

# Opinion on Hungary's New Constitutional Order:

## Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws

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## Introduction

The Hungarian Parliament passed Hungary's Fundamental Law (Constitution) on 18 April 2011,<sup>1</sup> and it entered into force on 1 January 2012. The Council of Europe's Venice Commission, in an opinion approved at its plenary session on 17 and 18 June 2011,<sup>2</sup> expressed its concerns about a constitution drawn up in a process that excluded the political opposition as well as professional and other civic organizations. At that time, 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, particularly the "cardinal" or super-majority laws that are crucial supplements to the new constitution.

As this new system, with an extended number of cardinal laws, was rushed through the Parliament and into effect, the worries of the Venice Commission unfortunately turned out to be well-founded. We regret to report that there was almost no consultation either with opposition parties or with civil society groups during the preparation of the cardinal laws. Parliamentary committees speeded approvals of the laws on party-line votes, often without even having a text before them to determine for certain what they were voting on. The opposition parties received drafts of laws only when they were published on the parliamentary website, often with little time to systematically study the proposals. Consequential amendments to draft laws were made on the floor of the Parliament minutes before final votes. Almost never did the ruling party permit discussion of opposition proposals. When the Constitutional Committee of the Parliament, which determines whether the rules of parliamentary procedure were violated, was asked for its opinion on these tactics, the committee always ruled that no violations had occurred – and those decisions within the committee were made on party-line votes. The blizzard of legislation

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

<sup>2</sup> Opinion of the New Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session, 17–18 June 2011, CDL-AD(2011)016, § 13. See:  
[http://www.venice.coe.int/docs/2011/CDL-AD\(2011\)016-E.pdf](http://www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf) .

made it very difficult for the parliamentary opposition, civil society groups, legal professionals or ordinary citizens to know what was in all of these laws.

Since it has come to power in late spring 2010, the government has very frequently used the parliamentary procedure of a private member's bill to move its legislative agenda. In fact, the constitution itself was adopted using a private member's bill.

Under the rules of parliamentary procedure in Hungary, private member's bills can use a streamlined procedure. Ordinary government-sponsored legislation requires an elaborate procedure of consultation both with interested groups and with the parliamentary opposition before a bill can be introduced on first reading. By contrast, private members bills can skip the consultation stage and be introduced without any advance notice to parties that may oppose the law or be affected by it. Using private member's bills, the government could and did take a cardinal law or even a constitutional amendment from first proposal into full legal effect in a very short period of time, sometimes in as little as ten days. About half of the cardinal laws enacted already were introduced and passed as private member's bills.

If there was very little debate on the laws before the new constitution went into effect, the new year is likely to bring much less. On 30 December 2011, the Hungarian Parliament passed a change to the rules of parliamentary procedure that entered into force on 1 January 2012. Under this change of rules, if a two-thirds vote of the Parliament approves (and the governing party has two-thirds without needing any opposition parties to join them), a bill can go from first proposal to final vote with much shorter debate.<sup>3</sup>

By the time the new constitution went into effect on 1 January 2012, the Hungarian Parliament had enacted many but not all of the so-called cardinal – or super-majority – laws that the constitution required in order to specify elements of the constitutional order. These laws substantially altered many constitutional institutions in Hungary and have made the guarantee of constitutional rights less secure.

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<sup>3</sup> 98/2011. (XII. 31.) OGY határozat.

In the last two weeks of 2011 alone, while most of the country prepared for the holiday season, the Parliament enacted hundreds of pages of new laws and also passed an omnibus constitutional addendum which the constitution required as “the Act on Transitional Provisions to the Fundamental Law” (“Transitional Provisions”). In passing the Transitional Provisions,<sup>4</sup> the Parliament asserted that everything in that act is – according to the wording of the act itself - now part of the Fundamental Law as if it were all one giant constitutional amendment. While the constitution required that Transitional Provisions be passed to clarify how the new constitution would be brought into effect, this omnibus law does much more than specify transitional provisions. A number of sections of the law are not transitional at all but instead purport to make permanent changes to core provisions of the constitution. Moreover, since the Transitional Provisions were passed on 30 December, published on 31 December and went into effect with the new constitution on 1 January, the primary purpose of this law – to give governmental institutions and citizens notice of how the new constitution would be phased in – was lost. Instead, the Transitional Provisions in practice acted like a giant collection bin for stray thoughts about what should be added to the final constitution in light of developments since it was passed by Parliament. For example, when the Constitutional Court ruled in mid-December that it was unconstitutional for the public prosecutor to select the court that would hear each criminal case, the ruling party simply put into the Transitional Provisions the very same now-unconstitutional provision that the Court had annulled.<sup>5</sup> This new power of the public prosecutor is now argued by the government to be part of the new constitution.

The Fundamental Law specified that many “cardinal acts,” providing important elaboration of the constitutional order, be passed before the Fundamental Law took

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<sup>4</sup> As the Hungarian authorities did not provide an official English translation of the Transitional Provisions, and also because the Venice Commission stated in its Opinion (§ 16), the translation of the Fundamental Law provided by the Hungarian Ministry of Public Administration and Justice and published on the official website of the Hungarian Government may not accurately reflect the original version in every point, we provide our own translation of the Transitional Provisions. See the appendix of this opinion.

<sup>5</sup> For more on this, see the section below on the judiciary.

effect.<sup>6</sup> Cardinal acts are not necessarily laws in which all of the provisions have cardinal status. Instead, many of the cardinal laws regulate a whole subject area and mix cardinal sections with ordinary statutory provisions within the same law. While most of the cardinal laws have been passed, not all have been. Among the cardinal laws in the constitution that remain to be enacted are important laws on the Parliament, electoral procedure, and party financing. In the meantime, the constitution has already gone in effect without critical parts of its implementing legislation. As a general trend, the old constitution used the supermajority requirement to ensure heightened protection for fundamental rights, but in the new Fundamental Law, the function of cardinal laws is to place rules about the structure of and personnel in governmental institutions beyond the reach of a (future) simple majority of Parliament.

In its first 20 months in office, in fact, this government passed 365 laws,<sup>7</sup> including twelve amendments to the old constitution that together changed more than 50 individual constitutional provisions. Many of these changes to the old constitution -- for example, changes in the composition and competencies of the Constitutional Court -- assisted the government in carrying out its new constitutional drafting process without challenge from other state bodies.

Throughout this campaign of parliamentary activity, rarely did any MP from the ruling party dissent. It was also rare when any of the opposition parties voted for any of the laws and, on the few occasions where it happened, it was the far-right party Jobbik that joined the government's side.

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<sup>6</sup> The precise number of required cardinal laws is contested. The Venice Commission in its Opinion put the number of cardinal laws at 50 (§ 22), but the Hungarian Parliament's website lists only 32 cardinal laws because the government grouped the substantive areas differently (<http://www.mkogy.hu/fotitkar/sarkalatos/sarkalatosvekjegyzeke.pdf>). Either way, the Venice Commission argued that the subjects of cardinal laws, as prescribed by the new Hungarian Constitution, are far too many, and recommended restricting the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority. §§ 25, 27. Instead, in the Transitional Provisions, the government added a section, Article 28(5), that permits the Parliament during the first year of operation of the new constitution to designate any other subject as requiring a supermajority law.

<sup>7</sup> This number was given by Prime Minister Viktor Orbán in his speech to the European Parliament on 18 January 2012, <http://www.bbc.co.uk/news/world-europe-16613934>.

This root-and-branch revision of the legal system has created a great deal of legal uncertainty. The constitution came into effect without some of the key cardinal laws that would give it important meaning. Even in cases where cardinal laws were passed, administrative regulations that are necessary to make these laws precise enough to use as a guide for administrative behavior were not enacted before the laws took effect.

On 17 January 2012, the European Commission started accelerated infringement proceedings against Hungary over three issues jointly regulated by the constitution and the new cardinal laws: the independence of the central bank, the independence of the data protection authority and some measures affecting the judiciary, particularly the sudden and mandatory lowering of the retirement age from 70 to 62.<sup>8</sup> On 16 February 2012 the European Parliament called on the European Commission to request the opinion of the Venice Commission on the legislative package consisting of the new constitution, the Transitional Provisions and the cardinal laws as a whole and continue working together on these matters with the Council of Europe.<sup>9</sup>

Before the European Commission issues its request to the Venice Commission, we provide in the following chapters more detailed analysis of the cardinal laws that the Venice Commission was already asked to review, either at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe (PACE), (including the laws on freedom of information, the Constitutional Court, the prosecution, nationalities, and family protection), or at the request of the Hungarian

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<sup>8</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>

<sup>9</sup> European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP))

authorities (including laws regulating the independence of the judiciary, the status of churches and elections to Parliament).

The request of the Hungarian authorities came as a response to the letter of January 2012 by the Secretary General of the Council of Europe Thorbjørn Jagland to the Minister of Foreign Affairs János Martonyi inviting Hungarian authorities to request the Venice Commission to provide opinions on these controversial laws. The Hungarian government accepted the invitation with respect to three of the laws. But in the same letter, the Secretary General also invited Hungary to request the expertise of the Council of Europe on the media law. Mr. Martonyi expressed the willingness of the Hungarian government to ask for this opinion after a planned amendment to the media law, which has not yet occurred. We do not know when the government will make changes to this law, nor what the changes will be. But because we anticipate that the government will ask for a review of this law eventually, we also provide our opinion on this law as it presently exists.

Because it affects a number of laws that the Venice Commission will review, however, we start our analysis with the Transitional Provisions, which the government has claimed are now incorporated into the new constitution.

## **The Act on Transitional Provisions of Hungary's Fundamental Law**

The Hungarian Parliament passed the Act on Transitional Provisions of the Fundamental Law (Transitional Provisions) as a separate law complying with the specifications of Clause 3 of the Fundamental Law's Final Provisions. The provisions that determine how the Fundamental Law will come into effect and related transitional matters are clearly part of the Fundamental Law, even if they were not part of the original text of the constitution. However, the Transitional Provisions also include many other articles that are clearly not transitional in nature nor responsive to the demands of Clause 3 of the Fundamental Law's Closing Provisions. They are therefore not logically related to the purpose of a transitional act.

It is our view that, even though these additional articles appear in the document that contains the Transitional Provisions, they should be considered simple statutory provisions without special status and not part of the constitution. These provisions cannot be considered transitional because, most obviously, they purport to change or supplement the new constitution permanently. In addition, they were not presented to the Parliament as constitutional amendments at the time of their enactment, nor were they enacted following a debate that expressed the understanding that all elements of the law were intended as constitutional amendments. Unless a provision is enacted as a constitutional amendment, in our view, it cannot be considered a part of the constitution.

Even for the parts of the law that are truly transitional in their function, the timing of the enactment of this law was unfortunate. The law was passed on 30 December 2011, published on 31 December and entered into force on 1 January 2012, the same day as the new constitution. Given that transitional provisions of constitutions are generally designed to maintain legality through the process of moving from one constitutional order to another, leaving no time for public notice of these transitional provisions before the new constitution took effect meant that the law could not have had one of the major beneficial effects of such laws: allowing people to plan for the transition.

A number of the "non-transitional" clauses of the Transitional Act are inconsistent with sections of the Fundamental Law itself, and with the international agreements that bind Hungary:

a) Paragraphs (3) and (4) of Article 11 of the Transitional Act legally enable the president of the National Judicial Office to name the particular court that will hear any particular civil or criminal case – even though the court she may specify is different from the generally competent court that would have jurisdiction under normal circumstances. These provisions also enable the public prosecutor to send any criminal case to a court other than the generally competent court as well.

Both provisions conflict with Article XXVIII of the Fundamental Law, according to which everyone has the right to have - in response to any accusation against him, or in any suit - his rights and obligations duly represented in a public and fair hearing of an independent and impartial court of justice, within a reasonable time. By putting the power to select the court that will hear particular cases into the hands of two state officials who hold political offices, the provisions in question deprive any litigant or any accused of the right to a neutral judge and to the fair litigation that is also guaranteed by Article 6 of the Charter of Fundamental Rights of the European Union. In Decision 166/2011 (XII. 20.) AB of the Constitutional Court, a law giving this power to the public prosecutor to select the court in any criminal case was found both unconstitutional under domestic constitutional law and contrary to the European Convention on Human Rights. But that decision was effectively overturned in 10 days by the Parliament when it added this power to the Transitional Provisions.

b) Under paragraph (1) of Article 21 of the cardinal law and again under the Transitional Provisions, the power to designate legally recognized churches is vested in the Parliament itself, while under the corresponding rules of the new Cardinal Law on the Status of Churches, previously registered churches lost their legal entity status in a way that affects their civil rights and obligations.

By empowering the Parliament itself to recognize the legal-entity status of churches without access to judicial review, paragraph (1) of Article 21 of the Transitional Provisions violates the requirements of access to court and the right to a legal remedy stated in Article XXVIII of the Fundamental Law .

The fact that the Parliament makes all decisions about the registration of individual churches creates a unique situation in Hungarian law in which a matter pertaining to fundamental rights is decided by a political body. Moreover, the criteria churches have to meet to regain their legal entity status are not transparent, and the procedure specified in the law through which these registrations is incomplete. As

a result, the provision that gives the power to Parliament to designate legally recognized churches confers an essentially discretionary power. This violates Article XXVIII of the Fundamental Law ensuring the right to access to court and legal redress, because (1) the procedure for the registration of churches will not be carried out by a court of law, and (2) the discretionary decision is not subject to judicial review. The only possible remedy in these cases might be a constitutional complaint against the specific decision. But it is unclear whether such a constitutional complaint is within the jurisdiction of the Constitutional Court because such parliamentary decisions (*határozat*) are not currently included in the list of legal acts that the Court can review.

If the government's claim is sustained that all parts of the Transitional Provisions are now part of the constitution, then this inclusion of the power of Parliament to legally recognize churches in the constitution has another worrisome consequence. By putting Parliament's power to recognize churches in the constitution itself, there will almost surely be no constitutional review of the practice by the Constitutional Court. The Constitutional Court could review for constitutionality a cardinal law that designates the Parliament as the agent of church designation but, under its jurisprudence to date, it cannot review a part of the constitution that does the same thing. We believe that all non-transitory parts of the Transitional Provisions are not part of the constitution, but if they are eventually found to be included, then the Parliament's role in designating churches could not be challenged before the Constitutional Court.

c) Article 27 of the Transitional Act extends the restrictions in the power of the Constitutional Court for a longer period of time than the Fundamental Law specified in Article 37 paragraph (4) of the Fundamental Law. Under the Fundamental Law, the Constitutional Court is precluded from reviewing for constitutionality any law that pertains to fiscal matters, unless the statute violates one of a listed number of rights that are all hard to infringe with a budget or tax measure. The Constitutional Court may review a fiscal law if it infringes the right to life and human dignity, freedom of conscience, thought and religion and a few more rights, but not if the law

infringes rights to property, freedom of religion, or equality before the law, which are far more likely to be affected by tax measures. In the constitutional text itself, previously reviewed by the Venice Commission, this restriction on the competence of the Constitutional Court was time-limited so that the Court was barred from reviewing such laws only when the national debt exceeded one half of the GDP. But under the Transitional Provisions, this restriction on the jurisdiction of the Constitutional Court is now extended so that the Constitutional Court may *never* review any fiscal law enacted during the period when the national debt exceeded one half of the GDP, even when the debt eventually falls below the target level. In short, a restriction on the Constitutional Court that was originally temporary in the Fundamental Law is now made permanent. This removal of fiscal laws from the jurisdiction of the Constitutional Court, not just when an economic crisis is going on but *ever*, constitutes a permanent modification of Article 37 (4) of the Fundamental Law. The provision therefore violates both Article R (1) of the Fundamental Law, according to which the Fundamental Law is the foundation of the Hungarian legal system, and also Article T (3), under which the legislation cannot be contrary to the Fundamental Law. And of course, this provision may infringe the rights of individuals that are not listed in the set of rights that would permit the Constitutional Court to be granted an exception to the general prohibition of review. So, for example, a tax provision that infringes an individual's right to property or equality under the law may, under the Transitional Provisions, never be reviewed by the Constitutional Court. The Parliament may now enact fiscal laws that violate the constitution and individual rights, and the Constitutional Court is not just temporarily but permanently barred from reviewing them.

d) According to Article 30 of the Transitional Provisions, the Parliament may merge the Hungarian National Bank (the Magyar Nemzeti Bank or MNB) with the existing Financial Supervisory Authority to create a new agency, within which the central bank would be just one division. The government would then be able to name the head of this new agency, who would effectively become the supervisor of the president of the central bank, reducing the central bank president to a mere vice-

president within a new agency. The law does not actually complete the merger – it just lays the groundwork for the later disappearance of the free-standing bank.

Article 42 of the Fundamental Law indicates that only a cardinal law may determine the rules and regulations for the body responsible for monitoring the financial system. According to this provision of the constitution, the MNB may legally exercise supervision over the Financial Supervisory Authority. The proposed merger of agencies is therefore constitutional as long as the MNB supervises the financial regulator and not the other way around. However, Article 30 of the Transitional Provisions allows for the creation of a new agency that would merge both the MNB and the Financial Supervisory Authority under a new supervisor. This would violate the requirement in Article 41 of the Fundamental Law, stating that the Hungarian National Bank is responsible for monetary policy. If the National Bank were itself to be supervised by the head of this new agency, it would be unclear just where monetary policy was set – at the central bank level or in the office of the person to whom the president of the MNB reports. And that would mean that the MNB alone was not clearly responsible for monetary policy, a violation of Art. 41 of the Fundamental Law.

e) The sentence in paragraph (2) of Article 31 of the Transitional Provisions that states that the Transitional Provisions themselves constitute a part of the Fundamental Law in fact violates the Fundamental Law. It does so because, as we have argued, the Transitional Provisions includes certain changes that are not in fact transitional, without following the constitutional procedures for amending the constitution, as stated in Article S) of the Fundamental Law. As a result, the non-transitional sections of the Transitional Provisions breach the above-quoted Article R) paragraph (1) and Article T) paragraph (3).<sup>10</sup>

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<sup>10</sup> This is what the Hungarian NGO, the Eötvös Károly Policy Institute, argued in its fictitious motion to the Constitutional Court that was published on 31 January, 2012. This NGO has been filing petitions with the Court that could have been heard under the Court's old jurisdiction but that cannot be heard under the Court's new jurisdiction as a way of

There are other problems with the Transitional Provisions as well, apart from the fact that many are not transitional and that they bypass the formal constitutional amendment procedure. Even the “transitional” parts have some constitutional problems, too.

The first part of the Transitional Provisions lists accusations against communist party officials during the Soviet period (Art. 2), extends the statute of limitations for these crimes (Art.3), brands the former communist party a "criminal organization" (Art. 3), and designates the current Socialist Party (Fidesz's primary opposition) as the legal successor to the communist party (Art. 4), hence responsible for all of its crimes. It is not clear what normative consequences follow from these statements, because as Hungarian criminal law now stands, organizations may not be held criminally responsible for the actions of their members.

The Transitional Provisions clearly contemplate, however, that the leaders of the communist party may be prosecuted for crimes they committed while in office (Art. 3). But it is not clear that the crimes that these leaders could be tried for were in fact crimes at the time they were committed. The Transitional Provisions open the way to prosecuting crimes that involve “maintaining a repressive system, violating fundamental rights and betraying the nation,” without regard to whether those offenses correspond to concrete prohibitions in the criminal law at the time. The Transitional Provisions therefore contemplate retroactive criminalization of certain actions, not just lifting the statute of limitations for crimes that were already on the books. Further clarifying legislation will be needed to see just what the government plans to do with these provisions, but in an act intended to have legal effect, and not just in a declaration, the lack of clarity surrounding these issues of criminal liability is troubling.

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protesting the cutback of the competencies of the Constitutional Court. See: <http://www.ekint.org/ekint/ekint.news.page?nodeid=500>

Other aspects of this framework cause legal uncertainty, completely apart from the retroactive effect of the waiver of the statute of limitations or the retroactive criminalization of certain actions, however heinous. At a minimum, these sections of the Transitional Provisions overturn decisions of the Constitutional Court from the 1990s that found that statutes of limitations for ordinary crimes could not be extended without breaching the principle of legal certainty, a principle which continues to be part of the new constitution. The Court always permitted crimes from the Soviet period to be prosecuted if they rose to the level of war crimes in international law, because there are no statutes of limitations in international law for such crimes. The Transitional Provisions effectively nullify these prior decisions by the Constitutional Court, once again opening the courts for prosecution of ordinary crimes committed during the Soviet period that were not prosecuted for political reasons at the time, even though the Constitutional Court argued in its earlier decision that the term “political reasons” is legally uncertain. The term has become no less uncertain with the passage of time or the adoption of the new constitution. And the retroactive nullification of the statute of limitations for a long list of crimes also violates an important principle of the rule of law.

The Transitional Provisions are also troubling because they are inconsistent with respect to honoring the terms of office that were in mid-course as the transition approached. Article 18 of the Transitional Provisions permitted the President of the Budget Council to remain in office after 1 January 2012, while Article 11(2) ended the terms of the President of the Curia (formerly Supreme Court) as well as the President and members of the National Justice Council (which formerly had the task of appointing judges). These are truly transitional positions, so the objection to them is not that they make permanent changes to the constitution. The worry here is about arbitrariness. Perhaps more troubling, the inconsistent treatment tracks political loyalty. These provisions permitted a ruling-party-appointed official who headed the Budget Council to keep his job while firing those, particularly the President of the Supreme Court, who were not appointed by the ruling party.<sup>11</sup>

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<sup>11</sup> The remaining member of the Budget Council was Zsigmond Járai. Járai’s term of office on the Budget Council was explicitly extended, despite the fact that the Budget Council

Even if the inconsistency is not due to political reasons, the firing of the President of the Supreme Court in the Transitional Provisions ignored an important caution of the Venice Commission– which was against using the Transitional Provisions to end a term of office to which someone had been elected under the old constitution.<sup>12</sup> Ending the terms of members of the National Judges Council is more understandable, as the functions of that council – particularly selecting judges – was given to a completely new office. Nonetheless, there was no transition from one arrangement to the other that would have permitted the President of the Supreme Court and the members of the National Justice Council to finish their terms of office before being replaced.

## **The Act on the Protection of Families**

1. The Parliament adopted the new cardinal law on the protection of families (Act No. CCXI of 2011) on 23 December 2011. In line with the governing parties' prior practice the bill was introduced on 2 December 2011 by four individual MPs, all belonging to the Christian Democratic People's Party. The Christian Democratic People's Party ran a joint party list with Fidesz in the 2010 election, and now sits formally as a separate parliamentary fraction, though it functionally acts as part of the ruling party. By introducing the law as a private member's bill and not as a government bill, the government was able to avoid both the rules on extensive public consultations (as prescribed by Act No CXXXI of 2010) and the rules on producing a required impact assessment [24/2011 (VIII. 9.) KIM decree]. It is highly problematic that, with a law affecting millions of Hungarian families, the final text was adopted without the involvement of representative civil society organizations.

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underwent such a major transformation that it was barely recognizable as the same body that had preexisted the new constitution. But Járαι was a close ally of the ruling party. Before his term started, however, Járαι resigned, but this was a personal choice and did not happen because he had been refused the job in the new system. By contrast, Judge András Baka, the President of the Supreme Court, fought the personnel changes that were compromising the independence of the judiciary and the Transitional Provisions arranged for his departure. Even though the Supreme Court remained largely the same institution before and after the constitutional changes, Justice Baka was required to leave.

<sup>12</sup> Opinion of the Venice Commission, No. 618 / 2011, 20 June 2011, Para. 140.

2. The Act reflects the extremely conservative approach of its drafters. The family is perceived as an independent community pre-dating law and state and it “rests on moral grounds”. The Act puts heavy emphasis on the types of families based on marriage and the raising of children, and considers them to be basis of sustainable development and economic growth. The Preamble of the law clearly ranks marriage-based families above other forms of families by stating that “(T)he solid ground for the establishment of the family is marriage, which is a union for life based on mutual love and respect, therefore it must always be in held in the highest esteem.” The Preamble further emphasizes that “being raised in [marriage-based] families is more secure than any other form of upbringing” and “families fulfill their role if the stable and firm relationship of a mother and a father is consummated by taking responsibility for a child.”

Unusual in Hungarian law, the Act gives a definition of family to be used in all other legislation regardless of purpose. In Article 7 it declares: “(1) Family is the relationship between natural persons in an economic and emotional community that is based on a marriage between a woman and a man, or lineal descent, or family-based guardianship. (2) Lineal descent is established by way of filiation or adoption.”

This definition of family is extremely exclusionary; it simply ignores hundreds of thousands of Hungarian families<sup>13</sup> and creates a direct link between family and marriage, which does not follow either from the relevant provision of the Fundamental Law, or from the international instruments Hungary has ratified. According to Article L of the Fundamental Law, “Hungary protects the institution of marriage as a life community based on the voluntary decision of a woman and a man, *and* the family as the guarantee of the survival of the nation” (emphasis added). The definition enshrined in the Act clearly connects the notion of family to

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<sup>13</sup> According to the Microcensus in 2005 14.71 % of couples live in cohabitation rather in marriage. This proportion is as high as 40% in the age group 25-29. The number of cohabiting couples is dynamically growing: in 1990 it was only 5.1, while in 2001 11.3 and in 2005 14.71 %. See: *Demográfiai Portré 2009*, Népeségstudományi Kutatóintézet and mikrocensus.hu.

the very traditional understanding of marriage and including lineal descent or family-based guardianship does not make it much broader. It is highly problematic that childless *de facto* partners and registered same-sex partners are not covered, and it is not certain if cohabiting or registered partners raising children who are biologically related to only one of them fall under this category. The definition is inconsistent with lower level legislation<sup>14</sup> affecting rights and benefits of families, thus the adoption of the Act is a threat to legal certainty and acquired rights.

3. The institution of cohabitation (“élettársi kapcsolat”) has been present in the Hungarian legal system since the late 1970’s, however originally it was limited to different-sex couples living in an emotional-economic community. In 1995, the Constitutional Court on the basis of a petition claiming the unconstitutionality of the Family Code’s provision permitting marriage and civil unions only for different-sex couples, found that the exclusion of same-sex partners from cohabitation was in violation of the then-existing Constitution. In Decision No 14/1995 (13 March 1995) the Court emphasized: “(A)n enduring union of two persons may realize such values that can call for legal acknowledgment on the basis of equal human dignity of those affected, irrespective of the sex of the cohabiting partners.”<sup>15</sup> With regard to registered partnerships, the Constitutional Court went even further when, in Decision No 154/2008 (17 December 2008), it found that the institution was constitutional for same-sex partners.<sup>16</sup> The Court confirmed that “with regard to same-sex persons, who may not get married according to the Constitution, the legislation should grant them a constitutional way to obtain a legal status – similar to that of spouses – guaranteeing their treatment as persons of equal dignity.”

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<sup>14</sup> Most importantly Act No IV of 1959 on the Civil Code (succession) and Act No XXIX of 2009 on Registered Partnership and Related Legislation and on the Amendment of Other Statutes to Facilitate the Proof of Cohabitation (creating registered partnership as family law institution), and legislation concerning child-care benefits afforded to the cohabiting partner of the biological parent.

<sup>15</sup> The Civil Code was accordingly amended in June 1996 by Act No XLII of 1996.

<sup>16</sup> The plain reference to ‘marriage’ in Article 15 of the previous Constitution was consistently interpreted by the Constitutional Court to include only different-sex couples. See in addition to those cited above: Decision No 65/2007 (18 October 2007) and Decision No 32/2010 (25 March 2010).

The legislator in enacting the new law on families clearly failed to include the already existing and recognized family law institutions under the concept of family defined in the Act. One may argue that by virtue of the general reference to marriage in Article 3 (1) of Act on registered partnership, registered same-sex couples are covered simply through the mentioning of marriage in the Act, but this interpretation is rather optimistic and to some extent unreasonable. Should have the drafters wanted to include registered partners in the concept of family, they could have explicitly mentioned them. The omission seems to be intentional: the Act evidently – in line with its Preamble – favors and considers worthy of protection only marriage-based communities. And same-sex partnerships were never permitted access to the institution of marriage itself, even under the liberal Constitutional Court decision that in 1995 required them to have access to the institution of civil unions.

Furthermore, in addition to the very restrictive definition of the family, Article 8 introduces a new provision on succession rights: “(1) In the event of intestate succession (hereinafter: legal succession), primarily persons related through lineal and collateral kinship to the statutory degree or adoption, and spouses shall be entitled to succession. (2) The State and other persons shall only be entitled to legal succession in the absence of the persons mentioned in paragraph (1).”

According to Article 607 (4) of the Civil Code in force, the registered partner of the deceased is treated in the same way as a spouse, *i.e.* he/she will inherit property in absence of direct descendants. Depending on the applicability of the general reference rule discussed above, this provision may limit the succession rights currently explicitly granted for same-sex registered partners.

4. The restrictive notion of family is in clear contradiction with the interpretation followed by the European Court of Human Rights under Article 8 of the European Convention on Human Rights. It is well-established in the case-law of the ECtHR that “(t)he existence or non-existence of ‘family life’ for the purposes of Article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties.” [*K. and T. v. Finland* 25702/94 (12/07/2001), par. 150] The Court does

not limit the notion of family life in Article 8 to “families based on marriage” as “it may encompass other de facto relationships.” In the Court’s understanding, “(w)hen deciding whether a relationship can be said to amount to ‘family life,’ a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means.” [*X, Y and Z v. the United Kingdom* 21830/93 (22/04/1997), par. 36]. The Court also found that “the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.” [*Kozak v. Poland* 13102/02 (02/03/2010), par. 98.]

It is very apparent that the Convention jurisprudence advocates a far more inclusive definition of family than the Hungarian legislator was ready to accept. In addition to marriage, the Act emphasizes the importance of lineal descent, which is not considered to be a primary factor in the relevant ECtHR jurisprudence. The European Commission on Human Rights in 1993 found that, without developing additional ties with the child, “the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child.” [*J. R. M. v. the Netherlands* 16944/90 (08/02/1993)]. The German Federal Constitutional Court came to a similar conclusion when assessing the constitutionality of second-parent adoption for registered partner. The Federal Constitutional Court emphasized that the relationship between the child and his/her parent cannot simply be founded on descent, but the *de facto* community raising the child needs to be taken into consideration as well [BVerfG, 1 BvL 15/09 (10/08/2009)]. In today’s society it is not rare that children are not raised by both parents. All the more reason why the legislator should thus not exclude real family settings that do not fit the narrow Hungarian definition, like families where children are brought up by one biological parent and his/her partner who – by this definition – is not considered to be part of the family.

5. The Act's silence on same-sex couples – be they registered or cohabiting partners – also fails to meet the ECHR standards. In 2010, the ECtHR with reference to the developments in the Council of Europe member states and the European Union declared: “(I)n view of [the above described] evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy ‘family life’ for the purposes of Article 8. (...) (A) cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of ‘family life,’ just as the relationship of a different-sex couple in the same situation would.” [Schalk and Kopf v. Austria 30141/04 (24/06/2010), par. 94]

The Council of Ministers in Recommendation CM/Rec(2010)5<sup>17</sup> also confirms that “(W)here national legislation recognizes registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.” (Recommendation 24) The Constitutional Court's position on registered partnership and also the very wording of the relevant act unequivocally refers to marriage as “comparable situation” for registered partners. In the light of this it is incomprehensible why the legislator failed to explicitly include them in the definition of family.

In its opinion 618 / 2011 on the Fundamental Law, the Venice Commission noted that the clause limiting marriage to a man and a woman moved in the opposite direction from European human rights jurisprudence and cautioned Hungary that it might soon be in violation of European human rights law with this provision. The new Law on Families makes even more exclusionary the vision of families that Hungarian law recognizes.

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<sup>17</sup> On measures to combat discrimination on grounds of sexual orientation or gender identity.

## Freedom of Religion and Church-State Relations

In January 2012, a new legal regime became applicable to church-state relations and indirectly regulates freedom of religion as an individual right. The Cardinal Law on the Status of Churches is based on newly introduced distinctions between various types of religious organizations so that now there are three possibilities in Hungarian law: churches<sup>18</sup> recognized in the original law, churches added to the law by subsequent parliamentary decision and non-recognized religious associations. The new Law on the Status of Churches listed fourteen legally recognized churches, and at the same time required all other previously registered churches (some 330 religious organizations in total) to either re-register under considerably more demanding new criteria, or continue to operate as mere religious associations without the legal benefits offered to the recognized churches (like tax exemptions and the ability to operate state-subsidized religious schools). As a result, the new regime clearly deprives the vast majority of previously registered churches of the benefits of legal-entity status at least temporarily (i.e. until their successful re-registration). Since the new registration criteria for churches are significantly more demanding than the previous conditions were, it is expected that the majority of previously registered churches will not be able to continue to operate with legal recognition under the new regime. Non-traditional and non-mainstream religious communities – which had not faced legal obstacles between 1989 and 2011 – are particularly likely to face increasing hardships and discrimination as a result.

1. The previous legal regime on freedom of religion and church-state relations was governed by the 1989 Constitution (Article 60) and Act no. IV of 1990 on Freedom of Conscience and Religion, and Churches. Under the 1990 law, 100 persons could request the registration of a church from a court of law, as long as they presented a charter of operations with a self-governing organizational structure and a declaration

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<sup>18</sup> The word “church” here reflects the Hungarian word choice but also includes non-Christian religious associations that do not use this term. While three Jewish congregations were initially recognized in the new law, no religious institutions belong to other non-Christian faiths like Islam, Buddhism, Hinduism or Bahai’i were granted official legal status as churches in the legal framework when it was initially passed.

that the founders intended to pursue a religious activity (Article 8(1) and Article 9). The registry of churches was kept at the Metropolitan Court in Budapest. Registration was granted as a matter of formal compliance with the language of the 1990 statute, with no further in-depth inquiry. The 1990 law did not distinguish among various types of religious organizations; registration under the law meant that all religious communities received the same status. It is estimated and was commonly accepted also in the parliamentary debate on the new legal regime that approximately 350 churches had been registered under the 1990 law in Hungary before the summer of 2011.

2. The new legal regime entirely replaces the previous one, governed by the 1989 constitution and the 1990 statute. The new legal regime was introduced in multiple phases, and its key components entered into force on 1 January 2012. Its pillars are the new Fundamental Law of Hungary, which was subsequently supplemented by a set of Transitional Provisions enacted on 30 December 2011 (see *supra* to the discussion of the Transitional Provisions) and the most recent cardinal law on freedom of conscience and religion, and on the legal status of churches, religious congregations, and religious communities (Act no. CCVI of 2011), also adopted on 30 December 2011 and taking effect 1 January 2012.

Act no. CCVI of 2011, the cardinal Law on the Status of Churches, which governs not only the status of churches but also some fundamental aspects of religious liberty, came into being in a rather unusual way. This cardinal law passed the Parliament in December 2011, replacing a nearly identical cardinal law passed in the summer of 2011 (Act no. C of 2011) with the same title. In its initial form passed in summer 2011, this act –the first cardinal law passed to put the 2011 Fundamental Law into operation – was meant to replace the old law on church-state relations (Act no. IV of 1990) by introducing much harsher criteria for church registration. In mid-December 2011, however, it was leaked to the press that the Constitutional Court planned to invalidate the cardinal law on church-state relations due to procedural irregularities in the parliamentary process leading to its adoption. As a result, the cardinal law on church-state relations was withdrawn by Parliament on December 19, 2011 through

an amendment appended to the act on national minorities (Act no. 179 of 2011, Article 241) just before the decision of the Constitutional Court invalidated the law on church-state relations on procedural grounds (164/2011 (XII. 20.) AB decision). Soon afterwards, and according to the regular practice of the current government, the latest, very similar law was reintroduced into the Parliament as a private member's bill and not as a government bill, a procedure that permitted the government to bypass any consultation with the opposition or with civil society groups. At the time the bill was tabled, it did not have a title or text. It was first read, in a general reading, on 23 December 2011 and it was passed on 30 December 2011, along with many other laws on the last day of the parliamentary session for the year.

Although rules to implement the first cardinal law on church-state relations (Act no. C of 2011) had never been adopted, reportedly nearly 80 churches applied for re-registration with Parliament by the time the more recent cardinal law was finally passed. In the week of 13 February 2012, when the Parliament returned from winter recess, a new bill was tabled that would grant formal recognition to an additional 13 churches (bill no. T/5839)<sup>19</sup>. At the same time, a motion for a parliamentary decision was tabled refusing the petitions of 67 other churches (motion no. H/5857). As the form of these new measures suggests, the Hungarian Parliament will recognize new churches by passing formal amendments to the cardinal Law on the Status of Churches, within which the recognized churches are listed by name. But refusals to register a petitioning church are registered only in a parliamentary decision without normative force. Although the cardinal law specified that the Hungarian Academy of Sciences should assist in determining one of the criteria for registration – that the church existed somewhere in the world for at least 100 years – the Hungarian Academy of Sciences refused the request and so the Parliament made its decisions without scientific input. In addition, the Parliament made its decisions without providing an analysis of the evidentiary bases for the rejections, which would have been particularly helpful in the cases where

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<sup>19</sup> The 13 items are in reality 17 churches, as the 13<sup>th</sup> item (“Buddhista gyülekezetek”) includes 5 Buddhist communities.

petitioning religious organizations were turned down. If churches understood why they were being denied registration, they could then provide the Parliament with evidence that addressed the decisive issues.

3. The new Fundamental Law expressly provides protection for freedom of religion as an individual right (Article VII(1)) and also requires the separation of church and state (Article VII(2)). It is a new element that the respective constitutional provision now also provides that “The State shall cooperate with the Churches for community goals” (Article VII(2)), as the corresponding provision of the 1989 Constitution (Article 60(3)) did not contain any express reference to cooperation.

The Fundamental Law demands that the rules for churches are set in an act passed by a qualified majority, a so-called cardinal law (Article VII(3)). This is a clear departure from the 1989 Constitution which required that only limitations on freedom of religion as an individual right be set by an act of Parliament passed by a qualified majority (Article 60 (4)). As a result, under the new Fundamental Law only the institutional dimensions of church-state relations receive more intense protection, while – unlike before – freedom of religion as an individual right may be limited by an ordinary act of Parliament. This departure from the standard of protection in the 1989 Constitution clearly indicates the diminished significance of freedom of religion as an individual right, and places emphasis on church-state relations instead.

The Transitional Provisions added to the Fundamental Law on December 30, 2011 introduce new distinctions among legally recognized churches on the constitutional level (Transitional Provisions, Article 21(1)). Under this new rule Parliament is required to identify so-called recognized churches (*elismert egyházak*) in a cardinal law, thus clearly empowering Parliament to offer a privileged position *ex lege* to certain churches. This is a clear departure from the preceding legal regime in which the constitution did not distinguish among churches recognized as such by the state, let alone require a two-thirds vote of the Parliament itself for such recognition. Article 21(1) of the Transitional Provisions expressly provides that a cardinal law on

church status may require particular criteria for recognition, including a particular length of time operating in the country, membership totals, historical traditions and societal support. These criteria for church recognition are new and more burdensome to establish than the criteria that they replaced.

The privileged status offered to recognized churches in the Transitional Provisions, together with the list of potential conditions of church recognition seek to establish a constitutional foundation for the system of church registration introduced in the 2011 cardinal law on church-state relations.

4. The 2011 cardinal law classifies fourteen select churches as 'recognized churches' in its appendix. All other churches which were registered under the 1990 legal framework have to seek re-registration as churches or they may continue to operate merely as associations (Article 34(1)) without the benefits that come with official recognition. The 2011 cardinal law assigns responsibility for the registration and re-registration of churches to a discretionary decision of the Parliament. Under the law, Parliament may decide to register a religious association as a church upon the request of 1.000 persons (Article 14(3)), provided that the community has been present in Hungary for at least 20 years, or has been known internationally for at least 100 hundred years (Article 14(2)(c)). The decision of Parliament requires assessing the religious nature of the activities of the applicant, including whether the applicant has creeds and rites reflecting the essence of its teachings and also requires assessing whether the applicant has met the various time requirements. This effort, according to the law, is assisted by the opinion of the president of the Academy of Sciences (Article 14(4)). But there is no procedure before the Parliament where the petitioning religious organization may present evidence about whether it has met the criteria for registration nor is there any avenue through which an adverse decision of the Parliament may be appealed.

The new system of church registration is more restrictive in many respects than its predecessor 1990 law has been, and thus presents a clear diminution of standards of

protection and vested rights in the domain of freedom of religion in Hungary. The conditions for church registration as defined in the 2011 law appear to run counter to European human rights standards (especially as defined in Article 9 and 11, and Article 6(1) of the Convention). In addition, the distinctions introduced in the 2011 cardinal law between churches and religious associations permit and even require discrimination against newer and smaller religious communities in Hungary.

The substantive conditions for registration, as well as the procedure of registration are equally problematic from the perspective of European human rights protection standards as exposed by the *Guidelines for Review of Legislation Pertaining to Religion or Belief*, prepared by the OSCE / ODHIR Advisory Panel of Experts on Freedom of Religion or Belief, in consultation with the European Commission for Democracy through Law (Venice Commission) (2004), and with respect to the jurisprudence of the ECtHR on freedom of religion read in conjunction with freedom of association (Articles 9 and 11)<sup>20</sup>. As their bottom-line, the *Guidelines* posit that “Provisions that operate retroactively or that fail to protect vested interests (for example, by requiring re-registration of religious entities under new criteria) should be questioned” (at 16). This should be the starting point for the evaluation of the 2011 Hungarian cardinal law on church-state relations, since the 2011 law requires the re-registration of already registered churches under considerably more demanding criteria.

First of all, under the 2011 law, the entry-level legal entity status for religious communities is not that of a registered church, but of a religious association operating under the Civil Code and the law on associations (Article 6(1)). Such religious associations differ in one respect only from other associations: resolutions of religious associations passed in connection with their religious operation are exempt from judicial review. Since registered associations are required to operate with a registered membership under Hungarian law, this format is unfit for the

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<sup>20</sup> See: *Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria* (35. vj.) § 66; *Metropolitan Church of Bessarabia and Others v. Moldova* (89. vj.) § 118; *Canea Catholic Church v. Greece* (92. vj.) §§ 30 and 40–41; *Kimlya and Others v. Russia*, application nos. 76836/01 and 32782/03, judgment of 1 October 2009, § 85.

exercise of religious freedom as the registration requirement runs counter to the right to the freely choose one's religion.

Secondly, the registration criteria for churches appear to run counter to standards discernible from the *Guidelines* which qualify 'high membership requirements' as unwelcome (p. 17). The new Hungarian membership requirement is the second highest in Europe, after the Slovak law which requires 20.000 founding members.

Thirdly, the 20-year waiting period for before a church may be registered in Hungary, appears excessive in light of ECtHR jurisprudence. Not long after finding that a 15-year waiting period required for re-registration violated the Convention in the Russian context, the Court ruled in the Austrian context<sup>21</sup> that a 10-year waiting period required for upper-tier registration was a violation of the Convention. Importantly, the ECtHR emphasized with regard to re-registration procedures that the state shall provide very weighty reasons for denying registration if the affected church had already obtained legal status and had not otherwise violated the law (i.e. apart from operating without the required new registration while waiting for their re-registration process to conclude).

The need for a new law on churches was justified in the Hungarian parliamentary debates by the need to eliminate registered churches that were simply taking advantage of the tax exemption to protect their business dealings and by the need to bring order to church-state relations through reducing the total number of registered churches. These reasons do not appear to correspond to any of the legitimate aims listed in Article 9(2), especially considering the new conditions for re-registering churches. If the government were concerned about illegally operating churches, it could have brought a legal action against the individual church in an ordinary court to establish this fact. But instead, the state through this new cardinal law simply deregistered more than 300 churches and forced them to reapply through a more burdensome process.

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<sup>21</sup> Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria

Fourthly, under the 2011 cardinal law, the decision on granting church status rests with the discretionary decision of Parliament, and the 2011 law does not offer any access to judicial review against this parliamentary decision. This procedure is not simply in violation of Article XXVII of the new Fundamental Law but is also clearly in contravention of ECtHR jurisprudence which requires under Article 6(1) access to court for private law actions since its decision in *Golder v the United Kingdom* in 1974. More specifically, in the freedom of religion context, the ECtHR found that lack of access to court in a property dispute over church property violated the Convention.<sup>22</sup>

Finally, the 2011 cardinal law maintains that legally recognized churches are equal in their rights and duties (Article 9(1)) but does not extend this protection to religious associations, thus creating a very clear distinction between churches and religious associations. Furthermore, Article 9(2) expressly provides that “in the course of passing further legal regulation in connection with the social role of the churches and in the course of keeping contact with them, the state may take into account the actual social role of churches, the public interest activities they perform” (Article 9(2)). Such a clear invitation to discrimination between religious communities using unclear and unpredictably applied standards appears to run counter to the recent jurisprudence of ECtHR on discrimination in church-state relations.<sup>23</sup>

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*Sambata Bihor Greco-Catholic Parish v. Romania*, application no. 48107/99, judgment of 12 January 2011.

<sup>23</sup> *Cha 48107/99, judgment of 12 Januar[GC]*, no. 27417/95, ECHR 2000-VII . See: Opinion 643/2011, CDL-AD(2011)028, Joint opinion on the draft law on freedoms of conscience and religion and on the laws making amendments and supplements to the criminal code, administrative offences code and the law on the relations between the Republic of Armenia and the Holy Armenian Apostolic Church of the Republic of Armenia, [http://www.venice.coe.int/site/dynamics/N\\_Opinion\\_ef.asp?L=E&OID=643](http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?L=E&OID=643) .

## Media Freedom

Hungary's media laws [the Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content (Smtv.) and of the Act CLXXXV of 2010 on media services and mass media (Mttv.)] appear to be inconsistent with European free-press norms,<sup>24</sup> standards of democratic constitutionalism and the basic principles set forth in article 2 of the Treaty on the European Union [hereinafter: TEU].

The main criticisms of the media laws (Smtv. and Mttv.) are:

- a) Political dependence of the Hungarian Media and Telecommunication Authority and its overbroad regulatory authority powers
- b) Unreasonable and unconstitutional regulation of the print and on-line press
- c) Political influence on public service media
- d) Disproportionate and unpredictable sanctions causing chilling effects

Right after the elections in 2010, the newly elected Parliament started to revolutionize the media landscape of Hungary. The first set of legal changes<sup>25</sup> completely restructured the institutional setup of the regulatory system. The Parliament established a so-called converged regulator, the National Media and Telecommunication Authority (NMHH), as the legal successor of the previous media and telecommunications authorities, nominating the same chairperson to lead the newly established body. A few months' later the "Media Constitution" (Smtv.)

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<sup>24</sup> The term "free press norms" refers to the rules and regulations pertaining to press freedom stipulated in Article 11 of the Charter of Fundamental Rights of the European Union, Article 10 of the European Convention on Human Rights (ECHR) and Article 19 of the UN Declaration of Human Rights. The term has been used by the study on "Hungarian Media Laws in Europe; An Assessment of the Consistency of Hungary's Media Laws with European Practices and Norms" published by the Center for Media and Communication Studies (herein: CMCS Study), 2012.

<sup>25</sup> Act LXXXII of 2010 on the amendments of certain laws regulating the media and electronic communications

entered into force specifying the scope of the future regulatory system. Traditional broadcast media (radio and television), on-line audio-visual media, print media and the on-line press were all drawn under the jurisdiction of this new board, when previously both print and on-line media had been exempt from regulation. The final step was the enactment of the “Media Law” (Mttv.) at the end of 2010 which entered into force on 1 January 2011. With this law, the NMHH became a “super-regulator,” with jurisdiction over public service media and with the power to use completely unprecedented regulatory methods and an overwhelming sanctioning system.

In order to properly understand the relevance of Hungarian media laws, we also have to take into account the overall democratic and constitutional context of the country. On 1 January 2012, a new constitution entered into force. As the Venice Commission previously noted, the new Fundamental Law has deeply redesigned the constitutional setup of checks and balances across all major areas of the democratic playing field. The limitation that these changes place on the democratic system makes even more important the need to safeguard freedom of speech and freedom of communication in Hungary. The new regulation of the media system should be understood within the context that any criticism of the government is not provided with satisfactory democratic guarantees as the opposition and civil society are not typically consulted on new laws, nor are they represented in the system of appointments that the ruling party has made to high-level independent “checking” bodies like the Constitutional Court or the electoral commission or to high-level posts like the public prosecutor, head of the National Judicial Office or head of the State Audit Office – or for that matter, to the Media Board. Therefore, the debate on the new media laws predictably gained a high profile within the Hungarian and international public sphere as almost no domestic legal remedy has remained<sup>26</sup> to preserve fundamental freedoms and the rule of law.

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<sup>26</sup> The Constitutional Court decision (Decision No. 165/2011. (XII. 20.) AB of the Constitutional Court, herein: Constitutional Court decision on the media laws) made some modifications in the system of media regulation by exempting print media from the onerous requirements it was required to fulfill for the first time. But with the new jurisdiction of the Constitutional Court, it is obvious that the Court can no longer provide necessary review of

We also have to be aware of the limited negotiating position and self-representing power of private media that operate in the free market since almost all of them depend to some extent on the state. Private media are dependent on the state either because they want to get their share of the large advertising budget distributed by state agencies and state-owned companies or because they have business interests in liaising with the public service broadcasters. The media laws were introduced and passed as private member's bills, which allowed their sponsors to bypass required consultation with opposition parties and civil society groups that a normal government-sponsored bill would have had to do. Shielded from public scrutiny in the legislative process, the government had the opportunity to make "deals" with the private media and thus to gain their support for the establishment of the new system.

An assessment of Hungarian media laws must consider this broader context. Certain legal provisions which are acceptable in countries with deeply rooted democratic values and systems of checks and balances may have a completely different role within the Hungarian legal and political context. Even though other converged regulators (e.g. Ofcom in the UK) serve as role models all over the world, the new "super-regulator" NMHH has become a symbol of concentration of political and regulatory power and the regulation of the print media has been seen as the attack on the last free space of the media sector. Although some supervision of the press is present in European countries as well, including regulation of media and systems of fines for violating regulations, the reorganization of public service media in Hungary produced direct political control over newsrooms while the sanctioning powers of NMHH created severe chilling effects on editorial content.

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the new media laws. Although the Court's December decision annulled some important parts of the media laws as of 31 May 2012 and declared that there were constitutional omissions with respect to other parts of the law, the Court never addressed the most debated issues (e.g. the institutional system, public service media, etc.) before its power to review these structural matters disappeared on 1 January 2012.

We focus on the most problematic areas of the new regulatory system: the independence of the “super-regulator” NMHH, the rules applicable to the press,<sup>27</sup> and the establishment of direct political influence, both on the public service media and on the sanctions to which media providers may be subject.

1. Independence of regulators is a highly disputed issue all over the world. An objective measuring of independence is hard to establish but indicators can be recognized and evaluated. “A regulator is independent if its governance structure ensures that its decision-making processes meet the normative requirements for which the independence of the regulator is necessary.”<sup>28</sup> This can be measured<sup>29</sup> against the following key indicators:

- Status and powers of the regulator
- Financial autonomy of the regulator
- Autonomy of decision makers
- Knowledge of the decision makers
- Transparency and accountability mechanisms

In terms of *status and powers*, the Chairperson and the Media Council of NMHH are provided with the broadest regulatory power over all possible communication markets including audio-visual linear and on-demand media, public service media, printed and on-line press, and the complete electronic communication sector. Furthermore, the regulator is provided with the authority to adopt normative acts with respect to *tendering, licensing, managing the spectrum, surveillance,*

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<sup>27</sup> Though the laws pertaining to the print media were nullified by December’s Constitutional Court decision, they will remain in force until 31 May 2012 and will then have to be replaced after the jurisdiction of Constitutional Court that would enable it to review them has lapsed. Therefore, these regulations are still a matter of concern despite the Constitutional Court’s decision.

<sup>28</sup> Hans Bredow Institute for Media Research/Interdisciplinary Centre for Law & ICT (ICRI), Katholieke Universiteit Leuven/Center for Media and Communication Studies (CMCS), Central European University/Cullen International/Perspective Associates (eds., 2011): INDIREG. Indicators for independence and efficient functioning of audio-visual media services regulatory bodies for the purpose of enforcing the rules in the AVMS Directive. Study conducted on behalf of the European Commission. Final Report. February 2011, p. 5.

<sup>29</sup> Id. at 4 p. 67-74.

*monitoring, and issuing sanctions.* This concentration of power in one body is unreasonable.

Within the Hungarian context, where the chair and all members of the NMHH are affiliated with the current ruling party as will be explained below, this concentration of powers is particularly overwhelming and unbalanced. The Chairperson of NMHH can act without consulting the rest of the council in reaching some of the most important decisions relevant to the media system. The rights provided to the Chairperson include appointing, dismissing or recalling *without the requirement of justification* the Vice-Presidents, the Director General of the Office of NMHH and the Deputy Director Generals.<sup>30</sup> These powers provide *de iure* influence on the daily operation of NMHH and are not balanced with institutional checks. These powers also enable the Chairperson to influence public service media by wielding power over the financing system of public service broadcasters.

The overwhelming authority of the Media Council within NMHH can also be seen in the lack of checks and balances built into the system for checking the use of the council's regulatory powers during tendering procedures. The rules on tender procedures<sup>31</sup> for broadcasting frequencies allow the Media Council to intervene into any tendering process and influence the outcome of the process by prolonging the closing of bids without any limit<sup>32</sup> or terminating the tendering process<sup>33</sup> at any time. These rights of the Media Council provide for possible arbitrary decisions, also making it more likely that broadcasters favorable to the Media Council will be selected in these tenders.

The financial autonomy of the regulator is proclaimed in the new media laws because its financing is independent from the state budget, generated instead by revenues provided from the payments of telecom operators' frequency charges and fees payable for the booking and use of identifiers. But in practice, the relation

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<sup>30</sup> Article 111 para. (2) of Mttv.

<sup>31</sup> Mttv. Part Two Chapter III.

<sup>32</sup> Article 53 of Mttv.

<sup>33</sup> Article 61 of Mttv.

between the budget of NMHH and for the budget for Hungary's public media, is neither transparent nor accountable because the use of the surplus of the budget of NMHH for financing the public media is based on personal decision of the Chairperson.<sup>34</sup> Using the NMHH's revenues in this way might also violate the EU framework for regulating telecoms.<sup>35</sup>

The *autonomy of decision makers* in case of NMHH is also an indicator where we can detect obvious signs of possible political influence. Because the Chairperson of the Media Council is appointed directly by the prime minister for nine years, the appointment can be a directly political one. There is no public debate over who the powerful chair of this council is. The term of nine years mean that an appointee of the current government can remain in place through more than two election cycles, which mean also that future governments, even of a different political orientation, will have to live with this particular regulator. In addition, the members of the Media Council are elected to their posts for nine years by a two-thirds vote of the Parliament. That two-thirds requirement might under normal circumstances require that multiparty agreements are reached on the occupants of these important positions, but in the current circumstance it guarantees that members of the ruling party may elect every member of the Council without consulting or accommodating any of the opposition parties in making this selection. Moreover, the members of the Council may only be replaced by a subsequent two-thirds vote of the Parliament, which a future government may find difficult to achieve. In those cases, the

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<sup>34</sup> "Article 134 (5) The amount of frequency charges and fees payable for the booking and use of identifiers shall be regulated by the President of the National Media and Infocommunications Authority in a decree. Portions of frequency charges, that were not used by the Authority for operating purposes – under the Act defined under Paragraph (2) – or were not used to generate reserves as outlined under Paragraph (1), shall be paid into the Fund as instructed by the President. The President shall designate in his/her instructions the public purpose for which, and the manner, in which the amount paid into the Fund in accordance with this Paragraph may be used. Any amount transferred pursuant to this Paragraph may be used by the Fund strictly as instructed and for the purpose designated by the President."

<sup>35</sup> Article 12 of the Authorization Directive ([2002/20/CE](#)) lays down precise provisions relating to the administrative charges that member states can levy on operators authorized to provide telecoms services and networks. Charges on telecoms operators can only cover certain administrative and regulatory costs. As the charges on telecom operators are used also for financing public media in Hungary, this might infringe EU telecom rules.

members of the Council may remain in their posts until such a supermajority is achieved, which may extend the 'dead hand' control of the Media Council even further.

The method of appointing and electing the Media Council's board and Chairperson have resulted in *de facto* political dependence. This political dependence is all the more worrying in light of the authority of the Chairperson to appoint, dismiss or recall<sup>36</sup> *without justification for the recall*<sup>37</sup> the Vice-Presidents, the Director General of the Office of NMHH and the Deputy Director Generals, powers provided *de iure* in the new media laws.

Regarding the *knowledge of the decision makers*, we can't detect any serious indicator of threat to independence, as the law sets clear qualifications for the members of the Media Council. They must possess a higher education degree and at least three years of work experience.<sup>38</sup> The professionally selected staff members of the legal predecessors of NMHH, the former media authority, ORTT and the telecom regulator, NHH, have remained largely unchanged.

The *transparency and accountability mechanisms* include the obligations to publish and justify the decisions of the regulator, to conduct consultations and to provide in the law for appeal procedures against the decisions of the regulatory body. Although NMHH is required to publish not only its decisions but also its recommendations, documents for consultation purposes, etc., not even these requirements have so far guaranteed transparency of the regulator in many key issues.<sup>39</sup> Therefore we have to signal serious problems related to this indicator as well.

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<sup>36</sup> Article 111 para. (2) of Mttv.

<sup>37</sup> Article 113 para. (6) of Mttv., Article 115 para. (7) of Mttv., Article 117 para. (4) of Mttv.,

<sup>38</sup> Article 124 para (2) of Mttv.

<sup>39</sup> Two decisions of NMHH as Special Authority, the rejection of the merger between AxelSpringer and Ringier (MP-1671-13/2011, [http://mediatorveny.hu/dokumentum/89/nmhh\\_szakhatosagi\\_allasfoglalas.pdf](http://mediatorveny.hu/dokumentum/89/nmhh_szakhatosagi_allasfoglalas.pdf)) and the approval of the merger of IKO and M-RTL (Decision of the Media Council 1309/2011. (X. 5.)), may serve as examples. Both decisions, each of which has a major impact on the media

2. Print media and the online press are traditionally the most established forums of freedom of speech in Hungary. The Hungarian press market is declining in terms of revenues and copies sold, as is true virtually everywhere. But there were no major problems in the past 10-15 years which would have required new regulatory intervention. The regulation of the print press by the “super-regulator” therefore seems unwarranted. The on-line press since its existence<sup>40</sup> is subject to general laws and also to self-regulation.<sup>41</sup> The vaguely defined rules<sup>42</sup> and the ensuing heavy sanctions<sup>43</sup> were in the focus of debates on the new media laws.

As print and on-line press are regulated in many European and EU member states to some extent (separate press laws, constitutions, and/or professional codes of ethics, even penal codes provide for certain rules<sup>44</sup>), statutory regulation of print and on-line press *itself* may not be considered harmful to the freedom of the press. However, *we cannot find any other regulatory system where the press is subject to such an intrusive kind of centralized regulation without any reasoned, evidence-based background.* Neither the regulator nor the Parliament has been able to justify why bringing the press into the regulated markets was necessary and no impact assessment has been conducted since the new laws went into effect.

The main concerns about the new rules regulating the press are constitutional and policy issues in their nature:

- since print and online press may have a different impact compared with the impact of audiovisual media, rules applicable to audiovisual media

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market, were published with considerable delay only after strong public pressure on NMHH for disclosure.

<sup>40</sup> Origo.hu and Index.hu, the portals with the highest viewership were established in 1999.

<sup>41</sup> Since 2001 the Association of the Hungarian Content Providers ([www.mte.hu](http://www.mte.hu)) is a well-organised and effective body for the self-regulation of the on-line press.

<sup>42</sup> Articles 14-18 of Smtv. stipulate the „Obligations of the press” . The rules include the obligation to „respect human dignity”, not to “incite hatred against any nation, community, national, ethnic, linguistic or other minority or any majority as well as any church or religious group”, etc. whereas the exact content of these rules is unknown and therefor provides the regulator with unnecessarily broad discretion in its decisions while interpreting these rules.

<sup>43</sup> Article 187 of Mttv. para (3)

<sup>44</sup> CMCS Study p. 11.

when applied to press may cause disproportionate limitation of freedom of speech and are therefore unconstitutional,

- illegitimate over-regulation of the press,
- possible imposition of severe sanctions and fines in case of breach of the disputed rules resulting in a chilling effect.

Some of the concerns are recognized in the Constitutional Court decision on the media laws, declaring unconstitutional parts of the law dealing with the print media on grounds of human dignity (Article 14 (1) of the Smtv.), the rights of persons interviewed (Article 15 of the same Act), human rights (sentence two of Article 16 of the same Act) and the protection of privacy (Article 18 of the same Act) as they constitute an unnecessary and disproportionate limitation on the freedom of press. The Constitutional Court annulled the critical rules with effect of 31 May 2012.<sup>45</sup> This means that the rules are still in effect for now.

However, the other rules that were prospectively annulled by the Constitutional Court – rules pertaining to the prohibition of hate speech, the protection of the constitutional order, the prohibition of coverage of persons under humiliating and defenseless conditions, the protection of minors, and the limitations on commercial announcements – may be imposed again by the regulator if certain conditions specified by the Constitutional Court are met.<sup>46</sup> However, given that the competency of the Constitutional Court has been changed, it is unclear whether there is any way to ensure Court review of what the regulator chooses to do next under this decision.

We believe the content supervision by the Media Council over print and on-line media is still unreasonable and intrusive, because the scarcity argument for

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<sup>45</sup> The only provision which is annulled with an immediate effect was a condition related to the (non)protection of journalistic sources based on public interest.

<sup>46</sup> The Constitutional Court has annulled these rules also by the effect of 31 May 2012 but provided legitimation for their re-imposition from a constitutional point of view.

electronic media does not apply here. When adopting the new rules related to regulation of the press, the regulatory powers of the Media Council should be restricted only to on-demand video content as was permitted in the AVMS Directive. From a policy perspective, the regulation of the press should be subject to general laws and to effective self-regulation. In fact, in the area of self-regulation, we can already find important signs of improvement.<sup>47</sup>

3. The new media laws have also provided for the re-regulation of the public media system in Hungary. A completely new institutional, organizational, and supervisory scheme has been set forth merging previously separate public service companies – among them the national news agency and its Board of Trustees, the Supervisory Board and Public Service Body, and the Programming Service Support and Property Management Fund (hereinafter: Fund). With this consolidated framework, the Media Council is provided with critical regulatory powers over the operations of the entire public media system.<sup>48</sup>

The key player of the new institutional system is the *Fund*<sup>49</sup> which *allocates money to employees, property and the general budget of the public service broadcasters*. Control over these funding decisions results in the *de facto and de iure* control of the public broadcasting system. This means that the Fund and the controlling body of the Fund have the power to control the public media in a non-transparent way.<sup>50</sup> The decisions over the allocation of the means of the Fund are not subject to any consultation or public debate, there are no preliminary set requirements on the principles nor are there evaluation criteria for assessing whether the allocations were appropriate. In addition, the decisions of the Public Service Fiscal Council are

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<sup>47</sup> The Forum of Chief-Editors has recently declared its establishment and adopted their Ethical Codes [http://foszerkesztokforum.files.wordpress.com/2012/01/english\\_ethical-guidelines\\_-final.pdf](http://foszerkesztokforum.files.wordpress.com/2012/01/english_ethical-guidelines_-final.pdf)

<sup>48</sup> Mttv. Part Three

<sup>49</sup> Mttv. Article 108 para. (1)

<sup>50</sup> The lack of accountability and transparency is detectable also if we take into account that the Fund is accountable only to the Media Council and not to the Board of Trustees or to the Public Service Body.

not published.<sup>51</sup> The control of the Fund is in the hands of the Media Council and its Chairperson, all of whom are presently close affiliates of the current ruling party (see above).<sup>52</sup> This kind of institutional and organizational setup combined with the strong role of the “super-regulator” is unprecedented in the European context.<sup>53</sup>

We can conclude that this concentration and centralization of operational powers clearly endangers the independence of editorial freedom within the public media and is contrary to the recommendations set forth in the Recommendation of the Council of Europe.<sup>54</sup> The new rules have established a public media system in which the public broadcasters' program is *not* based on valid and publicly debated social needs. Instead, the system through which the Chairperson of the Media Council and the CEO of the Fund are selected seems guaranteed to ensure political dependence instead.

4. The new media laws have also introduced entirely new consequences for violating the rules set forth in Smtv and in Mttv.<sup>55</sup> These provisions grant the Media Authority's Office and the Media Council sanctioning powers over all media, including print and the online press. These powers are unpredictable and potentially

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<sup>51</sup> Article 108 of Mttv.

<sup>52</sup> According to Mttv. Article 136 para. (11) the Chairperson of the Media Council appoints, dismisses and remunerates the CEO of the Fund.

<sup>53</sup> “... In response to criticism over the Media Council's role in managing the new fund for Hungary's public service media, the Hungarian government cites an example from one EU country, Finland, in which it states the media authority has a similar role. According to the country expert, this example is not accurate. The Finnish Communication Regulatory Authority's (FiCOra) role in managing public media financing is purely administrative: it collects the annual license fees from households and businesses for the State television and radio Fund. FiCOra has no authority to set the level of overall funding for public media, to allocate funding to public media outlets or to determine for what activities the funding is to be utilised. FiCOra has no relationship with the Fund other than to collect license fees.” CMCS Study, p.12.

<sup>54</sup> see Council of Europe Recommendation 1878 (2009) Funding of public service broadcasting

“... 16.2. ensure a sustainable structure of their public service broadcasters, which provides for adequate safeguards for their editorial and managerial independence in accordance with Committee of Ministers Recommendation No. R (96) 10 on the guarantee of the independence of public service broadcasting;

16.3. ensure the accountability of public service broadcasters including regular reviews of their public service mission and their meeting public service objectives and user demands;”.

<sup>55</sup> Mttv. Part Four Chapter Five

disproportionate,<sup>56</sup> endangering the existence of media outlets in some cases, and resulting in chilling effects in editorial rooms.<sup>57</sup>

The scope of the sanctioning powers of the regulator is unprecedented within the European context as well:

As the expert analyses show, the Media Authority's sanctioning scope over all media appears to exceed those afforded to other media authorities in all cited examples [across Europe]. The expert evaluations indicate that the sanctioning policies referenced are often imposed by various regulatory bodies and/or the courts, which have regulatory and sanctioning powers over different media sectors; in Hungary, a single authority has sanctioning power over all media. Although in many of these systems, traditional print and/or online press can be penalised for violating various legal statutes or laws—including in some cases for breaches to provisions in the criminal codes—sanctions in a majority of these examples are managed by separate regulatory bodies, independent press councils and/or the courts.<sup>58</sup>

Hungary's system of media regulation is therefore outside European norms.

## **The Act on Parliamentary Elections**

1. The system of the right to vote and the right to stand for election had been partly restructured by the Fundamental Law and have now been further changed by the Law on the Election of Representatives to the Parliament.

a) In line with decisions of the European Court of Human Rights, the drafters of the constitution had already eliminated provisions that stripped the right to vote from individuals who serve prison sentences or cannot vote due to physical

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<sup>56</sup> The amounts of the potential fines lay between 3 to 200 million HUF according to Article 187 para. (3)

<sup>57</sup> See testimonials of journalists who worked at the public service broadcasters, or the report and associated the press release of the Article 19 Expert Group <http://www.article19.org/resources.php/resource/2851/en/hungary:-international-mission-condemns-chilling-effect-and-calls-for-change>

<sup>58</sup> CMCS Study, p. 13.

disabilities. However, according to Article 26(2) of the Transitional Provisions of the Fundamental Law, those whose voting rights had been suspended because they are disabled or require care face an uncertainty when the Fundamental Law came into effect since the law does not set a deadline for reviewing their voting status.

- b) The Fundamental Law eliminates the restrictions, imposed by Parliament in the summer of 2010, on the right to vote of serving members of the Hungarian Defense and public safety organizations as well as on the right of retired members to stand for election within three years after departure from service. All of those categories of people may now participate in the electoral system.
- c) While the Fundamental Law indicated that it would be possible for Hungarians living outside the borders to vote in general elections, the Law on the Election of Representatives to Parliament has now established a definite right for citizens without permanent residency to vote, albeit only for a party list and not for candidates in individual districts. The exclusion of these non-resident Hungarians from voting in individual districts does not, in our opinion, constitute a violation of the principle of equal voting right since in other countries non-resident citizens vote in a special system which inevitably leads to concerns about equal weights of each vote, also. In and of itself the extension of voting rights to non-resident citizens does not violate the constitutional consensus in Europe; nevertheless, in Hungary, this concept raises serious issues due to the unique historic context, especially given the system adopted by the current Parliament. Non-resident citizens tend to constitute a small fraction of the general electorate in most other countries and tend not to substantively influence the outcome of parliamentary elections, except in very close elections. In Hungary's case, however, experts estimate that that number of non-resident Hungarians eligible to vote could reach as many as five million: all descendants of post-1929 émigrés remained to be citizens of Hungary, in addition, the legislation adopted by the current government extends the citizenship by request to Hungarians living in the neighboring countries. By contrast, Hungary has only eight million voters living within the country's borders. Since the number of Hungarians living abroad who would be eligible to vote is very large and since Parliament could extend the

circle even wider, these citizens could significantly influence the composition of Parliament. From the perspective of democratic legitimacy, this is very problematic as these Hungarians may be decisive in elections even though they do not fully bear the responsibility of their decisions because they do not have to live under the laws passed by the Parliament they have helped to elect. This phenomenon is problematic, even though most of the citizens living abroad are likely to stay away from voting.

2. The new electoral law assumes a Parliament with 199 members, much smaller than the current 386. This change aligns with the historic preference of the electorate; however, the sharp reduction in the size of the Parliament required substantially changing the previous system which elected 176 representatives directly from the various districts, 152 indirectly through party lists in counties (“megye”) and 58 on national party lists through the compensation system. Until now, parties with a national list were compensated both for their votes in the county list not required to secure a mandate, and for the votes for the candidates falling short of gaining a mandate in their respective individual constituencies.

- a) The electoral system preserves the two-vote, majoritarian and proportional features of the previous system, yet the proportion of single-member-district representatives elected in the 106 newly created districts, increases from 45.6% to 53.5%. This still remains well within the European constitutional norms, especially given that in many other countries, a clearly majoritarian system is in place.
- b) In the new system, candidate nomination requires relatively fewer signatures in individual districts. While the absolute number of signatures required to nominate a candidate in a particular district has gone up, the districts have roughly doubled in size without doubling the necessary number of signatures. In that regard, the new registration requirement may actually be a bit easier than in the old system. In the new single-round electoral system, however, the plurality

winner on election day takes the district, which may lead to concentration of parties in blocks but does not violate democratic principles.

c) Since the mandates achieved from the party list cannot be divided proportionally among the regions, since the number of mandates allocated for a region would be too small, voters may only vote for a national list and the compensation votes will only be applied to mandates in the national list. The system retains the 5% threshold for national lists and slightly tightens the number of candidates required for creating national lists (under the prior system, but applying the new rules 23.64 individual candidates would be needed to create a national list, while the new system requires 27 candidates) and the regional requirements for creating a national list (the prior system needed seven regional lists for creating a national list, while the new system requires that the 27 candidates be nominated in ten regions including Budapest). The new system will also compensate for the votes cast for the winner that exceeded the number required to secure the candidate's election with the difference of the votes gained by the winning candidate and the second best minus one vote. Compensating the winner means that voters will influence the composition of Parliament through their votes for candidates as well as through their votes for national lists. This feature of the system constitutes an inexplicable limit on the equal weighing of votes while it is also a completely unknown feature in European electoral systems, as no electoral system gives further compensation to a candidate who already won a seat in Parliament.

3. Before the new system was passed, the legislator had failed to adjust the boundaries of electoral districts and the number of mandates that could be achieved in each region ("megye") to take into account population migration in the last 22 years. Therefore – as noted by the Constitutional Court in its decisions 22/2005 (VI. 17.) AB and 193/2010. (XII. 8.) AB on this matter – a seriously disproportionate electoral system had emerged that endangered the equal weight of votes casted in the various districts. There was a definite need for the new election law to redraw the boundaries of electoral districts.

However, the ruling party made the decisions on redistricting entirely in secret without consulting with the general public, publishing scientific analysis or providing the opportunity for legal redress if a voter or an opposition party wanted to challenge the boundaries of the districts. The ruling party also did not consult opposition parties in this process. This fact alone weakens the legitimacy of the redistricting.

The new electoral law defines the precise boundaries of the electoral districts themselves in a cardinal act. Therefore, changing the boundary of any district in the future will require a two-thirds vote. With this system, it will be hard to continue systematic corrections of the boundaries to equalize districts and in later years could make it very difficult for adjusting the boundaries to population migration.

In addition, according to several published, empirical analysis, the new electoral system rearranges the electoral districts in a manner that favors the current governing parties in future elections. Most notably, the redistricting in the Veszprém region would have given the governing parties 100% of the mandates in the 2006 election even though they gained only 57.1% under the old system. Had the new system of districts been in place during the 2006 election, Fidesz would have won the election – even though it lost that election to the Socialist Party under the old system. The new election law redraws the electoral districts in a manner that clearly favors the right-to-center political parties without providing any opportunity for legal redress. The law provides no way for any political party or civil society group to challenge the boundaries of the districts in any way. Instead, the law creates barriers to altering the boundaries of the districts by requiring a two-thirds vote for even the smallest change.

4. The Hungarian electoral system has not previously guaranteed a preferential representation of national and ethnic minorities in Parliament. Members and organizations of minority groups could previously run in an election or nominate a candidate, but the rules were the same as for candidates belonging to the national

majority. In the new electoral system, members of minority groups have to decide prior to the election whether they run on a minority list or a party list and, therefore, could not gain more votes than members of the national majority. The new law provides two allowances for minority organizations that nominate candidates; a) the 5% threshold does not apply for minority candidates and b) they can gain the first mandate with one-fourth of the votes needed if the mandate were determined on a party list. Even if a minority organization cannot gain a mandate, the leader of the organization may participate in the work of Parliament as a “spokesperson.”

The new system does not guarantee an automatic seat in Parliament for every minority group, however. This would not be desirable in the Hungarian context. The law on national minorities recognizes 13 national and ethnic minority groups. The general electorate would not support giving each minority group a seat in Parliament, which would also give them a highly disproportionate representation. The extent of the allowances guaranteed in the new law for minority groups are still acceptable within the limits of equal voting rights, while the institution of special “spokesperson” guarantees that minority groups without a mandate can still voice their views in Parliamentary debates.

5. The recently passed law on elections only defines the legal framework for elections. Parliament has so far failed to adopt the rules on electoral procedures.

a) The election law still permits Parliament to grant, in the cardinal law on procedures, the right to vote only to individuals who pre-register for an election. For resident citizens, this could constitute an inexplicable and unacceptable limitation on their right to vote. Using the Hungarian registry for resident addresses, one can easily construct an electoral registry -- as it has been demonstrated in the course of the last six Parliamentary elections, six local government elections, two European Parliamentary elections, and five national referenda. A requirement for pre-registration would undoubtedly constitute an attempt to exclude the disadvantaged members of the population from voting, which would be unacceptable.

b) The law could also say that political advertisements should not appear in the electronic media. This would constitute an unacceptable limitation on the freedom of speech, but it would directly endanger the fairness of elections given the government's influence over public media.

6. The new electoral law makes what is the already third most disproportionate electoral system in Europe even more disproportionate. In the 2010 elections, the current governing parties gained 68% of the mandates with only 53% of the popular vote. With the "winner compensation" feature and the corresponding increase in the share of mandates from individual districts, future elections will likely result in far more disproportionate outcomes than in 2010.

While the new electoral system is mostly in line with European electoral norms and the principles of democracy, we believe that the system requires the following corrections, in order of importance:

- a) the boundaries of electoral districts need to be redrawn independent of politics and based on scientific recommendations,
- b) it should not be possible to condition resident citizens' right to vote on pre-registration,
- c) the system of winners' compensation should be eliminated,
- d) the number of mandates that can be achieved with votes from non-resident Hungarians should be limited,
- e) the limits on voting rights of disabled and those requiring care should be reviewed by a court before the next election of members of Parliament,
- f) political advertising in the media should not be banned.

## **The Act on the Right to Informational Self-determination and the Freedom of Information**

Up until the present time, informational freedoms were regulated in Hungary by a frequently modified law: Act LXIII of 1992 on the Protection of Personal Data. The philosophy on which this act was based was remarkably novel in a European and even in a wider international comparison. This was the world's first law which integrated in one legal document the two informational freedoms -- the protection of personal data and the freedom of information in mutual regard of each other -- thus regulating them in a synoptic fashion.

The new Regulations of Act CXII of 2011 on the Right to Informational Self-Determination and the Freedom of Information follow the underlying philosophy of the Hungarian 'System of National Co-operation'<sup>59</sup> in the sense that, like the Fundamental Law and the cardinal laws themselves, it erodes both the former constitutional system of checks and balances, as well as institutional independence. When the legislator wishes to reduce the level of the protection of rights, he has two choices: either he curtails the rights themselves or he weakens the institutional side of the enforcement of rights. In the new Hungarian constitutional order, both were done.

2. Since the subject of the investigation is the latter, here we'll discuss this institutional aspect. As several Hungarian NGOs have repeatedly pointed out to the legislator,<sup>60</sup> the abolition of the office of the Commissioner for Data Protection conflicts with the legal system of the European Union. But EU law shows serious internal inconsistencies. While the EU Audio-Visual Directive mentions the independence of the regulatory bodies only once in passing, in a remote passage,

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<sup>59</sup> The System of National Cooperation was the program of the Fidesz government that contained a national pledge that was supposed to be displayed in every public office. The program can be found at [http://www.parlament.hu/irom39/00047/00047\\_e.pdf](http://www.parlament.hu/irom39/00047/00047_e.pdf) with the national pledge at pp. 5-6.

<sup>60</sup> Here we make use of the letter sent by EKINT, TASZ and the Hungarian Helsinki Committee on October 3rd 2011 to JOSÉ MANUEL BARROSO ([http://ekint.org/ekint\\_files/File/barroso\\_dpa\\_independence\\_20111106\\_printed.pdf](http://ekint.org/ekint_files/File/barroso_dpa_independence_20111106_printed.pdf)). An important development is that in her letter of response on November 30<sup>th</sup>, Viviane Reding indicated that she agrees with several of the legal arguments used in our complaint and informed us that she has launched investigation against the Hungarian government. [http://www.ekint.org/ekint\\_files/File/levelezes/response\\_laszlo\\_majtenyi.pdf](http://www.ekint.org/ekint_files/File/levelezes/response_laszlo_majtenyi.pdf)

the Data Protection Directive defines the full independence of the data protection authorities as a definite legal requirement.

The EU Directive obliges member states to set up (possibly several) state authorities with the function of controlling the enforcement of laws accepted on the basis of the Directive. According to Article 28 (1) of the Directive, these authorities “shall act with complete independence in exercising the functions entrusted to them.” The EU does not perceive data protection institutions as belonging purely to the competency of national legal authorities but also as fulfilling functions conferred upon them by the law of the European Union; thus their status is defined jointly by national and EU law. It is clear that the national legislator does not have an entirely free hand in shaping the laws on the institutions of data protection. National legal systems must satisfy the guarantees laid down in the EU directive.

The guarantee for national data protection institutions included in the Directive on Data Protection requires full independence. This was established by the European Court in spring 2010 in the case of *Commission vs. Germany*.<sup>61</sup> The facts of that case were rather similar to those in Hungary at present, as Germany’s data protection organization, which had formerly functioned in subordination to the Parliament, similarly to Hungary, was reorganized to be supervised by the government, even if the conditions of the re-organization were less scandalous than in Hungary. This reorganization necessarily meant a reduction in the standard of rights protection, so it declared illegal by the European Court.

According to the Court, this independence was established “in order to strengthen the protection of individuals and bodies affected by their decisions. It follows that, when carrying out their duties, the supervisory authorities must act objectively and impartially. For that purpose, they must remain free from any external influence, including the direct or indirect influence of the State or the Länder.” Defining in more detail the exact content of the independence of national bodies, the decision points

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<sup>61</sup> ECJ C-518/07 - *Commission v. Germany*, 9 March 2010, paragraph 25.

out that independence “precludes not only any influence exercised by the supervised bodies, but also any directions or *any other external influence, whether direct or indirect* [emphasis added], which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data.”<sup>62</sup>

It is beyond question that independence entails protecting the ombudsman for data protection, who necessarily engages in sharp debates with the government. This independence should protect against being pushed out of office years before the person’s mandate expires. If the person filling this office is exposed to the danger of being ousted, he comes under strong temptation to follow the wishes of a government that can remove him – indeed, this is one of the strongest tools for influencing public actors in a position to criticize the government. In light of the above, it can hardly be doubted that Act CXII. of 2011 on Informational Self-determination and the Freedom of Information clearly offends against the independence of the Hungarian Commissioner for Data Protection because it abolishes this established institution and in doing so also removed the current Commissioner from his office before he had finished the term to which he had been elected.

The question arises how the present situation could be remedied. In our view there is only one method, even though there has been no precedent for such a procedure in European practice: the Commissioner for Data Protection whose office was abolished by reorganization of the relevant institutional network ought to be restored to his office by new legislation, and at the same time the new office should be placed once more under the control of Parliament. Any other solution would continue to offend against international constitutionalism and the basic principles of European law.

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<sup>62</sup> Ibid. paragraphs 31-32.

## The Act on the Rights of Nationalities

1. The Fundamental Law uses not the political but the ethno-cultural concept of nation as the constituent power that underwrites the text. The new constitution is addressed primarily to Hungarians, who constitute the subject of the Constitution, instead of citizens, a category that would include many who are not ethnically Hungarian. This identification of the constituent power of the constitution with the ethnic nation instead of with the citizenry leads to the erosion of the theoretical basis of minority rights on which the former constitution was based, namely the fundamental principles of the multi-cultural model. The new constitution says: “Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future.”<sup>63</sup> National and ethnic minorities cannot even participate in the drafting of the constitution, as the document begins with the following sentence: “WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian.”<sup>64</sup> Surprisingly, despite changes in the concept of the nation, the document leaves the minority self-government system based on the principle of personal autonomy intact. Restoring historical names, the new constitution uses the term nationalities instead of national and ethnic minorities.

