Comments of Hungarian NGOs on the Draft Report on the situation of fundamental rights: standards and practices in Hungary and on the Position of the Hungarian Government

May 23, 2013

This document contains comments by Hungarian NGOs on the Position of the Government of Hungary on the Draft Report on the Situation of Fundamental Rights: Standards and Practices in Hungary. The Hungarian Helsinki Committee (HHC) and the Hungarian Civil Liberties Union (HCLU) – with the contribution of Standards Media Monitor – have only dealt with the Government's reaction to the Draft Report and with comments that concern the Draft Report's statements on 'Reforms in Hungary'. Considering that neither procedural issues nor recommendations that are of a political nature are in the focus of our interest, comments made herein aim only to prevent and clarify possible misunderstandings and to contribute to the correct assessment of the legislative steps taken in Hungary. Bearing this in mind, the NGOs commented on the Government's position only when it contains evident factual errors, misleading interpretation of facts or false statements, while we have chosen not to deal with government comments that simply argue with the statements or recommendations of the Draft Report.

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Background and main issues at stake
The Fundamental Law and its transitional provisions

X. whereas the adoption of the Fundamental Law of Hungary – which was passed on 18 April 2011, exclusively with the votes of the members of the governing coalition and on the basis of a draft text prepared by the representatives of the governing coalition – was conducted in the exceptionally short time frame of one month, thus restricting the possibilities for a thorough and substantial debate with the opposition parties and civil society on the draft text;

Comment of the Hungarian Government

The statement on the process of the adoption of the new Fundamental Law is factually incorrect and misleading, giving the impression that the new constitution was adopted by way a stealth, over-night constitutional coup. The following facts must be emphasised:

- *Adoption of the Fundamental Law was preceded by a preparatory period of almost one year. The Parliament set up an ad hoc committee for the preparation of the Constitution in the summer of 2010. All parliamentary parties were invited to the committee, the procedure of which was open to public. Several hundreds of written comments were received from specialist private individuals, state organs, and civil society organizations. These comments were made publicly available on the committee's website. The ad hoc committee also organised public hearings for stakeholder groups such as trade unions or churches.*
- *Besides, in 2011, the Government distributed questionnaires on some constitutional issues to the entire adult population of Hungary (the "national consultation").*
- *Furthermore, in the beginning of 2011, all parliamentary parties were encouraged to submit their own proposals for a new Constitution. The rules of procedure of the Parliament had been amended explicitly in order to ensure for the opposition to more efficiently exercise its rights and with the aim of having a more substantive dialogue with the opposition.*
- *In 2011 great publicity was given to the Constitution-making process. In particular from February to April a wide range of substantive constitutional questions were widely discussed in the media and several seminars, conferences were organized by universities and civil organizations with the topic of the new Constitution on their agendas. The politicians and experts of the Government and the ruling party regularly attended these media events and scientific conferences; they shared their views with the general public and received the written or oral observations and comments.*
- *In March and April of 2011 every parliamentary session was dedicated to debating the new Fundamental Law, no other legislative acts were deliberated during this period. The procedure was fully open to the public and a number of external comments had been canalised in the parliamentary process via nearly 170 amendments.*
- *Unfortunately, during the preparation of the Fundamental Law two opposition parties, based on their own political decisions, decided to stay away from the discussions at the parliamentary sessions, and remained reluctant to formulate proposals.*

Comment of NGOs

The statement on the process of adoption of Fundamental Law is factually incorrect as the process looked as follows:
The Ad Hoc Parliamentary Committee Preparing the New Constitution[1] was established by Parliamentary Resolution 47/2010 on 28 June 2010, and hold its last session on 7 March 2011.
The above Parliamentary Resolution 47/2010 set out that the Ad Hoc Parliamentary Committee had to submit a proposal to the Parliament by 31 December 2010 on the fundamental principles of the new Constitution of Hungary. (It has to be added that the draft Parliamentary Resolution planned to devote a whole year to the preparatory work, thus the initial deadline was 30 June 2011, but this was altered in the course of the parliamentary debate upon an amendment of an MP of the Fidesz.)

The schedule regarding the document on the fundamental principles of the new constitution was the following:

- The six working groups of the Ad Hoc Committee had to prepare their concept papers by 20 October 2010.
- Working groups' concept papers were discussed by the Ad Hoc Committee between 2 and 15 November 2010.
- The final document on the fundamental principles of the new constitution was compiled by the responsible seventh working group by 30 November 2010.

[1] The website of the Ad Hoc Committee is available at: http://www.mkogy.hu/internet/plsql/ogy_biz.keret_frissit?p_szerv=911&p_ckl=39&p_biz=I005&p_nyelv=HU.

