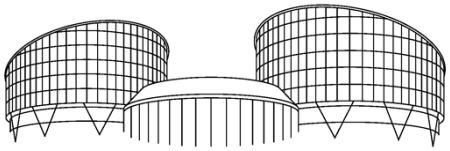

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF BAKA v. HUNGARY

(Application no. 20261/12)

JUDGMENT

STRASBOURG

23 June 2016

This judgment is final.

In the case of Baka v. Hungary,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Luis López Guerra, *President*,
Mirjana Lazarova Trajkovska,
Ledi Bianku,
Ganna Yudkivska,
Vincent A. De Gaetano,
Angelika Nußberger,
Julia Laffranque,
Paulo Pinto de Albuquerque,
Linos-Alexandre Sicilianos,
Erik Møse,
Helen Keller,
Paul Lemmens, *judges*,
Helena Jäderblom, ad hoc *judge*,
Aleš Pejchal,
Krzysztof Wojtyczek,
Faris Vehabović,
Dmitry Dedov, *judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar*,

Having deliberated in private on 17 June 2015 and on 14 March 2016,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 20261/12) against Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Hungarian national, Mr András Baka ("the applicant"), on 14 March 2012.

2. The applicant was represented by Mr A. Cech, a lawyer practising in Budapest. The Hungarian Government ("the Government") were represented by their Agent, Mr Z. Tallódi, Ministry of Justice.

3. The applicant alleged, in particular, that he had been denied access to a tribunal to contest the premature termination of his mandate as President of the Supreme Court. He also complained that his mandate had been terminated as a result of the views and positions that he had expressed publicly in his capacity as President of the Supreme Court, concerning legislative reforms affecting the judiciary. He relied on Article 6 § 1 and Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

5. Mr A. Sajó, the judge elected in respect of Hungary, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Ms Helena Jäderblom, the judge elected in respect of Sweden, to sit in his place (Article 26 § 4 of the Convention and Rule 29 § 1 (a) as in force at the time).

6. On 27 May 2014 a Chamber of that Section, composed of Guido Raimondi, President, Işıl Karakaş, Nebojša Vučinić, Helena Jäderblom, Egidijus Kūris, Robert Spano and Jon Fridrik Kjølbro, judges, and Abel Campos, Deputy Section Registrar, delivered a judgment in which it held unanimously that there had been a violation of Article 6 § 1 and Article 10 of the Convention.

7. On 27 August 2014 the Government requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 15 December 2014 a panel of the Grand Chamber granted that request.

8. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

9. The applicant and the Government each filed further observations on the merits (Rule 59 § 1). In addition, third-party comments were received from the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union, the Eötvös Károly Institute, the Helsinki Foundation for Human Rights and the International Commission of Jurists, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 June 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr Z. TALLÓDI, Ministry of Justice, *Agent*,
Ms M. WELLER, Ministry of Justice, *Co-Agent*;

(b) *for the applicant*

Mr A. CECH, lawyer practising in Budapest, *Counsel*,
Mr E. LÁTRÁNYI, lawyer practising in Budapest, *Adviser*.

The Court heard addresses by Mr Cech and Mr Tallódi.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born in 1952 and lives in Budapest.

A. Election of the applicant as President of the Supreme Court and his functions

12. On 22 June 2009, after seventeen years of service (from 1991 to 2008) as a judge at the European Court of Human Rights and, subsequently, more than one year's service as a member of the Budapest Court of Appeal, the applicant was elected by the Parliament of Hungary, by decision no. 55/2009 (VI. 24) OGY, as President of the Supreme Court for a six-year term, until 22 June 2015.

13. In that capacity, the applicant carried out managerial tasks and also had a judicial role, presiding over deliberations which resulted in uniformity resolutions (on consistency in case-law) and in guiding resolutions. He was also President of the National Council of Justice. This second function had been added to the tasks of the President of the Supreme Court in 1997 by the Organisation and Administration of the Courts Act (Law no. LXVI of 1997). As the head of the National Council of Justice, the applicant was under an explicit statutory obligation to express an opinion on parliamentary bills that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice (see paragraph 44 below).

14. On 13 October 2011 the General Assembly of the Network of the Presidents of the Supreme Judicial Courts of the European Union elected the applicant President of the Network for a two-year term (from 2011 to 2013).

B. The applicant's public statements and positions concerning the legislative reforms affecting the judiciary

15. In April 2010 the alliance of Fidesz – Hungarian Civic Union (hereafter "Fidesz") and the Christian Democratic People's Party (KDNP) obtained a two-thirds parliamentary majority and undertook a programme of comprehensive constitutional and legislative reforms. In his professional capacity as President of the Supreme Court and of the National Council of Justice, the applicant expressed his views on different aspects of the legislative reforms affecting the judiciary, notably the Nullification Bill, the retirement age of judges, the amendments to the Code of Criminal Procedure, and the new Organisation and Administration of the Courts Bill.

