

**Opinion
on the Fundamental Law of Hungary**

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1. Introduction

The Hungarian Parliament passed Hungary's Fundamental Law on 18 April 2011.¹ The Fundamental Law, which enters into force on 1 January 2012, supersedes the previous constitution (hereinafter: 1989 constitution), which, in keeping with the requirements of democratic constitutionalism during the 1989-90 regime change, comprehensively amended the first written Constitution of Hungary (Act XX of 1949). The drafting of the Fundamental Law took place without following any of the elementary political, professional, scientific and social debates. These requirements stem from the applicable constitutional norms and those rules of the House of Parliament that one would expect to be met in a debate concerning a document that will define the life of the country over the long term. The debate — effectively— took place with the sole and exclusive participation of representatives of the governing political parties. In its opinion approved at its plenary session of 25-26 March 2011, the Council of Europe's Venice Commission also expressed its concerns related to the document, which was drawn up in a process that excluded the political opposition and professional and other civil organisations.² The document—according to the declaration set forth in article B)—seeks to maintain that Hungary is an independent, democratic state governed by the rule of law, and furthermore – according to article E)—that Hungary contributes to the creation of European unity; however, in many respects it does not comply with standards of democratic constitutionalism and the basic principles set forth in article 2 of the Treaty on the European Union [hereinafter: TEU].

This opinion addresses the procedural problems related to the drafting of the Fundamental Law, and those flaws in its content in relation to which the suspicion arises that they may permit exceptions to the European requirements of democracy, constitutionalism and the protection of fundamental rights, and, thus, that in the

¹ For the “official” English translation of the Fundamental Law, see: <http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

² For the official English translation of the Opinion, see: http://tasz.hu/files/tasz/imce/2011/opinion_on_hungarian_constitutional_questions_enhu.pdf

course of their application they could conflict with Hungary's international obligations.

2. The questionable legitimacy of constitution-making solely by the governing majority

The process leading to the adoption of Hungary's new constitution are to be analyzed from three points of view: formal legality, adherence to rules of preparation and the availability of the required social and political support.

1. The most important question is whether the adoption of the new constitution meets the requirement of legality, that is, whether or not the constitutional rules applying to the procedures for drafting and adopting a constitution have been met. As regards the legal basis of its creation, the Fundamental Law refers to two passages of the 1989 constitution, which is still in force: point a) of paragraph 19.§ (3) and paragraph 24.§ (3).

Pursuant to point a) of paragraph 19.§ (3), the Parliament adopts the Constitution of the Republic of Hungary. Paragraph 24.§ (3) of the Constitution authorizes the two-third majority of Members of Parliament to change the constitution. This passage does not include a rule on the *drafting of the constitution*. This deficiency was recognized and corrected by Parliament in 1995 when the plan to adopt a new constitution was first seriously considered for the first time after the comprehensive overhaul of the first written, state-socialist/communist, i.e.: one-party-dictated, 1949 Constitution in 1989. It was then that paragraph 24.§ (5) of the Constitution was adopted. In view of the two-third majority of the governing coalition at the time, which was similar to that enjoyed by the government party today, this provision prescribed that as a first step in drafting the constitution Parliament is to adopt the regulatory principles of the new constitution in the form of a resolution of the House of Parliament by a four-fifth majority of Members of Parliament. To implement this constitutional norm, by amending the Standing Orders of Parliament, a house rule was adopted by the required majority regulating the process of preparation. The latter provision was deregulated by a four-fifth majority towards the end of that Parliament's term in 2007.

At the same time, the rule stated in paragraph 24.§ (5) of the 1989 Constitution remained in force. This made it clear that the preparation of the constitution necessitates the inclusion of the opposition into the preparatory process even in case of a two-third majority of the ruling parties at a later time. This guarantee was removed from the Constitution by the current government coalition by a two-third majority of Members of Parliament in July 2010. It in itself amounts to a constitutional violation that a law adopted by and requiring a four-fifth majority was annulled by a two-third majority—for which annulment no constitutional or political justification whatsoever was offered. However, the annulment of paragraph 24.§ (5) has had other serious consequences, as well. It has divested opposition parties of their negotiating positions. It has made it clear that they are only to serve as a backdrop in the drafting of the new constitution. Furthermore, the Constitution has been left without a rule regulating the process of preparing the making of the new constitution? constitution-making.

2. Parliament sought to make up for the lack of such a norm concerning the preparation of the constitution by adopting the Parliamentary Resolution 47/2010. (VI. 29.) pursuant to which an *ad hoc* Committee for the Preparation of the Fundamental Law was established. Of the 45 members of the ad hoc committee 30 were delegated by the governing parties. The committee introduced to Parliament a draft-resolution for the regulatory directives for Hungary's Constitution on 20 December 2010. Parliament has never read, discussed or voted on this draft-resolution. Instead, Parliament adopted the Parliamentary Resolution 9/2011. (III. 7.) on 7 March 2011 on the preparation of the new constitution. This was promulgated on 9 March, that is, five days prior to the introduction of the bill on the new Fundamental Law to Parliament. The wording of this Resolution invites Members of Parliament to submit their bills amending the Fundamental Law until 15 March 2011. At the same time, diverging from House's normal legislative and constitution-making? procedures, the Resolution also states that any bill, which enjoys the support of half of any parliamentary faction—*ipso facto*—is to be read by Parliament. By doing so, the governing majority has acknowledged that the parliamentary minority is to be given a special status in the constitution-drafting procedure without however restoring or creating/securing? their negotiating positions in fact.

The bill which was ultimately submitted on 14 March 2011 and was signed by all? Members of Parliament of the government's parties had been prepared by a three-person-committee appointed by the government and led by a member of the European Parliament who, consequently, does not have a seat in the Hungarian Parliament. At the same time, the Parliamentary Resolution (referred to supra) supplemented the House Standing Orders with regulations regarding the drafting of the new constitution. These regulations made it possible to diverge from the usual process of law-making and, so, to complete the Parliamentary discussion of the bill in 9 calendar days.

It follows that, contrary to what would be expected of document shaping the country's life in the long run, the preparation of the new Fundamental Law has been carried out exclusively by the governing party coalition and in the absence of constitutional and parliamentary regulations and was not preceded by the necessary political, professional, scientific and social debates.³ Worries concerning the exclusion of the public and also opposition political forces, professional, scientific and other non-governmental organizations were expressed by the statement of the Venice Committee of the European Council passed at its plenary session on 25-26 March 2011.

3. The new Fundamental Law was only supported by the governing party alliance and was rejected by other parliamentary and extra-parliamentary parties. Public opinion was demonstrably in favor of a referendum to at least decide on the adoption or rejection of the text. However, only a majority decision of Members of Parliament in session could have made possible the calling of such a referendum. This was rejected by the ruling parties. As a result, the new Fundamental Law has not gained the support of a sufficiently broad consensus of political parties nor has it received a direct confirmation by the electorate.

It is not surprising that the text of the new Fundamental Law is in many ways divisive which a considerable share of the population rejects. It is therefore foreseeable that

³ See, the document referred to in footnote 2, supra.

not even the passing of time will endow it with the consensual support of Hungarian citizens subject to Hungarian law. Its legitimacy will remain doubtful.

3. The Fundamental Law on the identity of the political community

An important criterion for a democratic constitution is that everybody living under it can regard it as his or her own. The Fundamental Law breaches this requirement on multiple counts.

1. Its lengthy preamble, entitled National Avowal, defines the subjects of the constitution not as the totality of people living under the Hungarian laws, but as the Hungarian ethnic nation: “*We, the members of the Hungarian Nation ... hereby proclaim the following*”. A few paragraphs down, the Hungarian nation returns as “our nation torn apart in the storms of the last century”. The Fundamental Law defines it as a community, the binding fabric of which is “intellectual and spiritual”: not political, but cultural. There is no place in this community for the nationalities living within the territory of the Hungarian state. At the same time, there is a place in it for the Hungarians living beyond our borders.

The elevation of the “single Hungarian nation” to the status of constitutional subject suggests that the scope of the Fundamental Law somehow extends to the whole of historical, pre-Trianon Hungary, and certainly to those places where Hungarians are still living today. This suggestion is not without its constitutional consequences: the Fundamental Law makes the right to vote accessible to those members of the “united Hungarian nation” who live outside the territory of Hungary. It gives a say in who should make up the Hungarian legislature to people who are not subject to the laws of Hungary.