- The final document was discussed by the Ad Hoc Committee between 10 and 15 December 2010.
- The document on the principles of the new Constitution was submitted as a draft Parliamentary Resolution to the Parliament by the Parliamentary Ad Hoc Committee on 20 December 2010.
- The draft Parliamentary Resolution was discussed by the Parliament between 15 February and 7 March of 2011 (the first reading – the general debate – was concluded within two days, and the second reading – the debate about the details of the concept paper – lasted for less than five hours).
- The Ad Hoc Committee held two further sessions after the submission of the draft Parliamentary Resolution (on 18 and 23 February and on 7 March), where committee members discussed proposed amendments to the draft Parliamentary Resolution.
- The Parliamentary Resolution 9/2011 OGY on the Preparation for the Adoption of the new Constitution was promulgated on 9 March 2011.

However, the draft of Parliamentary Resolution 9/2011 submitted by the Ad Hoc Committee was altered to a significant extent in the course of the debate. MPs János Lázár (head of the Fidesz parliamentary group) and Péter Harrach (head of the KDNP parliamentary group) submitted an amendment proposing that the concept paper of the Ad Hoc Committee was to be considered solely as a document supporting the constitution-making work of the MPs. The proposed amendment was adopted. Accordingly, Section 2 of the Parliamentary Resolution set out the following: "*The Parliament requests the members of parliamentary groups and independent MPs to submit their Bills on the new Constitution to the Parliament until 15 March 2011,* ***with or without taking into consideration*** *the proposal of the Ad Hoc Parliamentary Committee Preparing the Constitution, included in the annex of this Resolution. The Parliament considers the proposal of the Ad Hoc Parliamentary Committee Preparing the Constitution as* ***support for the constitution-making work of MPs***." Thus, the Ad Hoc Committee's concept paper was downgraded and there was no obligation to take it into consideration while preparing the draft Fundamental Law. It has to be recalled that the draft Fundamental Law was submitted to the Parliament by MPs of the governing majority only seven days after the adoption of the above Parliamentary Resolution, on 14 March 2011.

As to the participation of the opposition parties in the Ad Hoc Committee, the following may be stated. The ruling party had the legal basis, in the Rules of the Parliament, to appoint MPs to the Ad-Hoc Committee on an equal basis: one half could have been nominated by the ruling parties, and one by the opposition. However 30 MPs were nominated from the government supporting party alliance, and 15 MPs from the opposition parties – that reflects their share of seats in the Parliament. Under these circumstances the opposition parties were unable to have the slightest impact on the constitution-making process. As a response to the Bill aimed at curtailing the powers of the Constitutional Court regarding budgetary and tax matters, the Hungarian Socialist Party[2] and the LMP[3] announced on 26 October 2010 that they will no longer participate in the work of the Ad Hoc Committee. On 16 November 2010, the Jobbik[4] also announced that they leave the Ad Hoc Committee, claiming that the two-thirds majority does not take into consideration their proposals.

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[2] See e.g.: http://hvg.hu/itthon/20101026_alkotmany_mszp_kiszall.
[3] The statement of the LMP is available here: http://lehetmas.hu/sajtokozlemenyek/8079/el-a-kezekkel-a-jogallamtol/.
[4] See e.g.: http://hvg.hu/itthon/20101116_jobbik_alkotmany_elokeszites_.

Y. whereas the 'national consultation' on the draft Fundamental Law only consisted of a list of twelve questions on very specific issues drafted by the governing party in a way that could have lead to self-evident replies and which, above all, did not include the text of the draft Fundamental Law so that the public was not in a position to submit its views thereon;

Comment of the Hungarian Government

As shown above (paragraph X) the preparation and adoption of the new Fundamental Law was a broad and open process. The report however picks one single element of that process (the "national consultation") and caricatures it as a mock-consultation designed to rubber stamp political choices that have already been made. This account completely ignores the fact that the purpose of the consultation was not to solicit comments on the full text of the draft Fundamental Law, but to seek direct voter opinion on a number of fundamental questions (with a view to influencing subsequent drafting).

Comment of NGOs

It must be borne in mind that **the "consultation" about the new Fundamental Law** took place without having a draft text of it. It shall be noted, too, that the 12-questions questionnaire did not cover the important questions that may emerge as dilemmas during a constitution-writing process (such as the separation of church and the state; the powers of the Constitutional Court) but included questions loosely relating to the constitution-making process (i.e. the questions about whether the constitution should enhance the role of the family, public order, labour and the health; whether the constitution should emphasize the importance of protection of future generations, the protection of the land and water etc.) or being populist in character (i.e. the question about whether the life imprisonment sentence in Hungary should be in the Criminal Code).

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AA. whereas, despite that Decision, the Fourth Amendment to the Fundamental Law, adopted on 11 March 2013, integrates into the text of the Fundamental Law all the transitional provisions annulled by the Constitutional Court, with the exception of the provision requiring electoral registration, as well as other previously-annulled provisions;

Comment of the Hungarian Government

Contrary to the evaluation of the report, the Fourth Amendment has not been adopted "despite" but, precisely because of Decision No 45/2012 of the Constitutional Court. Importantly, the Decision was based on formal reasons (permanent constitutional requirements can only be laid down in the Fundamental Law itself not in transitional provisions) and did not address substantial issues. In fact, it was the Constitutional Court itself that called upon the legislator to create an unambiguous legal situation by way of revisiting the annulled provisions. The Court however gave no instruction as to which provisions should be integrated into the Fundamental Law, giving free hand to Parliament to make its own choice.
As to the re-enactment of provisions that have been annulled by the Constitutional Court it must be pointed out that this is not an exceptional – let alone unconstitutional – political practice. As the Venice Commission points out "[t]here is [...] no general standard saying that a constitutional revision cannot go against a decision of a constitutional court. This would make the Constitution as interpreted by the Constitutional Court intangible" (paragraph 67 of Opinion No. 679/2012 on the Revision of the Constitution of Belgium).

