procedural review, while negating further developments in decision 45/2012. The Constitutional Court seems to have accepted this development in its recent decision II/648/2013 where it held that “The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorisation to that effect.” However, in that decision the Court also held that “the Constitutional Court shall moreover consider the obligations Hungary undertook in its international treaties or those that follow from membership in the EU, along with the generally acknowledged rules of international law, and the basic principles and values reflected therein. All of these rules – with special regard to their values that are also incorporated into the Fundamental Law – constitute such a unified system (of values), that shall not be disregarded neither in the course of constitution-making or legislation, nor in the course of constitutional review conducted by the Constitutional Court.”

human dignity [Rechtsgutachten zur Verfassungs- und Europarechtskonformität der Vierten Verfassungsnovelle zum ungarischen Grundgesetz vom 11./25. März 2013, Prof. Rupert Scholz, Berlin 18 April 2013, p. 21 [available in German only].
90 Point III.6.
91 Point IV.7.
D. Review of budgetary laws (Article 17.1)

109. According to Article 37.4 of the Fundamental Law in force before the Fourth Amendment, as long “as state debt exceeds half of the Gross Domestic Product”, the Constitutional Court was competent to review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Fundamental Law exclusively in case 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 with the rights related to Hungarian citizenship”. In contrast, the Constitutional Court has the right to annul these acts because of non-compliance with the procedural requirements set forth in Fundamental Law.

110. The Venice Commission had already expressed its serious concern\(^\text{92}\) about a similar amendment to the previous Constitution in its Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary: “With regard to the Constitutional Court and its specific role in a democratic society, it should be pointed out that a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court’s competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament ‘to enhance the protection of fundamental rights in Hungary’\(^\text{93}\).

111. In its opinion on the new Constitution of Hungary, the Commission repeated this criticism in respect of the Fundamental Law\(^\text{94}\) and the Opinion on the Constitutional Court Act.\(^\text{95}\) In the Opinion on the new Constitution, the Venice Commission stated that such a limitation of the Constitutional Court’s powers to review gave the impression that capping the national budget at 50 per cent of the Gross Domestic Product was seen as such an important aim that it might even be reached by unconstitutional laws.\(^\text{96}\)

112. Article 17 of the Fourth Amendment introduces a new provision as Article 37.5 of the Fundamental Law: “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”. This means that the constitutional review of financially relevant laws adopted during times of budgetary difficulties is not only excluded during these difficulties but even later, when the budgetary problems have subsided. Thus laws which potentially contradict the Fundamental Law are permanently shielded from control by the Constitutional Court.

113. The Venice Commission again repeats its serious concern about the limitation of the competence of the Constitutional Court to review legislation. Shielding potentially unconstitutional laws from review is a direct attack on the supremacy of the Fundamental Law of Hungary. The Commission is particularly worried that the Fourth Amendment has given up the link of that provision to continued budgetary difficulties and thus has institutionalised this exception. This provision reinforces the assessment that the Fourth Amendment results in reducing the position of the Constitutional Court as guarantor of the Fundamental Law and its principles, which include European standards of democracy, the protection of human rights and the rule of law.

\(^{92}\) CDL-AD(2011)001, para. 9.
\(^{93}\) CDL-AD(2011)001, para. 54.
\(^{94}\) CDL-AD(2011)016, para. 98.
\(^{95}\) CDL-AD(2012)009, para. 38.
\(^{96}\) CDL-AD(2011)016, para. 123.
114. The Government Comments argue that the “real meaning of the new provision is that once the level of state debt falls below 50% of the GDP the Constitutional Court may review budgetary laws in full adopted even during that moratorium. The only limitation is that it may only quash such laws with ex nunc effect, i.e. no retroactive jurisdiction is possible as far as the effects of the decisions are concerned.” The Commission cannot identify this meaning in the text of paragraph 5 but this may be due to a problem in the translation. The Commission is ready to examine a revised translation of paragraph 5 but insists on its criticism of the restrictions of the jurisdiction, that already applied before the Fourth Amendment.

E. 30 day limit for the review of requests from ordinary courts (Article 12.1)

115. Article 12.1 of the Fourth Amendment changes Article 24.2.b of the Fundamental Law, which now provides that 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”.