2. Instead of being a new piece of legislation, the Nationality Act (2011),<sup>65</sup> adopted on 19 December 2011, is instead an amendment of the earlier Minority Act (1993),<sup>66</sup> with changes aimed mostly at eliminating the generally agreed-upon dysfunctions of the minority self-government elections. Though many provisions of the new Act are difficult to interpret, it is clear that the rules of the minority self-government elections are changing, first of all by reintroducing the preferential minority mandate for local government elections. The name Gypsy is being changed to Roma and in the

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<sup>63</sup> Fundamental Law’s preamble entitled National Avowal For the ‘official’ English translation of the Fundamental Law, see:

<http://www.kormany.hu/download/7/99/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf>

<sup>64</sup> National Avowal

<sup>65</sup> Act CLXXIX of 2011 on the Rights of Nationalities

<sup>66</sup> Act LXXVII of 1993 on the Rights of National and Ethnic Minorities

future the data of the census will be used to detect abuses in minority self-government elections.<sup>67</sup> The exact method is not clear yet because of the inconsistencies of the Act where, for example, an election for minority self-government must be held in municipalities where thirty residents declared themselves to belong to the given minority in the national census.<sup>68</sup> However, according to the law, minority self-government elections may also be held if voters register in the minority electoral registration. The text of the Act is loaded with a number of internal contradictions.<sup>69</sup> In the case of the Roma and the Armenian minorities, for example, the use of the Hungarian language is accepted as a minority language, whereas the definition of nationality includes that every nationality should have their own language. Or it is difficult to understand Article 158 of the Act, which lists the articles of the law that can only be changed by a vote of a two-thirds majority,<sup>70</sup> whereas Article 158 itself does not need two-thirds majority. It could mean that it is possible to modify the parts of the law that require a two-thirds vote without a two-thirds majority.

It is furthermore not clear which parts of the text have already entered into force and which will enter into force later – and when. Some parts of the Act enter into force with the date of its promulgation, other parts on 1 January 2012, other parts again on 31 March 2012, certain parts on 1 September 2012, yet again other ones on 1 January 2013, some on 1 September 2013, and some in 2014 at the time of minority municipal elections.

According to the official explanation of the Act, the exercise of various minority rights would have depended on being a member of the nationality in question and

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<sup>67</sup> For instance there are several municipalities where (according to the national census) nobody identified themselves as a member of any minority group, yet numerous minority candidates were registered.

<sup>68</sup> See for instance Article 56. Paragraph (1) of Act CLXXIX of 2011 on the Rights of Nationalities.

<sup>69</sup> Article 1 (1) Act CLXXIX of 2011 on the Rights of Nationalities

<sup>70</sup> According to the Fundamental Law the new name of two-thirds majority acts is Cardinal Acts.

would not have flowed only from citizenship. For this reason, from the former text of the Act the criterion of citizenship was cancelled. Later on in the law the concept changed, however, so in the *transitional* provisions of the act, Article 170 (1) read as follows: “This Act applies to all persons of Hungarian citizenship residing in the territory of the Hungary, who consider themselves members of any nationality, and to the communities of these people.” The exclusion of EU citizens from local ethnic self-government representation violates EU law. This provision however came into force only on 1 January 2012. The personal scope of the Act was narrowed to the citizens between 19 December 2011 and 1 January 2012. The poor quality of codification work itself endangers the rule of law because conflicting laws cannot be simultaneously observed.

3. According to the 1989 Constitution, the ombuds institution is based on the conception of ombudspersons of equal rank. *By abolishing specialized ombudspersons*, the Fundamental Law, the Act on Nationalities, and the Act on Ombudspersons<sup>71</sup> abandon the previous model for protecting fundamental rights. In the prior constitutional order, there was an independent and specialized ombudsperson for the protection of minority rights; as of 1 January 2012, protecting minority rights will be the responsibility of the deputy commissioner of human rights in charge of the protection of the rights of nationalities. The new commissioner for fundamental rights and the deputies will be chosen by Parliament by a two-thirds majority vote.<sup>72</sup>

The person who had been the specialized ombudsperson for national minorities lost his competence and the independent office was closed. Some of the staff were fired and some were moved to support directly the work of the Commissioner for Fundamental Rights. After 1 January, the new Deputy Commissioner for the Rights of Nationalities works within the office of the Commissioner for Fundamental Rights with the help of a secretariat and one lawyer, a major reduction in staff. The

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<sup>71</sup> Act CXI of 2011 on the the Commissioner for Fundamental Rights

<sup>72</sup> Order 1/2012. (I.6.) of the Commissioner for Fundamental Rights  
<http://www.obh.hu/ktk/index.htm>

changes are well characterized by the fact that the new secretary general of the office of the Commissioner for Fundamental Rights had carried out the staff reductions at the office before 1 January and was previously deputy secretary of state in the Ministry of Public Administration and Justice, a political office.

According to the former Act on Minorities, the specialized ombudsperson had competence in cases of ethnic discrimination. The abolition of the position of an independent minority ombudsperson might also raise concerns from the viewpoint of the European Union antidiscrimination directive 2000/43/EC because it is not clear if the new deputy commissioner has the same mandate.

4. According to Article 2 (2) of the Fundamental Law, nationalities living in Hungary shall participate in the work of the Parliament as defined by cardinal act. The Nationality Act and the Act on the Election of the Members of Parliament introduce the representation of nationalities in the Parliament, according to which all of the thirteen nationalities<sup>73</sup> acknowledged by the Nationality Act may be represented by minority parties in the Parliament but only if the individuals who vote for such a party trade in their mandate to vote for a national party electoral list in order to vote for a nationality list instead. Under preferential quotas, a minority mandate can be gained by one-quarter of the number of votes needed for mandates of the electoral list. If someone votes for the nationality list, he can cast his vote for candidates in the individual constituencies as well.

Under the new election law, ethnic Hungarians living outside of borders have the right to vote in Hungary even when they are not recognized as participating in the codification of the constitution, which is contrary to the concept of nation implied by the Fundamental Law.

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<sup>73</sup> The following ethnic groups qualify as nationalities of Hungary: Armenian, Bulgarian, Croatian, German, Greek, Polish, Roma, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.

## The Act on the Constitutional Court

1. Since the new Fundamental Law contains little detail about the regulation of the legal status and competencies of the Constitutional Court, the relevant cardinal law that elaborates the provisions of the Fundamental Law is a crucial element in the protection of the constitution and of fundamental rights. As was true with the new Fundamental Law, the preparation of the draft proposal for the Act on the Constitutional Court (ACC) did not allow for a professional and social debate of the proposal prior to its enactment. Contrary to the regulation contained in the Fundamental Law, which renders it the government's duty to submit to Parliament the bills necessary for executing the Fundamental Law (Point 4 of the Closing Provisions), the Bill on the Constitutional Court was actually submitted by a parliamentary committee. Thus the government did not take political responsibility for the preparation of one of the most important cardinal laws and at the same time it remains unknown precisely who wrote the text of the proposal.

What is worse, neither the Fundamental Law, nor the ACC contains the full body of regulations on the competencies of the Constitutional Court. The Transitional Provisions, passed on 30 December 2011 and put in effect on 1 January 2012 contain several rules which supplement the regulation of the Constitutional Court with lasting rather than temporary rules, though these rules appear in a law that should by its purpose contain only transitional provisions. The Transitional Provisions define the criteria for constitutional complaints (Art. 22) and restricts even further the jurisdiction of the Constitutional Court by extending the prohibition of the Court's review of fiscal laws enacted during a debt crisis beyond the time during which the country is heavily indebted (as the Fundamental Law provided in Art. 37(4)), to any point thereafter (Transitional Provisions, Art. 27)]. In short, a temporary restriction on the Court's jurisdiction was made permanent by the "transitional" provisions. As we argued earlier, while the Fundamental Law has empowered the Parliament to create Transitional Provisions related to the Fundamental Law, this constitutional authorization cannot create a basis for the Parliament to permanently restrict the

competency of the Constitutional Court any further without having gone through the regular procedure for amending the constitution.

2. One of the most significant changes in the Hungarian model of constitutional adjudication was the abolition of *actio popularis*, which previously allowed anyone to initiate an *ex post* abstract review of a law even if the petitioner was personally uninvolved in the issue at hand.

According to the Transitional Provisions, all *actio popularis* petitions still waiting for decision at the Constitutional Court should be dismissed. Although there is reason for concern about the constitutionality of regulations of the ACC, the aim of the Parliament in introducing this regulation could well have been to rule out the possibility of the constitutional review of the regulation concerning the handling of the above-mentioned petitions.

As a result of this change, the Constitutional Court sent letters in January 2012 to the 1600 petitioners still awaiting an answer from the Court, saying that the Court would no longer address their questions, even though the petitions were submitted pursuant to a valid legal rule at the time. Now petitioners are invited to resubmit their petitions only if they qualify under the provisions of the new Fundamental Law, which limits individual petitions to the Court to those who have been personally affected by the law that they are challenging.

Since *ex post* review remains one of the competencies of the Constitutional Court, it would have been compatible with the new constitutional order to address these petitions after 1 January 2012, provided they challenged existing laws under the new Fundamental Law. But this was not the option chosen.

Now, only where the complainant can prove that he is personally affected can he re-submit his appeal as a constitutional complaint (Article 71 of ACC). This means that petitions submitted by NGOs will now be impossible or at least far more difficult to submit to the Constitutional Court in future, owing to lack of the complainant's

personal involvement. Since no one yet knows how the Constitutional Court will interpret the level of personal injury required to bring a constitutional complaint (will a person have to have actually suffered a negative effect? Is it enough if the person *may* suffer such an effect if the law is enforced?), it is impossible to tell just what petitions will qualify for review. Under the old system, a human rights group could complain about laws that infringed rights even if the group were not directly affected by that law. Now human rights groups will have to find an affected individual to bring the case, which will take longer and be less effective at getting the Court to review more structural issues embedded in the legal order.

The ACC contains provisions which are far more unfavorable than this from the point of view of the protection of the constitution and of fundamental rights. After the ACC entered into force, not just the individual petitions but all *ex post* review procedures were to be cancelled unless the petition was made by those who are still today entitled to submit such petitions. Whereas a wide range of state actors could take abstract challenges to the Constitutional Court under the old constitution, the new constitution permits only the government itself, one-quarter of the MPs, or the Commissioner for Fundamental Rights to bring abstract review cases to the Court.

3. Following criticism by the Venice Commission, the Fundamental Law, in order to counterbalance the abolition of *actio popularis*, has granted the commissioner for fundamental rights the power to initiate an abstract *ex post* review. Besides the Commissioner for Fundamental Rights, the Government or one-quarter of the Members of Parliament may also initiate *ex post* review. In the present Parliament, however, the parties of the democratic opposition altogether do not amount to one quarter of the MPs, which puts a particularly high value, within constitutional protection, on the Commissioner for Fundamental Rights' competency. The Fundamental Law, however, contains no detailed regulations on when the Commissioner for Fundamental Rights may or must submit petitions brought to his attention to the Constitutional Court. The law on the Commissioner for Fundamental Rights adopted during summer 2011 left it to ACC to define the conditions (Article 34

of the Act CXI of 2011). But the ACC only declares that the Commissioner for Fundamental Rights shall submit a petition to the Constitutional Court after he has determined that the act in question is unconstitutional [Art. 24(2)].

Until now, the Commissioner for Fundamental Rights has made no use of this competency and there has been no interpretation and practical application of the regulation. While a definite answer is not yet known, it seems probable that the Commissioner for Fundamental Rights' ability to initiate constitutional review will not extend to the totality of the Fundamental Law. The reason is that, flowing from his function and competencies, the ombudsman as Commissioner for Fundamental Rights can only point out the unconstitutionality of a law if it is related to fundamental rights. He does not seem to have the competency to evaluate whether a law is unconstitutional in any other regard – for example, by violating other provisions of the Fundamental Law apart from the fundamental rights. Given that he must indicate to the Court that he believes a law he asks them to review is unconstitutional, he may only be entitled to initiate a constitutional action in matters that belong to his scope of competency – which is to say that they must relate to the office he heads. In a narrower interpretation, based on regulations of the ACC it could also be claimed that the Commissioner for Fundamental Rights can only appeal to the Constitutional Court as a measure subsequent to an investigation in individual cases. Thus it is possible that in questions that go beyond fundamental rights because they involve the competencies of state organs, the Commissioner for Fundamental Rights' ability to trigger constitutional review will not be able to compensate for the abolition of the *actio popularis*. For example, the change in the independence of the data protection agency could not be challenged by the Commissioner for Fundamental Rights in the abstract until and unless an action of the agency affected a particular individual. This shows that even with respect to fundamental rights, the Commissioner for Fundamental Rights may not be able to ensure constitutional review of a law in the absence of a specific infringement of rights or danger thereof which is subject to investigation by the commissioner until well after the rights-infringing law goes into effect.

4. While the Constitutional Court no longer has jurisdiction over *actio popularis* petitions, the Court has gained the ability to review constitutional complaints on the German model. The declared objective of this change was to extend the protection of the fundamental rights of the individual, since according to the new regulation, constitutional complaints may be filed not only against unconstitutional laws but also against unconstitutional applications of laws by courts.

The problem, however, is that neither the Fundamental Law nor the ACC has defined the procedure for submitting a constitutional complaint. While Article 22 of the Transitional Provisions defines the concept of constitutional complaint, the law was passed two days before the constitution went into force, thus practically adding further conditions to the Fundamental Law. Detailed regulations about constitutional complaints are contained in the ACC which, however, make it considerably more difficult to submit a complaint than was the case under the old system of constitutional review. One can thus question whether constitutional complaint can indeed become an effective tool for the protection of the fundamental rights of the individual.

These regulations specifying how a petitioner may file a constitutional complaint are detailed in the ACC. Unlike in the previous system of constitutional review when a petitioner could approach the Constitutional Court without a lawyer, the new system requires legal representation during constitutional complaint procedures (Article 51). This will limit constitutional review to those who can afford lawyers at this stage of the proceedings. Another regulation with a similar deterrent effect is the new capacity of the Court to levy fines on petitioners for procedural violations. According to the ACC, fines may be issued against complainants who practice their right of appeal in an abusive fashion or who exhibit a behavior which deliberately delays or obstructs conclusion of the procedure of the Constitutional Court (Article 54). This fine is worrying not only because of its alarming amounts (the sum may range from HUF 20,000 to 500,000, EUR 70 to 1,700), but also because the conditions for its application are not suitably clearly defined and no legal remedy against its application is offered.

Regarding the acceptance of constitutional complaints, the ACC allows broad discretion for the Constitutional Court which may accept complaints for review only in cases when the judge's ruling was fundamentally influenced by an unconstitutional law or if the petition poses a question of fundamental constitutional significance (Article 29). The success of constitutional complaints also depends on an element of 'luck.' If in consequence of such a complaint the Constitutional Court declares that a law is unconstitutional, this will have a *res iudicata* effect on other cases, meaning that after the ruling is passed, an infringement of rights caused by the same legal regulation on the same basis cannot be brought before the Court (Article 31). This means that the Constitutional Court 'rewards' with individual legal remedy the person who was first to bring the regulation in question before the Constitutional Court or whoever had their complaint processed first by the Court. Later cases that raise the same issue (and what counts as the "same issue" is within the discretion of the Court), can receive no remedy from the Constitutional Court. This may be important in determining whether a petition to the Constitutional Court may be required as an effective remedy by the European Court of Human Rights before a petitioner turns to Strasbourg. If cases similar to those already decided by the Constitutional Court cannot be heard by the Court, then the Constitutional Court cannot count as an effective general remedy within the Hungarian legal system. This may have a serious impact on the number of cases from Hungary that go to the ECtHR for review.

5. One of the most ardent criticisms against the Fundamental Law was provoked by the rule which restricts the competency of the Constitutional Court with regard to fiscal laws [Art. 37 (4)]. This change was already criticized by the Venice Commission when it came first as an amendment to the previous constitution, and later was entrenched as part of the new Fundamental Law.<sup>74</sup> According to the Fundamental

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<sup>74</sup> The Venice Commission has already provided its legal assistance to the Hungarian authorities in the context of the current constitutional process. In its Opinion CDLAD(2011)001 adopted at its 86th Plenary Session (Venice, 25-26 March 2011), it assessed, at the request of the Hungarian authorities, three legal questions having been raised in the process of drafting the new Constitution. In this first Opinion the Commission

Law, this restriction of competency will persist as long as the national debt exceeds half of the Gross Domestic Product, which Hungarian state budgets are likely to do for the foreseeable future so this is not a short-term constraint. Under this rule, the Constitutional Court may not review laws that deal with the Acts on the State Budget and its implementation, types of central taxes, duties, pension and healthcare contributions, customs and the central conditions for local taxes.

