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Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary

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Report of the International Bar Association's Human Rights Institute (IBAHRI)
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This report has been compiled in accordance with the Lund-London Guidelines 2009 (**www.factfindingguidelines.org**)

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List of Acronyms

ALSRJ	Act CLXII of 2011 on the Legal Status and Remuneration of Judges
AOAC	Cardinal Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary
CCA	Cardinal Act CLI on the Constitutional Court
ECHR	European Convention on Human Rights
Fidesz	Federation of Young Democracy
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
MDF	Hungarian Democratic Forum
MKP	Hungarian Communist Party
MszMP	MKP and the Hungarian Socialist Workers' Party
MSZP	Hungarian Socialist Party (formerly the MszMP)
NJC	National Judicial Council
NJO	National Judicial Office
SZDSZ	Association of Free Democrats
TEU	Treaty on the European Union

Executive Summary

The International Bar Association's Human Rights Institute (IBAHRI) undertook a fact-finding mission to Hungary between 19–23 March 2012. The mission was initiated following concerns at the impact of a series of legislative reforms that entered into force at the beginning of 2012, including a new Constitution (the 'Fundamental Law'), on the independence of the judiciary and the legal profession and on the situation of the rule of law in Hungary. These concerns included: the implementation of a mandatory retirement age of 62 for judges, causing the immediate compulsory retirement of over 270 judges; the creation of a new National Judicial Office (NJO) and the powers and accountability of its President with regard to judicial appointments, supervision and case allocation; changes in the composition and election procedures of the Constitutional Court, limitations to its power to review legislation and the abolition of the citizen's right of individual petition (*actio popularis*); and issues surrounding the replacement of the President of the Kúria (Supreme Court).

On 17 January 2012, the European Commission (the 'Commission') launched an accelerated infringement procedure against Hungary in response to the passing of the new legislation and, on 25 April 2012, the Commission referred the matter of the new mandatory retirement age of judges to the European Court of Justice. The IBAHRI emphasises that the fact-finding mission was initiated and undertaken independently of this process, however it hopes that this Report and its conclusions and recommendations will make a positive contribution to the national and international dialogue on the issue.

The delegation considers that, although the rationale behind the recent reforms presented to it by the Hungarian government during its visit, namely the need to make the operation of the judicial system faster and more efficient, is to be welcomed, several of the specific legislative solutions chosen threaten institutional guarantees of judicial independence. While it may have been possible in the case of certain of the individual reforms to point to comparable practices in other European countries, cumulatively the delegation considered that the reforms as they stood at the time of its visit undermined the independence of the judiciary and the necessary democratic checks and balances that are essential to the rule of law.

On 21 July 2012, the Hungarian Parliament passed Act CXI of 2012 which amended the legislation regarding the broad-ranging powers of the President of the NJO (the 'Amendment Act'). Although this amending legislation was passed after the conclusion of the delegation's visit, it is necessary to take these latest changes into account in this Report. The legislative amendments introduced by the Amendment Act restrict several of the powers of the President of the NJO and therefore resolve some of the most serious concerns of the national and international community, in particular the European Union and the Venice Commission. However, whilst the delegation welcomes the swift response of the government of Hungary with respect to these concerns, the delegation also considers that many of the problems would never have arisen in the first instance had the government engaged in proper legislative consultation and procedure with respect to the original offending legislation.

Furthermore, concerns remain regarding the independence of the judiciary and the rule of law in other areas and the delegation notes that the lowered mandatory retirement age for judges and the

limited competence of the Constitutional Court remain untouched by the Amendment Act. This Report will present the findings of the delegation at the time of its visit, as well as incorporating its views on the most recent legislative changes introduced by the Amendment Act into the conclusions and recommendations.

Independence of the judiciary

The premature termination of the mandate of the President of the former Supreme Court through the introduction of a retroactive and *ad hominem* law violates the guarantee of security of tenure that is essential for the independence of the judiciary. The former President's recent criticisms of the legislative reforms and the subsequent rapid introduction of legislation that made him ineligible for re-appointment have created the widespread perception that the government has deliberately used the reform process to remove him from office. In the absence of a convincing alternative explanation, the delegation finds it difficult to come to another conclusion.

Under the legislation passed at the beginning of 2012, the centralisation of a wide range of powers – 66 competences in total – relating to the administration and management of the judiciary into the hands of a politically-appointed individual, the President of the newly-created NJO, and the corresponding lack of accountability, presented some of the most worrying aspects of the reforms. As they stood, the reforms clearly contravened Hungary's international obligations to uphold the independence of the judiciary and the right to a fair trial. Although there still remain several areas of concern regarding the reforms and their impact on the independence of the judiciary in Hungary, the Amendment Act is in general to be welcomed as an improvement to the regime originally envisaged by the legislative reforms passed at the beginning of 2012.

The delegation was unable to receive any consistent or objective rationale regarding the early mandatory retirement age for judges, which at the very least, appears to have been based on unevidenced assumptions regarding the performance of senior judges. Aside from violating EU discrimination law, the retroactive effect of the law clearly undermines judicial security of tenure and deprives the Hungarian judiciary of the accumulated experience of its most senior judges. In the light of broader context and the inconsistent rationales put forward by government figures to justify the reduction in the retirement age, the delegation found a widespread perception that the introduction of the mandatory retirement age, combined with the moratorium on the appointment of new court executives before the entry into force of the Fundamental Law is an attempt to maximise the number of vacancies that will arise during the term of the current legislature and be dealt with through the exclusive appointment powers of the President of the NJO. This has created a risk of 'political capture' of the Hungarian court system that may undermine its international obligations to ensure the independence of the judiciary.

On 16 July 2012, the Hungarian Constitutional Court found that the lowering of the retirement age for judges was unconstitutional because the sudden and unclear manner in which it was implemented violates the principle of security of tenure – a fundamental tenet of the independence of the judiciary. The delegation welcomes this judgement and hopes that the executive branch respects it. However it is alarmed at the press conference statement of Prime Minister Victor Orbán following the

judgment that 'the system is here to stay',[1] which as will be considered in Chapter 4 of this Report, reflects a tendency of the government not to respect the decisions of the Constitutional Court.

The delegation is further concerned at the speed with which the government moved to replace the 228 judges who were immediately retired when the implementing legislation entered into force at the beginning of 2012. This occurred while the EU was launching infringement proceedings against Hungary on the issue and while complaints were pending before the European Court of Justice and the Hungarian Constitutional Court. Following the Court's judgment it is critical that the retired judges are compensated and either reinstated promptly in their previous post or a similar position. In this regard, the status of the judges who have been appointed in their place should also be clarified. The delegation again concludes that these problems could have been avoided through better legislative planning, consultation and respect for proper parliamentary procedures.

Recommendations

- The government should execute the decision of the Constitutional Court and repeal the lowered mandatory early retirement age regulation for judges. The procedure for providing compensation to the retired judges for their forced retirement as well as their swift reinstatement either in their previous post or a similar position should be set out promptly and clearly by the government/NJO. Similarly, the status of the judges who have been appointed in their place should be clarified.
- The government should open a consultation process or consider amending the criteria for election of the President of the Kúria so that it includes, or at least takes into account, judicial experience obtained in international courts and should refrain from implementing legislation that is directed, or easily perceived to be directed, against a specific individual.
- The long mandate and possibility of indefinite extension of the term of office of the President of the NJO should be amended, for example, through the provision that the President of the NJO may not be re-elected. The delegation is pleased to note that under the Amendment Act, in cases where it is not possible to gain a two-thirds parliamentary majority in order to appoint or re-appoint the President, the incumbent President of the NJO will be substituted by the Deputy President of the NJO or other deputies, rather than remaining in the position until such a majority has been achieved. However, given that the Deputy President of the NJO as well as other substitutes are directly appointed by the President of the NJO, the position clearly remains under the potential influence of the incumbent President. In order to avoid this danger, it would be preferable for these substitute tasks and duties to be performed by the President of the National Judicial Council (NJC) in the first instance, rather than the Deputy President of the NJO and other deputies of the NJO.
- Clear and transparent legal provisions formulated by the NJC and setting out specific criteria on which the President of the NJO may exercise his or her power to transfer a case should be implemented effectively. The right of parties to appeal to the Kúria as introduced by the Amendment Act is welcome.

1 Constitutional Court overturns judge retirement law' **www.budapesttimes.hu/2012/07/24/constitutional-court-overturns- judge-retirement-law/** [site last accessed on 24/07/12].

- The power to transfer judges 'if the even distribution of the case-load or the professional development of the judge make it necessary', rather than based on the vague criterion of 'service interest', provides a degree of clarification. However, the possibility of judicial review of the decision of the President of the NJO introduced by the Amendment Act is welcome.
- The power of the NJC to veto judicial appointments in certain circumstances is welcome; however the NJC's approval should be necessary every time the President of the NJO intends to deviate from the ranking list.
- With respect to administration of the judiciary, the NJC should be afforded real decision-making powers. Judicial independence would be best protected if the NJC held a veto over all decisions of the President of the NJO. Such an approach allows the President to take decisions flexibly and quickly but protects judicial independence by ensuring that such decisions can be overturned if the judiciary collectively feels that it is necessary to do so.
- The government should undertake a nationwide assessment of the justice sector in order to obtain a research-based understanding of the capacity needs of the judiciary and how resources can be best allocated.

Checks and balances

The manner in which the recent constitutional and legal reforms were implemented and responses to the decisions and jurisdiction of the Constitutional Court indicate a tendency of the current government, with its parliamentary super-majority, neither to respect the separation of powers nor take into account the views of opposition voices or civil society. The delegation is concerned that the government views its super-majority in the Parliament as an opportunity to leave its political legacy on Hungary's legal and constitutional order. The delegation did not hear of any meaningful attempt to engage with opposition groups or civil society in the preparation of the Constitution or related legislation. Several of the current technical and legal difficulties surrounding the reform package could have been avoided if there were more systematic and widespread consultation with opposition parties and civil society in general. Furthermore, the delegation is also concerned by the constitutional status of the Transitional Provisions and the number of organisational issues at the level of so-called 'cardinal laws', which require a 66 per cent parliamentary majority for amendment. The excessive use of cardinal laws to regulate such a wide range of areas, such as family and taxation policy (in addition to the court system), risks insulating the policy preferences of the current government from review by a future legislature that does not have such a majority.

The response of the executive and legislative to decisions of the Constitutional Court regarding the constitutionality of certain provisions by simply reintroducing them into the Transitional Provisions seriously undermines the Court's authority as well as the independence of the judiciary. The speed at which the government restricted the competence of the Constitutional Court to review certain fiscal matters following the Court's decision regarding the unconstitutionality of a retroactive 98 per cent tax, and passed legislation re-introducing the regulation, is alarming and exemplifies the government's attitude towards independent constitutional control. The delegation is concerned at the increased possibility of politicisation of the Constitutional Court due to the changes in the appointments procedure and the fact that the head of the Court is now elected by Parliament.

While constitutional review is still possible, the limitation on the ability of citizens to bring a constitutional challenge has been supplemented by measures that may discourage citizens from making use of their remaining rights. For example, the costs of representation are borne by the petitioner, which may prove prohibitive. Furthermore, a system that prevents individuals from representing themselves but does not pay for representation, may well breach the right of access to court protected by Article 6 of the European Convention on Human Rights. With respect to the Chief Prosecutor's discretionary power to allocate cases, the delegation considers that this risks undermining the right to a fair trial because the prosecution has a vested interest in the particular outcome of the trial. Finally, the delegation is concerned at the inclusion of an obligation in the new lawyer's oath to 'practise the duties and rights of the office of attorney for the benefit of the Hungarian Nation' and at the absence of recognition of the duty of confidentiality in the terms of the oath.

Recommendations

- The government should refrain from using non-standard parliamentary procedures in order to legislate in areas affecting fundamental aspects of public life and should seek to engage with opposition groups and civil society on a more frequent and systematic basis.
- Given the speed with which the new Constitution was adopted, the authorities should consider establishing a review of the Constitution to assess how it is operating in practice and to suggest amendments. Such a review should include membership from across the political spectrum.
- The government should seek to restrict the fields and scope of the cardinal laws in the Fundamental Law where there are not strong justifications for the requirement of a two-thirds majority, for example, in areas such as family and social policy and taxation policy.
- The government should conduct a review of the Transitional Provisions in order to remove measures that are not genuinely transitional. Specifically, the powers of the Chief Prosecutor and the President of the NJO and the procedures relating to the registration of religious institutions should be removed, as should the provisions permanently limiting the jurisdiction of the Constitutional Court in relation to fiscal matters.
- The power of the Chief Prosecutor to allocate cases should either be repealed, or subject to appeal by the parties affected, as has been included in the Amendment Act with respect to the President of the NJO.
- The authorities should cease the practice of rapidly overturning Constitutional Court judgments with which they disagree. Constitutional change should be a process that is accorded the gravity and time it deserves. A constitutional review should consider the issue of restrictions on the jurisdiction of the Constitutional Court.
- The authorities should provide for the possibility of legal aid for admissible constitutional challenges.
- The authorities should review the constitutional amendments that restrict *locus standi* and the ability of individuals to vindicate their constitutional rights in court.

- The lawyer's oath should be amended so as to include a reference to lawyers' duty of confidentiality towards their clients. Any further reforms to issues affecting the operation of the legal profession should be carried out in full consultation with the Hungarian Bar Association.

Chapter One: Introduction

1.1 This report has been prepared by the International Bar Association's Human Rights Institute (IBAHRI) following its fact-finding mission to Hungary, which took place between 19–23 March 2012. The mission was initiated following concerns at the impact of a series of recently-passed laws, including a new Constitution (the 'Fundamental Law'), on the independence of the judiciary and the legal profession and the situation of the rule of law in Hungary. These concerns included: the implementation of a mandatory retirement age of 62 for judges, causing the immediate retirement of over 270 judges and the transitory provisions to replace them; the creation of a new National Judicial Office (NJO) and the powers and accountability of its President with regard to judicial appointments, supervision and case allocation; changes to the composition and election procedures of the Constitutional Court, limitations to its power to review legislation and the abolition of the citizen's right of actio *popularis*; and issues surrounding the replacement of the President of the Kúria (Supreme Court).

1.2 On 17 January 2012, the European Commission (the 'Commission') launched an accelerated infringement procedure against Hungary in response to the passing of the new legislation and requested further information from the government of Hungary regarding, inter alia, the introduction of the mandatory retirement age for judges and the impact of the legislative changes on the independence of the judiciary. On 25 April 2012 the Commission referred the matter of the new mandatory retirement age to the European Court of Justice.[2] The IBAHRI emphasises that the fact-finding mission was initiated and undertaken independently of this process, however it is intended that this Report and its conclusions and recommendations contained in Chapter Five will make a positive contribution to the national and international dialogue on the issue.

