OPINION ON THE FOURTH AMENDMENT OF THE COSTITUTION OF HUNGARY

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The Fundamental Law of Hungary (hereinafter referred to as Hungarian Constitution), adopted on 18 April 2011 by the National Assembly, was promulgated on 25 April 2011. It went into force on 1st January 2012.

It has, since then, been subject to several amendments.

The Constitutional Court annulled the first amendment on transitional provisions by decision rendered on 28 December 2012. According to the report published by the Court, the latter considered that the National Assembly violated the Fundamental Law by inserting non-transitional provisions into the transitional provisions of the Fundamental Law, and thus annulled the provisions in dispute for formal irregularity without examining the constitutionality of their content.

Several Acts adopted by the National Assembly have been challenged before and annulled by the Constitutional Court for infringement of the Constitution: this was the case of the Act on Election Procedure (decision of the Constitutional Court n° 1/2013 - I. 7.), the Act on student contracts in higher education (decision n° 32/2012 - VII. 4.), the Act on prohibition of permanent living in public areas (decision n° 38/2012 - XI. 14.) and the Act on Churches and religious communities (decision n° 164/2011 - XII. 20.).

On 11 March 2012, the National Assembly adopted a fourth amendment containing provisions, which have been censured by the Constitutional Court, which considered that some of the censured provisions could not be contained in the transitional constitutional provisions and the others could not be contained in statutory acts.

The undersigned have been requested to provide an opinion in order to determine whether the above-mentioned fourth amendment complies with the European norms and standards.

The issue of the compliance of the statutory acts adopted on the basis of the Fourth Amendment with the Hungarian Constitution and the European norms and standards falls outside the scope of the present opinion. However, the compliance of the Fourth Amendment with the European norms and standards could be ensured in the context of the implementation of its provisions by laws.

INTRODUCTION

First, it should be established whether the authorities endowed with constituent power have the right to re-incorporate provisions, which have been previously annulled by the Constitutional judge. Concerning the provisions censured by the Hungarian Constitutional Court, the issue can be split into two, since some of the provisions were contained in the transitional constitutional provisions and the others in statutory acts.

Concerning the constitutional provisions, which were inserted into the transitional provisions, it has already been set out by the Hungarian Constitutional Court itself that their annulment has only been decided upon for formal reasons and not for substantive reasons: since these provisions were considered as final ones and as such they should not have been adopted as transitional ones, they were annulled; their content has not been censured. Therefore, the *res judicata* effect of the Constitutional Court's decision does not prevent the National Assembly from re-incorporating those provisions, this time not into the transitional provisions, but into the final provisions of the Constitution.

Concerning the statutory provisions, considered by the Constitutional Court as contravening the Constitution, the *res judicata* effect does not prevent either these provisions from being re-incorporated into the main text of the Constitution: indeed, since under the Constitution it was not allowed to incorporate those provisions by law, the Constitution now has been amended in order to allow to incorporate them. We have examples of other countries having adopted such solution. For instance, the French Constitution has been amended (Constitutional Laws of 8 July 1999 and of 23 July 2008) to provide that "*The law favors the equal access of women and men to electoral mandates and elective functions, just as to professional and social responsibilities*", after the French Constitutional Court decided that laws imposing gender quotas for the elections (Decision n°82-146 DC of 18 November 1082 and n°98-407 DC of 14 January 1999) and in professional organizations (n°2001-445 DC of 19 June 2001 and 2006-533 of 16 March 2006) contravened the Constitution. In the same way, the fourth amendment of the Hungarian Constitution gives constitutional ranking to a provision, which could not have been adopted at the legislative level.

The question remains whether these substantive amendments can be subject to a constitutional review: this question will be examined in the section on Article S, paragraph 3 of the Fundamental Law, as drafted in accordance with the fourth amendment and we will see that the power to amend the Constitution is not necessarily subject to a constitutional control.

In these circumstances, the re-enactment in the fourth amendment of the provisions, which have been previously annulled by the Constitutional Court, does not constitute a constitutional irregularity.

This observation leaves open the question whether the amendments of the Constitution contained in the fourth amendment, comply, as to the rules they contain, with constitutional standards generally accepted in democratic States and with European norms.

The European norms can be defined as those of the European Union, on the one hand, and those of the Council of Europe, especially those contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as European Convention).

This question is one interesting every Constitution: what is the hierarchy between the national constitutions and European norms?

This issue shall be examined before analyzing the content of the Fourth Amendment. This question can be split into two issues:

Do European norms have primacy over national constitutions?

Is there a room for manoeuver for the national constitutions?

On the primacy of European norms over national constitutions

The question arises at two different levels: when a State becomes member to international conventions, which create new norms (such as European norms), is it possible to ratify such convention when they contain rules contravening its Constitution? When the State has ratified an international convention providing norms (especially European norms), can its constitution have primacy over those norms?

To the first question, the answer is well established: in case of conflict between an international convention and constitutional provisions, a State cannot ratify the convention unless it previously amends its constitution in a way it will allow the ratification. Several examples can be given in relation to various States in the context of the ratification of the Maastricht Treaty.

The second question is the one to be raised in relation to the fourth amendment to the Hungarian Constitution, adopted on 11 March 2013, but also in relation to the Constitution itself, signed on 25 April 2011, since these provisions have been adopted while Hungary was becoming a member of the European Union and the Council of Europe and ratified the treaties of them both, namely the European Convention for the Protection of Human Rights and Fundamental Freedoms.

It has, thus, to be established, to what extent the law of the European Union and that of the European Convention have primacy over the national constitutions.

As to the law of the European union, the answer has been given by the Court of Justice of the European Communities,

First, in general terms in its decision of 15 July 1964, Costa v. Enel, case 6/64:

The law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question; ... the transfer by the states from their domestic legal system to the community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against with a subsequent unilateral act incompatible with the concept of the community cannot prevail;

Then, specifically with regard to the constitutional provisions in its decision of 17 December 1970, Internationale Handelsgesellschaft MB, case 11/70:

3 Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

The decision of 9 March 1978, Simmenthal, case 106-177, confirms in general terms that *any provision of a national legal system ... which might impair the effectiveness of community law ... are incompatible with those requirements which are the very essence of community law* – this decision covers the constitutional provisions.

In the Kreil case, C-285/58, dated 11 January 2000, the application of the Council Directive 76/207/EEC of 9 February 1976, relating to the implementation of the principle of equal treatment for men and women, to the possibility for women to join the German army, such possibility being excluded under the article 12 of the Fundamental Law of the Federal Republic of Germany (as implemented by the law on the military status and the regulation on military career) was in issue; the Court has decided that the answer to be given

to the question must therefore be that the Directive precludes the application of national provisions, such as those of German law, which impose a general exclusion of women from military posts involving the use of arms and which allow them access only to the medical and military-music services.

Therefore, the law of European Union shall have primacy over the constitution of the Member States.

We will see the difficulties, which can arise out of the conflicting positions adopted by the law of the European Union and the national constitutional judges, in particular the positions adopted by the Constitutional Court of the Federal Republic of Germany and the Constitutional Court of the Republic of France.

As to the law of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has dealt with the issue of primacy between the European Convention and the national constitutions.

In its decision dated 30 January 1998, United Communist Party of Turkey and others v. Turkey (133/1996/752/951), it adopted the following position:

29. The Court points out, moreover, that Article 1 requires the States Parties to "secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". That provision, together with Articles 14, 2 to 13 and 63, demarcates the scope of the Convention ratione personae, materiae and loci (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 90, § 238). It makes no distinction as to the type of rule or measure concerned and does not exclude any part of the member States' "jurisdiction" from scrutiny under the Convention. It is, therefore, with respect to their "jurisdiction" as a whole – which is often exercised in the first place through the Constitution – that the States Parties are called on to show compliance with the Convention.

30. The political and institutional organization of the member States must accordingly respect the rights and principles enshrined in the Convention. It matters little in this context whether the provisions in issue are constitutional (see, for example, the Gitonas and Others v. Greece judgment of 1 July 1997, Reports of Judgments and Decisions 1997-IV) or merely legislative (see, for example, the Mathieu-Mohin and Clerfayt v. Belgium judgment of 2 March 1987, Series A no. 113). From the moment that such provisions are the means by which the State concerned exercises its jurisdiction, they are subject to review under the Convention.

Therefore, the national Constitutions cannot disregard the rights and principles stemming from the Convention.

On the recognition of the autonomy of national Constitutions

Although the word « autonomy of national Constitutions » is not referred to as such in European texts, this concept can at least be connected to other ones: the concept of national identity pursuant to the law of European Union and that of the margin of appreciation doctrine developed under the European Convention.

On national identity under the law of European Union

Under article 4.2 of the Treaty on European Union (reproducing the provisions of article I.5 of the Draft Treaty establishing a Constitution for Europe):

The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

In their observations on this article, academic authorities have pointed out that it contributed to determining the status of the State in European law. C. Blumann and L. Dubois (*Droit institutionnel de l'Union européenne*, Lexis Nexis, Litec, Paris 4ème ed., 2010, n° 78) consider that: "*The national identity is not the same as the national sovereignty (...) Declare sovereignty of the States in the European legal order would be contradictory with the existence itself of the European Union, which is based upon continuous limitation and transfer of rights to act. However, the express reference to the national identities of the Member States is not insignificant, especially when it refers back to fundamental structures. The EU shall respect the national constitutions; this cannot be done without consequence at all regarding the primacy of the law of the Union. The national supreme courts can thus feel encouraged when they refuse the primacy of the law of the EU in case it conflicts with the national Constitution*."

However the same authors consider (n°79) that: "*The concept provided for in article 4 of the new Treaty on European Union, as resulting from the Lisbon Treaty, is a passed one, which obviously does not correspond anymore to the reality of Europe today, neither to the reality of the world, gripped in collective alliance networks, subject to the United Nations Charter*".

Even before article 4.2 of the Treaty on European Union has been adopted the Court of Justice has recognized the possibility for the requirements stemming from national constitutions to be taken into consideration.

In a case, which lead to the decision of 14 October 2004, Omega Spielhallen- und Automatenaufstellungs-GmbH**,** case C-36/02, the following question has been presented to the Court of Justice of the European Communities:

Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity – in this case the operation of a so-called "laserdrome" involving simulated killing action – to be prohibited under national law because it offends against the values enshrined in the constitution?

The Court answered that:

Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

However, it has to be noted that the Court based its decision on the similarities between the values of the European law and those contained in the constitution. It was not exactly the primacy of national constitution over the European law what was admitted here.

Domestic case laws have, on their part, considered that in certain cases the constitutional requirements could prevail over the law of the European Union.

The most well known cases are those rendered by the German Constitutional Court and the French Constitutional Court.

The German Constitutional Court in its decision So Lange I and II, of 29 May 1974 and of 22 October 1986, considered that the authorization, conferred upon the Federation under article 24 § 1 of the Fundamental Law, to transfer some sovereign rights to the international institutions "*is not of an unlimited nature at a constitutional level. This provision does not allow to renounce to the specific nature of the constitutional order in force in the Federal Republic of Germany, to interfere with its foundations, with its fundamental structures, by transferring sovereign rights to international institutions*". If the Court accepted not to review that the fundamental rights were respected by the European law "*it was only as long as the European Communities, and the European Union's precedents, constitute an efficient protection of the fundamental rights against the authorities of the Communities, a protection considered as essentially comparable to the protection required by the fundamental law*", as a consequence, if this were not the case, it would exercise its right to a control. This is exactly what the Court has confirmed in its decision of 12 October 1993, in relation to the Maastricht Treaty: "*the Constitutional Court will verify whether the acts of the European institutions and bodies were adopted within the scope of the sovereignty rights conferred upon them, or whether they fall outside of this scope".*

The French Constitutional Court decided in a similar manner.

First, in its decisions 2004-496 DC of 10 June 2004, 2004-497 DC of 1st July 2004, 2004-498 DC and 2004-499 DC of 29 July 2004, it considered that *under the article 88-1 of the Constitution*: "*The Republic is a member of the European communities and the European Union, composed of States which have freely chosen, by adhering to the Treaties constituting them, to exercise together some of their sovereign rights; as such the transposition of a directive into the domestic legal order results from a constitutional requirement, which can only be prevented by an express and conflicting provision of the Constitution*". This wording reserves the possibility of the primacy of the Constitution over an EC Directive. The solution has been then clarified.

In its decision 2004-505 DC of 19 November 2004 concerning the Treaty establishing a Constitution for Europe, the Constitutional Court observed that "*under article I-5, the EU respects the national identity of its Member States 'inherent in their fundamental structures, political and constitutional'";* in its decision of 27 July 2006 (2006-540 DC) it considers that "*the transposition of a directive should not contravene a rule or a principle inherent in France's constitutional identity, unless the constituent power has agreed on it*".

The French highest Court of administrative jurisdiction drew a conclusion from this position. In its decision (in Assembly) of 8 February 2007, Société Arcelor Atlantique, it decided on the case of a possible conflict between a text transposing European directive and a constitutional rule: "*if there is no rule or general principle of European law, which could*

guarantee the reality of the respect of the concerned constitutional provision or principle, the administrative judge shall have the power to directly review the constitutionality of the statutory provisions in dispute" – this could possibly allow that a measure transposing European directive which would not comply with the Constitution be censured.

Such case has not yet occurred and both German and French courts try to achieve conciliation between European and constitutional norms. But their case laws show a risk of possible conflict between these two categories of norms.

On the margin of appreciation doctrine developed under the European Convention law

The European Convention for the Protection of Human Rights and Fundamental Feedoms does not contain a provision similar to article 4.2 of the Treaty on European Union, reserving the right of the States to their national identity. The case law developed by the European Court of Human Rights has not either expressly used such terminology.

This concept is, however, not unknown to the law of European Convention and to the European Court's case law: the recognition of the margin of appreciation doctrine allows to the States to take into account their distinctive features, based on their history and structure, when implementing principles.

The decision of the European Court dated 7 December 1976, Handyside v. United Kingdom, n°5493/72, should be specifically cited in this regard. However, the margin of appreciation is not without limits. It does not mean that the States have total liberty under the margin of appreciation doctrine. The European Court sets out the limits to observe, which it then controls (cf. extracts in appendix).

Several decisions can be cited in this regard, especially
26 April 1979 Case Sunday Times v. United Kingdom *Application no 6538/74*
22 October 1981 Case Dudgeon v. United Kingdom *Application no 7525/76*
21 February 1986 Case James and others v. United Kingdom *Application no 8793/79*
2 March 1987 Case Mathieu-Mohin and Clerfayt *Application no 9267/81*
1st July1997 Case Ginotas and others v. Greece *(Application no 18747/91; 19376/92; 19379/92.*

The relevant extracts of those decisions are reproduced in the appendix.

