



Permanent Representative of Hungary to the United Nations Office
and Other International Organizations in Geneva

Ms. Gabriella Knaul
Special Rapporteur
on Independence of Judges and Lawyers

Office of the United Nations
High Commissioner for Human Rights
Geneva

4 September 2013

Dear Madam Special Rapporteur, *Dear Gabriella,*

I take the opportunity to hereby forward the detailed response of the Hungarian Government as requested in your letter dated 3 July 2013, on your concerns expressed over the provisions introduced by the Fourth Amendment to the Fundamental Law of Hungary in connection with the independence of the judiciary.

My Government is committed to the fundamental values and norms of democracy, and is dedicated to ensure the protection of human rights. The Government of Hungary remains engaged to working closely and continuing the constructive and objective dialogue with the UN human rights mechanisms in order to meet challenges to the full realization of all human rights and prevent the occurrence of human rights abuses. My Government does its utmost to comply with its obligations under international human rights law, including the UN Basic Principles on the independence of judiciary. Nevertheless, we wish to stress that legislative changes should be examined in their complexity strictly based on the facts and understood in the context of the evaluation of the legislative process in Hungary.

Excellency,

We very much hope that the enclosed responses will provide you with answers to your concerns and we trust you will include them in your report to the Human Rights Council. The Hungarian Government appreciates your continued attention to follow the fundamental changes in Hungary, and we remain open to discuss and explain concrete points and provide further details. Therefore, your personal visit to Hungary is more than welcome at a suitable date, which fits into your calendar.



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Meanwhile, should you wish to have any additional information, we remain at your disposal to inform you on any further developments on the situation of the independence of judiciary in Hungary, as has been to case to date.

Please accept, Madam Special Rapporteur, the assurances of my highest consideration.

with my best wishes

András DÉKÁNY
Ambassador

**Response of the Government of Hungary to the letter from the Special rapporteur on
the independence of judges and lawyers
No. AL G/SO 214 (3-3-16) HUN 3/2013**

This document contains the detailed response of the Government of Hungary to the concerns raised in the letter of the Special rapporteur on the independence of judges and lawyers concerning the Fourth Amendment to the Fundamental Law of Hungary (hereinafter referred to as ‘the letter’). The comments below follow the structure of the letter.

Constitutional Court

(1) The letter assumes that there is a systematic tendency in Hungary to “... overrule the decisions of the Constitutional Court”, and the Fourth Amendment to the Fundamental Law (hereinafter referred to as ‘Fourth Amendment’) is an example of that process. This claim is unfounded, as the Fourth Amendment is not one of a series of constitutional amendments affecting the decisions of the Constitutional Court. In fact, the first three amendments to the Fundamental Law did not concern the decisions of the Court at all.¹

(2) Second, although the Fourth Amendment did address certain subject matters that had previously been adjudicated by the Constitutional Court, none of the new provisions can be considered as a re-introduction of already annulled legal rules. A material distinction must therefore be drawn between overruling the Constitutional Court’s decision, on the one hand, and revisiting the subject matter of certain decisions, on the other.

(3) Reflecting on the examples referred to in the letter, the following clarifications must be pointed out:

- Decision 43/2012 (*basis of family ties*); Article L (1) of the Fundamental Law; Article 1 of the Fourth Amendment: There is no direct link between the old and the new provisions. The new provisions in the Fundamental Law is not equal to the one formerly included in the Family Act annulled by the Constitutional Court. Furthermore, the text in the Fundamental Law does not contain a legal definition of the notion of family (it merely declares that the “basis of family ties” is marriage or the relationship between parents and children) and therefore it does not exclude the legal protection of family relations in a wider sense.
- Decision 1/2013 (*media access for political parties*); Article IX (3) of the Fundamental Law; Article 5 of the Fourth Amendment: The annulled provisions contained much broader restrictions. The new regulation will allow free-of-charge political advertising in commercial broadcasting services during pre-election periods.
- Decision 38/2012 (*homelessness*); Article XXII (3) of the Fundamental Law; Article 8 of the Fourth Amendment: The completely new system is less restrictive on habitual

¹ - The First Amendment to the Fundamental Law, adopted on 18 June 2012, clarified the constitutional status of the Transitional Provisions as well as deleted the possibility to adopt a cardinal legislation on the merger – under a new institution – of the National Bank of Hungary and the Financial Supervisory Authority.

- The Second Amendment to the Fundamental Law, adopted on 9 November 2012, introduced a requirement into the Transitional Provisions concerning mandatory registration of voters. This amendment only affected the Transitional Provisions and was subsequently annulled by the Constitutional Court.

- The Third Amendment to the Fundamental Law, adopted on 21 December 2012, provided for the adoption of the fundamental provisions relating to the ownership of agricultural land and forests by cardinal laws.

living in public areas; obligation is imposed on the state and local governments to cooperate to eliminate homelessness. Paragraph (1) calls for the provision of decent housing and for the access of public services for all. A new paragraph (2) places an obligation on the central and local governments to cooperate with a view to creating the necessary conditions to provide shelter for all homeless persons. In addition, paragraph (3) allows local governments to designate limited zones where habitual living can be banned [based upon precisely defined public order considerations listed in the Fundamental Law (i.e. the protection of public order; public security; public health and cultural assets)]. These three provisions constitute a comprehensive package that requires constitutional regulation. As all implementing rules will be adopted by ordinary acts (or decrees of local governments) the Constitutional Court is fully entitled to assess their consistency with the Fundamental Law. Neither the new provisions of the Fundamental Law, nor those of the implementing legislation can be seen to amount to an “incrimination of homelessness”.

- Decision 6/2013 (*recognition of churches*); Article VII of the Fundamental Law; Article 4 of the Fourth Amendment: The concept of the annulled provisions was different from that of the Fundamental Law and the new regulation adopted by the Parliament on 5 July 2013 complies with the Constitutional Court decision. This new act ensures that any religious organisation can denominate itself as church and a parliamentary procedure is only necessary for those religious organisations that apply for a special privileged relationship with the state. The procedure is subject to judicial control by the ordinary administrative courts and/or by the Constitutional Court.

Previous case-law of the Constitutional Court

(4) As regards the concern formulated in the letter regarding Article 19 of the Fourth Amendment it must be underlined that the case-law of the Constitutional Court developed before the entry into force of the Fundamental Law is not rendered “void”. The second sentence of point 5 of the Closing and Miscellaneous Provisions of the Fundamental Law (see Article 19 (2) of the Fourth Amendment) clearly states that the legal effects of the earlier rulings remain intact.

(5) Moreover, the Fundamental Law does not prevent the Constitutional Court from referring to its earlier case-law. In its recent decisions (i.e. adopted after the entry into force of the Fourth Amendment) the Constitutional Court has indeed referred to its previous case-law extensively (e.g. decisions 12/2013, 3109/2013, 3104/2013 and 13/2013). In Decision 13/2013 the Constitutional Court summarized its position concerning the provision of the Fundamental Law affecting previous case-law. Please find attached the courtesy translation of the relevant parts of this Constitutional Court decision.

(6) The provision of the Fourth Amendment that the earlier rulings of the Constitutional Court are no longer in force (and are not annulled or void!) is more of a symbolic nature and has limited practical significance. Even in the own interpretation of Constitutional Court this provision does not create a source of uncertainty. All the more so, as the Fundamental Law makes it clear in Article R) that the so-called “historic constitution”² represents a source of interpretation of the Fundamental Law. The rich case-law of the Hungarian Constitutional Court is part of that tradition, thus can be freely used in constitutional jurisdiction (unless it

² Hungary's historical, unwritten constitution was for nearly 1000 years the legislative source of the Hungarian statehood and determined its constitutional development from the Middle Ages to World War II, which yields influence in public thinking on the constitution up to the present.

goes against the Fundamental Law itself). This way the Court is able to ensure constitutional coherence through its decisions adopted over the two decades of its existence.

Constitutional review

(7) Concerning the constitutional review of procedural validity of constitutional amendments the case-law of the Constitutional Court since its existence clearly states that *“The power of the Constitutional Court is a restricted power in the structure of division of powers. Consequently, the Court shall not extend its powers to review the constitution and the new norms amending it without an express and explicit authorisation to that effect.”* (see also decision 12/2013).

(8) However, the letter appears to see the Fourth Amendment as a legislative intervention against an interpretation gradually developed by the Constitutional Court to expand its own powers to review constitutional amendments from a substantive point of view. In that context we recall the various opinions of the Venice Commission of the Council of Europe (hereinafter: VC) to the effect that there is no general rule or practice authorising constitutional courts to overtake the role of the constituent power (CDL-AD(2012)010). The Hungarian Government merely intends to remain in that tradition, as do several Member States of the European Union. Substantive review of amendments to the Constitution is only permitted by a very few national constitutions in Europe.

(9) Furthermore, it must be stressed that contrary to the concern raised in the letter, in our opinion the recent decision of the Constitutional Court on the Transitional Provisions to the Fundamental Law (Decision 45/2012) did not overrule the former consistently reluctant approach of the Constitutional Court to the substantive review of the amendments to the Fundamental Law. There was only one paragraph in the background of the reasoning of a very long decision which might have been interpreted as a shift in the practice of the Constitutional Court. This kind of interpretation has taken this paragraph from its context. This paragraph was not of cardinal significance in the overall context of this decision. In fact Decision 45/2012 was about the special legal status of Transitional Provisions which were not recognised by the Constitutional Court as norms of constitutional level and not regarded as amendments to the Fundamental Law. Therefore the question of substantial review of an amendment to the Fundamental Law obviously could not be raised as a matter of principle in this case.

(10) There are also other interpretative tools which can be used by the Constitutional Court to strike a balance between different constitutional provisions when assessing the compliance of specific laws with the overall content of Fundamental Law. In this sense the Constitutional Court interprets the provisions of the Fundamental Law in line with the general standards of constitutionality and international law. This latter approach, which does not need annulling amendments to the Fundamental Law, has been explicitly taken up in its Decision 12/2013.

Tax and budgetary matters

(11) With reference to the introduction by the Fourth Amendment of an additional paragraph (5) to Article 37, the letter misinterprets the meaning of that provision which is merely a rule clarifying the legal situation after expiration of the transitional period of restrictions. It has been transplanted from the Transitional Provisions in a modified form and the meaning of the new provision is that once the level of state debt falls below 50% of the GDP the

Constitutional Court may review, without restriction, all budgetary laws adopted even during such moratorium. There is only one limitation that no retroactive jurisdiction is possible as far as the effects of the decisions are concerned. Thus, this new provision does not intend at all either to introduce further restrictions for the Constitutional Court or to make formerly established restrictions permanent.

(12) Regarding the former restriction established due to the economic crisis, we would like to recall that the restrictions on budget review are temporary in nature and limited in scope. Even under the period of restriction concerning budget-related norms the Constitutional Court has

- 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 even in budget-related questions);
- 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.

(13) Moreover, the Constitutional Court may continue to review the infringement of the individual fundamental rights defined in the Fundamental Law even as regards budget-related laws, also confirmed in recent decisions. Thus, the rule restricting the Constitutional Court does not prevent the body, for instance, from reviewing fiscal laws with reference to the infringement of the right to human dignity. Therefore, the Constitutional Court is able to fulfil its most important function of protecting fundamental rights even under the period of restriction concerning budget-related norms.

National Office for the Judiciary

(14) As regards the concern expressed in the letter, that the Fourth Amendment does not mention the National Judicial Council (hereinafter referred to as 'NJC'), as opposed to the President of the National Office for the Judiciary (hereinafter: PNOJ), the following must be stressed:

(15) To strengthen the independence of the constitutional status of the PNOJ, the Fourth Amendment transfers two essential provisions governing the institution into the Fundamental Law.

(16) The first one specifies that the central responsibilities of the administration of courts shall be performed by the PNOJ maintaining that the bodies of judicial self-government shall participate in the administration of courts. The second provision, fully identical with the relevant cardinal Act in terms of content, provides that the PNOJ shall be elected from judges for nine years by Parliament at the proposal of the President of the Republic, and that the election of the PNOJ shall require the votes of two-thirds of the Members of Parliament. As these provisions carry no new normative content and introduce the PNOJ in the Fundamental Law on the same basis as the President of the Curia, the concerns raised in their regard seem to be excessive. It should be noted that the former Constitution also provided for the central administrative body of the judiciary by proclaiming that courts shall be administered by the National Council of Justice with effect from 1 October 1997.