Comment of NGOs

The governmental reaction is self-contradictory, as the first paragraph suggests that the Fourth Amendment was a compelling consequence of the CC's decisions, while the second one admits that the Fourth Amendment contains provisions that were annulled by the CC. Obviously, the CC itself did not call upon the parliament to overrule its own previous decision. In fact some provisions of the Fourth Amendment were inserted into the Fundamental Law because they were deemed to be provisions requiring constitutional-level regulation. However, the following table shows that many of the provisions are actual overruling of CC's binding decisions, including those ones which annulled by the CC previously on substantial grounds.

CC decision	**Quotation from CC decision**	**Article of the Fourth Amendment**	**Text of the Fourth Amendment**
Declaring void CC decisions adopted prior to the Fundamental Law			
22/2012. (V. 11.) Reasoning [40]-[41] reiterated by: 30/2012. (VI. 27.) 34/2012. (VII. 17.) 4/2013. (II. 21.)	"In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution. […] The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid."	Article 19	"Decisions of the Constitutional Court delivered prior to the entering into force of the Fundamental Law become void. This provision does not concern the legal effects achieved by the preceding decisions."
Prohibiting the CC from examining the substantive constitutionality of proposed amendments to the Fundamental Law			
45/2012. (XII. 29.) Reasoning [117]-[118]	"In certain cases the Constitutional Court may also examine the undiminished predominance of the content-related constitutional requirements, guarantees and values of the democratic state based on the rule of law, and their inclusion in the constitution."	Article 12	"The Constitutional Court may only review the compliance of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements included in the Fundamental Law pertaining to the adoption and the promulgation of the

			Fundamental Law or its amendments."
Narrowing the notion of family			
43/2012. (XII. 20.) Reasoning [43]	"It does not follow from Article L) of the Fundamental Law that e.g. those in a partnership who take care of and raise each other's children, different-sex couples who do not want a child or who cannot have a common child due to different reasons, [...] widows, [...] grandparents raising their grandchildren, [...] and many other forms of long-standing emotional and economic cohabitations, which are based on mutual care and fall within the wider, more dynamic, sociological notion of a family would not be covered by the state's objective positive obligation [to provide constitutional protection for families]."	Article 1	"Marriage and the parent-child relationships are the basis of the family."
Banning political advertisements in the commercial media			
1/2013. (I. 7.) Reasoning [93]-[100]	"According to Article 151 (1) of the law, in the campaign period, political advertisements may be published exclusively in pubic media outlets. This provision bans this kind of political communication in every other media outlet […], which results that the possibility of publishing political advertisements ceases exactly regarding in the media reaching society to the widest extent. Thus, the ban is a considerable restriction on political speech as performed in the course of the election campaign. [...] Article 151 (1) of the law does not serve the aim of balanced information, and even may lead to an opposite result. [...] Therefore, the CC rules that the ban of publishing political advertisements in the campaign in [non-public] media outlets is contrary to the Fundamental Law."	Article 5	"In order to guarantee adequate information necessary for the formation of a democratic public opinion and in order to guarantee equal opportunities, political advertisements may be published in the media exclusively free of charge. Before the election of Members of Parliament and Members of the European Parliament, in the campaign period, political advertisements may be published by and in the interest of those organisations nominating candidates which set up a national list of candidates for the general elections of Members of Parliament or setting up a list of candidates for the election of Members of the European Parliament

			– as defined in a Cardinal Act – exclusively via public media outlets, under equal conditions."
Providing a constitutional basis for criminalizing homelessness			
38/2012. (XI. 14.) Reasoning [53]	"Homelessness is a social problem, which shall be dealt with by the state with the means of social administration and social maintenance instead of punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare [homeless persons] dangerous to the society and punish [them]."	Article 8	"An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values."
Recognition of churches by the Parliament			
6/2013. (III. 1.) Reasoning [205]	"Recognizing the status as a church by a parliamentary vote [...] may lead to decisions reached on political grounds. [...] vesting this kind of a decision exclusively in the Parliament, being essentially of political character, is not in compliance with the requirements included in the Fundamental Law [...]."	Article 4	"Parliament may recognize, in a cardinal Act, certain organizations that serve a religious mission as a church. With them the State collaborates for the public interest. Against the provisions of the cardinal Act concerning the recognition of churches a constitutional complaint may be filed."

