

**AMNESTY
INTERNATIONAL**



European Institutions Office

Amnesty International's Concerns about the Fourth Amendment to
Hungary's Fundamental Law

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INTRODUCTION

In a letter sent to Viktor Orbán Prime Minister of Hungary on the 8th of March, Amnesty International outlined its concerns regarding the proposed Fourth Amendment to the Fundamental Law of Hungary (the Constitution).

Hungary is bound by a number of international human rights treaties, including the International Covenant of Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, as well as the European Convention on Human Rights.

As a state party to these treaties, Hungary is obliged to respect the rights protected by them, and to ensure them to all individuals in their territory and subject to their jurisdiction. Pursuant to the principle articulated in article 26 of the Vienna Convention on the Law of Treaties, Hungary is required to give effect to the obligations under these human rights treaties in good faith.

With regard to the proposed Fourth Amendment of the Constitution (the proposal), Amnesty International is particularly concerned by three provisions that may limit the scope of rights in the following areas:

- protection from discrimination on the basis of sexual orientation (Article 1);
- the right to adequate housing (Article 8);
- the right to freedom of expression (Article 5(5)).

PROTECTION FROM DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

The proposed Constitutional amendments include a proposal to introduce a restrictive definition of family, defining it as obtaining only in respect of “marriage, and parental – children relations.” In full the new article would read:

Article (1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival. The basis of a familial relation is marriage and parent-child relationship.

The definition of marriage as a union between a man and a woman was introduced in the new Constitution in 2011. The proposed amendment goes beyond this already restrictive provision and by conflating “family” and “marriage” and parent-child relations, it excludes from the definition of a family same-sex couples; non-married heterosexual couples without children ; or orphans who are in the custody of their side relatives such as their aunt or uncle. Furthermore by only defining "marriage and parent-children relations" as family, the proposal creates a legal uncertainty as to whether an unmarried heterosexual couple with common children could be identified as a family, or whether only the individual parent-children relationships would be recognised as such.

The proposed constitutional definition of the family is unnecessarily restrictive and discriminatory on the basis of sexual orientation and marital status. The proposal is contrary to the jurisprudence of the European Court of Human Rights which held in a number of cases that “there is not just one way or one choice when it comes to leading one’s family or private life.”¹ In the case of *Schalk and Kopf v. Austria* the Court made it clear that it was artificial “to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy “family life” for the purposes of Article 8.”² In its recent decision of *X. and others v. Austria*³, the Court stated that “...the relationship of a cohabiting same-sex couple living in a stable de facto relationship falls within the notion of ‘family life’ just as the relationship of a different-sex couple in the same situation would.” The proposed amendment of the Constitution presents a departure from a decision of the Hungarian Constitutional Court which held in its judgement of AB 14/1995 (III. 13.) “[T]hat the prolonged

¹ European Court Of Human Rights, *Kozak v. Poland*, application no. 13102/02, 2 March 2010

² European Court of Human Rights, *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010.

³ European Court of Human Rights, *X. and others v. Austria*, Application no. 1910/07, 19 February 2013.

relationship of two people can create a certain value which could amount to the legal recognition of people cohabiting without regard to their gender.”⁴

Furthermore, the proposal contravenes the decision of the Constitutional Court 154/2008 (XII. 17.) in which the Court highlighted “the need for legal or institutional protection for same-sex couples – since they cannot marry – stems from human right to dignity, and from the related right to self-determination, and also from the freedom to act.”⁵

In the case of *Schalk and Kopf v. Austria* the European Court of Human Rights also clarified that “the notion of family under [the] provision [of Article 8] is not confined to **marriage-based relationships** [emphasis added] and may encompass other de facto ‘family’ ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that ‘family’ unit from the moment and by the very fact of his birth.”⁶

The Hungarian Constitutional Court in a recent decision also annulled certain provisions of the 2011 law on the protection of families for applying this discriminatory definition of the family.⁷

PROTECTION OF THE RIGHT TO ADEQUATE HOUSING

Article 8. – This will replace article XII.

(1) Hungary endeavours to guarantee for all the basic conditions of housing with dignity and access to public services.

(2) The state and the local governments can assist in ensuring the basic conditions of housing with dignity by seeking to provide alternative accommodation to all homeless persons

(3) A national law or a statute of a local government can outlaw habitual living in public spaces with reference to the protection of public order, public security, public health and the cultural values.

Amnesty International is concerned that the proposed constitutional amendment (Article 8), would create the possibility for national laws or for local decrees to penalise homelessness contrary to Hungary’s international obligations to guarantee the right to adequate for housing for all. We would like to remind you that as a state party to several international and regional human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Art. 11.1), Hungary is required to guarantee the right to adequate housing for all without discrimination, including the homeless, regardless of the absence of a corresponding provision in the Constitution.