(17) The Fourth Amendment did not aim at extending the powers of the PNOJ or “fixing forever” the institution in any way but, on the contrary, at laying even greater emphasis on the institution’s independence. It should be pointed out that the PNOJ is not some kind of an “external” administrative leader appointed by the Government as by definition it is a position for which only judges in office for at least five years are eligible. On the other hand, judges may not be members of any political party, engage in political activities, serve as Members of Parliament or members of local representative bodies, mayors, state leaders, and may only perform any work other than their office which is scientific, relates to sports or arts or is subject to copyright. However, in order to present this independence in Hungarian law at constitutional level, it was appropriate to name the PNOJ in the Fundamental Law, too.

(18) The guarantees for the PNOJ’s independence are completed by the rules for election and termination of this position. In this context, the letter raises the objection that the PNOJ’s election involves the “executive” and legislative branches of power but there is no proper system of checks and balances. Firstly, it should be clarified that the executive branch of power does not participate in this process. The candidate for PNOJ is proposed by the President of the Republic, who is not the head of the executive power in the Hungarian legal system as opposed to States with a presidential form of government, and who is separated from the other branches of power. The PNOJ is elected by the votes of two-thirds of the Members of Parliament.

(19) With respect to the independence of the judiciary, the letter expressed particular concerns about the PNOJ’s extensive powers and emphatically called on the Hungarian Government to take action in accordance with the VC’s latest opinion.

(20) In the wake of the VC’s detailed comments on the laws on courts and judges, and a series of letters exchanged with the Secretary General of the Council of Europe, Parliament repeatedly and extensively amended the Acts on the judiciary. Parliament essentially expanded the NJC’s powers at the expense of the PNOJ’s powers in terms of both central administration and personnel administration. The new scheme reinforced the role of the NJC as opposed to that of the PNOJ, and made the division of their powers more proportionate. The changes are available on the VC’s website as the VC did disclose not only its own opinions but also the written responses of the Hungarian Government (in CDL-AD or CDL-INF series and in other series for country “Hungary”).

(21) In this context the VC concluded that the amendments of the Acts in question addressed most comments. In its latest opinion, the VC only maintained three comments: firstly, the PNOJ’s inclusion in the Fundamental Law, as mentioned before, secondly, the PNOJ’s accountability and thirdly, the termination of the institution of appointing the proceeding court, also mentioned in the letter. The Government’s position on the first comment has already been presented above.

(22) With respect to accountability, the PNOJ may be removed from office, on the motion submitted by either the nominating President of the Republic or by the inspecting NJC by a two-third decision, which is subject to another two-third vote by the Parliament. The possibility to remove a civil servant from office serves the purpose of accountability.

(23) We would also like to note that the institution of appointing the proceeding court will be abolished indeed. To this effect, Parliament has already adopted the relevant amendment of Act CLXI on the Organization and Administration of Courts and of the procedural Acts (Act

XIX of 1998 on the Hungarian Criminal Procedure Code, and Act III of 1952 on the Hungarian Civil Procedure Code). A similar amendment to the Fundamental Law has already been submitted to the Parliament on 14 June 2013 (T/11545), which will probably be adopted this autumn and set to enter into force on 1 October 2013, but the institution, by lack of detailed legal provisions, cannot be applied before.

(24) With respect to the provisions of the Fourth Amendment on the ordinary court system, the allegation on a “dramatic” restriction of the Constitutional Court’s powers is inaccurate. The Hungarian Government would like to point out in this context, that each of the Basic Principles on the Independence of the Judiciary, adopted in 1985 (i.e. the independence of the judiciary and the obligation of the State to observe it, delivering judgments without influence and impartially, and the related prohibitions to unduly influence court procedures and judicial decisions, and to withdraw any court power) are fully guaranteed by both the Fundamental Law and by the acts on the judiciary (Act CLXI on the Organization and Administration of Courts by these basic principles and detailed rules and Act CLXII of 2011 on the Legal Status and Remuneration of Judges)³. These principles were enshrined in the Fundamental Law before the Fourth Amendment and in the above mentioned acts on the judiciary as well as in the former Constitution and the previous versions of the acts on the judiciary respectively, and this was not, and will never be, altered by the Fourth Amendment or any other amendment.