As to the Venice Commission's opinion referred to, we wish to point out **that the Government has cut off the quotation sentence half way through, leaving the reader with the impression that a constitutional revision against a constitutional court's decisions is no matter of concerns at all.** In fact, the quotation is followed in the Commission's opinion by the following sentence: "*Frequent constitutional amendments aimed at reversing decisions of the Constitutional Court would however undermine constitutional culture, the authority of the Constitutional Court, and thus the respect for the Constitution itself.*" It must also be taken into consideration that the Belgian case was about a procedural rule and not a substantive one restricting fundamental rights at constitutional level in a way found previously found unconstitutional by the CC. The six listed amendments, however, must be deemed frequent amendments and they are substantive ones, therefore the Venice Commission's opinion quoted by the Government is an argument against and not in favour of the allegation that the Fourth Amendment is in conformity with international constitutional standards.

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Extensive use of cardinal laws

AB. whereas the Fundamental Law of Hungary refers to 26 subject matters to be defined by cardinal laws (that is laws the adoption of which requires a two-thirds majority), which cover a wide range of issues relating to Hungary's institutional system,

the exercise of fundamental rights and important arrangements in society;

Comment of the Hungarian Government

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

Comment of NGOs

It is true that "*the existence of cardinal laws in the Hungarian constitutional system is nothing new*". However, the problematic issue about the new list of cardinal laws is their subject matter. **The Fundamental Law declares that family policy, the pension system or the acts on taxes, which have been within the authority of the government in power, shall be regulated by cardinal acts, i.e. acts adopted by the two-third of the Parliament. In the case of a Parliament where the government does not hold two-third majority, this rule can lead to a state of ungovernability. At the same time, this rule makes it possible for the recent government to ensure the long-lasting force of their family, pension and tax policies, expanding their effect even into the period when other political forces will hold governing responsibility. The Fundamental Law deprives the political force replacing the current governing majority of the possibility to realize its own government program hence it undermines equality in political change and in the democratic political competition**.

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Practice of individual members' bills and accelerated procedures

AE. whereas important legislation, including the Fundamental Law, its second and fourth amendments, the transitional provisions of the Fundamental Law and a number of cardinal laws were enacted on the basis of individual members' bills, to which the rules set out in Act CXXXI of 2010 on the participation of civil society in the preparation of legislation and in Decree 24/2011 of the Minister of Public Administration and Justice on preliminary and ex-post impact assessment do not apply, with the consequence that legislation adopted through this streamlined procedure is subject to a restricted public debate;

Comment of the Hungarian Government

Individual members of Parliament have a long-standing constitutional right to submit bills to Parliament, just like in most European countries. Contrary to the impression made by the report, these bills are not adopted in a legal vacuum. All bills and amendments thereto are publicly available on the website of the Parliament as soon as their submission, thus transparency is fully ensured.

Comment of NGOs

Using individual member's bill to amend laws, even the Fundamental Law and cardinal laws, is problematic because this way the Government can circumvent the duty of proceeding democratic consultation process prior to the submission of the amendment and hence deny the public and

competent NGOs to comment on the planned legal amendments. The Fourth Amendment is a telling example also for the reason that is has been submitted by almost all of the MPs belonging to the ruling party, and it is hardy imaginable that the amendment has in fact been drafted by the more than 200 MPs. So what is at stake is not transparency but real democratic legitimacy of law-making. Beside these reasons, it must also be noted that submitting cardinal laws is an explicit constitutional duty of the Government.

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Weakening of checks and balances: Constitutional Court, Parliament, Data Protection Authority

AG. whereas, under the Fundamental Law, the powers of the Constitutional Court to review budget-related laws have been substantially limited to violations of an exhaustive list of rights, thus obstructing the review of constitutionality in cases of breaches of other fundamental rights, such as the right to property, the right to a fair trial and the right not to be discriminated against;

Comment of the Hungarian Government

This statement ignores the fact that the Constitutional Court maintains significant powers with regards to the revision of budget-related legal acts as follows:

- *unlimited ex ante review of all budget-related legislative acts;*
- *unlimited ex post review of all legal acts other than acts of Parliament (e.g. government decrees);*
- *full ex ante and ex post review of all budget-related legislative acts from a procedural point of view;*
- *full ex ante and ex post review of all budget-related legislative acts with regards to their compliance with international treaty obligations.*

Besides, also in case the restriction applies the practice shows that Constitutional Court has proven capable to deliver judgements on budget-laws through an extensive interpretation of broad legal categories, such as human dignity.

Comment of NGOs

We only would like to quote the Venice Commission's Opinion regarding the restriction s of the competence of the CC (http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282011%29016-e, para. 99.):
"a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. ***Therefore, restricting the Court's competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament "to enhance the protection of fundamental rights in Hungary***".

