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Still under threat: the independence of the judiciary and the rule of law in Hungary

October 2015

Report of the International Bar Association's Human Rights Institute (IBAHRI)

This report has been compiled in accordance with the Lund-London Guidelines 2009 (www.factfindingguidelines.org)

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Contents

Glossary of Acronyms

ACCP	Act XIX of 1998 on the Code of Criminal Proceedings
ACFR	Act CXI of 2011 on the Commissioner for Fundamental Rights
ALSRJ	Act CLXII of 2011 on the Legal Status and Remuneration of Judges
AOAC	Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary
CCA	Act CLI on the Constitutional Court
CCJE	The Consultative Council of European Judges
CSO	civil society organisation
EEA	European Economic Area
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECSJ	European Charter on the Statute for Judges
EU	European Union
Fidesz-KDNP	Governing coalition party comprising Fidesz and the Christian-Democratic Party
GRECO	Group of States Against Corruption
HHC	Hungarian Helsinki Committee
HCLU	Hungarian Civil Liberties Union
HRWG	Human Rights Working Group
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICCPR	International Covenant on Civil and Political Rights
MPs	members of parliament
NCJ	National Council for the Judiciary
NGO	non-governmental organisation
NHRI	National Human Rights Institution
NJC	National Judicial Council
NJO	National Judicial Office
OHCHR	Office of the High Commissioner for Human Rights

SCA	Sub-Committee on Accreditation
TEU	Treaty on the European Union
TI	Transparency International
UN	United Nations
UPR	Universal Periodic Review

Executive Summary

The independence of the judiciary underpins the rule of law and human rights and must be guaranteed by states both in law and in practice. An independent and impartial justice system not only ensures the implementation of the right to a fair trial but also acts as a fundamental check and balance against executive and legislative action. As such, judicial independence is integral to the functioning of a democratic state.

In 2010, Hungary's newly elected government instigated a programme of legal reform that transformed the country's constitution and the composition of institutions governing the administration of justice. The scope of the reforms and the speed at which they were introduced during the government's first years in power caused domestic and international alarm, with observers perceiving an attempt to exert political control over the judicial apparatus.

Immediately, Hungary's new constitution (the Fundamental Law) and accompanying legislation forced some 270 judges into premature retirement, removed the president of Hungary's Supreme Court (now the Kúria) and restricted the jurisdiction of the Constitutional Court. In March 2012, the International Bar Association's Human Rights Institute (IBAHRI) undertook its first fact-finding mission to Hungary to examine the impact of the reforms on the judiciary and the administration of justice.

Under the amended legal framework, wide powers over judicial administration were entrusted to the newly established National Judicial Office (NJO), whose president is elected by parliament. Conversely, the competencies of Hungary's restructured autonomous judicial body, the National Judicial Council (NJC), were markedly reduced. The IBAHRI found this to be one of the most worrying aspects of the reform.

While welcoming the initiative to improve the efficiency of the justice system, the IBAHRI delegation concluded from its examination that the cumulative effect of the reforms had undermined both the independence of the judiciary and the necessary democratic checks and balances essential to the rule of law.

In its September 2012 report, the IBAHRI set out these findings and made recommendations aimed at strengthening the role of the NJC. It also urged the government to respect the independence of the judiciary by desisting from overturning Constitutional Court judgments and to undertake wide consultation so as to assess the impact and operation of Hungary's new legal framework.

In June 2015, a second IBAHRI delegation undertook a follow-up mission to Hungary to assess the implementation of its 2012 recommendations and to examine the current situation with regards to the rule of law in the country. In this report, the IBAHRI sets out the findings of its 2015 mission and presents further recommendations to support the restoration and reinforcement of the rule of law.

This present IBAHRI delegation welcomes the fact that, following constructive dialogue between Hungary's government and regional and international bodies, some of the gravest concerns previously expressed have now been addressed. The IBAHRI notes that much of this legislative reform was implemented through Act CXI of 2012 on the Amendment of Act CLXI of 2011 and

Act CLXII of 2011[1] (the 'Amendment Act'), which entered into force on 17 July 2012, and was considered in the IBAHRI's 2012 report. Since that time, the IBAHRI recognises that there have been subsequent incremental positive reforms, and the Parliamentary Assembly of the Council of Europe has welcomed the more balanced distribution of powers between the president of the NJO and the NJC.[2]

Nevertheless, for reasons set out in this report, the IBAHRI concludes that the independence of the judiciary and the rule of law – which were weakened in 2012 – remain under threat in Hungary in 2015. The IBAHRI notes, in particular, the significant regressive step introduced by the Fourth Amendment to Hungary's Fundamental Law (the 'Fourth Amendment'), which considerably limits the authority and role of the Constitutional Court, in breach of international standards.

In this report, the IBAHRI assesses the current functioning of Hungary's two judicial institutions (Chapter Three): the NJC and NJO. The delegation welcomes the practical steps taken by the NJC to fulfil its supervisory function in the best interest of the judiciary. However, the IBAHRI finds that, despite being Hungary's designated autonomous body of judicial self-government, the NJC is not empowered as such. Its function must be further strengthened if the judiciary is to be fully independent.

In Chapter Four, the report revisits the IBAHRI's concerns relating to the weakened system of checks and balances in the country, considering in particular the impact of the Fourth Amendment on the role of the Constitutional Court. The IBAHRI finds it deeply concerning that the reform has engendered a perception that the Constitutional Court is, in the words of one senior judge with whom the delegation spoke during its 2015 mission, 'not fit for purpose'. Despite further constitutional amendment, the authority of the Constitutional Court remains limited. Its ability to protect the rights guaranteed by Hungary's Fundamental Law is therefore also restricted and the rule of law weakened.

The abolition of the *actio popularis* challenge, which entitled citizens to initiate constitutional review for reasons of public interest, has represented a major change to Hungary's constitutional mechanism. Citizens' public interest legal challenges are now filtered through the Office of the Commissioner for Fundamental Rights (the 'Office'), Hungary's National Human Rights Institution (NHRI). This report examines the Office's changed role and that of the current Commissioner for Fundamental Rights. While the IBAHRI welcomes the Office's active work in promoting human rights, the delegation finds the current Commissioner adopts too narrow an interpretation of its mandate when seeking a review of legislation before the Constitutional Court. This should be urgently reviewed to ensure the effective protection of human rights.

Worrying rule of law developments include the inflammatory statements made against some civil society organisations (CSOs) and the abolition of the limit on the duration of pre-trial detention in serious cases (Chapter Five). The IBAHRI delegation views these changes as of grave concern to

1 The 2012 mission report, *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*, published in September 2012, is available online in English at www.ibanet.org/Article/Detail.aspx?ArticleUid=f95a6bf2-99cf-42c8-9c24-d3b7a531207c. This and all other URLs herein were last accessed on 23 September 2015, unless otherwise specified.

2 As quoted in the provisional report of the Committee on Political Affairs and Democracy on the Situation in Hungary following the adoption of Council of Europe Parliamentary Assembly Resolution 1941 (2013), [41] available at website-pace.net/documents/18848/1453125/20150604-SituationHungary-EN.pdf/5a28678b-d8b6-487f-8fce-a5b48398d61b.

rule of law protections in Hungary. Finally, the present IBAHRI delegation finds that the Hungarian government's failure to engage in frequent and systematic consultation on legislative reform continues.

Now in its second term of office, Hungary's government has an opportunity to demonstrate a commitment to rule of law principles and the IBAHRI urges it to address all legal and practical impediments to guaranteeing the independence of the administration of justice and of judges. This report further recommends that the government maximise the space for civil society in Hungary, in recognition of the valuable role CSOs play in the promotion of the rule of law and fundamental rights.

Chapter One: Introduction

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners, bar associations and law societies. Its membership includes over 55,000 lawyers and 195 bar associations and law societies spanning every continent. The IBA influences the development of international law reform and shapes the future of the legal profession throughout the world. The IBAHRI works to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession worldwide.

This report has been prepared following a visit to Hungary by IBAHRI delegates from 15–19 June 2015. The delegation's mandate was primarily to follow up on the findings of the IBAHRI fact-finding mission undertaken in March 2012[3] that had sought to assess the impact of legal reform implemented by Hungary's then new government on the independence of the judiciary and the rule of law.[4]

The 2012 delegation concluded that the new legislative framework undermined the independence of the judiciary and the necessary checks and balances essential to the rule of law. The resulting IBAHRI report (September 2012) presented 23 recommendations to the Hungarian government, which aimed to support the restoration and reinforcement of the rule of law. An assessment of the implementation of the IBAHRI's recommendations is presented in the content of each chapter, with reference to the enumerated recommendations ('IBAHRI 2012 Recommendations') in Annex I.

The IBAHRI presented a draft of this report to Hungary's Ministry of Justice for comments. The IBAHRI welcomes the government's response, which is included in Annex II, and is grateful for the time taken by the Deputy Minister of Justice, Dr Róbert Répássy, to review the draft report and provide substantive comments.

1.1 The IBAHRI's mission mandate

The 2015 mission's terms of reference were to:

- assess the implementation of the IBAHRI's recommendations contained in its September 2012 report, *Courting Controversy: the Impact of Recent Reform on the Independence of the Judiciary and Rule of Law in Hungary*;
- examine the level of independence of judges and of members of the legal profession and the impact thereof on the protection of human rights;
- examine other rule of law issues, as relevant;
- write and publish a report detailing findings of the mission; and
- make further recommendations.

3 The IBAHRI's first fact-finding mission to Hungary, undertaken from 19–23 March 2012, was funded by the Open Society Institute.

4 The terms of the reference of the 2012 mission were to: (1) examine the current status of judges and lawyers in Hungary and their ability to carry out their professional duties freely; (2) investigate impediments, either in law or in practice, to the effective administration of justice; (3) 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 (4) make recommendations with respect to the above.

1.2 Interviews and consultations

During the June 2015 mission, the delegation held 25 individual and group consultations with key stakeholders including: the Hungarian Bar Association; the Ministry of Justice; members of the judiciary (including the Constitutional Court and the Kúria); the Office of the Commissioner for Fundamental Rights; members of the NJO and the NJC; governing and opposition members of parliament (MPs); members of the diplomatic community; and CSOs – namely, among others, Amnesty International-Hungary; the Eötvös Károly Policy Institute; the Hungarian Civil Liberties Union (HCLU); the Hungarian Helsinki Committee (HHC); and Transparency International (TI) Hungary. The delegation also met with a former Minister of Justice and a former chief prosecutor.

Following the mission, the delegation conducted further analysis of domestic and international instruments, and reviewed secondary sources providing commentary on the rule of law situation in Hungary, including those by national CSOs and the European Commission for Democracy through Law (the 'Venice Commission'), to assist in the compilation of this report. The delegation also followed up with some interviewees by email and is very grateful for their continued assistance.

1.3 The members of the delegation

The IBAHRI expresses its gratitude to members of the delegation: José Igreja Matos, IBAHRI Programme Lawyer Chara de Lacey, and barrister and mission rapporteur Nick Stanage.

José Igreja Matos sits as a judge on the Court of Appeal of Porto, Portugal, and was a member of the Support Office to the Portuguese High Council of the Judiciary. He has 25 years of judicial experience and has been a Court of Appeal judge since 2012. He is the Vice President of the International Association of Judges, a position he has held since 2012. In this capacity, he has worked closely with national associations of judges worldwide on issues related to human rights and the independence of the judiciary. Between 2009 and 2012 he was Vice President of the Ibero-American Group of the International Association of Judges and has also acted as an expert on judicial systems and judicial reform for the European Union (EU), the Council of Europe and the Organisation for Economic Co-operation and Development, including in Serbia and Georgia. He is currently an Expert-Evaluator within the Council of Europe's Group of States against Corruption (GRECO).

Chara de Lacey is a Programme Lawyer with the IBAHRI. She is a United Kingdom-qualified lawyer, with private practice experience in commercial law. Before joining the IBAHRI, she worked for a London-based non-governmental organisation (NGO) coordinating legal education programmes for lawyers on issues of international human rights and the role of the law in the eradication of global poverty. Within the IBAHRI, she manages projects in the Middle East and Africa. She coordinates the IBAHRI's extensive judicial training programme in Tunisia to support the strengthening of judicial independence and has managed capacity building programmes for lawyers from Sudan and Malawi. She studied international human rights law and practice at the London School of Economics in the UK.

Nick Stanage, IBAHRI mission rapporteur, is a barrister at Doughty Street Chambers in London. He is recommended as a specialist by the Chambers and Partners Guide to the UK Legal Profession. He specialises in civil lawsuits involving unlawful detention and mistreatment by prison and immigration

authorities. He has extensive experience in immigration, refugee, human rights and public law. He is a part-time judge in the court of the coroner, which conducts investigations into the causes and circumstances of deaths in police stations, prisons and psychiatric hospitals.

Chapter Two: Background Information

A detailed introduction to the history of Hungary and its political, judicial and legal infrastructure can be found in the IBAHRI's September 2012 report. It is, however, useful to recall the legislative and political developments leading up to, and the reasons for, the IBAHRI's first mission before considering developments relevant to the mandate of the IBAHRI's June 2015 mission.

2.1 Background to the IBAHRI's 2012 mission

In April 2010, Fidesz-KDNP – a coalition party formed of the Fidesz – Magyar Polgári Szövetség party (the Association of Young Democrats – Hungarian Civic Party) and the Christian-Democratic Party (KDNP) – won its first term in power with a landslide victory that granted it a two-thirds parliamentary majority. The strength of the win gave the party the necessary parliamentary control to introduce substantial legislative reform during its first years in office, including the promulgation of a new constitution, the Fundamental Law of Hungary, which was adopted by Hungary's National Assembly on 25 April 2011 and came into force on 1 January 2012.[5]

The Fundamental Law signified a break with the country's communist past, provided a new regulatory framework for the state apparatus and set out citizens' fundamental rights and obligations.[6] Given its importance, commentators expressed frustration that the draft law was open for public consultation for only one month and three days.[7] Indeed, the speed of, and lack of transparency surrounding, the drafting process were decried by international bodies and Hungarian civil society as threatening the rule of law and democratic standards.