2. It characterises the nation referred to as the subject of the constitution as a Christian community, narrowing even further the range of people who can recognise themselves as belonging to it. “We recognise the role of Christianity in preserving nationhood”, it declares, not as a statement of historical fact, but also with respect to the present. And

it expects everyone who wishes to identify with the constitution to also identify with its opening entreaty: “God bless the Hungarians”.

This text – the first line of the National Anthem – originated in 1823. At that time in Hungary, as in most countries of Europe, everybody proclaimed themselves publicly to be believers, even those who were not believers. A Hungarian today can look back on those words in this knowledge, if a non-believer. He or she can respect it as the legacy of a bygone age.

But, if it is written over the constitution almost 200 years later, then this entreaty to God is not a venerable tradition, but a new development. It expresses that the Hungarian state wishes to return to a previous state of affairs, in which the community that possessed the state still defined itself as a congregation of faithful Christians.

3. The name of the 1989 constitution was “The Constitution of the Republic of Hungary”. Its first Section reads thus: “Hungary shall be a republic.” This statement means more than that the head of state does not live in the royal palace, and does not take office based on dynastic rules of succession. It simultaneously differentiates the new Hungarian democracy from the post-1949 People’s Republic and the post-1920 Regency; from the communist dictatorship and the authoritarian regime of the inter-war period. The new constitution, in contrast to this, is the “Fundamental Law of Hungary”. The word “republic” is not included among the 509 words of its preamble; and only occurs once in the main text. Even here its meaning has been narrowed: it no longer says anything about the *intellectuality* of our political apparatus, but merely about the *form of government* (“Hungary’s form of government shall be that of a republic”).

This narrowing of meaning sends out a symbolic message. The Fundamental Law does not draw the historical dividing lines where the 1989 constitution did. It claims that the “continuity” of Hungarian statehood lasted from the country’s beginnings until the German occupation of the country on 19 March 1944, but was then interrupted only to be restored on 2 May 1990, the day of the first session of the freely elected Parliament. Thus it rejects not only the communist dictatorship, but also the Temporary National Assembly convened at the end of 1944, which split with the

fallen regime. It rejects the national assembly election of December 1945. Today's democracy-watchers would classify the parliamentary election of December '45 as "partly free", adding that it was the freest in Hungary's entire history up until that time. It also rejects the progressive legislation of the National Assembly: the "little constitution" of the Republic approved at the beginning of 1946, which the Round Table was able to draw on in '89; as well as the abolition of noble titles and the Upper House of Parliament.

At the same time, it spells out that: "We honour ... the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation". This declaration is diametrically opposed to the republican ethos of 1946 and 1989. The crown symbolised the unity of the *nobility-centered conception of nation*, and the continuity of the *nobility-centered conception of the constitution*.

4. "We deny any statute of limitation for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships," continues the list of declarations. If "inhuman" crimes should be taken to mean war crimes and crimes against humanity, then the denial of a statute of limitations complies with effective international law – if it means something else however, then the Fundamental Law, in breach of the prohibition on retroactive effect, classifies as having no statute of limitations on criminal acts for which the limitation period has already expired. At the same time, it does not care to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents, but also between 1920 and 1944 by extreme right-wing "free troops" and the security forces of the independent Hungarian state, and not only against "the Hungarian nation and its citizens", but also against other peoples.

Neither does it care to acknowledge that the continuity of Hungary's statehood was not interrupted on 19 March 1944. Restrictions were placed on the government agencies' freedom to act, but they were not shut down. The Regent remained in his office, and the parliament sat and regularly passed those bills that were introduced by the government. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers.

The Fundamental Law only recognises the (pre-1944) glorious pages of Hungarian history, but does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the – reputed or genuine – injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples.

It raises to a constitutional level the worst traditions of national self-glorification, self-pity and self-justification. Its view of history is anachronistic, Christian-nationalist-kitsch; it is unacceptable to the non right-leaning part of the country and even elicits embarrassment from a section of the right wing.

4. Citizenship, voting rights, nation: the new boundaries of the political community

1. Unlike most of the major changes enacted with the Fundamental Law, where the regulation of citizenship is concerned the substance that lies beyond the constitutional provisions is known: the separation of citizenship from place of residence and the principle of effectivity. The legislature has lifted the requirement to reside in Hungary in cases where a person can certify or “demonstrate the likelihood” that they are of Hungarian descent and/or descended from a Hungarian citizen, and that they have knowledge of the Hungarian language.

2. The new regulations on citizenship – in keeping with the fact that the Fundamental Law indicates as the source of constitutional authority, in place of the people, an ethnically-based “single” Hungarian nation (article D) – serve to ethnicize, in the extreme, the procedure for obtaining citizenship. Although the extension of Hungarian citizenship to persons living abroad is not worded directly into the Fundamental Law, this step brings irreversible and far-reaching changes to the boundaries of the political community. This is because the Fundamental Law—correctly—prohibits a person from being deprived of their citizenship on any count (article G, paragraph 3) and also elevates to constitutional level the principle under which Hungarian citizenship may be “inherited” without limitation, so the child of a Hungarian citizen is in every case a Hungarian citizen. In this way, the members of communities abroad who obtain

Hungarian citizenship under the legislation will pass their Hungarian citizenship on from generation to generation, regardless of their place of residence (article G, paragraph 1).

3. The new legislation raises serious concerns with respect to the ban on discrimination. On the one hand it should be noted that the principle of granting benefits on the grounds of ethnicity is applied in many other European states, and benefits founded on cultural proximity can usually be regarded as an accepted purpose for discrimination. On the other hand, however, the extent of the difference in treatment must be proportionate to this purpose. It is contentious that while the legislature does not expect a preferred applicant to even settle in Hungary, the main rule applied to the non-preferred group is that the applicant must live in Hungary for an *uninterrupted* period of eight years. This issue could be especially pertinent in light of the fact that Protocol No. 12 to the European Convention on Human Rights also extends the ban on discrimination to rights above and beyond those set forth in the Convention, which means that it will also be applicable in the procedure for gaining citizenship. Hungary has not ratified the Protocol, but has signed it – and accordingly it may not approve any new legislation that runs counter to it. With this statutory amendment, Hungary has joined in the tendency, most typical of countries in the Balkan Peninsula, of treating the regulations on citizenship as a means of nation-building in the ethnic sense.

4. The new constitutional norms has failed to embed, into the regulations on citizenship, the existing European standards that already feature in the European Convention on Nationality, and which, due to Hungary's inertia, are not reflected in the Hungarian legislation to this day: the naturalisation procedure lacks all the guarantees of transparency, the authority is under no obligation to justify its decision, and there is no right to a judicial review.⁴ In light of the new constitutional rules, this also means that the legal substance of the vaguely worded provision which, although it refers to "Hungarian descent", is ethnically charged based on political statements, remains uncertain, and unfathomable to the general public. Applying the law is the task of an apparatus created specifically for this purpose, which will implement the

⁴ European Convention on Nationality, Strasbourg, 6.11.1997. See article 11 on the provision of written reasons for decisions, and article 12 on the right to legal remedy.

clearly espoused political intention to naturalise Hungarians living abroad – with no effective control, as described above.

5. According to the OSCE's Bolzano Recommendations: "States should refrain from taking unilateral steps, including extending benefits to foreigners on the basis of ethnic, cultural, linguistic, religious or historical ties that have the intention or effect of undermining the principles of territorial integrity. [...] States may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad. States should, however, ensure that such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship en masse, even if dual citizenship is allowed by the State of residence."⁵

Although these are primarily security-policy considerations, good neighbourly relations and the principle of sovereignty are also decisive factors. The granting of dual citizenship en masse fits in with plans of the cross-border national unification of persons of the same ethnicity living in relatively high numbers close to the border, and as such it raises a number of problems, ranging from extraterritorialism, through discrimination, to the issue of good neighbourly relations.⁶ While dual or multiple citizenship has become increasingly accepted in international practice, in certain contexts this solution, sacrificing the principle of territorial integrity in the name of strengthening ethnic identity, can lead to tensions.⁷

6. The extension of citizenship and voting rights, in view of its international consequences, should only be undertaken with particular caution, with a view to maintaining good neighbourly relations and respecting the principle of sovereignty. Due to the extraterritorial application, the holding of elections, in particular, will require bilateral consultation that did not take place in the course of the earlier

5 OSCE Bolzano Recommendations, points 10-12.

6 For the aspects involved, see the minority-themed publication of the Venice Commission, entitled: The Protection of National Minorities by their Kin-State, Athens, 7-8 June 2002, CDL-STD(2002)032, Science and technique of democracy No. 32, D.