16. On 12 February 2011, in relation to the Nullification Bill (subsequently Law no. XVI of 2011, ordering the annulment of final convictions relating to the dispersal of crowds in the autumn of 2006), the applicant's spokesman explained to the newspaper *Népszabadság* that, in the applicant's view,

> "the Bill ordering the annulment of certain judicial decisions delivered in relation to the 2006 riots gives cause for concern, because it violates the right of judges to assess evidence freely. This is a serious constitutional problem. ... [T]he judiciary is examining the Bill only from a professional point of view and distances itself from any kind of political debate. András Baka [the applicant], President of the National Council of Justice, hopes that Parliament will choose a legal technique that eliminates the problem of unconstitutionality".

17. On 8 March 2011, the day after the enactment of the Nullification Bill, István Balsai (Fidesz MP, Chairman of the Constitutional, Judicial and Standing Orders Committee of Parliament at the relevant time) responded at a press conference to the criticisms made by the judiciary, declaring that:

> "The adopted legal solution was said to be unfortunate. Now, I myself find it unfortunate if a member of the judiciary, in any position whatsoever, tries to exert influence over the legislative process in such a way."

18. On 24 March 2011, in a speech delivered to Parliament in the course of the debate on the Bill on the Fundamental Law of Hungary (the new Constitution), the applicant expressed his opinion on certain aspects of the proposed constitutional reform which concerned the judiciary, notably the new name given to the Supreme Court – *Kúria* –, the new powers attributed to the *Kúria* in the field of ensuring consistency in the case-law, the management of the judiciary and the functioning of the National Council of Justice, as well as the introduction of a constitutional appeal against judicial decisions.

19. On 7 April 2011, in relation to the proposal to reduce the mandatory retirement age of judges (from 70 years to the general retirement age of 62) in Article 26 § 2 of the Fundamental Law of Hungary, the applicant, together with other court presidents, addressed a letter to various actors in the constitutional process (the President of the Republic, the Prime Minister, the Speaker of Parliament) in which they pointed out the possible risks to the judiciary posed by the given proposal. Their concern was that, by abolishing the possibility for judges to remain in office until the age of 70, the proposed rule would force one-tenth of Hungarian judges (274 persons) to end their careers in 2012, earlier than planned, with all the attendant consequences for the functioning of the judiciary and the length of pending proceedings.

20. On the morning of 11 April 2011 (the day of the vote on the proposals to amend the retirement age of judges), the applicant addressed a letter to the Prime Minister, in which he stressed that the proposal was humiliating and professionally unjustifiable; it infringed the fundamental

principles of the independence, status and irremovability of judges; and it was also discriminatory, since only the judiciary was concerned. He refuted accusations of bias in favour of any political ideology within the judiciary, and continued:

> "It is, however, unacceptable if a political party or the majority of Parliament makes political demands on the judiciary and evaluates judges by political standards."

In his letter the applicant asked the Prime Minister to use his influence to prevent Parliament from adopting the proposal. On the same day, however, Parliament adopted the proposal (see "Relevant Domestic Law and Practice" below).

21. On 14 April 2011 a joint communiqué was addressed to the Hungarian and EU public by the plenary session of the Supreme Court, by the applicant in his capacity as President of the National Council of Justice, and by the presidents of regional and county courts. It argued for the autonomy and independence of the judiciary and criticised the new mandatory retirement age for judges and the proposal to modify the model of judicial self-governance embodied in the National Council of Justice. The relevant extracts from the communiqué read as follows.

> "According to the proposal, the mandatory retirement age of judges will be reduced by 8 years as of 1 January 2012. As a result, the tenure of 228 judges (among them 121 judges responsible for court administration and professional supervision) will be terminated on that same date, without any transition period, since they will have turned 62. By 31 December 2012 a further 46 judges will have to terminate their careers. As a consequence of this decision, the rapidity of judicial proceedings will significantly deteriorate (nearly 40,000 cases will have to be reassigned, which may even result in several years' delay in judicial proceedings, concerning tens of thousands of persons). The administration of the courts will be seriously hindered, since it is extremely difficult to replace dozens of retiring judges.
>
> The multiple effect of the forced pensioning-off, with no real justification, of highly qualified judges who have several years of experience and practice, most of whom are at the apex of the hierarchy, will fundamentally shatter the functioning of the court system – leaving aside other unforeseeable consequences. Moreover, the proposal is unfair and humiliating with respect to the persons concerned, who took an oath to serve the Republic of Hungary and to administer justice, and who have devoted their lives to the judicial vocation.
>
> It is incomprehensible why the issue of the retirement age of judges is worth regulation in the Fundamental Law. There is only one answer: by including it in the Fundamental Law, there will be no possibility of contesting this legal rule, which violates the fundamental principles of a democratic state governed by the rule of law, before the Constitutional Court.
>
> Such an unjustified step implies political motivation."