The UN Committee on Economic, Social and Cultural Rights (CESCR) which monitors State parties’ implementation of ICESCR has clarified states’ obligations vis-à-vis the right to adequate housing in General Comment 4. In paragraph 12, the UN Committee points out “While the most appropriate means of achieving the full realization of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, “defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures”. Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives.”

⁴ Hungarian Constitutional Court Resolution No. 14/1995 (III. 13.), 1995.

⁵ Hungarian Constitutional Court Resolution No. 154/2008 (XII. 17.), 2008.

⁶ European Court of Human Rights, *Schalk and Kopf v. Austria*, Application no. 30141/04, 24 June 2010

⁷ Hungarian Constitutional Court Resolution No. 43/2012 (XII. 20.), 2012

Criminalising homeless people especially in the context of the absence of concrete measures to fulfil the right to adequate housing for all therefore runs contrary to Hungary's obligations under ICESCR and, in particular, to address the housing needs and situation of the most vulnerable.

This approach of ensuring adequate protection of the rights of the homeless rather than penalising them has been endorsed by international experts as well as Hungary's own Constitutional Court. In November 2012, the Hungarian Constitutional Court annulled the legislative provision providing for the criminalisation of homelessness, on the basis that it was contradictory to the Fundamental Law's requirements for legal certainty, the protection of the right to human dignity and the right to property.⁸ The United Nations Special Rapporteur on Adequate Housing commented "[T]he recent decision of the Constitutional Court rightly highlights the fact that homelessness is a social issue, which needs to be addressed by the provision of adequate services and not by criminal proceedings" and recently, the United Nations Special Rapporteur on Extreme Poverty stated that "[T]he criminalization of rough sleeping and other life sustaining behaviours in public spaces is an infringement on the basic rights of homeless persons to liberty, privacy, personal security and protection of the family."⁹

FREEDOM OF EXPRESSION

Article 5(5) "The practice of freedom of expression cannot violate the dignity of the Hungarian Nation, or any national, ethnic, racial or religious community. Persons belonging to these communities – as prescribed by law – have the right to challenge these kinds of expressions that violate the dignity of their community or their own human dignity."

Amnesty International is concerned that the broad wording of this provision could lead to violations of the right to freedom of expression contrary to Hungary's obligations under International Covenant on Civil and Political Rights and the European Convention on Human Rights.

As the Human Rights Committee and the European Court have emphasized, the scope of the right to freedom of expression includes even expression that may be regarded as deeply offensive.¹⁰ The treaties are clear that any restrictions on the exercise of freedom of expression must be only such as meet all three elements of a stringent three-part test: they must be 1) provided by law which must be accessible and formulated with sufficient precision to enable an individual to regulate their conduct accordingly; 2) only for one of the legitimate purposes recognized under international law – which include protection of the rights and reputations of others; and 3) demonstrably necessary and proportionate for the achievement of that aim.¹¹ This could include, in extreme cases, prohibiting advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. But the UN Human Rights Committee has stressed that any such restrictions must not put in jeopardy the right itself, and that the relation between right and restriction and between norm and exception must not be reversed. The proposed provision is set out in terms which go much wider than these very narrow circumstances in which it is permissible under international law to impose restrictions on the exercise of freedom of expression, and in terms which effectively reverse the relation between the right and the permissible exceptions to it.

With regard to restrictions which may be permissible to ensure protection of the rights or reputations of others, the Human Rights Committee has clarified that the term "others" relates to other persons individually or as members of a community, but that the primary focus of this provision is on protection of the rights of individual members of such a community defined by its religious faith or ethnicity¹²; human rights law does not provide protection for abstract entities such as nations or religious beliefs as such. While in certain

⁸ Hungarian Constitutional Court Resolution No. 38/2012 (XI. 14.), 2012.

⁹ UN experts urge Hungary to uphold Constitutional Court decision to decriminalize homelessness, 11 December 2012, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12881&LangID=E>

¹⁰ Human Rights Committee, General Comment No. 34, 12 September 2011, UN Doc. CCPR/C/GC/34, para. 11; European Court of Human Rights, *Handyside v. UK*, application 5493/72, 7 December 1976, para. 49.

¹¹ UN Human Rights Committee, General Comment No. 34, paras 21-36

¹² UN Human Rights Committee, General Comment No. 34, para. 28

circumstances, in line with the criteria outlined above, it may be permissible to restrict some expression if it leads to violations of the rights or reputations of individual Hungarians or members of other national, ethnic, racial or religious communities, it is not clear how prohibiting expression aimed at "hurting the dignity of the Hungarian nation", or any other community as such, would comply with this focus of human rights law on individuals.

RECOMMENDATIONS

In view of these concerns, Amnesty International calls on Hungary not to enact the Fourth Amendment unless it is modified to ensure that it is in line with Hungary's obligations under international law. Amnesty International also urges the EU to state publicly its misgivings over these developments and engage with Hungary directly on these issues