Hungary's new constitutional framework was accompanied by implementing legislation introduced as a constitutional addendum (the 'Transitional Provisions')[8] and a series of cardinal laws.[9] For the purposes of an examination of the independence of the judiciary, the following cardinal laws are of most relevance: Act CLXII of 2011 on the Legal Status and Remuneration of Judges (ALSRJ); Act CLXI of 2011 on the Organisation and Administration of Courts in Hungary (AOAC); and Act CLI on the Constitutional Court (CCA).

The IBAHRI's March 2012 mission was initiated following widespread concern about the impact of these new laws on the independence of judges and the administration of justice. The key concerns examined by the IBAHRI were: the lowered, mandatory judicial retirement age; the wide powers held by the president of the NJO, an individual elected by parliament; reform to the composition and competency of Hungary's Constitutional Court; the abolition of the *actio popularis* challenge*;* and

5 'The Fundamental Law' (website of the Hungarian government), available at www.kormany.hu/en/hungary/the-hungarian-state/the-fundamental-law. The Fundamental Law of Hungary, the full consolidated text as on 1 October 2013, incorporating the First, Second, Third, Fourth and Fifth Amendments, is available at www.mfa.gov.hu/NR/rdonlyres/8204FB28-BF22-481A-9426-D2761D10EC7C/0/FUNDAMENTALLAWOFHUNGARYmostrecentversion01102013.pdf.

6 *Ibid.*

7 Gergely Bárándy, 'The Most Significant Issues of Power Theory in Hungary from 2010 to 2014' (2015) *International Constitutional Law Journal*, 9(1).

8 The Transitional Provisions came into force on 1 January 2012. Elements of the Transitional Provisions have since been introduced into Hungary's constitution, despite being declared unconstitutional and therefore annulled, by Hungary's Constitutional Court, see Constitutional Court Decision 45/2012. (XII.29.) available at www.mkab.hu/letoltesek/en_0045_2012.pdf.

9 Cardinal laws are defined in the Fundamental Law, Art T(4) as '…Acts, for the adoption or amendment of which the votes of two-thirds of the Members of the National Assembly present shall be required'.

the circumstances surrounding the replacement of the president of the Kúria (formerly Hungary's Supreme Court).[10] An update on these points is presented in Chapters Three and Four of this report.

In the months following the IBAHRI's mission, Hungary's parliament adopted the Amendment Act to amend the AOAC and the ALSJ which, inter alia, restricted the number of powers held by the president of the NJO. The IBAHRI's September 2012 report acknowledged and welcomed the reform; however, the delegation concluded that areas of law could be strengthened further.

2.2 Recent legislative and political developments

The Fourth Amendment to the Fundamental Law

Hungary's parliament voted to amend the Fundamental Law for a fourth time on 11 March 2013.[11] This Fourth Amendment has been subject to criticism of both its substance and the manner in which it was passed.[12] Introduced into parliament as a private member's bill,[13] the manner of reform recalled the government's apparent unwillingness to seek genuine democratic dialogue on the shaping of Hungary's constitutional framework. Considering the scope of the amendment, which 'changed the Constitution in a number of aspects, as concerns individual human rights, as concerns the ordinary judiciary and as concerns the role of the Constitutional Court of Hungary',[14] this was a deeply troubling legal development.[15]

Within its supplementary articles, the Fourth Amendment introduced significant change to the authority of the Constitutional Court. Specifically, its provisions:

- 'repealed' all Constitutional Court rulings delivered prior to the entry into force of the Fundamental Law on 1 January 2012;[16]
- limited the Constitutional Court's power to review the Fundamental Law or amendments thereto to one of procedural compliance rather than substance;[17] and
- extended the temporal limitation on the Constitutional Court's authority to review financial legislation to extend to laws passed 'even if state debt no longer exceeds half of the Gross

10 The Kúria was established by Art 11 of the Transitional Provisions and replaced Hungary's Supreme Court as its legal successor.

11 Submitted text and reasoning in Hungarian available at www.parlament.hu/irom39/09929/09929.pdf.

12 See, for example, Venice Commission, *Opinion on the fourth amendment to the Fundamental Law of Hungary* (2013), available at www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282013%29012-e; Eötvös Károly Policy Institute, the HHC and the HCLU, *Main concerns regarding the Fourth Amendment to the Fundamental Law of Hungary* (2013) available at http://helsinki.hu/wp-content/uploads/Main_concerns_regarding_the_4th_Amendment_to_the_Fundamental_Law_of_Hungary_13032013.pdf; 'Hungary must revoke amendment threatening judicial independence – UN rights chief' (UN News Centre, 18 June 2013) available at www.un.org/apps/news/story.asp?NewsID=45204#.VbjvEflVhHw.

13 See section 4.3 of this report.

14 See n 12, Venice Commission Opinion (2013), [138]. Both the Secretary General of the Council of Europe and Hungary's Minister for Foreign Affairs requested an Opinion of the Venice Commission on the compatibility of the Fourth Amendment with Council of Europe standards.

15 'Hungarian Constitutional Court restrictions of great concern to the IBAHRI' (IBAHRI press release, 22 March 2013) available at www.ibanet.org/Article/Detail.aspx?ArticleUid=bd579f00-0b69-4314-b9bf-f1a0a728a04f. See also Council of Europe Parliamentary Assembly Resolution 1941(2013) Request for the opening of a monitoring procedure in respect of Hungary [6], available at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19933&lang=en.

16 Fundamental Law, Closing and Miscellaneous Provisions, 5. The Venice Commission Opinion (n 12) [94] states that 'the complete removal of the earlier case-law could be neither adequate nor proportionate'.

17 Fundamental Law, Art 24(5) states: 'The Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation'.

Domestic Product',[18] meaning that such laws adopted in the foreseeable future will be subject to a highly restrictive form of constitutional review without the protection of legal certainty.[19]

Commentators also noted with alarm that the Fourth Amendment had the effect of reintroducing provisions of law found to be unconstitutional by the Constitutional Court, including elements of the Transitional Provisions that the Constitutional Court had previously annulled.[20] The Venice Commission, in its Opinion of 17 June 2013 on the Fourth Amendment, concluded:

> 'In this respect, a consistent pattern of reacting with constitutional amendments to the rulings of the Constitutional Court may be observed in Hungary in recent times, and the Fourth Amendment follows this pattern. Provisions which were found unconstitutional and were annulled by the Constitutional Court have been reintroduced on the constitutional level: this pattern of "constitutionalisation" of provisions of ordinary law excludes the possibility of review by the Constitutional Court.'[21]

The Fourth Amendment therefore represented a considerable restriction on the independence of the judiciary and the guarantees for the democratic system of checks and balances; in a press release dated 22 March 2013, the IBAHRI called for the Hungarian government to revoke the amendment.[22]

As well as provisions impacting on fundamental freedoms – including those of religion and expression[23] – the Fourth Amendment also elevated the position of the president of the NJO to the constitutional level, while failing to recognise the role of the NJC, Hungary's body of judicial self-government. The Venice Commission perceived this to be a regressive step given earlier, positive legislative reform.[24]

The Fifth Amendment to the Fundamental Law

In response to criticism, Hungary's parliament adopted its fifth, and latest, amendment to the Fundamental Law on 16 September 2013. Positively, the Fifth Amendment annulled the power of the president of the NJO to transfers cases to a different court,[25] and introduced constitutional recognition to the supervisory function of the NJC.[26] The amendment, however, left intact the restrictions on the competency of the Constitutional Court.

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18 Fundamental Law Art 37(4) limits the Constitutional Court's jurisdiction on taxation and budgetary matters, while state debt exceeds half of Hungary's gross domestic product. Fundamental Law, Art 37(5) extends this limitation.

19 See Chapter Three of this report and IBAHRI's 2012 report (n 3) ss 4.12–4.13.

20 For a summary see, Eötvös Károly Policy Institute, HHC and HCLU, *Provisions of the Fourth Amendment to the Fundamental Law of Hungary contradicting decisions of the Constitutional Court* available at http://helsinki.hu/wp-content/uploads/Constitutional-Court-vs-Fourth-Amendment.pdf.

21 See n 12, Venice Commission Opinion (2013), [81].

22 See n 15, IBAHRI press release (2013).

23 See n 12, Venice Commission Opinion (2013), ss C and E, respectively.

24 *Ibid*, [71].

25 The Fifth Amendment annulled the Fundamental Law Art 27 (4), which had been supplemented by the Fourth Amendment, Art 14.

26 Fundamental Law at Art 25(5) states: 'The central responsibilities of the administration of the courts shall be performed by the President of the National Office for the Judiciary. The National Council of Justice shall supervise the central administration of the courts. The National Council of Justice and other bodies of judicial self-government shall participate in the administration of the courts.'

Recent political developments

In Hungary's April 2014 elections, Fidesz-KDNP secured a second consecutive term in office, and a two-thirds parliamentary majority, under the leadership of incumbent Prime Minister Viktor Orbán. Since the elections, however, Fidesz-KDNP has lost its parliamentary super-majority.[27]

27 See, 'Fidesz Party loses supermajority' (*Financial Times*, 23 February 2015) available at www.ft.com/cms/s/0/36811202-baf2-11e4-945d-00144feab7de.html#axzz3agLdq244 (login required).

Chapter Three: The Independence of the Judiciary

3.1 International and regional standards

The principle of the separation of powers is the foundation of the rule of law and ensures that no state power – whether executive, legislature or judiciary – can exercise absolute authority. Accordingly, the United Nations Basic Principles on the Independence of the Judiciary (the 'UN Basic Principles') provide that it is 'the duty of all governmental and other institutions to respect and observe the independence of the judiciary'[28] because, as the Bangalore Principles of Judicial Conduct affirm, '[j]udicial independence is a prerequisite to the rule of law and a fundamental guarantee of a fair trial'.[29]

While international law does not prescribe a model system for safeguarding judicial independence, it does stipulate that the body responsible for overseeing all functions associated with the administration of justice – including the management of judges' careers – must act independently of the executive and legislative powers.[30] At the European level, the European Charter on the Statute for Judges (ECSJ) states that, 'In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge', there will be 'the intervention of an independent authority 'within which at least one half of those who sit as judges are elected by their peers'.[31]

The Consultative Council of European Judges[32] (CCJE) also provides recommendations on 'the structure and role of the High Council for the Judiciary or another equivalent body', which it describes as 'an essential element in a state governed by the rule of law'. In its Opinion No 10 (2007), the CCJE recommends that, inter alia, such bodies should: comprise either mixed composition (to avoid 'the perception of self-interest, self-protection and cronyism') or solely judges with judicial members elected by their peers; manage their own budget; hold all tasks 'aiming at the protection and the promotion of judicial independence and efficiency of justice'; and 'preferably be competent in the selection, appointment and promotion of judges'.[33] The CCJE also recommends that,

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28 The UN 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, Milan, 26 August – 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, UN Doc A/COND.121/22/Rev.1.

29 The Bangalore Principles of Judicial Conduct, Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices, The Hague, 25–26 November 2002, UN Doc E/RES/2006/23, Annex, Principle 1.

30 See, UN Human Rights Committee, General Comment No 32, UN Doc CCPR/C/GC/32, 99th session, Geneva, 9–27 July 2007, [19], which states: 'The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.'

31 See, ECSJ and the Explanatory Memorandum, General Principle 1.3. See also the Judges' Charter in Europe of the International Association of Judges 1997 (I.A.J./U.I.M.), [3.06], which states as a fundamental principle that, '[t]he administration of the judiciary must be carried out by a body which is representative of the Judges and independent of any other authority'.

32 The CCJE has an advisory function on general questions relating to independence, impartiality and competence of judges. This leads it to prepare opinions for the attention of the Council of Europe Committee of Ministers, see CCJE website, available at www.coe.int/t/dghl/cooperation/ccje/textes/Avis_en.asp.

33 CCJE, 'Summary of Recommendations and Conclusions', *Opinion No 10 (2007) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society* (2007) 18–19, available at www. venice.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE-opinion-10-2007_EN.pdf.

preferably, members work on a full-time basis.[34]

Selection, appointment and promotion of judges

The independent determination of who can become a judge and his or her career path provides an obvious protection against external pressures and influences. On judicial appointments, the UN Basic Principles state that '[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives'.[35]

While executive or legislative participation in judicial appointments and promotions is not inconsistent with judicial independence as prescribed by international standards,[36] the decision should be vested in an independent body with a 'genuinely plural composition', in which members of the judiciary and the legal profession form a majority,[37] and the appointing authority should follow this body's recommendations in practice.[38] The appearance of the independence of the procedure is paramount in the question of judicial independence more broadly.

On judicial promotions, the Special Rapporteur on the independence of judges and lawyers has recommended that 'final decisions on promotions should be preferably taken by an independent body in charge of the selection of judges, composed of at least a majority of judges'.[39]

Transfer and assignment of judges

International standards recognise that judges may need to be moved from one court to another to ensure the proper administration of justice and regulation of workloads, and provide conditions for such transfers so as to safeguard against abuses of this mechanism.[40] As with all aspects relating to judicial careers, best practice guides that the decision to transfer lie with an independent judicial authority.[41]

3.2 The administration of justice in Hungary

The IBAHRI's 2012 delegation was informed of the previous system's failure to provide efficient and effective court administration, and of the urgent need for reform. The restructuring of the administration of Hungary's justice system therefore aimed to centralise court organisation as a way

34 *Ibid*, 7 [34], the CCJE observes that: 'Although it is for the states to decide whether the members of the Council for the Judiciary should sit as full-time or part-time members, the CCJE points out that full-time attendance means a more effective work and a better safeguard of independence'.

