



Hungarian Helsinki Committee



## Analysis of the Fourth Amendment to the Fundamental Law's limit on freedom of expression

11 April 2013

On 8 February 2013, members of the governing coalition, having two thirds of the seats in the Hungarian Parliament, submitted a proposal<sup>1</sup> to amend the Fundamental Law of Hungary in force since 1 January 2012. The proposal was adopted by the Parliament as the Fourth Amendment to the Fundamental Law on 11 March 2013.<sup>2</sup> In our opinion the Fourth Amendment undermines the rule of law in Hungary by continuing the practice of inserting provisions into the Fundamental Law, which decrease the level of the human right's protection, violate international standards and further weakening the control exercised by the Constitutional Court (CC) over the Parliament. Some of these provisions had been previously found unconstitutional by the Constitutional Court

A nation's constitution is meant to protect freedom of expression. Contrary to this, **the Hungarian legislator amended the Fundamental Law with new limits on free speech.** The Constitutional Court has declared these new rules to be unconstitutional limits on freedom of speech in a democratic society. By amending the Fundamental Law, the Hungarian legislator is preventing the substantive constitutional review of these rules by the Constitutional Court. Below, we deal with the issues pertaining to free speech in the Fourth Amendment to the Fundamental Law.<sup>3</sup>

### 1. Protection of human dignity

New Article IX(4) of the Fundamental Law:

*"The exercise of one's right to free expression cannot be aimed at violating other persons' human dignity."*

In our opinion, this rule should be seen as an unjustifiable derogation of the protection of freedom of expression. The legislator basically declared with this amendment what was already

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<sup>1</sup> Submitted text and reasoning available in Hungarian at: <http://www.parlament.hu/irom39/09929/09929.pdf>.

<sup>2</sup> The adopted text of the Fourth Amendment is available here in Hungarian: <http://www.parlament.hu/irom39/09929/09929-0055.pdf>.

<sup>3</sup> Full analysis of the Fourth Amendment to the Fundamental Law by the Eötvös Károly Public Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee is available <http://tasz.hu/en/political-freedoms/newest-amendment-hungarys-fundamental-law-would-seriously-undermine-rule-law> here.

<sup>4</sup> Unofficial translation of the Fourth Amendment to the Fundamental Law by the Eötvös Károly Public Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee. See: [http://docs.alaptorveny.eu/Fourth\\_Amendment\\_to\\_the\\_Fundamental\\_Law\\_Unofficial\\_translation\\_13032013.pdf](http://docs.alaptorveny.eu/Fourth_Amendment_to_the_Fundamental_Law_Unofficial_translation_13032013.pdf)

evident from the system of protection of fundamental rights; namely that human dignity may be a limit to freedom of expression. However, this provision does not fit at all into the Hungarian system of handling and resolving possible conflicts between fundamental rights. The Fundamental Law does not list whether a certain fundamental right may supersede another but stipulates that conflicts between fundamental rights shall be dealt under a general limitations by a provision that allows a balancing procedure in the light of the principles of necessity and proportionality.<sup>5</sup> For this reason, **the amendment should be viewed as an attempt by the legislator to create a framework where free speech could face further limits.** This rule included in the Fundamental Law makes it possible to elude the constitutional control of freedom of expression.

Thereafter, the legislator can limit free speech by invoking human dignity in a manner that would prevent judicial review by the Constitutional Court – in case that the Constitutional Court follows the Fourth Amendment and disregards twenty-two years of precedence on constitutional rights, and the nature of human rights.<sup>6</sup>

We call attention to the provision on discussions of public affairs in the new Civil Code - which comes into force in 2014. According to the new Civil Code there is possible limitation on free discussion of public affairs in case of violating human dignity of a public figure. The new Civil Code rule contradicts to the ruling of the CC<sup>7</sup> and the case law of the ECtHR<sup>8</sup>. Persons holding public offices and public figure politicians must tolerate higher level of criticism than ordinary citizens.

## 2. The ban on opinion to violate the dignity of a community

New Article IX(5) of the Fundamental Law:

*“The exercise of one’s right to free expression cannot be aimed at violating the dignity of the Hungarian nation or the dignity of any national, ethnic, racial or religious group. Members of such groups are entitled to turn to court as defined by an Act against the expression violating the group in order to enforce their claim related to the violation of their human dignity.”*

The reasoning provided to this rule makes it clear, that the legislator intends to lower the level of protection for free speech and dismantle the relevant case law of the Constitutional Court.

According to the amendment to the Fundamental Law, speech that violates the dignity of a group is banned and may result in civil or criminal sanctions. The Parliament had passed several laws, which sanctioned for harm to communities. Both civil and criminal sanctions were declared unconstitutional by the Constitutional Court in 1992<sup>9</sup>, 2004<sup>10</sup>, and in 2008<sup>11</sup> for too broad scope

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<sup>5</sup> Article I) par. 3 of the Fundamental Law

<sup>6</sup> Repealing the decisions of the Constitutional Court from the period before the Fundamental Law entered into force (Miscellaneous and Closing Provisions of the Fundamental Law point 5.) compels the Constitutional Court to adjudication on formal grounds.

<sup>7</sup> For relevant decisions by the Constitutional Court, see: CC Decision 60/1994. (XII. 24.) (freedom of information) and CC Decision 36/1994. (VI. 24.) (tolerating criticism).

<sup>8</sup> Decisions of the European Court of Human Rights. See among others -Lingens v. Austria, Judgment of 8 July 1986; Castells v. Spain Judgment of 23 April 1992; Oberschlick v. Austria Judgment 23 May 1991; Thorgeirson v. Iceland, Judgment 25 June 1992.

<sup>9</sup> Unconstitutional criminal sanction: CC Decision 30/1992. (V. 26.)