22. On 14 June 2011 Bill no. T/3522 on the amendment of certain legislative acts concerning judicial procedure and the judicial system (including the Code of Criminal Procedure) was submitted to Parliament. At the applicant's request, the Criminal Law Division of the Supreme Court prepared an analysis of the Bill, which was communicated to members of

parliament. On 4 August 2011, as no substantive changes had been made to the Bill prior to its enactment on 4 July 2011 as Law no. LXXXIX of 2011, the applicant challenged the Law before the Constitutional Court, on the grounds of unconstitutionality and violation of the obligations enshrined in international treaties, making use of that power for the first time in Hungarian history. The Constitutional Court, in its judgment no. 166/2011. (XII. 20.) AB of 19 December 2011, established the unconstitutionality of the impugned provisions and quashed them (notably, the provision concerning the Attorney General's right to establish the competence of a court by derogation from the default statutory rules).

23. Lastly, on 26 October 2011 the applicant addressed to Parliament a detailed analysis of two new cardinal bills, namely the Organisation and Administration of the Courts Bill (no. T/4743) and the Legal Status and Remuneration of Judges Bill (no. T/4744). According to the explanatory memorandum to the Bills, it was proposed that the National Council of Justice be abolished and replaced by a National Judicial Office and a National Judicial Council. The purpose of those proposals was to separate judicial and managerial functions, which had been "unified" in the person of the President of the Supreme Court, who was at the same time President of the National Council of Justice. The proposed reform sought to concentrate the tasks of judicial management in the hands of the President of the new National Judicial Office, while leaving the responsibility for overseeing the uniform administration of justice with the President of the Supreme Court (which would be called by the historical name of "*Kúria*").

The applicant also decided to express his opinion directly before Parliament, as permitted by Article 45 § 1 of Parliamentary decision no. 46/1994 (IX. 30) OGY on the Rules of Parliament. In his speech, delivered on 3 November 2011, the applicant raised his concerns about the draft legislation. He said that it did not address the structural problems of the judiciary, but left them to "the discretion of the executive of an external administration (the President of the proposed National Judicial Office, which would replace the National Council of Justice in managing the courts), who [would be] assigned excessive and, in Europe, unprecedented powers, with no adequate accountability". The applicant referred to those new powers (to appoint judges and court executives, to issue normative orders and to designate the court in a given case) as "unconstitutional". In this regard, he stated as follows:

> "This unrestricted, non-transparent and uncontrollable power is unparalleled in contemporary Europe ... The extent and uncontrollability of such centralised authority is without precedent, even in countries where the administration of the judiciary lies with the ministry of justice and even if we think of the socialist dictatorship, in the last years of which Kálmán Kulcsár, member of the Hungarian Academy of Sciences and Minister of Justice responsible for the administration of the judiciary, declared that he would appoint only persons recommended by the professional organs of the judiciary."

Finally, in his speech the applicant again raised the issue of the new retirement age for judges, saying that it would have a severe effect on the Supreme Court and that the need to have enough judges at the *Kúria* had not yet been addressed. In this connection, he maintained that the *Kúria*'s main responsibility – that of ensuring consistency in the judicial application of laws – could be met only if that court were able to deliver judgments in a sufficient number of relevant cases.

C. Termination of the applicant's mandate as President of the Supreme Court

24. The Fundamental Law of 25 April 2011 established that the highest judicial body would be the *Kúria* (the historical Hungarian name for the Supreme Court). The date of entry into force of the Fundamental Law was scheduled for 1 January 2012.

25. On 14 April 2011, during a debate on the Fundamental Law, a Fidesz politician, Gergely Gulyás, MP, declared on the radio station InfoRádió that the President of the Supreme Court would remain the same and that only the name of the institution would change. On 19 October 2011, in an interview on the television channel ATV, the State Secretary of Justice, Róbert Répássy, MP, declared that under the Organisation and Administration of the Courts Bill (no. T/4743), the new *Kúria* would have the same function as the current Supreme Court and that only the name of the Supreme Court would change. He said that the legislation "will certainly not provide any legal ground for a change in the person of the Chief Justice".

26. On 6 July 2011, in the Position of the Government of Hungary on the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)016), transmitted by the Minister for Foreign Affairs of Hungary, the Government assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.

