

THE GOVERNMENT OF HUNGARY

**Bill number
T/332**

Seventh amendment of the Basic Law of Hungary

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Budapest, May 2018

Seventh amendment of the Basic Law of Hungary

Acting in its scope specified in Article 1(2)(a) of the Basic Law as a constitutional power, the Parliament amends the Basic Law as follows:

Article 1

The text “We honour the achievements of our historical constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary’s statehood and the unity of the nation” in the National Avowal shall be supplemented with the following text:

“We hold that it is a fundamental obligation of the state to protect our self-identity rooted in our historical constitution.”

Article 2

Article (E) Section (2) of the Basic Law shall be replaced with the following provision:

“(2) Based on an international treaty, Hungary may exercise its certain powers jointly with the other Member States via the institutions of the European Union to the extent necessary for the exercise of its rights deriving from the founding treaties and for the performance of its obligations, in order to take part in the European Union as a Member State. The exercise of its powers pursuant to this Section shall be consistent with the fundamental rights and freedoms laid down in the Basic Law, and shall not limit Hungary’s inalienable right of disposal related to its territorial integrity, population, form of government and governmental organisation.”

Article 3

Article (R) of the Basic Law shall be supplemented with the following Section (4):

“(4) All bodies of the State shall protect the constitutional self-identity of Hungary.”

Article 4

Article VI of the Basic Law shall be replaced with the following provision:

“Article VI

(1) Everyone shall have the right to have his or her private and family life, home, communications and good reputation respected. The exercise of freedom of expression and the right of assembly shall not harm others’ private and family life and their homes.

(2) The government shall provide legal protection for the homes to give piece of mind.

(3) Everyone shall have the right to the protection of his or her personal data, as well as to access and disseminate data of public interest.

(4) The application of the right to the protection of personal data and to access data of public interest shall be supervised by an independent authority established by a cardinal Act.”

Article 5

(1) Article XIV Sections (1)-(3) of the Basic Law shall be replaced with the following provisions:

“(1) No alien population shall be settled in Hungary. Any foreign citizen, excluding persons having the right of free movement and residence, shall be allowed to live in the territory of Hungary on the basis of his or her application individually evaluated by the Hungarian authorities. The fundamental rules of the preconditions of the submission and evaluation of the application shall be established by a cardinal Act.

(2) Hungarian citizens shall not be expelled from the territory of Hungary, and may return from abroad at any time. Foreigners staying in the territory of Hungary may only be expelled on the basis of a lawful decision. Collective expulsion shall be prohibited.

(3) No one shall be expelled or extradited to a State where there is a risk that he or she would be sentenced to death, tortured or subjected to other inhuman treatment or punishment.”

(2) Article XIV of the Basic Law shall be supplemented with the following Sections (4) and (5):

“(4) Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country. Any non-Hungarian citizen arriving to the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum.

(5) The fundamental rules of granting asylum are established by a cardinal Act.”

Article 6

Article 25 Sections (1)-(3) of the Basic Law shall be replaced with the following provisions:

“(1) Courts shall administer justice. The Court shall be the regular and the administrative court.

(2) Regular courts shall decide on criminal matters, civil disputes and on matters not specified in an Act. The supreme judicial organ of the regular courts shall be the Curia which shall ensure uniformity of the application of the law by the regular courts, and shall take uniformity decisions which shall be binding on the regular courts.

(3) Administrative courts shall decide on administrative disputes and other matters specified in an Act. The supreme judicial organ of the administrative courts shall be the Administrative Supreme Court which shall ensure uniformity of the application of the law by the administrative courts, and shall take uniformity decisions which shall be binding on the administrative courts.

Article 7

Article 28 of the Basic Law shall be replaced with the following provision:

“Article 28

In the course of the application of law, courts shall interpret the test of the legal regulations primarily in accordance with their purposes and with the Basic Law. Primarily, the preamble of the legal regulation, and the reasoning of the legal regulation or its amendment shall be taken into account when the purposes of the legal regulations are established. When interpreting the Basic Law or legal regulations, it shall be presumed that they serve moral and economical purposes which are in accordance with common sense and the public good.”