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The provisions of the fourth amendment to the Hungarian Constitution shall be assessed with regard to the norms and principles stemming from the main European Treaties, as well as, in some cases those stemming from the European constitutional standards.

The following provisions will be successively analyzed, in relation to:

- marriage and family;
- control of constitutional reviews;
- crimes committed under the communist regime;
- churches;
- electoral campaign advertisings;
- affronts to human dignity;
- higher education;
- housing;
- Constitutional Court;
- legal system.

The provisions of the 4th amendment in relation to marriage and family

(article 1 of the 4th amendment)

Article 1 of the 4th amendment provides that:

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

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

In reality, the first sentence has already been contained in article L 1) of the Constitution dated 25 April 2011 (entered into force on 1st January 2012). The change consists of the insertion of the sentence *"Family ties shall be based on marriage and the relationship between parents and children."*

The compliance issue of this provision with the European norms is double:

- first, the issue of the definition of marriage;
- then, the one as to how family ties are determined.

On the definition of marriage

The writers of the Constitution clearly wanted to limit the definition of marriage to the union of a man and a woman and to prevent the legislator from opening up the marriage to same-sex couples, as it has been done or it is being done in several legal orders, in particular in Europe. The Constitution of Poland contains a similar definition (article 18).

There is no European norm, which would prohibit the adoption of a definition of marriage as being exclusively the union of a man and a woman and, which therefore, would require the recognition of same-sex marriage.

This has been recognized by the European Court of Human Rights in its decision of 24 June 2010, Schalk and Kopf v. Austria, n° 30141/04, the most relevant parts of this decision being reproduced in the appendix.

The ECHR took this opportunity to remind the provisions of the European Union. The article 9 of the Charter of fundamental rights of the European Union, signed on 7 December 2000 and entered into force on 1st December 2009, provides that "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights", it is therefore left with each national legislator to define marriage, without being prevented from adopting a definition limited to the sole union of a man and a woman. The observations on the decision, reproduced in the appendix, confirm it.

As a consequence, since the European norms do not require opening up marriage to same-sex couples, the Hungarian Constitution does not disregard them when it limits the definition of marriage to the union of a man and a woman.

On the determination of family ties

Under the 4th amendment, "Family ties shall be based on marriage or the relationship between parents and children".

The European Court of Human Rights considers that the notion of family ties is not limited to the notion of marriage; such ties exist outside of marriage, between parents and children. This position is clearly set out in its decision of 13 June 1979, Marckx v. Belgium, case 6833/74. The Court, by referring to article 8 of the European Convention (*1. Everyone has the right to respect for his private and family life …),* points out that legitimate family should not be distinguished from natural family. Article 8 applies thus to all families, both natural and legitimate (see the extracts of the case reproduced in the appendix).

The equal rights of natural and legitimate children are for instance established under the inheritance rules. Other cases have been rendered in this respect: 8 October 1987, Inze v. Austria, case. 8695/79; 29 November1991, Vermeire, case. 12849/87; 13 July 2004, Pla and Puncerneau v. Andorre, case 69498/01. In particular, the decision of 1st February 2000, Mazurek v. France, case. 34406/97 recognizes the equal rights of children of legitimate and adulterous relationship regarding inheritance (see also 22 December 2004, Merger and Cros v. France, case. 68864/01).

The wording of the 4th amendment, pursuant to which "*Family ties shall be based on marriage or the relationship between parents and children"*, puts on an equal footing, by inserting the word *or*, establishing as such an alternative, the family relationship based on marriage and the relationship between parents and children, which can be a relationship

outside of marriage. In this regard, the requirement provided for in article 8 of the European Convention, which, as the Court pointed out "*does not make any difference between "legitimate" family and "natural" family*" is complied with. Hungarian statutory acts and case law will draw the consequences of the above in relation to the equal rights of children born within and out of wedlock.

The 4th amendment thus complies, in this regard, with the European norms.

In relation to the notion of family ties, the issue of the legal characterization of a situation falling outside of marriage and of parent child relationship can be raised.

Historically, such issue should not be raised since we do not see what kind of family ties could exist outside the scope of marriage and parent child relationship. However, the evolving lifestyle customs result in situation of cohabitation outside the scope of marriage and parent child relationship: two persons are living together as if married, outside of marriage (with or without children). The European Court of human rights' case law has dealt with this situation.

In its decision of 18 December 1986, Johnston and others v. Ireland, case 9697/82, the Court considers that two persons having lived together for fifteen years shall bee considered as a family (cf. extract in appendix).

In the case Keegan v. Ireland, 16969/90, 26 May 1994, *The Court recalls that the notion of the "family" in this provision (art. 8) is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage (see, inter alia, the Johnston and Others v. Ireland judgment of 18 December 1986, Series A no. 112, p. 25, para. 55).*

In its decision of 2 November 2010, ŞERİFE YİĞİT v. Turkey, case. 3976/05, the Court decides once again that: *notion of the "family" is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside of marriage* (cf. the extract in appendix).

In its above cited decision of 24 June 2010, Schalk and Kopf v. Austria, n° 30141/04, even though the European Court, as mentioned above, admits that marriage cannot be not recognized as the sole union of a man and a woman, it ends up to acknowledge the existence of a same-sex couple family life: *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*. (cf. the extract in appendix)

Therefore, under this case law, both a different-sex and a same-sex couple can enjoy family life regardless of marriage and parent-child relationship.

The wording of the 4th amendment, under which, "*Family ties shall be based on marriage or the relationship between parents and children*", appears to raise some issues with regard to the above-mentioned case law.

This wording can be understood in two ways.

In the narrow sense, the wording would mean that there are no other family ties than those based on family and parent child relationship: this would prevent the acknowledgment of all other forms of family relationship, in particular the one which could result from the cohabitation of two persons. The wording would be interpreted as having an exclusive meaning, as if the text would have been drafted in the following way: *Family ties are only based on marriage or on relationship between parents and children*. It would be, thus, impossible to admit, in the context of legislation or case law, the existence of any other form of family ties.

Such interpretation would violate the European norms as interpreted by the European Court of Human Rights.

However, another interpretation is also available. The wording "*based*" (in Hungarian, as well as, in French) would express mainly an observation – the one that normally, family ties are constructed on the basis of marriage and parent-child relations: it would be a basic solution, expressing more a sociological view (or approach) than a legal norm. It would not prevent from possibly acknowledging the existence of family ties in other circumstances.

The legal significance of the wording would be at the same time positive and negative.

In the positive sense, it would encourage the legislator to adopt provisions acknowledging family ties in the context of marriage and parent-child relation. As the European Court admits that "*it is in itself legitimate, even commendable, to support and even encourage traditional family*", it has to be admitted that it is legitimate, even commendable, to support and encourage family ties based on marriage and parent-child relation. It does not exclude that family ties – which could, if necessary, take another name – could be acknowledged in other situations.

Only the latter interpretation of the wording "*Family ties shall be based on marriage or the relationship between parents and children*" can be considered as in compliance with the European norms.

The Hungarian Constitutional Court and courts of other jurisdiction shall interpret the concept of family and that of the family ties in line with the European norms.

The 4th amendment's provisions in relation to the control of the constitutional review

(articles 2, 11 and 12, § 3, of the fourth amendment)

A. — Prior to the adoption of the fourth amendment, article S, paragraph 3, of the Fundamental Law provided as follows:

(3) "The Speaker of the House shall sign the Fundamental Law or the amended Fundamental Law and send it to the President of the Republic. The President of the Republic shall sign the Fundamental Law or the amended Fundamental law and shall order its publication in the Official Gazette within five days of receipt."

Article 2, contained in the fourth amendment to the Fundamental Law of Hungary, provides, for its part, that:

Article S, paragraph 3, is replaced by the following provision:

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

If we compare the two texts, two differences can easily be pointed out.

On the one hand, it is specified that the President of the National Assembly have "five days" to sign the Fundamental Law or an amendment to it. The change can appear as good practice. The above-mentioned President will have no power to unnecessarily delay the implementation of a constitutional provision, which has been adopted in compliance with the formal and procedural requirements of the Fundamental Law.

On the other hand, the President of the Republic has now the power, before signing the Fundamental Law or an amendment to it, to refer to the Constitutional Court the question of the compliance with the "procedural requirements … with respect to the adoption" of these documents. In such case, the Court will rule "on the departure from the requirements." In case of negative ruling, the President of the Republic will sign the documents sent to him without delay.

This solution is in line with the constitutional practice of certain modern States, in particular in Europe.

As it has been raised by professor Allan R. Brewer-Carias in his general report to the XVIIIth International Congress on comparative law (Constitutional Courts as positive legislators in comparative law, Washington 2010), several States refuse any form of judicial review of constitutional provisions – this would be so, when the document is in early draft form, or when it is already adopted but not yet censured or promulgated.

This situation appears to be normal practice. Indeed, the constituent power – the original or the derived one – generally considers itself as "sovereign." It is not subject, in this regard, to the review of its work or of a part of it[1].

[1] There is no need to remind that the Supreme Court of the United States refused to control the constitutionality of the constitutional provisions (*Coleman v. Miller,* 307 U.S. 433 (1939). The French Constitutional Court adopted the same position (*Loi autorisant la ratification du traité sur l'union européenne,* 92-313, DC, 23 September 1992, *JORF*, 1992, p. 13307).

From a theoretical point of view, the question remains open. According to the wording adopted by Claude Klein, it is "one of the most contemporary questions in the current constitutional theory"[2]. From a practical point of view, it can be noted that a number of states organize today, a certain control more or less broad and more or less automatic on the Constitutional Court's intervention for the adoption or the amendment – in whole or in a part - of the Constitution.

As it has been underlined by a group of authors writing to the *Cahier n° 27 du Conseil constitutionnel* ("*Le contrôle de constitutionnalité des lois constitutionnelles*", Paris, Dalloz, 2009), this is not the solution adopted under French law. The Constitutional Court "does not have the power to rule on constitutional changes, neither on the basis of article 61, nor on that of article 89 or any other provisions of the Constitution" (Decree. n° 2003-469 DC, 26 March 2003, *Révision constitutionnelle relative à l'organisation décentralisée de la République*, *JORF*, 29 March 2003, p. 5570).

Such review, however, exists in German law (Fundamental Law, art. 93)[3], Austrian law (Constitution, art. 138.2) and Italian law (Constitution, art. 134)[4]. As A. Brewer-Carias, pointed out in general terms "Constitutional courts, being constitutional organs leading with constitutional questions, in many cases interfere, not with the ordinary Legislator, but with the ''Constitutional Legislator', that is with the Constituent Power, enacting constitutional rules when resolving constitutional disputes between State organs, or even mutating in an legitimate way the Constitutions by means of adapting their provisions, giving them concrete meaning" (*op. cit.*, p. 36),

In such case, the review of the Constitutional Court can be carried out on the formal requirements[5]. It can also have the power to analyze the substance of the amendments – in which case, the Constitution aims to establish what is called "guarantees of constitutional perpetuity" [6] —.

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2 C. KLEIN, « The control of constitutional laws. Introduction to a modern issue», *CCC,* 2009, p. 9. Adde : C. GREWE, « The control of constitutionality of constitutional laws in Bosnia Herzegovina », *CCC,* 2009, p. 32 : « To control the constitutionality of constitutional laws, is to understand the logic of constitutional States and its limits ».

3 O. LEPSIUS, « The control of laws on constitutional changes by the Constitutional Court in the Federal Republic of Germany », *CCC,* 2009, p. 13.

4 M. LUCCIANI, « The control of constitutionality of constitutional laws in Italy », *CCC,* 2009, p. 27.

5 As M. LUCCIANI rightly points out " the Italian doctrine (…) has always admitted that procedural defects of constitutional laws be subject to judicial review, in particular in case of non compliance with the procedure set out in article 138 of the Constitution » (*op. cit.,* p. 28). Also see the proposition of G. CARCASSONNE: « Couldn't we imagine that the (constitutional) judge considers that the power to review the Constitution is only limited to the time period and the formal and procedural requirements as set out in the Constitution …? It does not mean supra-constitutionality, neither it gives carte blanche to any change voted anyhow, by anyone and in any circumstances » (« A determined plea in favor of a control wisely limited », *CCC,* 2009, p. 47.

6 Other constitutions, such as the one of Portugal (article 288), also list a number of provisions, which cannot be changed.

It can be, however, noted, than in both cases, the constitutional judge has adopted a "self-restraint" or a self-limitation approach and did not object to the right of the political authorities to make changes to the Constitution in a way that they consider to be the most appropriate.

We also note that the Turkish Constitution confers upon the Constitutional Court the right to review the constitutional amendments. In this case, the constitutional judge is only allowed to review the amendments as to the formal requirements of the procedure (article 148/2)[7].

According to the comparative constitutional law, it is clear that the right to review the substance of the constitutional changes is not part of the European constitutional culture. When extending the power of the Constitutional Court, at the request of the President of the Republic, to the review of the formal requirements of the amendments, the Fundamental Law of Hungary is within the limits accepted by the contemporary view on the rule of law.

B. — Prior to the adoption of the fourth amendment, article 9, paragraph 3, subparagraph i, of the Fundamental Law provided as follows :

(the President of the Republic)

"may send adopted Acts to the Constitutional Court to examine their conformity with the Fundamental Law, or may return them to the Parliament for reconsideration."

Article 11 of the fourth amendment of the Fundamental Law of Hungary provides, for its part, the following:

Article 9, paragraph 3, subparagraph i, shall be replaced by the following provision:

(The President of the Republic)
"may send the adopted Fundamental Law and any amendment thereof to the Constitutional Court for a review of conformity with the procedural requirements set in the Fundamental Law with respect to its adoption, and may send adopted Acts to the Constitutional Court for a review of conformity with the Fundamental Law or may return them to Parliament for reconsideration."

The new provision contained in article 9, paragraph 3, takes into account the amendment made to article S, paragraph 3.The same observations would thus apply to it.

C. — Prior to the adoption of the fourth amendment, article 24, paragraphs 4 and 5, of the Fundamental Law of Hungary provided as follows :

(4) The Constitutional Court shall be a body of fifteen members, each elected for twelve years by a two-thirds vote of the Members of Parliament. Parliament shall elect, with a two-thirds majority of the votes, a member of the Constitutional Court to serve as its President

7 The decision of 30 July 2008 has been published in the *Journal officiel* of 22 October.

until the expiry of his or her mandate as a constitutional judge. No member of the Constitutional Court shall be affiliated to any party or engage in any political activity.