27. In the period between 19 and 23 November 2011, members of parliament submitted several amendments proposing that the applicant's mandate as President of the Supreme Court be terminated.

28. On 19 November 2011 Gergely Gulyás submitted a Bill (no. T/4996) to Parliament, proposing an amendment to the 1949 Constitution (then in force). The amendment provided that Parliament would elect the President of the *Kúria* by 31 December 2011 at the latest. The reasoning of the Bill reads as follows:

> "In view of the Fundamental Law of Hungary and of the modifications to the court system resulting from that Law, in compliance with the Bill on the Transitional

> Provisions of the Fundamental Law of Hungary, and with a view to ensuring a smooth transition and continuity in the fulfilment of the tasks of the *Kúria* as from 1 January 2012, this Bill provides that Parliament must elect, by 31 December 2011 and according to the rules laid down in the Fundamental Law, the President of the *Kúria* who is to take office on 1 January 2012."

29. On 20 November 2011 two members of the parliamentary majority submitted a Bill (no. T/5005) to Parliament, on the Transitional Provisions of the Fundamental Law. Under section 11 of the Bill, the legal successors of the Supreme Court and of the National Council of Justice would be the *Kúria*, for the administration of justice, and the President of the National Judicial Office, for the administration of the courts. Pursuant to section 11(2), the mandates of the President of the Supreme Court and of the President and members of the National Council of Justice would be terminated upon the entry into force of the Fundamental Law. The reasoning of the Bill stated as follows:

> "The Bill regulates in a comprehensive manner the succession of the Supreme Court and the National Council of Justice and its president, in that the successor body or person shall be different for the respective duties. Having regard to the modifications to the court system, the Bill provides that the term of office of the President of the Supreme Court currently in office, and that of the President and the members of the National Council of Justice, shall be terminated upon the entry into force of the Fundamental Law."

30. On 23 November 2011 another member of parliament submitted a proposal for an amendment to sections 185 and 187 of the Organisation and Administration of the Courts Bill. While the previous versions of the Bill submitted by the Government (on 21 October and 17 November 2011) provided that the term of office of the court executives appointed before 1 January 2012 would last until the date fixed at the time of their appointment, this last mentioned amendment provided for an exception. It sought to terminate *ex lege* the mandate of the President and Vice-President of the Supreme Court. The reasoning of the proposal read as follows:

> "The aim of this proposal for an amendment, submitted before the final vote, is to ensure the compliance of consolidated Bill no. T/4743/116, by amending its transitional provisions, with the Fundamental Law, having regard to Bill no. T/4996 on the Amendment of Law no. XX of 1949 on the Constitution of the Republic of Hungary and also to Bill no. T/5005 on the Transitional Provisions of the Fundamental Law of Hungary, both submitted to Parliament."

31. On 28 November 2011 Parliament adopted both the Organisation and Administration of the Courts Bill (as Law no. CLXI) and the Constitution of the Republic of Hungary (Amendment) Bill (as Law no. CLIX), with the content described above.

32. On 30 December 2011 the Transitional Provisions of the Fundamental Law Bill was adopted without amendment.[1] The Transitional Provisions were published in the Official Gazette on 31 December 2011.

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1. Under section 31(2) of the Transitional Provisions, these provisions formed part of the

33. As a consequence of the entry into force of all these constitutional and legislative amendments, the applicant's mandate as President of the Supreme Court terminated on 1 January 2012, three and a half years before its expected date of expiry.

34. The applicant remained in office as president of a civil-law division of the *Kúria*.

D. Election of a new president to the *Kúria*

35. In order for a new president to be elected to the *Kúria* in due time, the Constitution of the Republic of Hungary (Amendment) Act (Law no. CLIX of 2011, adopted on 28 November 2011 – see paragraph 31 above) came into force on 2 December 2011. On 9 November 2011 the Organisation and Administration of the Courts Bill was amended, and an additional criterion for the election of the new president of the *Kúria* was introduced. This provided that he or she would be elected by Parliament from among the judges appointed for an indeterminate term and who had served for at least five years as a judge (section 114(1) of Law no. CLXI of 2011 – see "Relevant Domestic Law and Practice" below). On 9 December 2011 the President of the Republic proposed that Parliament elect Péter Darák as President of the *Kúria*, and Tünde Handó as President of the National Judicial Office. On 13 December 2011 Parliament elected those candidates, in line with the proposal by the President of the Republic.

E. Consequences of the early termination of the applicant's mandate as President of the Supreme Court

36. Firstly, the applicant lost the remuneration and other benefits (social security, presidential residence, personal protection) to which a president of the Supreme Court was entitled throughout the period of the fixed presidential term.

