



Right to housing is a human right!

Submission to the Venice Commission by A Város Mindenkié

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10 May 2013

Re: Amendments to the Hungarian constitution

English translation of Article 8 of the Fundamental Law (by Hungarian Helsinki Committee)

The following provision shall replace Article XXII of the Fundamental Law:

Article XXII

- (1) Hungary shall strive to provide the conditions for housing with human dignity and to guarantee access to public services for everyone.
- (2) The State and local governments shall contribute to creating the conditions for housing with human dignity by striving to guarantee housing for every homeless person.
- (3) An Act of Parliament or local government decree may outlaw the use of certain public space for habitation in order to preserve the public order, public safety, public health and cultural values.

Human and Constitutional rights' violations

I. on the basis of the Hungarian legal environment:

1. Violation of human dignity: criminalization of social status (extreme poverty, housing poverty, homelessness).

See Decision 38/2012. (XI. 14.) of the Hungarian Constitutional Court:

“[N]or the removal of homeless persons from public premises, nor urging them to draw on social maintenance may not be considered such a legitimate, constitutional aim which would substantiate that the living of homeless persons on public premises is declared a petty offence. Homelessness is a social problem, which shall be dealt with by the state with the means of social administration and social maintenance instead of punishment. It is incompatible with the protection of human dignity as enshrined in Article II of the Fundamental Law to declare [homeless persons] dangerous to the society and punish [them].”



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The period during which the previous version of the Act on Petty Offences that criminalized the use of public premises for habitation was in force (later struck down by the Constitutional Court in Decision 38/2012. (XI. 14.)) demonstrates that Hungarian authorities are not reluctant to punish citizens for sleeping rough. According to official data, between 15 April 2012 and 16 November 2012, 2202 persons were prosecuted for the violation of the prohibition of residual habitation on public premises and in 1544 cases a fine was exacted (in 859 cases the fine was €17, in 403 cases €170, the total amount of these fines was approximately €135.000.) There is no official data on the number of cases when the fine was replaced with incarceration, however, data show that the number of cases in which it was initiated that a fine is replaced with public work or incarceration increased from 5210 to 43243 between April 2012 and December 2012.

2. Discrimination on the basis of social status (extreme poverty, housing poverty, homelessness) in relation to the use of public premises.

3. Violation of legal certainty:

3.1. The amendment (esp. the brief and unspecified wording of Article XXII paragraph 3) gives very wide authority to the Parliament and local governments in terms of the regulation of the use of certain public space for habitation. The Constitutional authorization is so wide that it would be difficult to prove that a certain regulation is *ultra vires* or in fact an abuse of power.

"The Bill T/10749 on the Amendment of Act II of 2012 on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System in Relation to the Fourth Amendment of the Fundamental Law (see Annex) clearly proves that decision-makers do use, or rather abuse this wide authority. The Bill only says that local governments may declare certain parts of the public premises prohibited in order to "preserve the public order, public safety, public health and cultural values", but contains no further restriction in this regard. Accordingly, local governments will in practice – in contrast to what is suggested by the official reasoning of the Bill – be able to declare almost their whole city/town a prohibited zone, and e.g. will be easily able to "push" homeless persons to the outskirts of cities."

3.2. The amendment sets out that the State and local governments shall "strive" to guarantee housing for every homeless person. However, it does not mean an obligation on the authorities, and in fact there is no clear definition of what "striving" should mean (e.g. no Hungarian law defines what sufficient social/housing provision by the State or a local government is.)

3.3. The definition of the use of public premises for habitation that the Fundamental Law authorizes the Parliament and local governments to outlaw is not defined in the Fundamental Law that gives way to arbitrary interpretations. In fact, the Bill T/10749 on the Amendment of Act II of 2012 on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System in Relation to the Fourth Amendment of the Fundamental



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Law (see Annex) that is being discussed in the Parliament defines in a rather vague manner giving way to local arbitration:

“residing for habitation may cover conducts on the basis of which it may be established that a person resides for habitation in the designated area, without the intent to return to a domicile or place of residence, or to other accommodation, with the aim of residing in the designated area for a longer period of time, and the circumstances of residing in the designated area or the person’s behaviour may lead to the conclusion that the person carries out his/her activities in the designated area serving typically as a domicile – especially sleeping, cleaning up, eating, dressing, keeping animals – regularly and in a recurring way with small intervals in the designated area.”

II. on the basis of the international legal environment:

Violation of Article 14 of the European Convention of Human Rights in relation to Article 8. Argument: criminalization means interference into personal autonomy (more broadly, into personal integrity, liberty of private life, freedom of family life). The differentiation cannot be justified, as stated by the Hungarian Constitutional Court (Decision 38/2012. (XI. 14.)):

(See relevant case law: “the concept of “private life” is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self- determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.” Pretty v. UK)

ANNEX

Relevant provisions of Bill T/10749 (as submitted by the Government)

Article 5

The Petty Offence Act shall be supplemented with the following Chapter XXIII/A:

“Chapter XXIII/A

Petty offences punishable with community work

133/C. Infringing the rules of residing on public premises for habitation



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Article 179/A

(1) If a person

- a) resides for habitation on the public premises designated by the local government in its decree under Section (2) (hereafter: designated area), and,
- b) despite the request of the police, or the persons set out in Article 39 (2) a), e) and f), and – if complying with the condition included in Article 39 (3) – the request of the persons set out in Article 39 (2) g)–i),¹ does not leave the designated area,

he/she commits a petty offence.

