

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 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 **the Fourth Amendment to the Fundamental Law of Hungary**, which was adopted on 11 March 2013 and entered into force on 1 April 2013, and its possible negative consequences on the independence of the judiciary, the rule of law and the fundamental principle of separation of powers in Hungary.

In a communication sent on 29 February 2012, I had already expressed concerns over the implications of provisions of the Fundamental Law and related legal provisions for the independence of the judiciary. In particular, concerns regarding the election procedure for the President of the Curia and the President of the National Judicial Office, the duties of the President of the National Judicial Office, the new provisions on the retirement age of judges, and powers of the prosecution and its lack of separation from the judicial power, were highlighted in the communication. I thank your Excellency's Government for the substantive replies sent on 14 May 2012 and 7 September 2012 addressing the concerns expressed in this communication.

According to the information received:

On 1 April 2013, the Fourth Amendment to the Fundamental Law of Hungary entered into force. Several provisions in this Fourth Amendment allegedly constitute serious interferences on the independence of the judiciary, including in particular that of the Constitutional Court, and the rule of law in Hungary.

Provisions affecting the independence of the Constitutional Court

The Fourth Amendment is reported to contain provisions legitimizing legislative initiatives that had previously been found unconstitutional by the Constitutional

Court or could give rise to serious constitutional concerns. The insertion of provisions previously deemed unconstitutional into the Fundamental Law by the way of amendments is said to have become a means systematically used by the Parliamentary majority to overrule the decisions taken by the highest judicial authority in Hungary.

For instance:

- article 1 of the Fourth Amendment introduces a narrow interpretation of the family into the Fundamental law, while the Constitutional Court had abolished in its decision 43/2012 a law containing a restrictive interpretation of the notion of family;
- article 5 of the Fourth Amendment introduces a clause restricting political advertising in the media, which is similar to the legal provision annulled by decision 1/2013 of the Constitutional Court which banned political advertisement in the commercial media;
- article 8 of the Fourth Amendment introduces a new provision that enables the Parliament and local governments to outlaw living in public premises, while in its decision 28/2012, the Constitutional Court had overturned an Act of Parliament criminalizing homelessness; and
- article 4 of the Fourth Amendment provides for the possibility of religious communities to be recognized as churches, which includes specific rights and benefits, by an Act of Parliament adopted with a two-third majority, whereas the Constitutional Court had established in its decision 6/2013 that the 2011 rules on the recognition of religious communities as churches by the Parliament instead of a court are unconstitutional.

Article 19 of the Fourth Amendment also declared void the decisions of the Constitutional Court adopted prior to the Fundamental Law. It is alleged that, as a result, reference to the case law of the Constitutional Court developed since Hungary's transition to democracy cannot be made when interpreting the Fundamental Law and that important principles established in the Constitutional Court's rulings have thereby been abolished. It is further alleged that such development is in direct contradiction to specific Constitutional Court decisions reached after the entry into force of the Fundamental Law, where the Court argued that when the content of the old Constitution and the Fundamental Law are identical or similar to a considerable extent the decision adopted on the basis of the old Constitution may still be used and referred to.

Furthermore, article 24 (5) of the Fourth Amendment expressly prohibits the Constitutional Court from reviewing the content of amendments to the Fundamental Law. This is said to be in contradiction with a recent decision of the Constitutional Court where ruling on the Transitional Provisions to the

Fundamental Law the Court decided it had the power to review amendments to the Fundamental Law on the basis of general standards of constitutionality. It is alleged that this clause unduly restricts the competence of the Constitutional Court.

In addition, article 37 (5) of the Fourth Amendment permanently restricts the Constitutional Court's powers in tax and budgetary matters. This restriction was first introduced in the old Constitution in 2010 and negatively criticized by the European Commission for Democracy through Law (the Venice Commission) in March 2011. Nevertheless, the Fundamental Law upheld this restriction of the powers of the Constitutional Court under specific circumstances. This transitory restriction was made permanent by article 27 of the Transitional Provisions to the Fundamental Law. Article 27 was later abolished in a decision of the Constitutional Court which argued that the content of article 27 did not have a transitional character. Article 37 (5) of the Fourth Amendment reintroduced this provision into the Fundamental Law.

Provisions affecting the independence of judges in the ordinary court system

Article 13 of the Fourth Amendment includes the President of the National Judicial Office in the Fundamental Law and article 25(5) stipulates that he/she manages the central administrative affairs of the courts, despite concerns expressed previously by the Venice Commission, as well as in the Urgent Appeal dated 29 February 2012 and mentioned above. The Fourth Amendment does not include reference to the National Judicial Council, the courts' own self-governing body.

Moreover, article 11(3) of the Transitional Provisions of the Fundamental Law allowed the President of the National Judicial Office to reassign cases between courts until the realization of a balanced distribution of caseload between the courts. This rule was abolished by the Constitutional Court in its decision 45/2012. However, article 14 of the Fourth Amendment creates a constitutional basis for the President of the National Judicial Office to transfer cases from one court to another and abolishes the original transitional character of the provision. This article is said to be in contradiction with the opinion of the Venice Commission, but also with the principle of the natural or lawful judge, a fundamental guarantee of the right to a fair trial. I was informed that the Government expressed in a recent statement its intention to remove this provision from the Fundamental law in reaction to the criticism which it has received.

I am seriously concerned that several provisions of the Fourth Amendment to the Fundamental Law would constitute serious threats or interference on the independence of the judiciary, the rule of law and the principle of separation of powers in Hungary. In particular, I would like to express serious concern about the provisions of the Fourth

Amendment that seem to dramatically curtail the competence and independence of the Constitutional Court.

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 at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, and in particular:

- principle 1, which states: “The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”;

- principle 2, which states: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.”; and

- principle 4, which states: “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

Regarding article 24 (5) of the Fourth Amendment in particular, I would like to refer your Excellency's Government to principle 3 of the Basic Principles on the Independence of the Judiciary, which states: “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.”

Regarding article 13 of the Fourth Amendment, I would like to reiterate my concern that too many powers seem to have been vested in one person, the President of the National Judicial Office, whose election is dependent upon both the executive and legislative powers, without the possibility for an appropriate system of checks and balances.

Regarding article 14 of the Fourth Amendment in particular, I would like to welcome the announcement of the Government that the power of the President of the National Judicial Office to transfer cases will be removed by a subsequent constitutional amendment. Nevertheless, I wish to reiterate the concerns I expressed in my letter dated 29 February 2012 and expressed above, i.e. that the position of President of the National Judicial Office in the constitutional order and his broad powers remain very worrying from the perspective of independence of the justice system.

It is my responsibility under the mandates provided to me by the Human Rights Council to seek to clarify all cases brought to my attention. Since I am expected to report on these cases to the Human Rights Council, I would be grateful for your cooperation and your observations on the following matters:

1. Are the facts alleged in the summary of the case accurate?
2. Please provide detailed explanations on how the provisions of the Fourth Amendment to the Fundamental Law referred to above comply with Hungary's obligations under international human rights law, in particular the UN Basic Principles on the independence of the judiciary.

I would appreciate a response within sixty days. Your Excellency's Government's response will be made available in a report to the Human Rights Council for its consideration.

While waiting for your response, I urge your Excellency's Government to take all necessary measures to guarantee the independence of the justice system and respect for the rule of law and the principle of separation of powers. I further urge your Excellency's Government to seriously consider the opinions of the Venice Commission on Hungary, and in particular Opinion 720/2013 on the Fourth Amendment to the Fundamental Law of 17 June 2013.

In light of the potentially serious implications of this situation, I am considering to publicly express my concerns in the near future.

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

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers