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on the situation of Fundamental Rights: standards and practices in Hungary
(pursuant to the EP resolution of 16 February 2012) - The principles of
democracy and the rule of law

Committee on Civil Liberties, Justice and Home Affairs

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1. Introduction

As a result of the 2010 elections, the governing majority gained two-thirds of the seats in parliament. With this qualified majority the ruling majority and the government have been able to rapidly initiate legislative activity to reshape the Hungarian constitutional and institutional framework.

The overall impact of this reform process, which concerns a wide range of issues including the operation of the judiciary, family protection, elections to Parliament, freedom of expression, raises concerns as regards its compatibility with the principles of democracy and the rule of law enshrined in the European Law.

Democracy and the rule of law, which are enshrined in Article 2 of the Treaty on European Union (TEU) and mentioned in the Preamble to the TEU as well as in the Preamble to the Charter of Fundamental Rights of the European Union, require a clear separation of powers between independent bodies. Core features of these two principles include: (i) the respect for legality, including a transparent, accountable and democratic process of enacting law; (ii) legal certainty; (iii) a strong system of representative democracy based on free elections and respecting the rights of opposition; (iv) effective control of the conformity of legislation with the constitution; (v) an effective, transparent, participatory and accountable government and administration; (vi) an independent and impartial judiciary; (vii) independent media; (viii) respect for fundamental rights¹.

2. The process of adopting the new constitutional order of Hungary

On 18 April 2011 the Hungarian Parliament adopted a new Constitution representing the Fundamental Law of Hungary, which entered into force on 1 January 2012.

The adoption of the new Constitution was the first step of a comprehensive reform process, which resulted in the establishment of a new constitutional and institutional framework. Indeed, a wide set of cardinal laws was enacted after the adoption of the new Constitution, which substantially modified almost all institutions and governmental bodies (parliament, constitutional court, judiciary, public prosecution service, data protection authority, local governments, national bank and family law).

The process leading to the adoption of Hungary's new Constitution is the first element attracting criticism. The draft new Constitution was prepared by FIDESZ/KDNP elected representatives (governing coalition) and introduced before the Hungarian Parliament on 14 March 2011 on the basis of a private member's bill. The new Constitution was adopted by the Hungarian Parliament on 18 April 2011 with the votes of the governing coalition².

¹ For a detailed analysis of the meanings given to the notion of the rule of law at international, European and national level see the Report on the Rule of Law, adopted by the Venice Commission on 25-26 March 2011. CDL-AD(2011)003rev.

² See Working Document No 2 on the situation of Fundamental Rights: standards and practices in Hungary (pursuant to the EP resolution of 16 February 2012) - Fundamental principles and fundamental rights and the

While government's sponsored legislation requires an elaborated procedure of consultation with relevant stakeholders, individual members' bills can take a more "streamlined" avenue. More specifically, the rules set out in Act CXXXI of 2010 on the participation of civil society in the preparation of legislation and in decree 24/2011 (VIII. 9.) of the Minister of Public Administration and Justice on preliminary and ex post impact assessment do not apply when legislation is proposed as an individual or private member's bill. This procedure enabled the governing coalition to prepare and adopt the new Constitution within a short timeframe (one month: the draft was tabled on 14 March 2011 and adopted on 18 April 2011). The second constitutional amendment was also adopted on the basis of an individual member's bill¹.

Among cardinal laws, the following have been enacted on the basis of a private member's bill: - Act CCIII of 2011 on the election of members of Parliament; - Act CCXI of 2011 on the protection of families; - Act CCVI of 2011 on the freedom of belief and religion, and the status of churches; - Act CCII of 2011 on the coat of arms and national flag as well as the state decorations of Hungary; - Act XXXVI of 2012 on the Parliament - the draft cardinal act on the electoral procedure².

The timing and level of political debate and public consultation³ on the new Constitution as well as on cardinal laws received criticism⁴. In the last two weeks of 2011 the parliament passed several cardinal laws (such as the acts on the freedom of belief and religion⁵ and on the National Bank of Hungary⁶) and adopted the transitional provisions to the Fundamental

opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

¹ On 18 September 2012 a proposal for the second modification (T/8404) of the Fundamental Law was tabled in Parliament as an individual members' bill. It concerns the registration requirement for exercising the right to vote during parliamentary elections. It was adopted by Parliament on 29 October 2012 and was published on 9 November.

² T/8405.

³ A national consultation concerning 12 questions was organised by the governing parties in February-March 2011. Cf. <http://www.fidesz.hu/index.php?Cikk=158885>.