7 As the Venice Commission noted with regard to voting rights granted as a benefit to minorities: "A given mechanism may help to reduce tensions in one country, but create tensions in another." European Commission For Democracy Through Law, Report on Dual Voting for Persons Belonging to National Minorities, Strasbourg, 16 June 2008, Study No. 387/2006, paragraph 7

legislative work.⁸ Prior to the extension of voting rights, Slovakia and Ukraine reacted negatively to the mere granting of citizenship: people living in these countries are threatened with the loss of citizenship of their country of residence if they take the opportunity offered by the Hungarian statutory amendment.

7. The Fundamental Law leaves open the question of whether the right to vote is dependent on having a permanent address in Hungary, and it also makes no provision regarding precisely in what manner and in what form Hungarian citizens without a Hungarian place of residence will exercise their voting rights (paragraph (4), Section XXIII.). The answer to this is probably not unconnected to what proportion of Hungarians living outside the country's borders eventually request naturalisation. The number of submitted applications currently stands at over 80,000. Given that the populations of Hungarian communities abroad amount to several million people, in the electoral system of a country with 10 million inhabitants the extension of voting rights as described above could lead to substantial anomalies – consider, for example, the approval of the state budget with the supporting votes of representatives' of citizens who, at best, only bear the social and economic consequences of the decision in a limited extent. The detailed rules on the extension of voting rights abroad will greatly influence the quality of Hungarian democracy in the future.

5. The relationship between rights and obligations

The Fundamental Law reshapes the relationship between rights and duties in contrast with the 1989 Constitution. This change will impact on the substantive rules of most of the Hungarian legal system (for example, the chapter on fundamental rights itself contains 18 passages pertaining to the legislation of new acts of Parliament) and the practice of political institutions, as well. Although fundamental rights and duties (articles I-XXXI) were included in one chapter, the chapters called “National Avowal” and “Foundation” also contain principles concerning the enjoyment and exercise of rights as well as the fulfillment of duties. (The relevance of the “National Avowal” is based on article R, which prescribes with mandatory force that the

⁸ Regarding the cooperation obligation determined in bilateral treaties, see: The Protection of National Minorities by their Kin-State, Athens, 7-8 June 2002, CDL-STD(2002)032, Science and technique of democracy No. 32, especially footnote no. 15.

interpretation of provisions of the Fundamental Law are to be in harmony with the National Avowal's declarations.)

The relationship of rights and duties stated by the Fundamental Law is marked by a peculiar ambiguity. The description of a number of entitlements and duties follows the conception that shaped the constitution of 1989 as well. This is a liberal conception of law which has been developed and elaborated in modern constitutional democracies (e.g., IV-VIII., XIV-XV., XXIII., XXIV., XXVI-XXVII., XXX-XXXI.). However, the Fundamental Laws adds a number of rules which are incompatible with the liberal consensus of modern constitutions. This threatens to transform the structure of fundamental rights, as well. According to certain provisions of the Fundamental Law, and the general picture which they outline, the exercise of certain rights depends on the discharging of duties. As a result, they can no longer be regarded as inalienable individual rights. This ambiguity can be detected in the passage of the National Avowal according to which "individual freedom can only unfold in cooperation with others" (the article cataloguing fundamental rights also bears the title "Freedom and responsibility").

1. According to the modern conception, which the 1989 constitution shares with conceptions of the world's constitutional democracies, and which has been shaped by Hungarian constitutional review, as well everyone enjoys fundamental rights equally and the state is to protect everyone's rights equally. According to this conception, inalienable constitutional rights are entitlements which lay the groundwork for the duties of the state (and those of all other agents, as well). "It is the primary duty of the state to protect the inviolable and inalienable rights of human beings" (I.). That is, it is not for the state to decide what it will protect and what it will not. (Nor are human beings given these rights by the makers of the constitution.) A conception running counter to this manifests itself, however, in a number of passages in which the Fundamental Law makes the exercise of rights expressly dependent on the discharging of duties. For example, article XII. declares in one and the same passage everyone's right to choose one's employment and profession freely, and their duty to contribute to the welfare of the community by doing work in accordance with one's abilities and opportunities. This is unacceptable in a liberal democracy. The bearer of an inalienable right is free not only to choose among available opportunities for work,

but also to refrain from work. The obligation to work is contrary to freedom. Moreover, since this passage includes a duty, it also empowers an entity (local government, authority) to oversee whether this duty is discharged.

2. Binding the exercise of inalienable human rights to the meeting of duties does not only undermine the internal structure of rights and duties (basically eliminating inalienable human rights), but is also objectionable in terms of its content. An analysis of the content of these duties reveals that the Fundamental Law is outdated, The 1989 Constitution was based on the equal recognition of individual and communal forms of life and a plurality of views regarding the good life. The Fundamental Law breaks with this tradition by including moral duties among the fundamental rights. It thereby selects those forms of the good life which it regards as morally valuable and worthy of constitutional protection. The Fundamental Law excludes the following components of the liberal constitutional conception: equal recognition of the plurality (freedom) of forms of life, the neutrality of (and tolerance by) the state and respect for personal autonomy.

By defining one man and one woman as the subjects of marriage (see article L.), the Fundamental Law creates a long-term constitutional obstacle to individual demands for extending the plurality of forms of partnership. Although, by doing so, it adopts the legal position of the Hungarian Constitutional Court, this measure will clearly hamper an eventual revision of existing legal interpretations. Article XIX. on social rights and the social policies of the state entitle Parliament to place those citizens, who make use of welfare institutions, under an obligation to engage in “activities benefiting the community”. The freedom of teaching and learning is subordinated to a definite goal, namely the acquisition of the highest possible form of knowledge (see article X.). Grown-up children incur a duty to look after parents who are in need (see article XVI.).

Although the subject of rights is the human being, even if their rights are communal (Article I.), the new Constitution is in some of its passages anti-individualist. Rights do not necessarily serve to protect the autonomous interests of persons, but rather collective interests (which remain unspecified). In these passages, the new Constitution does not regard entitlements as the limits of collective (state) agency, but

rather treats the interests of the collective as the source and at the same time limitation of rights. Thus the new Constitution identifies the foundations of the economy the freedom of enterprise *and* value-creating work (see Article M.); the pursuit of individual welfare is coupled with duties owed to the collective (see Article O.); the article on the freedom of property and inheritance admonishes to the “social responsibilities” of the owner (see Article XIII.).

3. In addition to burdening citizens with duties, the Fundamental Law also restricts their rights (and, parallel to this, reduces the pertaining obligations of the state). The passage on equality does not include the prohibition of legal inequality or discrimination on the basis of sexual orientation (although it does include the same prohibition of discrimination of the handicapped). At the same time, protection is given to the life of the foetus from conception (see Article II.). This can easily lead to the restriction of the autonomy of women in early stages of pregnancy, as well. Extending the right of self-defense to the protection of property broadens the private use of violence to a dangerous extent (see Article V.).

In sum, the concept of law of the Fundamental Law reflects the intention of the Hungarian state not to remain neutral as regards the life and ideologies of its citizens. Furthermore, it seeks to restrict citizens’ rights which undermines the value of these entitlements. This restrictive approach to rights presents a conception which is hardly defensible in a modern society based on the plurality of forms of life.

6. Intervention into the right to privacy

The Fundamental Law breaks with a distinguishing feature of constitutions of rule-of-law states, namely, that they comprise the methods of exercising public authority and the limitations on such authority on the one hand and the guarantees of the enforcement of fundamental rights on the other. Instead of this, the text brings several elements of private life under its regulatory purview in a manner that is not doctrinally neutral, but is based on a Christian-conservative ideology. With this, it prescribes for the members of the community a life model based on the normative preferences that fit in with this ideology in the form of their obligations towards the community. These

values, which are not doctrinally neutral, feature as high up as the Fundamental Law's preamble entitled National Avowal:

"We recognise the role of Christianity in preserving nationhood."