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AH. whereas the Fourth Amendment of the Fundamental Law left untouched the already existing right of the Constitutional Court to review amendments to the Fundamental Law on procedural grounds, and whereas it excludes in the future the Court being able to review constitutional amendments on substantive grounds;

Comment of the Hungarian Government

First, it must be pointed out that even before the Fourth Amendment the Constitutional Court, in its own interpretation, held no powers to review constitutional amendments on substantive grounds. The Fourth Amendment is a mere transposition of this case law into the text of the constitution. Moreover, the assessment of the Venice Commission on the review of constitutional amendments by constitutional courts concludes that this is a rare feature of constitutional jurisdiction, and that "such a control cannot therefore be considered as a requirement of the rule of law" (paragraph 49 of Opinion No. 679/2012 on the Revision of the Constitution of Belgium).

Comment of NGOs

The first sentence of the Government is factually untrue. As mentioned above, decision No 45/2012. (XII. 29.) of the Constitutional Court established that "*In certain cases the Constitutional Court may also examine the undiminished predominance of the content-related constitutional requirements, guarantees and values of the democratic state based on the rule of law, and their inclusion in the constitution*." This is in clear contradiction with the provision of the Fourth Amendment saying that "*The Constitutional Court may only review the compliance of the Fundamental Law and an amendment to the Fundamental Law with the procedural requirements included in the Fundamental Law pertaining to the adoption and the promulgation of the Fundamental Law or its amendments*". Indeed, the Court refrained from reviewing constitutional amendments on substantive grounds previously but transforming this self-restraint into an explicit prohibition on the level of the constitution can hardly has other aim than limiting the autonomy of the Court.

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AI. whereas the Constitutional Court, in its above-mentioned Decision 45/2012, held that 'Constitutional legality has not only procedural, formal and public law validity requirements, but also *substantial* ones. The constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalisation of the *substantial* requirements, guarantees and values of democratic States under the rule of law.' (Point IV.7 of the Decision);

Comment of the Hungarian Government

The context of this passage from the Decision of the Constitutional Court was whether or not the Transitional Provisions could contain substantial amendments to the Fundamental Law. The Court's evident conclusion was negative, hence it quashed the (majority) of the Transitional Provisions. The Court however did not arrive at a finding that it was empowered to review the substantive constitutionality of amendments to the Fundamental Law (also see comments on paragraph AH).

Comment of NGOs

There is no context in which this paragraph means other than that the CC is empowered to review the substantial constitutionality of amendments to the Fundamental Law. Indeed, the requirements on which the merit of the case was decided were not exclusively procedural ones pertaining only to the adoption of the Fundamental Law or its amendment.

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AK. whereas a non-parliamentary body, the Budget Council, with limited democratic legitimacy, has been granted the power to veto the adoption of the general budget, thus restricting the scope for action of the democratically elected legislature;

Comment of the Hungarian Government

The establishment of a Budget Council with strong powers over national spending was required under the 2008 IMF loan and EU balance of payment assistance agreement. The raison d'être of such an institution is exactly what is criticised by the report: to limit the powers of political parties to adopt irresponsible budgetary measures. It is a well-known fact that Hungary has been subject to an excessive budget deficit procedure since its accession to the EU. This has been the result of democratically elected representatives paying no attention to fiscal reality or the long-term financial interests of the country. Furthermore, not only has the establishment of the Budget Council been a requirement advanced by the EU, the 2012 country-specific recommendations endorsed by the European Council call for further strengthening of the institution.
These external control bodies do not have to be democratically elected. The Constitutional Court, the National Bank, the State Audit Office are institutions with no direct electoral mandate, yet they exercise extensive powers that restrict the action of the democratically elected legislature.
As a point of clarification it must be highlighted that the Budget Council may exercise a veto only as a last resort exceptional measure when Parliament is to adopt a budget leading to the growth of state indebtedness. Otherwise the ordinary function of the Council is to undertake a preliminary review of the draft national budget and to make recommendations.

Comment of NGOs

The Budget Council's right to prevent the adoption of the annual budget of the state shall be measured with respect to the right of the President of the Republic to disband the Parliament in case of having no annual budget adopted until 31 March of the given year.

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AL. whereas the new Freedom of Information Act, adopted in July 2011, abolished the institution of the Commissioner on Data Protection and Freedom of Information, thus prematurely terminating the six-year-long mandate of the Commissioner and transferring its powers to the newly-established National Agency for Data Protection whose independence is currently under review by the Court of Justice of the European Union;

Comment of the Hungarian Government

This paragraph mixes up two distinct issues. It is true that the premature termination of the office of the former data protection ombudsman is sub judice before the European Court of Justice. Importantly, however, the independence of the new data protection agency has not been questioned by the European Commission. As regards the independence of the Hungarian Data Protection Authority even the Venice Commission acknowledged that it is far better ensured in Hungary than in many other European states. It is worth mentioning that in its Decision No. 3076/2013. (III. 27.) the Hungarian Constitutional Court confirmed that the restructuring of an organisation may be an explicit constitutional reason for the shortening of the mandate of civil servants.

Comment of NGOs

The CC decision quoted by the Government did in fact confirm its previously established practice that the restructuring of an organisation may be an explicit constitutional reason for the shortening of the mandate of civil servants. However, this is irrelevant from the point of view of the abolishment of the position Commissioner on Data Protection and Freedom of Information, the case of which is being examined by the Court of Justice of the European Union on account of violating an EU-norm.