116. This means that in concrete review cases, originating from any ordinary judge, the Constitutional Court has to fit its whole procedure, including the handing down of the decision within a 30-day limit. While the Fundamental Law imposes such a short period, Section 12 of the Bill amends Section 57 of Act CLI of 2011 on the Constitutional Court and provides that the Constitutional Court has to inform the author of the challenged legal rule (paragraph 1a) and “(1b) If the author of the legal rule or the initiator of the law wishes to inform the Constitutional Court of his/her position on the case, also with regard to whether the case concerns a wide group of individuals, he/she shall send his/her position to the Constitutional Court within 30 days of the notification under paragraph (1a), or in the case of urgent proceedings, within 15 days, …”. Consequently, even in urgent cases, the Court has to fit in a 15-day period for the author of the legal rule within the very short 30-day period.

117. Even without such a further complication, a 30-day period for the examination of the constitutionality of a legal provision appears to be extremely difficult to meet, especially in the context of the introduction of individual appeals to the Constitutional Court, which results in a substantial additional work-load. While it is understandable that the Hungarian authorities wish to provide for speedy proceedings before the ordinary courts, this should not be done in a way that renders ineffective constitutional review as an essential element of checks and balances.

118. The Government Comments (para. 61) announce that the Hungarian Government will submit a proposal amending Article 24.2.b of the Fundamental Law extending the 30-day limit to 90 days. The Venice Commission welcomes that this proposal would result in an improvement but the deadline is still very tight and should be made more realistic, for example 9 months.

F. Request for abstract control by the Curia and the Supreme Prosecutor (Article 12.2)

119. Article 12.2 of the Fourth Amendment, changes Article 24.2.e of the Fundamental Law, which now reads [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;”

120. This means that now, in addition to the Government and one-fourth of the Members of Parliament, both the Curia and the Supreme Prosecutor can make abstract requests for the control of the legislation to the Constitutional Court. However, there is a danger that this competence may drag the Curia (as well as the Supreme Prosecutor) into the political arena.
Normally, requests for review in concrete cases should provide sufficient opportunity of access to the Constitutional Court.

**G. Special tax in case of court judgments leading to payment obligations (Article 17.2)**

121. Article 17.2 of the Fourth Amendment adds a new paragraph 6 to Article 37 of the Fundamental Law:

“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.”

122. The Background Document insists that, in view of the EU convergence criteria to be met for a future introduction of the Euro, unexpected expenses due to national or European court decisions need to be counterbalanced. Even without this provision, Parliament would at any moment have the right to introduce new taxes. Any new tax would have to be in conformity with the requirements of the Fundamental Law (in particular legal certainty and the prohibition of discrimination). Such special taxes would even facilitate the necessary implementation of court decisions.

123. However, it should normally be possible to find funds in the budget. In case of a violation of the Constitution or European Law, the Government will not be forced to cover the costs within the budget. The burden will instead be directly transferred to the Hungarian citizens as taxpayers. Article 37.6 thus enables the Hungarian Government to circumvent the disciplining effect of Constitutional and other Court decisions which trigger payment obligations.

124. A special charge concerning payment obligations caused by a court decision has an important symbolic value: it may result in pressure on the judges who will be seen as responsible for the special tax while in fact the fault lies in an act of the Government or of Parliament that was unconstitutional or contrary to European law or standards. This pressure seriously endangers the judges’ independence.

125. The Commission acknowledges the difficult fiscal problems which Hungary is currently facing, but strongly objects to the Government’s reasoning that Article 37.6 of the Fundamental Law can and should be interpreted as (part of) an answer to those problems.

126. The Commission recalls that Hungary is, according to Article B.1 of the Fundamental Law, a state governed by the rule of law. It is at the very core of the rule of law concept that the people trust ‘their’ courts. A special tax may lead to an aversion against the courts as a whole or against the national Constitutional Court or European courts. Article 37.6 of the Fundamental Law creates the risk of a loss of acceptance of the court system while the aim should be for people to accept court decisions as indispensable for the functioning of the rule of law. A court that tries to remedy a violation of the Constitution or of European Law or standards contributes to the functioning of the legal order.

127. Finally, Article 37.6 of the Fundamental Law may lead to an arbitrary imposition of such taxes. While it reads “a contribution [...] shall be established”, it is quite obvious that not every court decision resulting in budgetary expenditure can lead to a special tax and in fact it seems that Article 29.1 of the Transitional Provisions of 31 December 2011, which had the same content, was never applied in practice. There are no criteria when a special tax should be
imposed and thus each court has to face the danger that its judgment will be singled out for such a tax.

128. The Government Comments (para. 63) announce that the Hungarian Government will introduce a parliamentary procedure to abandon the special tax in case of unexpected expenses due to court decisions and to delete Article 37.6 of the Fundamental Law. The Venice Commission welcomes this intention.