"We hold that individual freedom can only be complete in cooperation with others."

"We hold that the family and the nation constitute the principal framework of our coexistence, and that our fundamental cohesive values are fidelity, faith and love".

"Our Fundamental Law ... expresses the nation's will and the form in which we want to live."

With particular regard to the fact that according to article R) the provisions of the Fundamental Law must also be interpreted in keeping with the National Avowal, and that according to article I, paragraph (3) fundamental rights may be restricted in the interest of protecting a constitutional value, this provision could serve as the basis for a restriction of fundamental rights.

Certain provisions of the Fundamental Law pertaining to fundamental rights intervene in questions of marriage and the family, the prohibition on same-sex marriage, and the protection of embryonic and foetal life, prescribing ideologically-based normative value preferences in private relationships.

1. According to article L) of the Fundamental Law:

"(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival.

(2) Hungary shall encourage the commitment to have children.

(3) The protection of families shall be regulated by a cardinal Act."

The Fundamental Law's conception of marriage – which, incidentally, follows the definition serving as the basis for the Constitutional Court's Decision 154/2009 (XII. 17.) AB on the constitutionality of registered domestic partnerships – corresponds roughly to the Catholic natural-law interpretation of marriage, which regards faithfulness, procreation and the unbreakable sanctity of the relationship between spouses as the most important elements of marriage. This constitutional regulation, founded on natural-law principles, protects those of the people's interests that not everyone attributes to themselves, and with which they do not necessarily wish to identify themselves and, thus, it breaches their autonomy. When defining marriage and evaluating the role of the family a modern, living constitution – especially a new

Fundamental Law – should accommodate the changes to society that increase the range of choices available to the individual. This should have required the Fundamental Law to regulate the institution of marriage and family together with the fundamental rights guaranteeing the self-determination of the individual and the principle of equality.

2. With the constitutional ban on same-sex marriage the constitution-maker has ruled out the future ability of the Hungarian legislature, following the worldwide tendency, to make the institution of marriage available to same-sex couples. In keeping with this, article XV of the Fundamental Law does not mention discrimination based on sexual orientation and gender identity in its list of prohibited forms of discrimination. This means that the Hungarian constitution-maker does not prohibit the state from supporting or negatively discriminating against a way of life—based on sexual orientation alone. This solution runs counter not only to the European Union’s Charter of Fundamental Rights and the case law of the European Court of Justice (for the latest example see judgement C-147/08 in the case of Jürgen Römer v Freie und Hansestadt Hamburg), but also to the provisions of Hungary’s still effective Act CXXXV of 2003 on the Promotion of Equal Treatment and Equal Opportunities.

3. According to article II of the Fundamental Law: “Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception”. Apart from the Irish constitution of 1937, there is no other European constitution that protects embryonic and foetal life from the moment of conception. The Fundamental Law does not state explicitly that the embryo and foetus has a right to life, but it supports this interpretation by incorporating the phrase “embryonic and foetal life shall be subject to protection from the moment of conception” into the same sentence as the statement that “every human being shall have the right to life”. In this way it prompts both the legislature, ordinary and Constitutional Court judges’ interpretation of the law to restrict women’s right to self-determination.

Uncertainties also arise with regard to the artificial reproduction procedures that have been widely permitted by the medical act of 1997. By necessity, the in-vitro fertilisation methods permitted by law entail the death of numerous embryos, either

inside or outside of the womb. In view of the fact that the Fundamental Law does not differentiate between in-utero and in-vitro embryos, we have to conclude that they both enjoy the same constitutional protection. This could cause in-vitro fertilisation to become unviable.

It gives rise to considerable legal uncertainty if a country—like Hungary to this very day—,which promotes various means of treating infertility, including in-vitro fertilisation and implantation and, which also permits research on embryos, prescribes in its Fundamental Law the constitutional protection of embryonic and foetal life from the moment of conception. This requirement could bring into question the constitutionality of artificial reproduction procedures and the compatibility of the new constitutional provision with international treaties ratified by the Republic of Hungary, including the Oviedo Convention on Human Rights and Biomedicine, approved by the Council of Europe.

All of these provisions breach the autonomy of individuals who do not accept the normative life models defined on the basis of the Fundamental Law's ideological values—as the preamble words it: “the form in which we want to live” – and they are capable of ostracising them from the political community.

7. State goals instead of social rights

The provisions of the Fundamental Law pertaining to social rights result in no dramatic change with respect to the protection of these rights, mainly because under the 1989 Constitution the Constitutional Court did not recognise the fundamental-right status of social provisions. Some of the provisions of the Fundamental Law (articles XII, XIX and XX), reflecting the spirit of the Constitutional Court's judicial practice to date, make this even clearer than the previous text. At the same time, in certain places (e.g. Section XIX, paragraphs 3 and 4), the wording contains new mandates and restrictions in line with current policies with which the constitution-maker attempts to prevent the new direction taken by social-policy measures from being declared unconstitutional and seeks to classify the solutions brushed aside by the current government as unconstitutional in the future.

1. Unlike the previous legislation, the Fundamental Law does not proclaim the right to work (which the Constitutional Court has also interpreted as no more than the state's obligation, not specified in any more detail, to pursue an employment policy), and, thus, the new provisions make it clear that the provision relating to creating work opportunities is only a state goal. A new element, however, is the prescription of an obligation to perform work to the best of the individual's ability and potential—which is rather hard to defined by a court of law.

2. By prescribing the obligation for employees and employers to cooperate and by recording the objectives of such cooperation the Fundamental Law, in contrast to the constitutional provision, places this process under constitutional protection; the wording, however, leaves room for uncertainty regarding the normative status of the provision. In line with article 6 of the European Council's Social Charter and article 28 of the EU Charter of Fundamental Rights, the Fundamental Law affords constitutional protection to the collective bargaining process. It is significant, however, that the Hungarian text—as opposed to the official English translation—avoids the term “strike”, using instead the expression “work stoppage” (“munkabeszüntetés”; see, Section XVII). From the context, it appears that both parties in the bargaining process have this right, which thus permits the employer to prevent the performance of work (lock out). This was not an inference that could be made from the provisions of the 1989 Constitution. With respect to the regulation of the right to strike, a diminishing of the guarantees is marked by the fact that the related law is no longer subject to a two-thirds parliamentary majority.

The Fundamental Law contains no provisions on the constitutional protection of wages. (Paragraph (2) of Section 70/B of the 1989 Constitution sets forth the principle of equal pay for equal work, while paragraph (3) contains, with respect to the remuneration of work, a provision that still proclaimed the distribution principle of state socialism.)

3. The Fundamental Law, in keeping with the spirit of the Constitutional Court precedents, treats the creation of social security not as a right, but as a state goal. The

wording of Section 70/E of the 1989 Constitution and some of the relevant Constitutional Court decisions, in principle, left open the opportunity for the right to social security to be interpreted as a fundamental right at some time in the future. Constitutional Court Decision 32/1998. (VI. 25.) AB even went as far as to outline, in abstract terms, the constitutional extent of the right to social security. The new text eliminates the opportunity for interpretations of this kind. The second sentence is virtually a word-for-word repetition of the second phrase of Section 70/E, but while this clearly only lists examples of those entitled to receive assistance, the new text can be interpreted as an exhaustive list of the entitled groups, from which it can be concluded, for example, that the state only needs to concern itself with creating social security for the groups included in the list (and not people unemployed through “their own fault”, for example). Another change is reflected in the fact that the assistance to be provided is no longer of the extent “necessary for subsistence”, but just the extent “determined by law”.

Social insurance has been removed from among the means of creating social security, and only the system of social institutions and measures remains in the text. These provisions aim to ensure that there are no constitutional barriers to introducing measures to make benefits dependent on the performance of work or other activity regarded as socially beneficial, in keeping with the new social-policy approach.

The text rules out the reinstatement of the compulsory private pension funds regime, with the aim of this being to make it impossible, due to a conflict with the Fundamental Law, to re-introduce this previously tried social-policy solution, which is rejected by the present government.