(5) The detailed rules for the competence, organisation and operation of the Constitutional Court shall be regulated by a cardinal Act.

Article 12, § 3, of the fourth amendment to the Fundamental Law of Hungary is drafted, for its par, in the following way:

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

"(4) The Constitutional Court may only review or annul a legal provision not submitted to it for a review if its substance is closely related to a legal provision submitted to it for a review.-
(5) The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. Such a review may be initiated by:
a) the President of the Republic in respect of the Fundamental Law and the amendment thereof, if adopted but not yet published, b) the Government, a quarter of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights within thirty days of publication.
(6) The Constitutional Court shall decide on the motion pursuant to Paragraph (5) out of turn, but within thirty days at the latest. If the Constitutional Court finds that the Fundamental Law or any amendment thereof does not comply with the procedural requirements defined in Paragraph (5), the Fundamental Law or the amendment thereof shall be:
a) renegotiated by Parliament in the case laid down in Paragraph (5) a), b) annulled by the Constitutional Court in the case laid down in Paragraph (5) b).
(7) The Constitutional Court shall hear the legislator, the initiator of the Act or their representative and shall obtain their opinions during its procedure defined by cardinal Act if the matter affects a wide range of persons. This stage of the procedure shall be open to the public.
(8) The Constitutional Court shall be a body of fifteen members, each elected for twelve years by a two-third majority of the Members of Parliament. Parliament shall elect, with a majority of two- thirds of the votes of all Members of Parliament, a member of the Constitutional Court to serve as its President until the expiry of President's mandate as a constitutional judge. Members of the Constitutional Court may not be members of a political party or engage in any political activity.

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

The new text leads to the following comments. The comments will be set out following the order of the adopted amendments.

— Concerning paragraph 4, it is generally accepted that when a dispute is brought before the Constitutional Court, it can only rule on the issues filed with it and it cannot on its on motion rule on other statutory provisions than those which have been brought before it by the authorities entitled to file a request with it. It has no jurisdiction to rule *ultra petita*.

This principle should not be interpreted in a formalistic way. It is the subject matter of the rule of law in dispute, which is subject to the constitutional review. In these circumstances, the constitutional court can replace a wrong reference by a correct one. If necessary, it can also review, as a consequence, a provision if its content is narrowly connected to the provision, it is requested to control the constitutionality thereof[8].

— Concerning paragraph 5, subparagraph a, it follows the amendment made in relation to article S, paragraph 3. It calls for the same comments.

— Concerning paragraph 5, subparagraph b, the Fundamental Law confers upon the Government, a quarter of the Members of Parliament, the President of the Supreme Court, the Supreme Prosecutor or the Commissioner for Fundamental Rights the same power. They are entitled to put into dispute the methods used for the adoption and promulgation of the Fundamental Law and its amendments, within thirty days running as of the publication of the constitutional provisions.

As currently drafted, such involvement can be seen as rather strange. If we consider that, as in the Federal Republic of Germany, the head of State has to ensure "that State organs operate in a democratic way" (article 9, paragraph 1) and can be vested, in this capacity, with a specific power – namely to ensure that all procedures, including constitutional ones, are complied with in a unicameral parliamentary system - we cannot see on what grounds the other authorities vested, in other conditions, with political, judicial and administrative functions, would be entitled to act in the same circumstances.

However, we cannot see either how such an extension of the right to act can contravene the generally accepted standards of the rule of law.

—Concerning paragraph 6, subparagraph a, it sets out the procedure to be followed in the context of an action filed with the Constitutional Court for violation of procedural rules in relation to the adoption and promulgation of the Fundamental Law and its amendments. It also provides what are the actions to be taken once the procedure is launched.

As already indicated, if the Constitutional Court considers that the dispute is without merit, it informs the President of the Republic; he will sign the text in dispute without further delay and order its publication in the Official Gazette.

If, on the contrary, it considers that the complaint is well founded, the National Assembly, which is better informed on the procedural requirements that have to be complied with, has to call for a "new discussion" in relation to the Fundamental Law or one of its amendments and

8 The Constitutional Court in Belgium can, for instance, take annulment measures as a consequence of the principal annulment decision: it can annul all kind of rules it considers as being "inseparably connected" to the provisions it annuls, e.g., those determining the entering into force of them or those revoking other norms (CA, n° 47 of 25 February 1988 and n° 73 of 22 December 1988).

decide, with full background knowledge, in line with the conditions set out in the Fundamental law on procedure and substance.

— Concerning paragraph 6, subparagraph b, it calls for the same reservations as those expressed in relation to paragraph 5, subparagraph b. Our observation has even more significance, since in this case, a claim brought in relation to the will expressed by the constituent power can result, if the Constitutional Court considers that such claim is well founded, in the "annulment" of the provision in dispute. This would enlarge in principle the procedural guarantees beyond the requirements of comparative European constitutional law.

— Concerning paragraph 7, a number of hearings are provided for before the Constitutional Court, namely the hearing of the "legislator" or the "initiator of the Act or their representative". If the matter concerns a "wide range of persons", their observation can be collected. The carrying out of such hearings can appear as burdensome. It however fits with the wishes of authors on public law who regret that the writer of the law in dispute, namely if it holds a parliamentary mandate, is only exceptionally involved in the judicial discussion notwithstanding the observations it can make in relation to the law adopted at his request.

— Concerning paragraph 8, it reproduces the text of article 24, paragraph 4, of the Fundamental Law. The election of the members of the Constitutional Court by the members of Parliament, with a qualified majority, is of standard practice. Their election for a specific time period is of common rule, except – concerning the European constitutional courts – in Austria and Belgium.

— Concerning paragraph 9, it reproduces the text of article 24, paragraph 5, of the Fundamental Law. This text also corresponds to standard practice in this area of law. Generally, constitutional provisions set only out rules organizing constitutional justice and refer back, as they do for the other judicial authorities, to organic laws in order for them to establish more detailed rules on its organization and operation.

It is nevertheless important that the Constitution provides itself the fundamental rules with regard to the composition and the powers of the Constitutional Court.

The Provisions of the 4th amendment in relation to the crimes of the communist regime

(article 3 of the 4th amendment)

The « declaration » in relation to the crimes of the communist regime

Under article 3 of the fourth amendment, a new article U has been inserted into the section « Foundation » of the Fundamental Law:

"Article U)

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

a) maintaining and directing an oppressive regime, violating the laws and betraying the nation;

b) eliminating with Soviet military assistance the democratic attempt built on a multi-party system in the years after World War II;

c) establishing a legal order based on the exclusive exercise of power and unlawfulness;

d) eliminating an economy based on the freedom of property and driving the country into debt;

e) submitting the economy, national defence, diplomacy and human resources of Hungary to foreign interests;

f) systematically devastating the traditional values of European civilisation;

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

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

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

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

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

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

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

(5) Statutory pensions or any other benefits provided by the State to leaders of the communist dictatorship as defined by law may be reduced to a statutory extent; the arising revenues shall be used to mitigate the affronts caused by the communist dictatorship and to preserve the memory of victims as prescribed by law.
(6) There shall be no statute of limitations for the serious statutory crimes which were committed against Hungary or persons in the communist dictatorship in the name and interest of, or in agreement with, the party-state and which were left unprosecuted for political reasons by ignoring the criminal law in force at the time of perpetration.
(7) The crimes laid down in Paragraph (6) shall become statute-barred on the expiry of the period defined by the criminal law in force at the time of perpetration, to be calculated from the day when the Fundamental Law came into force, provided that they would have become statute-barred by 1 May 1990 under the criminal law in force at the time of perpetration.
(8) The crimes laid down in Paragraph (6) shall become statute-barred on the expiry of the period between the date of perpetration and 1 May 1990, to be calculated from the day when the Fundamental Law came into force, provided that they would have become statute-barred between 2 May 1990 and 31 December 2011 under the criminal law in force at the time of perpetration and that the perpetrator was not prosecuted for the crime.
(9) No law may establish any new legal grounds for compensation providing financial or any other pecuniary benefits to individuals who were unlawfully deprived of their lives or freedom for political reasons and who suffered undue property damage from the state before 2 May 1990.
(10) The documents of the communist state party, the non-governmental and youth organisations established with its contribution and/or existing under its direct influence and of trade unions created during the communist dictatorship shall be the property of the State and shall be deposited in public archives in the same way as the files of bodies in charge of public duties.

The political motivations of article U of the Fundamental Law are easily understandable. The explanations provided by the Hungarian authorities contribute to it in an energetic and exemplary way. Those explanations, in particular, provide that:

« Hungary has lived through a political regime of communist dictatorship for more than forty years. During this time, the representatives of the State-party have committed many crimes, in particular in relation to the part they played in the suppression of the revolution.

The constituent power found important to declare on a political level that the liability of the key players for the State-party regime is beyond debate, and as such, to reserve, for instance, the possibility to reduce the retirement pension (of the most powerful leaders).

Condemnation of crimes committed during the communist regime is of a specific concern to post-communist, post-socialist, States. The national avowal of the Fundamental Law provides that there should be non-statute of limitation for inhuman crimes committed during the national-socialist and communist regimes. This provision has not been subject to any criticism in the opinion of the Venice commission dated June 2011. The amendment to the Fundamental Law provides a definition of the crimes committed during the communist regime and a ground for political liability of the perpetrators.

Condemnation of nazi and communist regimes is also part of the Polish and Croatian Constitutions, in more concise terms. »

The twenty-one articles inserted into the section "Foundation" of the Fundamental Law contain provisions of a great variety.

The title ("foundation") could lead us to believe that it mainly contains a list of values and principles with no direct legal implications. Such impression could easily be confirmed by the idea that the derived constituent power had the intention to list the values and principles, which have guided its work by inserting such declaration into the text of the Fundamental Law. Such principles and values would likely have an influence on the constituent power, in its efforts in relation to the application of other parts of the Constitution, in particular in an indirect way (through "teleological" interpretation).

It appears, however, that it is the Preamble to the Constitution, which mainly corresponds to such intention. The section "foundation" is in fact a combination of a declaration of values (as an example, see article C (1) ("*The functioning of the Hungarian State is based on the principle of separation of powers*") and of fully applicable legal provisions (as an example, see article A ("the name of our country is "Hungary""). Throughout this section the nature of the provisions (and the proportions of their characteristics) vary from an article to another.

The diverse nature of this section requires from the reader to keep in mind that each provision can possibly contain binding legal norms.

Concerning the "declaration" in relation to the crimes of the communist regime, on which our opinion has been requested, it has to be, first, noted that the Preamble contains some sentences, which clearly, condemn "the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship" and declare the "Communist constitution" of 1949 "null and invalid" since it established "tyrannical rules". Number of other post-communist States has adopted the same position in their new constitutions, by using various wording.

In this regard, the new article U further extends the condemnation already contained in the Preamble of the current Constitution. The new article brings a novelty when it expressly holds liable the person taking active part in the communist regime. In this particular respect, the concerned provisions require specific analysis.

From a formal point of view, the first obvious characteristic of article U is its voluminous nature, taken as a whole. It is, in fact, composed of a list of 9 subparagraphs on "crimes" committed by the Hungarian communist regime. (paragraph 1st subparagraphs a – i)
and
a rather important number of provisions relating to the issue of liability (paragraphs 2 to 10, to which can be added the second and last sentences of the 1st paragraph).

The reading of the whole text appears to be challenging, which can present a problem to the extent the text contains provisions others than simple declarations of values. In a State under

the rule of law, it is important that the legislative provisions with regard to civil and criminal liability of private persons and corporate entities (in our case liability allegedly connected to the past communist regime) could be easily read.

Thirdly, some of the key provisions of the text appear to be vague (this observation is subject to possible translation issues). For instance, the second sentence of the 1st paragraph provides that the "leaders" can be held liable without being subject to a statute of limitation: does this wording refer to all of the "leaders" (including leaders of the young communist league and those of district comities …) or only to the "main leaders" or a category in between? Such inaccuracies could be problematic to the extent article U can trigger direct legal implications for the individuals in question.

Leaving that aside, paragraph 1st is mainly a text of descriptive nature since it lists a series of harmful acts committed during the communist regime. Notwithstanding the fact that it contains a detailed list, which moreover includes some references to acts, which cannot fit to the established categories of "crime against humanity", the provision is in line with a number of preexisting formal texts condemning the communist past in Europe.

The situation is different for paragraphs 2 to 10, which – based on their form – fall outside the category of general condemnation. They also seem falling largely outside the scope of declarations of values.

They contain at least two series of provisions, which appear to trigger direct practical – legal effects.

The first such provision is the one setting up a "Committee of National memory" in relation to the communist dictatorship (paragraph 3). Such provision is not problematic in itself; on the contrary, this aim is easily understandable.

The same is not true for the other provisions, which should be analyzed in light of a variety of principles, which form not only part of the norms of European Union and of the European Convention but also of the European standards, in particular in criminal matters. Those principles are the following ones:

- the principle of crimes and sentences being established in law
- prohibition of retroactive criminal legislation;
- the rights of persons.

The principle of "no punishment without law" prevents from convicting an individual for criminal offences, which have not been legally defined at the time they were committed. Only acts committed subsequently can lead to a conviction. This principle is contained by numerous national constitutions (cf. for instance art. 8 of the French declaration of the rights of man and of the citizen of 1789; art. 103.2 of the Fundamental Law of the Federal Republic of Germany; art. 25.1 of the Spanish Constitution; art. 25 of the Italian Constitution); in particular, article 7 of the European Convention for the protection of human rights and fundamental freedoms provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Article 49 of the Charter of Fundamental Rights of the European Union, on *Principles of legality and proportionality of criminal offences and penalties*, states that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

The Hungarian Constitution has also declared in article XXVIII :
(4) No person shall be found guilty or be punished for an act which, at the time when it was committed, was not an offence under the law of Hungary or of any other state by virtue of an international agreement or any legal act of the European Union.

However, the above-cited provisions are subject to an exception.

Under paragraph 2 of article 7 of the European Convention,
This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 49 of the Charter of Fundamental Rights of the European Union also accepts that *2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.*

The Hungarian Constitution could thus add to paragraph 4 of article XXVIII a paragraph 5) in the following terms :
(5) Paragraph (4) shall not exclude the prosecution or conviction of any person for an act which was, at the time when it was committed, an offence according to the generally recognised rules of international law.