1.3 The terms of the reference of the mission were as follows:

(i) to examine the current status of judges and lawyers in Hungary and their ability to carry out their professional duties freely;

(ii) to investigate impediments, either in law or in practice, to the effective administration of justice;

(iii) to examine the legal guarantees for the effective functioning of the justice system, including the independence of the judiciary and whether these guarantees are respected in practice; and

(iv) to make recommendations with respect to the above.

1.4 The IBAHRI delegation met with a range of members of the executive, the judiciary, the legal profession, civil society and members of the international diplomatic community. Between 19–23 March 2012, the delegation conducted 27 individual and group consultations with key national and international stakeholders, including: the President of the Kúria;

2 European Commission Press Release, 'Hungary: infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary', IP/12/395, (25 April 2012), see: **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML**.

the former President and current Head of Bench at the Kúria; the President of the Constitutional Court; the Chief Prosecutor; the Presidents of the Hungarian and Budapest Bar Associations; the President of the Hungarian Chamber of Civil Law Notaries; the Under-Secretary of State for Justice; the Ministry of Foreign Affairs Commissioner for Policy; the Commissioner for Fundamental Rights; the former President of Hungary and first President of the Constitutional Court; the Deputy Heads of Mission of Denmark, France, Poland, the Netherlands, the Republic of Ireland, the United Kingdom and the United States; former ministers, governmental officials, parliamentarians and members of the judiciary; a wide range of practising lawyers in private practice, as well as law professors and representatives of non-governmental organisations. The IBAHRI delegation was disappointed that its meeting with the President of the newly-created NJO was cancelled at short notice. The IBAHRI attempted to reschedule the meeting, without success.

1.5 The members of the high-level delegation were:

(i) Professor Jerzy Makarczyk (Poland)

Jerzy Makarczyk is a former Secretary of State for Foreign Affairs of Poland (1989–1992) as well as a former Chairman of the Polish delegation to the General Assembly of the United Nations. He served as a Judge at the European Court of Human Rights (1992–2002) and the Court of Justice of the European Union (2004–2009). He acted as negotiator for the Polish government for the withdrawal of Russian troops from Poland in 1990–1991. He was elected President of the Institut de Droit international in 2003 and acted as adviser to the President of the Republic of Poland on foreign policy and human rights between 2002 and 2004.

(ii) Professor Cathi Albertyn (South Africa)

Cathi Albertyn is Professor of Law at the University of the Witwatersrand in Johannesburg, where she specialises in Constitutional Law and Human Rights. She is a former Commissioner of the South African Law Reform Commission (2007–2011) and a former Director of the Centre for Applied Legal Studies (2001–2007). She is qualified as an Attorney of the High Court of South Africa.

(iii) Dr Ronan McCrea (Ireland/Rapporteur)

Ronan McCrea is a Lecturer in the Faculty of Laws at University College London and is a Visiting Professor at the Central European University in Budapest. He was previously référendaire in the chambers of Advocate General Poiares Maduro at the European Court of Justice. He is qualified as a barrister in the UK and the Republic of Ireland.

(iv) Mr Alex Wilks (United Kingdom/IBAHRI Senior Programme Lawyer)

Alex Wilks is a UK-qualified lawyer and Senior Programme Lawyer at the IBAHRI in London. He was previously a legal adviser on human rights issues in the House of Lords. Between 2007 and 2008, he was the IBAHRI's Legal Specialist in Kabul where he worked to establish Afghanistan's first ever national bar association. He has implemented projects in Brazil, Colombia, East Timor, Libya, Macedonia, Mexico, Sri Lanka, Ukraine and Venezuela. He has an LLM in International Human Rights Law from the University of Essex (UK).

1.6 The IBAHRI delegation is extremely grateful for the cooperation and hospitality shown by all those it met during the mission and for the logistical assistance provided by the Hungarian Embassy in London, the British Embassy in Budapest and the Hungarian Bar Association.

1.7 This report is divided into four chapters. Chapter Two provides a brief general historical context, an overview of the relevant legislative changes and political developments and outlines the organisation of the Hungarian executive, legislative, judiciary and legal profession. Chapter Three deals with the concerns arising from the impact of the recent legislative reforms in relation to the courts system and the independence of the judiciary with sub-sections on the removal of the President of the Supreme Court from office, the extensive powers of the President of the newly-created National Judicial Office and the changes in the age of retirement of judges, as well as an analysis of the government's response to these concerns. Chapter Four addresses the broader issue of checks and balances within the Hungarian system. It has sub-sections addressing the relations between the legislature, the executive and the Constitutional Court, and the restriction of the right to make constitutional complaints, along with further sub-sections that address amendments to the criminal procedure, the use of cardinal laws and the participation of the opposition in the constitution-making process and the changes to the lawyers' oath. These substantive sections are followed by the delegation's conclusions and recommendations in Chapter Five.

Chapter Two: Background Information

Historical context

2.1 Hungary adopted Christianity in AD 1000 and for centuries resisted the expansion of Ottoman Turks in Europe. In 1867, it entered into a constitutional monarchic union with Austria, which lasted until the end of the First World War. A year later, Hungary experienced a brief, yet bloody, communist dictatorship and a counter-revolution. The events were followed by a quarter-century long regency of Admiral Miklós Horthy. For most of the Second World War, Hungary fought with the Axis countries. In 1944, it fell under German military occupation after an unsuccessful attempt to switch sides. On 20 January 1945, an armistice was concluded between the Soviet Union and a provisional Hungarian government, which resulted in the creation of the Allied Control Commission. Soviet, British and American representatives held sovereignty over Hungary under the Commission, whose Chairman, Kliment Voroshilov, was a member of Stalin's inner circle.[3]

The communist era and the 1956 uprising

2.2 The Hungarian Communist Party (MKP) dominated the provisional government. After elections in November 1945, it was replaced by a coalition led by the Independent Smallholders Party. In the fraudulent 1947 elections, the communists regained control over the government, following a campaign of terror and blackmail. In 1949, all the political parties were forced to merge with the MKP and the Hungarian Socialist Workers' Party (MszMP) was founded. In the same year, a Soviet-style constitution was adopted, which established the Hungarian People's Republic. The Soviet-style economic model was adopted, with nationalisation of the majority of private industrial firms, forced industrialisation and land collectivisation. Freedom of religion, assembly and the press were limited, leading to a severe political crisis, which culminated in mid-1953. As a result, Imre Nagy took over the office of Prime Minister from Mátyás Rákosi. Nagy renounced much of his predecessor's economic programme. He also halted political persecution and freed thousands of prisoners of conscience.

2.3 However, the economic situation continued to deteriorate and Rákosi resumed the office of Prime Minister in 1955. In the same year, Hungary joined the UN and acceded to the Warsaw Treaty Organization, led by the Soviet Union. In 1956, the continuing discontent with government policies triggered a large-scale popular uprising. The revolution was prompted by the events of 23 October 1956, when security forces opened fire on demonstrating Budapest students. On 25 October, the Central Committee was pressured to reappoint Nagy as Prime Minister. Nagy subsequently dissolved the security police, abolished the one-party system, negotiated withdrawal of the Soviet troops from Hungarian territory and promised free, independent elections. On 1 November, Nagy declared Hungary's withdrawal from the Warsaw Pact, which provoked a massive military intervention launched by Moscow on 3 November. János Kádár, the Party's First Secretary, defected from the Nagy cabinet, fled to the USSR and,

3 Information taken from the Central Intelligence Agency, *The World Factbook: Hungary*, at: **www.cia.gov/library/publications/the-world-factbook/geos/hu.html#**.

on 4 November, announced the formation of a new government. Supported by the Soviets, he returned to Budapest and commenced severe reprisals, which resulted in thousands of people being executed or detained. 200,000 Hungarians fled the country in fear of the reprisals, an occurrence to which an explicit reference is made in the Transitional Provisions Act (Article 2(g) of the Preamble). Despite the fact that the government undertook to guarantee Nagy's safe conduct, he was arrested and deported to Romania. When he was returned to Hungary in 1958, he stood a secret trial and was executed by the Soviet authorities.[4]

2.4 In 1968, Hungary, under Kádár's leadership, began to liberalise its economy. The new policy led to the introduction of the so-called 'Goulash Communism'. It was characterised by the presence of elements of market economy and a better human rights record than in other countries. By the early 1980s, Hungary managed to achieve some lasting economic reforms and also pursued a foreign policy, which invited more trade with the West, although Hungary's foreign debt continued to rise.[5]

Transition to democracy

2.5 By 1987, there was significant pressure from party activists and intellectuals to introduce change. The Federation of Young Democracy (Fidesz) was formed by young liberals and the Association of Free Democrats (SZDSZ) and the Hungarian Democratic Forum (MDF) were established. The regime changes were accelerated in May 1988, when Kádár ceased to be the leader. Between June and September 1989, the so-called 'triangular table' talks took place. An important result of these talks was the establishment of a Constitutional Court and judicial review, which led to the amendment of Article 35 of the Constitution by Parliament. The establishment of a constitutional democracy, in which the Court could act to prevent the concentration of power in Parliament or collusion between the other two branches of government, was not untypical of newly democratic societies seeking to avoid the authoritarian concentration of party power of community regimes and allowed Hungary to become the first former communist country to achieve membership of the Council of Europe in 1990, the same year in which it held its first free, multiparty elections and launched a free market economy.

2.6 Following the popular elections of 1998, Fidesz assumed power for the first time. It ruled in coalition with the Smallholders and the MDF. On 12 March 1999, under the leadership of Fidesz Prime Minister Victor Orbán, Hungary joined NATO. On 1 May 2004, Hungary was admitted to the EU. In autumn 2008, Hungary was severely affected by the economic crisis and Prime Minister Ferenc Gyurcsány stepped down. He was replaced by a technocratic crisis management government led by Gordon Bajnai, the Former Minister of Economy and National Development.[6]

2.7 In the free and independent Parliamentary elections of April 2010, the Fidesz Party obtained 53 per cent of votes, which gave the centre-right political party over two-thirds of seats in the Parliament (68 per cent). Fidesz is in coalition with a smaller Christian-Democratic party,

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

KDNP. The Parliamentary opposition parties include: the Hungarian Socialist Party (MSZP), formerly the MszMP; the far-right nationalist Jobbik party; and Politics Can Be Different (LMP), the Green party. Hungary assumed the six-month rotating presidency of the EU in 2011 for the first time.[7]

Recent legislative changes and political developments

2.8 Having obtained a significant majority in the 2010 elections, the Fidesz Party, led by the Prime Minister Victor Orbán, started to reshape the constitutional order. In its first 20 months in office, the government passed a new Constitution and over 360 laws. The government has argued that there was a strong need for adoption of a newly drafted Constitution, since Hungary was the only post-communist country that had not done so upon its transition to democracy. The laws cover a wide range of issues, including freedom of religion, freedom of expression, elections to Parliament, nationality issues, family protection and the operation of the judiciary.

2.9 With respect to the independence of the judiciary and for the purposes of this Report, the most relevant legislative changes have been the Fundamental Law of Hungary of 25 April 2011 (the 'Fundamental Law');[8] the Transitional Provisions of Hungary's Fundamental Law (the 'Transitional Provisions');[9] the Cardinal Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary (AOAC);[10] the Cardinal Act CLXII of 2011 on the Legal Status and Remuneration of Judges (ALSRJ)[11] and the Cardinal Act CLI on the Constitutional Court (CCA).[12] On 21 July 2012, following the visit of the delegation, the Hungarian Parliament passed Act CXI of 2012[13] that restricted several of the extensive powers of the President of the NJO contained in the AOAC and ALSRJ (the 'Amendment Act').These will be considered briefly below and examined in closer detail in Chapters Three and Four.

The Fundamental Law (Constitution)

2.10 The Fundamental Law was passed on 25 April 2011 and entered into force on 1 January 2012. In its preamble, the Fundamental Law (see paragraphs 2.16–2.18 below) replaces and invalidates the former Constitution as a 'basis for tyrannical rule'.[14] It refers to the Christian tradition of Hungary and seeks to make a clear break with the country's communist past. The preamble also lifts the statute of limitations for 'inhuman crimes committed against the Hungarian nation' during the communist and national socialist era. It also changes the name of the country from 'the Republic of Hungary' to 'Hungary'.

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7 *Ibid.*

8 Available at: **www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf**.

9 Available at: **www.venice.coe.int/docs/2012/CDL-REF(2012)018-e.pdf**.

10 Available at: **www.venice.coe.int/docs/2012/CDL-REF(2012)007-e.pdf**.

11 Available at: **www.venice.coe.int/docs/2012/CDL-REF(2012)006-e.pdf**.

12 Available at: **www.venice.coe.int/docs/2012/CDL-REF(2012)017-e.pdf**.

13 Available at: **www.venice.coe.int/docs/2012/CDL-REF(2012)024-e.pdf**.

14 The National Avowal, The Fundamental Law of Hungary, 25 April 2011.

2.11 The speed and manner in which the Fundamental Law was drafted and passed has raised serious concerns both among Hungarian civil society and the international community. Despite the fact that the government was not legally obliged to hold a referendum on the constitutional changes it introduced, the Hungarian authorities have been criticised for failing to consult the public.[15] Instead of a referendum, the government reportedly distributed questionnaires on the Constitution to eight million voters, promising to take their answers into account.[16] In its plenary session of 17 and 18 June 2011, the Council of Europe's Commission on Democracy through Law (the 'Venice Commission') expressed its concerns about a Constitution that was drawn up in a process that excluded the political opposition as well as civil society and hoped that there would be cooperation between the majority coalition and the opposition in the preparation of the implementing legislation, especially the 'cardinal' or super-majority laws that were to precede or supplement the new Constitution.[17]

2.12 However, approximately 50 cardinal laws were rushed through the Parliament at the end of 2011. Commentators have noted that there was minimal discussion of opposition proposals.[18] As will be discussed in this Report, the delegation heard that Parliamentary Committees rushed through approvals of the laws on party-line votes and amendments were made to laws minutes before the final votes. The Parliamentary Constitutional Affairs Committee always ruled that there had been no violations of parliamentary procedure, decisions reportedly having been made on party-line votes.[19]

2.13 The delegation also heard of the frequent use of private members' bills, which can use a streamlined procedure – including by-passing the consultation stage and their introduction without any prior notice to parties that may be affected by or oppose them – to further the government's legislative agenda. The Constitution itself was adopted using a private members bill and approximately half the cardinal laws were introduced using this procedure.[20] The delegation heard many complaints that the process of drafting and adopting the new Constitution was characterised by a lack of transparency, very limited dialogue between the majority and the opposition and insufficient opportunities for an adequate public debate. The exclusion of the opposition and civil society from meaningful participation in the reform process and its implications are considered in further detail in sections 4.4 to 4.8 of this Report.

