

**Mandate of the Special Rapporteur on the independence of judges and lawyers**

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 17/2.

In this connection, I would like to draw the attention of your Excellency's Government to information I have received regarding recent legislation adopted in the Republic of Hungary on various aspects which may affect the independence of the judiciary. In particular, I am concerned with some of the related consequences of the provisions of the new Constitution adopted on 18 April 2011, and entered into force on 1 January 2012, regarding the functioning of the judiciary as well as of the following cardinal acts:

- Act CLXI of 2011 on the Organisation and Administration of Courts, adopted on 28 November 2011 and entered in force on 1 January 2012;
- Act CLXII of 2011 on the Legal Status and Remuneration of Judges, adopted on 28 November 2011 and entered in force on 1 January 2012;
- Act CXXXI of 2011 on the Transitional Rules of Filling Certain Positions of Judges in Order to Ensure the Timely Termination of Court Proceedings, which entered in force in October 2011.

According to information received, several provisions of the new legal framework may affect the independent functioning of the judiciary. They particularly concern the election procedure regarding the President of the Curia and the President of the new National Judicial Office, the duties of the President of the National Judicial Office, and the consequences of the new provisions on the retirement age of judges. In addition, information was received regarding the powers of Hungary's Prosecution Service.

*The transformation of the Hungarian Supreme Court into a Curia and the election procedure of its President*

With regard to the election procedure of the President of the Curia, which replaces the Supreme Court, I note that Article 26 (3) of the newly adopted Constitution provides that “The President of the Curia shall be elected from among its members for nine years by Parliament on the recommendation of the President of the Republic. The election of the President of the Curia shall require a two-thirds majority of the votes of the Members of Parliament.” The Act CXLI on the Organisation and Administration of Courts further details the election procedure. A similar procedure is envisaged in Sections 66 and 67 of the Act CXLI regarding the election of the President of the National Judicial Office.

I note in particular Section 114 (1) of the same Act which provides the following details: “The President of the Curia shall be elected by Parliament from among judges appointed for an indeterminate duration and with at least five years of judicial service in accordance with Article 26 (3) of the Fundamental Law”. This amendment has reportedly led to the fact that the last President of the Supreme Court, Mr. András Baka, was dismissed before the end of his term and is currently not eligible to serve as President of the newly established Curia as he has not served for five years as a judge in Hungary. It is alleged that his 17-year experience as a judge at the European Court of Human Rights is therefore not taken into consideration for this position. I have received information alleging possible political motivations for the termination of the Supreme Court President’s mandate, as Mr. Baka had reportedly been particularly critical vis-à-vis a number of planned institutional changes related to the justice system and the administration of courts.

Furthermore, with regard to the termination of the term of office of the President of the Curia, Section 115 (4) mentions that “If the term of office of the President of the Curia was terminated on the basis of Paragraph (1) a) [upon the expiry of the term of office] and the Parliament did not elect a new President before the termination of office, the President of the Curia will exercise the presidential rights and powers until the new President of the Curia has been elected.”

Concern is expressed that this election procedure of the Presidents of the Curia and of the National Judicial Office, where the President of the Republic and the Parliament have decisive roles, may result in allowing for improper political influence on the election process and discharge of duties of the two Presidents. This situation may affect the principles of separation of powers and independence of the judiciary. In the case of the President of the Curia, this concern is deepened by the fact that the term of office can be prolonged indefinitely in case of a failure to elect a new President. Concern is also expressed about the alleged political motivations in the process of modifying the legislation related to the requirements for election as President of the Curia.

In this connection, I would like to refer Your Excellency’s Government to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. In particular, principle 1 states that the independence of the judiciary shall be guaranteed by the State, as well as that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

### *Duties of the President of the National Judicial Office*

Section 76 of the Act CXLI on the Organisation and Administration of Courts defines the duties of the President of the National Judicial Office. Among them, paragraph 3 invests the President with duties related to the budgets of courts; paragraph 4 details the duties regarding statistical data collection, case distribution and measuring of workloads; paragraph 5 states important duties on matters of human resources; and paragraph 7 stipulates the duties related to the administration of courts. Paragraph 5 in particular invests the President with essential duties of, *inter alia*, putting forward proposals concerning the appointment and relief of judges (b), post judges (c), adopt a decision on the transfer of the judge (g), take a decision concerning the long-term foreign secondments of judges (i), appoint and relieve the court leaders defined by law (m).