VI. Constitutionalism

A. Use of cardinal laws

129. In addition to amending the constitution(s), the Parliament adopted numerous cardinal laws with the present two-thirds majority, which may be difficult to amend by subsequent – less broad - majorities. This wide use of cardinal laws to cement the economic, social, fiscal, family, educational etc. policies of the current two-thirds majority, is a serious threat to democracy.

130. In its opinion on the new Constitution of Hungary the Venice Commission stated: “The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-thirds majority have of cementing its political preferences and the country’s legal order.”

131. In its opinion on the New Constitution, the Venice Commission expressed its hope that there would be “co-operation between the majority coalition and the opposition in the preparation of the implementing legislation”. In its reply to the Opinion, the Government fully subscribed to this idea. However, the visit of the delegation of the Commission showed that the cardinal laws were adopted or amended in a rushed way, often introduced by individual members of Parliament, thus avoiding the scrutiny foreseen for governmental proposals. This hasty adoption often did not even allow for adequate consultation of the opposition and civil society.

132. In the Background Document, the Government argues that the total number of cardinal laws did not change as compared to the previous Constitution. The Commission does not dispute this figure. However, what matters is not the number of cardinal laws, but the issues on which they are enacted and the degree of detail of the provisions raised to ‘cardinal level’. Instead of declaring only basic principles within in these laws as cardinal, whole laws including numerous detailed regulations have been raised to cardinal status en bloc. The Commission strongly criticised this practice, but to no avail.

133. “Elections, which, according to Article 3 of the First Protocol to the European Convention on Human Rights, should guarantee the ‘expression of the opinion of the people in the choice of the legislator’, would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and ‘detailed rules’ on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk.”

134. The tendency of ensuring that following elections future majorities cannot legislate in many areas because they will be bound by cardinal laws is even reinforced by the Fourth Amendment. A number of provisions, which are now included in the Fundamental Law, have no


constitutional character and should not be part of the Constitution (e.g. homelessness, criminal provisions on the communist past, financial support to students, financial control of universities). In addition to shielding these provisions from control by the Constitutional Court, this ensures that future governmental majorities in Parliament without a two-thirds majority cannot change these policies.

B. Instrumental use of the Constitution

135. Already in its Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, the Venice Commission expressed its concern regarding the constitution-making process in Hungary. During the various visits of its delegation, the Commission learned about the lack of transparency of the process of the adoption of the new Constitution and the inadequate involvement of the Hungarian society. The Commission criticised the absence of sincere consultation and noted with regret that the consensus among political forces and within society generally required for the legitimacy of a constitution was absent.

136. The Fundamental Law entered into force 1 January 2012. Since then, the Constitution has already been amended four times. Before the entry into force of the new Constitution, the previous Constitution was amended 12 times after the elections of 2010. Frequent constitutional amendments are a worrying sign of an instrumental attitude towards the constitution as is the resort to the exceptional two-thirds majority in constitution-making without a genuine effort to form a wide political consensus and without proper public debates. As the Commission formulated recently in respect of Romania, "[i]t seems that some stakeholders were of the opinion that anything that can be done according to the letter of the Constitution is also admissible. The underlying idea may have been that the majority can do whatever it wants to do because it is the majority. This is obviously a misconception of democracy. Democracy cannot be reduced to the rule of the majority; majority rule is limited by the Constitution and by law, primarily in order to safeguard the interests of minorities. Of course, the majority steers the country during a legislative period but it must not subdue the minority; it has an obligation to respect those who lost the last elections."

137. During the visit in Budapest and in the documentation provided, the Hungarian Government referred to parliamentary sovereignty as if it were the ultimate instance of legitimacy and no further checks applied. The Commission never denied the sovereign right of Parliament to adopt the constitution or to amend it, but it criticized the procedure and methods of doing so in Hungary. The Constitution of a country should provide a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way in which it is implemented must create in the society the conviction that, by its very nature, the constitution is a stable act, not subject to easy change at the whim of the majority of the day. A constitution’s permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the ‘political game’, but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought.

100 CDL-AD(2011)001, paras. 16-19.
VII. Conclusions

138. The Fourth Amendment to the Fundamental Law has changed the Constitution in a number of aspects, as concerns individual human rights, as concerns the ordinary judiciary and as concerns the role of the Constitutional Court of Hungary.