37. Secondly, the legislation dealing with certain post-term benefits for outgoing presidents of the Supreme Court (Remuneration and Allowances Act 2000) was repealed with effect from 1 January 2012. Section 227(1) of the Legal Status and Remuneration of Judges Act 2011 (as amended on 28 November 2011 and in force from 1 January 2012) supplemented this abrogation, and stipulated that the repealed legislation would be applied to any former president of the Supreme Court only to the extent that he or she was entitled to the allowance specified in sections 26(1) and 22(1) (pension supplement for life), had reached retirement age at the time of the entry into force of the Act and had requested the allowance. Since the applicant had

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Fundamental Law. The First Amendment to the Fundamental Law (18 June 2012) and its section 1(1) added point 5 to the Final Provisions of the Fundamental Law, stating that the Transitional Provisions formed part of the Fundamental Law.

not attained retirement age by 1 January 2012, he could not claim payment of that post-function benefit.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of 1949

38. The relevant Articles of the Constitution (as amended and in force until its replacement by the Fundamental Law of Hungary, with effect on 1 January 2012) provided as follows.

Article 7

"(1) The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and shall harmonise the country's domestic law with the obligations assumed under international law.

..."

Article 47

"(1) The Supreme Court shall be the highest judicial organ of the Republic of Hungary.

(2) The Supreme Court shall ensure uniformity in the application of the law by the courts; its uniformity resolutions [*jogegységi határozat*] shall be binding on all courts."

Article 48

"(1) The President of the Supreme Court shall be elected by Parliament upon the recommendation of the President of the Republic; its vice-presidents shall be appointed by the President of the Republic upon the recommendation of the President of the Supreme Court. A majority of two-thirds of the votes of Members of Parliament shall be required to elect the President of the Supreme Court.

...

(3) Judges may only be removed from office on the grounds and in accordance with the procedures specified by law."

Article 50

"...

(3) Judges are independent and answer only to the law. Judges may not be members of political parties and may not engage in political activities.

..."

Article 57

"(1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him or her, as well as his or her rights and duties in legal proceedings, judged in a just and public trial by an independent and impartial court established by law.

...”

Article 61

“(1) In the Republic of Hungary everyone has the right to freely express his or her opinion, and furthermore to access and distribute information of public interest.

...”

B. Organisation and Administration of the Courts Act (Law no. LXVI of 1997)

39. To fulfil the task of ensuring the uniformity in the application of the law by the courts, the Supreme Court was empowered to adopt uniformity resolutions (*jogegységi határozat*, section 25(c) of the Act) and to publish guiding resolutions (*elvi bírósági határozat*, section 27(2)).

40. Section 62 of the 1997 Organisation and Administration of the Courts Act listed the president of a court among the so-called “court executives”, that is, those judges responsible for the management and administration of courts and judicial organisational units.

41. Under section 69 of the Act, court executives were appointed for six years.

42. Section 73 of the Act contained an exhaustive list of reasons for terminating the mandates of court executives. It provided that

“[t]he term of office of a court executive shall come to an end by:

(a) mutual agreement,

(b) resignation,

(c) dismissal,

(d) the expiry of the period of the term of office,

(e) the termination of the person’s judicial mandate”.

43. Under section 74/A(1) of the Act, if an assessment of the court executive’s management activity established his or her incompetence for such a managerial position, the court executive was to be dismissed from his or her office with immediate effect. A dismissed court executive was entitled to seek a legal remedy before the Service Tribunal to contest the dismissal within fifteen days of service of a dismissal notice (section 74/A(2)).

44. The Act established the National Council of Justice and added the function of President of that Council to that of President of the Supreme Court, the roles to be held simultaneously. The President of the National Council of Justice was under an explicit statutory obligation to express an opinion on draft legislation that affected the judiciary, after having gathered and summarised the opinions of different courts via the Office of the National Council of Justice (section 46(1)(q) of the Act).

C. Legal Status and Remuneration of Judges Act (Law no. LXVII of 1997)

45. Under section 57(2), sub-paragraphs (ha) and (hb) of the 1997 Legal Status and Remuneration of Judges Act, a judge was entitled to serve beyond the general retirement age, up to the age of 70.

D. Parliamentary decision no. 46/1994. (IX. 30.) OGY on the Rules of Parliament

46. Article 45 § 1 of Parliamentary decision no. 46/1994. (IX. 30.) OGY on the Rules of Parliament provided as follows:

> "The President of the Republic, the members of the Government, the President of the Constitutional Court, the President of the Supreme Court, the Chief Prosecutor, the Ombudsman, the President of the State Audit Office, and also persons required to report to Parliament during debates on their reports and Hungarian members of the European Parliament during debates on matters of European integration, shall be entitled to take part and speak in sittings of Parliament."