The European Court of human rights, in the context of cases with regard to the conviction of formal officials of the communist regimes, allowed the possibility to convict (22 March 2001, Streletz, Kessler and Krenz v. Germany, Applications no 34044/96, 35532/97 and 44801/98; on the same date, K.H W. v. Germany, Application no 37201/97;. 17 May 2010, Kononov v. Latvia, Application no 36376/04). The Court accepted, in some cases, the lawfulness of the criminal proceedings against individuals who committed crimes during the former regime – allowed to "apply and interpret the legal provisions existing at the time the wrongful acts were committed in the light of principles of the Rule of law" (contra 19 September 2008, Korbely / Hungary, Application n° 9174/02. In all matters, the rule of law should apply.

It can be noted that the new wording of article U, even if it severely condemns in paragraph 1) crimes committed during the communist regime and their perpetrators, does not establish in practice any new criminal offence in this regard. It constitutes a mere general declaration; it does not contain any definition of new offences or of new punishments for the offences committed. The exceptions based on the general principles of law recognized by civilized nations has not been referred to.

The first principle of criminal law (the principle of "no punishment without law") is therefore complied with.

The second principle (prohibition of retroactive criminal legislation) can raise some issues in relation to the new provisions contained in article U on the rules of statute of limitation.

The European Court of human rights had the occasion to rule on the issue of the statute of limitation in its decision of 22 June 2000, Coëme and others v. Belgium, (Applications nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96).

On the one hand,
146. Limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (see the Stubbings and Others v. the United Kingdom judgment of 22 October 1996, Reports 1996-IV, pp. 1502-03, § 51).

On the other hand,
149. The extension of the limitation period brought about by the Law of 24 December 1993 and the immediate application of that statute by the Court of Cassation did, admittedly, prolong the period of time during which prosecutions could be brought in respect of the offences concerned, and they therefore detrimentally affected the applicants' situation, in particular by frustrating their expectations. However, this does not entail an infringement of the rights guaranteed by Article 7, since that provision cannot be interpreted as prohibiting an extension of limitation periods through the immediate application of a procedural law where the relevant offences have never become subject to limitation.

Therefore the extension of statute of limitations, which has not yet been expired, would not infringe the prohibition of retroactive criminal legislation.

To the extent paragraphs 7 and 8 of the article U only provide for an extension of the statute of limitation, which have not yet been expired, they do not contravene the prohibition of retroactive criminal legislation.

Paragraph 6 raises more issues since it excludes the application of any statute of limitation in relation to the concerned criminal offences, even in case the statute of limitation has already be expired. We understand that the serious nature of the crimes committed and the great deal of leniency accorded to their perpetrators during the communist regime lead to refuse that such crimes remain unpunished.

In comparative law we can find examples of provisions stating that crimes of a certain nature should not be subject to any statute of limitation, and allowing as such the prosecution of the perpetrators even in case a statute of limitation would have applied under prior rules. This is the case of crime against humanity in France (art. 213-5 of the criminal code).

However the crimes in such case should be of such serious nature that the application of any exception would be completely unacceptable.

In order to accept that paragraph 6 could allow the prosecution of perpetrators of crimes already time-barred, this kind of level of seriousness shall be established. The legislator, who will enact these provisions, will have to take the necessary measures to comply with the principle of prohibition of retroactive criminal legislation. The judge, before whom specific disputes are brought, shall also ensure the right balance between these different legal principles.

Thirdly, article U raises issues, in several respects, in relation to the principles on the right of persons.

First, the former communist leaders shall take as to be true *factual statements, except for any willful and essentially false allegations, about their roles and actions related to the operation of the dictatorship*

This wording constitutes an irrefutable allegation of truth, which cannot be subject to evidence to the contrary.

It is difficult to accept such solution, regardless of its purpose.

The purpose of the provision can be the collection of general information on the events. It would allow to learn what happened, to get to know the circumstances, to identify the participants and their behavior. In this regard, they are of historical nature. If historical research allows the discovery of historical truth, no official version of historical truth can exist. Individuals cannot be forced to accept it.

The purpose of the provision on factual statements can concern individuals, regarded on their own. The allegations concern facts that were committed by these individuals. By forcing them to take those allegations to be true, the provisions contravene the freedom of opinion and the presumption of innocence: to force a person to take a fact to be true, imposes on him a factual finding and a judgment; if the alleged facts are constitutive of a criminal offence, it would force the person to plead guilty.

This provision is therefore unacceptable.

Furthermore, personal data of the former communist leaders in relation to their role action can be publicly disclosed. This confirms that the provision of the factual statements concerns individuals. This provisions contains two threats: one to the presumption of innocence, as it has been mentioned, and the other to the protection of privacy.

We can understand that public authorities would like to bring out into the open the former communist leaders' behavior, but this cannot be made at the expense of the presumption of innocence and the right to privacy.

This provision should, in the best-case scenario, be interpreted and applied in a way that would avoid infringement of both principles.

Finally, article U 5) allows that decisions on the reduction of pension and other allowances given to former communist leaders be rendered. The amount of money collected this way *shall be used to mitigate (translation issue: to compensate) the affronts caused by the communist dictatorship and to preserve the memory of victims.*

This provision contravenes the principle of peaceful enjoyment of one's possessions, set out in article 1 of the First Additional Protocol to the European Convention. Social benefits are covered by this article (in this regard, ECHR 26 November 2002, Buchen v. Czech Republic, case36541/97, on retirement pension).

Under the Additional Protocol, no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles. The reduction of pensions and other allowances do not satisfy these two conditions. It can however be argued that a deprivation of possession resulting from the reduction of pensions and other allowances with a purpose to allocate the recovered sums to the compensation of damages incurred by the victims and to the preservation of their memory can fall into the category of deprivation of possession in the public interest. In this regard, this provision would comply with the article 1 of the First Additional Protocol.

As we have already pointed out on several occasions, the general assessment of a given constitutional provision in a large part depends on its application. The contentious aspects of article U would be largely mitigated if the interpretation of the provision would favor the symbolic nature of it, considering it as constituting a mere declaration of values, as opposed to fully applicable legal norms.

The same would especially apply, if statutory rules on civil and criminal law were applicable even in case the constitutional norms do not make express reference to them. However, it does not allow casting away the doubt on the lawfulness of some provisions in the light of the generally accepted constitutional and European standards. In particular, this would be the case of the provision of paragraph 4 on the obligation to "tolerate factual statement" and on the public disclosure of personal data. Therefore, it is necessary that the provisions in question be interpreted in line with the European norms and the European standards.

The provision of 4th amendment concerning the churches

(article 4 of the 4th amendment)

Prior to the adoption of the fourth amendment, article VII, paragraphs 2 and 3 of the Fundamental Law provided the following:

(2) The State and Churches shall be separated. Churches shall be autonomous.

(3)The detailed rules for churches shall be regulated by a cardinal act.

The "national avowal", which, as we know, is "incorporated" into the Fundamental Law, which according to article R, § 3, is a key reference for its interpretation, has not, for its part, been modified. If the wording starts with "*God bless the Hungarians*", if it does not hesitate to recognize *"the role of Christianity in preserving nationhood*", it also clearly expresses its intention to value the "various religious traditions".

Article 4, contained in the fourth amendment to the Fundamental Law of Hungary, does now provides, in this regard, that:

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

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

The State and Churches and other organisations engaged in religious activities shall be separated. Churches and other organisations engaged in religious activities shall be autonomous.

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

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

These provisions raise several observations. Those observations will attempt to take into account different stand points, which are worth considering in the context of this discussion.

A. — Concerning the individuals, it shall be noted that article VII, paragraph 1 of the Fundamental law has not been changed in any way. It solemnly states that "*every person shall have the right to freedom of thought, conscience and religion*". It adds a second sentence providing that *"this right shall include the freedom to choose or change religion or any other persuasion, and the freedom for every person to proclaim, refrain from proclaiming, profess or teach his or her religion or any other persuasion by performing religious acts, ceremonies or in any other way, whether individually or jointly with others, in the public domain or in his or her private life."*

These provisions are in line with the wording contained in the most recent national constitutions as well as those contained in the best established international provisions in relation to the same subject matter— we would, in particular, refer to the European Convention on Human Rights (articles 9 and 14), to the International Pact on Civil and Political Rights (articles 18 and 2) and the Charter of Fundamental Rights of the European Union (articles 10 and 21) — . We would also refer to the landmark case *Kokkinakis v. Greece* of 25 May 1993 (ECHR, series A, n° 260-A, § 31).

These preliminary considerations constitute the general background to the observations, which could be made in relation to article VII.

It would be worthwhile to note that article XV, paragraph 2, of the Fundamental Law also specifies *"Hungary shall ensure fundamental rights to every person without any discrimination on the grounds of … religion"*

These preliminary considerations constitute the general background to the observation, which could be made in relation to article VII.

B. —Concerning the State, a fundamental principle is always useful to be reminded of. It has to be "separated" from the churches, which is the generally accepted principle in modern society. (ECHR, 31 July 2001, *Refah Partisi v. Turkey*, *RTDH*, 2002, pp. 981-1008*)*. See as an example, in particular, article 41, subparagraph 4, of the Portuguese Constitution.

For clarity purposes, it is specified that the principle of separation apply not only to Churches (see below) but also to "*other organisations engaged in religious activities*".

It might have been imagined that such application to the latter would be self-understood. However, this specification is not without merit. We can also find it in the Constitution of Spain (art. 16, § 3), of Italy (art. 8), of Lithuania (article 43-1), of Poland (art. 25, §§ 4 et 5) and of Sweden (chapter VIII, art. 6).

C. — Concerning the churches, to which shall be added, for reason of identical motivation, the other organizations engaged in religious activities, the principle of separation is also confirmed. We can consider that this principle covers both their organization and their operation.

Within this framework, they can freely choose their name, appoint their minister of faith, provide a series of social activities, apply for financing, create private institutions …

The public authorities have no right to interfere with their activities, and even less with the organization of the own institutions.

D. — We have pointed out that the same principle of separation applied to both churches and other organizations engaged in religious activities.

A division has to be created – not only from a terminological point of view – between these two categories of entities. In fact, under the Fundamental Law only "certain" religious organizations can be recognized as churches. They have contacted the State authorities. The State has taken specific measures in their respect. The legislator, via a statutory regulation, has recognized them as such.

According to the Fundamental Law, an appeal can be lodged with the Constitutional Court if the Assembly has not granted their requested recognition as a church.

This division is shared with several European States (cf. B).

One issue should, however, be raised. Should the Constitution define itself the conditions, under which a church could be recognized at the legislative level? The purpose of such solution would be to prevent the legislator from having discretionary power, in our case purely political or administrative, which is difficult to accept in matters in relation to human rights. This also has the advantage no to encourage public authorities to engage in issues of "validity" of religious beliefs (ECHR, 26 September 1996, *Manoussakis and others v. Greece*, R. 1994-IV, §§ 40-47). It also would allow to avoid inconsistencies and discriminations.

This process, which aims to ensure a better materialization of the parliamentary decision, is to be welcomed.

Does this mean that the conditions set out in the fourth amendment are sufficient to constitute a valid basis for a legislative decision on the recognition? It has to be noted that they correspond to those generally applied in States establishing, in one way or another, recognition process for churches and similar organizations.

Concerning the "*extended period of operation*", we only can hope that the State, when called to recognize a number of churches, keep a distance from the current trends and take into account, as required by common sense and, in our case by the "national avowal", the religious traditions which are peculiar to the given society.

Concerning the "*social support*" it is understandable that the State does not wish to establish privileged relationship with religious organizations, which are on the margin of society or, which would contest, with regard to fundamental issues, its political organization, or refuse its authority or would put into question the application of the well established

constitutional rights, namely the freedom of religion recognized for each person (ECHR, case *Refah Partisi*,cited)[9].

Concerning the capacity of churches of "cooperation to promote community goals", we can understand, in a more positive way, that the State cooperates with organizations that will allow it to achieve community goals defined as such by itself, in various fields, such as health and education, but for the achievement thereof it can require, in line with the principle of subsidiarity, the assistance of social organizations. Following the academic opinions in Belgium and Switzerland, "the social significance of the religious community" should be a key criterion in the context of a recognition by public law.

The support of the churches by the whole population, the number of its followers and its participation in addressing societal issues should be taken into account. They would, in particular, be the grounds on which such recognized church can become eligible to receive State subsidies[10].

Needless to say that in this case, as in the other cases, it is not sufficient to simply consider the general declarations, but the practical implementation of these justified principles, and even if they are general principles, should be verified.

In this regard, it has to be ensured that the distinctions are made in an objective manner and that in accordance with the predetermined criteria no ill grounded discrimination will take place.

E. — It is accepted that the principle of the mutual independence of the State and of Churches does not prevent the State from actively cooperating with the latters. It is precisely for this reason of independence from each other, that they can participate in the realization of public interest projects, which were freely defined by the State and for which it requests the contribution of political, social and cultural, in our case religious, forces.

In his communication filed with the European Parliament on "Religions and Constitutions in Europe", the professor d'Onorio pointed out that "the principle of cooperation between State and religions (was) declared in nine constitutions, under different forms: in Germany (art. 137 and 138 of Weimar), in Austria (art. 15 of the Fundamental Law of 1867), in Spain (art. 16, § 3), in Italy (art. 8) and in Poland (art. 25, §§ 4 et 5)… ; this is also the case of Luxembourg (art. 22)…, in Sweden… (art. 6 du chapter VIII of the revised Constitution of 2000), in Finland…, in Belgium where the Constitution does not refer to any religion but

9 « The Court concurring with the government's position, accepts that a multi-legal system, such as proposed by the R.P., would introduce, in the legal relationships, a distinction between individuals based on their religion, which would categorize them according to their religious beliefs and would confer upon them rights and liberties, not taken as individuals but as a member of a religious association. In the opinion of the Court such type of society is not in compliance with the system of the Convention (…). This would prevent the State from guaranteeing the rights and liberties of individuals and organize in a neutral way the exercise of various convictions and religions in a democratic society» (point 69).

10 The issue is largely dealt with in books and theoretical studies. We will review, in particular, the working document published by the French Senate in the series « Comparative legislation » under the title « The financing of religious communities » (September 2001): "The contrasting position of the French position leads us to examine the funding system applicable to religious communities in some of our neighboring countries. Germany, England, Belgium, Denmark, Spain, Italy, the Netherlands, and Portugal have been selected for this purpose. These eight countries experienced a very different historical developments in relation to religion" (p. 2).

provides that "salaries and pensions of the minister of faith" shall be paid out from the public funds (art. 181), a similar provision is applicable in Luxembourg (art. 106), which leads these two countries to legally recognize the various religions practiced on their territory» (*R.D.Public*, 2006, p. 715, here p. 722)[11].