The ACC obviously regulates the competencies of the Constitutional Court within these limits. At the same time, we must take into account that the Transitional Provisions contain further restrict the competencies of the Constitutional Court. According to Article 27 of the Transitory Provisions, the restriction on competency is to be applied even after national debt goes under the appointed level, i.e. beyond the time limit fixed in the Fundamental Law. This perpetual restriction on the review of laws applies to all those fiscal laws that were published during the period when national debt still exceeded half of the GDP. By this rule, the document containing the Transitional Provisions extends in a permanent fashion the restriction of competency to a situation not covered by the Fundamental Law, which Parliament was not authorized to do in the “Transitional Provisions” on the constitution. This is a permanent exclusion of Constitutional Court review of any law that is passed during a period of economic crisis, even after the economic crisis disappears and constitutional review is supposed to return to normal.

6. The Fundamental Law contains very few regulations regarding the legal status of constitutional judges; thus their independence is not safeguarded by guarantees. While it is a positive development that the ACC rules out the re-election of constitutional judges [Article 6(3)] and therefore avoids the worry that judges may attempt to please those who have the capacity to vote in the future on their jobs, the Act also contains rules which do not serve the independence of the judges. The cardinal law on the Constitutional Court maintains the procedure for nomination

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argued that “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” § 54.

which was introduced with the modification of the Constitution in 2010 (and has since then lost force together with the former constitution). Under this new procedure, constitutional judges are nominated by a parliamentary committee that is composed according to the proportions of the parliamentary factions each party has [§7(1)]. Thus these rules entitle the governing majority to nominate all candidates without having to engage the opposition parties in finding candidates that will also appeal to them. While the rules then require a constitutional judge to receive a two-thirds vote on the floor of the parliament, something that might act as a safeguard against the political “capture” of the Court by the government of the day, the current government has a two-thirds majority and has already elected six new judges to the Court with the votes of no party other than their own. This new system for nominating judges therefore creates no political counterweight against the will of the governing majority, nor does it guarantee consideration of the professional qualification of the candidate. Several of the new constitutional judges elected by the Parliament since this new system of nomination went into place did not meet the qualifications for constitutional judgeships outlined in the law at the time of their election, but the opposition was not able to block these appointments. By contrast, the system that these new rules replaced required nominees to first gain a majority of the political parties in the Parliament before going to the floor of the Parliament for election by a two-thirds vote there.

These changes in the composition and mode of election of the judges of the Constitutional Court were already criticized by the Venice Commission’s prior opinion on the competences of the Court. The Commission was concerned that a number of provisions of the new Constitution may undermine further the authority of the Constitutional Court as a guarantor of constitutionality of the Hungarian legal order.<sup>75</sup> The regulations criticized by the Venice Commission in its earlier review were included in the new Constitutional Court Act, and were even made worse by the Transitional Provisions.

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<sup>75</sup> See § 97 of the Opinion.

The ACC also includes a regulation which is actually contrary to the very text of the Fundamental Law. It prescribes that if Parliament fails to elect a new constitutional judge by the time his term expires, the constitutional judge whose term is over may remain on the Court until his replacement is elected [Article 15(3)]. Since electing a new constitutional judge requires a two-thirds majority, this rule in effect allows certain parliamentary factions, either of the governing or the opposition side, to prevent the expiry of the mandate of any constitutional judge for whom they have an ideological preference if the governing majority does not have two thirds.

## **The Judiciary and the Public Prosecutor's Office**

1. The new Fundamental Law diminished the system of checks and balances also by shortening of the mandate of the sitting judges by eight years, thus it creates uncertainty concerning the status of judges. The mandatory retirement age was 70, the new constitution forces judges to retirement at the age of 62. This serious curtailment of the status of judges was not supported by professional or any other public demands. In addition, the Venice Commission raised concerns about this change, finding the measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges.<sup>76</sup> There is no official written explanation for this change so it invites the inference that the reason is purely political.

According to Róbert Répássy, minister of state for justice, 236 judges will have to retire early under this new system.<sup>77</sup> Those judges include eight of the 20 court presidents at the county level, two of the five appeals court presidents and 20 of the 80 Supreme Court judges. In addition to these judgeships waiting to be filled, there are more that have been piling up because the usual procedure for appointing judges was suspended for the six months before the new constitution came into effect. In an act adopted in June 2011, the Parliament suspended all appointment procedures (including for judges who were already submitted) until 1 January 2012.

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<sup>76</sup> See § 108 of the Opinion.

<sup>77</sup> Interview with Róbert Répássy, 31 January 2012.

This moratorium withdrew the authority of the President of the Supreme Court, András Baka, to appoint judicial leaders, reserving the power to appoint these judges for the new administration.

The gaps made by the new mandatory retirement age and the backlog of unfilled appointments are being filled by new judges appointed with a substantially eased procedure that included a shortened period of application and a potential waiver of the results of the judicial suitability examination.

Under the new Fundamental Law and with the two-thirds majority, the government created a completely new system for the administration of the judiciary, without any serious consultation with the judiciary. Some members of the Association of Hungarian Judges signed a strategic agreement with the government and formed an opinion on the drafts, but the official leaders and the elected judicial bodies were not involved in the consultation. Judges were left out from this process as were other professional groups.

The judiciary followed a pattern repeated again and again since the ruling party took office in spring 2010. Since that time, the ruling party systematically removed the leaders of certain independent institutions before their normal terms of office had expired, often through the amendment or change of the related office. Just as happened to the members of the National Election Committee, the Data Protection Ombudsman, the Ombudsman for Minority Rights, and the National Radio and Television Board, so also the President of the Supreme Court lost his position before his term was over, without any constitutional or professional reasons given. The President of the Supreme Court (András Baka, former judge of ECtHR) was removed from office three years before the end of his mandate, singled out by one of the provisions in the Transitional Provisions (Art. 11(2)).<sup>78</sup>

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<sup>78</sup> The Venice Commission report on the Fundamental Law anticipated this problem in two ways: it raised the question whether the change of the name of the highest judicial body will result in replacement of the Supreme Court's president by a new president of the "Curia" at § 107 and it also cautioned that the Transitional Provisions should not terminate the ongoing mandate in office of current office holders at § 140. The termination of Judge

This act ignored the values and principles of the high protection of the status of judges. Besides the retroactively applied requirement of being a judge in Hungary at least for five years (Act on the Judiciary, Art. 114(1), the only formal argument given for removing Judge Baka was that the Supreme Court's title had been changed to the Curia. But the structure and the authority of this body is not much modified, only a few technical aspects of its jurisdiction and the official name were changed. It seems hard to escape the conclusion that the logic of this personnel change is purely political: Baka criticized the new laws on the administration of judiciary and some other acts of Parliament concerning judges (reducing the compulsory retirement age of judges, retroactive act on reviewing some judicial sentences).

Under the new constitutional order, the system of judicial administration has become fully centralized. The mechanism of decision-making has been transformed from a collective decision-making process to a single decision emanating from one person. The newly created National Judicial Office has a single head who holds all the authorities (personal, financial, regulative) concerning the courts and judiciary. This concentration of power did not leave room for autonomous judicial bodies or a collective process.

The new judges under the new system will be now nominated by the newly elected President of this newly created National Judicial Office and appointed by the President of the Republic. The current President of the Republic has yet to veto or oppose any action that the government has proposed to him. Usually, however, the President of the National Judicial Office operates alone. Judges within the system may be transferred from court to court at the sole a decision of the President of the National Judicial Office.

She will also administer the court system and therefore has the power to select the presidents of each court, to select and promote judges and, under a provision of the

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Baka's term as president of the Supreme Court/Curia runs directly against both of these cautions.

Transitional Provisions (art. 11(3)), even has the power to assign each particular case to any court. The power of the President of the National Judicial Office is not controlled under any law relating to judicial selection, case assignments or promotion/demotion of judges. According to the Act on the Administration of Judiciary, an elected judicial body (the National Council of Judges) also shares some of the activities of the President of the National Judicial Office, but the act did not give any real tools to this body to enforce such co-control. Instead, the National Council of Judges can only form opinions, make suggestions and give advice without any binding effect. In reality the hands of the President of the National Judicial Office are free in all of her tasks and she is accountable to no one. Since her term of office lasts for nine years, even the power to replace her is not available to a new government, or to the one after that.

The Parliament elected a judge as the head of this highly centralized system, as they were required to do by law. But the occupant of the office is a wife of one of the authors of the Fidesz constitution and a close friend of the prime minister's family. She was elected for a nine-year term and her mandate will be automatically prolonged if no new President is elected by the Parliament (with its two-thirds majority). Thus she may be kept in office for an indefinite period of time with these near-absolute powers over the judiciary.

The system of selecting judges reinforces her power. The National Council of Judges forms a list of the applicants according to the results of the judicial tender. At that point, the President of the National Judicial Office, who is not bound by the top recommendation of the National Council of Judges assessing applications for judicial positions, may recommend for appointment to the President of Hungary the applicant ranked as second or third by the National Council of Judges. . She must only inform the National Council of Judges about her reasons, but this body has no authority to veto or change the decision. All judges, with the exception of the President of the Curia (the new name for the Supreme Court), will be appointed by the President of Hungary after nomination by the President of the National Judicial

Office unless they are already judges in the system, in which case the President of the Republic need not be involved at all.

The previous system for the administration of the judiciary was created in 1997 and was based on the highest autonomy of the previous National Justice Council. This system functioned very badly and was criticized heavily by experts who said that the operation of the judiciary and courts had become non-transparent and functioned without any accountability. One of the most frequently recurring criticisms was that judges elected presidents of county courts to the National Justice Council, which meant that county court presidents monitored their own courts, which obviously weakened the efficiency of the control. The new court system does not eliminate the problem of non-transparency, but has centralized the administration for the sake of greater efficiency.

The aim of efficiency is also the rationale behind the new rule which authorizes the President of the newly created National Judicial Office to assign any case to another court, if the initial court defined by the law had a heavy caseload and could not finish the case in reasonable time. Most of the complicated legal issues (including those which have political content) are located originally in the capital; the courts of Budapest are the most burdened. Therefore, it is reasonable to expect cases to be transferred out of Budapest to the smaller cities or the countryside where the courts have fewer judges and where the transfer of a case to a particular court means the transfer of a case to a particular judge.<sup>79</sup> This measure curtails the right of citizens, since it will not be the law, but the decision of a person close to the ruling party who will select the judge. It is highly likely that a judge in a little town without experience in large suits will understand what the government or the prosecutor will want him to do.

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<sup>79</sup> On 17 February, 2012 the President of the National Judicial Council transferred nine cases out of Budapest to other cities, including the criminal case of the former Socialist deputy mayor of Budapest. Az Országos Bírósági Hivatal Sajtóosztályának közleménye. (Release of the National Judicial Council's Press Office) [http://www.birosag.hu/engine.aspx?page=Birosag\\_Sajto](http://www.birosag.hu/engine.aspx?page=Birosag_Sajto) . So the system of transferring cases has already begun.

2. The Chief Public Prosecutor also has the right to press charges before a court other than the legally designated one, if he deems it necessary to speed consideration of the case. This provision was inserted earlier into the law on criminal procedure, but the Constitutional Court nullified this provision in its decision 166/2011 (XII. 20.) AB. Immediately thereafter, the Parliament reinstated this power of the Chief Prosecutor by putting it into the Transitional Provisions (Art. 11(4)), perhaps so as to avoid an adverse judgment in a future constitutional complaint.

The Prosecutorial Office has preserved its highly hierarchical structure, which does not give enough autonomy to the prosecutors in specific cases. Prosecutors can be instructed (even to accuse defendants or to drop cases) by superiors. The prosecutorial system in Hungary in fact had never abandoned its Stalinist structure. Formally, it is independent from the government because the Chief Prosecutor is elected by the Parliament, but there is no accountability of this office to any other, or any possibility of the review of its activities by anyone. It is completely non-transparent and therefore vulnerable to covert political influence.

During the process of making new acts on the system of judges, there was no consultation with the Council of Judges or the President of the Supreme Court, who was also the Head of the National Council of Judges.

The new system of judicial administration in Hungary has no equivalent in any other democratic state, because in every democratic state the authorities concerning judges are organized into separate and autonomous judicial bodies that can effectively participate in the process of selection, promotion, and disciplining of judges. The centralized one-person system is unbalanced because all the decision-making power is in the hand of the newly created office of the President of the National Judicial Office without any accountability; because there is no effective judicial body which could control or veto her decisions (there is a body but only with consultative role); because the Parliament selected a judge who is close to governmental politicians; because there are not enough guarantees of transparency

of judicial administration and finally because other constitutional checks are also seriously diminished.

## Appendix

### The Act on the Transitional Provisions of the Fundamental Law

(31 December 2011)

#### The transition from the communist dictatorship to democracy

We, Members of the Parliament – conscious that the constitutional order’s secure functioning cannot stand on a solid foundation without acknowledging the past and the conclusions to which it leads; without naming the crimes committed against people, groups and society during communism and the perpetrators of these crimes; without condemning and prosecuting the perpetrators of these crimes with an emphasis on the responsibility of the leaders of the communist regime and at the same time the compensation of the victims of these crimes; without differentiating between democracy and dictatorship, right and wrong, and good and evil-- state the following in order to facilitate the adoption of Hungary’s first constitution according to the requirements of a rule of law state:

1. Communist dictatorship is incompatible with a state based on the rule of law and created by the will of the people through the first free elections in 1990. The current Hungarian rule of law state cannot be built on the crimes of the communist system.
2. The Hungarian Socialist Worker’s Party and its legal predecessor (the state party) are responsible
  - a. For eliminating, with the help of the Soviet Army, the democratic, multi-party effort of the post WWII years;
  - b. For a legal system based on illegality and the exclusive use of power;
  - c. For eliminating an economy based on the freedom of property and for indebting and permanently destroying the competitiveness of the economy;
  - d. For subjecting Hungary’s economy, military, foreign policy and human resources to foreign rule;
  - e. For systematically destroying traditions based on European values and undermining the nation’s identity;
  - f. For depriving or seriously limiting fundamental rights of individual citizens and certain groups, specifically
    1. For murdering, subjecting to foreign rule, unlawfully imprisoning, forcing into labor camps, torturing, and inhumanely treating people;

2. For arbitrarily confiscating property from citizens and limiting their rights to private property;
  3. For completely depriving people of their freedom and subjecting their political opinions and expressions of will to state coercion;
  4. For negatively discriminating against people based on origin, worldview or political conviction and for obstructing their progress and self-fulfillment based on knowledge, diligence, and talent;
  6. For the self-serving intrusion of political and ideological grounds into education, cultural education, scientific life and culture;
  7. For creating and operating a secret police to illegally observe and influence people's personal lives;
  - g. For strangling in blood the October 1956 revolution in collaboration with Soviet troops, subsequently ruling based on fear and retribution and forcing 200,000 Hungarians to emigrate;
  - h. For causing a drop in Hungary's ranking among European nations and in world comparison;
  - i. For those public law crimes which were carried out for political reasons and which the justice system failed to prosecute for political reasons.
3. The Hungarian Socialist Worker's Party, its predecessors and the political organizations created in the communist ideology for their service were all criminal organizations, and their leaders are responsible without statute of limitations for maintaining a repressive system, violating rights, and betraying the nation.
  4. The Hungarian Socialist Party shares the responsibility of the state party – through the continuity in party leadership that bridged the old and the new party -- as the legal successor to the Hungarian Socialist Worker's Party, as the inheritor of the illegally amassed wealth and as the benefactor of the illegitimate advantages acquired during the transition.
  5. Under the communist dictatorship, it was impossible to prosecute crimes involving the construction and maintenance of the system nor was it possible to do so -- given that the constitutional transition did not break legal continuity –

after the first free elections. The leaders of the dictatorship were never held responsible in a legal or moral manner. As the Fundamental Law comes into effect, there is now the possibility for delivering justice.

6. Every citizen who showed resistance to the communist dictatorship, who was unjustly prosecuted or was injured in his rights and human dignity by the servants of the communist dictatorship deserves recognition and moral compensation, as long as the person did not participate in these violations of the law.
7. The communist dictatorship systematically prompted the violation of the law, but the acts were perpetrated by individuals. For the living and future generations, the memory of the crimes committed must be preserved and the perpetrators must be named.

The Parliament and other Hungarian state bodies will base their actions on the above constitutional provisions.

#### **Article 1.**

- (1) The remuneration of communist leaders, granted by the State in statute, may be reduced according to degrees defined in law.
- (2) The revenues from the reductions carried out in accordance with Paragraph (1) must be used for alleviating the injuries caused by the communist dictatorship and preserving the memory of its victims.

