

Ref: TG EUR 27/2011.005

Pál Schmitt  
President of Hungary  
Sándor Palace  
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14 April 2011

Dear President

### **CONCERNS OVER THE DRAFT OF THE NEW CONSTITUTION OF HUNGARY**

Amnesty International is concerned that the draft of the new Constitution of Hungary introduces changes which may in practice restrict internationally protected human rights. In particular, we are concerned about Article II which introduces the protection of the life of the foetus from the moment of conception; Article IV introducing life sentence without the possibility of parole; and Article XIV listing prohibited grounds for discrimination which fails to include grounds such as age or sexual orientation and gender identity.

The governing majority made public the draft text of the new Constitution on March 14. The parliamentary debate on the draft started on March 21 and it is expected to be adopted on April 18. Amnesty International urges you to introduce a Constitution that is firmly in line with human rights standards enshrined in treaties to which Hungary is a signatory.

#### **PROTECTION OF LIFE FROM THE MOMENT OF CONCEPTION**

Article II of the Draft Constitution states that: "Every human being has the right to life and human dignity, and the life of the foetus shall be protected from the moment of conception".

On the assumption that the inclusion of the right to life of the foetus from conception is meant to bring about a change from the legal status quo, Amnesty International is concerned that the change inherent in the revised constitutional protection of the right to life will undermine human rights protection for women and girls.

Article II risks creating obstacles or barriers to access to medically indicated health care needed by pregnant women and girls by generating legal uncertainty about the status and permissibility of health care options, including abortion, emergency obstetric care, treatment for miscarriage or abortion complications, and diagnostic and curative care that may impact on the foetus' well-being. Article II risks leading health care providers to prioritise the foetus' interests before those of the woman or girl. Fearing being accused of not having protected the right to life of the foetus, health care providers may feel pressured to delay providing treatment, or feel justified in refusing treatment, even where this puts the concerned girl's or woman's health or life at risk.

Article II risks exposing women and girls to criminal investigation and prosecution where their pregnancy does not result in a live birth. As a result of Article II, pregnant women and girls may also feel pressured to refrain from seeking health information and care in a safe environment and resort to unsafe options for fear of being judged.

Moreover, there is a risk that Article II will be used as justification for subsequent legislative, judicial and administrative action to arbitrarily restrict – or even prohibit – access to essential health care

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options for pregnant women and girls. Such restrictions or prohibitions would violate the human rights of women and girls.

Hungary's human rights obligations require taking a range of measures protective of prenatal life – measures protecting women's health and rights during pregnancy, ensuring safe delivery, post-partum care and neonatal care.<sup>1</sup> All measures to protect prenatal life can and must be *compatible* with the rights of women, including their rights to life, health, autonomy, private life and equality and non-discrimination.

#### LIFE IMPRISONMENT WITHOUT PAROLE

Article IV (1) of the new Constitution allows for life imprisonment without the possibility of parole (LWOP), stating: "Final deprivation of liberty shall take place only for the commitment of a criminal offence and upon final decision by a judge."

Amnesty International considers that the imposition of LWOP violates the principle that incarceration should involve, among other goals, social rehabilitation and the prohibition of cruel, inhuman or degrading punishments under the International Covenant of Civil and Political Rights. All prisoners should be entitled to periodic review of their sentences. There is an emerging view that LWOP sentences constitute cruel, inhuman or degrading treatment or punishment. The European Court of Human Rights has suggested that such sentences may violate the prohibition of cruel and inhuman treatment.

#### PROTECTION FROM DISCRIMINATION

Article XIV (2) lists the prohibited grounds of discrimination: "Hungary guarantees the fundamental rights to every person without any discrimination on account of race, colour, disability, language, religion, political or other opinion, national or social origins, financial situation and birth or on any other grounds whatsoever." This list omits sexual orientation and gender identity as grounds of discrimination.

Amnesty International is concerned that the exclusion of sexual orientation as a ground of discrimination in Article XIV(2) may narrow the scope of Hungary's anti-discrimination law, and contravenes both international and European human rights law.

The Hungarian 2003 Act on Equal Treatment and the Promotion of Equal Opportunities forbids discrimination based on factors that include sexual orientation and sexual identity in the fields of employment, education, housing, health, and access to goods and services. In such a forward-looking and fundamental document as a nation's constitution, the equal protection of the law to all citizens should not have to be implied.

Article 2 of the International Covenant on Civil and Political Rights requires a state party to "ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind." Article 26 guarantees that "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." The UN Human

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<sup>1</sup> UN Convention on the Elimination of All Forms of Discrimination against Women Article 12.1; Committee on the Elimination of Discrimination against Women General Recommendation 24 (Women and health); International Covenant on Economic, Social and Cultural Rights Article 10.2; Committee on Economic, Social and Cultural Rights General Comment 14 (The Right to the Highest Attainable Standard of Health); Convention on the Rights of the Child Article 24.2(d); Committee on the Rights of the Child General Comments General Comment 4 (Adolescent Health and Development in the Context of the Convention on the Rights of the Child) and 7 (Implementing Child Rights in Early Childhood).

Rights Committee has made clear on several occasions that sexual orientation is a status protected against discrimination under these provisions.<sup>2</sup>

The UN Human Rights Committee has also urged states to pass anti-discrimination legislation that expressly includes sexual orientation<sup>3</sup> and has urged states to include in their constitutions the prohibition of discrimination based on sexual orientation.<sup>4</sup> The European Union explicitly prohibits discrimination on the grounds of sexual orientation in Article 21 (1) of the Charter of Fundamental Rights of the European Union, 2000, and the EU Employment Equality Directive of the same year prohibits discrimination on grounds of sexual orientation in the fields of employment & occupation, vocational training, membership of employer and employee organisations.

Amnesty International strongly urges the Hungarian Government to explicitly include sexual orientation as a protected ground in order to comply with both European and international law.

#### PROTECTION FOR FAMILY LIFE

Under Article K (1), it is stated that: "Hungary protects the institution of marriage as a union between man and woman established by mutual consent, and the family as the foundation of the survival of the nation."

Amnesty International is concerned that the explicit articulation of marriage as between a man and a woman may have the effect of preventing courts from extending the institution to include same-sex couples. Although Hungarian law does not currently recognise same-sex marriages, implicitly banning them not only runs counter to current European and international law, but is disproportionate in its aim. Article 2 of the International Covenant on Civil and Political Rights sets out that states may not discriminate with regards to any of the rights set out under the Covenant, including the right to marry and the right to found a family in Article 23.

In the recent case of *Schalk and Kopf v Austria*<sup>5</sup>, the European Court of Human Rights decided that the reference to "men and women" in Article 12 no longer means that "the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".

The clause also implies that 'the family' excludes same-sex couples and their children. This could have the effect of preventing same-sex couples from adopting, fostering children, or accessing medical assistance for assisted reproduction. In *Schalk v Kopf*, the court stated that: "it is 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."

Amnesty International calls on the Hungarian Government in its new draft constitution to end discrimination on the basis of sexual orientation and gender identity and to render the definition of marriage and family non-discriminatory by including same-sex couples.

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<sup>2</sup> See UN Human Rights Committee Communication no. 488/1992, *Toonen v Australia*, , adopted April 4, 1994; UN Human Rights Committee Communication no. 941/2000, *Young v Australia*, adopted September, 2003. The Human Rights Committee has also urged states to pass anti-discrimination legislation that expressly includes sexual orientation, and to prohibit in their constitutions all discrimination based on sexual orientation and gender identity.

<sup>3</sup> Concluding Observations: Slovakia, CRC/C/SVK/CO/2, June 8, 2007, para. 28; Concluding observations: Namibia, CCPR/CO/81/NAM, July 30, 2004, para. 22; Concluding Observations: Trinidad and Tobago, CCPR/CO/70/TTO, November 3, 2000, para. 11.

<sup>4</sup> "Concluding Observations of the Human Rights Committee: Poland," Human Rights Committee, 66th Session, CCPR/C/79/Add.110, para. 23.

<sup>5</sup> Application no. 30141/04.

We look forward to your earliest response.

Please note that a copy of this letter is being sent to the Prime Minister, Deputy Prime Minister and the Members of the Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Salil Shetty', with a long, sweeping horizontal line extending to the right.

For Salil Shetty, Secretary General