Article 8

Article 46 Section (1) of the Basic Law shall be replaced with the following provision:

“(1) The core duties of the police shall be the prevention and investigation of criminal offences, and the protection of public security, public order, and the order of state borders. The police shall take part in the prevention of illegal immigration.”

Article 9

Part “CLOSING AND MISCELLANEOUS PROVISIONS” of the Basic Law shall be supplemented with the following Section 27:

“27. Until an administrative judicial organ is set up, the court shall decide on

- a) criminal matters, civil disputes and on matters not specified in an Act;
- b) the lawfulness of administrative decisions;
- c) conflict of local government decrees with other legal regulations and their annulment;
- d) establishment of non-performance of the statutory legislation obligation of a local government.”

Article 10

- (1) This amendment of the Basic Law shall enter into force on the day following its publication, with the exceptions specified in Section (2).
- (2) Article 7 shall enter into force on 1 January 2019.
- (3) This amendment of the Basic Law shall be adopted by the Parliament on the basis of Article 1(2)(a) and Article S(2) of the Basic Law.
- (4) The consolidated text of the Basic Law shall be published in the official journal immediately after this amendment of the Basic Law enters into force.

General Reasoning

The mass immigration affecting Europe and the activity of the pro-immigration forces are threatening the national sovereignty of Hungary. Brussels intends to introduce a mandatory, automatic quota-based distribution of migrants residing in and coming to Europe, which endangers the safety of our country and would permanently change the population and culture of Hungary.

As the main body of the representation of the people, it is the obligation of the Parliament to enforce the will of the Hungarian people. At the parliamentary elections held on 8 April, the Hungarian people repeatedly made it clear that they do not want Hungary to become an immigrant country. Also, the Hungarian people do not accept that others decide instead of them with whom they should live together.

Therefore the Government of Hungary submits its amendment of the Basic Law to the Parliament. Its aim is to protect the national sovereignty and to prohibit the settlement of alien populations in Hungary.

As part of the amendment of the Basic Law, the National Avowal is supplemented in order to protect the sovereignty and the constitutionality. In the future, the protection of the constitutional self-identity in accordance with the decisions of the Constitutional Court will be the duty of all bodies of the State.

In addition, the amendment of the Basic Law creates the organisational bases for distinct administrative jurisdiction, and thereby, following the Hungarian historical traditions, setting up an Administrative Supreme Court having the same status as the Curia will again be possible. The amendment of the Basic Law concerning the courts also corrects their approach to legal interpretation. Based on this, courts must interpret the purpose of a legal regulation primarily from the preamble and the reasoning of the legal regulation.

The amendment of the Basic Law intends to provide more intensive legal protection for the private and family life as well as the home, taking into account the trends of the recent years.

Detailed Reasoning

Article 1

The Proposal contains a supplement to the National Avowal, which declares that the Government has a fundamental obligation to protect the constitutional self-identity of Hungary rooted in its historical constitution.

Article 2

The European Union is a community of laws and values which respects the constitutional identities of its Member States and their independent right to decide on the most essential issues of statehood. Article 4(2) of the Treaty on the European Union also states specifically that the Union respects the principle of equality of the Member States and the national identity

of the Member States, inherent in their political and constitutional structures. Defining the Member State's national identity is reasonably the most fundamental and indisputable right of the relevant state and its political community, which appears primarily, but not exclusively, in its constitution. Therefore it is relevant for the political community of a state to define certain components of the state's national identity in its constitution through its constitutional body. The interpretation of the interconnection between the national and Union laws in view of the constitutional self-identities of the individual states is constantly on the agenda also before the constitutional courts of the European countries. According to the Union law, the choice of political and social values considered as significant from the aspect of the national and political self-identity of the Member States and appearing in their constitutions may not be called into question. The proposed supplementation of Article E would clarify the term "as necessary" and give content to it in the current Section (2), which is, in fact, the clarification of the scope of the Union's right to exercise of powers.

Article 3

In compliance with the supplementation of the National Avowal, the amendment of Article R of the Basic Law would clarify that all bodies of the State are committed to protect the constitutional self-identity of Hungary.

Article 4

As a result of the technological development, the digitalisation and the increase of media attention, the individual's private protection faces new challenges, to which regulation must also respond; in the digital age, the protection of private life covers not only the intimate sphere but also the private sphere in a broader sense, the individual's family life, home and communications.

The previous Constitution named only a few elements of privacy, but did not provide complex protection. However, with the adoption of the Basic Law, the protection of private life has been elevated to a new regulatory level in Hungary. Thereby Hungary has become one of the countries providing general protection of private life at a constitutional level. The expression of the general protection of private life in the Basic Law provides the highest legal recognition, which also complies with the protection provided in Article 7 of the Charter of Fundamental Rights.

The constitutional power has detected the importance of the collision of privacy rights and other fundamental rights, and therefore the Proposal intends to lay down at the level of the Basic Law that the exercise of freedom of expression and the right of assembly may be external limits to others' rights to have their private and family life and home respected. Should the above fundamental rights collide, the Proposal emphasises the emphasises the protection of these elements of privacy rights, in view of the general frameworks of the allowed limitation of fundamental rights and the practice of the Constitutional Court.

The protection of privacy rights covers also the space in which the private and family life thrives. In its Decision 13/2016 (VII.18) AB, the Constitutional Court emphasised that according to the U.S. Supreme Court, the peace of home – the last resort of tired people – is a space where people may draw back against the everyday bustle {Carey v. Brown [447 US 455 (1980)] és Frisby v. Schultz [487 US 474(1988)]}.

In compliance with the above, the Proposal states that the protection of the peace of home, as a particularly important value, must be protected by the state in a legal form.

Article 5

The amendment of Article XIV states that no alien population may be settled in the territory of Hungary. It clearly states that no other state or supranational organisation may make a decision which results in the settlement of persons belonging to alien populations. In addition, it also states that an alien citizen may live in the territory of Hungary only on the basis of an individual application assessed by the Hungarian authorities in a procedure pursuant to an Act adopted by the Parliament. The rule does not apply to the citizens of the countries of the European Economic Area, as their settlement is subject only to declaration.

The new Section (1) of Article XIV clarifies that settlement may take place only in a manner that guarantees the fundamental rights of the applicant, at his or her voluntarily lodged application, individually assessed by the bodies of the Hungarian Government. Thereby Hungary elevates the principle “the state has the right to define the preconditions on which it allows aliens to enter into the country” to the level of the Basic Law, which is accepted in the international customary law, confirmed by the practice of the government, and laid down also in the draft of the International Law Commission of the United Nations on the international legal rules of expulsion of foreigners. Thus it is obvious that the state sovereignty intrinsically includes the inalienable right to allow or reject the entry of foreigners into the territory of the state.

Based on Article XIV Section (3) of the Basic Law currently in effect, Hungary guarantees asylum as a fundamental right in compliance with its international legal commitments.

Fundamental rights are substantive rights enforceable before the court, the provision of which depends not on the state’s consideration in accordance with Article I (1) of the Basic Law. In addition to the fundamental rights, the legal system provides several other rights, in legal sources subordinated to the Basic Law, and the state has more decision-making freedom in their protection, limitation or withdrawal.

Based on Article 31(1) of the Geneva Convention [see the Convention adopted on 28 July 1951 on the status of refugees, announced in Legislative Decree 15 of 1989 as well as the Protocol made on 31 January 1967], the Proposal makes it clear in the Basic Law that only persons directly coming from an area where according to the Geneva Convention they are being persecuted or having a well-founded fear of persecution are entitled to the right to asylum in Hungary. In all other cases (i.e. for persons who arrive to the territory of Hungary through a country where according to the Geneva Convention they are not being persecuted or having a well-founded fear of persecution), the Parliament is free to decide if asylum is granted to them or similar protection is provided for them, and if so, then according to what substantive legal terms and procedural rules.

In addition to the above, the Proposal supplements the Basic Law with additional cardinal regulation issues. The provision requiring high parliamentary consensus is not intended to achieve that the whole asylum and alien policy is regulated by a cardinal Act: the Proposal recommends that the basic rules, primarily for example those regulating the substantive provisions of granting protection, would require a qualified parliamentary majority.

Article 6

The separation of the administrative jurisdiction, first of all the existence of an independent administrative supreme court is an achievement of our historical constitution: the process of the administrative jurisdiction started in the 1880s, and was completed in 1896 when the Hungarian Royal Administrative Court was set up. This control mechanism over public administration could operate until 1949.

Though after the regime change, a system of judicial review of administrative decisions was set up, but, as in its decision 1/2017 (I.17.) AB the Constitutional Court also stated, *“However, several structural changes have taken place since 1991, in view of which complete renewal of the administrative procedural law and of the procedural law, the complex rewording of the administrative official procedural law and of the administrative procedure law became necessary”*. Rewording of the procedural law may become complete only with an institutional reform.

Almost seventy years after the dissolution of the distinct administrative supreme court, the Basic Law re-creates an organisationally distinct model of the judicial control of administration. Thereby the acts of the state may be controlled in a way, where it simultaneously guarantees the enforcement of the requirements of the rule of law via the principles of judicial independence and fair procedures, and enforces the specificities and inner logic of administrative law.

The amendment states that the structure of the judiciary is divided into regular courts and administrative courts. Administrative courts will decide on administrative disputes and other matters specified in an Act. Regular courts will decide on criminal matters, civil disputes and on matters specified in an Act. The administrative supreme judicial body will be the Administrative Supreme Court, while the supreme judicial body of the regular courts remains the Curia. The two supreme judicial forums will perform duties related to uniformity of the application of the law in relation to the judicial structures concerned. Other guarantee provisions related to the structure of the judiciary remain unchanged, and therefore they will be properly enforced in the case of both regular courts and administrative courts.

Article 7

Article 28 of the Basic Law is a rule applicable to the legal interpretation of the courts and indirectly of other public bodies, and provides a guide in connection with the interpretation of the legal regulations. Not affecting the practice of the Constitutional Court related to the provision [see for example Decision 3325/2012. (XI. 12.) AB, Decision 3231/2014. (IX. 22.) AB] and the interpretation of the provision by the Curia [see for example Decision Kúria Mfv. 10.272/2015/4], the Proposal states that in the framework of teleological legal interpretation, the courts must take into account primarily the purpose well specified by the legislator.

The preamble of the legal regulations in legislation and their reasoning provided for the legal regulation or for its amendment, if they are published, are proper and authentic sources to explore the legislator’s purpose in the entire legislative process. The Proposal requires the courts to explore these sources and use them as an interpretation aid during the application of the law, with the condition that naturally they may not be considered as an exclusive method of this type of legal interpretation, as the arguments stated in connection with the adoption of the legal regulation, the achievements of the historical constitution and the results of the theory of law may be further used.

As regards to the Proposal, it should be noted that the Parliament will have a broad consideration right to specify the scope of the reasoning concerned in the legislative

procedure to be published, as well as the method of publication.

Article 8

Article 46 of the Basic Law currently in effect provides on the functional scopes and statuses of the police and the national security services, as enforcement bodies to be compulsorily operated by the state on the basis of the Basic Law, and the fundamental rules guaranteeing their structure, operation and direction.

The core duties of the police are the prevention and investigation of criminal offences, and the protection of public security, public order, and the order of state borders. This provision specifies the duties to be compulsorily performed by the police, while it also states that as a main rule these duties belong primarily to the scope of the police.

The prevention of illegal immigration is partly connected with the core duties of the police, and partly covers a wider scope of activities in view of its complexity. Therefore the objective related to this activity is indicated by the Proposal in the Basic Law among the “core duties” of the police. The wording of the Basic Law clearly indicates that the Proposal does not intend to re-arrange the competency of other bodies (e.g. the alien police, asylum authority etc.) involved in the prevention of illegal immigration.

Article 9

A temporary provision must be made to ensure that the Curia and the judicial organisational system operating in its current structure may properly act in administrative matters until the Administrative Supreme Court is set up.

Article 10

The article contains the provision on the Proposal’s entry into force, and requires the publication of the consolidated text of the Basic Law after its amendment.