8. Lack of market economy guarantees

The passing of the Fundamental Law cannot be listed among the symbolic political acts. Restrictions, which are unacceptable in a state governed by rule-of-law also count as major interventions in the operation of the market. The success of the political steps serving the purpose of macroeconomic adjustment cannot be separated from the fate of the protection of fundamental rights. The protection of political freedoms and the survival of market-economy institutions are inseparable from each

other. Taking a stand against this provocative invasion of the private sector by those in power is imperative both on moral and business grounds.

The Fundamental Law makes no mention of the fact that Hungary is a market economy. There is no doubt that the proclamation of the – still effective – 1989 Constitution in this regard (see, paragraph (1) of Section 9: “The economy of Hungary shall be a market economy, in which public and private property shall be equal and be granted equal protection.”) clearly has no normative effect, yet its omission is nevertheless revealing. The implication is that several provisions of the Fundamental Law are irreconcilable with the main expectations that represent the key features of a social market economy and, therefore, the constitution-maker has sought to resolve this conflict to the detriment of the market economy.

The purpose of this analysis is not to judge whether there is economic justification for the Fundamental Law to specify, at the level of detail found in sections 36-37, the desirable level of state debt and the obligations and prohibitions that prevail in situations where this is not achieved. There is no doubt, however, that it should not be possible to waive protection of fundamental rights, even temporarily, citing the public finance problems of the state. The new Fundamental Law, on the other hand, does precisely that: based on paragraph (4) section 37, a private owner may only claim protection against state authority if the national economic indicators are relatively favorable. In a market economy it is unacceptable for the—reputed or genuine, rightful or indefensible—interests of the state to enjoy priority over protection of the right to property that underpins the freedom of those subject to law and for there to be no impartial forum to serve justice in a constitutional dispute between the state and the owner. While paragraph (1) section XIII of the Fundamental Law highlights that “property shall entail social responsibility”, it does not make it clear that the owner’s fundamental right to protection from the state extends to the rights and privileges acquired in observance of the provisions of law. (The Parliament, in a fast-track amendment to the still effective 1989 Constitution, following approval of the Fundamental Law, made it clear that it interprets the protection of the right to property more narrowly: it does not apply to the acquired rights formerly obtained by those with pension entitlement). The “fading” of the concept of the market economy is also made apparent by the fact that while the Fundamental Law remains silent about the

key principals of private autonomy and freedom of contract; it goes unreasonably far in referring the task of defining the state's exclusive property, and the issues of disposal over so-called national assets, to the authority of an act to be passed with a qualified majority of parliamentary representatives (with a so-called cardinal act; for this, see paragraph (2) of section 38 of the Fundamental Law).

In summary it can be stated that the aim of the Fundamental Law is not to lay down the most important guarantees of the market economy, but rather to strengthen, by legal means, the political and economic power of the state and the party alliance with which it is intertwined.

9. Freedom of conscience, unequal religions – cooperating churches, operating separately from the state

Section VII of the Fundamental Law preserves the structure of Section 60 of the 1989 Constitution and appropriates a substantial part of its wording. Nevertheless, a stark difference can be demonstrated between the stances of the two constitutions towards freedom of conscience and religion.

1. The preamble to the Fundamental Law, which it is compulsory to take into consideration when interpreting the main text (see, paragraph (3) article R), commits itself to a branch of Christianity, the Hungarian Roman Catholic tradition. According to the text of the preamble, “We are proud that our king Saint Stephen built the Hungarian state on solid ground and made our country a part of Christian Europe”, the members of the Hungarian national recognise Christianity’s “role in preserving nationhood”, and honours the fact that the Holy Crown “embodies” the constitutional continuity of Hungary’s statehood. Besides the sacral symbols, this choice of ideology is reflected—inter alia—in the Fundamental Law’s concept of community and its preferred family model (paragraph (1-9 of section L.), and its provision regarding the protection of embryonic and foetal life from the moment of conception (section II).

The preamble, while giving preference to the thousand-year-old Christian tradition, states that “we value the various religious traditions of our county”. The choice of words displays its model of tolerance, under which the various world views do not have equal status, although following them is not impeded by prohibition and persecution. It is however significant that the tolerance thus declared only extends to the various “religious traditions”, but does not apply to the more recently established branches of religion, or to those that are new to Hungary, or to non-religious convictions of conscience.

This means that the Fundamental Law does not simply approve of the world view, religion, practices and cultural heritage of a portion of the country’s citizens, but also states a position regarding the question of which world view and perception of life is true and correct, thereby according lower status to the rival doctrines and cultural practices. In other words, the Fundamental Law does not merely recognise the historical role of Christianity in the creation of the state, but also makes a commitment to its moral and political principles. Consequently it breaks with the solution applied in the 1989 Constitution, which remained neutral among the competing doctrinal approaches.

2. paragraph (1) of Section VII, of the Fundamental Law recognizes the freedom of conscience and religion and defines the main substantive elements of these: “This right shall include the freedom to choose or change religion or any other persuasion, and the freedom for every person to proclaim, refrain from proclaiming, profess or teach his or her religion or any other persuasion by performing religious acts, ceremonies or in any other way, whether individually or jointly with others, in the public domain or in his or her private life.” Here the standard text essentially appropriates the working of paragraphs (1)-(2) of Section 60 of the 1989 constitution.

In a departure from this, however, paragraph (2) of Section VII of the Fundamental Law proclaims: “The State and Churches shall operate separately. Churches shall be autonomous. The State shall cooperate with the Churches for community goals.” The 1989 Constitution prescribed the “separation of the state and the church”, while the new wording – employing a solution similar to that of the pre-1989 Hungarian constitution, describes “separate” operation. This seemingly insignificant semantic

difference, however, sheds light on the passage about the “cooperation” between the state and the churches. This is because the Fundamental Law does not provide regarding cooperation between the state and associations, social, health-care and cultural institutions or between other non-governmental organisations. It only prescribes cooperation between other state organs, local governments and the state. (see, paragraph (1) of Section 34).

The Fundamental Law’s model of “separate, but cooperating” churches appropriates Hungarian constitutional court practice, under which the rules on public education, social and health-care and taxation may give preference to the “historical churches” over other churches, and the churches may be given an advantage over other institutions (associations, foundations). The incorporation of this approach into the Fundamental Law makes it far more difficult for this constitutional-court practice—which does not comply with the principle of equality—to change.

Another change brought by the Fundamental Law is that paragraph (3) of Section VII requires a two-thirds majority of votes in order to change the detailed rules pertaining to the churches. The 1989 constitution only protected freedom of conscience and religion from legislation passed with a simple parliamentary majority. Therefore, while a broad parliamentary consensus used to be needed in order to change the most important guarantees of fundamental rights, in future the detailed rules pertaining to church institutions will not be amendable with a simple majority. The likely consequence of the new structure will be that, based on the authority of the Fundamental Law, in the near future the party with a two-thirds parliamentary majority will pass an Act on Churches that emphatically enshrines the “tolerated, but not treated as equal”-model for freedom of conscience, and the “separate, but cooperating” model pertaining to the churches.

10. Weakening of the protection of fundamental rights

The decline in the level of protection for fundamental rights is significantly influenced not only by the substantive provisions of the Fundamental Law pertaining to fundamental rights, but also by the weakening of institutional and procedural

guarantees that would otherwise be capable of upholding those rights that remain under the Fundamental Law. The most important of these is a change to the review power of the Constitutional Court, making it far less capable than before of performing its tasks related to the protection of fundamental rights. Added to this is the change in the composition of the Constitutional Court, taking place prior to the entry into force of the Fundamental Law, which will further impede it in fulfilling its function as protector of fundamental rights.

1. The considerable restriction on ex-post control has caused great controversy in Hungary and abroad, because the withdrawal of the right to review financial laws created a solution found nowhere else in the world, since there is no other institution functioning as a constitutional court whose right of review has been restricted based on the object of the legal norms to be reviewed. The constitutional court judges can only review these laws from the perspective of those rights (the right to life and human dignity, protection of personal data, freedom of thought, conscience and religion, or the right to Hungarian citizenship), that they typically cannot breach. The restriction remains in effect for as long as state debt exceeds half of what is referred to in the Hungarian text as “entire domestic product”, the content of which is uncertain. Therefore, in the case of laws that are not reviewable by the court the requirement that the constitution be a fundamental law, and that it be binding on everyone, is not fulfilled. This also clearly represents a breach of the guarantees, set out in Title 2 of the TFEU, relating to respect for human dignity, freedom, equality and the respecting of human rights – including the rights of persons belonging to a minority.