The principle of mutual independence of the State and of the recognized churches does not mean that they ignore or rule out each other. Article 17 of the Treaty on the functioning of the European Union is, where necessary, in line with this approach in relation to the recognized religions.

In its opinion on the new Constitution of Hungary, The European Commission for democracy through law has, also, cited the *(2004) Guidelines for Review of Legislation Pertaining to Religion and Belie: "Legislation that acknowledges historical differences in the role that different religions have played in a particular country's history are permissible so long as they are not used as a justification for ongoing discrimination"*. It concludes on this basis that Article VII of the Fundamental Law is "in compliance with article 9 of the ECHR" (Opinion n° 621, CDL-AD, 2011, 016). The amendments made to this provision would only reinforce this opinion.

The provisions of 4th amendment on electoral campaign advertising

(article 5 of 4th amendment)

Article 5 of the 4th amendment provides:

(1) Article IX(3) of the Fundamental Law shall be replaced by the following provision:
"(3) For the dissemination of appropriate information required for the formation of democratic public opinion and to ensure the equality of opportunity, political advertisements shall be published in media services, exclusively free of charge. In the campaign period prior to the election of Members of Parliament and of Members of the European Parliament, political advertisements published by and in the interest of nominating organisations setting up country- wide candidacy lists for the general election of Members of Parliament or

11 From the same author, *The freedom of religion in the world. Theoretical and political analysis,* Ed. Universitaires, 1989. As part of abundant literature, see also INTERNATIONAL ACADEMY OF CONSTITUTIONAL LAW, *Constitution and religions*, Tunis, 1994; *Constitution and religion* (ed. J. ILIOPOULOS-STRAGAS), Athens, Sakkoulas, 2002 ; *Constitution and religion,* International directory of constitutional justice, 2000, pp. 401-510 ; W. COLE DURHAM and S. FERRARI, *Laws on religion and the State in Post-Communist Europe,* Leuven, Peeters, 2004 ; S. FERRARI, « Constitution and religion », in *International Treaties on constitutional law* (dir. M. TROPER and D. CHAGNOLLAUD), Paris, Dalloz, 2012, t. III, pp. 437 to478 ; J. ROBERT, *The freedom of religions and regime of religious cults,* Paris, PUF, 1977. Adde : C. SAGESSER, *Cults and secularity,* Brussels, Ed. CRISP, 2011 : in Belgium, « the procedure called the recognition of a cult or of a non confessional philosophical organization is based sovereign decision of the Parliament, in light of the administrative case law » (p. 23).

candidacy lists for the election of Members of the European Parliament shall exclusively be published by way of public media services and under equal conditions, as determined by cardinal Act."

Prior to the amendment, article IX paragraph 3 provided:

3.The detailed rules for the freedom of the press and the organ supervising media services press products and the infocommunication markets shall be regulated by cardinal Acts.

It has to be noted that the 4th amendment does not change at all the subparagraphs 1 and 2 of article IX, drafted as follows :
(1) Every person shall have the right to express his or her opinion.
(2) Hungary shall recognise and defend the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion

The freedom of expression, and, in particular, the freedom of the press and of information is thus recognized. The new provisions of article 3 replace the prior wording under which *The detailed rules for the freedom of the press and the organ supervising media services press products and the infocommunication markets shall be regulated by cardinal Acts* – which raised the issue about whether the freedom of the press and of information was subject to the adoption of an organic law. The ambiguity has now been lifted: the freedom of the press and of information is recognized by virtue of the subparagraphs 1 and 2; their efficiency does not depend on statutory rules.

The wording of the new provisions of article 3 has to be clarified.

First, the meaning of "political advertisement" has to be specified. It concerns in fact political propaganda, setting out political ideas, positions and projects of some groups, in particular those of political parties, and praising the virtues of the candidates in order to convince the voters to vote for them. It differs from the simple political information, aiming to inform the public about political events; neutral analysis and observations could be provided along with such information; information would become "propaganda" when these analysis and observations took a stand in favor of candidates.

The political advertising, as soon as those who ordered it pay it for, becomes a paid political advertising or a commercial political advertising.

Second, the new provision of subparagraph 3 refers obviously, under the wording "media service", to the ones organized by the public authorities (they can directly be dependent on those authorities, or they can have a separate organization, but with a legal status connecting them to the public sphere).

It does not provide any specification in relation to the meaning of the term, which was translated into English as "media services". It refers to the media communication providing the public with services covering not only information but also any other content. These services are provided by radio and television broadcasters, to which shall be added today the information network on the Internet. The printed media (which has been for longtime the exclusive source of public information) shall be considered, and it should be placed first in this regard, as part of the media.

The media services correspond thus to what is generally referred to in plain contemporary French as medias ("*médias*"). Some of them are public (the new paragraph 3 of article IX refers to those as "media services"). Others are private.

On the basis of this analysis, the scope of the paragraph 3 can be clarified as follows:

On the one hand, the political advertising (=propaganda) is subject to two limits:
- in the public medias, advertisement is only permitted free of charge, it cannot be paid;
- concerning the election campaign for the members of the National Assembly or of the European Parliament, advertisement is exclusively permitted by way of public media, under equal conditions and as determined by organic law.

On the other hand, as a counterpoint,
- free of charge political propaganda is permitted in the public media, not only during election campaign (in which case it is the only media available for that purpose) but also outside of election campaign;
- political propaganda, paid or unpaid, is permitted in the private medias (printed media, radio, television, internet) outside of the election campaign period;
- it is not permitted for private medias to broadcast political propaganda, paid or unpaid, during the election campaign,
- political information (which differs from political propaganda) can be freely provided at all times by all medias (public and private).

These provisions can be compared to other legislations in this regard.

The drafter of subparagraph 3, as provided for in the 4th amendment, wanted first to follow the French legislation.

On the one hand, article L. 52-1 of the French elections code (applicable to all elections: local, legislative, presidential, European) provides:

During six months running from the first day of the month of an election to the date of the ballot, when it becomes admissible, all methods of commercial advertisement by using printed media or any other audiovisual media are prohibited for political propaganda purposes.

As of the first day of the sixth month prior to the month during which general election are to be taken place, no advertisement campaign can be organized in relation to the operation and management of the local community in the territory of the community concerned by the election. Without prejudice to the provisions of the present chapter, this prohibition does not apply to the presentation, carried out by a candidate or on its behalf, in the context of the organization of his campaign, in relation to progress achieved during his current or prior terms ….

This provisions means, *a contrario*

- that if political propaganda, in the form of commercial advertisement via the medias, is prohibited during the period of six month prior to the elections, it is permitted outside of the election campaign ;

- that medias can be used; even during election campaigns, for political propaganda purposes to the extent it does not take the form of commercial advertisement ;

-that political information is always available.

On the other hand, under the provisions of article L. 167-1 of the elections code in relation to the election of the members of the National Assembly and of article 19 of the law of 7 July 1977 in relation to the election of the members of the European Parliament, the parties and political groups can use public audiovisual media programs during election campaign.

It does not, however, confer a monopoly position upon public medias for propaganda purposes during election campaigns: free of charge political propaganda is permitted in the private media.

More generally, the rule of law concerning the political advertising in different States has been set out in the case of the European Court of Human Rights dated19 February 1998, BOWMAN V/ UNITED KINGDOM, N° 141/1996/760/961, in the terms as reproduced in the appendix. It points out the variety of solutions: prohibition or permission of paid political advertising, the availability or not of free broadcasting time for the parties and candidates.

The regulation applicable to political advertising has to be analyzed in the light of two provisions of the European Convention of Human Rights.

Firstly, in the light of article 10 (Freedom of expression) of the European Convention of Human Rights and Fundamental Freedoms, which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Secondly, in the light of article 3 of the First Additional Protocol to the European Convention of Human Rights and Fundamental Freedoms, entitled, Right to free election,

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The European Court of Human Rights had the opportunity to specify the scope of the above-cited provisions in two cases, which we will set out.

In its decision of 19 February 1998, BOWMAN V/ UNITED KINGDOM, N° 141/1996/760/961, it ruled in relation to a fine imposed on a person who had leaflets being distributed with regard to the views of the candidates to a legislative election on abortion, according to article 75 of a law dated 1983 prohibiting an individual, other than a candidate or its representative, from spending money to promote the election of a candidate. The claimant raised the violation of her right to freedom of expression guaranteed under article 10 of the Convention. The analysis of the Court, the relevant parts thereof being reproduced in the appendix, lead it to the conclusion that article 10 has been violated.

In its case of 11 December 2008, AFFAIRE TV VEST AS & ROGALAND PENSJONISTPARTI v. NORWAY, n° 21132/05 it rules in relation to a fine imposed for the violation of the legal prohibition on broadcasting political advertisements in favor of the pensioners party, in violation of the prohibition on political advertising on pubic or private television. As a conclusion to its detailed analysis (cf. extract in appendix), it decided the following : *78 In sum, there was not, in the Court's view, a reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means deployed to achieve that aim. The restriction which the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression cannot therefore be regarded as having been necessary in a democratic society, within the meaning of paragraph 2 of Article 10, for the protection of the rights of others, notwithstanding the margin of appreciation available to the national authorities. Accordingly, there has been a violation of Article 10 of the Convention.*

The Court unanimously held that there has been violation of article 10 of the Convention, by pointing out the marginal weight of the small “Pensioners Party” in the elections and the difficulties for it to get access, for this reason, to mass television coverage, in particular during election campaign.

Summing up the case law of the Court in this matter, it can be said that the Court considers necessary, while recognizing the margin of appreciation of the States, to adapt political advertising, in particular, in relation to election matters, to both the requirements of the freedom of expression and to the requirements of the free expression of opinion of people on the legislative body of their choice.

The Committee of Ministers of the Council of Europe has adopted two recommendations, one in 199, the other in 2007,concerning media coverage of election campaigns. They are reproduced in the appendix. They point out the necessity for them to be fair, well balanced and independent. They do not prohibit paid advertising, neither the limitation of such advertising.

The provision of subparagraph 3 of article IX of the Hungarian Constitution, resulting from the 4th amendment, within the scope thereof identified above,

Permits the exercise of the freedom of expression through the following solutions:

- political information (which differs from political propaganda) can be freely provided at all times by all medias (public and private);
- free of charge political propaganda is permitted in the public media, not only during election campaign (in which case it is the only media available for that purpose) but also outside of election campaign;
- political propaganda, paid or unpaid, is permitted in the private medias outside of the election campaign period;

It establishes three limitations:

- in the public medias, political propaganda is only permitted free of charge, it cannot be paid;
- it is not permitted for private medias to broadcast political propaganda, paid or unpaid, during the election campaign,
- concerning the election campaign for the members of the National Assembly or of the European Parliament, advertising is exclusively permitted by way of public media, under equal conditions and as determined by organic law.

Prohibition of paid political propaganda in public medias in all time (election period or not) and in private media during election campaign can be justified by the purpose to avoid the promotion of parties, groups and persons with large financial means and thus avoiding inequality between the candidates.

During the election campaign, the prohibition of all political propaganda, even unpaid, in the public media and the permission of (unpaid) political propaganda in the sole public media can be justified by the purpose to ensure equal conditions for the competing candidates in this regard, in accordance with the rules established by organic law. The issue could be raised in relation to the suitability of the prohibition of advertising, even free of charge, in the private media: however this issue does not arise since private media does not provide free publicity.

The provisions of the 4th amendment in relation to dignity

(article 5 §2 du 4th amendment)

Article 5 paragraph 2 of the fourth amendment to the Fundamental Law adds the following paragraphs to article IX of the Fundamental Law:

(1) Article IX of the Fundamental Law shall be supplemented by the following Paragraphs (4)–(6):
"(4) The right to freedom of speech may not be exercised with the aim of violating the human

dignity of other people.
(5) The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation or of any national, ethnic, racial or religious community. Members of such communities shall be entitled to enforce their claims in court against the expression of an opinion, which violates their community, invoking the violation of their human dignity as determined by law.

The original wording of paragraphs 1 to 3 has been kept, as follows:

(1) Every person shall have the right to express his or her opinion.
(2) Hungary shall recognise and defend the freedom and diversity of the press, and shall ensure the conditions for free dissemination of information necessary for the formation of democratic public opinion.
(3) The detailed rules governing freedom of the press and the body supervising media services, press products and the communications market shall be laid down in a cardinal Act.

Following the French translation provided by the Hungarian authorities of the paragraph 4 of article 5, it would concern "freedom of opinion". In fact this provision concerns the "freedom of expression". The new paragraphs of article 5 supplement the paragraphs contained in the previous text, relating to the freedom of expression in general in the first paragraph, and to the freedom of the press (fundamental aspect of the freedom of expression) in the second and third. The new paragraphs 4 and 5 concern some aspects of the expression of opinions. They have to be analyzed in light of the freedom of expression.

They can be read in conjunction with the Decision n° 36/1994 (IV. 24.) of the Hungarian Constitutional Court, in which the Court stated that "the freedom of opinion has to be ensured with no regard for the position taken with regard values and the trustworthiness of the opinion expressed. The freedom of opinion is a substantive freedom, which can only be limited by some important fundamental rights. The law in issue, limiting the freedom of opinion, can only be justified by the application of the protection of fundamental rights of individuals."

They should also be combined with other provisions of the Fundamental Law:

- paragraph 3 of article I: *the rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right;*

- the first sentence of article II: *Human dignity shall be inviolable.;*

- paragraph 1 of article XXIX: *Nationalities living in Hungary shall be constituent parts of the State. Every Hungarian citizen belonging to any nationality shall have the right to freely express and preserve his or her identity. Nationalities living in Hungary shall have the right to use their native languages and to the individual and collective use of names in their own languages, to promote their own cultures, and to be educated in their native languages,*

as well as the "national avowal" which forms part of the Preamble to the Fundamental Law, promising *to preserve the intellectual and spiritual unity of our nation* and proclaiming

that the nationalities form part *of the Hungarian political community* as *constituent parts of the State.*

The new paragraphs 4 and 5 of article IX have to be assessed in light of other provisions.

They have to be assessed mainly in light of the freedom of expression, which is not only provided for in paragraph 1 of article IX, but also in article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms covering the right to *freedom to hold opinions and to receive and impart information and ideas* and the European Charter of Fundamental Rights.

These texts reserve the possibility of some restrictions.