E. Constitution of the Republic of Hungary (Amendment) Act (Law no. CLIX of 2011), which came into force on 2 December 2011

47. The Constitution of Hungary of 1949 was amended as follows with regard to the election of the President of the *Kúria*:

Section 1

"The Constitution shall be amended with the following section:

...

Section 79. In accordance with Article 26 § 3 of the Fundamental Law, Parliament shall elect the President of the *Kúria* by 31 December 2011 at the latest."

F. Fundamental Law of Hungary of 25 April 2011, which came into force on 1 January 2012

48. Articles 25 and 26 of the Fundamental Law provide as follows.

Article 25

"(1) The courts shall administer justice. The supreme judicial body shall be the *Kúria*.

(2) The courts shall decide on:

(a) criminal matters, civil disputes, and other matters defined by law;

(b) the legitimacy of administrative decisions;

(c) conflicts between local ordinances and other legislation, and on their annulment;

(d) the establishment of non-compliance by a local authority with its statutory legislative obligations.

(3) In addition to the responsibilities defined by paragraph (2), the *Kúria* shall ensure uniformity in the judicial application of laws and shall make decisions accordingly, which shall be binding on the courts.

...

(8) The detailed rules for the organisation and administration of the courts, and of the legal status and remuneration of judges shall be regulated by a Cardinal Act [*sarkalatos törvény*][2]."

Article 26

"(1) Judges shall be independent and only subordinated to laws, and may not be instructed in relation to their judicial activities. Judges may be removed from office only for the reasons and in a procedure defined by a Cardinal Act. Judges shall not be affiliated to any political party or engage in any political activity.

(2) Professional judges shall be appointed by the President of the Republic as defined by a Cardinal Act. No person under thirty years of age shall be eligible for the position of judge. With the exception of the President of the *Kúria*, no judge may serve after reaching the general retirement age.

(3) The President of the *Kúria* shall be elected by Parliament from among the judges for nine years on the proposal of the President of the Republic. The election of the President of the *Kúria* shall require a two-thirds majority of the votes of Members of Parliament."

G. Transitional Provisions of the Fundamental Law of Hungary, which came into force on 1 January 2012

49. The relevant parts of the Transitional Provisions of the Fundamental Law of Hungary read as follows.

Section 11

"(1) The legal successor to the Supreme Court, the National Council of Justice and their President shall be the *Kúria* for the administration of justice and the President of the National Judicial Office for the administration of the courts, with any exceptions defined by the relevant Cardinal Act.

(2) The mandates of the President of the Supreme Court and the President and members of the National Council of Justice shall be terminated when the Fundamental Law comes into force[3]."

Section 12

"(1) If a judge has reached the general retirement age defined by Article 26 § 2 of the Fundamental Law before 1 January 2012, his or her service shall be terminated on

2. Cardinal Acts require a two-thirds majority to be adopted or changed.

3. The Fourth Amendment to the Fundamental Law of 25 March 2013 transferred the text of section 11 of the Transitional Provisions to point 14 of the Final Provisions of the Fundamental Law.

30 June 2012. If a judge reaches the general retirement age defined by Article 26 § 2 of the Fundamental Law in the period between 1 January and 31 December 2012, his or her service shall be terminated on 31 December 2012."

Section 31

"(2) ... The Transitional Provisions shall form part of the Fundamental Law[4]."

H. Organisation and Administration of the Courts Act (Law no. CLXI of 2011), which came into force on 1 January 2012

50. The relevant parts of the 2011 Organisation and Administration of the Courts Act read as follows.

Chapter II
The organisation of the courts

6. The Kúria

Section 24

"The *Kúria* shall:

(a) adjudicate, in the cases specified in an Act, on appeals lodged against the decisions of a tribunal or a high court;

(b) adjudicate on motions for extraordinary review of a final court decision;

(c) adopt uniformity resolutions [*jogegységi határozat*], which shall be binding on all courts;

(d) analyse the judicial practice in cases closed with a final judgment, explore and examine the case-law of the courts;

(e) publish guiding resolutions [*elvi bírósági határozat*] [adopted by the *Kúria*] and guiding decisions [*elvi bírósági döntés*] [adopted by the lower courts];

(f) adjudicate on the conflict of local ordinances with other legislation and on their annulment;

(g) adjudicate on the establishment of non-compliance by a local authority with its statutory legislative obligations;

(h) act in other cases falling within its scope of competence."

Chapter VIII
President of the *Kúria* and court executives

32. President of the Kúria

4. The First Amendment to the Fundamental Law of 18 June 2012 and its section 1(1) added point 5 to the Final Provisions of the Fundamental Law, stating that the Transitional Provisions formed part of the Fundamental Law.

