Comments on the Fifth Amendment to the Fundamental Law of Hungary

18 September 2013

On 16 September 2013, the Fundamental Law of Hungary was amended for the fifth time by the Parliament. This means that on average, the governing majority, which has prepared the text of the Fundamental Law not long ago, has continued to amend it every 125 days. We are not of the view that leaving the Fundamental Law intact is a value *per se*, to the contrary, we believe that it would be better to replace it with an entirely new constitution which conforms to Hungarian and European constitutional traditions. However, it is worth pointing out the frequency in amendments as it demonstrates an interesting analogy; that the Fundamental Law has a shorter life span than smart phones or personal computers, the average life cycle of which (the time elapsing before marketing of the newer models) is two times more than our Fundamental Law. In addition to the existing deficiencies of legitimacy and substance, the constant patching and padding of the Fundamental Law further dispels the notion that the constitution is to set the limits of the political powers, as our constitution seems to serve as a tool of the political power to enforce its everyday political interests.

The Fifth Amendment to the Fundamental Law is admittedly a correction: the governing majority has abolished or amended certain provisions incorporated by the initial text and by the Fourth Amendment which proved to be impossible to comply with. It is important to highlight, however, that such amendments to the Fundamental Law of Hungary have still not produced an acceptable document which is suitable for regulating the common matters of the Hungarian political community.

The large majority of the professional and political objections raised domestically and abroad in relation to the Fundamental Law have been left unanswered. When adopting the amendment, the governing majority was led more by necessity than recognition: they only conceded in relation to provisions concerning which the European Commission has indicated an intention to lodge further proceedings. As to the provisions in respect of which the sanctions of an international organization binding upon Hungary were not a threat, the governing majority failed to show any willingness to understand and remedy the complaints made in relation to the merits of the text. *The most interesting aspect of the Fifth Amendment is therefore what has been omitted from it: the unacceptable provisions of the Fundamental Law (e.g. the ideologically partisan National Avowal of Faith, the rules violating the human dignity of the homeless and those regarding the prohibition of offensive speech, the abolishing of the right to social security, and limiting the competences of the Constitutional Court) have remained part of the Fundamental Law and have been left intact by the amendment.*

The Amendments Affecting the Judiciary

The governing majority has been slowly but surely forced to amend its initial idea concerning the administration of courts; the core of which has been the creation of a centralized one-man-led administrative organ with an exceptionally broad jurisdiction and competence lacking any substantial control or balances. The Fifth Amendment is one stage of this process.

The Fifth Amendment abolishes the right of the President of the National Judicial Office (NJO) to appoint a court other than a court of general competence to proceed, and appoints the National Council of Judges (NCJ) – composed by elected judges and the President of the Curia (i.e. the Supreme Court) – as the supervisory body of the NJO, being the central administrative body of the judiciary, which participates in the general management of the courts. These are indeed justified changes; however it merely aligns the Fundamental Law with lower ranking legislation. In reality, the supervisory task of the NCJ (irrespective of the rather narrow nature of its competence in comparison with its functional importance which has not been broadened by this amendment of the Fundamental Law) has already been stated by previously adopted legislation regarding the organization and administration of courts, and the right of the President of the NJO to transfer cases has been justly abolished as of 1 August 2013 by Act CXXXI of 2013. As a result, the changes regarding the administration of the judiciary can be considered to be more cosmetic than substantial. They shed light, however, on how the governing majority approaches the Fundamental Law: that it is not recognized as the framework of the lawmaking and political conduct but is rather subjected to the statutes, and both the Fundamental Law and the statutes are subjugated to certain political needs which are deemed to be important.

Amending the Rules of Election Campaign

The Fifth Amendment appears to have modified the rules of placing political ads in media outlets, however in reality *there has been no real change*. The previous rules, on the one hand, ensured that political advertising will be free of charge for all organizations which set up a national list of candidates for the general elections of Members of Parliament or for the election of Members of the European Parliament respectively, but on the other hand, limited such political advertisement placements and campaign to public media outlets only.[1] The current amendment maintains the free of charge nature of advertisements and the limitation to public media outlets is only seemingly overruled.[2]

We note that the Bill on the Rules of the Election Procedure (Bill T/8405.) adopted by the Parliament on 26 November 2012 contained similar rules as the Fundamental Law does.[3] The abovementioned rule has been declared unconstitutional by the Constitutional Court in its Decision 1/2013. (I. 7.) adopted pursuant to the initiative of the President of the Republic for preliminary constitutional review. The key arguments were: (a) the freedom of political speech is considerably limited as such a rule ceases the possibility of placing political advertisements in media outlets reaching the broadest spectrum of society (commercial media outlets), (b) limitation of publishing political advertisements not only affects the freedom of speech of political parties but also of other organizations and persons, as all persons are entitled to take part in the discourse of public matters, (c) the limitation of publishing political advertisements is

[1] Article IX (3) of the Fundamental Law of Hungary

[2] Article 2 of Bill T/12015. on the Fifth Amendment to the Fundamental Law of Hungary: "*In the interest of ensuring necessary information in campaign periods securing the development of a democratic public opinion, political advertisements may only be placed in media outlets free of charge in accordance with conditions set out by a cardinal law to ensure equal opportunities.*"

[3] Article 151 (1)-(2) of Bill T/8405.

equally detrimental to the fundamental right to information as the voters' right to obtain information is also restricted.[4] The Parliament, however, disregarded the Constitutional Court's decision by the Fourth Amendment, formally incorporating the unconstitutional and restrictive regulation into the Fundamental Law.