I am concerned that the power and decision on crucial elements of management of courts in terms of human resources, budgeting and workload are vested in one person. This situation leads to a risk of a concentration of powers and a lack of a system of checks and balances, which could affect the independent and effective functioning of courts and the discharge of duties by the judges. This concern is strengthened by the additional allegations mentioned in the previous chapter on the election procedure of the President of the National Judicial Office, which is reportedly dependent on the Parliament and the President of the Republic.

In this respect, I would like to draw the attention of Your Excellency's Government to Basic Principles 2 and 4 on the Independence of the Judiciary. They insist on the fact that both the decisions of the judiciary and the judicial process shall occur without improper influence, and inappropriate or unwarranted interference. In 2009, the report A/HRC/11/41, addressed to the Human Rights Council, referred in detail to the guarantees for judicial independence, including those related to the selection and appointment of judges. I invite Your Excellency's Government to take particular note of the paragraphs 27 to 30, recommending the establishment of an independent body with a plural composition in charge of the selection of judges.

### *New provisions on the mandatory retirement age of judges*

I am further informed of the new legislation on the lowering of the mandatory retirement age of judges from 70 to 62 years of age, as well as of the short transitional periods for the application of these new provisions. Section 230 of the Act CLXII on the Legal Status and Remuneration of Judges regulates the transitional periods as follows:

(a) The provisions of the present Act shall govern judges completing the upper age limit before 1 January 2013 subject to the differences set forth in Paragraphs (2) and (3).

(b) If the judge completed the upper age limit before 1 January 2012, the initial day of the exemption period is 1 January 2012, while the closing day is 30 June 2012, and his judicial office shall cease effective as of 30 June 2012. The proposal

concerning exemption shall be made at a time which permits the adoption of the decision on exemption on 30 June 2012, at the latest.

(c) If the judge completes the upper age limit between 1 January 2012 and 31 December 2012, the initial day of the exemption period is 1 July 2012, while the closing day is 31 December 2012, and his judicial office shall cease effective as of 31 December 2012. The proposal concerning the exemption shall be made at a time which permits the adoption of the decision on exemption on 31 December 2012, at the latest.

According to the information received these new legal provisions might lead to the immediate retirement of more than 200 judges. Concern is therefore expressed with respect to the security of tenure of judges, and possible delays in proceedings. Further concern is expressed regarding the nomination procedure of new judges, bearing in mind the new related provisions on the duties of the President of the National Judicial Office.

#### *Powers of the Prosecution service*

I have also received information regarding the powers of the Prosecution Service in the country. It is alleged that public prosecutors have the powers to choose the court in which a particular case shall be heard as well as the presiding judge.

Concern is expressed at the insufficient separation of functions between judges and prosecutors in this regard. I would like therefore to underline the importance of taking measures to ensure that the competences and role of prosecutors established by the Law do not infringe upon the independence and impartiality of judges. I would like by consequence to draw the attention of Your Excellency's Government to the Guidelines on the Role of Prosecutors, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. In particular, Guideline 10 states that the office of the prosecutors shall be strictly separated from judicial functions.

While I do not wish to prejudge the accuracy of this information, I wish to appeal to your Excellency's Government to seek clarification on the content and possible implications of the new provisions under the Constitution and the cardinal acts on the independence of the judiciary in the Republic of Hungary:

1. Is the information in the summary of the new constitutional and legal provisions accurate?
2. Please explain the reasons for the replacement of the Supreme Court by the Curia and for the legislative modifications related to the election requirements as President of this body.
3. Please explain the reasons for the dismissal of the last President of the Supreme Court, Mr. András Baka, before the end of his term. Please specify whether he is currently considered suitable or not to serve as President of the newly established Curia, given that he has not served for five years as a judge in Hungary.

4. Please indicate the reasons for granting numerous important powers to the President of the National Judicial Office. Please provide in addition a detailed description of the competences of the National Judicial Office as a body, as well as of the National Council of Judges.

5. Please explain the reasons for lowering the mandatory retirement age of judges, as well as provide the text of the legal provisions regulating this issue.

6. Please specify the guarantees provided for ensuring an independent administration of the courts, as well as an impartial process of appointment, promotion, and transfer of judges.

7. Please describe the powers of the Prosecution Service in the Republic of Hungary in relation to the possibility for prosecutors to select the court in which a particular case is heard and the presiding judge.

8. Please explain how the proposed amendments in the law and the new Constitutional provisions in the field of the administration of justice are compatible with international human rights standards regarding the independence of judiciary.

I undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the report I will submit to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of my highest consideration.

Gabriela Knaul  
Special Rapporteur on the independence of judges and lawyers