(25) It should be noted that the Hungarian Constitutional Court is not part of the ordinary court system, unlike in States where, for instance, the Supreme Court exercises the powers of the Constitutional Court. However the principles of independence, impartiality and the performance of its duties without inappropriate or unwarranted interference are all guaranteed by the Fundamental Law and by the Act on the Constitutional Court respectively.

³ Fundamental Law, Article XXVIII(1), Article 26(1), Act CLXI of 2011, Chapter I (Basic Principles), Act CLXII of 2011, Chapter I (Basic Principles)

Unofficial courtesy translation of paragraphs 27- 33 of Decision 13/2013. (VI.17.) AB of the Constitutional Court

References to previous case-law of the Constitutional Court

[27] In the assessment of the challenged statutory provisions the Constitutional Court makes use of its earlier decisions in view of the Fourth Amendment to the Fundamental Law (25 March 2013). In this regard, first of all it points out that its assessment is based on the provisions of the Fundamental Law, more particularly on the framework of interpretation defined by Article R). Furthermore, the Constitutional Court makes the following general conclusions that, as a matter of course, are being applied to the present case as well.

[28] Paragraph (2) of Article 19 of the Fourth Amendment to the Fundamental Law (25 March 2013) amended, from 1 April 2015, point 5 of the Closing and Miscellaneous Provisions of the Fundamental Law as follows: “Constitutional rulings given prior to the entry into force of the Fundamental Law are hereby no longer in force. This provision is without prejudice to the legal effect produced by these rulings.”

[29] While the Constitutional Court has used the reasoning and findings of its earlier decisions in its jurisdiction, the actual legal basis of its decision has always been the text of the constitution in force.

[30] Following the entry into force of the Fundamental Law, the Constitutional Court defined the status of its decisions adopted under the previous constitution by way of clarifying that it could make use of the reasoning employed in its decisions delivered before the entry into force of the Fundamental Law only if “it is possible in view of the concrete provisions that are identical or similar to those of the previous constitution and the rules of interpretation of the Fundamental Law ” {Decision 22/2012. (V.11.) AB, paragraph [40]}. Consequently, application of the general conclusions of its jurisprudence developed under the previous constitution required, in the light of the rules of interpretation of the Fundamental Law, the juxtaposition and evaluation of the content of the comparable provisions of the previous constitution and of the Fundamental Law.

[31] Following such juxtaposition, however, in view of the Fourth Amendment to the Fundamental Law the Constitutional Court must – on the basis of point 5 of the Closing and Miscellaneous Provisions – give reasons in a detailed fashion in support of the inclusion of the arguments used in its previous decisions. On the other hand, it is also possible to disregard the principles developed under its earlier jurisprudence even when the content of the provisions of the previous constitution and of the Fundamental Law is essentially the same: the change in the applicable law opens the possibility to re-evaluate the constitutional problem at issue.

[32] The evolution of Hungarian and European constitutional law and the intrinsic characteristics of constitutional law have an inevitable impact on the interpretation of the Fundamental Law. The Constitutional Court may make use of the arguments, principles, constitutional conclusions applied in its previous decisions based upon the identity of the given provision of the Fundamental Law with that of the constitution, as well as of the contextual equivalence regarding the whole of the Fundamental Law, the rules of

interpretation of the Fundamental Law and also upon the concrete case the application of the above statements are not unjustified and the their inclusion in the reasoning of the decision to be adopted seem to be necessary.

[33] Upon the assessment of the above conditions, the Constitutional Court may, as a source of interpretation, make reference to or quote, in substance or verbatim, arguments or legal principles developed in its earlier decisions that are no longer in force, to the extent it is necessary to decide over a particular constitutional problem. This follows from the requirement that in a democratic state governed by the rule of law the reasoning and the sources of constitutional decisions must be accessible for and controllable by all. The principle of legal certainty calls for the openness and transparency of the considerations behind the decisions. Openness of the argumentation is the primary source of the legitimacy of the reasoning of the decision.