Transitional Provisions

2.14 In addition to the passing of many 'cardinal laws' at the end of 2011, the Parliament also passed a massive constitutional addendum, the Transitional Provisions. In passing the Transitional Provisions, the Parliament reportedly asserted that everything contained in them was now part

15 *Ibid; Opinion on three legal questions arising in the process of drafting the new Constitution adopted by the Venice Commission at its 86th Plenary Session* (Venice 25/26 March 2011), Opinion No 614/2011 **www.venice.coe.int/docs/2011/CDL-AD(2011)001-e.pdf**, paras 15–19.

16 'Goulash Soup', *The Economist,* (Budapest, 7 April 2011), see: **www.economist.com/node/18530690**.

17 European Commission for Democracy through Law (Venice Commission), *Opinion on the New Constitution of Hungary*, adopted by the Venice Commission at its 87th Plenary Session, 17–18 June 2011, CDL-AD(2011)016, para 13. See **www.venice.coe.int/docs/2011/CDL-AD(2011)016-E.pdf**.

18 Miklós Bánkuti et al, *Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the key Cardinal Laws* (February 2012), 3 ('Amicus Brief').

19 *Ibid*, p 3–5.

20 *Ibid*, p 4.

of the Fundamental Law, as if it were a constitutional amendment.[21] The Fundamental Law required that Transitional Provisions be passed to clarify how the new Constitution would be brought into effect. As will be examined in further detail, it has been noted that several sections appear to make permanent changes to core provisions of the Constitution.[22]

2.15 The primary purpose of the law was to give governmental institutions and civil society notice of how the new Constitution would be phased in. However, the Transitional Provisions were passed on 30 December 2011, published on 31 December and came into force on 1 January 2012. According to paragraph 2 of the Closing Provisions, the Transitional Provisions form a part of the Fundamental Law. They were adopted in accordance with Articles 19(3)(a) and 24(3) of the Act XX of 1949 (the 'Old Constitution'), to which reference is made both in the Transitional Provisions and in the Fundamental Law. The Old Constitution required a two-thirds majority to amend the Constitution. Under the Fundamental Law, the requirement for a two-thirds majority has been retained and given that the Transitional Provisions are a part of the Fundamental Law, a two-thirds majority is required for their amendment.

2.16 The Transitional Provisions have been criticised, not only for making permanent changes to core provisions of the Constitution, but also for acting like a 'giant collection bin for what should be added to the final Constitution in light of developments since it was passed by Parliament',[23] covering matters such as family policy, taxation, controversial powers of the Chief Prosecutor and President of the NJO, the procedure for registration of religions and restrictions on the powers of the Constitutional Court.

2.17 The Transitional Provisions also criminalises the former MszMP and designates the left-wing party currently in the opposition (MSZP) as the legal successor to the MszMP, since it inherited the communist party's 'illegally amassed wealth' and benefited from 'illegitimate advantages acquired during the transition'.[24] It is not clear either from the Fundamental Law or the Transitional Provisions what consequences the above-cited provisions are expected to have. However, the delegation notes that a potential criminalisation of the main opposition party would undermine the scope for legitimate opposition to the current government under the new constitutional order, as well as Hungary's obligations under the European Convention on Human Rights (ECHR) to uphold the right to freedom of association.[25] The association in a constitution of an official opposition party with criminal allegations regarding a former totalitarian regime also raises questions regarding the quality of the democratic exercise that should have preceded the adoption of such an instrument.

21 See n 16 above, p 5.

22 *Ibid.*

23 *Ibid.*

24 Transitional Provisions, Preambular Paragraph 2.

25 Article 11, ECHR; see also *Affaire Parti Communiste Unifiéet Autres c Turquie* (French), (133/1996/752/951), European Court of Human Rights, [1998], para 42.

Cardinal Laws

2.18 The Fundamental Law provides for the extensive use of cardinal laws to regulate various sectors and they are defined in Article T4 of the Fundamental Law as laws 'the adoption and amendment of which require[s] a two-thirds majority of the votes of Members of Parliament present'. The cardinal laws, which regulate whole subject areas, have been criticised for mixing cardinal sections with ordinary statutory provisions.

2.19 For example, the Venice Commission has found with respect to the laws on the organisation and administration of courts and on the legal status and remuneration of judges, the 'cardinal elements' of these laws should have been restricted to fundamental principles and important rules on the issue and that the merely technical details should have been regulated by ordinary laws, which can more easily be amended by a simple majority in Parliament whenever this is deemed to be necessary.[26] Not all cardinal laws have been passed; those that remain to be enacted include those on Parliament, electoral procedure and party financing. The delegation is alarmed that the Constitution appears to have come into force without crucial parts of its implementing legislation.

European Commission infringement proceedings

2.20 Following the passing of the new legislation under the new Fundamental Law, on 17 January 2012 the European Commission launched an accelerated infringement procedure against Hungary. In their request for further information the European Commission focused on three issues: independence of the national central bank; independence of the judiciary in light of the new mandatory retirement age for judges; and independence of the data protection supervisory authority.[27]

2.21 With respect to the mandatory retirement age for judges, EU Rules on equal treatment in employment (Directive 2000/78/EC) prohibit discrimination at the workplace on grounds of age. Under the case law of the Court of Justice of the EU, an 'objective and proportionate' justification is needed if a government decides to reduce the retirement age for one group of people and not for others.[28] In Hungary's case, the Commission has not found any objective justification for treating judges and prosecutors differently from other groups, notably at a time when retirement ages across Europe are being progressively increased and not lowered.[29] It considered that the situation is even more legally questionable because the government has already communicated to the Commission that it intends to raise the general retirement age to 65.

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26 See n 15 above, paras 22–27.

27 European Commission Press Release, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary' IP/12/24, (17 January2012), at: **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24&format=HTML&aged=0&language=EN&guiLanguage=en**.

28 See Case C-447/09 *Prigge and Others v Lufthansa*, European Court of Justice [13 September 2011], ('*Prigge*').

29 *Ibid.*

2.22 The Hungarian government addressed the European Commission's concerns in their response of 16 February 2012. The authorities defended the questioned laws but at the same time they expressed their willingness to cooperate and amend elements of the contentious legislation. On 20 January 2012 the Hungarian government requested the Venice Commission's opinion on laws relating to the independence of the judiciary, freedom of religion and parliamentary elections. On 25 January 2012, they further requested that the rapporteurs of the Council of Europe Commission also review laws on freedom of information, the Constitutional Court, prosecution, nationalities and family protection. The Venice Commission rapporteurs have visited Hungary twice since the request was made in January.[30]

2.23 On 16 February 2012 the European Parliament adopted a resolution, in which the MEPs expressed their concerns relating to the recent political developments in Hungary.[31] They called upon the Hungarian government to amend the contested laws to make them compliant with the recommendations of the European Commission and the Council of Europe, in particular the Venice Commission. They also urged the European Commission to conduct a thorough study to ensure the full restoration of, that is: the independence of the judiciary; the institutional independence of data protection and freedom of information; the Constitutional Court's full right to review legislation (including budgetary and tax laws); media freedom and pluralism; democratic standards of electoral law; and freedom of conscience under Church Law.

2.24 The European Parliament is due to draft a report assessing the observance of EU common values in Hungary. They will subsequently decide whether or not it is necessary to initiate the Article 7 of the Treaty on the European Union (TEU) procedure against Hungary to investigate the risk of a serious breach of EU principles enshrined in Article 6(1) TEU. The common EU values in question are 'the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. If a breach of these principles is determined, the EU Council may decide to suspend some of Hungary's rights, including the voting right of the representative of the Hungarian government in the Council (Article 7(3) TEU).

2.25 On 20 February 2012, the leader of the Fidesz party's parliamentary group, János Lázár, stated that amendments to laws contested under the EU infringement procedure (the mandatory retirement age for judges, the law on the central bank and the data protection authority) would be promulgated in parliament in the second half of March.

2.26 However, on 7 March 2012, the European Commission decided that despite Hungary's responses to their concerns, 'additional commitments and further clarifications' were needed and requested further clarification on the measures affecting the judiciary and the independence of the country's data protection supervisor.[32]

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30 See *Opinion on three legal questions arising in the process of drafting the new Constitution adopted by the Venice Commission at its 86th Plenary Session*, see n 14 above, and Opinion on the New Constitution of Hungary, see n 16 above.

31 Text of the European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)): **www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2012-0053+0+DOC+XML+V0//EN**.

32 European Commission press release, 'Hungary: Commission continues accelerated infringement procedure', (7 March 2012) IP/12/222, 07/03/2012, see: **http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/222&format=HTML&aged=0&language=EN&guiLanguage=en**.

2.27 The European Commission has therefore sent two reasoned opinions to Hungary – the second stage under EU infringement proceedings after which the matter may be referred to the Court of Justice of the European Union – and two administrative letters. The reasoned opinions concern the independence of the data protection authority and measures regarding the retirement age of judges. The two administrative letters are seeking further clarifications regarding the independence of the judiciary and the independence of the central bank.

2.28 The European Commission considered that, with respect to the mandatory retirement age, Hungary had not provided an objective justification regarding independence of the judiciary. The Commission required further clarification regarding the powers attributed to the President of the NJO, particularly the President's powers to designate a court in a given case and the transfer of judges without consent. The Commission has also raised concerns with regard to potentially systemic deficiencies in Hungary's justice system.

Vice-President Viviane Reding, the EU's Justice Commissioner, said:

> 'Hungary has responded to some of the Commission's legal concerns, but we still have serious questions regarding potential violations of EU laws as regards the anticipated compulsory retirement of 274 judges and public prosecutors in Hungary and the independence of the Hungarian data protection authority. Now that the Commission has moved to the second stage of the infringement process, it is essential that the Hungarian authorities address the Commission's legal concerns swiftly. I would like to see real changes to the legislation in question to alleviate the Commission's legal concerns.'

2.29 The Venice Commission's opinions on the issue of the changes to the Hungarian judiciary were adopted in March 2012. In April 2012 the Hungarian government announced a series of proposed legislative amendments that were intended to amend the relevant cardinal laws to address the Venice Commission's concerns, which are analysed in further detail in paragraphs 3.36–3.44. On 25 April 2012 the Commission announced that it was not satisfied with the explanations provided by the Hungarian government and that it would bring a challenge to the European Court of Justice regarding the changes in the retirement age applicable to judges.[33]

2.30 On 16 July 2012, the Constitutional Court decided that the lowering of the retirement age for judges was unconstitutional because the sudden and unclear manner in which it was implemented violated security of tenure – a fundamental tenet of the independence of the judiciary.[34] Furthermore, the legal reforms introduced on 21 July 2012 relating to the powers of the President of the NJO, did not address the issue of the retirement age.

33 European Commission, Press Release, see n 2 above.

34 Constitutional Court decision No: IV/2096/2012 of 16 July 2012

Executive

2.31 The President of Hungary is elected by the National Assembly for the term of five years, with a possibility of re-election for the second consecutive term. To win the elections, the President must obtain two-thirds of legislative votes in the first two rounds or a simple majority in the third round. Pal Schmitt, a member of the Fidesz, took office in August 2012 but, following a scandal, resigned as President in April 2012 to be replaced by László Kövér, the acting President. The head of government is elected by the National Assembly on presidential recommendation. Victor Orbán is currently serving as Prime Minister. He was elected on 29 May 2010. Ministers of the Cabinet are appointed and relieved by the President on the Prime Minister's recommendation.[35]

Legislature

2.32 Országgyűlés, or the National Assembly, is unicameral. The 386 members of Parliament are elected by popular vote for a term of four years. The last elections were held on 11 and 25 April 2010 and the next are scheduled for April 2014. Results of the last elections (per cent of vote by party) are as follows: Fidesz 52.7 per cent; MSZP 19.3 per cent; Jobbik 16.7 per cent; LMP 7.5 per cent. This originally translated into the following number of seats per party: Fidesz: 263; MSZP: 59; Jobbik: 47; LMP: 16; Independent: 1. For the party representation in Parliament, five per cent or more of the votes are required in the first round. The Democratic Coalition, a centre-left party, was created on 22 October 2011, when ten members of the MSZP decided to leave the left-wing party. On 7 November 2011 the Parliament's Constitutional and Procedural Committee decided that the Democratic Coalition would not be able to form a new parliamentary fraction until spring 2012. According to the rules of procedure, an MP who left a political party or was expelled from it must sit as an independent MP for six months. Following the changes, the current composition of the National Assembly is as follows: Fidesz: 263; MSZP: 48; Jobbik: 46; LMP: 15; Independent: 14.[36]

Judiciary

2.33 The Constitutional Court was established in 1989, with 11 judges selected by a representative parliamentary committee, thus avoiding one party dominating the selection. After the constitutional changes of 2011, this number increased to 15 Constitutional Court judges, who, according to the new Fundamental Law, are elected for a single term of 12 years by two-thirds majority vote in the National Assembly.[37] The length of the judicial mandate was increased from nine to 12 years. The President of the Constitutional Court is elected from among the members of the Court, also with two-thirds parliamentary majority, to serve as the President until the end of his/her mandate as the Court member.[38]

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35 See n 1 above.

36 *Ibid.*

37 Fundamental Law, Art 24(4).

38 *Ibid.*

2.34 The Kúria, formerly the Supreme Court, is the highest Court. The President of the Kúria is elected by the National Assembly with two-thirds majority vote. All the other Kúria judges are appointed by the President of the Republic, on the recommendation of the President of the NJO. If they are already serving as judges at other courts, the appointment procedure does not require involvement of the President of the Republic. Judges of the lower courts (the Regional Courts of Appeal, the 20 county courts etc) are appointed by the President of the Republic on the recommendation of the President of the NJO. The President of the Republic, who is elected by the National Assembly, is not bound by the recommendation of the President of the NJO.

Lawyers and bar associations

2.35 The structure and organisation of the Hungarian legal profession is governed by the Act XI of 1998 on attorneys at law. The profession is organised into bar associations, which are self-governing public bodies, independent of the State and established by an Act of Parliament. They regulate membership of the legal profession and the conduct of lawyers. Their duties include: maintenance of the public register of attorneys; monitoring the conduct of lawyers; representing attorneys' interests; provision of continuous training for lawyers and future lawyers; initiation of disciplinary proceedings and making decisions on membership and its termination.[39]

2.36 The Hungarian Bar is comprised of the Hungarian Bar Association and 20 regional bar associations (including the Budapest Bar Association). The former operates at the national level and regional bar associations are its members. The regional associations are public bodies with independent budgets and each has a representative and administrative apparatus. Their operational areas correspond to the areas of jurisdiction of county courts. They fulfil the duties assigned to their geographical jurisdictions. All of the attorneys practising in the given territory are members of the respective regional association, whose membership is mandatory.