#### **Article 2.**

- (1) The statute of limitations cannot toll on a crime committed against Hungary or against individuals in the name or interest of the state party or with its consent during the communist dictatorship which were not prosecuted for political reasons by ignoring the penal code in effect at the time the crime was committed.
- (2) The statute of limitations for a crime defined in Paragraph (1) will be set according to the penal code in effect at the time the crime was committed and will commence 1 January 2012 if the crime's statute of limitations passed before 1 May 1990.
- (3) The statute of limitations for a crime defined in Paragraph (1) will be defined according to the penal code in effect at the time the crime was committed and will commence 1 January 2012 if the crime's statute of limitations passed between 2 May 1990 and 31 December 2011 and the perpetrator of the crime was not prosecuted.

### **Article 3.**

- (1) In order to preserve the memory of the crimes committed in relation to communist crimes, a National Memorial Commission will be established.
- (2) The National Memorial Commission will investigate the functioning of the communist dictatorship and the role of individuals and organizations who held the powers of the communist regime. The Commission will also report on its activities and publish its results.

### **Article 4.**

Discovering how the communist dictatorship functioned and securing society's sense of justice are both public interests. Those who held power during the communist dictatorship constitute public individuals. For the public interest, those who held power during the communist dictatorship must tolerate public statements (with the exception of deliberate and untrue statements) regarding their roles and their acts related to the communist dictatorship. . Data on personal information in relation to these roles and acts may be revealed to the public.

### **Transitional Provisions Pertaining to the Coming into Effect of the Fundamental Law**

### **Article 5.**

The Fundamental Law does not impact previously adopted laws, administrative measures and other legal means of state administration, individual decisions, and duties assumed in international agreements.

### **Article 6.**

The legal successors to state bodies that served their tasks and jurisdiction according to Act XX of 1949 on the Constitution of the Republic of Hungary are bodies that serve their tasks and jurisdiction according to the Fundamental Law.

### **Article 7.**

References to the Republic of Hungary will remain in place according to the normative acts enacted before 31 December 2011, even after the enactment of the Fundamental Law goes into effect designating the country as Hungary, as long as the

transition to the new national name set in the Fundamental Law cannot be completed according to the principles of responsible resource management.

#### **Article 8.**

The coming into effect of the Fundamental Law does not impact – with the exceptions outlined in Articles 9-18 – the mandate of elected and appointed officials of Parliament, the Government, local governments, and officials appointed or elected before the Fundamental Law comes into effect.

#### **Article 9.**

- a) Articles 3 and 4 of the Fundamental Law should apply to the mandate of the Parliament and Members of Parliament in office at the time the Fundamental Law comes into effect.
- b) Articles 12 and 13 of the Fundamental Law should apply to the mandate of the President of the Republic in office at the time the Fundamental Law comes into effect.
- c) Articles 20 and 21 of the Fundamental Law should apply to the mandate of the Government and members of the Government in office at the time the Fundamental Law comes into effect.
- d) Article 27(3) of the Fundamental Law should apply to the mandate of judicial clerks serving at the time the Fundamental Law comes into effect.
- e) Article 33(2) of the Fundamental Law should apply to the mandate of regional assembly presidents in office at the time the Fundamental Law comes into effect.
- f) Article 35(3)-(6) of the Fundamental Law should apply to the mandate of local government representative bodies and mayors in office at the time the Fundamental Law comes into effect.

#### **Article 10.**

The date of reference for Article 4(3)f) of the Fundamental Law is the date the Fundamental Law comes into effect.

#### **Article 11.**

- (1) The Curia is the legal successor in matters of adjudication to the Supreme Court and the National Justice Council and the President of the National Judicial Office is their legal successor in matter of administration of the courts. .
- (2) The mandate of the President of the Supreme Court, the President and members of the National Justice Council end when the Fundamental Law comes into effect.

- (3) In order to guarantee the right to trial within a reasonable timeframe, as provided in Article XXVIII(1) of the Fundamental Law, the President of the National Judicial Office may assign any case to a court at an equal level but outside the normal court's jurisdiction, if the caseload across courts is not balanced.
- (4) In order to guarantee the right to trial within a reasonable timeframe, as provided in Article XXVIII(1) of the Fundamental Law, the Public Prosecutor, as the leader and manager of the Office of the Prosecutor based on Article 29 of the Fundamental Law, may assign any case to a court at an equal level but outside the normal court's jurisdiction, if the caseload across courts is not balanced. This does not impact the right of the President of the National Judicial Office as granted in Paragraph (3) and the right of the prosecution to assign a case to any court within their jurisdiction.

#### **Article 12.**

- (1) If a judge reaches the general retirement age, defined in Article 26(2) of the Fundamental Law, before 1 January 2012, his or her term of service will end 30 June 2012. If a judge reaches the general retirement age, defined in Article 26(2) of the Fundamental Law, between 1 January 2012 and 31 December 2012, his or her term of service will end 31 December 2012.
- (2) If a person is appointed by a specific government decision to serve as a mediator or arbitrator under Article 25(6) of the Fundamental Law, the person will be subject to the general retirement policy, outlined in Article 26(2) of the Fundamental Law, as of 1 January 2014.

#### **Article 13.**

If a prosecutor reaches the general retirement age defined in Article 29(3) of the Fundamental Law before 1 January 2012, his or her term of service will end 30 June 2012. If a prosecutor reaches the general retirement age defined in Article 29(3) of the Fundamental Law between 1 January 2012 and 31 December 2012, his or her term of service will end 31 December 2012.

#### **Article 14.**

- (1) The minimum age requirement, defined in Article 26(2) of the Fundamental Law, must be applied to judicial appointments – except in cases defined in Paragraph (2) that are based on an application process that is announced after the Fundamental Law comes into effect.
- (2) If the appointment takes place without a formal application process, the minimum age requirement must apply to judicial appointments made after the Fundamental Law comes into effect.

#### **Article 15.**

The title of the Parliamentary Commissioner for Citizen Rights will change to Commissioner for Fundamental Rights when the Fundamental Law comes into effect. The Commissioner for Fundamental Rights is the legal successor to the Parliamentary Commissioner for Citizen Rights, the Parliamentary Commissioner for National and Ethnic Rights and the Parliamentary Commissioner for the Rights of Future Generations. The serving Parliamentary Commissioner for National and Ethnic Minority Rights becomes the deputy to the Commissioner for Fundamental Rights and protects the rights of nationalities living in Hungary when the Fundamental Law comes into effect; the serving Parliamentary Commissioner for the Rights of Future Generations becomes the deputy to the Commissioner for Fundamental Rights and protects the rights of future generations when the Fundamental Law comes into effect; their mandate will end when the mandate of the Commissioner for Fundamental Rights ends.

#### **Article 16.**

The mandate of the serving Commissioner for Data Protection ends when the Fundamental Law comes into effect.

#### **Article 17.**

The title of President of a Regional Council becomes the President of the Regional Representative-body when the Fundamental Law comes into effect.

#### **Article 18.**

The serving member of the Budget Council, appointed by the President of the Republic, becomes the President of the Budget Council when the Fundamental Law comes into effect.

#### **Article 19.**

- (1) The provisions of the Fundamental Law must be applied to pending cases as well as future cases – with the exceptions outlined in Paragraphs (2)-(5).

- (2) Article 6 of the Fundamental Law must be applied beginning with the first Parliamentary session after the Fundamental Law comes into effect.
- (3) The petitions filed by individuals who do not have the right to petition to the Constitutional Court under the Fundamental Law are terminated – unless the petitions come under the jurisdiction of an organization other than the Constitutional Court after the Fundamental Law comes into effect, in which case the petition may be transferred.. An individual may file the petition again with the Constitutional Court based on the conditions outlined in cardinal act.
- (4) Articles 38(4) and 39(1) of the Fundamental Law should be applied, as defined in law, to contracts and grants in effect 1 January 2012 and negotiations of contracts and grants in process when the Fundamental Law comes into effect.
- (5) The third sentence of Article 70/E(3) of Act XX of 1949 on the Constitution of the Republic of Hungary, in effect 31 December 2011, should be applied according to the normative acts in effect 31 December 2011 to changes in the condition, nature or amount of pensions or the transformation of such pensions to other provisions until 31 December 2012.

#### **Article 20.**

Articles 26(6), 28/D, 28/E, and 31(2)-(3) of Act XX of 1949 on the Constitution of the Republic of Hungary should be applied to cases ongoing at the time the Fundamental Law takes effect.

#### **Article 21.**

- (1) Parliament, in the cardinal Act on the Status of Churches, lists the recognized churches and defines the conditions for recognizing further churches. A cardinal Act may prescribe that recognizing an organization as a church should require that the organization be in existence for a given length of time with a certain number of members and that the State take into account the general historic traditions and societal support for the organization.
- (2) Parliament, in a cardinal Act on Nationalities residing in Hungary, lists the recognized national minorities and defines the conditions for recognizing other nationalities. A cardinal Act may define the conditions for recognizing a national minority to include the length of time of residence in Hungary, the number of members of the group and the initiation of recognition of the minority group through application by a member of the minority group.

#### **Article 22.**

- (1) In applying Article 24(2)c) of the Fundamental Law, a constitutional complaint is a
  - (a) complaint submitted against a normative act that is already in effect that violates of the petitioner's rights guaranteed in the Fundamental Law and that is applied in a judicial decision, after the petitioner has exhausted all available legal remedies or no legal remedy is available, together with
  - (b) a complaint submitted against a normative act that violates the petitioner's rights guaranteed in the Fundamental Law, in an individual case with a direct effect and that is applied without a judicial decision, after the petitioner has exhausted all legal remedies or no legal remedy is available.
- (2) Applying Article 24(2)d) of the Fundamental Law, a constitutional complaint is a complaint submitted in a case where a right guaranteed in the Fundamental Law is infringed by a judicial decision or by another judicial action that closes a case, after the petitioner has exhausted all available legal remedies or there are no legal remedies.

#### **Article 23.**

- (1) The first general elections for local government representatives and mayors after the Fundamental Law comes into effect will be held in October 2014. The general elections of local government representatives and mayors will be held the same day – with the exception of the first general elections after the Fundamental Law comes into effect – as the elections for representatives to the European parliament; the time between two subsequent general elections for local government representatives and mayors may differ from the period set in Article 35(2) in order to follow the general elections for representatives to the European parliament.
- (2) The participation, in Parliament, of representatives of nationalities living in Hungary should be guaranteed, as defined in Article 2(2), in the work of the first Parliament elected after the Fundamental Law comes into effect.

#### **Article 24.**

Fundamental Law coming into effect does not affect prior decisions – in accordance with Act XX of 1949 on the Constitution of the Republic of Hungary -- of the Parliament or the Government on the deployment of the Hungarian Army in Hungary or abroad, deployment of foreign forces in or originating from Hungary or the decisions of the Hungarian Army on the deployment of Hungarian forces abroad or the deployment of foreign forces within Hungary.

#### **Article 25.**

- (a) The Fundamental Law's provisions on state of national crisis should be applied in case a state of national crisis is declared.
- (b) The Fundamental Law's provisions on state of emergency should be applied if a state of emergency is declared as a result of armed acts that aim to overthrow the constitutional order or to acquire the exclusive use of power or to commit armed or non-armed violent acts that endanger *en masse* life or property.
- (c) The Fundamental Law's provisions on state of extreme danger should be applied in case a state of national crisis is declared as a result of a natural disaster or industrial accident that endangers *en masse* life or property.
- (d) The Fundamental Law's provisions on the state of preventive defense should be applied in case a state of preventive defense is declared.
- (e) The Fundamental Law's provisions on unexpected attacks should be applied in case a situation emerges as defined in Article 19/E of Act XX of 1949 on the Constitution of the Republic of Hungary.
- (f) The Fundamental Law's provisions on state of extreme danger should be applied if a state of extreme danger is declared.

**Article 26.**

- (1) If, when the Fundamental Law comes into effect, a person is barred from participating in public affairs by a final court judgment, the person does not have a right to vote under the Fundamental Law.
- (2) If a person whose capacity is limited or restricted by being subject to guardianship on the basis of a final court judgment, the person does not have the right to vote until the guardianship is terminated by a court or until a court decision returns to the person the right to vote.

**Article 27.**

Article 37(4) of the Fundamental Law should remain in force for Acts that were promulgated when the state debt to the Gross Domestic Product ratio exceeded 50% even if the ratio no longer exceeds 50%.

**Article 28.**

- (1) Article 12(2) of Act XX of 1949 on the Constitution of the Republic of Hungary, in effect 31 December 2011, should be applied in case of a transfer of local government property to the state or another local government until 31 December 2013.
- (2) Article 44/B(4) of Act XX of 1949 on the Constitution of the Republic of Hungary, in effect 31 December 2011, remains in force until 31 December 2012. After 31 December 2011, a normative act authorized by an Act of

Parliament may grant public administrative tasks and jurisdiction to a notary of a competent local government.

- (3) A capital or regional government office may ask a court to decide whether a local government failed in its statutory obligation to deliver a decision. If the local government does not satisfy its statutory obligation to deliver a decision within the time frame set by a court, the court may order, based on the capital or regional government office's initiative, the head of the capital or regional government office to address the failure by issuing a decree in the name of the local government.
- (4) Article 22(1) and (3)-(5) of Act XX of 1949 on the Constitution of the Republic of Hungary, in effect 31 December 2011, remains in force until the cardinal law as called for by Article 5(8) of the Fundamental Law comes in effect. Parliament will adopt the cardinal laws according to Articles 5(8) and 7(3) of the Fundamental Law before 30 June 2012.
- (5) Until 31 December 2012 Parliament may require in a cardinal act that certain of its decisions be subject to a qualified majority.

#### **Article 29.**

- (1) As long as the public debt exceeds 50% of the Gross Domestic Product, if the Constitutional Court, the Court of the European Union, another court or other law applying that body's decision requires the state to pay a fine, and the Act on the central budget does not contain necessary reserves to pay the fine, and the amount of the fine cannot be allocated from the budget without undermining a balanced management of the budget or no other item from the budget may be eliminated to provide for the fine, a general contribution covering the common needs must be specified that relates in its name and content exclusively and explicitly to the above fine.
- (2) Those who were illegally deprived of their lives or freedom based on political factors and saw the unjust damage to their property caused by the state prior to 2 May 1990 cannot be granted financial or other material compensation in a new compensation statute.

#### **Article 30.**

- (1) A Cardinal Act, as defined in Articles 41 And 42 of the Fundamental Law, may specify that a new organization assume the tasks and jurisdiction of the organization charged with Financial Supervisory Authority and the Hungarian National Bank. The President of the Republic appoints the head of this organization according to Article 41(2) of the Fundamental Law.
- (2) In the case defined in Paragraph (1), the vice-president of the new organization, with respect to the tasks on monetary policy and central banking, is the President of the Hungarian National Bank, in office at the time the Act on the

new organization comes into effect, and the vice-president of the new organization, with respect to tasks on supervising the financial sector, is the President of the Financial Supervisory Authority, in office at the time the Act on the new organization comes into effect. The vice-presidents will remain in office until their terms as President expire. Once the mandate of the vice-president ends, the President of the Republic appoints new vice-president according to Article 41(2) of the Fundamental Law.

## **Closing Provisions**

### **Article 31**

- (1) The Act on the Transitional Provisions of the Fundamental Law (hereinafter: Transitional provisions) comes into effect 1 January 2012.
- (2) Parliament adopts the Transitional Provisions based on Articles 19(3)a) and 24(3) of Act XX of 1949 on the Constitution of Republic of Hungary and with respect to Paragraph 3 of the Closing Provisions of Hungary's Fundamental Law. The Transitory Provisions form a part of the Fundamental Law.
- (3) Hereby repealed are
  - a) Act XX of 1949 on the Constitution of the Republic of Hungary,
  - b) Act I of 1972 on the unified text of the Constitution of the People's Republic of Hungary and on the amendment to Act XX of 1949,
  - c) Act XXXI of 1989 on the amendment to the Constitution,
  - d) Act XVI of 1990 on the amendment to the Constitution of the Republic of Hungary,
  - e) Act XXIX of 1990 on the amendment to the Constitution of the Republic of Hungary,
  - f) Act XL of 1990 on the amendment to the Constitution of the Republic of Hungary,
  - g) the 25 May 2010 amendment to the Constitution,
  - h) the 5 July 2010 amendment to the Constitution,
  - i) the 6 July 2010 amendment to the Constitution,
  - j) the 11 August 2010 amendment to the Constitution,
  - k) Act CXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
  - l) Act CXIX of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
  - m) Act CLXIII of 2010 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
  - n) Act LXI of 2011 on the amendments to Act XX of 1949 on the Constitution of the Republic of Hungary to create certain necessary transitional acts in relation to the Fundamental Law.

- o) Act CXLVI of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary,
- p) Act CLIX of 2011 on the amendment to Act XX of 1949 on the Constitution of the Republic of Hungary.

**Article 32.**

In memory of its enactment, April 25<sup>th</sup> is designated as the day of the Fundamental Law.

Dr. Pál Schmitt

President of the Republic

László Kövér

Speaker of the House