⁴ See the opinions on three legal questions arising in the process of drafting the new Constitution of Hungary and on the new Constitution of Hungary adopted by the Venice Commission respectively on 25-26 March 2011 and on 17-18 June 2011 (CDL-AD(2011)001, CDL-AD(2011)016). In its opinion 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges of Hungary and Act CLXI of 2011 on the organisation and administration of courts of Hungary the Venice Commission notes that "cardinal laws were adopted in a speedy manner that did not include an adequate consultation of the opposition and civil society. The adoption of a large amount of legislation in a very short period of time could explain why some issues in the cardinal laws examined in the present Opinion do not meet European standards". Par. 9. CDL-AD(2012)001.

⁵ Act CCVI of 2011 on the freedom of belief and religion, and the status of churches, tabled as an individual member's bill on 21 December 2011 and enacted on 31 December 2011.

⁶ Act CCVIII of 2011 on the National Bank of Hungary, tabled by the government on 13 December 2011 and enacted on 31 December 2011.

Law.

As pointed out by the Venice Commission in its opinion on the new Constitution of Hungary "[...], it is regrettable that the constitution-making process, including the drafting and the final adoption of the new Constitution, has been affected by lack of transparency, shortcomings in the dialogue between the majority and the opposition, the insufficient opportunities for an adequate public debate, and a very tight timeframe"¹. As further stressed by the Venice Commission: "[...] the adoption of the new Constitution in April 2011 appears to be [...] only the beginning of a longer process of establishment of a comprehensive and coherent new constitutional order. This implies adoption or amendment of numerous pieces of legislation, new institutional arrangements and other related measures. To be fully successful, these processes should be based on the largest consensus possible within the Hungarian society"².

The new Hungarian Constitution requests the government (and not individual members) to submit to Parliament the bills necessary for the implementation of the Fundamental Law³.

3. The Transitional Provisions of the Fundamental Law

The transitional provisions of the Fundamental Law were adopted by the Parliament on 30 December 2011⁴. They were published in the Hungarian Official Journal on the next day and entered into force on 1 January 2012, on the same day as the new constitution. A number of strong criticisms were expressed against the transitional provisions, claiming they harmed the principle of the rule of law⁵.

¹ See para. 144 of the opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

² See para. 21 of the opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016. In the same opinion the Venice Commission further noted that: "A special feature of the new Constitution of Hungary is that, while drawing on the abovementioned standards, this Constitution contains a number of particular variations of European guarantees which can partly be found in a limited number of European constitutions. Most of them are linked to national traditions and identity. These are considered to be an important factor in European Union law (Art. 6 TEU) and also accepted under the ECHR. The Venice Commission considers in this respect that, while a number of these special guarantees may be seen as part of national constitutional autonomy, other guarantees must be analysed in the light of European standards, above all the case law of the ECtHR [...]. The task might be more difficult in some cases due to sometimes unclear interrelations between its different provisions as well as to the fact that the constitutional text often relegates to cardinal (organic) laws the definition of the detailed rules applicable to the concerned matters (including fundamental rights, institutional settings, structural arrangements for the operation of the judicial power etc.)" Paras. 19-20.

³ Point 4 of the Closing Provisions: "4. The Government shall be obliged to submit to Parliament all bills required for the enforcement of the Fundamental Law".

⁴ T/5005 was also tabled as an individual members' bill on 20 November 2011.

⁵ See the criticism expressed by Hungarian academics in the Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the key cardinal laws, Bánkúti, M et. al. (February 2012).

The status of the transitional provisions and their place in the national legal order was not clear (there has now been a recent modification of the Fundamental Law). In this respect, the closing provisions of the transitional provisions define the transitional provisions as part of the Fundamental Law (Art. 31(2))¹. With a view to clarifying the legal status of the transitional provisions the Government tabled on 17 April 2012 the proposal for the first modification of the Fundamental Law². It was adopted by Parliament on 4 June 2012 and was published on 18 June. The text of the first constitutional modification adds the following point to the closing provisions of the Fundamental Law: "The transitional provisions related to this Fundamental Law [...] are part of the Fundamental Law."³ The transitional provisions include a number of non-transitional articles aiming at supplementing or modifying the new constitution permanently.

On 14 March 2012, the Hungarian Commissioner for Fundamental Rights (ombudsman) requested the Constitutional Court to examine whether the transitional provisions comply with the requirements of the rule of law laid down in the Fundamental Law⁴. Following the constitutional review on 28 December 2012 the Constitutional Court declared in its decision No 45/2012 that the Hungarian Parliament exceeded its legislative authority when it enacted the following transitional provisions on the main grounds that they do not have a transitional character⁵ : Preamble, Articles 1-4 (provisions on the former communist party), 11(3)-(4) (provisions on the power of the President of the NJO and the Supreme Prosecutor to designate a court other than the court of general competence in the interest of adjudicating a case within a reasonable time), 12, 13 (provisions on the general retirement age of judges and prosecutors), 18 (provision on the appointment of the President of the Budget Council), 21 (the power of Parliament to identify the recognised churches and to determine the criteria for recognition of additional recognised churches), 22 (provision on the meaning of constitutional complaint), 23 (1) and (3)-(5) (provisions on the election of local governments and on electoral registration), 27 (a limitation of judicial review), 28(3) (on the procedure on establishing the failure to act by local governments), 29 (on the possibility to impose a general contribution covering fines), 31(2) (provision declaring that the transitional provisions form part of the Fundamental Law), 32 (on designating 25 April as the "day of the Fundamental Law"). Therefore, the Constitutional Court of Hungary annulled the above mentioned transitional provisions.

As further specified by the Constitutional Court, while Point 3 of the Closing Provisions of the Fundamental Law authorises the Hungarian Parliament to adopt transitional regulations related to the Fundamental Law in order to ensure the transition from the old regulation into

¹ An English translation of the Transitional Provisions to the Fundamental Law of Hungary is available on the website of the Venice Commission (CDL-REF(2012)018). [http://www.venice.coe.int/docs/2012/CDL-REF\(2012\)018-e.pdf](http://www.venice.coe.int/docs/2012/CDL-REF(2012)018-e.pdf)

² T/6817, proposal moved by Mr György Matolcsy, minister of national economy.

³ Non-official translation.

⁴ <http://www.ajbh.hu/allam/eng/index.htm>

⁵ <http://mkab.hu/sajto/news/certain-parts-of-the-transitional-provisions-of-the-fundamental-law-held-contrary-to-the-fundamental-law>

the new one, more than two-thirds of the provisions do not have transitional character as they contain permanent and general regulations.

4. The institutionalisation of the two-thirds majority's requirement

Cardinal laws require the support of a qualified majority of two-thirds of the members of parliament present for their adoption and amendment. The new Constitution of Hungary refers to 26 subject matters to be defined by cardinal laws, which include the judiciary (Article 25(7)), family policy (Article L), the rights of nationalities (Article XXIX), the fundamental rules of general taxation and the pension system (Article 40)¹.

The list of policy areas requiring qualified majority is a crucial aspect of democracy. While the use of cardinal laws is appropriate to define fundamental principles for instance of the national institutional framework, it is less appropriate in policy areas which are usually regulated by ordinary laws, such as family legislation, social and taxation policy².

In this regard, the Venice Commission pointed out that "a too wide use of cardinal laws is problematic with regard to both the Constitution and ordinary laws. [...] Functionality of a democratic system is rooted in its permanent ability to change. The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-third majority have of cementing its political preferences and the country's legal order. Elections [...] would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority"³.

Furthermore, a number of cardinal laws adopted so far lay down not only fundamental principles but also very specific and technical rules, such as very detailed regulation of every aspect of the organisation and administration of courts and on the legal status and remuneration of judges⁴ and even the exact boundaries of the electoral districts⁵. This practice entails the risk of restricting the impact of a new legislator following an election. A future new government relying only on a simple majority will not be able to modify the policies

¹ The third modification of the Fundamental Law (21 December 2012) modifies article P): the limits and the conditions of the acquisition of agricultural land and forest and the rules governing the integrated organisation of agricultural production shall be defined by cardinal law.

² See para. 27 of the Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

³ See para. 24 of the Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

⁴ See para. 19 of the Opinion 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges of Hungary and Act CLXI of 2011 on the organisation and administration of courts of Hungary adopted by the Venice Commission on 16-17 March 2012. CDL-AD(2012)001.

⁵ Act CCIII of 2011 on the elections of members of Parliament of Hungary.

defined in cardinal laws by the current government, even if it receives a clear mandate from the electorate to do so.

5. Checks and balances

As mentioned above, democracy and the rule of law require separation of powers based on a system of checks and balances. Freedom of media is also a key element of democracy and of a correctly functioning system of checks and balances¹. The new Constitution of Hungary introduced the following institutional changes, which could potentially weaken the functioning of this system:

5.1. A limited constitutional jurisdiction

Article 37(4) of the new Constitution limits the power to review the constitutionality of the Acts on the State Budget and its implementation to the fields explicitly listed ("*violation of the right to life and human dignity, the right to the protection of personal data, freedom of thought, conscience and religion, and with the rights related to Hungarian citizenship[...]*"), which excludes the review of constitutionality in case of breaches of other fundamental rights.

In this regard, the Venice Commission recalled that "a sufficiently large scale of competences is essential to ensure that the court oversees the constitutionality of the most important principles and settings of the society, including all constitutionally guaranteed fundamental rights. Therefore, restricting the Court's competence in such a way that it would review certain state Acts only with regard to a limited part of the Constitution runs counter to the obvious aim of the constitutional legislature in the Hungarian parliament 'to enhance the protection of fundamental rights in Hungary'².