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Independence of the judiciary

AN. whereas, according to the Fundamental Law and its transitional provisions, the six-year-long mandate of the former President of the Supreme Court (renamed the 'Kúria') was prematurely ended after two years;

Comment of the Hungarian Government

The former President of the Supreme Court held two combined, indivisible functions until the entry into force of the Fundamental Law. On the one hand, he was the chief justice of the Supreme Court (a judicial function). On the other hand, he was heading the administrative branch of the entire national judiciary (an administrative function). These two offices became separate under the new Fundamental Law, leading to an inevitable termination of the office of the incumbent President.
The above circumstances constitute a sufficient reason for the termination of the appointment of the former leader position before its original expiry, as it was confirmed by the Constitutional Court in Decision No. 3076/2013. (III. 27.).

Comment of NGOs

On the same issue the Venice Commission held: "*Since the provision of the Fundamental Law concerning the eligibility to become President of the Curia might be understood as an attempt to get rid of a specific person who would be a candidate for the President, who has served as president of the predecessor of the Curia, the law can operate as a kind of a sanction of the former president of the Supreme Court. Even if this is not the case, the impression, that this might be the case, bears the risk of causing a chilling effect, thus threatening the independence of the judiciary*".
(http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282012%29001-e, para 113.)

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AU. whereas on 11 March 2013 the Hungarian Parliament adopted Act No XX of 2013 amending the upper age limits with a view to complying with the rulings of the Hungarian Constitutional Court of 16 July 2012 and of the Court of Justice of the European Union of 6 November 2012;

Comment of the Hungarian Government

A point of information as to paragraphs AS-AU: The Hungarian Government has committed itself to execute the judgment of the ECJ. To this end Act XX of 2013 has been prepared in close cooperation with the European

Commission. The Commission has approved the concept of the regulation, including the solution that certain managerial court positions may only be restored if they are vacant.
The new Act sets the upper age limit for judges and prosecutors at 65 years from 1 January 2023, i.e. following a 10 year transitional period (equal that of the increase of the general retirement age from 62 to 65). Judges and prosecutors already laid off can decide whether they wish their contract to be restored. Due compensation is provided for by the Act, including the possibility to claim damages incurred in connection with the early termination of the service relationship. The implementation of the Act (i.e. the reinstatement of judges and prosecutors) is in progress, the Hungarian Government regularly informs the Commission on the developments.

Comment of NGOs

Beside the legislative steps mentioned by the Government, as another relevant amendment provides (Article 232/J (3) of Act CLXII of 2011 on the status and remuneration of judges) only **in those cases can the judicial leader position of judges whose service relationship had been terminated unlawfully reinstated whose position had not been filled in previously, the new legal regulation fails to provide redress** to the harm caused by the unlawful termination of the judicial positions.

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Media legislation

BP. whereas, further to the dialogue conducted with the EU and the Secretary General of the Council of Europe through an exchange of letters and expert meetings, further legal amendments were tabled in February 2013 in order to strengthen and guarantee the independence of the media regulatory bodies, notably in respect of the rules relating to the conditions of the appointment and election of the President of the National Media and Infocommunications Authority and the Media Council and concerning, respectively, the nomination procedure, the person making the appointment and repeated appointment;

Comment of the Hungarian Government

After the exchange of letters and expert meetings, further legal amendments were adopted by the Parliament on 25 March 2013 (see Act XXXIII of 2013) in order to strengthen the independence of the President of the Media Authority; to preclude the possibility of re-appointment of the President of the Authority as well as of the re-election of the Members of the Media Council; to set out legal obligations to consult NGOs and to take their proposals into consideration in the nomination procedure; to set higher professional requirements for the appointment of the President of the Authority and the Members of the Media Council. Besides, in relation to information services provided by linear media service providers, the amendment maintained only the requirement of 'balanced' coverage, while it repealed the adjectives 'comprehensive, factual, up-to-date, objective' as suggested by the Council of Europe.
As shown by the above-mentioned steps, Hungarian Government has always been constructive in considering the criticism and suggestions to the media regulation, coming from either the Hungarian or the European institutions. Mr Jagland, Secretary General of Council of Europe, also expressed his satisfaction with the amendments to the media legislation.

Comment of NGOs

The nomination of a new president according to the new rule is currently pending. The Minister of Justice has asked the Constitutional Court to offer an interpretation of the law he had himself introduced two months ago, since it appears that there is no candidate who would simultaneously

satisfy the legally required preconditions and be found suitable by the Prime Minister. In his query submitted to the Constitutional Court, the minister questions whether Parliament is even authorized to specify requirements concerning professional eligibility, a position that puts him at odds with the agreement between the government and the Council of Europe.