35 See n 28, UN Basic Principles, Principle 10.

36 IBA Minimum Standards of Judicial Independence (1982), Principle 3(b), available at www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29.

37 Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, (2009), A/HRC/11/41, [28], available at www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf. See also, *Ibid*, Principle 3(a) and 3(b).

38 Council of Europe, *Recommendation CM/Rec(2010)12 and explanatory memorandum* (2010) [47], available at www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec%282010%2912E_%20judges.pdf.

39 *Ibid*, Report of the Special Rapporteur (2009) [71].

40 See n 36, Principle 12 provides, 'The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld'.

41 *Ibid*.

to improve efficiency and accountability.[42]

The government's legislative reform established a new institution, the NJO, whose president is responsible for the central administration of the courts.[43] The NJO president, who holds office for nine years, must be a judge with five years' experience and is elected by a two-thirds majority of MPs on the recommendation of the President of the Republic.[44] Since the NJO's establishment, this post has been held by Dr Tünde Handó.

The reforms also established a new autonomous judicial body, the NJC, an institution comprised solely of judges elected by their peers. The NJC's current membership comprises: the president of the Kúria; a judge from the Regional Court of Appeal; five judges from regional courts; seven judges from district courts; and a judge from an administrative and labour court.[45] The current composition contrasts positively with the NJC's earlier iteration, the now-abolished National Council for the Judiciary (NCJ), which included in its membership the Minister of Justice and two MPs.[46] The NJC holds a supervisory function over the decisions of the president of the NJO under its mandate to 'oversee the central administration activity of the President of the [NJO], and… notify the President of the [NJO] where considered appropriate'.[47]

As detailed in Chapter Two, the responsibilities of the president of the NJO and the NJC have, since the IBAHRI's 2012 mission, been afforded constitutional recognition via the Fourth and Fifth Amendment, respectively. However, the legal relationship between the two institutions – whereby the president of the NJO holds responsibility for the administration of the courts, while the NJC holds a supervisory function – remains the same as at the time of the IBAHRI's earlier mission due to the constitutional reforms aligning the Fundamental Law with the institutions' respective roles as set out in the AOAC.

3.3 Update on the role of the president of the National Judicial Office and the National Judicial Council

During its 2015 visit, the IBAHRI delegation was pleased to hear of the impressive series of practical measures that have modernised the court system and facilitated public access to the courts. For example, court users can now sign up to receive text messages on the progress of their cases, while open days give the public insight into the life of Hungary's courts.[48]

Hungary's unique arrangement of judicial administration has prompted considerable external scrutiny and commentary regarding the impact on the independence of the judiciary. In its Opinion of 19 March 2012 on the AOAC and the ALSRJ, the Venice Commission concluded:

'The NJC is designed as an organ of judicial self-government, with all its members being judges

42 See the government of Hungary's response to the communication of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 14 May 2012, (UN Doc A/HRC/20/30), available at https://spdb.ohchr.org/hrdb/20th/Hongrie_14.05.12_(1.2012).pdf. The communication of the Special Rapporteur, 29 February 2012, (UN Doc UA G/SO 214 (3-3-16) HUN 1/2012) is available at https://spdb.ohchr.org/hrdb/20th/UA_Hungary_29.02.12_(1.2012).pdf.

43 Fundamental Law, Art 25(5) and AOAC, s 65.

44 Fundamental Law, Art 25(6).

45 See NJC website, available at http://birosag.hu/en/njc/national-judicial-council.

46 See n 42.

47 AOAC, s 103 (1)(a).

48 IBAHRI meeting with the members of the NJO, including the president of the NJO, 17 June 2015.

elected by their peers. Nevertheless, it has scarcely any significant powers and its role in the administration of the judiciary can be regarded as negligible.'[49]

When presenting its findings, the IBAHRI's 2012 delegation considered the impact of the Amendment Act and welcomed the positive steps taken by the government in response to external commentary to transfer select powers held by the president of the NJO to the NJC. Hungary's legislature has continued to assess the balance of powers between the two institutions and incrementally grant new, distinct functions to the NJC. The most recent supplementary powers, for example, were introduced at the beginning of 2014,[50] and grant the NJC the power to approve the courts' rules of procedure[51] and the judicial code of ethics.[52]

The present IBAHRI delegation is encouraged to learn that these codes will be drafted by Hungary's autonomous judicial body and is further reassured that the Code of Judicial Conduct,[53] which came into effect at the beginning of January 2015, is based on the Bangalore Principles[54] and will form the basis for all disciplinary action taken against judges.[55] The delegation was also pleased to note that the disciplinary court comprises judges elected by the NJC.[56]

While these are welcome developments, the delegation finds that these new functions do not amount to a significant strengthening of the NJC's ability to act as a check and balance on the activities of the president of the NJO. The delegation also notes that, at the time of writing, the president of the NJO retains responsibility for twice the number of judicial functions as the NJC.[57] Notably, the former retains the power: to select, appoint[58] and terminate judicial positions; to transfer and assign judges;[59] over the inspection of judges,[60] and has a role in judicial discipline.[61]

During its 2012 mission, IBAHRI delegates had been informed that, in practice, the NJC served 'a largely consultative function with little determinative authority'.[62] As a way to strengthen the supervisory role of the NJC and thereby protect judicial independence, the IBAHRI recommended that the NJC be granted the right to veto all decisions made by president of the NJO so as to allow the latter 'to take decisions flexibly and quickly' while, at the same time, ensure such decisions 'can be overturned if the judiciary collectively feels that it is necessary to do so'.

The present delegation was informed, however, that the NJC's right to veto decisions (IBAHRI

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49 Venice Commission, *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* (2012), [50], available at www.venice.coe.int/webforms/documents/CDL-AD(2012)001-e.aspx.

50 Established by Act CCXLIII of 2013, effective as of 1 January 2014, which amended sections of the AOAC and the ALSRJ.

51 AOAC, s 103(d). In its meeting with the NJC (19 June 2015) the IBAHRI delegation was informed that the provision had been interpreted to mean that the NJC prepares the ethical code.

52 AOAC, s 103(e).

53 See NJC website, The Code of Judicial Conduct, available at http://birosag.hu/en/code-judicial-conduct.

54 See n 29, the Bangalore Principles.

55 IBAHRI meeting with NJC members, 19 June 2015.

56 *Ibid.*

57 The functions of the President of the NJO are enumerated in s 76 of the AOAC and those of the NJC in s 103 of the AOAC. The IBAHRI's 2012 delegation reported that the president of the NJO was afforded 66 competences in total. The NJC representation informed the IBAHRI's 2015 delegation that, since the IBAHRI's earlier report, the number of its competences has increased from 15 to 27 (IBAHRI meeting with the NJC, 19 June 2015).

58 The president of the NJO presents a proposal to the President of the Republic regarding the appointment and removal of judges (AOAC, s 76(5)(b)), but independently appoints and removes 'court executives' (AOAC, s 76(5)(m)).

59 ALSRJ, ss 34 and 33, respectively.

60 AOAC, s 76(6)(c).

61 AOAC, s 76(6)(d).

62 See n 1, IBAHRI report (2012), s 3.15.

2012 Recommendation 8) taken by the president of the NJC pertains only to judicial nominations and budgetary matters; the delegation finds that the IBAHRI's earlier recommendation has not, therefore, been implemented to the extent recommended.

The current delegation was, however, pleased to hear that the NJC exercised control over various decisions taken by the president of the NJO. Indeed, the NJC members informed the delegation that the NJC had intervened to contest wide-ranging decisions made on seven occasions since the beginning of 2015. For example, the NJC had contested the NJO's president's 'wide-procurement' plan, opinions on and nominations for judges in leading positions, and the criteria for calculating and defining court vacancies.[63] This is welcome dialogue between the two institutions and provides a positive indication that the NJC's function is now more than merely consultative.

The delegation also learned during its meeting with the NJC representation that the NJC is a founding member of the Balkan and European Network for the Judiciary of Councils for the Judiciary. The delegation has since been informed that the NJC was granted full membership of the European Network of Councils for the Judiciary on 3 June 2015.[64] This is a positive development and is to be welcomed.

The delegation was, however, concerned to hear during its mission that the perception of some mission interviewees was that the NJC still held insufficient powers while the president of the NJO controlled judicial matters.[65]

Noting that the president of the NJO should operate under the effective supervision of the NJC, the delegation was perturbed by concerns voiced by NJC members over the workload and time demanded by the role, suggesting there is limited time available for the NJC membership to fulfil its functions. The delegation concluded that the current working structure may limit the effectiveness and timeliness of supervisory interventions, and feels that this may contribute to the perception that the NJC holds little power compared to the president of the NJO.

In particular, the delegation notes that none of the current membership is full or part time; instead, members are afforded one day's relief from the mandatory eight days of judicial duty per month. It is worth recalling that eight of the 15 member judges are court presidents, including the president of Hungary's principal court, the Metropolitan Court, while another is a president in office, and two others are vice-presidents.[66] While the seniority and experience of these individuals is obviously beneficial, the NJC membership must manage its own significant judicial duties in addition to reviewing and forming an opinion on decisions taken by the NJO's president, with only an 8.75 per cent reduction in its professional duties.

Furthermore, to facilitate the undertaking of their activities, the NJC members convene only four times a year (although with the option to meet as necessary).[67] In the view of the delegation, this does not ensure sufficient face-to-face time commensurate to the importance of decisions taken.

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63 IBAHRI meeting with NJC members, 19 June 2015.

64 See government of Hungary's response, Annex II.

65 The IBAHRI delegation heard from one interlocutor that the NJC was a 'puppet' institution and that the president of the NJO determines everything centrally. Several interlocutors mentioned that judges have to seek the permission of the president of the NJO, rather than the NJC, to attend external meetings.

66 See 'The National Judicial Council Members', (NJC website) available at http://birosag.hu/en/obt/obt-tagok.

67 AOAC, s 105 (1)

The delegation finds that the NJC, the body entrusted to protect the independence of the judiciary, is fulfilling its role within a working structure resembling that of the earlier and now defunct NCJ. The delegation notes that the NCJ members were considered to be unable to 'fulfil their duties properly in addition to their judicial work'.[68] The body was criticised for meeting only once a month, as a result of which it was deemed unable to make decisions effectively 'especially in situations requiring immediate action'.[69]

3.4 Update on the election of, and succession to, the president of the National Judicial Office

The IBAHRI 2012's delegation welcomed the legislative reform removing the possibility for an NJO president to remain in post should he or she be unable to command the support of a two-thirds parliamentary majority.[70] The delegation nonetheless recommended further reform to remove the provision permitting a president of the NJO to be re-elected.

The present delegation therefore welcomes the annulment of the possibility of re-election[71] but notes that the IBAHRI's recommendation that the president of the NJC be appointed as an interim NJO president in the first instance, rather than the vice-president of the NJO (IBAHRI 2012 Recommendation 3) has not been implemented.[72]

3.5 Update on the transfer of cases

In its 2012 report, the IBAHRI concluded that the power of the president of the NJO to transfer cases was 'one of the most controversial powers'[73] and recommended transparency in relation to this competency.[74] The 2015 delegation is therefore very pleased to note the abrogation of this power as implemented by the Fifth Amendment.[75] The delegation also notes that the chief prosecutor no longer has any authority over the transfer of cases between courts.[76]

The delegation is pleased to find that its recommendations with regards to the transfer of cases (IBAHRI 2012 Recommendations 4 and 20) have been implemented in full.

3.6 Update on the transfer of judges

In its 2012 report, the IBAHRI delegation welcomed the 'possibility of judicial review' should the president of the NJO exercise the power to transfer a judge.[77] The current delegation understands,

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68 See n 42.

69 *Ibid*.

70 See n 1, IBAHRI 2012 report, s 3.31.

71 AOAC, s 66 (established by s 14(1) of the Amendment Act, effective as of 1 August 2013).

72 AOAC, s 78(2) (established by s 11(5) of Act CCXLIII of 2013) effective as of 1 January 2014 states: 'The duties of the President of [NJO] shall be taken over by the President of [NJC] if there is no eligible person to take his place'.

73 See n 1, IBAHRI 2012 report, s 3.26.

74 *Ibid*, s 3.25.

75 The Fifth Amendment to the Fundamental Law annulled the power to transfer cases granted by Art 14 of the Fourth Amendment. This power was also annulled by Act CXXXI of 2013, effective as of 1 August 2013.

76 The Constitutional Court annulled (with retroactive effect) Art 11.4 of the Transitional Provisions in December 2012 by Decision No 45/2012 (XII.29.) of the CC, available at www.mkab.hu/letoltesek/en_0045_2012.pdf.

77 See n 1, IBAHRI 2012 report, s 5.4.

however, that the judicial transfer as regulated by section 34(4) of the ALSRJ has not been used, and mission interviewees were unable to comment on the efficacy of the review mechanism.[78] The delegation was therefore not in a position to assess IBAHRI 2012 Recommendation 5 in any detail.

However, recalling international standards, which stipulate that the power to transfer judges should preferably lie with a judicial authority, the present delegation is of the opinion that this function should be within the competency of the NJC. The delegation also notes that the president of the NJO can post a judge on a temporary secondment without the requirement for consent,[79] which is, prima facie, incompatible with international standards.[80]

3.7 Update on the financial autonomy of the National Judicial Council

States must provide adequate funding for the judicial apparatus 'to enable the judiciary to properly perform its functions'.[81] To this end, the Special Rapporteur on the independence of judges and lawyers recommends that, '[t]he judiciary be given active involvement in the preparation of its budget'.[82] The CCJE is its Opinion No 10 recommends that a High Judicial Council 'should manage its own budget and be financed to allow an optimum and independent functioning'.[83] In order to enhance the operational autonomy of the NJC, the IBAHRI's 2012 delegation recommended that 'the NJC should have the power to approve its own budget rather than the president of the NJO' (IBAHRI 2012 Recommendation 6).[84]

With regard to court budgetary matters, the current delegation heard that, in practice, the NJC and the president of the NJO always attempt to reach a compromise where there is disagreement on elements of the court administration budget.[85] By law, however, the final decision on the court budget remains with the president of the NJO, who prepares the proposal for the budget and can debate the court chapter of the central budget before parliament.[86] The delegation therefore finds that IBAHRI 2012 Recommendation 6 has not been addressed.