Moreover, according to Article 27³ of the transitional provisions this restriction remains in force for acts that were promulgated when the state debt to the Gross Domestic Product ratio exceeded 50% . In this regard, the Venice Commission raised the following criticism: "The Constitution imposes specific criteria for the management of the state budget as well as strict limitations to the State debt. Nevertheless, instead of giving the Constitutional Court full scope of control over the constitutionality of the budget and taxes legislation, it gives a special power of intervention in this domain to the new Budget Council. In line with the "veto power" of the Budget Council, the said curtailment of the powers of the Constitutional Court and which regards the budget, taxes and other financial legislation is conditional on the state debt exceeding 50 % of the GDP"⁴.

¹ The question of media freedom is dealt with in Working Document No 3.

² See para. 99 of the Opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016

³ Provision annulled by the Constitutional Court of Hungary on 28 December 2012 (Decision No 45/2012).

⁴ See paragraph 98 of the opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

The independence of the Constitutional Court and its members should be clearly set forth in the Constitution¹, and there should be consideration of whether or not the general provisions of the Fundamental Law on the rule of law and the separation of powers (Articles B and C) are sufficient constitutional guarantees of the independence of the Constitutional Court².

5.2. A limitation of parliamentary powers

A limitation of parliamentary powers has been also introduced in the field of budgetary matters as the newly established non-parliamentary Budget Council appears to have in a number of cases a power of ‘veto’ over the State budget.³ Adoption of the budget is usually the core competence and exclusive privilege of parliament and allows for the implementation of the political program. As recalled by the Venice Commission making the decision dependent on another authority with limited democratic legitimacy may negatively impact upon the democratic legitimacy of budgetary decisions.⁴

It is furthermore worth recalling the criticism raised by the Venice Commission, according to which the very tight timeframe for the establishment of the new constitutional framework restricted the possibility for a genuine debate with the opposition forces in parliament⁵. This practice may weaken the correct functioning of a system of representative democracy, which is based on the respect for the rights of the opposition.

5.3. The independence of the judiciary: remaining shortcomings

¹ Article 24(1) of the Fundamental Law of Hungary declares that "The Constitutional Court shall be the supreme body for the protection of the Fundamental Law." without making any reference to the independence of the Constitutional Court. It then includes the list of competences and the last paragraph refers to a cardinal law for "the detailed rules for the competence, organisation and operation of the Constitutional Court".

² In its remarks on the draft opinion of the Venice Commission on Act CLI of 2011 on the Constitutional Court of Hungary, the Hungarian government commented as follows: "The independence of the Constitutional Court as a body is a principle that appears not expressly in the Fundamental Law but it results from the general principles of the Fundamental Law, especially from the principle of rule of law and separation of powers [Fundamental Law Article B) paragraph (1) and Article C) paragraph (1)]". CDL(2012)045.

³ Article 44(3) of the Fundamental law: "The adoption of the State Budget Act shall be subject to the prior consent of the Budget Council in order to meet the requirements set out in Article 36(4)-(5)." Article 36(4)-(5) reads as follows: "(4) Parliament may not adopt a State Budget Act which allows state debt to exceed half of the Gross Domestic Product. (5) As long as state debt exceeds half of the Gross Domestic Product, Parliament may only adopt a State Budget Act which contains state debt reduction in proportion to the Gross Domestic Product".

⁴ See para. 129 of the Opinion on the new Constitution of Hungary, adopted by the Venice Commission on 17-18 June 2011, CDL-AD(2011)016.

⁵ See para. 144 of the opinion on the new Constitution of Hungary adopted by the Venice Commission on 17-18 June 2011. CDL-AD(2011)016.

The judiciary has been subject to an overall reform set forth in two cardinal acts¹, the first version of which clearly compromised judicial independence². Independence means that the judiciary is free from external pressure and from interferences by other branches of the government, in particular the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers.

The above mentioned cardinal acts were amended on 2nd July 2012 by the Hungarian parliament³. The amendments take into considerations most of the recommendations of the Venice Commission, notably by reducing the powers of the President of the National Judicial Office (NJO) and transferring some of those powers to the National Judicial Council and by reinforcing the accountability of the President of the NJO.

However, three main issues still remain regarding the independence of the judiciary.

Firstly, key safeguards of the independence of judges, such as irremovability, guaranteed term of office, the structure and composition of the governing bodies, are not regulated in the Constitution and are – together with detailed rules on the organization and administration of the judiciary – set out in cardinal laws. As regards the level of regulation the Venice Commission found "the constitutional guarantees, principles and structures regarding the judiciary underdeveloped"⁴.

Secondly, with regard to the regulation of the transfer of cases the previous rules made it possible for the President of the NJO to assign a given case to another court instead of the presiding court, in order to ensure "the adjudication of cases within a reasonable period of time." The recently adopted amendments restrict this power so that the President of the NJO must now take into account the principles established by the NJC when transferring cases and must provide the reasoning behind each decision. However, the amendments neither lay down criteria for the selection of cases to be transferred nor entrust the NJC with the mandate to

¹ Act CLXI of 2011 on the organisation and administration of courts of Hungary and Act CLXII of 2011 on the legal status and remuneration of judges of Hungary.