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BQ. whereas the Fourth Amendment imposes press restrictions as it bans all political advertising during electoral campaigns except for advertising in the public media;

Comment of the Hungarian Government

As clarified in relation to paragraph AY above, restrictions on political marketing only apply to broadcasting services. The aim of this provision is to ensure the publication of political advertisings via public media (radio and television) on an equal basis and free of charge. The Fourth Amendment does not affect at all political advertisings not displayed through broadcasting services (e.g. posters, flyers, internet). Similar restriction exists in a number of European countries and was also recognised by the European Court of Human Rights in one of its recent judgments. [Animal Defenders International vs. UK; judgement of Grand Chamber of 22 April 2013].
The Hungarian Government is in consultation with the European Commission with a view to fine-tuning the rules on political advertising, although the Commission itself has not raised any points of EU law thus far.

Comment of NGOs

In its Decision 1/2013. (I. 7.) the Constitutional Court declared the following rule in the new Election Procedure Act unconstitutional: "*[i]n the campaign period, political advertisements may only be published in the public media*". The CC emphasized that the rule in question would "*cease the possibility of publishing political advertisements exactly regarding in the media reaching society to the widest extent. Thus, the ban is a considerable restriction on political speech as performed in the course of the election campaign.*" Furthermore, it was concluded that the ban "*does not serve the aim of balanced information, and even may lead to an opposite result. Indeed, the provision bans the publishing of political advertisements – which, besides influencing the voters, also inform them – precisely in case of the type of media which reaches voters in the widest range.*"
Despite the statements of the CC cited above, Article 5 of the Fourth Amendment includes the following provision into the Fundamental Law under Article IX (3): "*In order to guarantee adequate information necessary for the formation of a democratic public opinion and in order to guarantee equal opportunities, political advertisements may be published in the media exclusively free of charge. Before the election of Members of Parliament and Members of the European Parliament, in the campaign period, political advertisements may be published by and in the interest of those organisations nominating candidates which set up a national list of candidates for the general elections of Members of Parliament or setting up a list of candidates for the election of Members of the European Parliament – as defined in a Cardinal Act – exclusively via public media outlets, under equal conditions.*" (It shall be added that the text cited is the result of changes proposed in the course of the parliamentary debate by an individual MP of the Fidesz.) Thus, the Fourth Amendment bans the publishing of political advertisements in the commercial media by and in the interest of the strongest (opposition) parties, which is in contradiction with the standards established by the CC.
Furthermore, on the one hand, it is highly improbable that commercial media outlets would allow not only political parties but anyone to advertise free of charge. On the other hand, in the campaign period public service media, which has specifically low ratings, plays much less role than commercial media. This has importance in the light of the fact that the amendment, neither the ban nor the requirement of equal conditions, does not cover political advertisements on public billboards. Since billboards are as significant in the campaign period as commercial media

would be, and the market of billboards is dominated by business groups close to the governing parties, it is improbable as well that the requirement of equal conditions in the public media will actually result in equal opportunities.
The provision of the Fourth Amendment as cited above also violates Article 10 of the European Convention on Human Rights. In the case *TV Vest As and Rogaland Pensjonistparti v. Norway*, 27 which dealt with the general ban of political advertisements in television, the European Court of Human Rights (ECtHR) reiterated that according to its case-law there is little scope under Article 10 (2) of the European Convention on Human Rights for restrictions on political speech or on debate on questions of public interest and that "the potential impact of the medium of expression concerned is an important factor in the consideration of the proportionality of an interference" in case of restricting political speech. In the latter case, the ECtHR assessed the fact that the applicant party was at a disadvantage compared with major parties which had obtained edited broadcasting coverage. On the basis of this line of reasoning, the Fourth Amendment does not meet the standards established by the case law of the ECtHR either.

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BR. whereas the National Media and Infocommunications Authority and the Media Council have not conducted assessments on the effects of the legislation on the quality of journalism, the degrees of editorial freedom and the quality of working conditions for journalists;

Comment of the Hungarian Government

It is difficult to see why the Hungarian media authorities (or any other national authorities) would be obliged to undertake sociological or market-review reports as suggested by the report. Such a demand has no EU relevance whatsoever.

Comment of NGOs

Without such analyses, the Media Council cannot fulfil its task. However, the Media Act confers the competence on the Media Council to pursue sectoral inquiries in the media market.
According to the researches of NGOs, 80% of the complaints regarding the unbalanced information is put in against the public service broadcasting (http://mertek.eu/en/reports/content-regulation-in-the-practice-of-the-media-council). Other researches show that the government and the governing parties appear in the 73% of the news on PSB, the biggest opposition party appear only in 17% of the PSB news. Especially the second rate justify a significant change in the PSB news: the rate of opposition parties' appearance was 40% in 2008, before the change of government and PSB regulation. (http://mertek.eu/sites/default/files/reports/kozeleti_tartalom.pdf). In line with the former problem, there is no public data regarding the balancement of PSB on the Media Council's website.