3.8 Update on judicial appointments

The IBAHRI's 2012 report sets out the process for judicial appointments: '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.'[87]

As examined in that report, the president of the NJO is permitted to deviate from the short list of

78 Under s 76(5)(g) of the AOAC, the president of the NJO has the power to decide on the transfer of judges. ALSRJ, s 34 deals with the conditions of transfer.

79 ALSRJ, s 31(3).

80 For a detailed consideration, see the Council of Europe GRECO report, *Evaluation Report: Hungary* (2015), available at www.coe.int/t/dghl/monitoring/greco/evaluations/round4/Eval%20IV/GrecoEval4Rep(2014)10_Hungary_EN.pdf.

81 UN Basic Principles, Principle 7.

82 See n 37, Report of the Special Rapporteur on the independence of judges and lawyers (2009) [101].

83 See n 33.

84 See n 1, IBAHRI 2012 report, s 5.4.

85 IBAHRI meeting with NJC members, 19 June 2015.

86 AOAC, s 76(3)(a) and(b).

87 See n 1, IBAHRI 2012 report, s 3.16.

judges presented by the panel of judges[88] and 'propose the second or third candidate on the list to fill the post'.[89] The NJC can veto the decision to deviate from the ranking.[90] However, the president's choice is final.

The IBAHRI's 2012 delegation recommended that NJC approval be required in all instances where the president of the NJO decides to deviate from the ranking (IBAHRI 2012 Recommendation 7). The present delegation notes that the NJC has readily exercised its veto power in the area of judicial appointments.[91] However, the present delegation is of the opinion that judicial independence could be strengthened further by entrusting the NJC, or a genuinely plural body with a majority of judges, with the final decision over the appointment of judges in practice and in law.

The IBAHRI's 2012 delegation, among other commentators, expressed particular concern that the president of the NJO could decide that a call for judicial applications was unsuccessful and annul proceedings, with the result that none of those applicants shortlisted by the panel of judges are appointed. The NJC informed the 2012 delegation that the use of this power was not typical but did occur. The president of the NJO confirmed that, in 2014, out of the 115 calls for applications announced, she declared nine per cent of calls unsuccessful.

The IBAHRI delegates can see no reason for the president of the NJO to retain this power,[92] although notes that all calls annulled in 2014 were reportedly for reasons of a procedural breach (that is, no applications were submitted, procedural rules were violated or there was a change in the workload or organisation of the work at the court after the announcement of the call)[93] rather than on the merit of the applications.

The IBAHRI delegation concludes that a second element of IBAHRI 2012 Recommendation 7 – that there be clear criteria for annulling a competition call – has been implemented, as explained in the government's response in Annex II. The delegation, however, finds that the criteria could be clearer.

As for the appointment of judges to senior positions, the current delegation was pleased to hear that the president of the NJO could not make an appointment without the support of the NJC.[94] The legal provision, however, remains unchanged in that the president of the NJO has the authority to appoint court executives, including the president and vice-presidents of Courts of Appeal and general courts.[95]

3.9 Update on the removal of the president of the Supreme Court

With the introduction of revised election criteria for the president of the Supreme Court, restructured as the Kúria, the Supreme Court's former president, Judge András Baka, was deemed ineligible to continue in his role despite his 17 years of judicial experience at the European Court of

88 See n 42. The 'judicial council' or 'panel of judges' refers to bodies operating within the Kúria, courts of appeal and tribunals, which are comprised of the judges of the given court and whose members are elected by the plenary conference of judges.

89 ALSRJ, s 18 (3). See also n 1, IBAHRI 2012 report s 3.16–17.

90 AOAC, s 103(3)(b) and (c).

91 IBAHRI meeting with the NJC, 19 June 2015.

92 See n 1, IBAHRI report, ss 3.16–3.21.

93 Briefing memo on the appointment of judges provided to the delegation by the president of the NJO.

94 Meeting with the NJC members, 19 June 2015, and meeting with Dr Róbert Répássy, Deputy Minister of Justice, 18 June 2015.

95 AOAC, s 128(2).

Human Rights (ECtHR). In its 2012 report, the IBAHRI delegation concluded that this aspect of the legislative reform was *ad hominem*[96] and, further, that the guarantee of security of tenure had been violated through 'the introduction of a retroactive law'.[97]

Judge Baka has since been reinstated as Chamber President in the Kúria, rather than as the president of the Kúria itself. The present delegation notes that this is quite a departure from his former role as Chief Justice of Hungary. The delegation notes that Judge Baka has taken his case to the ECtHR.[98] The case went before the ECtHR Grand Chamber on 17 June 2015 and, at the time of writing, the final decision is still awaited.[99]

With reference to the IBAHRI's 2012 recommendations, the present delegation notes that the legal criteria for the position of the president of the Kúria has not been amended (IBAHRI 2012 Recommendation 1). However, the delegation heard of no legislation that could be perceived to be directed against a specific individual (IBAHRI 2012 Recommendation 2) and considers that this element of the IBAHRI's earlier recommendation has been heeded.

3.10 Update on the mandatory retirement age for judges

The reformed legislation, which forced some 270 of Hungary's judges and prosecutors into premature retirement,[100] attracted widespread criticism for undermining judicial security of tenure and was the subject of accelerated infringement proceedings brought against Hungary by the European Commission.[101] Because the legislative change affected those nearing the end of their judicial career, the reform resulted in the removal of many judges in leadership positions. The IBAHRI's 2012 delegation concluded that this created a risk of 'political capture', given the exclusive appointment powers of the NJO president over senior judicial positions.[102]

The 2012 delegation emphasised (IBAHRI 2012 Recommendation 9) the need to set out a clear and prompt procedure for providing compensation to the retired judges, their prompt reinstatement 'either in their previous post or a similar position' and that the status of the newly appointed judges be clarified. Since the IBAHRI's 2012 mission, the government has implemented legal reform sufficient to bring an end to the infringement proceedings. Under Act XX of 2013 on Legal Amendments Concerning the Upper Age Limit to be Applied in Certain Justice Related Legal Relationships, the judicial retirement age will be gradually reduced to 65 years over a ten-year period until 31 December 2022, and the criteria for reinstatement or compensation (equivalent to 12

96 See n 1, IBAHRI 2012 report, s 3.11: 'The former President's recent criticism 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.'

97 See n 1, IBAHRI 2012 report, s 3.12.

98 The Chamber of the ECtHR has found that the conditions under which Judge Baka's position was prematurely terminated violated his Article 10 ECHR right to freedom of expression and his Art 6(1) ECHR right to a fair trial, *Baka v Hungary*, App no 20261/12 (ECtHR, 27 May 2014), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144139.

99 'Grand Chamber hearing concerning premature termination of the President of the Hungarian Supreme Court's mandate' (ECtHR, 17 June 2015) available at http://hudoc.echr.coe.int/webservices/content/pdf/003-5110974-6301676.

100 Prior to the legislative reform, the minimum retirement age for judges was 62, but gave judges the option of remaining in office until they reached the upper age limit of 70. That option was removed by the Transitional Provisions and the ALSRJ, which required retirement at 62 other than in the case of 'certain public law officers' such as the chief prosecutor, the president of the Court of Auditors and the judges of the Constitutional Court. See n 1, IBAHRI 2012 report, ss 3.4–3.5.

101 'European Commission closes infringement procedure on forced retirement of Hungarian judges' (European Commission press release, 20 November 2013) available at http://europa.eu/rapid/press-release_IP-13-1112_en.htm.

102 See, Chapter 3.8 of this report. See also n 1, IBAHRI 2012 report, s 3.18.

months' salary) are set out.[103]

The present delegation was, however, concerned to learn that remedial legal reform had been slow to come into effect.[104] Conversely, as observed during the IBAHRI's 2012 visit, there had been a prompt internal recruitment process. As a result, a majority of judges (173 out of 229) did not return to their original position and only four of the 17 removed court presidents returned to positions of leadership.[105] The delegation notes, however, that some judges elected to receive compensation in preference to reinstatement, as explained in the government's response in Annex II.

The delegation was also concerned to hear that the compensation and reinstatement arrangement provided for by law has not provided an amenable resolution for all removed judges. The delegation understands the HHC is representing around 60 judges who have joined a class action before the ECtHR in relation to the lowered retirement age.[106]

The present delegation concludes that IBAHRI 2012 Recommendation 9 has been implemented in part. The Hungarian government has introduced positive reform to redress the offending legal position on the mandatory early retirement age for judges and set out in law the position of reinstatement or compensation. However, that reform has not been implemented with sufficient alacrity, with the result that some aggrieved judges are now seeking redress before the ECtHR.

While the IBAHRI delegation finds the remedial steps taken in respect of the legal reform to be unsatisfactory, it recognises that the situation would not be improved by removing newly promoted individuals to allow for the reinstatement of those removed. The delegation therefore reiterates the second element of IBAHRI 2012 Recommendation 9: that a nationwide assessment of the justice sector be undertaken to better understand the needs of the judiciary following the legal reform.[107]

3.11 Judicial salaries

The president of the Hungarian Chapter of the International Association of Judges informed the delegation that judicial salaries in Hungary are the lowest of any EU Member State.[108] He also stated that there had been no increase in salary over the last ten years, whereas the national average salary had increased significantly during that period. The low remuneration of judges was recognised by all IBAHRI interviewees, including government representatives and the president of the NJO.

The UN Basic Principles state that judges be given 'adequate remuneration'.[109] The delegation also notes the recommendation of the Special Rapporteur on the independence of judges and lawyers, that, 'judges be remunerated adequately, with due regard for the responsibilities and the nature of their office and without delay',[110] and the IBA Minimum Standards of Judicial Independence, which

103 See, HHC, The situation of Hungarian judges affected by the lowering of the mandatory retirement age for judges after the judgment of the CJEU in the case *Commission v Hungary* (C-286/12) (December 2013).

104 Act XX of 2013 was adopted on 11 March 2013, yet the law amending judicial retirement was adopted in December 2011.

105 See, '105 judges turn to Strasbourg court over "forced retirement"' (HHC press release, 25 June 2012) available at http://helsinki.hu/en/105-judges-turn-to-strasbourg-court-over-forced-retirement.

106 IBAHRI email correspondence with the HHC, 17 June 2015.

107 See n 1, IBAHRI 2012 report, s 5.6.

108 IBAHRI meeting with Dr Makai Lajos, 18 June 2015.

109 UN Basic Principles, Principle 11.

110 See n 37, Report of the Special Rapporteur on the independence of judges and lawyers (2009) [99].

provide that '[j]udicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of executive control'.[111] The delegation also notes the observations relating to judicial salaries in Hungary set out in the GRECO's 2014 report on Hungary.[112] Given the commentary on judicial salaries in Hungary, the delegation is of the opinion that the current level of judicial salaries deserves review.

111 See n 36, IBA Minimum Standards of Judicial Independence, [14], [15(a)]. See also CCJE Opinion No 10, [36].

112 See n 80, Council of Europe GRECO, *Evaluation Report: Hungary* (2015).

Chapter Four: Checks and Balances

4.1 Update on the Constitutional Court

Hungary's Constitutional Court was established in 1989 with 11 judges selected by a representative parliamentary committee, thus preventing any single party from dominating the selection process. As detailed in the IBAHRI's 2012 report, the Fundamental Law increased the Constitutional Court's membership to 15 judges and increased the judicial mandate to a single 12-year term.[113] The revised judicial retirement age considered in section 3.10 of this report does not apply to Constitutional Court judges who may retain the position for the full 12-year tenure.[114]

The report notes that, following the reforms, the composition of the committee nominating the Constitutional Court judges reflects the proportional representation of Hungary's National Assembly. The nominating committee therefore currently comprises a majority of government representatives. The report notes that under Hungary's former Constitution, the nominating committee consisted of one representative from each political fraction.

The IBAHRI's 2012 delegation observed that the new appointment procedure had been rendered more vulnerable to politicisation[115] and recommended that the selection process re-establish the former composition of the nominating committee responsible for the selection of Constitutional Court judges. The present delegation notes that the appointment procedure has not been amended. As of August 2015, the ruling party has been able to nominate and elect, without needing opposition support, the majority of the current Constitutional Court judges (eight out of 15) who will remain on the bench beyond the age originally established by law.[116]

The present delegation was concerned to hear scepticism about the Constitutional Court's independence and reluctance from some legal practitioners to consider the Constitutional Court post-reform a worthwhile channel of redress for infringement of citizens' fundamental rights.[117] The delegation understands the opinion of commentators, who express that, by changing the composition of the Constitutional Court, the government had sought to ensure a majority of Constitutional Court justices in its favour.[118]

This concern is understandable given that the 'cooling-down' period in the appointment of Constitutional Court judges, in respect of MPs, advised by the Parliamentary Assembly of the Council of Europe[119] has not been implemented. The present IBAHRI delegation was informed that two of the current Constitutional Court judges – Dr István Balsai (elected September 2011) and Dr László

113 Fundamental Law, Art 24(8). See n 1, IBAHRI 2012 report, s 4.17.

114 CCA, s 15.

115 See n 1, IBAHRI 2012 report, s 4.17.

116 See Eötvös Károly Policy Institute, the HHC and the HCLU, *Statement of human rights NGOs on abolishing the upper age limit of Constitutional Court judges* (14 November 2013) available at http://tasz.hu/files/tasz/imce/ngo_statement_on_age_limit_for_cc_judges_14112013.pdf.