² See Working Document 1 on the situation of Fundamental Rights: standards and practices in Hungary (pursuant to the EP resolution of 16 February 2012) - Independence of Judiciary.

³ As concluded by the Venice Commission in its opinion on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 on Hungary: "The amendments of 2 July 2012 address most remarks made in the Opinion CDL-AD(2012)001 of the Venice Commission of 16-17 March 2012 on the Act CLXI of 2011 on the organisation and administration of courts and on the Act CLXII of 2011 on the legal status and remuneration of judges of Hungary"(para. 83 CDL-AD(2012)020).

⁴ See para. 82 of opinion on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 on Hungary adopted by the Venice Commission on 12-13 October 2012. CDL-AD(2012)020.

adopt selection criteria¹, which the rights to a fair trial and to a lawful judge require².

Thirdly, the decision of the Court of Justice of the European Union, adopted on 6 November 2012³ and declaring that the lowering of the retirement age for Hungarian judges from 70 to 62 constitutes unjustified discrimination on grounds of age, needs to be timely and correctly implemented.

In this regard, it is worth recalling that the implementation of the Hungarian Constitutional Court's judgment no. 33/2012 annulling the same provision resulted in legal uncertainty. The Venice Commission reported that: "The President of the NJO invited the judges concerned to appeal to the labour courts in order to have their dismissal reversed. Several judges already won their cases before the labour courts, but these judgments were appealed against by the President of the NJO because she disagreed with their reasoning. Most importantly, even final judgments of the labour courts would not result in a reinstatement of the judges concerned in their previous position, but they will go through a new appointment process and could be assigned to other courts than those, which they belonged to before their dismissal".⁴

The legal dispute is also involving the Court of Strasbourg as two complaints have been submitted by two groups of Hungarian judges on 20 June 2012 seeking a ruling to establish that Hungary's legislation lowering judges' retirement age violates the European Human Rights' Convention⁵.

With a view to complying with the rulings of both the Hungarian Constitutional Court (No 33/2012) and the Court of Justice of the European Union (case C-286/12), the Hungarian government tabled on 21 December 2012 the draft law No T/9598 on the legislative amendments concerning the upper age limits to be applied in certain judicial legal relations⁶.

¹ In this regard, Hungary's comments on the draft opinion of the Venice Commission on the amended cardinal acts on the judiciary (CDL(2012)072) state that: "The NJC did not obtain the legal mandate to elaborate, in addition to the principles for the appointment of the proceeding court, the principles governing the selection of cases "to be transferred", because it is only the president of the court initiating the appointment who can judge whether it should be initiated for a case "to be transferred", taking into account the specific features of the case, as well as the workload and the personnel capacities of the given court".

² The rights to a fair trial and to a lawful judge are enshrined in Article 47(2) of the Charter of Fundamental Rights of the European Union, according to which "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. [...]". On the European level the rights to a fair trial and to a lawful judge are guaranteed by Article 6 of the European Convention on Human Rights. In its Opinion no. 683/2012 on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 on Hungary the Venice Commission concluded that "the Venice Commission strongly disagrees with the system of transferring cases because it is not in compliance with the principle of the lawful judge, which is an essential component of the rule of law" (para. 74, CDL-AD(2012)020).

³ Case C-286/12, Commission v. Hungary.

⁴ See paragraph 76 of the Venice Commission opinion no. 683/2012.

⁵ 45434/12 J.B. and 110 Others, 45438/12 Almásy and 45 Others.

⁶ <http://www.parlament.hu/irom39/09598/09598.pdf>

The draft law has not been debated by the Hungarian Parliament yet.

As regards the retirement age of judges, the draft law sets the upper age limit and the old age pension age limit at 65 years of age, which will apply at the end of a transition period of 10 years. More specifically, the draft law introduces a gradually decreasing upper age limit until 31 December 2022, when the general old age pension age limit and the upper age limit will be equally 65 years of age.

As regards the reinstatement of the unlawfully dismissed judges the draft law sets forth the following solution to comply with the Constitutional Court's decision No 33/2012: The dismissed judge will have to make a statement for reinstatement to the President of the NJO, who will make sure that the overdue remuneration and other emoluments be reimbursed to the judge. The judge will then continue to be employed at the "service quarters" where he or she was in office before dismissal.

The latter wording does not specify if the judge will be reinstated in the exactly same position (with the same duties and responsibilities) he or she was holding before being dismissed.

The draft law explicitly excluded the possibility for a judge to be reinstated in a court leadership position. However, a very recent proposal for an amendment to the draft law No T/9598 on the legislative amendments concerning the upper age limits to be applied in certain judicial legal relations¹ deletes the legal provisions precluding the reinstatement in judicial and public-prosecutor executive offices.