Section 114

"(1) The President of the *Kúria* 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."

Chapter XV
Transitional Provisions

58. Election of the President of the National Judicial Office and the President of the Kúria *for the First Time*

Section 177

"(1) The President of the Republic shall nominate the President of the National Judicial Office and the President of the *Kúria* for the first time by 15 December 2011, at the latest. The nominees shall be heard by the committee of Parliament responsible for justice.

(2) Parliament shall elect the President of the National Judicial Office and the President of the *Kúria* for the first time by 31 December 2011. ..."

60. Determination of Date of Expiry of Mandates and Beginning of New Mandates

Section 185

"(1) The mandates of the National Council of Justice ... and its members, its President as well as the President and the Vice-President of the Supreme Court and the Head and Deputy Head of the Office of the [National Council of Justice] shall terminate upon the entry into force of the Fundamental Law.

(2) The mandates of the President of the National Judicial Office and the President of the *Kúria* shall commence as of 1 January 2012. ..."

Section 187

"The mandates of court executives appointed before 1 January 2012 shall be valid for the term determined in their appointments, except as set forth in section 185(1)."

Section 188

"(1) The legal successor to the Supreme Court, the National Council of Justice and its President shall be the *Kúria* for the purposes of activities related to the administration of justice, and – in respect of the administration of courts – the President of the National Judicial Office, except as determined in the Cardinal Acts."

51. Under section 173 of the Organisation and Administration of the Courts Act, section 177 came into force on the day following its promulgation (3 December 2011), and sections 185, 187 and 188 came into force on 1 January 2012.

I. Legal Status and Remuneration of Judges Act (Law no. CLXII of 2011), which came into force on 1 January 2012

52. The relevant parts of the 2011 Legal Status and Remuneration of Judges Act, as in force at the material time, provided as follows.

Section 90

"A judge shall be exempted [from judicial service]:

...

(h) if the judge

(ha) has reached the applicable retirement age (hereafter referred to as the "upper age limit"). This provision does not apply to the President of the *Kúria* ..."

Section 227

"(1) The person who occupied the office of President of the Supreme Court prior to the entry into force of the present Act shall be governed by the provisions of Law No. XXXIX of 2000 on the remuneration and benefits of the President of the Republic, the Prime Minister, the Speaker of the House, the President of the Constitutional Court and the President of the Supreme Court, inasmuch as he shall be entitled to the benefits under section 26(1) and section 22(1) of Law No. XXXIX of 2000 on the remuneration and benefits of the President of the Republic, the Prime Minister, the Speaker of the House, the President of the Constitutional Court and the President of the Supreme Court if he had reached retirement age at the time of the entry into force of the present Act and requested the benefits."

Section 230

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

(2) If a judge has reached the upper age limit before 1 January 2012, the initial date of the exemption period is 1 January 2012, while the closing date is 30 June 2012, and his judicial mandate shall cease 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.

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

J. Judgment no. 33/2012. (VII. 17.) AB of the Constitutional Court of 16 July 2012

53. The Hungarian Ombudsman appealed to the Constitutional Court against the retrospective lowering of the retirement age of judges. In its judgment of 16 July 2012, the Constitutional Court declared

unconstitutional and consequently annulled the provisions on the compulsory retirement age of judges (sections 90(ha) and 230 of the 2011 Legal Status and Remuneration of Judges Act) as of 1 January 2012 (the date of entry into force of the Act). The Constitutional Court held that the new regulation violated the constitutional requirements for judicial independence on both "formal" and "substantive" grounds. From a formal perspective, a cardinal Act ought to determine the length of judicial service and the retirement age, in order to guarantee the irremovability of judges. Reference to the "general retirement age" in an ordinary Act did not fulfil that requirement. With regard to the substantive unconstitutionality of the provision, the new regulation had resulted in the removal of judges within a short period of three months. Notwithstanding the relative freedom of the legislature to determine the maximum age of serving judges, and the fact that no specific age can be deduced from the Fundamental Law, the Constitutional Court held that the introduction of a lowered retirement age for judges had to be done gradually, with an appropriate transition period and without violating the principle of the irremovability of judges. The greater the difference between the new retirement age and the age of 70 years, the longer the transitional period required for introducing a lower retirement age. Otherwise, the irremovability of judges, which constituted an essential element of the independence of the judiciary, would be violated.