Paragraph 2 of article 10 of the European Convention provides:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary

More generally, article 52 of the European Charter, determining the scope of the guaranteed rights and principles, specifies:

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The European Court has outlined the way in which these provisions shall be applied in its decision 7 December 1976, Handyside v. United Kingdom, application no 5493/72:

49. Nevertheless, Article 10 para. 2 (art. 10-2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its "necessity"; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention ("decision or ... measure taken by a legal authority or any other authority") as well as to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41-42, para. 100).

The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any

sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.

From another standpoint, whoever exercises his freedom of expression undertakes "duties and responsibilities" the scope of which depends on his situation and the technical means he uses. The Court cannot overlook such a person's "duties" and "responsibilities" when it enquires, as in this case, whether "restrictions" or "penalties" were conducive to the "protection of morals" which made them "necessary" in a "democratic society".

The restrictions on the freedom of expression established in paragraphs 4 and 5 of the new article IX relates to three issues:

- human dignity;
- dignity of the Hungarian nation
- dignity of national, ethnic, racial or religious communities.

The issue of human dignity is at the core of human right instruments: as stated by the Professor Renucci (*Droit européen des drois de l'homme*, Paris, LGDJ, 2ème éd. 2012, n°1), *"In the context of human rights the concept of human dignity is essential since it appears as the ultimate "framework principle, "which constitutes the basis of fundamental rights, their reason to be"*. If the European Convention for the protection of human rights and fundamental freedoms does not expressly refers to it, the European Court of human rights pointed out that *Having regard to the relevant international instruments (see paragraphs 22-24 above) and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society* (4 December 2003, Gündüz v. Turkey, Application n° 35071/97); article 1 of the Charter of Fundamental Rights of the European Union relating to human dignity provides: *Human dignity is inviolable. It must be respected and protected.*

Therefore, restrictions on freedom of expression can be justified by the protection of human dignity. Conditions to such restrictions shall be defined (see above).

Restrictions on the freedom of expression are more debatable concerning the violation of dignity of the Hungarian nation. Even if the recognition of a nation and a regulation protecting it are important, the concept of the dignity of a nation is unclear. There is a risk that political statements criticizing the actions taken by the public authorities are considered as violating such dignity. The European Court of Human Rights applies careful scrutiny with respect to the guarantee of freedom of expression in political matters. It states for instance in its decision of 22 October 2007, Lindon and others v. France, applications n° 21279/02 and 36448/02:

46 There is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in the area of political speech or debate – where freedom of expression is of the utmost importance (see Brasilier v. France, no. 71343/01, § 41, 11 April 2006) – or in matters of public interest (see, among other authorities, Sürek v. Turkey (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV, and Brasilier, cited above).

It is hard to see how the insertion of the wording "*violation of the dignity of Hungarian nation*" can be justified in a provision, which mainly relates to the protection of various minorities. It is, in any event, necessary that the legislation strictly specify what can

be considered as a violation of the dignity of the Hungarian nation, in a way that will fully take into account the requirements of freedom of expression in this area.

Concerning the dignity of national, ethnic, racial or religious communities, a distinction has to be made between two categories.

The first concerns the national communities. In fact, it's in the singular that the expression shall be analyzed: it concerns a national community. In this regard, it does not differ from the Hungarian nation. We refer thus back to what has been developed above.

The second category is composed of the ethnic, racial or religious communities, which on the one hand differs from the national community and, on the other hand, from each other. They often concern minorities, which should be protected as such. Restrictions on the freedom of expression would be justified in this respect. The purpose of protecting members of "ethnic, racial or religious" minorities against hate speeches etc because of their minority background falls within the scope of generally accepted constitutional and European standards.

In the above-cited case Gündüz v. Turkey, rendered on 4 December 2003, the Court stated in relation to the words of a member of a religious community, considered as constituting hate speech toward other groups:

40… it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued (with regard to hate speech and the glorification of violence, see, mutatis mutandis, Sürek v. Turkey (no. 1) [GC], no 26682/95, § 62, ECHR 1999‑IV).

41. Furthermore, as the Court noted in Jersild v. Denmark (judgment of 23 September 1994, Series A no. 298, p. 25, § 35), there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention.

But,

51. In conclusion, having regard to the circumstances of the case as a whole and notwithstanding the national authorities' margin of appreciation, the Court considers that the interference with the applicant's freedom of expression was not based on sufficient reasons for the purposes of Article 10.

As a consequence, a very specific assessment of circumstances is required in order to establish the violation of the dignity of a given group. The wording of paragraph 5 is too vague and does not allow such assessment.

In any event, the provisions of paragraph 4 and 5 of article IX requires, according to the above-cited paragraph 3 of article I, the adoption of a law for their implementation: only legislative provisions can determine the restrictions on freedom of expression.

In the case Lindon and others v. France of 22 October 2007, already cited, the European Court had the opportunity to specify what can be regarded as law:

41. The Court reiterates that a norm cannot be regarded as a "law" within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.

The Court further reiterates that the scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails (see, for example, Cantoni v. France, judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V, § 35, and Chauvy and Others v. France, no. 64915/01, §§ 43-45, ECHR 2004-VI).

The above-cited paragraph 3 of article I expressly provides that *the rules for fundamental rights and obligations shall be determined by special Acts. A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.*

It is therefore important that the law, which will be enacted in order to implement paragraphs 4 and 5, strictly comply with these conditions, this would allow that the new provisions it establishes be considered themselves as consistent with European standards and norms.

The provisions of the 4th amendment in relation to the higher education

(articles 6 et 7 of the 4th amendment)

Concerning education, the 4th amendment contains two sets of provisions relating to the institutions and to the students in higher education respectively in its article 6 and its article 7.

On the provisions in relation to higher education institutions

According to article 6 of the 4th amendment, the following paragraph has been inserted into article X of the chapter "freedom and responsibility" of the Fundamental Law:

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

The original provisions of paragraphs 1,2 and 4 remain unchanged:
(1) Hungary shall ensure the freedom of scientific research and artistic creation, the freedom of learning for the acquisition of the highest possible level of knowledge, and the freedom of teaching within the framework determined by law.
(2) The State shall not be entitled to decide on questions of scientific truth, and scientists shall have the exclusive right to evaluate any scientific research.
(4) All institutions of higher education shall be autonomous in terms of the contents and methodology of research and teaching, and their rules of organisation shall be regulated by Act.

In fact, the first sentence of paragraph 3 exactly reproduces the one of the original draft. The 4th amendment has thus only added the second sentence.

The only significant change from the previous draft is the possibility for the government to set out the "rules of financial management of public institutions of higher education" and to oversee the "management" within the limits of the law.

The above-cited provisions have not been subject to serious criticism. We do not see why this should be different this time.

However, it has to be analyzed whether the substantial changes set out above could lead to a different assessment.

Under the comparative law, the necessity for the legislative power to provide "rules of organization" for higher education institutions, following the authorization to implement it by law, is not unusual. On the contrary, it is considered in several countries to be normal practice in relation to public establishments. Concerning private establishments (of various categories), it is considered to be common practice with regard to establishments that are authorized to issue diplomas recognized by the State and, even so, to the extent such establishments is subsidized, directly or indirectly (through the funding of students), by the State.

It has to be pointed out that, since it cannot be completely excluded that the organization of such establishments have an impact on education and research, the outcome of the final test of compliance of the domestic law to the European norms will depend, as always, on the legislatives acts adopted, and in particular on their implementation.

Concerning the "rules of financial management", it has to be first noted that the power of the government in this respect is expressly limited to the public establishments, institutions operating as part of the public sector and financed according to the terms laid down in the budget of the State.

Since the mean feature ("management") appears to relate to the financial aspect of the management of such establishments, we can hardly see an issue of compliance with the generally accepted constitutional and European standards in this respect (with the proviso that potential impact on the freedom of education and research would be inacceptable).

This assessment is all the more true to the extent that the management of the relevant establishments will have the right of litigating in case of alleged unlawful or event unconstitutional interference of the competent minister.

Therefore, and with the proviso of the above-mentioned comments, the concerned provision corresponds to usual practice.

The provisions in relation to students

Pursuant to article 7 of the 4th amendment, the following paragraph (3) is inserted into article XI of the Fundamental Law:
« (3) By virtue of an Act of Parliament, financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law.

Article XI, into which this paragraph 3 has been inserted provides:

(1) Every Hungarian citizen shall have the right to education.
(2) Hungary shall ensure this right by extending and generalising public education, providing free and compulsory primary education, free and generally available secondary education, and higher education available to every person according to his or her abilities, and by providing statutory financial support to beneficiaries of education.

On the basis of information provided by the Hungarian authorities, it appears that Hungarian students admitted to higher education institutions have the choice between private funding (parental support, through non-governmental establishments), a state loan funds system (more or less subsidized, and in principle made accessible to all) or scholarship (offering free education), which would allow to finance a more or less significant portion of education related expenses.

Since this issue concerns the limitation of the fundamental liberty of free movement of people, the new provision of the Fundamental Law confers upon the legislative power the possibility to regulate the specific terms, following in this regard the Hungarian Constitutional Court, which insisted on the necessity to provide a legislative framework to determine these rules.

We can assume that one of the most important reason for the introduction of such possibility in the Fundamental Law, at the same hierarchical level, as the one of the provisions concerning the right to higher education, is the financial crisis hitting not only Hungary but also a large part of Europe. It is well known that even in "normal" times, some States, having the reputation to provide high quality education under attractive terms, provide some

professionals (in particular doctors) for foreign countries, which do not necessarily have a worse a financial situation. In some fields of science, at least, Hungary seems exactly to fall within this category. We can understand that this situation can be considered as both a political and a financial issue.

Hungarian authorities use, in support of their position, the example of the French National School of Magistrates where the students sign a contract pursuant to which, they have to work during a period of ten years in the French judiciary system, following their free education of a 31 months duration. The same requirements can be found in other school's conditions for education (*Politechnique* School, National School of administration, in particular). In a number of other countries, similar terms apply to the students in higher education institutions providing sufficient competent officials for public services (army, police, foreign affairs …).

These examples only concern the "schools for public services" and not the higher education institutions under "general law"; however, it is not excluded to apply the same conditions to the latters, regarding both the funding efforts made by the States to allow the students to pursue their studies and the country's needs for professionals.

The terms of the provisions has to be, however, specified by law.

More specifically, if *financial support of higher education studies may be bound to participation for a definite period in employment or to exercising for a definite period of entrepreneurial activities, regulated by Hungarian law*, in reality, it is at the time when the financial support is granted that the beneficiary shall be informed of its conditions; however the fulfillment of such conditions could only be verified after he/she finished his/hers studies: the condition of professional employment in Hungary in the field in which the state subsidized studies have been finished can only be verified at that moment. Technically, state funding is subject to a resolutive condition.

This provision shall be analyzed in the light of freedom to choose a professional activity (in particular, freedom to work and freedom of establishment) on the one hand and the freedom of movement within the European Union on the other hand.

First, it has to be pointed out that the issue raised by the obligation to be employed in Hungary for a definite period, is not one of "forced labor": the concerned individuals have no obligation to work or to work in Hungary, they only have an obligation to reimburse the financial support in case they accept employment abroad.

If the students would like to seek employment abroad, they can refuse during their studies financial support, and in case, they move abroad after having finished their studies, they can repay the amounts they received.

In light of the current labor market situation, if the students do not find in Hungary appropriate employment, in line with their field of studies, they should not be under the obligation to repay the state subsidies in case they find employment abroad.

In this case the professional freedom would not be infringed.

The issue of freedom of movement can be raised since the obligation of the students to repay state subsidies received during their studies in case they move to work abroad, could constitute a factor preventing them from moving.

The Court of Justice of the European Communities had several times the opportunity to point out the application of the principle of free movement in relation to students. In its case dated 13 February 1985, Françoise Gravier, case 293/83, it states
23 The common vocational training policy referred to in article 128 of the treaty is thus gradually being established. It constitutes, moreover, an indispensible element of the activities of the community, whose objectives include inter alia the free movement of persons, the mobility of labour and the improvement of the living standards of workers.
24 Access to vocational training is in particular likely to promote free movement of persons throughout the community, by enabling them to obtain a qualification in the member state where they intend to work and by enabling them to complete their training and develop their particular talents in the member state whose vocational training programmes include the special subject desired.
25 It follows from all the foregoing that the conditions of access to vocational training fall within the scope of the treaty.

In its case dated 15 March 2005, Dany Bidar, case C-209/03, it rules again:
.42. (...) it must be considered that the situation of a citizen of the Union who is lawfully resident in another Member State falls within the scope of application of the Treaty within the meaning of the first paragraph of Article 12 EC for the purposes of obtaining assistance for students, whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs.

Similarly, in its case dated 18 November 2008, Jacqueline Förster**,** case C-158/07, the Court points out:

36 It is settled case-law that a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope ratione materiae of Community law (Case C-85/96 Martínez Sala [1998] ECR I - 2691, paragraph 63, and Bidar, paragraph 32).

37 Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside within the territory of the Member States conferred by Article 18 EC (see Case C-148/02 Garcia Avello [2003] ECR I-11613, paragraph 24, and Case C-403/03 Schempp [2005] ECR I-6421, paragraph 18).

38 In this connection, the Court has already held that a national of a Member State who goes to another Member State and pursues secondary education there exercises the freedom to move guaranteed by Article 18 EC (see Case C - 224/98 D'Hoop [2002] ECR I-6191, paragraphs 29 to 34, and Bidar, paragraph 35).

All these cases were rendered in relation to the issue of access of nationals of a Member State to the education and student maintenance grant provided in another Member State: all measures taken by that State to prevent the concerned individuals from benefiting from the financial assistance have been ruled against.

In this case, the situation is reverse: it concerns access of students, having finished their studies and having benefitted from state subsidies in Hungary, to professional employment in another country. Their right to free movement is limited by their obligation to repay the financial assistance.

We can note that, under the current wording, such obligation would apply to all individuals having been granted financial assistance in Hungary, regardless of their nationality (foreign students are as much concerned as Hungarian students).

The considerations on which this obligation has been based could be connected to the ones expressed by the Court of Justice in its above-cited cases rendered in relation to the allocation of maintenance grants to students.

Pursuant to the 15 March 2005, Bidar, case:

57 In the case of assistance covering the maintenance costs of students, it is thus legitimate for a Member State to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State.

The18 November 2008, Jacqueline Förster, case specifies:

48 In Bidar, the Court observed that, although the Member States must, in the organisation and application of their social assistance systems, show a certain degree of financial solidarity with nationals of other Member States, it is permissible for a Member State to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State (see Bidar, paragraph 56).

49 The Court also pointed out that it is legitimate for a Member State to grant assistance covering maintenance costs only to students who have demonstrated a certain degree of integration into the society of that State (Bidar, paragraph 57).