117 The IBAHRI delegation heard from at least three mission interviewees that the ECtHR, rather than Hungary's Constitutional Court, was now viewed as the only forum for constitutional claims.

118 See Eötvös Károly Policy Institute, HHC and HCLU, *Analysis of the Performance of Hungary's 'One-Party Elected' Constitutional Court* (2015) available at http://tasz.hu/files/tasz/imce/2009/ekint-hclu-hhc_analysing_cc_judges_performances_2015.pdf.

119 The Parliamentary Assembly of the Council of Europe called for a 'cooling-down' period between the end of judges' political mandates and before they could be elected as judge of the Constitutional Court, [12.3.3], available at www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19933&lang=en.

Salamon (elected February 2013) – were MPs within the governing coalition until their appointment and took up their judicial positions soon after. The delegation notes that this practice occurred under earlier governments, as explained in the government response in Annex II.

The present delegation also finds that the Constitutional Court's reduced authority sits uneasily alongside its enlarged membership. The delegation was surprised to learn that, over the period of the last few years, the Constitutional Court's caseload had fallen to approximately ten per cent of what it had been ten years ago.[120] Yet, given that the Constitutional Court now comprises a higher number of judges than ever before, its capacity to consider applications has never been greater.[121]

4.2 Update on executive and legislative responses to decisions of the Constitutional Court

As considered in Chapter Two, through the Fourth Amendment, the government has continued to use its parliamentary control to amend the Fundamental Law in such a way that Constitutional Court decisions have been overruled and its authority restricted. The Venice Commission's Opinion on the Fourth Amendment was highly critical of its impact on the Constitutional Court's role as a democratic check, particularly 'where the ruling coalition can rely on a large majority and is able to appoint to practically all state institutions officials favourable to its political views'.[122]

Members of Hungary's Constitutional Court explained to the 2015 IBAHRI delegation that a 'fight for power' existed between parliament and the Constitutional Court. The IBAHRI's 2012 delegation also reported 'tensions between the government and the Court', noting that such tensions 'have been accompanied by measures that compromise judicial independence'.[123] The 2012 delegation, for example, reported that the Fundamental Law – which included provisions restricting the Constitutional Court's authority on economic matters – was adopted shortly after the Constitutional Court had passed a politically unpopular judgment annulling a financial regulation.[124]

The present delegation was surprised to hear the president of the Constitutional Court say that he would consider it a sign of confidence should the Court's previous authority be restored.[125] Recalling Principle 3 of the UN Basic Principles – which states that courts alone should determine their jurisdiction[126] – restoration of the Constitutional Court's jurisdiction should be considered a necessary guarantee for respecting the Court's independence. While, the delegation notes the case law mechanism whereby the Constitutional Court can refer back to its previous jurisprudence in prescribed circumstances,[127] delegates share concerns that this may result in a lack of legal certainty

120 IBAHRI meeting with members of the Constitutional Court, 16 June 2015.

121 The IBAHRI delegation learned that the number of cases of which the Constitutional Court is seized has reduced significantly from approximately 2,000 in 2005 to 200 in 2015. The Court has published data on the number of concluded cases according to the content of the decisions (2014). See the website of the Office of the Commissioner for Fundamental Rights, available at www.ajbh.hu/en/web/ajbh-en.

122 See n 12, Venice Commission Opinion (2013) [76].

123 See n 1, IBAHRI 2012 report, s 4.17.

124 *Ibid*, ss 4.12–4.13.

125 IBAHRI meeting with members of the Constitutional Court, 16 June 2015.

126 UN Basic Principles, Principle 3 asserts: 'The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law'.

127 For an explanation of the mechanism, see the government of Hungary's response to the communication of the Special Rapporteur on the independence of judges and lawyers, 4 September 2013, (No AL G/SO 214 (3-3-16) HUN 3/2013.), [5], available at https://spdb.ohchr.org/hrdb/24th/Hungary_04.09.13_(3.2013).pdf

over the use of judicial precedent.[128]

With reference to the 2012 recommendations, the present delegation concludes that the introduction of the Fourth Amendment indicates that the IBAHRI's recommendation that the government cease to overturn Constitutional Court judgments (IBAHRI 2012 Recommendation 15) has not been implemented. Rather, the Fourth Amendment represents a further restriction of the Court's authority, which was not restored by the Fifth Amendment. The current delegation reiterates IBAHRI 2012 Recommendations 15 and 17.

The delegation notes that the appointment procedure for Constitutional Court judges is also unchanged (IBAHRI 2012 Recommendation 16).

However, the present delegation was pleased to learn that in respect of the provision of legal aid for constitutional complaints (IBAHRI 2012 Recommendation 18), the prohibition on the grant of legal aid for such complaints was annulled by a Constitutional Court decision on 18 December 2012.[129]

4.3 Update on the participation of the opposition in legal reform

The 2012 IBAHRI report expressed concern at the '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'. In response, the delegation recommended that the government 'refrain from using non-standard parliamentary procedures… when legislating in areas affecting fundamental aspects of public life' (IBAHRI 2012 Recommendation 10).

The IBAHRI is therefore disappointed that the Fourth Amendment was introduced in parliament as a private member's bill. The significance of this procedure was summarised in an Amicus Brief to the Venice Commission in April 2013,[130] which explained that:

> 'According to Hungarian parliamentary procedure, government bills must go through a stage of social consultation before the bill is voted on. Social consultation requires the government to seek the views of interested civil society groups as well as with relevant government ministries about the effects of the proposed law. But private member's bills skip that requirement and can go straight to the floor of the Parliament for a vote. Even though the Fourth Amendment was introduced by all of the MPs in the government's parliamentary fraction and was voted on along strict party lines – with every member of the governing party's bloc voting yes and everyone else either voting no or boycotting the vote – the government avoided open political debate on the bill by using the private member's bill procedure.'[131]

128 IBAHRI meeting with the HHC, 15 June 2014.

129 See, 'On the decision of the Constitutional Court concerning legal aid' (Office of the Commissioner for Fundamental Rights press release), available at www.ajbh.hu/en/web/ajbh-en/press-releases/-/content/14315/16/on-the-decision-of-the-constitutional-court-concerning-legal-aid;jsessionid=ACE6EF834F5B43122896FD8E2D52E8C3.

130 Professor Gábor Halmai, Eötvös Loránd Tudományegyetem and Professor Kim Lane Scheppele (eds), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2013) available at http://halmaigabor.hu/dok/437_Amicus_Brief_on_the_Fourth_Amendment4.pdf.

131 *Ibid*, 3.

The Fifth Amendment, adopted by parliament in September 2013, was also initiated by the government.[132]

The IBAHRI delegation was unable to determine whether laws impacting fundamental rights have been passed as private members' bills since the Fifth Amendment. Delegates were, however, informed that 20 per cent of bills during the government's current term in office had been initiated as MP motions.[133]

The delegation also heard that, during the legislative process, the coalition government continues to place draft laws before parliament with inadequate or no time for consultation by the opposition. For example, the delegation heard that in the weeks following the delegation's visit, 50 draft laws were to be passed, of which only two to three had been drafted in consultation with opposition parties.[134] The Commissioner for Fundamental Rights likewise informed the IBAHRI delegation that the government seldom consults with civil society and that his Office generally receives draft legislation with very short deadlines for comment.[135] The Commissioner stated that if established procedure is followed, then his Office has ten days to comment. In practice, however, the Office has only four or five days.[136]

The delegation concludes that IBAHRI 2012 Recommendations 11 and 12 have not been implemented. There is no evidence that the government and parliamentary committees seek to engage with opposition groups and civil society on a more frequent and systematic basis. The present delegation was informed that no official consultation guidelines for best practice have been drawn up (IBAHRI 2012 Recommendation 11).

With regards to IBAHRI 2012 Recommendation 12, the delegation notes the polarised responses of interlocutors towards Hungary's Fundamental Law.[137] While the delegation heard that the government is 'ready to consult',[138] the authorities have not established a multi-party review of the Fundamental Law in conjunction with civil society organisations to assess how the law is operating in practice and seek suggested amendments.

4.4 Update on the Transitional Provisions and cardinal laws

The IBAHRI's 2012 delegation noted with concern the government's use of cardinal laws to regulate aspects of life often considered to be matters of ordinary law, and preferably amendable by a simple parliamentary majority.[139] The delegation noted the consequence of the current regulatory framework being that issues relating to social and fiscal policy set out in the Fundamental Law and

132 Professor Dr Zoltán Szente, 'The new Hungarian Fundamental Law: Recent Developments', (International Association of Constitutional Law, 3 February 2014) available at http://constitutional-change.com/the-new-hungarian-fundamental-law-recent-developments.

133 IBAHRI meeting with Dr Gergely Gulyás, the Deputy Speaker of the Hungarian National Assembly and Chairman of the Committee of Legislation, 15 June 2015.

134 IBAHRI meeting with Dr Bárándy, Vice Chairman of the Committee of Legislation, 18 June 2015.

135 IBAHRI meeting with the Office of the Commissioner for Fundamental Rights, 17 June 2015.

136 *Ibid.*

137 Dr Gulyás informed the IBAHRI delegation that the Fundamental Law is 'operating' (meeting on 15 June 2015). The delegation heard elsewhere that, after the Fourth Amendment, there is no real constitution in Hungary (meeting with the Eötvös Károly Policy Institute, 17 June 2015).

138 IBAHRI meeting with Dr Gulyás, 15 June 2015.

139 See n 1, IBAHRI 2012 report, s 5.9: '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.'

accompanying cardinal acts are effectively precluded from review by a future government who cannot command the necessary two-thirds parliamentary majority.[140] The present delegation reiterates the IBAHRI's earlier recommendation that provisions relating to social policy and taxation are more appropriate to the remit of ordinary law (IBAHRI 2012 Recommendation 13).

The 2012 delegation was also concerned by the fact that aspects of the Transitional Provisions were not genuinely transitional – in particular those provisions relating to the powers of the chief prosecutor and the president of the NJO to transfer cases. The present delegation is pleased to reiterate that, as set out in section 3.5 of this report, this element of IBAHRI 2012 Recommendation 14 has been implemented.

The present delegation notes, however, that aspects of the Transitional Provisions that deal with the registration of religious institutions have since been reintroduced at the level of the Fundamental Law via the Fourth Amendment. This gives Hungary's parliament the mandate to determine state cooperation with religious communities despite the Constitutional Court finding, by Decision 6/2012 (III. 1) Reasoning [205], that this makes way for politicised decisions and is unconstitutional.[141] The delegation understands that while there is a draft bill to amend the Churches Act (Act of CCVI of 2011 on the Right to Freedom of Conscience and the Legal Status of Churches, Denominations and Religious Communities), the corresponding provisions in the Fundamental Law will remain unamended.[142]

Finally, as set out in section 4.2 of this report, the jurisdiction of the Constitutional Court on economic matters remains restricted. The delegation thereby concludes that the second element of IBAHRI 2012 Recommendation 14 has not been implemented.

4.5 The Office of the Commissioner for Fundamental Rights: an update on *ex post facto* review

Prior to the Fundamental Law, citizens and human rights groups could petition the Constitutional Court directly for judicial review of abstract legal norms via an *actio popularis* challenge. Following the legal reform, there must now be a '…close substantive connection between that provision and the provision requested to be reviewed of the legal regulation'.[143] This was reported as representing a major change in the constitutional landscape, where 'it has been the abstract ex post review that characterized the [Constitutional Court's] role in protecting the Constitution' and where the *actio popularis* was 'an integral part of the country's constitutional culture'.[144]

Given the radical change to the constitutional review mechanism, the IBAHRI's 2012 delegation recommended that the government assess provisions restricting citizens' access to the Constitutional Court for *ex post facto* review (IBAHRI 2012 Recommendation 19). The present delegation understands that such an assessment, by way of public consultation, has not been undertaken.

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140 *Ibid.*

141 See n 20, *Provisions of the Fourth Amendment to the Fundamental Law of Hungary.*

142 IBAHRI meeting with the HCLU, 15 June 2015.

143 Fundamental Law, Art 24(4). See also CCA, s 26.

144 Eötvös Károly Policy Institute, HHC and HCLU, *Opinion on the New Constitutional Court Act of Hungary* (25 March 2015), 8, available at http://helsinki.hu/wp-content/uploads/Analysis_of_the_new_Constitutional_Court_Act_of_Hungary_January2012.pdf.

The changed role of the Office of the Commissioner for Fundamental Rights

Access to the Constitutional Court for the purposes of seeking judicial review of the conformity of a legal regulation within the Fundamental Law (that is, an abstract *ex post facto* review) is now only open to one quarter of MPs, the president of the Kúria, the Prosecutor-General, and the Commissioner for Fundamental Rights.[145] A citizen or civil society organisation must instead turn to the Office of the Commissioner for Fundamental Rights to initiate a constitutional examination of legislation.[146] Of the four bodies who can initiate a review, the IBAHRI 2012 delegation conjectured that the Commissioner for Fundamental Rights would be the one most likely to apply for constitutional review. The Commissioner can therefore be expected to play a greater role in protecting citizens' fundamental rights before the Constitutional Court.

International standards

The Office of the Commissioner for Fundamental Rights is Hungary's NHRI and, as such, according to the Office of the High Commissioner for Human Rights (OHCHR), should play 'a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level, a role increasingly recognised by the international community'.[147] The OHCHR further states that 'NHRIs can, and should, play a role in advancing all aspects of the rule of law, including with regard to the judiciary, law enforcement agencies and the correctional system'.[148]

Resolution 68/171 adopted by the General Assembly on 18 December 2013[149] recognises:

> 'The role of independent national institutions for the promotion and protection of human rights in working together with governments to ensure full respect for human rights at the national level, including by contributing to follow-up actions, as appropriate, to the recommendations resulting from the international human rights mechanisms.'