If the judge does not request to be reinstated the President of the NJO will have to order the payment of a flat rate indemnification corresponding to 12 months remuneration of the judge.

5.4. Removal of senior officials from their office before the end of their term

Another issue surrounding checks and balances is the removal and replacement of the heads of certain institutions before the end of the official term of their office.

As a consequence of the transformation of the Supreme Court to the Curia, the President of the Supreme Court was also removed from his office as of 1 January 2012, even though he was elected by the Parliament in 2009 for six years². The guarantee of security of tenure is a key element of the independence of the judiciary.

The new Freedom of Information Act³, adopted in July 2011, abolished the institution of the Commissioner on Data Protection and Freedom of Information and replaced it with the newly

¹ http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=9598

² Article 11(2) of the Transitional Provisions to the Fundamental Law reads as follows: "The mandates of the President of the Supreme Court and the President and members of the National Council of Justice shall be terminated when the Fundamental Law comes into force".

³ Act CXII of 2011 on Informational self-determination and Freedom of Information.

established National Agency for Data Protection. The former Commissioner, who had occupied the post since September 2008, was then removed from office with effect from 1 January 2012 (two years and a half before the expiry of his regular six-year term).

The independence of data protection supervisors is enshrined in Article 16 of the Treaty on the Functioning of the European Union and Article 8 of the Charter of Fundamental Rights. The Commission introduced an infringement proceeding¹ against Hungary arguing that the term of office has to be of reasonable duration and it is indispensable that once a Member State has fixed the duration of that term of office, that duration should be respected. In its grounds of appeal the Commission referred to Directive 95/46/EC establishing that one or more public authorities of the Member States, which are to act with complete independence in exercising the functions entrusted to them, are to be responsible for monitoring the application of the national provisions transposing that Directive. According to the Commission: "the removal from office before time of the authority responsible for supervising data protection undermines the independence required by the Directive of that authority"².

6. Electoral Reform

Democracy in the EU Member States and thus in the EU requires that national electoral laws comply with a certain set of fundamental standards. Most of these standards mainly derive from constitutional principles applicable to electoral law and notably from Article 21 of the Universal Declaration of Human Rights in 1948 and Article 3 of the Additional Protocol to the European Convention on Human Rights. All EU member States, including Hungary, committed to the code of practice in electoral matters determined by the Council of Europe³.

The extensive institutional and constitutional reform in Hungary also includes a new electoral law, namely the Act CCIII of 2011 on the elections of members of Parliament of Hungary⁴, and a new Act on Election Procedure.

The Act CCIII of 2011 on the elections of members of Parliament of Hungary - adopted on 23 December 2011 and entered into force on 1 January 2012⁵ - introduced the following changes: - a significant reduction in the number of seats in Parliament (from 386 to 199); - a modified formula for the allocation of seats (a mixed proportional-majoritarian electoral system with an

¹ European Commission v. Hungary, Case C-288/12. The Commission asked the CJEU to declare that Hungary failed to fulfil its obligations under Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data by removing the data protection supervisor from office before time.

² European Commission v. Hungary, Case C-288/12, Official Journal of the European Union of 28 July 2012, C 227/15.

³ A compilation of the applicable standards is laid down in the Code of Good Practice in Electoral matters, drafted by the European Commission for Democracy through Law (Venice Commission) in 2002. CDL(2002)023rev.

⁴ An official translation has been provided by the Venice Commission. See CDL-REF(2012)003.

⁵ See Venice Commission and OSCE/ODIHR joint opinion. CDL-AD(2012)012

increased weight of the majoritarian part); - the introduction of a single round of elections instead of the two-round system, previously used for the allocation of seats under the majoritarian part of the electoral system; - the reduction in the number of electoral constituencies and the inclusion of an annex setting out each district in precise detail ; - the extension of the right to vote to Hungarian citizens living abroad but only for the proportional part of the elections; - specific rules for the representation of national minorities in Parliament.

A draft law on the election procedure was tabled on 18 September 2012 as an individual member's bill¹ by members of the Fidesz and KDNP parties. It intended to replace the current automatic voter registration of all citizens with residence in Hungary by a system of voluntary registration as a condition to exercise the individual's right to vote.

On the same day when the draft law on the election procedure was tabled, a proposal for a modification of the transitional provisions of the Fundamental Law - which following the first constitutional modification formed an integral part of the Fundamental Law - was tabled in Parliament, also as an individual members' bill². It was adopted by Parliament on 29 October 2012 and was published on 9 November. The second constitutional modification enshrined the requirement of voter registration in the Fundamental Law³.

The draft law on the election procedure was signed by the Speaker of the Parliament on 1 December 2012. It applies to both national elections (parliamentary, local and national minorities) and the elections of the European Parliament.

The Act has not been promulgated yet as on 6 December 2012 the President of the Republic sent the law to the Constitutional Court for a constitutional review pursuant to Article 6(4) of the Fundamental Law⁴.

In his petition the President of the Republic of Hungary asked the Court to declare unconstitutional a number of provisions of the law on the electoral procedure governing the

¹T/8405.

²T/8404.

³ The following paragraphs (3)-(5) were added to Article 23 of the transitional provisions of the Fundamental Law: "(3) In order to give effect to the rights set out in Article XXIII of the Fundamental Law, all the electors pursuant to paragraphs (1)-(3) and (7) of Article XXIII of the Fundamental Law shall be, at their own request, entered into a register; the right to vote can be exercised after having been entered into the register. Registration may be requested, a) by electors residing in Hungary: personally or through electronic means which allow the identification of the person who makes the request, b) by electors not resident in Hungary: by letter or through electronic means which allow the identification of the person who makes the request. (4) Entry into the register may be requested until the fifteenth day preceding the election or the referendum. (5) The register shall be drawn up again according to paragraphs (3) and (4) each time before the general election of the members of parliament, except for elections resulting either from Parliament dissolving itself or from it being dissolved".

⁴ "If the President of the Republic considers an Act or any of its provisions to be contrary to the Fundamental Law [...] he or she shall send the Act to the Constitutional Court for an examination of its conformity with the Fundamental Law."

modalities for voter registration and the political advertisement during the campaign (Articles 88, 92, 151, 152(5), 154(1), 353(4)). The President's motion is based on Articles B (democracy and the rule of law), I (first article in the chapter "freedom and responsibility"), IX (freedom of expression and freedom of the press), XV (equality and the right to non-discrimination), XXIII (right to vote) of the Fundamental Law, on Article 23(3) of the transitional provisions thereof and also refers to Article 3 of the 1st additional protocol of the ECHR¹ and the case-law of the ECtHR.

More precisely, the contested provisions are the following:

- Articles 88(1)-(2) lay down two different registration modalities for electors resident in Hungary and for electors resident abroad. Electors residing in Hungary may register personally or through the "citizens' portal", i.e. through an electronic means which allow the identification of the person who makes the request. The request must be addressed to the competent local authority where the elector is resident. Electors not resident in Hungary may register by letter or through the "citizens' portal". According to the President's motion, the obligation to make the request to the competent local authority is a stricter condition than what is foreseen in the transitional provisions and might breach the principle of proportionality.
- Article 92 stipulates that electors who are resident in Hungary but who do not have an address fall under the provisions on electors residing abroad. According to the President's motion this provision is discriminatory.
- Articles 151 and 152(5) are related to the electoral campaign. Political advertisement during the campaign will only be allowed for public media providers, and only until 48 hours before the vote. Cinemas will not be allowed to screen political advertisements. According to the motion this rule is contrary to the freedom of expression and of the press.
- Article 154(1) forbids the publication of the results of opinion polls related to the elections during the last 6 days of the campaign. According to the motion this provision is contrary to the freedom of expression and of the press.
- Article 353(4) contains a technical provision on the applicability of the new procedure which seems to be contrary to Article 23 of the transitional provisions.

Following the petition of the President of the Republic of Hungary on 4 January 2013 the Constitutional Court finalised its constitutional examination (Decision No 1/2013)².

As regards the registration requirement, the Court declared that in case of citizens resident in Hungary, the mandatory registration restricts the right to vote without any reason, which is contrary to the Fundamental Law. On the contrary, the Court admitted that the registration is justified in certain cases as it facilitates the exercise of the voting rights of certain groups of

¹ Article 3 of the 1st additional protocol of the ECHR: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

² <http://mkab.hu/sajto/news/certain-provisions-of-the-act-on-election-procedure-held-contrary-to-the-fundamental-law>

voters. These groups include the Hungarian voters without residence in Hungary; those members of the national minority living in Hungary who wish to vote on national minority list; and those who need help to take part in elections. The Court further added that it would be a disproportionate limitation of the right to vote if those voters, whose right to vote without previous registration cannot be ensured, could only register at their permanent domicile and not at their usual residence.

The Constitutional Court also found discriminatory the exclusion of the possibility of personal registration of voters living in Hungary without address.

As regards the rules on the election campaign, the Court declared that the provisions allowing the publication of political advertisements only in the public media service during the electoral campaign and the rules banning the publication of public opinion polls within six days before the elections disproportionately limit the freedom of expression and the freedom of press are therefore contrary to the Fundamental Law.

Therefore the Court declared that the following provisions of the Act on Electoral Procedure adopted on 26 November 2012 are unconstitutional: §§ 82(2), 88(1), 92, 106, 151, 152(5), 154(1), 353(4).

7. The recent proposal for a fourth constitutional amendment

On 8 February 2013 the FIDESZ/KDNP coalition tabled a proposal for the fourth constitutional amendment in the form of an individual member's bill¹, which is signed by almost all members of the coalition.