139. In constitutional law, perhaps even more than in other legal fields, it is necessary to take into account not only the face value of a provision, but also to examine its constitutional context. The mere fact that a provision also exists in the constitution of another country does not mean that it also 'fits' into any other constitution. Each constitution is the result of balancing various powers. If a power is given to one state body, other powers need to be able to effectively control the exercise of this power. The more power an institution has, the tighter control mechanisms need to be constructed. Comparative constitutional law cannot be reduced to identifying the existence of a provision the constitution of another country to justify its democratic credentials in the constitution of one's own country. Each constitution is a complex array of checks and balances and each provision needs to be examined in view of its merits for the balance of powers as a whole.

140. However, the Fourth Amendment itself brings about or perpetuates shortcomings in the constitutional system of Hungary. The main concerns relate to to the role of the Constitutional Court and to a lesser extent the ordinary judiciary. In the field of human rights in general, several issues are regulated in a manner disregarding earlier decisions by the Constitutional Court.

141. These constitutional amendments are not only problematic because constitutional control is blocked in a systematic way, but also in substance because these provisions contradict principles of the Fundamental Law and European standards. In particular:

- the provisions on the communist past attribute responsibility in general terms, without any individual assessment;
- the absence of precise criteria for the recognition of churches and of an effective legal remedy against the decision not to recognise;
- the limitations on advertising have a disproportionate effect on opposition parties; and
- the provisions on the dignity of communities are too vague and the specific protection of the "dignity of the Hungarian nation" creates the risk that freedom of speech in Hungary could, in the future, be curtailed in order to protect Hungarian institutions and office holders.

142. In the field of the judiciary, the Fourth Amendment constitutionalises the overwhelming position of the President of the National Judicial Office as compared to the National Judicial Council, which is not even mentioned in the Fundamental Law. However, the Venice Commission warmly welcomes the Government's announcement that it will propose to Parliament the removal of the system of transfer of cases on the constitutional and the legislative level.

143. The Venice Commission also welcomes the Government's announcement to introduce a parliamentary procedure to abandon the special tax in case of unexpected expenditures resulting from court decisions. Furthermore, the Commission welcomes the Government's announcement to introduce a parliamentary procedure to extend the deadline for the Constitutional Court in dealing with requests from ordinary courts from 30 days to 90 days. This proposal would result in an improvement but the deadline is still very tight and should be made more realistic. The Commission expresses its hope that Parliament will be able to implement such proposals soon.
Like other Central and East European countries, Hungary introduced the separation of powers and checks and balances in its Constitution and Hungary established a Constitutional Court. This Court quickly became renowned in Europe and abroad for its decisions advancing constitutional principles. The Fourth Amendment seriously affects the role of the Constitutional Court of Hungary in a number of ways:

1. A series of provisions of the Fourth Amendment raise issues to the constitutional level as a reaction to earlier decisions of the Constitutional Court. Reacting to Constitutional Court decisions by ‘constitutionalising’ provisions declared unconstitutional is a systematic approach, which was applied already to the old Constitution, then to the Transitional Provisions and now to the Fundamental Law itself. It threatens to deprive the Constitutional Court of its main function as the guardian of constitutionality and as a control organ in the democratic system of checks and balances.

2. The removal of the possibility to base itself on its earlier case-law unnecessarily interrupts the continuity of the Court’s case-law on a a body of principles, which transcend the Constitution itself and directly relate to the basic principles of the Council of Europe: democracy, the protection of human rights and the rule of law.

3. Instead of removing the limitations on the competence of the Constitutional Court to review potentially unconstitutional legislation which has a budgetary incidence, the Fourth Amendment perpetuates this system which shields potentially unconstitutional laws from constitutional review even when budgetary problems have subsided.

Taken together, these measures amount to a threat for constitutional justice and for the supremacy of the basic principles contained in the Fundamental Law of Hungary. The limitation of the role of the Constitutional Court leads to a risk that it may negatively affect all three pillars of the Council of Europe: the separation of powers as an essential tenet of democracy, the protection of human rights and the rule of law.

The Venice Commission stresses that the Hungarian Fundamental Law should not be seen as a political instrument. The crucial distinction between ordinary and constitutional politics and the subordination of the former to the latter should not be disregarded, lest democracy and the rule of law be undermined in Hungary.

In conclusion, the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office, seriously undermines the possibilities of constitutional review in Hungary and endangers the constitutional system of checks and balances. Together with the en bloc use of cardinal laws to perpetuate choices made by the present majority, the Fourth Amendment is the result of an instrumental view of the Constitution as a political means of the governmental majority and is a sign of the abolition of the essential difference between constitution-making and ordinary politics.

The Venice Commission remains at the disposal of the Hungarian authorities for assistance in this and other areas.