The resolution also '[e]ncourages national institutions for the promotion and protection of human rights established by Member States to continue to play an active role in preventing and combating all violations of human rights'.[150]

On 29 December 2014, based on the results of the activities of Hungary's Office of the Commissioner for Fundamental Rights, the Bureau of the International Coordination Committee of National Human Rights Institutes (the 'Bureau') granted it 'A' status accreditation.[151] This status indicates that the Bureau recognises the Office of the Commissioner acts in compliance with the Principles Relating

145 Fundamental Law, Art 24(2)(e).

146 Act CCXXIII of 2013, which amended Act CXI of 2011 on the Commissioner for Fundamental Rights (ACFR), s 2(3), provides that the Commissioner may initiate a constitutional review of legal rules as to their conformity with the Fundamental Law, the interpretation of the Fundamental Law and, within 30 days after their promulgation, the review of the adherence to the procedural requirements stipulated by the Fundamental Law as regards the adoption and promulgation of the Fundamental Law and its amendments.

147 See, UN OHCHR, 'OHCHR and NHRIs' available at www.ohchr.org/EN/Countries/NHRI/Pages/NHRIMain.aspx.

148 *Ibid.*

149 UN General Assembly Resolution on National institutions for the promotion and protection of human rights, UN Doc A/RES/68/171, (18 December 2013), available at http://nhri.ohchr.org/EN/AboutUs/Governance/Resolutions/A_RES_68_171_EN.pdf.

150 *Ibid,* [10].

151 See, Office of the Commissioner for Fundamental Rights, NHRI *'A' Status to the Office of the High Commissioner for Fundamental Rights* (2014), available at www.ajbh.hu/en/web/ajbh-en/news/-/content/14315/1/nhri-a-status-to-the-office-of-the-commissioner-for-fundamental-rights.

to the Status of National Institutions (the 'Paris Principles'),[152] which govern the competence, responsibilities, composition and methods of operation of NHRIs.

National legislation

Act CCXXIII of 2013, which amended Act CXI of 2011 on the Commissioner for Fundamental Rights (ACFR), entered into force on 10 December 2013[153] and obliges the Commissioner, who is appointed by parliament,[154] to promote the enforcement and protection of fundamental rights.[155] The delegation notes that the ACFR provides for a statutory 'cooling-down' period of four years for the position of Commissioner for Fundamental Rights.[156]

The changed role of the Office of the Commissioner for Fundamental Rights

Given the internationally and nationally recognised importance of the Office of the Commissioner and its mandate to access the Constitutional Court, the delegation expected that the Office would have regularly exercised its power to apply for constitutional review. For example, the delegation heard that from TI-Hungary and the HCLU that they have submitted multiple cases to the Commissioner requesting a constitutional review. The delegation was therefore surprised to learn that in the last 18 months, the Office had only used its power to apply for constitutional review on three occasions, a significant decrease in comparison with the previous period.[157]

The Commissioner explained to the IBAHRI delegation that he believed the role of his Office was to act as a filter, selecting only applications for constitutional review that he considered meritorious – that is, those which engaged fundamental rights but were, in his words, 'not political'. The Commissioner further informed the delegation that the Office now avoids political or institutional issues.[158] The Deputy Minister of Justice informed the delegation that the current Ombudsman has sought a higher success rate with cases.[159]

The delegation believes that many, if not most, meritorious applications for constitutional review will, by their nature and in a broad sense, have some political impact. The delegation cannot see any objective or published basis for the unwillingness of the Office to refer for constitutional review applications that might have such impact. The delegation believes that such unwillingness is not consistent with the statutory function of the Office or with the wide remit as conferred by the Paris Principles, whose second paragraph states: 'A national institution shall be given as broad a mandate as possible'.[160]

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152 The Paris Principles adopted by the UN General Assembly in Resolution on National Institutions for the promotion and protection of human rights, UN Doc A/RES48/134, 1993.

153 International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, *Report and Recommendations of the Session of the Sub-Committee on Accreditation* (SCA) (2014), available at http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20OCTOBER%202014%20FINAL%20REPORT%20-%20ENGLISH.pdf.

154 ACFR, s 5(2).

155 ACFR, s 2(5).

156 ACFR, s 5(5).

157 The delegation was informed that 34 cases had been referred to the Constitutional Court in the 18-month period prior to the current Commissioner taking office. IBAHRI meeting with the Office of the Commissioner for Fundamental Rights, 17 June 2015.

158 IBAHRI meeting with the Office of the Commissioner for Fundamental Rights, 17 June 2015.

159 IBAHRI meeting with Dr Róbert Répássy, Deputy Minister of Justice, 18 June 2015.

160 See n 152, UN Doc A/RES48/134,1993, Annex [2].

The delegation suggests that this broad mandate should be matched by an equally broad interpretation of the applications that merit consideration by the Constitutional Court. If a narrow 'filter' approach is taken on the basis of criteria that remain unclear then the risk is that the Office of the Commissioner of Fundamental Rights cannot fulfil its role on behalf of the citizen as an important check on the power of the government.

This being said, the delegation is very pleased to note that one of the three constitutional reviews referred by the Office, and which is before the Constitutional Court,[161] concerns legislation that abolishes limits upon the duration of pre-trial detention (see section 5.3 of this report).[162] This legislation has caused grave concern nationally and internationally.[163] The present delegation was also pleased to note, from the Office's annual report published in 2014, that the Office of the Commissioner had made inquiries into, inter alia: the position of Roma in Hungary;[164] prison overcrowding and the rights of detainees in the penitentiary and prison of Sopronkőhida;[165] access to clean drinking water for children;[166] disaster management;[167] and the right of the accused to disclosure of the evidence against him or her while in pre-trial detention.[168]

The delegation does not underestimate the value of the Office as an advisory body on such issues but, in its view, the Office's activity in assessing human rights stands in contrast with the current Commissioner's reluctance to initiate constitutional review that might have wide practical effect.

A further area of institutional concern arises from the report of the Sub-Committee on Accreditation (SCA),[169] which accredited the Office. The SCA found that:

> '[A]ccording to the legislation, vacancies for the posts of Commissioner and Deputies are neither widely advertised, nor is there broad consultation. The SCA again stresses the importance of a clear, transparent and participatory selection process that promotes merit-based selection, ensures pluralism and promotes the independence of, and public confidence in, the senior leadership of a NHRI.'[170]

The delegation supports the SCA's recommendations which, if implemented, could only serve to strengthen the role of the Office as an independent, effective and respected check upon potential abuse of power by the government.

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161 'The Ombudsman's Petition to the Constitutional Court Regarding the Duration of Pre-trial Detention' (Office of the Commissioner for Fundamental Rights), available at www.ajbh.hu/en/web/ajbh-en/-/the-ombudsman-s-petition-to-the-constitutional-court-regarding-the-duration-of-pre-trial-detention.

162 *Ibid.*

163 See Fair Trials International and HHC, *Communique on Pre-trial Detention in Hungary* (2013), available at www.fairtrials.org/publications/hungarian-experts-concern-over-pre-trial-detention-2.

164 Commissioner for Fundamental Rights and his Deputies, *Annual Report on the Activities of the Commissioner for Fundamental Rights 2013* (2013) 30, available at www.ajbh.hu/documents/14315/129172/Annual+Report+2013/42bc9441-1e90-4963-ad01-8f2819d2c3bf?version=1.0.

165 *Ibid*, 45.

166 *Ibid*, 51.

167 *Ibid*, 66.

168 *Ibid*, 77.

169 See n 153, *Report and Recommendations of the Session of the SCA* (2014).

170 *Ibid.*

Chapter Five: Other Rule of Law Issues

5.1 Update on changes to the lawyer's oath

The Preamble to the UN Basic Principles on the Role of Lawyers notes that:

> '...adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession'.[171]

A legal profession that is truly independent is essential for the protection of human rights. Moreover, Principle 16 of the Basic Principles requires governments to 'ensure that lawyers (a) are able to perform all of their professional functions without... improper interference'.

In light of these principles and the fact that, across the world, legal systems recognise the primacy of a lawyer's duty to his or her client, the IBAHRI's 2012 report expressed concern that the Hungarian lawyer's oath had been changed by the government, without meaningful input by the Hungarian Bar Association, so as to require lawyers to 'practise the duties and rights of the office of attorney for the benefit of the Hungarian Nation', and also omitted any reference to the duty of confidentiality.

The present delegation was therefore very pleased to find that, as recommended in the previous report (IBAHRI 2012 Recommendations 21–23), the government had conducted a consultation with the Hungarian Bar Association with the result that the current lawyer's oath is now in compliance with international standards. Lawyers no longer work for the 'benefit of the Hungarian Nation'; rather they act in the interest of the client and 'in the course of doing… safeguard all secrets of which [they] gain knowledge'.[172]

5.2 The role of civil society

International standards

International human rights bodies place great emphasis on the role of civil society in the promotion of the rule of law, human rights and democracy. As highlighted by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, 'civil society is an essential component for the promotion of human rights, democracy and the rule of law: therefore states should create and maintain a safe and enabling environment in which CSOs can operate free from hindrance and insecurity'.[173]

On the expectation that governments will seek to cooperate with civil society organisations, the

171 UN Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Cuba, 27 August – 7 September 1990 (UN Doc A/CONF.144/28/Rev.1), available at www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx.

172 Act XI of 1998 on Attorneys at Law (unofficial English translation).

173 Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, (UN Doc A/HRC/23/39, 24 April 2013). See also, Community of Democracies and Special Rapporteur on the rights to freedom of peaceful assembly and of association, 'Protecting civic space and the right to access resources', available at http://freeassembly.net/wp-content/uploads/2014/11/General-principles-funding-update_Nov.-14.pdf.

vice-president of the UN Human Rights Council stated on 22 April 2015:

> 'None of us on our own, governments included, have all the facts, best ideas, or know all the reasons underlying the problems we are trying to solve. We can only benefit from collective wisdom. And so it's important for us to hear from all constituencies, especially marginalized voices, before making a decision.'[174]

In 2014, the UN Human Rights Council adopted resolution 27/31 on civil society space, acknowledging the 'crucial importance of the active involvement of civil society, at all levels, in processes of governance and in promoting good governance, including through transparency and accountability, at all levels, which is indispensable for building peaceful, prosperous and democratic societies'. [175]

The delegation recalls that UN Secretary-General Ban Ki-moon has called for 'More participation. More democracy. More engagement and openness. That means maximum space for civil society'.[176] In disappointing contrast, the UN High Commissioner on Human Rights, in his March 2015 opening statement before the Human Rights Council, identified Hungary as a country of concern 'in the context of a shrinking democratic space', noting in particular recent 'attacks on public freedoms' and 'challenges to the independence of the judiciary'.[177]

The participation of civil society in legislative reform

During its 2015 mission, the IBAHRI delegation was concerned to learn that the government of Hungary, contrary to international standards, has displayed a tendency to not engage with civil society. One area where the civil society voice has been excluded is during the legislative reform process. In particular, the delegation notes that there has been a lack of a systematic consultation with civil society on human rights legislation. For example, the HHC informed the delegation that a proposed amendment to the Asylum Act – which comprised 17 pages consisting of 45 sections – was published on 19 June 2015. The deadline given for submitting related comments was the same day – 19 June 2015.[178] The delegation believes that the government would certainly have been aware of the longstanding public interest and particularly the critical position expressed by human rights organisations on legislation regulating the granting of refugee status.[179] The HHC also informed the IBAHRI delegation that only one day was accorded for review of the draft law implementing the Optional Protocol to the Convention Against Torture.[180]

The delegation understands that this lack of adequate time conflicts with the objective of the applicable procedural rules on public consultation. Act CXXXI of 2010 on Public Participation

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174 Vice President of the UN Human Rights Council Opening Remarks (22 April 2015), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15878&LangID=E .

175 Human Rights Council Resolution on Civil Society Space, UN Doc A/HRC/REC/27/31 (3 October 2014).

176 See, 'Secretary-General's remarks at High-Level event on supporting civil society' (UN Secretary General statement, 23 September 2013), available at www.un.org/sg/statements/index.asp?nid=7116.

177 UN High Commissioner's Opening Statement to the Human Rights Council (8 September 2014), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14998.

178 See, Helsinki Monitor Blog post in Hungarian (19 June 2015), available at www.helsinkifigyelo.blog.hu/2015/06/19/met_modositas_velemenyezese_12_ora_alatt.

179 See, for example, HHC, 'Information note on asylum-seekers in detention and in Dublin procedures in Hungary' (Hungarian Helsinki Committee, 29 May 2014), available at http://helsinki.hu/wp-content/uploads/HHC-Hungary-info-update-May-2014.pdf.

180 IBAHRI meeting with the HHC, 15 June 2015.

in Developing Legislation provides in Article 8 that 'general consultation' shall always include publishing the draft bills on the web, allowing for the submission of any opinion via email. Article 10(1) of the Act states:

> 'The draft, which shall be submitted for concurrent consultation with government agencies, shall – in line with the objective and entry into force of the draft – be published in a way to allow sufficient time for the substantive appraisal of the draft, as well as for expounding opinions and considering the merits of the received comments.'[181]

The delegation can see no objective justification for the denial of 'sufficient time' for public consultation on draft bills of such fundamental importance to Hungary's human rights framework.