The proposal for the fourth constitutional amendment integrates into the text of the Fundamental Law all transitional provisions - with the exception of the provision requiring the electoral registration -, which were annulled by the Constitutional Court of Hungary on 28 December 2012 on procedural grounds (decision No 45/2012). These provisions include for example: the provisions on the former communist party including the non application of statute of limitations of the serious crimes committed in the communist dictatorship (Article 3 of the Proposal, which adds new Article U to the part of the "Fundamental Principles" of the Fundamental Law - previous Preamble and Articles 1-4 of the Transitional Provisions); the parliament's power to draw up the list of officially recognized churches (Article 4 of the Proposal - previous Article 21(1) of the Transitional Provisions); the parliament's power to determine detailed rules on the rights of nationalities living in Hungary and the requirements for recognition as a nationality (Article 9 of the Proposal - previous Article 21(2) of the Transitional Provisions); the power of the president of the National Judicial Office to designate courts other than the competent general court to trial cases (Article 14 of the Proposal - Previous Article 11(3)-(4) of the Transitional Provisions); the extension of the restriction of the judicial review of budgetary and financial laws to an indefinite period (Article 17(1) of the proposal), etc.

Furthermore, the proposal for the fourth constitutional amendment contains at least two

¹ http://www.parlament.hu/internet/plsql/ogy_irom.irom_adat?p_ckl=39&p_izon=9929

clauses on the Constitutional Court that raise concerns:

According to the first provision, the Constitutional Court can review the Fundamental Law and any amendments thereof only for conformity with the procedural requirements set out in the Fundamental Law with respect to its adoption and promulgation (Article 12(4) of the Proposal). Thus, the Court will not be able in the future to review the substance of any constitutional amendment and therefore the Fundamental Law will be open for any amendment regardless of its content¹. To complement this provision Article 11 of the Proposal aims to entitle the President of the Republic to send the adopted Fundamental Law and any amendments thereof to the Constitutional Court for a review of conformity (only) with the procedural requirements set out in the Fundamental Law with respect to its adoption.

In addition, the Proposal imposes a short time limit for such a revision, namely "thirty days at the latest" (Article 12(5) of the Proposal).

According to the second provision, the rulings of the Constitutional Court and related justifications adopted before the entry into force of the Fundamental Law cannot be taken into consideration for the purposes of interpreting the Fundamental Law (Article 19 of the Proposal). In other words, it will not be possible to take into consideration 20 years of constitutional jurisprudence for the purposes of the interpretation of the Fundamental Law. The draft doesn't specify the subject of that prohibition; therefore it will possibly apply not only for the Constitutional Court, but also for ordinary courts. (Several constitutional principles of Hungarian law are based solely on the jurisprudence of the Court. For example, besides the obligations under international law the domestic legal base for the non-existence of the death penalty is decision 23/1990 of the Constitutional Court.)

The proposal imposes further restrictions on the Constitutional Court's jurisdiction: - it imposes a short time limit ("immediately and no later than thirty days") to review the conformity of any legal regulation applicable in a particular case with the Fundamental Law upon the request of a judge (Article 12(1) of the Proposal).

In addition, a number of fundamental rights are potentially narrowed down by some provisions of the proposal for the fourth constitutional amendment, despite the fact that the Constitutional Court had previously declared unconstitutional such limitations:

- the freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation (and of other communities, such as ethnic, racial or religious minorities) (already declared unconstitutional by decisions 30/1992² and 18/2004³) (Article 5(2) of the Proposal);

- students whose studies are subsidized in the Hungarian universities can be bound by law to

¹ The settled case law of the Court has indeed been that it only reviewed constitutional amendments on procedural grounds, but this practice was rather based on the self-restraint of the Court and not on a constitutional prohibition.

² http://www.mkab.hu/letoltesek/en_0030_1992.pdf

³ http://www.mkab.hu/letoltesek/en_0018_2004.pdf

work in Hungary for a certain period of time after their studies (Article 7 of the Proposal); the amendment stipulates that such a restriction is governed solely by Hungarian law (already declared unconstitutional (on formal grounds) by decision 32/2012¹);

- an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode (already declared unconstitutional by decision 38/2012²).

Finally, the proposal for the fourth amendment proposes to incorporate in the constitution various other provisions, such as:

- the existence of a "Parliament Guard" under the direction of the Speaker of the House,

- the rules of financial management of public institutions of higher education shall be determined by the government who shall also supervise their financial management.

The proposal for the fourth constitutional amendment is being currently debated in the Hungarian parliament.

¹ <http://public.mkab.hu/dev/dontesek.nsf/0/780CA328B83B304BC1257ADA00524DBC?OpenDocument>

² <http://public.mkab.hu/dev/dontesek.nsf/0/1C19F4D0CFDE32FBC1257ADA00524FF1?OpenDocument>