2.37 There are four types of legal professionals in Hungary: attorneys; associate attorneys (they are employed by a law firm but may work under an attorney's supervision only); European Community Jurists; and Foreign Legal Counsels. Only attorneys are members of the bar association; however, every legal professional (including trainee attorneys) must be registered with a bar association and is subject to its supervision. There are approximately 9,000 registered attorneys in Hungary.[40] Around 60 per cent – 5,200 – are registered with the Budapest Bar Association, which is the oldest and most significant public body of attorneys in Hungary.[41]

39 Márta Pardavi, *The Legal Profession in Hungary*, (October 2008), at **www.osce.org/odihr/36305**.

40 The Budapest Bar Association's official website, at **www.bpugyvedikamara.hu/main_page**.

41 *Ibid.*

Chapter Three: Independence of the Judiciary

3.1 Independence of the judiciary is fundamental to the rule of law and the separation of powers, whereby the executive, legislative and judiciary form separate branches of power which constitute a system of checks and balances aimed at preventing abuses of power. This independence means that both the judiciary as an institution and also individual judges when deciding particular cases must be able to exercise their professional responsibilities without being influenced by the executive, the legislature or other inappropriate sources. For example, the Canadian Supreme Court has noted that judicial independence:

> 'connotes not only a state of mind but also a status or relationship to others – particularly to the executive branch of government – that rests on objective conditions or guarantees…. [This] involves both individual and institutional relationships; the individual independence of the judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government.'[42]

3.2 The principle of an independent judiciary is well established in international law as an essential element of the right to a fair trial and is enshrined in several treaties to which Hungary is party, in particular Article 6 of the ECHR, Article 47 of the EU Charter of Fundamental Rights and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Further guidance is provided by the UN Basic Principles on the Independence of the Judiciary, which were unanimously endorsed by the UN General Assembly and represent universally accepted views on this matter.[43] Domestically, the independence of judges is guaranteed by the new Fundamental Law, specifically in Article 26.1 and more generally, as an aspect of the separation of powers, which is set down in Article C.1.

3.3 The delegation heard that, between 1997 and 2011, the Hungarian judiciary exercised almost complete self-governance although many of those to whom it spoke conceded that this system was inefficient in many respects, particularly in terms of court administration and case backlogs, and required reform. However, the delegation heard widespread concern in relation to the solutions chosen by the government and the degree to which the recent legislative reforms have restricted the independence of the judiciary in Hungary, in particular the AOAC and the ALSRJ, taken in conjunction with the Fundamental Law and the Transitional Provisions.

3.4 In this regard, the delegation examined three specific developments that appear to be of particular concern: (i) the circumstances surrounding the removal of the former President of the Supreme Court, András Baka; (ii) the wide-ranging powers given to the President of the

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42 *Valiente v The Queen* 2 SCR 673 (1985).

43 *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985 (Available at Annex 4). See also the *Bangalore Principle of Judicial Conduct2002*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Roundtable Meeting of Chief Justices held at the Peace Palace, The Hague, 25–26 November 2002.

newly-created NJO, Tunde Hando, and the corresponding lack of oversight powers given to the NJC; and (iii) the entry into force of a mandatory retirement age of 62 for members of the judiciary, causing the immediate retirement of over 270 judges.

3.5 On 21 July 2012, the Hungarian Parliament passed the Amendment Act which restricted several of the broad-ranging powers of the President of the NJO and increased the oversight capacity of the NJC. Although this occurred after its visit, the legislative solutions contained in the Act address several of the concerns identified by the national and international community, in particular the Venice Commission, which has also compiled a report on this issue.[44] For the purposes of this Report, the offending legislative provisions that were in place at the time of the delegation's visit will be considered as well as the extent to which the amending legislation has addressed these concerns.

Removal of the President of the Supreme Court

3.6 András Baka was appointed to a six-year term as President of the Supreme Court by the Hungarian Parliament in June 2009.[45] He had previously been a judge on the European Court of Human Rights between 1991 and 2007. Under the law applicable at the time (Act LXVI of 1997 on the Organisation and Administration of the Courts), the President of the Supreme Court was one of the 'court executives' responsible for the management and administration of courts whose term of office is six years.[46] Under Article 73 of the relevant law, the term of office of a court executive can only be terminated before the expiry of the period of the mandate by mutual agreement, resignation or dismissal. Dismissal is only possible in cases of incompetence.[47]

3.7 The delegation heard that Mr Baka had been outspoken against the some of the policies of the new Fidesz government in relation to the justice system on a number of occasions. His first public criticism related to the 'Nullity Act',[48] which nullified certain convictions relating to the civil unrest of autumn 2006,[49] on the basis that the law interfered with the right of judges (rather than the legislature) to assess evidence and decide on individual cases. In April 2011, Mr Baka criticised the proposal to impose a mandatory retirement age of 62 for judges and in August the same year he made use of his prerogative as the President of the Supreme Court to challenge acts before the Constitutional Court in order to contest the validity of certain reforms of the Code on Criminal Procedure, permitting the Chief Prosecutor to move cases to particular courts. The delegation also heard that Mr Baka had been critical of the cardinal acts on the judiciary introduced to Parliament in October 2011, which provided for the abolition of the National Council of Justice and its replacement by the NJC and NJO.

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44 Opinion of the Venice Commission on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of the Courts of Hungary (Adopted by the Venice Commission at its 90th Plenary Session, Venice 16–17 March 2012).

45 Decision 55/2009, 22 June 2009.

46 A subset of court executives, the presidents of judicial panels, are elected to indefinite terms.

47 Act LXVI on the Organisation and Administration of the Courts of 1997, ss 73 and 74.

48 Act XVI of 2011.

49 Civil unrests of 2006 refer to the large scale protests beginning in late 2006 and continuing to early 2007. On 18 September 2006 a massive demonstration was held near the Hungarian Parliament. The protests, allegedly attended by 40,000 people, concerned the audio recording, which surfaced on 17 September 2006, on which the then Prime Minister Gyurcsány admitted to lying to the public for a couple of years, including lying about budget deficit.

3.8 In April 2011, members of the ad hoc parliamentary committee charged with drafting the new Constitution, including its Vice-Chair, had asserted that although the Bill provided that the Supreme Court would be renamed the 'Kúria', this would merely be a change in the name of the Court and that the President of the Supreme Court would continue in office as President of the renamed 'Kúria'.[50] In October 2011, Bill T/4743, which was later passed as the AOAC, was introduced. It provided that court executives appointed prior to 1 January 2012 would serve out the entirety of their mandate. However, in defining 'court executives' the Bill listed all court presidents other than the President of the Supreme Court.[51]

3.9 On 19 November 2011, shortly before the final vote on the draft AOAC, the Vice-Chair of the Constitutional Affairs Committee submitted Bill T/4996, which provided that Parliament would elect the President of the Kúria before 31 December 2011. This was followed by a further Bill T/5005, which was introduced on 20 November 2011 and provided for the termination of the mandate of the President of the Supreme Court upon the entry into force of the Fundamental Law. Further, the new criteria for the election of the President of the Kúria introduced in the AOAC (section 114), discounted judicial experience in European Courts thus rendering Mr Baka, who had spent 17 years as Hungary's judge in the European Court of Human Rights but less than the new requisite five years as a judge in Hungary, ineligible for appointment. Accordingly, Mr Baka's mandate as President of the Supreme Court was terminated on 1 January 2012 and he was replaced by Péter Darák.

3.10 The delegation was not convinced by the arguments presented to it by government officials that the competences of the Kúria and the former Supreme Court are significantly different, with the Kúria dealing with more substantive rather than administrative legal matters, and that therefore Mr Baka was no longer considered to have sufficient judicial experience for the position. The delegation notes that while certain of the administrative powers exercised by the President of the Supreme Court through the NCJ have indeed been transferred to the NJO, in relation to the administration of the courts there do not appear to be major differences between the jurisdiction of the Supreme Court and the Kúria. As Article 11 of Bill T/5005 made clear, 'The successor to the Supreme Court, to the National Council of Justice as well as to its President, shall be the Kúria in respect of administering justice'. Further, the delegation was surprised to hear the argument that Mr Baka did not have the requisite experience, given that he had already served as President of the Supreme Court and had almost two decades' experience at the European Court of Human Rights, which requires its judges to have the proper qualifications for 'high judicial office' or equivalent *jurisconsult* credentials. In fact, the delegation considers such experience could actually have been extremely useful for the position of President of the Kúria.

3.11 Mr Baka's removal has created the highly unusual situation where all court executives and all members of the former Supreme Court remained in their posts during the transition and only its President was removed following the enactment of a retroactive and *ad hominem* regulation. The delegation found that Mr Baka's criticisms of the 'Nullity Law' and the government's recent legislative reforms and the subsequent rapid introduction of legislation that specifically

50 See debate on Fundamental Law of 14 April 2011 on Inforadio available at **http://inforadio.hu/hir/befold/hir426973**.

51 Bill T/4743 of 2011, s 118(1).

terminated his mandate and made him ineligible for re-appointment, has created the widespread perception that the government has deliberately used the reform process to remove him from office. Furthermore, the delegation agrees with the Venice Commission that laws such as these, which are generally formulated but directed against a specific person, are contrary to the rule of law.[52]

3.12 The delegation is concerned that the premature termination of the mandate of Hungary's most senior judicial post through the introduction of a retroactive law violates the guarantee of security of tenure that is essential for the independence of the judiciary.[53] The delegation is further concerned as to the contribution this may make towards a 'chilling effect' among members of judiciary, with judges fearful of the consequences of being critical or returning decisions that are not aligned with the policies of the executive in the future. This concern is accentuated by the centralised powers of the politically-appointed President of the new NJO, Tünde Handó, who controls the appointment, administration and supervision of the judiciary, and the lack of meaningful oversight powers provided to the new NJC, which are discussed in further detail below.

Powers of the President of the National Judicial Office and the National Judicial Council

3.13 Prior to the recent reforms, court administration in Hungary was largely the responsibility of the NCJ. The delegation heard that this provided for almost complete judicial autonomy, both politically and operationally. While such a system is clearly beneficial in terms of ensuring judicial independence, the delegation heard numerous criticisms of the functioning of the former Council. In particular, it heard that the Council had failed to reform the boundaries and structures of local courts, many of whose geographical boundaries had been established as long ago as the late 19th century and were no longer appropriate. This has been said to have led to the overburdening of certain courts, most notably those in the Budapest metropolitan area. The efficacy of the Council was also said to have been undermined both by the fact that it met only monthly and because leading members of the Council succeeded in blocking reforms that may have impinged on the operation of their own districts.

3.14 The delegation heard from members of the government, former and sitting judges and members of the legal profession that the administration of the courts system was in urgent need of reform in order to increase its efficiency. However, the delegation considers that while the intention to reform the administration of the judiciary in order to improve its efficacy is to be welcomed, aspects of the specific legislative reforms chosen by the government are clearly problematic.

3.15 The reforms placed the administrative powers held by the National Council of Justice and its president (the President of the Supreme Court) into the hands of two new bodies – the NJO and the NJC. Under the AOAC, the NJC is mandated to examine the administration of the courts by the President of the NJO and to signal any problems.[54] The delegation heard that it

52 See n 43 above, para 112.

53 See Principles 11 and 12 of the *United Nations Basic Principles on the Independence of the Judiciary*, n 42 above, and Recommendation I.3 of the Council of Europe Recommendation No R (94) 12 of 13 October 1994.

54 AOAC, s 103.

served a largely consultative function with little determinative authority. Instead, section 76 of the AOAC provides the President of the NJO with a vast array of powers relating to judicial appointments, case allocation, administration, management and supervision, and thus vested extensive power over the judiciary in one politically-appointed individual. These powers were further augmented by the ALSRJ and other provisions of the AOAC which taken together, provided the President of the NJO with 66 competences in total. However, following the widespread alarm of the national and international community regarding these powers and their impact on the independence of the judiciary,[55] on 21 July 2012 the Hungarian Parliament passed the Amendment Act that amended the AOAC and ALSRJ, restricting certain of the competences of the President of the NJO and increasing those of the NJC.

Powers over judicial appointments

3.16 Section 4.1 of the ALSRJ outlines the procedure for judicial appointments, which provides for the President of the NJO to propose candidates to the President of the Republic for approval. Before an application for a judicial position is referred to the President of the NJO, it is assessed by a panel of judges. The panel of judges is comprised of representatives of the court to which the application for a judicial position was made.[56] The panel awards points to each of the applicants, according to the criteria outlined in section 14(4) ALSRJ, for example performance in interview or training courses undertaken. Based on the scores the panel of judges drafts a ranking list of the three best applicants, which is subsequently forwarded to the President of the NJO. The panel of judges may not depart from the score-based ranking.

3.17 According to the ALSRJ, the President of the NJO was able to depart from the initial ranking list proposed by the panel of judges and, instead of the candidate with the highest score he or she was able to nominate the second or third best candidate for judicial appointment. If the President decided to do so, he or she is obliged to submit a justification to the NJC. However, President's choice was final.

3.18 Section 128 AOAC provides the President of the NJO with the power to appoint court leaders, in particular the division heads of courts of appeal and tribunals and the heads and deputy heads of the regional administrative and labour divisions. Similarly, the President of the NJO was not bound by the recommendation of the reviewing board[57] and could proceed with an appointment even if the NJC disagreed.[58]

3.19 These changes to the judicial appointments procedure were widely criticised for giving the opinion of the President of the NJO excessive weight in the appointment of the judiciary and for creating the risk that the President could appoint favoured candidates, particularly in view of the large number of vacancies created by the forced early retirement of over 270 judges.[59] Although the actual procedure provided merit-based and objective criteria for the appointment

55 In particular the Venice Commission, which concluded that 'The main problem is the concentration of powers in the hands of one person, ie the President of the NJO.' At section 118, n 45 above.

56 ALSRJ, s 14–16.

57 AOAC, s 132(2).

58 AOAC, s 132(6).

59 See n 27 above.

of judges, at the time of its visit the delegation considered that the discretionary power for the President of the NJO to depart from the list of the reviewing board and the absence of any veto power by the NJC significantly reduced the safeguard of objective candidate selection essential to the independence of the judiciary.[60]

3.20 This has been addressed to some extent by the Amendment Act. The NJC has the power to define the principles to be taken into account when President of the NJO defers from the ranking list[61] and may exercise the right of veto in cases where the President defers from the ranking list or the majority of the nomination body.[62] However, in the event that the NJC does not agree with an appointment, the President of the NJO retains the power to declare the call for applications invalid or unsuccessful.[63] Therefore, if the President of the NJO does not agree with the decision of the NJC, he or she can prevent the first-ranked candidate from being appointed by declaring the call for applications unsuccessful.

3.21 The appointment powers of the President of the NJO have been curbed in other respects. Importantly, applicants may challenge the decision of the President of the NJO with respect to judicial nominations before the administrative and labour courts.[64] NJC has also been afforded extra powers including the right to nominate the president and members of service courts, the right to consent to the repeated nomination of the presidents and deputy presidents of regional appellate courts and the right to agreement of nominations for managerial court positions when the applicant did not receive the consent of the opinion forming body.[65]

Powers over case allocation

3.22 Under the original reforms, the President of the NJO had been allocated extensive powers over case allocation. Section 9 AOAC provides that the President of the respective court should have set the distribution schedule of cases by 10 December the previous year 'based on the opinions of the chamber of judges and colleagues'. Section 9(i) AOAC provided for exceptions based on 'important reasons affecting the operation the court or in the interests of the court' and section 76(4)(b) AOAC enables the President of the NJO to designate another court to adjudicate upon a case instead of the presiding court if this is necessary in order to attain the objective of adjudicating cases within a 'reasonable period of time'.

3.23 The ability of a government-appointed official to allocate cases raises serious issues in terms of the right to a fair trial as it potentially affects the independence and impartiality of tribunals required by Article 6 ECHR.[66] The delegation heard that the rationale behind this extensive power was to improve the efficiency of the court system. However, while it is clearly important for the heads of judicial administration to be able to improve the efficiency of the court system – and consequently not necessarily unusual for them to have the power to assign cases to

60 'Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience'. Principle 13, *United Nations Basic Principles on the Independence of the Judiciary*, see n 42 above.

61 Section 7 (4)(b).

62 Section 15.

63 *Ibid.*

64 Section 5 (4)(b).

65 See n 63 above.

66 See above n 56, para 86.

individual judges – such a power carries with it the danger of misuse because politically sensitive cases may be assigned to certain judges. In order to avoid this danger, it is therefore critical for the allocation of cases to be based on objective and transparent criteria rather than exclusive discretion.[67]

3.24 This danger had in fact already been identified by the Hungarian Constitutional Court, which found that the criterion contained in the AOAC that the President of the NJO and the Chief Prosecutor may designate courts so that cases may be adjudicated within a 'reasonable period of time' to be too discretionary and contrary to Article 6 ECHR.[68] However, this power was merely reinstated in the Transitional Provisions of the new Constitution.[69] As will be noted below in section 3.27, the first use by the President of the NJO of this power was to assign cases that were politically sensitive.

3.25 The discretionary nature of this power has been curbed by the Amendment Act, which provides that the President of the NJO must only allocate cases with due respect for the principles set out by the NJC[70] and must also detail in her decision the implementation of those principles.[71] Furthermore, the decision to allocate is subject to appeal to the Kúria by the parties in the case and the Kúria may repeal the decision.[72] The enunciation of clear and transparent principles for case allocation by the NJC and the inclusion of the right of the parties to appeal would provide an important check on one of the most controversial powers of the President of the NJO.

Powers over judicial administration and supervision: transfer of judges, evaluation and law standardisation

3.26 In addition to the above, the President of the NJO has numerous powers covering a wide range of aspects of court administration and management, the most significant of which are as follows. The President is able to transfer judges when the territorial jurisdiction no longer justifies the retention of a judicial position there.[73] If the judge does not agree with the transfer, he or she is automatically 'exempted from office for six months and his or her service relationship is terminated'.[74] The Venice Commission notes that this appears to be an overly harsh automatic sanction and highlighted the importance of clear and proportional rules for such actions, as well as a right of appeal.[75] The President may also: determine the number of judges for various courts (administrative, labour, district courts); choose the posting of newly appointed judges (in accordance with the ASLRJ); post judges to the Kúria, the NJO and to the Ministry of Justice and shall decide upon the termination of the appointment and re-appointment of the judge to an actual judicial position; adopt a decision on the transfer of judges; adopt a decision on the posting of judges to another service venue (in accordance with the ASLRJ) and appoint and

67 Council of Europe Recommendation CM (2012) 12, para 24.

68 Judgment No 166/2011 of 20 December 2011.

69 Transitional Provisions, arts 11(3) and 11(4).

70 Section 2 of the Amendment Act.

71 Section 3 of the Amendment Act.

72 *Ibid.*

73 ALSRJ, s 34.

74 ASLRJ, ss 90(j) and 94 (3).

75 See n 45 above, para 79.

relieve the court leaders as defined by law.[76] The President may also: assign a judicial position to another court;[77] give orders on temporary assignments of judges to other courts without the consent of the judge concerned;[78] and provide posts to judges who have worked at the NJO to judicial posts 'without the invitation of applications'.[79]

3.27 The President of the NJO has the power to determine the content of evaluation rules for judges as well as the cases that must be evaluated.[80] It is notable that in the case of an ineligible evaluation grade a judge may be asked to resign by the chair of the court without the possibility of discussing the outcome of the evaluation. Only after the refusal of the judge to resign from office could he or she appeal to the court of first instance.[81] It therefore appeared that due process rules are applicable only after the judge has been requested to resign and has refused to do so, therefore raising concerns under Article 6 ECHR.[82]

3.28 Some of the above-mentioned powers have been limited to an extent by the Amendment Act which obliges the President of the NJO to provide reasons for his or her decisions to exercise those powers regarding her central administrative authority contained in section 76 of the AOAC, although this must only be 'in accordance with necessity'; a somewhat vague criterion.[83] Significantly however, the Amendment Act provides that the regulations prepared by the President of the NJO with respect to judicial administration may be subject to constitutional review and that judges may challenge decisions of the President of the NJO in relation to human resource or service relations issues, including judicial transfer and evaluation, before the administrative and labour courts.[84] Making the binding decisions of the President of the NJO subject to judicial challenge significantly increases his or her accountability. Certain extra powers have also been transferred from the President of the NJO to the President of the NJC under the Amendment Act relating to declarations of conflicts of interest and consent regarding shorter retirement periods.[85]

3.29 The President of the NJO was also able to initiate and play a prominent role in disciplinary proceedings and to initiate the 'law uniformisation procedure' by which the Kúria ensures the consistency of the interpretation of law by lower courts in particular areas.[86] The Venice Commission noted that while the uniformity procedure has its roots in 19th-century Hungarian legal history, the system established in the AOAC provides for an active interference in the administration of justice.[87] In particular, heads of courts and tribunals are obliged to inform the higher levels of courts of judgments returned contrary to 'theoretical' issues or grounds[88] and data such as 'decisions of second instance and review decisions' form a part of the evaluation

76 AOAC, s 76.
77 ASLRJ, s 9(3).
78 *Ibid*, ss 31(1) and 31(3).
79 *Ibid*, s 58(3).
80 *Ibid*, s 67.
81 *Ibid*, s 79.
82 See above n 56, para 80.
83 Section 5 of the Amendment Act
84 *Ibid*.
85 Section 28 of the Amendment Act.
86 AOAC, s 24; Fundamental Law, Art 25(3).
87 See n 45 above, para 72.
88 AOAC, ss 26 and 27.

of judges. This would effectively turns court presidents into supervisors of the adjudication of the judges in their courts and that non-compliance with rulings of higher courts may negatively influence the evaluation of judges, which may have a 'chilling effect' on the independence of the individual judge.[89] Furthermore, combined with the influential role of the President of the NJO in the disciplining and evaluation of judges, the law standardisation procedure would have added to his or her dominant position. However, the delegation is pleased to note that under section 1 of the Amendment Act, the President of the NJO is no longer entitled to propose the initiation of the law standardisation procedure.

Election and accountability of the President of the NJO

3.30 The President of the NJO is elected by Parliament by a two-thirds majority from among judges who hold their office indefinitely and who have at least five years of judicial service. The President holds office for nine years.[90] Strikingly, if it is not possible to obtain a two-thirds majority for a new President upon expiration of the nine-year mandate, the incumbent was able to remain in post until such a majority can be achieved.[91] The delegation heard widespread concerns that the legislative reforms created the significant possibility, in the event that a future parliament cannot achieve a two-thirds majority that the current President may be able to remain in office indefinitely. This possibility has been removed by the Amendment Act, which provides that the President of the NJO shall be substituted in the first instance by the deputy President of the NJO,[92] although the term of office of the President of the NJO remains unchanged and he or she may still be re-elected indefinitely.

3.31 The delegation further notes that under the Amendment Act, in situations where the Parliament is unable to elect a new President, provisions for an interim president have been included, for example, that the Deputy President of the NJO, or other substitutes appointed by the President of the NJO where the Deputy President is unable to fulfil the role, shall act as an interim President until a successor has been appointed. When no NJO member is able to fulfil the role, then the tasks and duties of the President of the NJO shall be performed by the President of the NJC.[93] This is an improvement on the possibility that the President of the NJO may remain in the position until a successor has been appointed. However, given that the Deputy President of the NJO as well as other substitutes are directly appointed by the President of the NJO, the position clearly remains under the potential influence of the incumbent President. In order to avoid this danger, it would be preferable for these substitute tasks and duties to be performed by the President of the NJC in the first instance, rather than the Deputy President of the NJO and other deputies of the NJO.

3.32 Furthermore, the NJC is composed of judges who are subject to the administrative authority of the President of the NJO who currently ensures the operational conditions of the NJC. Under the Amendment Act, the NJC now has the power to determine its own budget, however

89 See n 45 above, paras 72 and 73.

90 AOAC, s 66.

91 *Ibid*, s 70.4.

92 Section 6 of the Amendment Act.

93 *Ibid.*

this is subject to the agreement of the President of the NJO and the NJO must also guarantee the operational conditions for the NJC.[94] As noted by the Venice Commission, 'the President of the NJO controls those who should control the President',[95] which brings into question its ability to carry out effective independent scrutiny. Finally, the President of the NJO may only be removed by a two-thirds parliamentary majority via a motion to Parliament by the President of Hungary or by the NJC on the narrow grounds of 'unworthiness of his/her position'.[96] While security of tenure is of fundamental importance to the independence of the judiciary and the NJC has been granted with certain veto rights over the actions of the President of the NJO, the delegation considers that the concentration of such broad-ranging powers in the hands of one politically-appointed individual for a potentially indefinite period of time and with high procedural obstacles for removal risks jeopardising judicial independence.

3.33 The delegation was disappointed that its meeting with Tünde Handó was cancelled at short notice and requests to reschedule were unsuccessful. However, the delegation heard in several of its meetings complaints regarding the appropriateness of the appointment of the first President of the NJO, Mrs Handó. While the delegation understands that Mrs Handó is a well-qualified, efficient and respected member of the judiciary, her close connections to the ruling Fidesz party – she is married to Fidesz MEP József Szájer who played a prominent role in drafting the new Constitution – have led to speculation as to her perceived independence from the executive branch. Although the delegation stresses that it does not consider such a connection in itself to indicate a lack of professional independence, such speculation has not been helped by Mrs Handó's first use of her case transfer powers.

3.34 The cases involve a highly politically-sensitive corruption trial of an opposition politician away from a court in the Budapest region to a court in another district[97] and to transfer the appeal of a Fidesz politician against his corruption conviction to Debrecen.[98] Although this power has been curbed and any decision is now subject to appeal. The delegation is concerned that the power was used to transfer cases in such politically sensitive trials. In any event, whether the decisions to effect such transfers were politically motivated or not, the delegation considers that they create a perception of proximity to the executive branch and risk jeopardising public confidence in the independence of the justice and the fair and impartial administration of justice.

Changes in the mandatory retirement age for judges

3.35 A further controversial element of the recent reforms in Hungary has been a significant reduction in the age of retirement applicable to judges.[99] Prior to the reforms, the minimum retirement age was 62 but judges had the option of remaining in office until they reached the upper age-limit of 70. Article 12 of the Transitional Provisions and the ALSRJ has retroactively removed this right and requires retirement at 62 other than in the case of 'certain public law

94 Section 8 of the Amendment Act.

95 See n 56 above, para 40.

96 AOAC, s 74(1).

97 The relevant case is the trial of former Budapest Deputy Mayor Miklós Hagyó on corruption charges whose case was transferred to from Budapest to Kecskemét. Several individuals who spoke to the delegation noted that the President of Kecskemét County Court was one of the relatively small number of judges who did not sign a petition protesting against the government's judicial reforms.

98 The case in question is the appeal of former Fidesz economic adviser Tamás Varga against a conviction for embezzlement.

99 The changes also affect some other public officials such as prosecutors (other than the Chief Prosecutor) and notaries.

officers' such as the Chief Prosecutor, the President of the Court of Auditors and the judges of the Constitutional Court. The European Commission has launched accelerated proceedings against the Hungarian government arguing that the sudden reduction in the retirement age lacked objective justification and breached EU law in relation to discrimination on grounds of age in employment. The Commission issued a Reasoned Opinion setting out its view that a breach of EU law had occurred in January. On 25 April 2012 it announced that 'Hungary did not provide an objective or coherent justification for its measures'[100] and announced that it has decided to take a case against Hungary to the Court of Justice of the European Union.

3.36 It was pointed out to the delegation that under the previous rules, it was possible for judges both to draw a pension and earn a salary between the ages of 62 and 70, an arrangement that could readily be seen as unfair and ripe for reform. However, the delegation considers that any unfairness resulting from the payment of both salary and pension between the ages of 62 and 70 could easily have been resolved by postponing payment of judicial pensions until judges had actually retired.

3.37 The approach chosen by the government has the effect of causing a very large amount of retirements in a short period of time. It is estimated that almost one judge in ten will be forced to retire in the very near future due to this change. In practice it has had a disproportionate impact on the upper echelons of the judicial system, meaning that more than 270 judges have been immediately forced to retire. Thus, a significant number of judges who were carrying out their functions in a satisfactory manner and who were entitled to continue to do so were suddenly subject to a dramatic shortening of their mandate and faced forced retirement.

3.38 The delegation was unable to obtain any consistent or convincing rationale for these changes from the government officials it met. The Vice-Chair of the Parliament's Constitutional Affairs Committee that drafted the relevant legislation, asserted that the objective of the reforms was to reallocate judicial resources from higher to lower courts by retiring higher court judges and replacing them with judges at lower levels, as well as building the capacity of, and career opportunities for, younger judges. However, while the intention to build the capacity and progress of the junior judiciary and to increase efficiency is to be welcomed, the delegation was unable to grasp how the imposition of a mandatory retirement age for judges could effect this fairly and efficiently. Furthermore, given that lower courts are so much more numerous than higher courts, the number of higher court judges whose vacant posts will not be filled and who will be replaced by colleagues at a lower level is, according to a range of lawyers interviewed by the delegation, too low to have any appreciable impact on the operation of the system at lower levels.

3.39 The Minister of State for Justice insisted that the objective was to remove discrimination within the pension system. It is unclear, however, how this objective has been achieved, given that the new age limit has not been applied in other areas. In addition, the objective of equalising the pension age could have been achieved without creating an enormous amount of vacancies at once and without reducing the mandates of sitting judges by introducing the lower age for new judges while maintaining existing conditions for sitting judges. Such an approach has been used

100 European Commission Press Release, see n 2 above.

in other countries where the retirement age of judges was changed.[101] The explanation becomes even less credible when it is considered that the general retirement age is in the process of being raised from 62 to 63 in 2014 and to 65 in the long term.

3.40 The Minister's Commissioner responsible for departmental policy of the Ministry of Foreign Affairs suggested to the delegation that the reform was motivated by a desire to improve the promotion prospects of younger and, therefore 'more vigorous', judges. To forcibly retire older judges en masse on the basis of a presumption that younger judges are more vigorous and effective is an approach that clearly raises serious issues in relation to EU law on discrimination on grounds of age, which requires measures be justified on bases other than unevidenced assumptions in relation to the capabilities of different age-groups.[102] Furthermore, the delegation considers that losing the accumulated experience of Hungary's most senior judges may in fact have a negative impact on the performance of the judiciary as a whole. However, while some of the rationales offered by the Hungarian authorities are clearly problematic in terms of age discrimination and notwithstanding concerns as to the effect on the operational capacity of the courts following the mass removal of over 270 judges,[103] the delegation's main concern is to consider the implications of this on the independence of the judiciary and the rule of law.

3.41 It is difficult to see the reduction in judicial retirement age in isolation from the wider reforms implemented by the current government. As already noted, and as will be discussed further in Chapter Five, the super-majority held by the current government has already been used to remove the President of the Supreme Court, to centralise powers relating to the administration of the judiciary in the hands of a politically appointed individual and to reform the composition and reduce the jurisdiction of the Constitutional Court.[104] Furthermore, in June 2011 the Parliament enacted a moratorium on the appointment of new court executives before the entry into force of the new Fundamental Law, which had the effect of maximising the number of senior judicial appointments that would be made under the new arrangements.[105] Seen in this broader context and in the light of the inconsistent rationales put forward by government figures to justify the reduction in retirement age, the delegation is concerned that this reduction may be seen as an attempt to maximise the number of vacancies that will both arise during the term of the current legislature and be dealt with through the exclusive appointment powers of the President of the NJO, creating a real risk of 'political capture' of the Hungarian court system.

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101 For example, in Ireland, under the Courts and Court Officers Act 1995, the retirement age of ordinary judges of the Supreme Court was reduced from 72 years to 70 years. Judges appointed prior to the coming into operation of that Act however, were permitted to continue in office until aged 72.

102 See *Prigge*, n 28 above.

103 As the Venice Commission notes 'bearing in mind the heavy workload of several courts, it is difficult to justify forcing judges to retire early' especially as the government moratorium on judicial appointments in the six months before the entry into force of the new Constitution meant that vacancies would not be filled in a speedy fashion (see n 45 above, para 108).

104 Art 24 of the Fundamental Law increased the membership of the Court from 11 to 15 and prolonged the mandate of members from nine to 12 years.

105 Act LXII of 2011, s 8.

3.42 The delegation notes that in its response to the Venice Commission, the government promised to undertake a 'modification of the Transitional Provisions in consultation with the European Commission', which is included in the draft amendment bill to the cardinal laws considered below. However, the delegation also heard from a number of those it interviewed that while carrying on discussions with European and international bodies, the NJO had already nominated over 100 new judges. In fact, the delegation has learned subsequent to its visit that 129 vacant judicial positions were in fact filled on 1 April 2012.[106] Such actions will have the effect of rendering any changes made at a later stage ineffective in relation to those judges who have already been retired. It calls into question the extent to which the government has regard to the concerns of the international community and has strengthened the suspicion held by many of those who spoke to the delegation that the aim of imposing the new rule was to enable the government to place favoured candidates in judicial positions.

3.43 On 16 July 2012, the Hungarian Constitutional Court found that the lowering of the retirement age for judges was unconstitutional because of the sudden and unclear manner in which it was implemented violated security of tenure – a fundamental tenet of the independence of the judiciary.[107] The delegation welcomes this judgement and hopes that the Executive branch executes it. However it is extremely concerned at the press conference statement of Prime Minister Orbán following the judgment that 'The system is here to stay'[108] which reflects a tendency of the government not to respect the decisions of the Constitutional Court which will be examined in further detail in the following chapter.

Legislative solutions: improvements and continued areas of concern

3.44 The government has addressed some of the concerns of the international community and the concerns raised by the Venice Commission through the Amendment Act, passed in July 2012. This swift response is to be welcomed; however the delegation considers that while there are significant improvements in some respects, there remain areas of concern in others.

3.45 With respect to concerns regarding the extensive competence of the President of the NJO and the corresponding lack of accountability,[109] the Amendment Act restricts the powers of the President significantly in certain areas and grants extra powers to the NJC. For example, the NJC would have to approve a decision of the President of the NJO to deviate from the ranking of candidates when making judicial appointments and the NJC would also be given a veto over a decision to appoint a candidate who is not ranked first on the list. The consent of the NJC would also be necessary for the appointment of a judge or a court leader who has not obtained the support of the majority of the reviewing board.[110] Furthermore, the operational conditions of the NJC would no longer be the exclusive competence of the President of the NJO;[111] the

106 See w**ww.mabie.hu/node/1570** [site last accessed 31/07/2012].

107 Constitutional Court judgment IV/2096/2012 of 16 July, **www.mkab.hu/download.php?h=178** [site last accessed 1/8/2012].

108 See n 1 above.

109 Concerns 3–5 of the *Legislative solutions proposed by the government of Hungary in relation to the Venice Commission's Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, transmitted by the Ministry for Foreign Affairs of Hungary on 14 March 2011, CDL (2012)034.

110 Section 7(4).

111 Section 8.

President would no longer participate in the *in camera* meetings of the NJC;[112] the NJC, rather than the President may be able to order the adjudication of cases as a 'matter of urgency' if it is in the public interest;[113] and the President would only be able allocate a case to a particular court by taking into account the relevant principles set out by the NJC and shall detail how these principles were taken into account.[114] The President would also have extra reporting requirements to the Parliament to include the reasoning behind the appointment and removal of judges, as well as case transfers.[115] The Act also removes the right of the President to initiate a law standardisation procedure.[116] Significantly, the decisions of the President of the NJO relating to judicial evaluation, supervision and case transfer are subject to judicial challenge, which place an important check or counter-balance on his or her powers.[117]

3.46 These proposals may contribute to restricting the competence of the President of the NJO however, the delegation considers that there are several areas in which they could be strengthened further. In relation to judicial appointments, the delegation is concerned that the President is empowered to declare a call for applications unsuccessful that could potentially be used to impede the first-ranked candidate from filling a position.

3.47 The delegation also notes that the reforms do not guarantee significant involvement of the NJC in the appointment process for court leaders as the constitution of the reviewing board for the nomination of such leaders remains beyond the control of the NJC. In this regard, ideally the NJC's approval should be necessary every time the President of the NJO intends to deviate from the list drawn up by the reviewing board. The delegation also notes that while the NJC may set its own budget, final approval of the budget lies with the President of the NJO, which could render this operational autonomy illusory.

3.48 The Act provides for the possibility that judges may be transferred to another posting without their consent on a temporary basis 'if the even distribution of the case-load or the professional development of the judge make it necessary'.[118] This is an improvement to the possibility of transfer on the excessively broad criterion of 'service interest'; however the provision of clearer and more detailed rules on the involuntary transfer of judges would reduce the scope for arbitrary decisions. In relation to disciplinary proceedings, the Act narrows the scope of the President of the NJO in initiating disciplinary procedures, which is to be welcomed.[119]

112 Section 10.
113 Section 7(3).
114 Section 3.
115 Section 4(4).
116 Section 1.
117 Sections 3 and 5
118 Draft Amendment Bill of 2012, s 17.
119 Section 26.

3.49 The right of the President of the NJO to transfer cases still exists, however the Act provides that he or she must take into account the principles established by the NJC in the course of exercising the power and his or her decision is subject to appeal to the Kúria. While this is a welcome control on one of the most worrying powers of the President, the delegation notes that under Article 9(1) AOAC, presidents of courts still have considerable scope to alter the case distribution schedule 'for service interests or for important reasons affecting the operation of the court' and that the Transitional Provisions still enable the President of the NJO to transfer cases to another court under the original circumstances.

3.50 The delegation considers that the government's legislative response to the Venice Commission's concerns improves the situation in some respects, in particular regarding restriction of the extensive competences of the President of the NJO and conferral of more powers to the NJC, including veto powers. The possibility of judicial review in cases regarding the administration of the judiciary, particularly with respect to evaluation, appointment and case allocation is particularly welcome. However, while some of the detail has been modified, some of the issues are left unresolved. For example, the Act leaves open the possibility of indefinite re-election and while it increases the reporting responsibilities of the President of the NJO, the placement of a wide range of powers in the hands of a politically appointed individual which extremely high procedural obstacles for discipline or removal raises concerns. Furthermore, the provision regarding the mandatory retirement age for judges remains unchanged.

Chapter Four: Checks and Balances

4.1 The distinction between constitutional issues and ordinary politics is an essential element of any modern constitutional democracy. Constitutions provide a normative framework that entrenches certain fundamental values which are considered to be necessary for the functioning of a stable democratic system. While ordinary political policies are the legitimate subject of democratic debate, constitutional norms need to command a greater degree of cross-party support so that the entrenchment of those norms does not become a means through which the ruling political party of the day insulates its particular policy preferences from being overturned in future parliaments. It is therefore vital that constitution-drafting includes meaningful participation by the public, civil society and opposition parties. In fact, the UN Human Rights Committee has interpreted the right to participation in public affairs enshrined in Article 25 of the ICCPR as affording a specific right to participate in constitution-making[120] that goes beyond the act of voting.[121] The Guidance Note of the UN's Secretary-General on Assistance to Constitution-making Processes,[122] aimed at outlining lessons and best practices learned from the UN's past experience in assistance to constitution-making, is also instructive; the resulting guiding principles focus, among others, on the importance of ensuring national ownership, supporting inclusivity, participation and transparency, as well as mobilising and coordinating a wide range of expertise.

4.2 Furthermore, modern constitutional democracies have at their heart respect for the rule of law and separation of powers. Respect for these principles is both a matter of institutional design and broader political culture and means that the three branches of state must respect the autonomy of each other and accept that the legitimate exercise of power by one branch may at times limit the other. During the tri-party negotiations in 1989, Hungary elected to adopt a constitutional democracy, in which a Constitutional Court was given authority to prevent the abuse of power by other governmental institutions by reviewing their actions against the principles and rights enshrined in the Constitution. This choice was a direct response to the authoritarian abuse of power under communism and the political dominance of a single party. However, regardless of the choice of institutional design, a democracy is unlikely to function properly unless all institutions recognise the legitimacy of, and grant appropriate weight to, the legitimate acts of other branches.

4.3 The delegation is concerned that both the manner in which the recent constitutional and legal reforms were implemented and responses to the decisions and jurisdiction of the Constitutional Court indicate a tendency of the current government, with its parliamentary super-majority, not to respect independent constitutional control, nor take into account opposition voices or civil society. To use the government's legislative majority to overturn Constitutional Court judgments almost as soon as they are issued undermines the degree to which the Hungarian Constitution and the rights it protects can be seen as genuinely

120 *Marshall v Canada* (Citizenship and Immigration), 2009 FC 622, and UNHCR, *General Comment No 25: The right to participate in public affairs, voting rights and the right of equal access to public service* (Art 25), (12 July 1996), CCPR/C/21/Rev.1/Add.7.

121 Vivien Hart, *Democratic Constitution Making, United States Institute of Peace,* (31 May 2010), p 6.

122 Guidance Note of the Secretary-General, *United Nations Assistance to Constitution-making Processes,* United Nations, April 2009, p 4.

entrenched. Such an approach brings about a change in the nature of Hungary's democracy from one with a justiciable Constitution to one in which Parliament is supreme, without such a change having been subject to proper consultation processes.

Exclusion of opposition from meaningful participation in the reform process

4.4 The delegation heard widespread complaints at the very low level of cross-party political consensus that characterised the framing and adoption of the new Constitution and the rapid adoption of vast amounts of constitutionally significant legislation in 2011. The delegation heard from the Vice-Chair of the Parliamentary Constitutional Committee that there had been 'enough' consultation, however the delegation also heard repeated complaints that the questionnaires circulated were not fit for purpose and that the consultation process had been so minimal as to render it meaningless. It is concerned that there was no serious attempt to engage with opposition groups or civil society in the preparing of the Constitution or related legislation which was in general adopted when the government used its super-majority to force the passage.

4.5 In particular, the delegation reports heard that governing parties resorted to using non-standard parliamentary procedures in order to ensure that the normal processes of consultation that apply to government-sponsored legislation did not have to be respected. This involved the introduction of bills that were effectively government-sponsored by individual members of Parliament as the consultation obligations set out in Act CXXX of 2010 on the Legislative Process only apply to acts prepared by a minister. Remarkably, not only half of all Cardinal Laws but also the new Fundamental Law itself began life as private members' bills.

The Constitutional Court was highly critical of the government's actions in this regard. It stated that:

> 'Successive modifications of the Constitution motivated by current political interests and purposes are extremely worrying from a point of view […] of a democratic state governed by the rule of law, especially the need for legal certainty and predictability, for wide social legitimacy as well as for the insertion of a rule into the constitutional system without causing any controversy or collision. […] Amendment of laws and, especially, of the Constitution upon proposals submitted by individual members of Parliament poses a serious problem in relation to criteria of a democratic state governed by the rule of law. […] it is almost excluded in the case of an individual MP to make preliminary calculations and analysis with the necessary thoroughness or to conduct consultations with interested parties before he or she submits a bill. There is a great chance therefore that the Parliament adopts amendments of laws or even the Constitution, the effects and consequences of which were not duly considered. In the case of legislation upon proposals submitted by individual members of the Parliament, the government is not bound to make preliminary impact assessments and to conduct necessary consultations […]. Consequently, the Constitutional Court declares that the amendments to the Constitution submitted by individual members of Parliament obviously does not wholly fulfil the criteria of a democracy governed by the rule of law despite the fact that they respected the procedural requirements laid down in the Constitution.'[123]

123 Decision 61/2011 (VII.13) AB.

4.6 In addition to resorting to the use of individual MPs to introduce government-backed proposals, constitutionally-significant legislation was regularly amended on party-line votes just before the final vote, thereby precluding adequate participation and consultation of the opposition. As mentioned in section 3.7, the removal of Mr Baka as President of the Supreme Court, for example, was partly effected by amending a law through a pre-final vote amendment proposal that was debated only for one hour.[124] Similarly, the President of the Budget Council was removed through a pre-final vote amendment to a healthcare law.[125] The law on freedom of conscience and religion and the legal status of churches, religious denomination and religious communities was radically amended at a very late stage to significantly restrict the number of religious bodies that would be recognised by the state. Deputies were reportedly given only ten minutes to read the amendment before the debate.[126] The extremely short time allocated for debate also precluded meaningful participation by civil society organisations.

4.7 The delegation is concerned that, by using its legislative super-majority to force through the Fundamental Law by expedited parliamentary procedures without engaging in meaningful consultation with opposition parties, the new constitution may be viewed as a partisan instrument representing a particular segment of the political spectrum.

4.8 The consequences of such a process become even more problematic when the Constitution seeks to regulate areas that are more usually the subject of political and electoral contestation. The delegation notes that cardinal laws have been enacted covering areas such as family policy and taxation policy that are traditionally the preserve of the ordinary legislative majority. They were being used to grant the power to recognise churches and religious groups to Parliament rather than an independent authority. Even if technically cardinal laws are not part of the Constitution, they require a two-thirds majority for amendment and are therefore no easier to change or repeal than articles of the Constitution. The delegation is concerned that the excessive use of cardinal laws to regulate these areas risks insulating the policy preferences of the current government from review by a future legislature that does not have such a majority. As with other developments discussed above, such an approach risks a blurring of the distinction between the interests and policies of the governing party and the agreed, fundamental norms and values of the state and constitutional order.

Transitional Provisions

4.9 The IBAHRI delegation is particularly concerned at the quasi-constitutional status of the Transitional Provisions. While special provisional measures are generally justified in order to smooth the transition between constitutions, the Transitional Provisions introduced include matters that do not appear to be transitional in nature but actually appear to substantively change the Constitution. In fact the current legislative majority designated the Transitional Provisions as themselves part of the Fundamental Law.[127] This permitted substantial amendment

124 Pre-final vote amendment proposal T/1668/73.

125 Legislative Proposal T/3538, pre-vote amendment proposal T/3538/13: minutes of the Committee on the Constitution, Justice and Order of Business: 28 July 2011.

126 1279/B/2011 ABH.

127 Transitional Provisions, Art 31(2).

of the Constitution without the need to follow the procedures laid down in Article S of the Fundamental Law for the constitutional amendment.

4.10 Furthermore, certain of the Transitional Provisions actually contradict the Fundamental Law by providing that the President of the NJO and the Chief Prosecutor shall have the power to name the particular court that will hear a specific case. Such a power is likely to violate Hungary's obligations under Article 6 of the ECHR and was found to be unconstitutional by the Constitutional Court in Decision 166/2011 (XII 20) AB as incompatible with the right to a fair trial guaranteed under Article XXVIII of the Fundamental Law. The delegation heard that the Transitional Provisions were, however, used to reverse this decision of the Court and to reintroduce this controversial power.

4.11 The delegation also heard that other important and non-transitional matters such as the above-mentioned right of Parliament to recognise the legal-personality status of churches[128] as well as the restrictions on the power of the Constitutional Court to review financial legislation[129] were also included and made permanent under the Transitional Provisions. Again, this is a fundamental shift on the nature of Hungary's constitutional democracy through the 'back door'.

Executive and legislative responses to decisions of the Constitutional Court

4.12 The Venice Commission has noted the importance of 'a constitutional culture which clearly separates constitutional issues from ordinary politics'.[130] Constitutional Courts charged with constitutional interpretation play a key role in modern democracies in placing limits on the powers of political majorities and thus ensuring the protection of fundamental rights and the maintenance of the rule of law. The IBAHRI delegation was concerned to hear of the response of the government to politically unpopular Constitutional Court judgments. For example, the Court's decision to annul a regulation imposing a retroactive 98 per cent tax on certain kinds of severance pay was followed almost immediately by the submission of a Fidesz-backed bill (later passed as Act CXIX of 2010) to Parliament to restrict the competence of the Constitutional Court over matters relating to taxation.

4.13 This bill amended the former Constitution to limit the ability of the Constitutional Court to review measures relating to taxes and the budget for as long as the state debt exceeds half of gross domestic product (GDP). It provided that such review could only take place on the basis of examination of the conformity of such laws with the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion and the rights related to Hungarian citizenship. This limitation was included in Article 37(4) of the new Fundamental Law. State debt is likely to remain above 50 per cent for the foreseeable future. In addition, Article 27 of the Transitional Provisions provides that Article 37(4) will remain in force for laws adopted when the debt-to-GDP ratio was greater than 50 per cent, even when debt has fallen below this level. It is therefore likely that all tax and budgetary laws passed

128 Transitional Provisions, Art 21(1).

129 Transitional Provisions, Art 27.

130 See n 16 above.

since 2010 and all such laws adopted in the foreseeable future will be subject only to a highly restricted form of constitutional review.

4.14 While it may not be necessary for all democracies to grant the power of legislative constitutional review to a Constitutional Court, this was the democratic choice of Hungary in 1989. In addition, systems that lack a court with such powers generally have built in alternative means of ensuring compliance with constitutional and basic legal norms. The delegation heard that the Hungarian system for protecting compliance with such norms has traditionally been based around the legislative review jurisdiction of the Constitutional Court rather than any other method. It is therefore potentially damaging to the rule of law in Hungary to remove categories of legislation from the jurisdiction of the Court.

4.15 The delegation is alarmed at the speed with which these changes were introduced. It heard that within a month of the Court's ruling in relation to the retroactive 98 per cent tax, laws restricting both the Court's competence of review and legislation re-enacting the regulation that had previously been annulled by the Court had been passed by the legislature. Similarly, the Court's decision annulling a provision of the Criminal Procedure Code that allows the Chief Prosecutor the right to press charges before a court other than the legally designated one if he feels it is necessary to do so was struck down by the Court.[131] This power was immediately reintroduced by the parliamentary majority and effectively granted constitutional status by inserting it into the Transitional Provisions.[132]

4.16 For the legislature to effectively overturn the judgments of the Constitutional Court with such haste shows a lack of serious consideration for the constitutional norms upheld in the Court's ruling. It also sends out a signal that the government is willing to use its legislative supermajority to overturn any measures or decisions that are not considered aligned with its interests or political goals. Again, this places political party interests over constitutional norms and values. In this context, the delegation is concerned at the statement made by Prime Minister Orbán at the press conference following the judgment of the Constitutional Court that 'the system will remain' and that the government will move swiftly to explaining that the government will move quickly to submit a proposal to 'harmonise' the voided laws with the country's constitution.

4.17 The delegation also noted that tensions between the government and the Court have been accompanied by measures that compromise its independence. In June 2011, a constitutional amendment increased the number of judges from 11 to 15, a number that some current and former members of the Court described to the IBAHRI delegation as 'excessive' and 'incompatible with the effective functioning of the Court'. The mandate of judges was also increased from nine to 12 years. At the same time, the procedure for selection of judges has been rendered more vulnerable to politicisation.

4.18 While under Article 32(4) of the former Constitution, the nominating committee consisted of one representative from each political fraction, the new procedures mean that the nominating committee reflects the proportions of seats held by parties in the legislature as whole and

131 Decision 166/2011 (XII 20) AB.

132 Transitional Provisions, Art 11(4).

therefore contains a majority of government representatives.[133] Furthermore, instead of being elected by the judges themselves, the President of the Court is now elected by the National Assembly by a two-thirds majority.[134] Since its election, the government has nominated six judges to the Constitutional Court without any of their nominees receiving the support of the opposition. Furthermore, section 6(3) of the CCA provides that judges will serve a single term. While this would normally be seen as a measure that increased the independence of the Court, section 15 of the CCA provides that if Parliament fails to select a new member within the set deadline, the mandate of the sitting member may be prolonged.[135]

4.19 Taken together, the delegation considers that these measures both change the nature of Hungary's constitutional order and risk undermining the independence of the Constitutional Court. The President of the Court is now elected by Parliament. The government has created a large number of vacancies at once that are filled through a procedure that is subject to the control of the legislative majority during the period in which the government enjoys a supermajority. The candidates selected will serve longer terms and may remain in office, should a future blocking minority in the legislature so wish. Cumulatively, these measures give much greater scope for the politicisation of appointments to the Court with a consequent diminution in its capacity to act as a restraint on the executive or the legislative majority. Of equal concern, these changes follow a series of events in which the current political majority has reacted to unfavourable decisions of the Court by using their supermajority to overturn such decisions with extraordinary speed and to restrict the competence of the Court in the relevant areas. Such an approach fails to give the necessary weight to constitutional norms and the role of the Court and speaks to a broader unwillingness to permit other branches of government to exercise their powers in an independent manner.

Ex-post facto review of law: the abolition of actio popularis

4.20 The new Fundamental Law abolishes the citizen's right to take constitutional review on abstract points of law[136] and the CCA terminates all procedures initiated before that date.[137] The delegation heard that many of the key decisions of the Constitutional Court over the past two decades have been in decisions reached in cases initiated through *actio popularis*, for example with respect to the constitutionality of the death penalty and dismissal without justification of public servants.

4.21 The IBAHRI delegation heard arguments both for and against this restriction in competence of the Constitutional Court. On the one hand, the delegation heard the complaint from serving and former members of the Constitutional Court that the right of *actio popularis* had overburdened the Court with excessive numbers of cases, as well as the observation that in many countries, such abstract review is not permitted. It would be more efficient for the Constitutional Court to focus on individual claims that raise issues of public and constitutional

133 CCA, s 7(1).

134 See CCA, s 7(1); see also Amicus Brief, n 16 above, 59.

135 *Ibid.*

136 Fundamental Law, Art 24.

137 CCA, s 71.

importance. However, on the other hand, the delegation heard that the wide discretion granted by section 29 CCA to the Court of whether to admit a constitutional complaint could have the effect of denying individuals whose constitutional rights have been violated a remedy, if the Court felt that their case lacked general importance.

4.22 Furthermore, there are some features of the changes regarding the new procedure for constitutional review that may be of concern. Article 24(2) of the Fundamental Law provides that the Court may examine legislation at the request of a quarter of MPs, the government or the Commissioner for Fundamental Rights. As most legislation is likely to have been introduced by the government, the Court is most likely to be seized of a matter by a minority of MPs or the Commissioner. None of the opposition parties currently holds 25 per cent of the seats, so in practical terms it is likely that it will be the Commissioner who will bring constitutional complaints. As the Commissioner has responsibility for a limited range of competences, it is not clear if he or she will be entitled to bring cases across the entire law or merely in relation to areas falling within his or her competence.

4.23 Ex ante review of laws is also limited as it can, under Article 6(2) of the Fundamental Law, only be brought about by a reference from the proponent of the bill in question, the government, the Speaker of the House or the President. It is likely, therefore, that the scope for allowing the political opposition to challenge measures on constitutional grounds will be limited.

4.24 The law does still permit individual citizens to make constitutional complaints. However the new criteria provide that they will have to prove that they have been directly affected by the law or its application.[138] The delegation heard complaints that that this may make it excessively difficult for citizens to initiate review proceedings. For example, citizens would have to breach a law they regard as unconstitutional and be subject to legal proceedings in terms of this in order to permit them to challenge it in court, thus potentially exposing themselves to criminal penalties. The limitation on the ability of citizens to bring a constitutional challenge has been supplemented by measures that may discourage citizens from making use of their remaining rights. In a change from the previous position, section 51(2) CCA introduces an obligation of compulsory legal representation for those making a constitutional complaint. According to the legislation,[139] the costs of representation are borne by the petitioner, which the delegation heard may prove prohibitive. The Commissioner for Fundamental Rights of Hungary has also challenged the prohibition on providing legal aid to an individual submitting a constitutional complaint.[140] In addition, a system that prevents individuals from representing themselves but does not pay for representation, may well breach the right of access to court protected by Article 6 of the ECHR.[141]

4.25 Furthermore, the legislation also permits the Court to fine petitioners whom it judges to have exercised their rights 'in an abusive manner'. The delegation is concerned that penalising petitioners in such circumstances may act as an excessive deterrent. While the rationale for

138 CCA, s 71.

139 *Ibid*, s 54(1).

140 Case AJB-1961/2012.

141 A failure to provide any civil legal aid, even in circumstances where (unlike in Hungarian constitutional challenges) individuals were allowed to represent themselves before the courts, was held to violate the right of access to court in *Airey v Ireland* [1979] 2 EHRR 305.

many of the reforms might themselves be justifiable, namely to reduce the caseload of the Constitutional Court and increase its efficiency, the delegation considers that they are likely to discourage constitutional challenges either because abstract review is not available or because individuals may fear the financial consequences of taking a challenge.

Right of the Chief Prosecutor to allocate cases

4.26 As mentioned above, the Constitutional Court annulled an amendment to the legislation governing criminal procedure, by which the Chief Prosecutor obtained the right to press charges before a court other than the legally designated one if he felt it was necessary to do so.[142] This power was immediately reintroduced by the parliamentary majority who effectively granted it constitutional status by inserting it into the Transitional Provisions.[143]

4.27 The view of the IBAHRI delegation is that such a power is inappropriate because the prosecution has a vested interest in a particular outcome of a trial and should therefore not have the ability to choose which court will try a case. Such a power represents a fundamental breach of elementary fair procedures by placing the prosecution at a significant advantage in relation to the defence, which cannot choose the location of the trial. However, the IBAHRI delegation was reassured to hear from the Chief Prosecutor that he had never used this power and that he did not envisage using this in the future. There are, however, no guarantees that a future Chief Prosecutor will not take a different approach. Furthermore, the delegation notes that the President of the NJO, who had been granted a similar power, has already exercised it in an extremely controversial manner.

Changes to the lawyer's oath

4.28 Legal systems strive to do justice overall by doing justice in individual cases. The rule of law cannot operate and justice cannot be served if lawyers are not free to represent their clients' interests, or if their clients are not free to speak openly with their legal representatives. Across the world, legal systems recognise the primacy of a lawyer's duty to his or her client by protecting the confidential nature of discussions between lawyer and client. This is commonly captured in a lawyer's oath of office.

4.29 The delegation was disappointed to hear that while the Hungarian authorities had consulted at an early stage with the Hungarian Bar Association, ultimately a revised oath was passed with no provision for meaningful input by the Hungarian Bar. The delegation also heard several complaints in relation to the new oath, which differs significantly from the previous version.

142 Decision 166/2011 (XII 20) AB.

143 Transitional Provisions, Art 11(4).

The old oath read:

> 'I,… do solemnly swear to conscientiously practise the legal profession in the interests of my client and in accordance with the Constitution of the Republic of Hungary and its legal regulations and in the course of so doing safeguard all secrets of which I gain knowledge. So help me God (according to the belief of the oath-taker).'

The new oath is in the following terms:

> 'I, … do solemnly swear that I will be faithful to Hungary and the Fundamental Law of Hungary, I shall keep and make others keep its laws; I shall practise the duties and rights provided by the office [of attorney] for the benefit of the Hungarian Nation. During the practice of my profession I will exercise my professional duties conscientiously, according to my best knowledge and in the interest of my client. So help me God (according to the belief of the oath-taker).'

4.30 The delegation considers that there are some worrying features to this new oath. The duty to 'keep and make others keep [Hungary's] laws' appears to turn lawyers from legal counsel to law-enforcement officials, a duty that seems inconsistent with the lawyer-client relationship. Lawyers are not public officials and should not be treated as if they are, yet the delegation heard that the new oath for lawyers is almost identical to that prescribed for public officials. Lawyers' duties are to their client and the law. The imposition of a law enforcement role upon them threatens the ability of lawyers to represent their clients effectively. The imposition of a duty to 'practise the duties and rights provided by the office of [lawyer] for the benefit of the Hungarian Nation' is also inconsistent with the pursuit of justice in individual cases and the nature of the lawyer-client relationship. There may well be occasions where a lawyer must represent a client who is seeking to assert rights against the collective interest. A society governed by the rule of law must allow such cases to be taken and such individuals to be effectively represented. A duty to exercise the office of lawyer 'for the benefit of the Hungarian Nation' compromises this goal and is in conflict with Principle 15 of the United Nations Basic Principles on the Role of Lawyers, which requires that lawyers 'shall always loyally respect the interests of their clients'.[144]

4.31 Finally, the undertaking in the previous oath that a lawyer would 'safeguard all the secrets of which I gain knowledge' in the course of his or her work, is absent from the new oath. Lawyer-client confidentiality is a prerequisite of a functioning and just legal system recognised in Principle 22 of the United Nations Basic Principles, which requires that 'Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential'. The IBAHRI delegation is of the view that the new lawyer's oath has the potential to compromise the ability of the legal system to function independently.

144 *United Nations Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, Principle 15.

Chapter Five: Conclusions and Recommendations

Independence of the judiciary

5.1 The delegation concludes that although the rationale behind the recent reforms presented to it by the Hungarian government – namely the need to make operation of the judicial system faster and more efficient – is to be welcomed, certain of the legislative solutions chosen by the government and introduced by the cardinal laws threaten many of the institutional guarantees of judicial independence. While it may be possible in the case of certain of the individual reforms to point to comparable practices in other European countries, cumulatively the delegation concluded at the time of its visit that as they stood they seriously undermined the independence of the judiciary in Hungary and the necessary democratic checks and balances that are essential to the rule of law.

5.2 The legislative changes introduced by the Amendment Act address some of the most serious concerns of the national and international community regarding the independence of the judiciary and are in general to be welcomed as an improvement. However, the delegation also considers that although the passing of the new legislation may have resolved to a certain extent several of the issues relating to the powers of the President of the NJO, many of these problems would never have arisen in the first instance had the government of Hungary engaged in proper legislative consultation and procedure with respect to the original offending legislative provisions. Furthermore, concerns remain regarding the independence of the judiciary and the rule of law in other areas and the delegation notes that the lowered mandatory retirement age for judges and the limited competence of the Constitutional Court remain untouched by the Amendment Act.

Removal of the former President of the Supreme Court

5.3 The premature termination of Hungary's most senior judicial figure through the introduction of a retroactive and *ad hominem* law violates the guarantee of security of tenure that is essential for the independence of the judiciary. Mr Baka's recent criticisms of the legislative reforms and the subsequent rapid introduction of legislation that made him ineligible for re-appointment have created the widespread perception that the government has deliberately used the reform process to remove him from office. In the absence of a convincing alternative explanation, the delegation finds it difficult to come to another conclusion. Laws such as these, which are directed against a specific person, are contrary to the rule of law.

Recommendations

- The government should open a consultation process or consider amending the criteria for election of the President of the Kúria so that it includes, or at least takes into account, judicial experience obtained in international courts.

- The government should refrain from implementing legislation that is directed, or easily perceived to be directed, against a specific individual.

National Judicial Office and the administration of justice

5.4 The centralisation of a wide range of powers – 66 competences in total – relating to moving the administration and management of the judiciary into the hands of a politically-appointed individual, and the corresponding lack of accountability presented some of the most worrying aspects of the reform to the delegation at the time of its mission. As they stood, they clearly contravened Hungary's international obligations to uphold independence of the judiciary and the right to a fair trial. The delegation considers that the government's legislative response to the concerns of the international community improves the situation through restriction of the extensive competences of the President of the NJO and conferral of more powers to the NJC, including veto powers. The possibility of judicial review in cases regarding the administration of the judiciary, particularly with respect to evaluation, appointments, transfers and case allocation is particularly welcome. However, while some of the detail has been modified, there remain areas in which they could be strengthened further.

Recommendations

- The long mandate and possibility of indefinite extension of the term of office of the President of the NJO should be amended, for example through the provision that the President of the NJO may not be re-elected. The delegation notes that under the Amendment Act, in situations where the Parliament is unable to elect a new President, provisions for an interim president have been included, for example, that the Deputy President of the NJO, or other substitutes appointed by the President of the NJO where the Deputy President is unable to fulfil the role, shall act as an interim President until a successor has been appointed. When no NJO member is able to fulfill the role, then the tasks and duties of the President of the NJO shall be performed by the President of the NJC. This is an improvement on the possibility under the previous regime that the President of the NJO may remain in the position until a successor has been appointed. However, given that the Deputy President of the NJO as well as other substitutes are directly appointed by the President of the NJO, the position clearly remains under the potential influence of the incumbent President. In order to avoid this danger, it would be preferable for these substitute tasks duties to be performed by the President of the NJC in the first instance, rather than the Deputy President of the NJO.

- Clear and transparent legal provisions formulated by the NJC and setting out specific criteria on which the President of the NJO may exercise his or her power to transfer a case should be implemented effectively The right of parties to appeal to the Kúria as introduced by the Amendment Act is welcome.

- The power to transfer judges 'if the even distribution of the case-load or the professional development of the judge make it necessary', rather than based on the vague criterion of 'service interest', provides a degree of clarification. However, the possibility of judicial review of the decision of the President of the NJO introduced by the Amendment Act is welcome.

- In order to enhance its operational autonomy, the NJC should have the power to approve its own budget rather than the President of the NJO.
- The power of the NJC to veto judicial appointments in certain circumstances is welcome; however the NJC's approval should be necessary every time the President of the NJO intends to deviate from the ranking. Furthermore, clear criteria regarding when the President of the NJO may make a call for applications 'unsuccessful' should be set out.
- With respect to administration of the judiciary, the NJC should be afforded real decision-making powers. Judicial independence would be best protected if the NJC held a veto over all decisions of the President of the NJO. Such an approach allows the President to take decisions flexibly and quickly but protects judicial independence by ensuring that such decisions can be overturned if the judiciary collectively feels that it is necessary to do so.

Mandatory early retirement age

5.5 The delegation was unable to receive any consistent or objective rationale from those it met regarding the early mandatory retirement age for judges, which at the very least appears to have been based on unevidenced assumptions regarding the performance of senior judges. In addition to violating EU discrimination law, the retroactive effect of the law clearly undermines judicial security of tenure, an essential element of judicial independence, and deprives the Hungarian judiciary of the accumulated experience of its most senior judges. In the light of broader context and the inconsistent rationales put forward by government officials to justify the reduction in retirement age, there is a widespread perception that the introduction of the mandatory retirement age, combined with the moratorium on the appointment of new court executives before entry into force of the Fundamental Law is an attempt to maximise the number of vacancies that will both arise during the term of the current legislature and be dealt with through the exclusive appointment powers of the President of the NJO. This has created a significant risk of 'political capture' of the Hungarian court system that is likely to make it incompatible with Hungary's international due process obligations.

5.6 Following the Court's judgment it is critical that the retired judges are compensated and either reinstated promptly in their previous post or a similar position. In this regard, the status of the judges who have been appointed in their place should also be clarified. The delegation again concludes that these problems could have been avoided through better legislative planning, consultation and respect for proper parliamentary procedures.

Recommendations

- The government should execute the decision of the Constitutional Court[145] and repeal the lowered mandatory early retirement age regulation for judges. The procedure for providing compensation to the retired judges for their forced retirement as well as their prompt reinstatement either in their previous post or a similar position should be set out promptly and clearly by the government/NJO. Similarly, the status of the judges who have been appointed in

145 Constitutional Court decision No: IV/2096/2012 of 16 July 2012.

their place should be clarified. The government should undertake a nationwide assessment of the justice sector in order to obtain a research-based understanding of the capacity needs of the judiciary and how resources can be best allocated.

Checks and balances

5.7 Respect for the rule of law is as much a matter of political culture and attitude as individual rules. The manner in which the recent constitutional and legal reforms were implemented and response to the decisions and jurisdiction of the Constitutional Court indicate a tendency of the current government, with its parliamentary super-majority, neither to respect the separation of powers nor take into account the views of opposition voices, as well as civil society.

Exclusion of opposition from meaningful participation in the reform process

5.8 The delegation is concerned that the government views its super-majority in the Parliament as an opportunity to leave its political legacy on Hungary's legal and constitutional order. It did not hear of any meaningful attempt to engage with opposition groups or civil society in the preparation of the Constitution or related legislation, which was in general adopted when the government used non-standard parliamentary procedures to override normal consultation procedures to pass vast amounts of legislation, including almost 50 cardinal laws that were introduced as private members' bills. Furthermore, the delegation considers that several of the current technical and legal difficulties surrounding the reform package could have been avoided if there had been more systematic and widespread consultation with opposition parties and civil society in general.

Recommendations

- The government should refrain from using non-standard parliamentary procedures, which should only be used in exceptional circumstances, when legislating in areas affecting fundamental aspects of public life.
- The government and parliamentary committees should seek to engage with opposition groups and civil society on a more frequent and systematic basis. Official consultation guidelines for best practice should be drawn up.
- Given the speed with which the new Constitution was adopted, the authorities should consider establishing a review of the Constitution to assess how it is operating in practice and to suggest amendments. Such a review should include membership from across the political spectrum. Such a review could provide an opportunity for opposition groups and civil society organisations to contribute to the formation of the Constitution, which they were unable to do when the Constitution was being drafted and adopted in 2011.

Transitional Provisions / cardinal laws

5.9 The delegation is also concerned at the constitutional status of the Transitional Provisions and the number of organisational issues at the level of cardinal laws. The excessive use of cardinal laws to regulate such a wide range of areas, such as family and taxation policy (in addition to the court system), risks insulating the policy preferences of the current government from review by a future legislature that does not have such a majority. Furthermore, on a technical level, certain of the Transitional Provisions actually contradict the Fundamental Law, for example by providing that the Chief Prosecutor and the President of the NJO can allocate cases to a particular court. The delegation notes that the government of Hungary has not proposed any solutions to the concerns of the Venice Commission regarding regulation of the number of organisational issues on the level of cardinal laws.

Recommendations

- The government should seek to restrict the fields and scope of the cardinal laws in the Fundamental Law where there are not strong justifications for the requirement of a two-thirds majority. For example, areas such as family and social policy and taxation policy should be dealt with through ordinary legislation that future legislatures will be free to adapt to changing conditions and political preferences.
- The government should conduct a review of the Transitional Provisions in order to remove measures that are not genuinely transitional. Specifically, the powers of the Chief Prosecutor and the President of the NJO and the procedures relating to the registration of religious institutions should be removed from the Transitional Provisions, as should the provisions permanently limiting the jurisdiction of the Constitutional Court in relation to fiscal matters. Such matters are more appropriately dealt with by ordinary amendment.

Executive and legislative responses to decisions of the Constitutional Court

5.10 The delegation considers that the response of the executive and legislative to decisions of the Constitutional Court regarding the constitutionality of certain provisions by simply reintroducing them into the Transitional Provisions seriously undermines the Court's authority, as well as the independence of the judiciary. The speed at which the government restricted the competence of the Constitutional Court to review certain fiscal matters following its decision as to the unconstitutionality of a retroactive 98 per cent tax, and passed legislation reintroducing the regulation is alarming and exemplifies the government's attitude towards independent constitutional control. In this context, the delegation is concerned at the statement made by Prime Minister Orbán at the press conference following the judgment of the Constitutional Court that 'the system will remain' and that the government will move swiftly to submit a proposal to 'harmonise' the voided laws with the country's constitution.

Recommendations

- The authorities should cease the practice of overturning Constitutional Court judgments with which they disagree. Similarly, the government should refrain from making public comments that undermine the authority of the Court.
- The procedure for selecting Constitutional Court judges should be changed to re-establish the proportionate representation of parliamentary fractions in the selecting committee.
- A constitutional review should consider the issue of restrictions on the jurisdiction of the Constitutional Court.

Ex-post facto review: the abolition of actio popularis

5.11 The delegation acknowledges that there may have been issues under the previous system of *actio popularis* relating to the overburdening of the Constitutional Court. The law does still permit individual citizens to make constitutional complaints. However, while constitutional review is still possible, the limitation on the ability of citizens to bring a constitutional challenge has been supplemented by measures that may discourage citizens from making use of their remaining rights. For example, the costs of representation are borne by the petitioner, which may prove prohibitive. Furthermore, a system that prevents individuals from representing themselves but does not pay for representation, may well breach the right of access to court protected by Article 6 of the ECHR.[146]

Recommendations

- The authorities should provide for the possibility of legal aid for admissible constitutional challenges.
- The authorities should review the constitutional amendments that restrict locus standi and the ability of individuals to vindicate their constitutional rights in court. While the delegation acknowledges that the Constitutional Court had a very significant case load in the past, recent reforms pose a risk that citizens will be unduly constrained in their ability to obtain judicial protection of their fundamental rights.

Right of the Chief Prosecutor to allocate cases

5.12 The power of the Chief Prosecutor to allocate cases is inappropriate because the prosecution has a vested interest in a particular outcome of a trial and should therefore not have the ability to choose which court will try a case. Such a power represents a fundamental breach of elementary fair procedures by placing the prosecution at a significant advantage in relation to the defence, which cannot choose the location of the trial. However, the IBAHRI delegation was reassured to hear from the Chief Prosecutor that he had never used this power and that he did not envisage using this in the future. There are, however, no guarantees that a future Chief Prosecutor will not take a different approach. Furthermore, the delegation notes that

146 See above n 151, *Airey v Ireland* [1979] 2 EHRR 305.

the President of the NJO, who had been granted a similar power, has already exercised it in an extremely controversial manner.

Recommendations

- The delegation considers that the power of the Chief Prosecutor to allocate cases should either be repealed, or subject to appeal by the parties affected, as has been included in the Amendment Act with respect to the President of the NJO.

Changes to the lawyer's oath

5.13 The ability of lawyers to serve the interests of their clients and to benefit from protection of client-lawyer confidentiality in doing so, are cornerstones of the rule of law. The delegation is therefore concerned by the inclusion of an obligation in the new oath to 'practise the duties and rights of the office of attorney for the benefit of the Hungarian Nation' and at the absence of recognition of the duty of confidentiality in the terms of the oath. The delegation is of the view that relatively minor changes in the oath would suffice to ensure that it complies with international legal standards.

Recommendations

- The obligation to practise the rights and duties of the office of attorney 'for the benefit of the Hungarian Nation' and the duty 'to make others keep [Hungary's] laws' should be removed or amended to clarify that such an obligation does not override the duty of lawyers to their individual clients.
- The oath should be amended so as to include a reference to lawyers' duty of confidentiality towards their clients.
- Any further reforms to issues affecting the operation of the legal profession should be carried out in full consultation with the Hungarian Bar Association.

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