Shrinking space for civil society organisations

The delegation also heard that the government had introduced restrictive measures against some CSOs. During the mission, the current IBAHRI delegation met with, among others, four prominent and internationally recognised CSOs – TI-Hungary, the HHC, the HCLU and Eötvös Károly Policy Institute – who have jointly published a timeline of 'governmental attacks' on civil society in Hungary.[182]

The timeline indicates that, on 21 May 2014, the Hungarian government initiated a state audit against CSOs who received grant funding from the European Economic Area (EEA)/Norway Grants NGO Fund.[183] It is reported that, in early June that year, the government began inspections on three CSOs who had been critical of the Hungarian government[184] and who benefitted from EEA/Norway Grant funds. The delegation notes that the Norwegian government has rejected all allegations of supporting, financially or otherwise, any party political activity in Hungary.[185]

The timeline continues that, during June 2014, 58 CSOs supported by the EEA/Norway Grant received a letter from the Government Control Office to submit documents related to their projects financed by the fund.[186] The delegation understands that non-compliance could have entitled the Government Control Office to initiate the suspension of the CSO's tax number, rendering its continued activity impossible.[187] The timeline states that, as of 18 September 2014, the tax numbers of four CSO organisations have been suspended.[188] TI-Hungary complied with the audit but informed the IBAHRI delegation that the organisation contested the legal basis of the audit. The delegation understands that one of the recipients of the EEA/Norway Grant, whose tax identification had been suspended, has challenged the suspension before a first instance court in Hungary, and requested

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181 IBAHRI email correspondence with the HCC, 24 June 2015.

182 See, TI-Hungary, HCLU, HHC and Eötvös Károly Policy Institute, *Timeline of Governmental Attacks Against Hungarian NGO Sphere* (12 August 2015) available at http://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_12082015.pdf.

183 The NGO Fund of the EEA/Norway Grants is operated by the Hungarian Environmental Partnership Foundation – Ökotárs Alapítvány in cooperation with Autonomia Foundation, Foundation for Development of Democratic Rights and the Carpathian Foundation-Hungary. For more information see, https://norvegcivilalap.hu/en/about-the-fund.

184 Special Rapporteur on the rights to freedom of peaceful assembly and of association, 'The Year in Assembly and Association Rights' (January 2015), 8, available at http://freeassembly.net/wp-content/uploads/2015/01/UNSR-FOAA-2014-annual-report_r.pdf.

185 The Norwegian Embassy in Hungary, 'Proposed investigation of the NGO Fund by the Government Control Office' (The Norwegian Embassy in Hungary, 28 May 2014), available at www.norvegia.hu/Norsk/EEA-and-Norway-Grants1/EEA-and-Norway-Grants/Proposed-investigation-of-the-NGO-Fund-by-the-Government-Control-Office/#.VBnPwVekPgH.

186 See n 182.

187 *Ibid.*

188 *Ibid.*

that the trial judge refer the case to the Constitutional Court.[189]

The delegation heard from another CSO – the HHC – that the organisation was in the midst of defamation proceedings against a Fidesz party member. As background, the HHC was named by the spokesperson of Fidesz, Péter Hoppál, as one of the organisations referenced in his speech at a press conference on 17 August 2013, in which he had stated:

> 'From an investigative report we learnt that a circle of American speculators paid about half a billion forints to show its gratitude to pseudo-civil organizations who were willing to regularly denounce Fidesz and the Hungarian government, particularly abroad and in front of forums abroad... These organizations kept for millions of dollars, what these organizations do, all they have to do in exchange of the American money, is to attack the Hungarian government, attack Fidesz, and attack the Prime Minister of Hungary in all possible forums.'[190]

The HHC requested an apology and, when not forthcoming, took legal action for defamation.[191]

Finally, the IBAHRI delegation was informed that, more recently, in a speech given by Prime Minister Viktor Orbán at the opening of the 2014 autumn session of the Parliament, Orbán insinuated that CSO representatives were paid political activists:

> 'We don't want anything more than to see clearly, we want to have clean water in the glass, because we are bothered by insincerity and lies, and we don't like it when someone who talks about freedom is a mercenary, or who talks about independence is a kept person. Declares himself a civilian but is in fact a paid political activist.'[192]

One deeply regrettable repercussion of public statements made against CSOs by government representatives has been the withdrawal of certain eminent CSOs from the government's inter-ministerial Human Rights Working Group (HRWG),[193] which was established in February 2012 as a result of Hungary's 2011 Universal Periodic Review (UPR). As the Hungarian government explains in its report on steps taken towards the implementation of recommendations emanating from the UPR:

> 'As a result of the UPR of Hungary in 2011, the Government set up an inter-ministerial [HRWG] in February 2012 which was tasked to monitor human rights in Hungary, to consult with stakeholders engaged in human rights matters and to advise the Government on human rights legislation. The HRWG operates a Human Rights Roundtable composed of 12 sub-working groups for the participation of the nongovernmental organisations. The Human Rights Roundtable was established for the explicit purpose to engage in an ongoing dialogue with the civil society and

189 IBAHRI email correspondence with TI-Hungary, 26 June 2015. See also, 'Courts decision welcomed', (website of the NGO Fund of the EEA/Norway Grants), accessible at https://norvegcivilalap.hu/en/node/11452.

190 See, TI-Hungary, HCLU, HHC and Eötvös Károly Policy Institute, 'Hungary Factsheet No 1: Undermining Constitutionality' (2014), available at www.osce.org/odihr/124145?download=true.

191 In July 2014, a first instance court found that Hoppál and Fidesz had defamed the organisation, ruling that the statements – which the respondents did not seek to support with evidence in court – may cause damage to the public image of the organisation. The court obliged the respondents to publish an apology in two daily newspapers and on the party's website. The respondents appealed against the decision. See n 182, *Timeline of Governmental Attacks*.

192 See n 182. The Prime Minister's speech was given on 15 September 2014. See also, 'Foreign funding of NGOs. Donors: keep out' (*The Economist*, 13 September 2014), accessible at www.economist.com/news/international/21616969-more-and-more-autocrats-are-stifling-criticism-barring-non-governmental-organisations (login required).

193 IBAHRI email correspondence with HCC and HCLU, 24 August 2015. See also open letter by HCLU in Hungarian, 18 September 2014, accessible at http://tasz.hu/files/tasz/imce/emberi_jogi_mcs_kilepes_20140918.pdf.

provides a platform for consultations with various stakeholders.'[194]

The initiative of the HRWG is welcomed and is indicative of a strategy to engage more frequently and systematically with CSOs. The IBAHRI is therefore disappointed to learn that the recent hostility towards some CSO activity means that the current political environment is not conducive for constructive debate between CSOs and the government on legislation and human rights. Recalling the emphasis afforded by international human rights bodies on the role of civil society, this undoubtedly has a detrimental impact of the promotion of the rule of law, human rights and democracy in Hungary.

5.3 Removal of the time limit on pre-trial detention in serious cases

International and national law

Protections for pre-trial detainees are set out in international and regional instruments to which Hungary is a party.[195] The general rule is that deprivation of liberty must be an exceptional measure,[196] which is the logical protection of the right to be presumed innocent until proved guilty.[197] Before 18 November 2013, Hungary's national law – under the Act XIX of 1998 on the Code of Criminal Proceedings (ACCP) – stipulated that pre-trial detention should not exceed four years even in the case of the most serious offences.[198] However, an amendment to the Act[199] abolished this limitation with effect from 18 November 2013 in cases where the penalty of imprisonment is more than 15 years, or life.[200]

Hungary has been found to be in breach of Article 5(3) ECHR by the ECtHR.[201] It is not alone in failing to meet international standards; the arbitrary and excessive use of pre-trial detention around the world is a form of human rights abuse that affects more than 14 million people a year.[202] Commentators suggest that few rights are so broadly accepted in theory but so commonly abused in practice. The global overuse of pre-trial detention has been described as one of the most overlooked human rights crises of our time.[203]

With regards to the situation in Hungary, the UN Working Group on Arbitrary Detention, following its visit in October 2013, expressed concern that:

'[E]ven with legislation providing for alternative measures to detention, the recourse to use detention as a first resort rather than the last, has been commonplace. Hungary's prison population is currently at a 140 per cent overcrowding ratio, much of which can also be attributed to the common use of

194 See Hungary's mid-term UPR implementation report (May 2014), 4, available at http://lib.ohchr.org/HRBodies/UPR/Documents/session11/HU/MidtermUPRreportHungary28May2014.pdf. Hungary was reviewed as part of the UPR process in May 2011.

195 For example, the International Covenant on Civil and Political Rights (ICCPR), Art 9(3) and ECHR, Art 5(3).

196 ICCPR, Art 9(3)

197 *Ibid.*

198 ACCP, Art 132(3).

199 Act CLXXXVI of 2013 on the Amendment of Certain Criminal Law Acts and Other Related Acts.

200 See n 161, 'The Ombudsman's Petition to the Constitutional Court Regarding the Duration of Pre-trial Detention'.

201 See, *Galambos v Hungary* App no 13312/12 (ECtHR, 11 June 2014), available at http://hudoc.echr.coe.int/eng?i=001-156268. See n 163, *Communique on Pre-trial Detention in Hungary* (2013), 4, [15].

202 Open Society Foundations, 'Executive summary and recommendations', *Presumption of Guilt: The Global Overuse of Pretial Detention* (2014), available at www.opensocietyfoundations.org/publications/presumption-guilt-global-overuse-pretrial-detention.

203 *Ibid.*

detention for those in the pre-trial regime.' [204]

The delegation is concerned the amendment that abolished the four-year limit on pre-trial detention is in conflict with the right to trial within a reasonable time under Article 5(3) ECHR, and creates an obvious tension with Article 64/A (1) a) of the ACCP, which requires the authorities to proceed without delay. The delegation believes that the amendment is very likely to discourage expedition in the investigation and prosecution of offences to the detriment of the human rights of affected pre-trial detainees. As at December 2013, the total population of all pre-trial detainees in Hungary was 5,053 of a total prison population of 18,042.[205] The IBAHRI delegation also considers the abolition of the time limit on pre-trial detention to be incongruous, as it was introduced at a time when, according to the president of the NJO, the administration of the court system had become more efficient.

Exacerbating this situation further is the fact that prison overcrowding is already an acknowledged human rights violation in Hungary. The ECtHR currently has approximately 450 applications pending against Hungary concerning complaints about inadequate conditions of detention.[206]

The delegation is therefore particularly pleased to note that, in March 2015, the Office of the Commissioner for Fundamental Rights, acting on representations made by Eötvös Károly Policy Institute and the HHC in January 2014,[207] referred the amendment abolishing the limit on pre-trial detention to the Constitutional Court for review.[208] The Commissioner considers that 'the abolition of the maximum duration of pre-trial detention infringes on the rule of law clause of the Fundamental Law' and has recommended that the Constitutional Court annul the amendment.[209]

204 Statement by the Working Group on Arbitrary Detention, 'Hungary: UN experts concerned at overuse of detention and lack of effective legal assistance' (2 October 2013), available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13817&LangID=E.

205 Council of Europe, 'Court: Hungary must take action against prison overcrowding' (10 March 2015), available at www.humanrightseurope.org/2015/03/court-hungary-must-take-action-against-prison-overcrowding.

206 *Varga and Others v Hungary* App no 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13 (ECtHR, 10 June 2015), available at http://hudoc.echr.coe.int/eng?i=001-152784#{"itemid":["001-152784"]}.

207 See, 'Civil Orgs appeal to ombudsman over unlimited pre-trial detention' (*All Hungary Media Group*, 21 January 2014), available at www.politics.hu/20140121/civil-orgs-appeal-to-ombudsman-over-unlimited-pre-trial-detention.

208 See n 161, 'The Ombudsman's Petition to the Constitutional Court Regarding the Duration of Pre-Trial Detention'.

209 *Ibid.*

Chapter Six: Conclusions

6.1 Conclusions on the independence of the judiciary

There is no doubt that the restructuring of Hungary's judicial administration model has improved efficiency in the judicial system. The IBAHRI delegation also welcomes the positive steps taken to rebalance the distribution of powers and agrees with the conclusion of the Venice Commission that the 'system was now more balanced with regards the powers of the Chairperson of the National Judicial Office and the bodies of judicial self-government'.[210]

Nonetheless, the IBAHRI delegation emphasises that Hungary has made the decision to establish an independent body of judicial self-government and, as such, is encouraged to organise the functions of the NJC in line with best-practice principles. In particular, the NJC should, as recommended by the CCJE in its Opinion No 10 (2007), be entrusted with all tasks relating to the protection and advancement of judicial independence and the efficiency of justice, and be competent in the selection, appointment and promotion of judges. The NJC should also be granted all functions relating to judicial transfer, suspension and cessation of judicial functions to guarantee the independent functioning of the judiciary.

The IBAHRI delegation reiterates the conclusion of its 2012 report: that judicial independence could be strengthened further. Under the current arrangement, the delegation considers that the NJC's decision-making powers and effectiveness remain limited by legislative and practical impediments. The delegation therefore concludes that, contrary to international standards, the administration of justice is not governed by an independent authority with a substantial representation of the judiciary, and shares the conclusion of one of its mission interviewees, that the arrangement of the NJO and the NJC should be viewed as an interim solution.

In relation to other issues considered, the delegation builds on the overarching recommendation of the 2012 delegation, which is that a nationwide assessment of the justice sector be undertaken, and encourages the government to engage the judiciary in a participatory, transparent and non-discriminatory review of Hungary's model of justice administration. Importantly, the way forward must be determined in full consultation with the members of the NJC, an elected body of judges who hold considerable expertise and experience.

6.2 Conclusions on checks and balances

On the Constitutional Court

The delegation welcomes the observation of the Parliamentary Assembly of the Council of Europe in its report of June 2014, which states that, 'in spite of the restrictions criticised in the Assembly Resolution, the Constitutional Court had been able to play its role as the main check on the power of those who currently had the majority'.[211]

210 See n 2 [41].

211 *Ibid*, [36].

Nonetheless, as noted in the IBAHRI's 2012 report, the cumulative effect of the legislative reforms is that the role of the Constitutional Court to act as an independent check on the actions of the executive and legislature has been greatly weakened by the reforms' impact on the appointment procedure of the Constitutional Court membership and on the Court's authority. The delegation considers that the constitutional reform implemented by the Fourth Amendment exacerbated existing concerns on the curtailment of the Constitutional Court's role and undermined the independence of the judiciary.