With regard to the Constitutional Court’s powers of ex-post control, the effectiveness of the protection of fundamental rights is reduced not only by the limitation of their objective scope, but also by a radical restriction of the range of persons that may initiate a Constitutional Court review. This is due to the abolition of one of the peculiarities of the Hungarian regime change: the institution of the *actio popularis*, according to which a petition claiming ex post norm control may be submitted by anybody, regardless of their personal involvement or injury. Over the past two decades or more this unique institution has provided not only private individuals, but also non-governmental organizations and advocacy groups with the opportunity to contest in the Constitutional Court, for the public good, those legal provisions that

they regard as unconstitutional. It could of course be argued that this institution has never existed in any other democratic state, but it has nevertheless undoubtedly contributed substantially to ensuring the level of protection of fundamental rights that has been achieved and which now diminishing.

Abstract ex-post norm control, under point e) paragraph (2) of Section 24 of the Fundamental Law, may in future only be initiated by the government, a quarter of the votes of members of parliament, or the Commissioner for Fundamental Rights. Given the balance of power in the current parliament, this makes any such petitions highly unlikely, since the government and the ombudsperson appointed by it are hardly about to make use of this opportunity, while a quarter of MPs' votes would assume a coalition between the two democratic opposition parties and the radical right-wing party, which supports the government.

The Fundamental Law also leaves open the question of whether the Constitutional Court, in relation to its restricted powers of ex-post control, continues to have the right to annul legal provisions that are deemed to be unconstitutional. While paragraph (3) of Section 24 does mention the authority of annulment, it adds “or shall determine legal consequences set out in a cardinal act”. In other words, it is conceivable that the cardinal Act on the Constitutional Court, to be passed at a later juncture, may not ensure the right of annulment.⁹

Without a knowledge of the cardinal Act on the Constitutional Court, it is also impossible to know the fate of the several hundred petitions that are already lying in the court's in-tray, submitted in the form of an *actio popularis* by private individuals entitled to do so prior to the entry into force of the Fundamental Law, but who will be subsequently divested of this right. Will the *ad malam partem* retroactive effect, so willingly applied by the present government in other cases, also come into play here with the result that the Constitutional Court does not pass judgement on previously submitted petitions?

⁹ We note that in this respect the “official” English translation of the Fundamental Law is misleading, because it refers not to alternative legal consequences, as in the Hungarian text, but to “further” legal consequences.

2. As we have seen, private individuals or organisations may only turn to the Constitutional Court in future if they themselves are the victims of a concrete breach of law and this has already been established in a civil-administration or a final court decision. In this case, the legal remedy offered by the Constitutional Court will naturally only affect them. In other words, the extension of opportunities to submit constitutional complaints is no substitute whatsoever for the widely available right of private individuals and organisations to file petitions. Besides this, without any knowledge of the cardinal Act on the Constitutional Court, for the time being, the details of the extended constitutional complaints procedure, the precise conditions for initiating such a complaint, and the legal consequences, are unknown to us.

3. There is no doubt that the widely available opportunity to submit complaints could be beneficial to the judging of cases involving fundamental rights, and this has been the case in Germany, Spain and the Czech Republic. A prerequisite for this, however, is a Constitutional Court that is committed to fundamental rights and is independent from the government. The present government, on the other hand, has done all it can to prevent this since taking office in May 2010. This process began with the alteration of the system for nominating constitutional court judges, giving the governing parties the exclusive opportunity to nominate and subsequently replace judges. The Fundamental Law, in a further weakening of the guarantees of independence, increased the number of Constitutional Court judges from eleven to fifteen, which – in view of the fact that one position is currently unoccupied – makes it possible to select five more new judges, after the two judges selected in May 2010, with their appointments lasting for a term of twelve years rather than the previous nine; in other words, for three parliamentary cycles. In future the president of the constitutional court, who has until now been elected for a term of three years by the judges, will be selected by Parliament for the duration of his/her time in office. These changes cannot wait until the entry into force of the Fundamental Law on 1 January 2012; rather, the president and the new members will be selected at the end of July based on an amendment to the existing constitution, passed in July 6, 2011.¹⁰

¹⁰ See: <http://www.parlament.hu/irom39/03199/03199.pdf>

11. Judicial autonomy without guarantees

1. The text of the Fundamental Law does not provide sufficient guarantee of judicial autonomy. The passages of the Fundamental Law pertaining to the administration of justice are missing a number of important guarantees and symbolic elements. These deficiencies permit changes to public law that could threaten the autonomy of the courts. Unlike the currently effective constitution, the Fundamental Law makes no mention of the judicial levels, and does not name the elements of the judicial system, and, thus, it gives authority to abolish the regional courts of appeal. It does not deal with the administration of the courts: even prior to 1997 the wording of paragraph (5) of Section 25, which mentions the participation of organs of judicial self-government in court administration, proved to be an insufficient guarantee in the face of excessively broad interpretations of government powers. The Fundamental Law, therefore, does not prevent the creation of an administration model in which there are no counterbalances to central governmental powers.

2. The classic constitutional principle of equality under the law is also missing from among the guiding principles pertaining to the operation of the judicial system. A declaration that the courts are the protectors of constitution order, and of rights and lawful interests, is conspicuously absent from the Chapter on the courts. The wording that “[The] Courts shall administer justice” does not guarantee the courts' monopoly on administering justice. Thus, a classic element of the division of powers is also missing.

3. Section 28 of the Fundamental Law addresses the judicial interpretation of law, with a text that defies interpretation. The statement that judges should interpret legal norms not only in accordance with the Fundamental Law, but must also be based on the assumption that they serve common sense, the public good and a moral and economic purpose, is obscure and therefore gives rise to legal uncertainty. Concerns relating to

the interpretation of legislation are also raised by the section of the Fundamental Law that permits the restriction of fundamental rights on the basis of constitutional values, the substance of which is obscure. (“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.”) This is particularly worrying given what has previously been said about the values enshrined in the preamble.

4. The renaming of the highest judicial level as the Curia enables the governing parties to use their two-thirds majority of Parliament to elect a new person in place of the president of the current highest judicial body, the Supreme Court, who was elected with a mandate lasting until 2015. The term of the new supreme judge, acceptable to the governing parties, is increased from six years to nine years by the Fundamental law.

Immediately before the final vote, without any consultation or impact study, the text of the Fundamental Law came to include a new rule that changes, from one day to the next, the upper age limit for serving judges from 70 years to the general age of pension entitlement (currently 62 years). This amendment, chiefly due to the lack of preparation, professional grounding and the speed of its introduction, breaches the principles pertaining to the protection of the judges' status. After approving the Fundamental Law, the Parliament also passed a statutory amendment ordering a moratorium on the filling of vacated court judge positions, obviously in anticipation of changes to the appointment procedures. All of these measures endanger the continuity of the administration of justice and threaten to undermine confidence in its impartiality. The lowering of the age ceiling and the moratorium on appointments took place under circumstances in which the governing forces had given numerous signs of its mistrust of the judicial staff.

12. The demolition of 1989 Constitution's ombudsperson model

According to the 1989 constitution, this institution is based on the conception of ombudspersons of equal rank. Its success is demonstrated by the fact that it has served as an example for the development of the ombudsman model of several countries

undergoing democratic transformation. The 1989 constitution specifies that Parliament can create ombudsman positions for the protection of any fundamental right, or interrelated fundamental rights, pertaining to sensitive social issues provided that their everyday violation threatens the freedom of citizens. Those rights which are given special protection in this way are excluded from the competence of the general ombudsperson. They are safeguarded by a specialized ombudsperson who pays them heightened attention. The government and public administration thus has to face a number of counterparts who are themselves independent from one another. The ombudspersons themselves are involved in this way in a kind of competition of autonomy. The scope of authority of the specialized ombudspersons can be broader than that given to the ombudsman of citizens' rights. It can also include special competencies required for enabling the exercise of the given right(s). That is, they do not only possess the standard scope of authority given to an ombudsperson. Among these, the scope of investigation by the ombudsperson for data protection and freedom of information and the ombudsperson for future generations also extends to the private sphere. Both ombudspersons can also function with authoritative powers. The institutions of the minority and data protection and freedom of information ombudspersons have also served as guarantees for the execution of pertaining directives of the European Union.