<sup>10</sup> Unconstitutional criminal sanction: CC Decision 18/2004. (V. 25.)

<sup>11</sup> Unconstitutional criminal sanction: CC Decision 95/2008. (VII. 3.), unconstitutional civil sanction 96/2008. (VII. 3.)

of the limits on free speech. The amendment to the Fundamental law does not guarantee protection against hate speech. Instead this rule enables the sanctioning of speech that may only harm a community.

According to the new provisions of the Fundamental Law, groups and communities have dignity similarly to individuals and certain groups enjoy extra protection against criticism.<sup>12</sup> Members of religious groups, or any national groups, or even the Hungarian nation will enjoy extra protection according to the Fourth Amendment. In our view, opinions that may be harmful or critical to groups and communities are part of the essence of free speech in a free and democratic society.

### 3. Leaders of the communist dictatorship

New Article U (4) of the Fundamental Law:

*“Those in power under the communist dictatorship need to tolerate public statements regarding their role and acts related to the communist dictatorship, with the exception of deliberate and essentially untrue statements. Personal data in relation to these roles and acts may be revealed to the public.”*

There is no justification for this rule being included in the Fundamental Law. These rules are important in a democratic society but they need no regulation on a constitutional level because the freedom of expression includes the right to heavily criticize people in power and the limitation of their right to data protection. This legislation is unnecessary because of the ruling of the CC<sup>13</sup> and the case law of the ECtHR<sup>14</sup>. These decisions state that persons holding public offices and public figure politicians must tolerate higher level of criticism than ordinary citizens.

The new Fundamental Law provision concerns only one regime – the communist regime – in Hungarian history when it refers to higher tolerance for criticism of leaders and publication of data concerning these leaders. This rule in the new Article U (4) basically qualifies the dictatorships of Hungary. There is no reason not to use this rule in case of people in power under the Nazi regime. Moreover, the rule should apply to leaders of all political systems, including the leaders of the current one.

### 4. Electoral campaign

New Article IX(3) of the Fundamental Law:

*“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 organizations 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.”*

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<sup>12</sup> Contradicts the decisions of the European Court of Human Rights. See among others - Handyside v. United Kingdom, Judgment of 7 December 1976; Jevsild v. Denmark, Judgment of 23 September 1994; Zana v. Turkey, Judgment of 25 November 1997.

<sup>13</sup> For relevant decisions by the Constitutional Court, see: CC Decision 60/1994. (XII. 24.) (freedom of information) and CC Decision 36/1994. (VI. 24.) (tolerating criticism).

<sup>14</sup> Decisions of the European Court of Human Rights. See among others - Lingens v. Austria, Judgment of 8 July 1986; Castells v. Spain Judgment of 23 April 1992; Oberschlick v. Austria Judgment 23 May 1991; Thorgeirson v. Iceland, Judgment 25 June 1992.

The amendment to the Fundamental Law contains rules that the Constitutional Court invalidated in its decision on the rules of electoral procedure in 2013.<sup>15</sup> While the provision refers to equal opportunity, it actually prevents equal access when it declares that political advertisement in commercial media services, the most widely used media outlets, is banned. The legislator not only limits freedom of political expression but also violates the electorate's right to access information and ability to make informed decisions. This limit on campaign activity is seriously disproportional while this widespread ban on information violates the right to vote and undermines equal opportunity. The restriction of political advertisement to public media services, which have to broadcast free-of-charge, does not increase the transparency of campaign financing, nor does it reduce the costs of campaign since other rules on campaign financing have not yet sufficiently defined.

The provision of the Fourth Amendment as cited above also violates Article 10 of the European Convention on Human Rights based on the case *TV Vest As and Rogaland Pensjonistparti v. Norway*<sup>16</sup>.

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As a conclusion, we can say that the Fourth Amendment to the Fundamental Law contradicts to the past practice of constitutional adjudication and ignores the decisions by the European Court of Human Rights as it limits freedom of expression in a manner that is not necessary in a democratic society without addressing any pressing social need. The provisions in question not only create the possibility to limit free speech but directly limit it.

Therefore, it is rational to worry that the constitutional alterations introduced by the Fourth Amendment will have, individually and cumulatively, negative implications for the vitality of public debate. Especially when taking into consideration that several attempts have been already made to restrict freedom of expression before the Fourth Amendment was adopted.

Restrictive media acts adopted in 2010 and the politically non-independent Media Authority have suppressed the level of freedom of expression and the press in Hungary. The minor amendments made to the media regulation after the heated international critiques on this issue, the intervention of the European Commission and the controversial decision of the CC have not resulted in structural changes. Legislation concerning media competition is still not appropriate, media pluralism and the independence of public service media are not ensured since the Media Authority is still a politically entirely homogenous body consisting of members nominated only by the governing party. The current media system and the lack of an independent media make collecting of genuine and adequate information nearly impossible for the vast majority of the Hungarian population.

We face a decline in the level of free speech because of the reduced guarantees of access to public information, too. Due to the replacement of the ombudsman-type institution for data protection and freedom of information by an administrative body in charge with the protection of these

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<sup>15</sup> CC Decision 1/2013. (I. 7.) In its Decision the CC declared the abovementioned rule unconstitutional, emphasizing 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.*”

<sup>16</sup> *TV Vest As and Rogaland Pensjonistparti v. Norway*, Judgment of 11 December 2008.

rights the independent supervision has been compromised. Moreover, the new Civil Code which was adopted in 2013 and will enter into force in 2014 appears to make it more difficult for citizens to obtain public information about public fund issues.

Putting these changes together, it can be seen that political liberties and their guarantees have been subject to systematic curtailment in the past three years in Hungary. The Fourth Amendment is a new component of this process that is able to move Hungary even more away from the Western-type constitutional democracies.