The delegation therefore urges the restoration of the Constitutional Court's jurisdiction by repealing the provisions of national law that limit the Court's jurisdiction. The IBAHRI delegation also recommends a review of the composition of the committee nominating Constitutional Court judges to remove the perception of politicised judicial appointments.

On the Office of the Commissioner for Fundamental Rights

As Hungary's NHRI, the Office of the Commissioner for Fundamental Rights must promote and monitor the effective implementation of international human rights standards at the national level. The delegation recognises that the Office is very active in the conduct of investigations and works to raise awareness of human rights issues through annual reports and public outreach. However, despite its mandate to refer constitutional complaints to the Constitutional Court for review, the Office has decided not to do so in cases that it deems political or institutional. The IBAHRI is concerned that the value of the Office of the Commissioner for Fundamental Rights is likely to be diminished by its reluctance to refer matters to the Constitutional Court.

The delegation recommends that this be addressed and further recommends that the government review, and consider implementing, the recommendations of the SCA relating to the importance of a participatory selection process that promotes the independence of, and public confidence in, the senior leadership of a NHRI.

On the participation with the opposition in legal reform

The delegation is concerned by the failure of the government to consult adequately or at all with parliamentary members of opposition parties. The delegation considers that the lack of adequate consultation affects more than merely the interests of the opposition: it is detrimental to public confidence in democratic institutions, and to open debate and transparency.

As to ensuring the opposition voice is recognised during the legislative process, the IBAHRI concludes that the government continues to allow insufficient time for consultation and/or debate of bills before the National Assembly. This unwillingness to ensure the meaningful participation of the opposition extends to civil society and the Office of the Commissioner for Fundamental Rights, who are often not permitted sufficient time to make a meaningful contribution to legal consultation or debate.

6.3 Conclusions on other rule of law issues

On the role of civil society

The delegation laments the effect that inflammatory language used by senior members of the government is likely to have on the public perception of the value of CSOs. To describe reputable organisations as paid political activists serves no legitimate purpose based on the known facts. The role that civil society can play in the promotion of the rule of law and as a check on the misuse of power should be respected. Hungary's next UPR will be held in April 2016 and the delegation hopes that this will be viewed as an opportunity to engage constructively with CSOs.

The delegation further finds that the government, far from granting CSOs the 'maximum space' recommended by the UN, has sought to restrict their effective functioning through questionable financial controls to the detriment of the rule of law. The IBAHRI concludes that the civil society space should conversely be maximised in view of the valuable role that civil society can and does play in the promotion of the rule of law and fundamental rights.

On pre-trial detention

This report notes the serious concerns levelled at the ACCP (as amended), which abolishes time limits on the duration of pre-trial detention for the most serious crimes. The IBAHRI notes that the amendment conflicts with international law and best practice. The delegation concludes that unlawfully prolonged pre-trial detention in conditions already condemned by the ECtHR will increase unless the need for expeditious criminal investigations is reasserted and alternatives to custody are actively considered.

Chapter 7: Further Recommendations

7.1 Judicial administration

The IBAHRI recommends that the government:

1. consults with the membership of the NJC to review the functioning and powers of the NJC, with reference to the ECSJ and the CCJE Opinion No 10, with a view to implementing further reform to ensure that the NJC membership can fulfil its role as Hungary's independent body of judicial self-government;

2. grants the NJC the power to determine its own budget and considers granting the NJC membership the power to debate its budget before parliament;

3. reviews the judicial appointments procedure to ensure that the NJC, or a genuinely plural body with a majority of judges elected by their peers (as recommended by the Special Rapporteur on the independence of judges and lawyers[212]), makes the final decision on the selection, appointment and promotion of judges, including court presidents; and

4. undertakes a review of judicial salaries to assess whether they are at a level of remuneration that is commensurate with the nature of the judicial office, as recommended by the Special Rapporteur on the independence of judges and lawyers.[213]

7.2 The Constitutional Court

The IBAHRI recommends that the government:

5. respects the authority of the Constitutional Court to determine its jurisdiction and repeal all provisions of national law that represent a limitation on the Constitutional Court's jurisdiction;

6. considers reforming the nomination procedure of Constitutional Court judges to ensure that no political party dominates the procedure; and

7. implements the recommendation of the Parliamentary Assembly of the Council of Europe to legislate for a 'cooling-down' period in respect of MPs, between the end of their political mandates and before they can be elected as judges of the Constitutional Court.

7.3 The Office of the Commissioner for Fundamental Rights

The IBAHRI recommends that the Office of the Commissioner of Fundamental Rights:

8. reviews its decision not to refer for constitutional review those complaints that it deems to have a political or institutional impact; and

9. adopts a clear, transparent and participatory selection process that promotes merit-based

212 See n 37, Report of the Special Rapporteur, [28] and [71].

213 *Ibid*, [99].

selection, ensures pluralism and promotes the independence of, and public confidence in, the senior leadership of a NHRI. To that end it should:

- publicise vacancies broadly;
- promote broad consultation and/or participation in the application, screening, selection and appointment process; and
- assess applicants on the basis of pre-determined, objective and publicly available criteria.

7.4 Consultation with opposition groups and civil society

The IBAHRI recommends that the government:

10. allows sufficient time for meaningful debate and consultation between the presentation of draft legislation to parliament and the parliamentary vote upon the same. During such consultation the government should invite the meaningful participation of CSOs;
11. ensures that the Office of the Commissioner for Fundamental Rights receives all draft legislation in sufficient time to enable at least ten days for comment;
12. publishes best practice guidelines for public consultation on liaison with CSOs; and
13. establishes a review of Hungary's Fundamental Law to assess how it is operating in practice. Such a review should include membership from across the political spectrum and a wide representation of civil society.

7.5 Civil society organisations

The IBAHRI recommends that the government:

14. urgently reviews the legal basis for the audit process initiated by the Government Control Office and for the suspension of tax numbers of the affected CSOs;
15. recognises that CSOs operate to protect human rights, thus providing crucial protection for the rule of law;
16. desists from public attack upon such organisations and seeks to rebuild an atmosphere in which responsible dialogue between government and CSOs is possible; and
17. allows CSOs maximum space to operate freely and without unlawful interference or intimidation.

7.6 Pre-trial detention

The IBAHRI recommends that the government**:**

18. urgently reconsiders the lawfulness of Act CLXXXVI of 2013 on the Amendment of Certain Criminal Law Acts and Other Related Acts, which abolished the four-year limit on pre-trial detention for certain crimes;

19. upholds and respects international and national standards and norms regarding the use and conditions of pre-trial detention; and

20. assesses the use of pre-trial detention in Hungary and considers how alternatives might be adequately resourced.

Annex I

Recommendations from the IBAHRI's September 2012 report *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary*

1. 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.

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

3. 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 fulfil 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. The government should execute the decision of the Constitutional Court[214] 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 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

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

16. The procedure for selecting Constitutional Court judges should be changed to re-establish the proportionate representation of parliamentary fractions in the selecting committee.

17. A constitutional review should consider the issue of restrictions on the jurisdiction of the Constitutional Court.

18. The authorities should provide for the possibility of legal aid for admissible constitutional challenges./.

19. 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.

20. 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.

21. 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.

22. The oath should be amended so as to include a reference to lawyers' duty of confidentiality towards their clients.

23. Any further reforms to issues affecting the operation of the legal profession should be carried out in full consultation with the Hungarian Bar Association.

Annex II

The response of the governent of Hungary to the IBAHRI's draft report

Chara de Lacey
Programme Lawyer
International Bar Association's Human Rights Institute
Budapest, 16 September 2015

Dear Miss Lacey,

Thank you for sending me the draft Report before publication. I would like to make the following responses to the Report.

3.3 Update on the role of the president of the NJO and the NJC
I would like to call your attention to the fact that the National Judicial Council (NJC) became a full member of the European Network of Councils for the Judiciary (ENCJ) on 3 June 2015, as all attending Member State's delegates voted unanimously – without any votes against or abstentions – in favour of the NJC's application for membership. The full membership is a proof of the NJC's independence "*of the executive and legislature*" and of its responsibility "*for the support of the Judiciaries in the independent delivery of justice*". I note that Austria, Cyprus, the Czech Republic, Estonia, Finland, Germany, Luxembourg, Norway and Sweden only have the status of observer in the ENCJ.

As for criticism about the administrative powers of the NJC, I consider important to stress that the NJC is basically not an administrative body, it has rather the duty to supervise administration. In accordance with Section 103 (1) a) of *Act CLXI of 2011 on the Organisation and Administration of Courts, the NCJ shall oversee the central administration activity of the President of the National Judiciary Office* (*NJO), and notify the President of the NJO where considered appropriate.* However, the NJC has a veto right with regard to the powers of the NJO's president in matters of human resources.

3.8 Update on judicial appointments
I consider it important to draw your attention to the fact that, contrarily to the critics formulated in the draft report, Section 20 of *Act CLXII of 2011 on the Legal Status and Remuneration of Judges* establishes clear criteria for a judge candidacy procedure to qualify as unsuccessful.

The affirmation stating there is no legal requirement for prior NJC approval when it is decided to deviate from the judge appointment ranking ("*there is still no legal requirement for prior NJC approval, and finds that its recommendation has therefore not been addressed*") is false, given that Section 103 (3) of

Act CLXI of 2011 on the Organisation and Administration of Courts grants the NJC a veto right when the second or third candidate on the shortlist is proposed by the President of the NJO or by the President of the Curia to fill the post.

3.10 Update on the mandatory retirement age for judges

I call your attention to the fact that the scrutiny of the draft report stating that judges made to retire had no opportunity to return to their original position ("*As a result, a majority of judges (173 out of 229) have not been able to return to their original position and only four of the 17 removed court presidents have been able to return to a position of leadership.*") is based on false information. Out of the earlier removed 229 judges mentioned in the report, 173 chose to receive compensation, despite having been offered the possibility to return to their original positions.

3.11 Judicial salaries

I would like to bring to your attention that according to the Act CLXII of 2011 on the Legal Status and Remuneration of Judges the amount of minimum basic judicial gross salary increased in 2004 to 304,400 HUF, in 2005 to 322,700 HUF, in 2006 to 356,000 HUF then in 2012 to 391,600 HUF. Sincerely I would like to draw your attention to those inflation reducing governmental measures, which eventuates significant tax savings for the judges too. While in 2010, a judge with 10 year practical time on a local court earned net 266,000 HUF from 480,600 HUF gross, than in 2015 a childless district court judge with 10 year practical time earns about 345,000 HUF from 528,660 HUF gross, and in case of a judge having two dependants a judge earns net 392,000 HUF per month. In the view of this data, the quoted statement in the report in connection with the increasing of judicial salaries is ill-founded.

4.1. Update on the Constitutional Court

The rules for the election of Constitutional Court judges remain unchanged since 1989. Constitutional Court judges are nominated by a Parliament committee and elected by the Parliament with a two-thirds majority. The only change occurred in the composition of the nominating committee which, until 2012, has had one member from each Parliament fraction: since 2012, the committee's composition corresponds to the shares of parliamentary fractions (according to old rules, opposition parties formed the majority in this committee, despite holding a minority of the seats in the Parliament).

I draw your attention to the fact that by virtue of *Act CLI of 2011 on the Constitutional Court, "Members of the Constitutional Court shall be independent, subordinated only to the Fundamental Law and Acts […] The mandate of Members of the Constitutional Court shall be incompatible with any other position or mandate in state or local government administration, in society, or with any political or economic position"*. I would like to complete the information you possess with the fact that not only Dr István Balsai and Dr László Salamon used to be MPs, but also Dr Mihály Bihari who was a Member of the Constitutional Court between 1999 and 2008, as well as between 2010 and 2013 and even the President of the Court between 2005 and 2008. Thus, this practice is not a novelty introduced by the current Government.

4.2 Update on executive and legislative responses to decisions of the Constitutional Court

It is falsely stated that the government has continued to use its parliamentary control to amend the

Fundamental Law in such a way that Constitutional Court decisions have been overruled. The last amendment took place in September 2013, just in order to remedy the critics formulated by the European Union and the Council of Europe.

4.3 Update on the participation of the opposition in legal reform
The statement of the report concerning the participation of the opposition is to be completed, given that two opposition parties have deliberately boycotted the preparation of the Fundamental Law of Hungary which lasted for six months, while one opposition party has taken part in the constitution-making process.

5.2. The role of civil society
I draw your attention to the fact that, according to data provided by the National Judicial Office, 81,696 civil society organisations operated in Hungary in 2014. I note that approximately 10,000 among them receive State funding (through grant procedures), moreover each taxpayer has the possibility to offer 2% of the tax paid by him or her to any civil organisation or church (This contribution is doubled by the State). The Government Control Office however has only investigated 55 civil society organisations altogether and found financial irregularities in several cases.

As for the declarations made by Péter Hoppál and Viktor Orbán on civil society organisations, I note that in accordance with Article IX (1) of the Fundamental Law, "*everyone shall have the right to freedom of speech*" in Hungary. This right is enjoyed by members of the Government, MPs and civil society organisations likewise.

5.3. Removal of time limit on pre-trial detention in serious cases (Prison overcrowding)
We hereby inform the delegation that the Government has launched a prison construction project in order to eliminate prison overcrowding. According to preliminary plans, the capacity of penal institutions will be extended by approximately 5,000 persons until 2019. Eight new institutions having a capacity of 500 persons and one having a capacity of 1,000 persons will be established, all with both penitentiary and correctional units.

I could make the aforementioned responses for the issues raised by the draft Report. Hopefully these will help you in the preparation of the final Report.

Thank you for your cooperation.

Yours sincerely,

Dr. Róbert Répássy
Deputy Minister of Justice

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