1. *By abolishing specialized ombudspersons*, the new Fundamental Law abandons the model of protecting fundamental rights described above. The details of the new regulation are inconsistent or remain unknown. All that the new Fundamental Law says about them is that Parliament will elect by two-third majority two vice ombudspersons “to protect the interests of future generations and the rights of ethnic groups living in Hungary”.

2. According to the Section on fundamental rights “an independent authority, to be created by means of a cardinal act, will oversee the enforcement of the right to the protection of personal data and the right to access information of public interest” (paragraph (3) of Section 6). Although it is difficult to know what exactly is meant by “independent authority”, the most likely scenario is that the ombudsperson for data protection will become a government official. If this institution will not be given guarantees subsequently to safeguard its independence, then this new regulation may

also conflict with the European Union directive for data protection (95/46/EC) which requires “complete independence” of the pertaining official procedures. As regards the level of data protection, it seems unlikely that a government not always steadfastly committed to the transparency of the state and the protection of personal data is going to be efficiently controlled by a government authority. This will yield an absurd situation especially in the area of freedom of information where in each dispute the state is opposed by the “independent authority”.

3. Replacing the specialized ombudsperson, in the future the vice ombudsperson in charge of the protection of the rights of ethnic groups will be chosen by Parliament by two-third majority. Abolishing the position of an independent minority ombudsperson also concerns the requirements of the European Union directive 2000/43/EC. This because the Office for Equal Treatment which handles cases of discrimination alongside the minority ombudsperson is not independent from the government. It is worth mentioning that although the Hungarian government has worked to prepare a framework decision on the Roma in the course of its Presidency of the European Union, the Fundamental Law is not accordance with these efforts as the Roma minority is not explicitly mentioned among the target groups of positive discrimination. Paragraph (5) of Section 15 states that “Hungary takes special measures to protect children, women, the elderly and the handicapped.”

4. The Fundamental Law declares that the protection of the “interests of future generations” will be overseen by a vice ombudsperson elected by a two-third majority. This wording diverges from the current scope of authority of the ombudsperson as it does not refer to the right to a healthy environment. It is therefore unclear what function will be assigned to this vice ombudsperson’s position. If this ombudsperson will really be put in charge of the protection of future generations, then it is questionable who still unborn persons, who are not legal persons, can file complaints at the office of the ombudsperson or even on what grounds ex officio inquiries will be possible.

5. The future of the statutorily created Complaints Committee for Law Enforcement, which was modeled on the institution of the collective ombudsperson, is unclear since the Fundamental Law contains no provisions regarding this issue. At present, the five

members of this body are chosen for a period of six years by a two-third majority in Parliament upon the joint recommendation of the two Parliamentary Committees in charge of law enforcement and human rights, respectively. The scope of authority of this body is special insofar as it can be appealed to not only after all instances of public administration have been used. Rather, the investigation of this body forms part of the procedure, which is concluded by the decision by the Chief of the Police.

13. The constitutional entrenchment of political preferences

It is one of the functions of constitutions to entrench in the form of entitlements or procedural rules those moral values which are shared by the overwhelming majority of society. Fundamental rights, the the doctrine of division of powers and procedural order of decision-making in public matters have been traditionally regarded as such constitutionally entrenched values. By contrast, in countries resembling Hungary in their system of parliamentary governance most issues of public policy, especially economic and social policies, have been assigned to the competence and responsibility of the governing majority winning the elections.

At the time of the Hungarian regime change, the constitution makers have preserved the amendment rule of the original 1949 constitution used to produce a substantively new constitution. Whatever the original reason, this rule requiring only 2/3 of the absolute majority of parliament to make any and all changes to the constitution has been long considered insufficient for a protection of fundamental rights, adequate constitutional review and of the stability of the basic structure of the constitution. Observers in and near the Constitutional Court considered this deficiency the main one requiring the making of a new constitution. The rules for producing a new constitution already referred to during the 1994-1998 parliamentary session responded to this difficulty by linking the making of a new constitution to higher consensual requirements. The FIDESZ government too, in its initial plans, proposed a new amendment rule that would require 2/3 votes in two parliamentary sessions with an election in between to approve constitutional amendments. Unlike its Spanish prototype, not distinguishing between fundamental revision and minor changes, this

rule promised to entrench to too high a degree a constitution that was not produced with sufficient consensus. It was because of such legitimation problems the government backed away from the idea of replacing the purely parliamentary amendment rule. But it chose to compensate for this failure by lifting a large number of ordinary policy issues into the realm of entrenched laws, thereby removing the power of future parliaments to alter policy choices made by the present one. Thus the basic law suffers from two problems at once: insufficient protection of fundamental rights and removal of policy questions from the decisions of future majorities.

The new Fundamental Law regulates some issues which would have to be decided by the governing majority, while it assigns others to laws requiring a two-third majority. This makes it possible for the current government enjoying a two-third majority support to write in stone its views on economic and social policy. A subsequent government possessing only a simple majority will not be able to alter these even if it receives a clear mandate from the electorate to do so. In addition, the prescriptions of the Fundamental Law render fiscal policy especially rigid since significant shares of state revenues and expenditures will be impossible to modify in the absence of pertaining two-third statutes. This hinders good governance since it will make it more difficult for subsequent governments to respond to changes in the economy. This can make efficient crisis management impossible. These risks are present irrespective of the fact whether in writing two-third statutes the governing majority will exercise self-restraint (contrary to past experience). The very possibility created by the Fundamental Law to regulate such issues of economic and social policies by means of two-third statutes is incompatible with parliamentarism and the principle of the temporal division of powers.

1. As regards pensions, the Fundamental Law itself excludes the possibility that a subsequent governing majority create a funded pension scheme based on capital investment. Europe and the Western world in general will face serious demographic challenges in the coming decades. One possible response of public policy to this challenge is the partial transformation of the pay-as-you-go pension system to a funded pension scheme based on capital investment. Such a decision is to be preceded by a comprehensive social debate and assessment of the pros and cons of different public policy solutions. It is not compatible with the functions of the constitution that

the current governing majority excludes the application of one of the available public policy solutions in the Fundamental Law without having been empowered by the electorate to do so. In addition, Section 40 of the Fundamental Law assigns the basic rules of the pension system to a cardinal act, which, as mentioned above, requires a two-third majority. It is impossible to know today to what extent this statute will regulate the pension system. In any case, the Fundamental Law makes it possible that the retirement age and other conditions of eligibility as well as the basis for calculating pensions will be modifiable only by a two-third majority. This prevents subsequent governments winning popular support at free elections to put in practice its own views of pension policy.

2. Section L) of the Fundamental Law specifies that the regulation of family welfare support is also to be subject to two-third statutory regulation. Without knowing the text of the planned statute it is impossible to decide to what extent the governing majority intends to regulate this issue in the pertaining two-third statute. It is clear, however, that the pertaining prescriptions of the Fundamental Law creates the possibility that every detailed issue of the family welfare support will only be modifiable subsequently by a two-third majority. It is to be part of the ruling majority's social policy at any given time to settle questions such as the child's age limit until which motherhood support is paid, the eligibility conditions and amount of this support, or the eligibility of different family types for different kinds of support. Thus, in a parliamentary democracy there is no justification for writing in stone the views of the current government coalition in such a manner.

3. Section 40 of the Fundamental Law states that basic rules of taxation are to be determined by a fundamental statute, that is, one requiring a two-third majority. This prescription makes it possible that the currently ruling government coalition to set its own views in a two-third statute on tax policies, especially as regards the linear, flat tax and the exceptionally high tax benefits for families. This could easily make it impossible that a subsequent government gaining power because of its promise to introduce progressive taxation realize its public policies based on the mandate received from voters.