50 On the basis of those considerations, the Court held that the existence of a certain degree of integration may be regarded as established by a finding that the student in question has resided in the host Member State for a certain length of time (Bidar, paragraph 59).

These considerations could be relevant in relation to the state subsidies granted to students who, then decide to move to work abroad, and in particular in relation to their obligation to repay the financial assistance: this solution can be justified, on the one hand, by the desire of a certain degree of integration of the students into the Hungarian society, which granted the financial support and on the other hand, by the fact that such financial support constitute an unbalanced burden on the State.

In such case, the freedom to move would not be infringed.

The conditions to access student financial assistance and their compliance with the principles of professional freedom and freedom of movement could only be verified with regard to the provisions implemented by law in this respect. On the basis of the above, we cannot simply say that the provisions of paragraph 3 inserted, under the 4th amendment, into article IX of the Fundamental Law, would contravene those principles.

The provisions of the 4th amendment in relation to housing and to permanent living in public area

(article 8 of the 4th amendment)

Pursuant to article 8 of the 4th amendment,

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

(1) Hungary shall strive to provide every person with decent housing and access to public services.
(2) The State and local governments shall also contribute to creating the conditions of decent housing by striving to provide accommodation to all homeless people.
(3) In order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.

In the original version, article XXII only contained the wording reproduced in subparagraph 1 of the current version. The 4th amendment has thus added to the original text paragraphs 2 and 3.

The text contains two series of provisions:
- ones guaranteeing access to decent housing;
-the others allowing to declare illegal staying in public area as permanent abode.

On the guarantee of access to decent housing

The provisions of the Hungarian Constitution in relation to access to decent housing, in its original version as well as in its amended version, correspond to the recognition at a constitutional level of the obligation of public authorities in relation to the housing of its citizens. Former constitutions did not contain provisions in this regard.

Only modern constitutions deal with this issue (e.g. art. 21.4 of the Swiss Constitution of 9 June 1975; art. 65 of the Portuguese Constitution of 2 April 1976; art. 47 of the Spanish Constitution of 27 December 1978; art. 75.1 of the Polish Constitution of 2 April 1997).

States, which did not have constitutions containing provisions on the housing issues, could nonetheless recognize the obligations of public authorities in this respect. For instance, in France the Constitutional Court recognized as "constitutional goal" "the possibility for all to have access to decent housing" (decision n° 94-359 DC of 19 January 1995), and the legislator recognized the enforceable right to housing (law of 5 March 2007). We can also mention that the Supreme Court of Monaco, in two decisions dated 6 November 2001, considered that if the right to housing is not provided for by the title III of the Monegasque Constitution on rights and freedoms (1st decision), such right is nonetheless recognized by article 11-1 of the International Covenant on Economical, Social and Cultural Rights of 16 December 1966, which became binding on Monaco (2nd decision).

In addition to the constitutional norms, international norms contain provisions with regard to the State duties in housing matters.

The above-cited International Covenant on Economical, Social and Cultural Rights of 16 December 1966, provides in its article 11-1:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

As to the Council of Europe, article 31 of the (revised) European Social Charter recognizes that

« *I. Everyone has the right to housing*
II.: The right to housing: With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

The European Committee of Social Rights had several times the opportunity to rule on the application of this article in its decisions rendered concerning France (5 December 2007, 4 February 2008, 19 October 2009, 28 June 2011, 24 April 2012, 11 September 2012), Italy (7 December 2005, 25 June 2006), the Netherlands (20 October 2009), Portugal (30 June 2006), Slovenia (8 September 2009). The decisions are often strict, for instance with regard to France (cf. appendix).

The European Convention of Human Rights and Fundamental Freedoms is silent with regard to the right to housing. The European Court interpreted, however, two articles in such way as to acknowledge a right to housing, even tough such right is not expressly provided for.

First, article 8 of the Convention on the Right to Respect for Private and Family Life. In the case Wallova and Walla v. Czech Republic, n° 23848/04, rendered on 26 October 2006, the application of this article was raised in relation to the automatic delivery into foster care of children whose family housing was considered as inadequate.

The European Court of Human Rights has also acknowledged certain aspects of right to housing on the basis of article 1 of the First Additional Protocol to the European Convention, in relation to the protection of property.

In its case dated 30 November 2004, Oneryildiz v. Turkey, n° 48939/99, in relation to the accident caused by an explosion of a dump-site surrounded by slum houses, which killed several people who lived in the area, the Court pointed out the failure of the authorities to ensure that the safety of the inhabitants were protected and the right of the concerned persons to their property.

Therefore, and even though the European Court of Human Rights did not expressly recognized the right to housing, it required that public authorities take the necessary measures to ensure decent housing conditions to their citizens.

The 4th amendment is strictly in line with this position when it ensures that *(1) Hungary shall strive to provide every person with decent housing and access to public services* and that *(2) The State and local governments shall also contribute to creating the conditions of decent housing by striving to provide accommodation to all homeless people.*

These provisions strictly comply with the European norms.

On the declaration on prohibition of permanent living in public areas

It is surprising that a constitutional provision deals with the recognition of the possibility to *declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.* At first sight, this issue falls more within the scope of administrative regulations and court jurisdictions. For instance in France the highest Court of administrative jurisdiction and other administrative courts have often had the opportunity to declare unlawful the private occupation of public areas and consequently order the eviction of the occupants (for recent examples see: *Conseil d'Etat* 23 July 2010, SA PROMO METRO, N° 335132 **Listed** in the tables of Lebon Collection; 22 October 2010, M. Serge A, 335051; Published in the Lebon Collection; 11 April 2012, SOCIETE PRATHOTELS, N° 355356; **28** December 2012, the association named " La Forge de Belleville, N° 353459; 8 April 2013, association ATLALR, N° 363738), including the eviction from a housing (for instance 17 March 2008, M.A, N° 306461, Listed in the tables of Lebon Collection; 7 March 2012, Mme Bominique A, N° 352367: expulsion from a housing).

It is possible to explain the insertion into the Constitution the provisions of an apparently secondary nature by the seriousness of the issues they raise and with which the constituent power would like to deal at the highest level of the legal order. For instance the 2nd amendment to the Constitution of the United States guarantee the right to bear arms, the18th amendment (later repealed by the 21st amendment) banned the manufacture, sale, and transportation of alcohol. Similarly, the Constitution of the Swiss Federation contains provisions on the conditions of animal slaughter (art. 25 bis), on distilled beverages (art.32

bis), on absinthe (art. 32 ter), on spirits (art. 32 quater), on the prohibition of gaming houses (art. 35) etc…

The insertion of the provisions of paragraph 3), following the 4th amendment, into article XXII, can be explained, in combination with the subparagraphs 1) and 2), by the desire of the constituent power to allow the eviction of individuals who illegally occupy public area for housing purposes. The European norms, which as we have just seen do not expressly recognize a right to housing but do impose some protection of individuals in relation to the dwelling they occupy, should be taken into consideration in this regard.

The above-cited decisions of the European Committee of Social Rights and of the European Court of Human Rights have raised the failure of some States to comply with their obligation to take the necessary measures in relation to the housing of individuals facing financial difficulties, with a specific regard to the adequate nature of the accommodations of travelling people. They have considered unlawful the eviction of persons illegally occupying public areas since it considered that their long-term establishment had to be subject to some level of protection.

But the precedents are not clear-cut. It also takes into account the public interests, which are also concerned by this issue.

Two sets of considerations can be noted.

There are the ones, which condemn the States.

In the above-cited decision of 5 December 2007, Mouvement international ATD Quart Monde v. France, Request n° 33/2006, the European Committee of Social Rights issues a harsh opinion in relation to the conditions of evicition of the occupants of the dwelling (cf. extracts in appendix).

On its part, the European Court of Human Rights, in its above-cited case, Oneryildiz v. Turkey**,** dated 30 November 2004, *n° 48939/99*, have ruled that the right of the concerned persons to their property has been infringed (cf. extracts in appendix). (Similar decision rendered by ECHR 24 September 2012, Yordanova v. Bulgaria, n° 25446/06).

Other decisions uphold the decisions taken by national authorities on the ground of the protection of public interest, over which cannot prevail the considerations in relation to the length of the occupation of the area.

This was the position taken in the decisions rendered on 18 January 2001 by the European Court in the CHAPMAN v. United Kingdom (n° 27238/95) case in relation to the refusal of a building permit to a Roma on the land, on which he setteled in (cf. appendix).

The European Court has reached the same conclusion in the Depalle v. France (n° 34044/02) and Brosset-Tribollet (n° 34078/02) cases, both dated 29 March 2010, issued by Grand Chamber, in relation to the refusal to renew an authorization, which have been granted for a long period of time, to occupy an area annexed to a publicly owned coastal land, on which the concerned persons have built their house (cf. appendix).

This decision can be read together with the ones rendered by the French Court on similar issues.

The French highest Court of administrative jurisdiction considered that the prohibition to construct on a territory annexed to the publicly owned seafront is justified by the necessity to maintain the protection of the concerned area. (cf. the decisions of 6 October 2010 and of 7 March 2012 reproduced in the appendix).

The provisions of article XXII 3) as set out in the 4th amendment, pursuant to which *in order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area*, shall be assessed in light of the above-cited precedents.

The concept of illegality and the punishment for such illegality shall be distinguished.

The concept of illegality has to have a purpose and give rise to some measures.

Its purpose is to protect four series of interests: public order, public security, public health and cultural values. It always concerns the public interest. As already pointed out, the European Court takes such interest into consideration when it decides whether a refusal of a building permit or an eviction from housing can be justified. The purposes, for which the Hungarian constituent power inserted a provision on the illegal nature of permanent occupation of public area, are not questionable.

It specifies that the concept of illegality will be defined by law or by decree. In this regard, two situations shall be distinguished.

The case of a provision of general application, which would define that a "specific" part of the public area cannot be used for housing purposes (such is the case of article L. 2132-3 of the general Code on public property, under which "*no one shall build in the maritime public area, carry out construction or any other works thereon, under penalty of demolition, confiscation of the equipment and fine*". Such wording should be fully acceptable.

The second situation concerns a provision defining the illegal nature of an occupation for housing purposes with respect to a specific part of the public area. The actual construction of the dwelling and its illegal nature are directly referred to: these facts are not considered in application of the rules contained in the law or a decree. Once it establishes the existence of those elements, the court will directly rule on the consequences thereof.

The current wording of paragraph 3) of article XXII does only confer upon legislative and regulatory authorities the power to define the specific public areas in which permanent living is considered as illegal. It does not have the aim, neither the effect, to define by law or by decree each unlawful occupation.

This observation concerns the punishment for the illegality. Paragraphe 3) is silent on this issue, but it did not have to provide the legal framework of such punishment. The general provisions on the procedure implemented in order to stop illegal activities of an individual shall apply.

These procedures consist of the intervention of a judge, who will only have the power to determine the illegal nature of the concerned individual's actions and to draw legal consequences thereof.

These consequences can be criminal fines or an order to cease the unlawful conduct under penalty of eviction of the offender by the threat of the use of force.

The specific circumstances of the situation of the occupant, in particular the length of the occupation, the fact that the occupation has been tolerated for a long time, the impossibility for the concerned person to find anther housing – conditions that following the opinion of European Court shall be in some cases taken into consideration in light of the article 8 of the European Convention for the Protection of Human Rights and of the article 1 of its First Additional Protocol (Oneryildiz v. Turkey**,** 30 November 2004, *n° 48939/99*,above-cited) shall be taken into account and the procedural safeguards shall be followed at this stage.

The new paragraph 3) of article XXII of the Hungarian Constitution does not question those safiguards. If it allows the prohibition of permanent living in some public areas, which will be determined by law or decree, it does not specify the implementing measures, those will have to be taken with respect to the rights of the concerned individuals.

Therefore, article XXII, as a whole, of the Hungarian Constitution, resulting from the 4th amendement, complies wit the European norms.

The provisions of the 4th amendment in relation to the constitutional justice

(article 12 of the 4th amendement)

A. — Prior to the adoption of the fourth amendment, article 24, paragraph 2, subparagraph b) of the Fundamental Law provided the following:

(The Constitutional Court shall)

b) review any piece of legislation applicable in a particular case for conformity with the Fundamental law at the proposal of any judge.

Article 12, contained in the fourth amendment of the Fundamental Law of Hungary, is now drafted in the following way:

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

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

With regard to its substance, the provision is not essentially different from the one it amends. It only provides an additional procedural rule. It requires the Constitutional Court to decide on an issue of constitutionality in relation to a pending dispute within a specific time limit – namely, thirty days.

Even if the time limit, within which the Court has to decide is relatively short – this same time period has been already provided for in article 6, paragraph 6 – it has to be noted that in other European country the Court is generally required to rule within a specific time limit, running as of the filing of the application in relation to an incidental claim – i.e. when the claim has been filed in the context of a pending constitutional procedure – in order not to unduly delay the pending procedure.

B. — Prior to the adoption of the fourth amendment, article 24, paragraph 2, subparagraph e) of the Fundamental Law contained the following provision:

(The Constitutional Court)

e) examines any piece of legislation for conformity with the Fundamental Law at the request of the Government, one fourth of the Members of the Parliament or the Commissioner for Fundamental Rights.

This subparagraph is replaced by the following one:

(The Constitutional Court)

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

Under this provision, the President of the Supreme Court and the Public Prosecutor can commence before the Constitutional Court a legal action requesting the review of the compliance of legal norms, as defined under article T, paragraph 2, with the Fundamental Law. In our view, no legal objection can be raised in relation to this provision.

C. — Prior to the adoption of the fourth amendment, article 24, paragraphs 4 and 5, of the Fundamental Law contained the following provision:

(4)The Constitutional Court shall be a body of fifteen members, each elected for twelve years by a two-thirds vote of the Members of Parliament. Parliament shall elect with a two-thirds of majority of the votes, a member of the Constitutional Court to serve as its President until the expiry of his or her mandate as constitutional judge. No member of the Constitutional Court shall be affiliated to a political party or engage in any political activity.

Article 12, § 3 contained in the fourth amendment of the Fundamental Law of Hungary, is now drafted in the following way:

(3) Article 24(4) and (5) of the Fundamental Law shall be replaced by the following provisions:
"(4) The Constitutional Court may only review or annul a legal provision not submitted to it for a review if its substance is closely related to a legal provision submitted to it for a review.
(5) The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. Such a review may be initiated by:
a) the President of the Republic in respect of the Fundamental Law and the amendment thereof, if adopted but not yet published,
b) the Government, a quarter of the Members of Parliament, the President of the Curia, the Supreme Prosecutor or the Commissioner for Fundamental Rights within thirty days of publication."