This unconstitutionality is *not remedied by the Fifth Amendment*. Albeit the regulation previously objected by the Constitutional Court for reasons of narrowing publicity to public media is apparently deleted from the text, *the impact remains the same*: as commercial media outlets may only broadcast political ads for free, only their social responsibility and wisdom will determine whether the messages of the political parties are conveyed to the voters during marketable airtime or not.[5] This concept contradicts the very core principle of commercial media, as the prerequisite of its operation is selling advertising possibilities on the market. In other words the restriction of the freedom of speech, of the free discourse of public matters and of the information rights of voters, still applies.

This legislation is not only in breach of constitutional requirements but also of Hungary's *undertakings under international law*. Article 10 of the European Convention on Human Rights on freedom of expression is violated by not ensuring all conditions necessary for *real political discourse* before elections: freedom of expression and free elections may not be separated from one another in this context.[6] The possibility to access information of public interest and to discuss without limitations the competing political views are still not guaranteed entirely by this amendment. As stated in the decision of the Constitutional Court overruling the previous legislation,[7] prescribing the free of charge nature of broadcasting political advertisements by media outlets is not an inevitable necessity as equal opportunities for the nominating organization could be ensured by other means (e.g. determining a maximum threshold for the financial support dedicated to the political campaign). Free of charge publishing impacts the transmitting of political messages to voters in a restrictive manner due to the absence of editorial freedom and the free of charge nature, therefore it is right to assume that commercial media outlets will not or will rarely endeavor to do so. As a result of the limited access to the political messages of the nominating organizations the freedom of expression is also restricted and consequently the requirement of ensuring the right to free elections *cannot be effectively exercised.*

Amending the Rules on Churches

According to the motion submitted for the draft of the Fifth Amendment, the "satisfactory handling of the situation of religious communities" justifies the amendment and the need to supplement Article VII of the Fundamental Law. Indeed, handling the situation would have been justified, as the constitutional criteria of the status and recognition process of churches has been duly stated by the Decision of the Constitutional Court 6/2013. (III. 1.),[8] however the Fourth Amendment to the Fundamental Law opted to regulate the subject matter in contradiction with the decision of the Constitutional Court and ratified the situation deemed unconstitutional. The Fifth Amendment equally fails to correct the rules of the Fundamental Law to comply with the requirements of the Constitutional Court's decision and instead cements the concept of the

[4] Decision of the Constitutional Court 1/2013. (I. 7.), [93]-[94]
[5] Article 147 (6) and (9) of Act XXXVI of 2013 on the Rules of the Election Procedure prescribe, however, that the public media broadcasters are under obligation to broadcast the political advertisements of the organizations running in the national elections or the European elections respectively, the occasions and the airing time of which is determined by the National Election Committee.
[6] *Case of Bowman v. the United Kingdom* (141/1996/760/961, 19 February 1998), [42]
[7] Decision of the Constitutional Court 1/2013. (I. 7.), [97]
[8] Decision of the Constitutional Court 6/2013. (III. 1.), 5.

regulation on churches promulgated by the recently modified Church Law,[9] which has been passed in the meantime. In other words it is the Fundamental Law which once again is adjusted to lower ranking legislation.

The Fifth Amendment continues to provide the opportunity for the Parliament to grant a privileged status to those religious communities ("recognized churches") with which the government contemplates cooperation "in the aim of achieving the common goals of public interest". Although some new elements of the provisions of the Church Law comply with constitutional requirements when detailing the "general" rules applicable to all religious communities (e.g. the legal status of an organization conducting religious activity is registered by courts which may be subject to an appeal), however the mere fact of introducing – actually upholding – the notion of qualified churches in itself renders the legislation unconstitutional. The Parliament – as a political organization *par excellence* – still holds the power to award the privileged church status by a two-thirds majority effectively not subject to any effective appellate procedure which is not in accordance with the principle of separating the State from the Church. Moreover, and again contrary to the principle of separation, the Fifth Amendment proclaims that the State shall only cooperate with religious communities having been awarded such qualified status and shall – for this purpose – provide them with certain "special privileges" to which the religious communities of secondary rate are not entitled (such as the wide range of exemption from stamp duty, collecting 1% of personal income taxes freely donated for religious purposes, state aid for religious education and organizing religious education in public schools, exemption from tax-payment in respect of the income generated by religious activity, subsidies of educational institutions, operation of clerical services in hospitals and correctional facilities, etc.).[10] In addition to the above, this amendment does not endeavor to settle the status of those communities which have lost their status as a church by virtue of the Church Law in the past year, despite the pending litigations brought before the European Court of Human Rights in Strasbourg. Even those churches the legal status of which has been reinstated by the Constitutional Court in its decision are required to file their request with the Parliament for recognition.

In summary, the Fundamental Law not only maintains the violations resulting from the entry in force of the Church Law but with the Fifth Amendment it openly declares the differentiation between religious communities (qualified/recognized churches and organizations pursuing religious activities) where the only criterion is the approval by the Parliament of which the arbitrary nature has been stated by both the Constitutional Court and the Venice Commission.[11]

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[9] Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Status of Churches, Denominations and Religious Communities, modified by Act CXXXIII of 2013 on the Amendment of Certain Pieces of Legislation Related to the Status and Activity of Religious Communities in Relation to the Fourth Amendment to the Fundamental Law

[10] Articles 20-25 of Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Status of Churches, Denominations and Religious Communities

[11] Decision of the Constitutional Court 6/2013. (III. 1.), [147], and Opinion on the Right to Freedom of Conscience and Religion and the Status of Churches, Denominations and Religious Communities, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), Opinion 664/2012, CDL-AD(2012)004, 108.