4. In addition to the long-term fixing of preferences concerning economic and social policies, the governing parties can implement their very own personal preferences, too, in the appointment and replacement of the leaders of independent institutions. Parliament chose as president of the State Audit Office for 12 years and a head of the National Media and Telecommunications Authority for 9 years former MPs of the bigger governing party. The chief prosecutor appointed for 9 years is a former parliamentary candidate of the bigger governing party. Without any additional reason, the coming into force of the Fundamental Law makes it in itself possible that the governing parties nominate only their own candidates for the positions of five Constitutional Court judges, a new president of the Constitutional Court, the head of the ordinary judiciary, as well as new ombudspersons for six, nine and twelve years, respectively. Following the adoption of the Fundamental Law, a statute prohibits the president of the National Council of Justice, who, at the same time, is also the president of Hungary's Supreme Court, to appoint judges until the Fundamental Law comes into force. Clearly, the aim of this moratorium is that the head of the Curia, to be chosen for nine years on the basis of new Fundamental Law, should appoint the heads of the most important courts. This will result in the long-term entrenchment of personal preferences. This can undermine the adequate operation of independent institutions.

5. In a related development, the Fundamental Law gives the Budget Council the right to veto the state budget statute. Two of the three members of the Council were appointed by the ruling government coalition until at least 2019. At the same time, the Fundamental Law fails to define unequivocally what is covered by the Council's right to veto. In addition, it does not contain guarantees to exclude the abuse of the powers of this body. Such guarantees would be all the more required as the drafting of the budget is the competence and responsibility of the governing majority at any given time. This prerogative cannot be limited by a body which seems to be independent, but consists of appointees of an earlier government. This raises the possibility that in addition to – or even instead of – considerations regarding the sustainability of budgetary policies the Budgetary Council may be guided by preferences of public policy when exercising its veto right.

14. The international compatibility of the Fundamental Law

The Fundamental Law expresses its commitment to the international community and international law (Section Q) and also contains a Europe clause, forming the basis for cooperation with the EU (Section E), but with content that is not entirely identical to that of the 1989 Constitution.

According to the 1989 Constitution “[the] Republic of Hungary may exercise certain competences deriving from the Constitution in conjunction with the other member states; ... the exercise of these competences may be realized independently, through the institutions of the European Union” (paragraph 1 of Section 2/A). The Fundamental Law rewrites this as follows: “Hungary may exercise some of its competences arising from the Fundamental Law jointly with other member states through the institutions of the European Union” (“Foundation”, paragraph 2 of Section E.). The original rule permitted the Hungarian state to delegate certain powers to EU bodies in which it has no joint decision-making rights—the Fundamental Law does not allow this. It makes it possible to declare as unconstitutional the delegation of any competence to an EU institution if this results in termination of the nation state's consensual decision-making right. The current constitutional rule was made so as not to stand in the way of the EU's continued development along federal lines – the new underlying intent is to obstruct federalisation.

1. Paragraph (1) of Section Q, unlike the currently effective Constitution, does not contain a renunciation of war and prohibition on the use of force, although in a positive manner it does list peace, security and sustainable development as aims in its cooperation with the nations and countries of the world. Paragraphs (2)-(3) provide with regard to the relationship between international law and Hungarian law, maintaining the requirement for harmony between them, the monist adoption of the generally accepted rules of international law, and the system of dualist transformation in the case of other sources of international law (treaties).

2. Based on point f) of paragraph (2) of Section 24, the Constitutional Court will continue to investigate whether laws breach international agreements; the Fundamental Law does not mention, however, who shall initiate procedures of this

nature, and also makes no reference to the opportunity for an ex officio review. No mention is made of how harmony should be created if a Hungarian law breaches a generally accepted rule of international law. Where an international agreement is breached by a piece of legislation or constituent provision, the annulment of the latter two is only an option (point c) of paragraph (3) of Section 24.). This weakens the requirement set out in paragraph (2) of Section Q, under which Hungarian laws must be in harmony with international law: it would have been more opportune to prescribe categorical annulment of such legislation, naming it as an exception due to a conflict with the EU's founding treaties.

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3. Section E contains only one new rule in comparison to Section 2/A and paragraph (4) of Section 6 of the 1989 Constitution: namely that the law of the EU may stipulate a generally binding rule of conduct. This requirement, incidentally, also follows from the EU's founding treaties. The rule, however, still says nothing about requesting priority of application.

4. With respect to these constitutional norms, the international agreements continue to oblige Hungary to respect, protect and uphold the rule of law, democracy and fundamental rights. The above-mentioned provisions – since they relate to the effect that the laws governing nations have on Hungarian law – are valid in respect of the constitution (as prevailing at any time), and set requirements that broach no exceptions. Several provisions of the Fundamental Law, however, can also be interpreted as permitting exceptions to the aforementioned European requirements – pertaining to democracy, the rule of law and the protection of fundamental rights – and as such they could come into conflict with international commitments.

4. 1. Paragraph (3) of Section R, in respect of the Fundamental Law as a whole—including articles E and Q—makes it compulsory to take the preamble and the achievements (“acquis”) of the historical constitution into consideration for the purposes of interpretation. The preamble, which is, thus, granted normative status, only defines European unity in a cultural sense (“We believe that our national culture is a rich contribution to the diversity of European unity), sees international cooperation in terms of nations (in contrast to the wording of article Q), and its collectivist approach is not in keeping with the spirit of the European Convention on

Human Rights (ECHR) and the Charter of Fundamental Rights. The substantive meaning of “the achievements of our historical constitution” is totally ambiguous; there is no legal-scientific consensus in Hungary regarding their precise nature, and it is by no means obvious whether it should be taken to include the precedents stemming from Constitutional Court’s interpretation practice accumulated since the regime change, while it is also unclear which of the achievements are reconcilable with international commitments.

4. 2. It also deserves a mention that the Fundamental Law – in contrast to Section 5 of the currently effective Constitution – does not express its constitutional recognition of the borders set out in the relevant international agreement.

4. 3 It is problematic, from the perspective of the requirement of democracy, that the Fundamental Law does not clearly identify the political community as the community of citizens living subject to the laws of Hungary; accordingly it permits the naturalisation of Hungarians living abroad without their relocation, and raises the prospect that together with “extraterritorial” citizenship, they will also be given the right to vote.

Such enfranchisement does not comply with articles 39-40 of the Charter of Fundamental Rights or with paragraph (2) of Article 20 of the TFEU. This is because it does not assure the citizens of other EU member states of the same conditions as Hungarian citizens in European Parliament and local authority elections, since for the former group must have a Hungarian place of residence, while in the case of Hungarian citizens this requirement does not apply.

The creation of democratic will is restricted by the fact that the Fundamental Law stipulates that many of the current government’s public policy preferences, from family and tax policy to pensions policy, must be enshrined in cardinal acts, which could make it impossible for voters who are dissatisfied with today's government policy to achieve a change in the direction of government.

4. 4. The principle of the rule of law is compromised by the fact that violating the Fundamental Law has no effective constitutional consequence or sanction, since in the

case of legislation pertaining to public finances the restrictions on the Constitutional Court's right of review and annulment, with the exception of four areas of fundamental law, will remain in place for an indeterminate period. As a consequence of the restrictions on Constitutional Court review power, numerous fundamental rights (especially, e.g. the right to property, social rights, freedom of enterprise, the right to employment, the principle of non-discrimination) are weakened. In the governmental system of a parliamentary democracy, the institution of constitutional review, which serves as a counterbalance against parliamentary and the executive actions, is what guarantees the division of power and safeguards the sovereignty of the law (finally, the constitution). The closer this so-called "acting unit" is between the legislative and the executive branches, the broader the review power should be constitutionally ensured in order to maintain a healthy balance. Paradoxically, with the chosen solution the Fundamental Law also rules out the protection of its own public finance provisions by the Constitutional Court. Breaches of the constitutional rules pertaining to public finances are most likely to occur through precisely those laws on the budget, taxes etc., which the Constitutional Court is not even permitted to review in terms of their compliance with Sections 36-40. Thus, the section on public finances is less effective, and does not represent a full guarantee with regard to international financial obligations.

4. 5. According to Section K of the Fundamental Law, Hungary's official currency is the forint. This new provision runs counter to the onus on member states to fulfil their obligations arising from the founding treaties of the European Union. In the Accession Treaty Hungary agreed to adopt the European Union's common currency, the euro, as and when it meets the conditions for doing so. In this case, it is not the member state that decides whether to join the euro, but the European Council. In other words, the Hungarian constitution-maker has no authority to provide with regard to the national currency.