(2) The local government, and with respect to the capital the metropolitan government, may, in order to protect public order, public safety, public health and cultural values, designate in a decree those parts of the public premises where residing for habitation qualifies as unlawful.

(3) When applying Section (1), residing for habitation may cover conducts on the basis of which it may be established that a person resides for habitation in the designated area, without the intent to return to a domicile or place of residence, or to other accommodation, with the aim of residing in the designated area for a longer period of time, and the circumstances of residing in the designated area or the person's behaviour may lead to the conclusion that the person carries out his/her activities in the designated area serving typically as a domicile – especially sleeping, cleaning up, eating, dressing, keeping animals – regularly and in a recurring way with small intervals in the designated area.

(4) If the conditions set out in the present Act of Parliament prevail, the petty offence set out in Section (1) may be punished with community work. If the perpetrator does not undertake to carry out community work, a fine may be imposed on him/her.

(...)

(6) If the person involved in the procedure has been taken to account in a final decision because of committing the petty offence set out in Section (1) already two times within the last six month before he/she commits the petty offence set out in Section (1) [for the third time], he/she may be sentenced to confinement because of repeatedly committing the petty offence set out in Section (1).

(7) If a person is caught on the spot for committing the petty offence set out in Section (1), no one-the-spot fine may be imposed.”

The opinion of the Hungarian Helsinki Committee on Bill T/10749 on the Amendment of Act II of 2012 on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System in Relation to the Fourth Amendment of the Fundamental Law:



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Bill T/10749 on the Amendment of Act II of 2012 on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System in Relation to the Fourth Amendment of the Fundamental Law was submitted to the Parliament by the Government (more specifically, the Minister of Interior) on 12 April 2013, and it is pending before the Parliament.¹ The Bill would introduce two new petty offences: “infringing the rules of residing on public premises for habitation” (criminalizing homelessness as such) and “construction without the consent of the owner” (aiming to counter illegal settlements, built by homeless persons). As it is shown by the text of Bill T/10749 as presented below, Act II of 2012 on Petty Offences, Petty Offence Procedure and the Petty Offence Registry System (hereafter: Petty Offence Act) would set out that:

- the petty offence of “infringing the rules of residing on public premises for habitation” is committed if a person resides for habitation on certain parts of the public premises, determined by local government decrees, and if he/she does not leave the premises upon request of the police, etc.
- Accordingly, the Petty Offence Act would also explicitly authorize (but not oblige) local governments to determine that parts of the public premises which are prohibited for homeless persons in terms of living there. It is important to note that the Bill only says that local governments may declare certain parts of the public premises prohibited in order to “preserve the public order, public safety, public health and cultural values”, but contains no further restriction in this regard. Accordingly, local governments will in practice – in contrast to what is suggested by the official reasoning of the Bill – be able to declare almost their whole city/town a prohibited zone, and e.g. will be easily able to “push” homeless persons to the outskirts of cities.
- The Petty Offence Act would also contain a definition of what “residing for habitation” actually covers.
- According to Bill T/10749, committing the petty offence of “infringing the rules of residing on public premises for habitation” would result in sentencing homeless persons to community work, or, if they do not agree to community work, a fine may be imposed. According to Article 14 (2) of the Petty Offence Act currently in force, the minimum for community work is six hours of work, while the maximum is 180 hours. (It may be added here that according to Article 92 (5) d) and 92 (3) of the Petty Offence Act the costs of the medical examination necessary to be allowed to carry out community work shall be covered by the homeless person sentenced, however, there is a possibility to request cost exemption.)

¹ The text of the Bill and the official reasoning attached to it is available here in Hungarian: <http://www.parlament.hu/irom39/10749/10749.pdf>.



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As to the amount of the fines: under Article 11 (1) of the Petty Offence Act currently in force, the amount of the fine may vary between 5,000 HUF and 150,000 HUF. If the fine is not paid (which is a highly likely scenario in case of homeless persons with very limited financial resources), it shall be converted to confinement under Article 12 (1) of the Petty Offence Act, in a way that one day of confinement stands for 5,000 HUF of fine.

- Furthermore, the Bill includes a special “three strikes rule”: if a homeless person committing the petty offence above was brought to account already twice in the preceding six month for residing on public premises (which would not be surprising e.g. if in the given city most of the premises are declared a prohibited zone), he/she may be sentenced to imprisonment. Under Article 9 (1) of the Petty Offence Act as currently in force, the length of imprisonment varies between one day and 60 days.

To sum it up, local governments have practically unlimited power to declare certain public premises a prohibited area and it is a very likely scenario for homeless persons that they end up in confinement because they live on the streets.