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BW. whereas, although intolerance against the members of Roma and Jewish communities is not a problem solely associated with Hungary and other Member States are faced with the same predicament, recent events have raised concerns as to the increase in anti-Roma and anti-Semitic discourse in Hungary;

Comment of the Hungarian Government

Paragraphs BU-BW are dangerous examples of a selective political narrative that create a picture that Hungary is country where racial tension is mainstream political condition and racial crime is rife. Paragraph BU mentions a recent series of racially motivated crimes. It fails to mention however that these crimes ("the Roma-killings") were committed in 2008-2009, i.e. during the previous government whose activities are generously spared from criticism by the report. The current government has acted against all these (and similar) crimes in a most determined fashion. Lack of reaction by law enforcement authorities thus was characteristic up to 2010.
Paragraph BW suggests that anti-Roma ad anti-Semitic political talk is a mainstream political phenomenon in Hungary. This is an incorrect presentation of the situation. While such negative and unfortunate incidents do emerge in Hungary, they have been tackled by the Government and Parliament with zero tolerance. Notably, the Government introduced a range of legislative measures tackling hate speech and racial incitement in public (providing legal remedies under the Fourth Amendment against hate speech, criminalising Holocaust-denial, banning paramilitary groups), to promote Jewish and Roma culture and identity (introduction of the Remembrance Day, 50% increase in Holocaust pension, dedicating 2014 as the Hungarian Holocaust Memorial Year, compulsory education of Holocaust and Roma history in public schools, etc.). President Áder, Prime Minister Orbán and all members of the Government speak up in public condemning each and every incident of a racist motive.

Comment of NGOs

The continuously selective reaction and the less effective use of legal means by the law enforcement authorities in cases of racially motivated crime is a general phenomenon in Hungary, regarding not only the so-called "Roma-killings" committed in 2008-2009 but all the bias-based crimes against the Roma, Jewish people and LGBTQ-people.
That is also noteworthy that legislative steps taken by the current parliamentary majority, such as so-called collective defamation, introduced into the Civil Code and into the Fundamental Law by the Fourth Amendment, were judged to be unconstitutional by the Constitutional Court previously. In addition, setting the right to human dignity as an overall constraint on the freedom of speech by the Fourth Amendment can be (and has been) used to interfere this freedom too broadly, while the judicial practice presents deficiencies and misunderstandings in the area of application the rules against hate crime (i. e. crime against member of a community).
The government also introduced the concept "closing the social gap" – translated into English by the government as "social inclusion" –, which is unknown in EU jurisprudence or social policy, into the Fundamental Law with the Fourth Amendment and then introduced a bill before the Parliament to amend the law on equal opportunity with this concept. Amending the clause on positive discrimination with the notion of "closing the social gap" creates the opportunity for schools that are seen to close the social gap based on subjective criteria to evade the ban on segregation.
Creating a society free from intolerance and discrimination would require strengthening of the effectiveness of the operation of law enforcement authorities in hate-motivated crimes, and taking the fight against discrimination and segregation in all level and areas of the public sphere seriously. The solution to segregation of the Roma requires a) real efforts from politicians beyond outlawing segregation, b) strong commitment from the government based on equal human dignity, c) respect for evidence from scientists and experts, and d) a strategy to intervene rooted in professional and societal consensus, and that the key to this is respect for equal dignity within a political community, inclusion, and solidarity all of which would imply an education system based on integration and inclusion.

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Freedom of religion and recognition of churches

CC. whereas the Constitutional Court in that Decision, while not questioning the right of the parliament to specify the substantive conditions for recognition as a church, considered that the recognition of church status by a vote in Parliament might result in politically biased decisions, and whereas the Constitutional Court declared that the Act did not contain any obligation to provide detailed reasoning of a decision which refuses recognition of church status, that no deadlines were specified for the parliament's actions and that the Act did not ensure the possibility of legal remedy in cases of refusal or lack of a decision;

Comment of the Hungarian Government

The concerns raised by the Constitutional Court are being addressed by Parliament under a bill (No. T/10750) amending the Act on Churches. The proposed new legislation sets out clear conditions for recognition as a church, contains an obligation for detailed reasoning of a decision which refuses church status, specifies deadlines for the procedure of recognition and ensures the possibility of legal remedy in cases of refusal or lack of a decision.

Comment of NGOs

The Constitutional Court declared in its Decision 6/2013 of 26 February 2013 that "it is a constitutional requirement based on Articles VII and XV of the Fundamental Law that the State guarantees the legal status of a church, which enables the operation of religious groups, and the acquisition of other entitlements accessible to churches in line with the right to religious freedom and with the related entitlements, based on an objective and reasonable condition, in accordance with Articles XXIV and XXVIII in a fair manner with the opportunity for legal remedy." The Fourth Amendment added a further new and extremely vague condition of the "suitability for cooperation with in the interest of community objectives" for the recognition, thus overruling the Constitutional Court's decision. Disregarding the constitutional requirements set out by the CC the proposed bill no. T/10750 is going to amend the Act on Churches with a parliamentary recognition procedure similar to the annulled one, with the obligation for only a formal reasoning of a decision which refuses church status, with the regime of a two-stage level of denominations with the reduced legal status of the so-called "organization conducting religious activity" than that of the "recognized churches", with the possibility of submitting a request for review to the Constitutional Court against the rejecting parliamentary resolution by which only the lawfulness of the procedure – instead of the merits of the decision – would be questioned.