In this regard, we refer back to our previous observations on the composition of the Constitutional Court, on its power to review on its own motion statutory laws and on the control of the constitutional provisions in light of the procedural requirements of the Fundamental Law.

D. — Article 19, § 2, contained in the fourth amendment of the Fundamental Law of Hungary is drafted in the following way:

(Closing and miscellaneous provisions)
(2) Point 5 of the Fundamental Law shall be replaced by the following provision:
"5. Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings."

In order to understand the meaning of this provision, it is essential to point out that under the "National Avowal" the second day of May 1990 constitutes the date of "the restoration of our country's self-determination, lost on the nineteenth day of March 1944, …when the first freely elected body of popular representation was formed*."*

This same date of 2 May 1990 is considered *"to be the beginning of our country's new democracy and constitutional order."* See also the wording contained in article R, paragraph 1 of the "Foundation".

It has to, moreover, be noted, that the Fundamental Law of Hungary of 25 April 2011 has only been entered into force on the "1st January 2012, according to the first paragraph of its closing provisions.

How should, in light of the chronology — whose political importance should obviously not be ignored or underestimated[12] — the rule contained in the "closing and miscellaneous provisions" of the Fundamental Law, which is aimed to "repeal" the decisions rendered by the Constitutional Court rendered prior to the 1st of January 2012, without prejudice to their legal effects, be interpreted?

12 J.-P. MASSIAS, « La justice constitutionnelle dans la transition démocratique du postcommunisme », in *La démocratie constitutionnelle en Europe centrale et orientale. Bilans et perspectives* (dir. S. MILACIC), Bruxelles, Bruylant, 1998, p. 117.

We do not know whether the terminology "repeal", subject to the verification of the translation of this provision, is the best-suited terminology under the present circumstances. A repeal generally concerns a rule — in this case, statutory laws and regulations —. It shall be issued by the authority, which had the initial power to adopt the concerned formal provision. It cannot have retroactive effect. It applies immediately (*ex nunc*). It can only concern future measures. In other terms, the repealed provision has, in principle, no effects for the future.

Within the usual meaning of the wording, the concept of repeal applies less to court decisions, and even less to what is referred to as "case-law".

Beyond the wording related considerations, we believe that no legal objection can be raised in relation to a provision, which expressly states the idea that the new constitution replaces the prior one.

In our view, the final provisions – which have to be read with article C, paragraph 1 of the Fundamental Law providing for the principle of the separation of powers – can only be understood in four ways. Four separate situations shall be distinguished. They can be distinguished on the basis of the subject matter in question and of the moment when the situation occurred or could occur.

1. — First will be analyzed the decisions of the Constitutional Court, which have been rendered prior to the adoption of the fourth amendment of the Fundamental Law and were grounded on legal provisions, which no longer have a constitutional foundation.

It has to be pointed out that the legal effects of these decisions and the reasons on which they were grounded could not anymore serve as basis for other decisions of the Constitutional Court.

The Court could not ground the new rulings on provisions, which no longer exist. Moreover, it could not take into consideration decisions, which have been based on those provisions.

2. — Secondly, should be considered the decisions rendered prior to the adoption of the Fundamental Law. In principle, they remain valid. They keep their legal relevance – for instance from an academic point of view – provided, obviously, that the constitutional provisions they were based on remain in force, i.e. they are expressly enacted into the Fundamental Law, in its current state, in line with the fourth amendment.

In this regard, these decisions can be taken into consideration in the context of a consistent case law developed on the basis of provisions – kept in its original version or amended – of the Fundamental Law.

3. — Also should be considered the decisions rendered after the adoption of the fourth amendment and on the basis of texts regarded as in line with the Fundamental Law. The latter contains now general rules for the interpretation of its own provisions. It is in the best interest of the constitutional judges to ground their decisions on the constitutional provisions, which are in force as opposed to prior decisions of the Court, which were rendered in a particular political era and in a constitutional order with a fuzzy framework. It is an interpretive guideline set out by the writer of the constitutional rule, which cannot be considered as objectionable.

4. — Finally, will be considered the decisions, which will be rendered according to the provisions contained in the fourth amendment to the Fundamental Law. The Constitutional Court could not take into consideration its own precedents with regard to these new issues. In the context of matters brought before it, the Court, as a consequence and within the limits of its own jurisdiction, shall define the rules of interpretation of the provisions resulting from the Fundamental Law and shall apply them accordingly.

The provisions of the 4th amendment in relation to the judiciary

(article 14 of the 4th amendment)

Under article 14 of the 4th amendment,

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

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

The three first subparagraphs of the Fundamental Law promulgated on 25 April 2011 remain unchanged:

(1) Unless otherwise provided for by law, courts shall administer justice in panels.
(2) Non-professional judges shall also participate in the administration of justice in the cases and ways defined by laws.
(3) Sole judges and chairpersons of panels shall be professional judges. In cases defined by law, court secretaries may also act within the competence of sole judges subject to Article 26 (1).

These provisions form part of the section entitled "Courts" (art. 25 to 28). Should be, in particular, pointed out the article 26, under which *1) Judges shall be independent and only subordinated to laws, and may not be instructed in relation to their judicial activities*

These provisions should be read together with the ones contained in article XXVIII: 1) "Every person shall have the right to have any charge against him or her, or any right and duty in litigation, adjudicated by a legally established independent and impartial court in a fair public trial within a reasonable period of time."

The new provision of article 27 4) allows that the President of the National Office for the Judiciary transfer a case from a court to another to the extent it has the same general jurisdiction and the same powers. The motivation for such provision is to ensure that decisions are rendered within a reasonable time and to balance the workload between the courts. It does not confer jurisdiction upon a specialized court, but upon a similar tribunal, having the same jurisdiction and the same powers than the one, which would be normally competent. In fact, the solution adopted allows to alter the division of territorial jurisdiction but not the one of subject matter jurisdiction.

The aimed purpose is in line, on the one hand, with the requirements of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, following to which the decisions shall be rendered within a reasonable time and, on the other hand with the desire to ensure a due administration of justice.

The issue can be raised as to whether such transfer of a case from a court to another would be considered as constituting a measure aiming to confer jurisdiction upon a specific court, in order for it to reach a specific result. If this were the case, the principle of impartiality, a key principle under article 6.1 of the European Convention of Human Rights, would be violated.

The European Court has specified the concept of impartiality, by drawing a distinction between a subjective and an objective approach in this regard. The first decision it rendered on this issue is the one dated 1 October 1982, Piersack v. Belgium no 8692/79). The Court gives the following general definition: *30. Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under Article 6 § 1 (art. 6-1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect.*

This distinction has been further dealt with, in particular, in its case of 24 May 1989, Hauschildt v. Denmark, n° 10486/83:

46. The existence of impartiality for the purposes of Article 6 para. 1 (art. 6-1) must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, amongst other authorities, the De Cubber judgment of 26 October 1984, Series A no. 86, pp. 13-14, para. 24).

47. As to the subjective test, the applicant has not alleged, either before the Commission or before the Court, that the judges concerned acted with personal bias. In any event, the personal impartiality of a judge must be presumed until there is proof to the contrary and in the present case there is no such proof.

There thus remains the application of the objective test.

48. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see, mutatis mutandis, the De Cubber judgment previously cited, Series A no. 86, p. 14, para. 26).

This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive (see the Piersack judgment of 1 October 1982, Series A no. 53, p. 16, para. 31). What is decisive is whether this fear can be held objectively justified.

The Court of Justice of the European Communities (now of the European Union) has adopted the same solution. In its decision rendered (in grand chamber) on 1 July 2008; Chronopost SA, La Poste, v. Union française de l'express (UFEX) and others, joint cases C-341/06 P and C-342/06 P, the Court states that:

54 Second, there are two aspects to the requirement of impartiality: (i) the members of the tribunal themselves must be subjectively impartial, that is, none of its members must show bias or personal prejudice, there being a presumption of personal impartiality in the absence of evidence to the contrary; and (ii) the tribunal must be objectively impartial, that is to say, it must offer guarantees sufficient to exclude any legitimate doubt in this respect (see, to that effect, in particular, Eur. Court HR, Fey v. Austria, judgment of 24 February 1993, Series A no. 255-A, p. 12, §28; Findlay v. United Kingdom, judgment of 25 February 1997, Reports of Judgments and Decisions 1997-I, p. 281, §73; and Forum Maritime S.A. v. Romania, judgment of 4 October 2007, nos. 63610/00 and 38692/05, not yet published in the Reports of Judgments and Decisions).

(see for same solution CJEC 19 February 2009, Koldo Gorostiaga Atxalandabaso, case C-308/07 P).

The issue, which can essentially and generally be raised with regard to the provision of article 27 4) of the Hungarian Fundamental Law, following the fourth amendment, is one of objective impartiality. It could in certain cases offset the risk of subjective bias.

In general, if a case filed with the normally competent Court were to be transferred to another court, by decision of the President of the National Office for the Judiciary, the person whose file has been transferred could be under the impression that the purpose of such transfer was to influence the outcome of the dispute. According to the subjective approach, such impression could be ill-grounded since the President of the Office, would have been motivated in this regard by the due administration of justice, and in particular by the desire to ensure that decisions are rendered within a reasonable time and the workload is well-balanced between the courts. It has to be nonetheless noted that, according to the famous saying, *Justice must not only be done, it must seen to be done.*

However, and as pointed out by the European Court (namely 6 June 2000, Morel v. France no 34130/96*), when it is being decided whether in a given case there is a legitimate reason to fear that a particular body lacks impartiality, the standpoint of those claiming that*

it is not impartial is important but not decisive. What is decisive is whether the fear can be held to be objectively justified (v. extracts in appendix).

Sudden change in the composition of the court just before the opening of the hearing, in combination of other circumstances (late transfer of the applicants, the short time allocated to the hearing, and especially the fact that important pieces of evidence have not been produced and adequately discussed during the hearing, in the presence of the accused and in a public hearing) (ECHR 6 December 1988, Barbera, Messegué and Jabardo v. Spain**,** Application no 10590/83 – cf. extract in appendix). It is implicitly admitted that the change in the composition of the tribunal, on its own, may not jeopardize the objective impartiality of the tribunal.

For this reason, we cannot state that the provision in itself, allowing the possibility for the President of the National Office for Judiciary to transfer a case from a tribunal to another would contravene the objective impartiality requirements. However, the possibility of such risk cannot be avoided.

In order to avoid all risks, the statutory law, which shall be adopted in order to implement article 27 4), as set out in this text, specify the conditions and criteria under which the President of the National Office for Judiciary could decide to transfer some cases from a tribunal to another. It would be desirable that this power to transfer cases from a tribunal to another applies in relation to a category of cases as opposed to a specific case. This would correspond to the aim of rebalancing the workload between the tribunals and ensuring reasonably prompt administration of justice, which should both apply to a series of cases as opposed to a specific case. This power shall thus apply as a general rule and not as a rule specifically applicable to a particular case.

However, in relation to a particular case, the existence of risks of subjective bias could be raised. This would be the case when the members of the tribunal has already taken position on an issue, or when the case is considered as a very sensitive one with regard to the location of the normally competent tribunal (for instance a crime, which stirs up the feeling of the town where it has been committed and the inhabitants thereof claim a harsh punishment).

In the first case, if the concerned judge does not "disqualify" himself, the possibility of recusation would normally allow that he/she does not sit in the Court. If the whole tribunal is suspected of being subjectively impartial, the transfer of the case can be considered as a possible solution.

In the second case, it is not the personal bias of the members of the tribunal, which is in issue, but the environment in which they have to render their decision. In order to ensure a peaceful environment, the case could be entrusted to tribunal located in another area (this is what is called in France the trial's "change of scenery").

In both case, the acknowledgement of the power of the President of the National Office for the Judiciary to transfer the case to another court than the one, which would have been normally competent, aims to ensure the impartiality of the court system.

The new article 27 4) of the Fundamental Law specifies that it shall be implemented by statutory law. This law should specifically set out the conditions and criteria under which

the President of the National Office for the Judiciary could decide to transfer some cases from a tribunal to another.

The assessment in relation to the compliance of the fourth amendment with the European norms could be, in fact, carried out with regard to the rules contained in this statutory law.

CONCLUSION

On the basis of the above observations, the undersigned are of the opinion that the provisions of the 4th amendment of the Fundamental Law of Hungary:

- comply with the European norms and standards or are consistent with them in relation to:

* the definition of marriage
* the control of constitutional review
* the description in the form of a declaration of crimes committed under the communist regime to the extent they are not subject to a new definition
* the recognition of the status of the Churches
* the regulation of political advertising
*the regulation of higher education institution and of the legal framework for the financial assistance to students working abroad in their professional field after the accomplishment of their studies
* the right to housing and the definition of illegal occupation of public areas
* the constitutional justice;

- comply with the European norms and standards or are consistent with them, to the extent that they can be interpreted in a way imposing the following:

* the determination of family ties to the extent they do not exclude a relationship other than those based on marriage and on parent-child relation
* the system of the statute of limitation applicable to the crimes committed under the communist regime to the extent it does not allow to prosecute a crime which has already been time barred by extending the applicable time limit
* the disclosure of personal data in relation to the role and actions of former communist leaders to the extent that the presumption of innocence and the protection of privacy requirements are complied with
* the reduction of pensions and other allowances granted to former communist leaders, to the extent that the amounts recovered are allocated to the compensation of the victims, which can be considered as a deprivation of possession in the public interest
* the restrictions on the freedom of expression in relation to the violation of human dignity and dignity of ethnic, racial and religious communities, to the extent such restrictions are strictly necessary for the protection of fundamental rights
* organization of the judiciary to the extent that the decision to transfer disputes from a court to another similar one is based on objective criteria;

- are of a debatable nature with regard to the European norms and standards in relation to:

* the declaration on the lack of applicable statute of limitation with regard to crimes committed under the communist regime to the extent that those crimes have already been time barred
* the obligation to acknowledge factual allegations in relation to the events/behavior under the communist regime
* the restrictions on the freedom of expression in relation to the violation of dignity of the Hungarian nation and of national communities, since these concepts are too vague.

In any event, the statutory provisions, which will have to be enacted in order to implement the constitutional provisions, shall contain all the necessary safeguards in order to comply with fundamental rights and freedoms, as set out in the Fundamental Law as well as in the European norms and standards.

On the 1st May 2013

Francis Delpérée **Pierre Delvolvé** **Eivind Smith**