54. Following the Constitutional Court's judgment of 16 July 2012, Parliament adopted Law no. XX of 2013, which repealed section 230, amended section 91 and added section 233/C to Law no. CLXII of 2011, with effect from 2 April 2013. Under the modified scheme, the reduction of the compulsory retirement age to a unified limit of 65 years will be effective as of 1 January 2023. Transitional provisions apply to the period between 2 April 2013 (the entry into force of the amendment) and 31 December 2022. During this interval, the age-limit for compulsory retirement will vary between 70 and 65 years, according to the date of birth of the person concerned (the older a judge is, the longer the preparation time accorded to him or her before compulsory retirement). For those judges who had already been affected by the rules of compulsory retirement and forced to retire, the new law introduced the possibility of choosing, within a 30-day time-limit to be calculated from the amendment's entry into force, from three options. Firstly, they could request a stand-by post at the court from which they had retired, meaning that they would receive the difference between their pension allowance and 80% of their last basic salary (that is, calculated without the additional allowances received for holding senior positions, and so forth) and that, once in every three-year period, they may be ordered to perform judicial or managerial tasks for a maximum of two years. Secondly, they could apply to be reinstated to their normal judicial service. In that case, they would also be entitled to salary arrears for the period of their unconstitutionally ordered retirement. However, they could not be reinstated to their previous senior positions, such as court president (vice-president) or

head of division (deputy head of division), unless that position had not been filled in the meantime. Thirdly, those who did not request reinstatement or placement in a stand-by post were entitled to lump-sum compensation, equal to one year's salary.

K. Judgment no. 3076/2013. (III. 27.) AB of the Constitutional Court, of 19 March 2013

55. The Vice-President of the Supreme Court, appointed by the President of the Republic for six years from 15 November 2009 on a proposal by the applicant, was also removed from his executive position as of 1 January 2012 by virtue of section 185(1) of the Organisation and Administration of the Courts Act (Law no. CLXI of 2011), which stated that the mandate of the Vice-President of the Supreme Court was to be terminated when the Fundamental Law came into force (see paragraph 50 above). The former Vice-President submitted a constitutional complaint to the Constitutional Court, alleging that the termination of his position violated the rule of law, the prohibition on retrospective legislation and his right to a remedy. In its judgment no. 3076/2013. (III. 27.) AB, adopted by eight votes to seven, the Constitutional Court dismissed the constitutional complaint. It held that the premature termination of the claimant's term of office as Vice-President of the Supreme Court had not violated the Fundamental Law, since it was sufficiently justified by the full-scale reorganisation of the judicial system and the important changes in the tasks and competences of the President of the *Kúria*. It noted that the *Kúria*'s tasks and competences had been broadened, in particular with regard to the supervision of the legality of municipal council regulations. The relevant parts of the judgment read as follows.

> "[30] 1. The impugned statutory provision terminated the mandate of an executive of an organ of the judiciary, an independent branch of State power, whose status was regulated by the Constitution.
>
> [31] The Vice-President of the Supreme Court was one of the executive officials of the judiciary, whose term of office was regulated by Article 48 § 1 of the Constitution. This Constitutional provision provided that the Vice-President of the Supreme Court was to be appointed by the President of the Republic upon the proposal of the Supreme Court's President. Under section 69(1) of the old AOAC [Law no. LXVI of 1997 on the organisation and administration of the courts], the Vice-President's term of office should last for a fixed duration of 6 years. One element of the system of separation of powers was that the Constitution distinguished the appointment of the executives of the highest judicial forum from the ordinary system for appointing court executives by placing their appointment in the hands of another branch, namely Parliament in the case of the Supreme Court's President, and the President of the Republic in the case of its Vice-President. The fact that the former AOAC stipulated a longer fixed-term office for court executives than the mandate of the Government (thus overlapping governmental cycles) constituted one of the constitutional guarantees of the independence of the judiciary, a separate branch within the State.

[32] The Fundamental Law and the new AOAC maintained this distinction with regard to the executives of the *Kúria*. Although the Fundamental Law does not regulate the appointment and dismissal of the Vice-President, the new AOAC contains a regulation which is similar to the previous one. According to its section 128(1), Vice-Presidents of the *Kúria* shall be appointed by the President of the Republic on proposals from the *Kúria*'s President. Their term of office lasts for a determinate period of six years, as stipulated in section 127(1). Pursuant to this regulation, the declaration of the termination of the Vice-President's term of office by a unilateral State decision, that is, dismissal, is also within the power of the President of the Republic (see decision 176/1991. (IX. 4.) KE of the President of the Republic).

[33] Under section 73 of the former AOAC and section 138 of the new AOAC, the term of office of a judicial executive shall be terminated, as a general rule, upon the expiry of the determinate period of appointment. However, it may be terminated sooner in the event of: resignation, mutual agreement, loss of judicial status and (if an appraisal concludes that the executive is inapt) dismissal.

[34] 2. Taking into account the Constitutional Court's case-law, it is observed that the shortening of fixed-term appointments via legislation has not been automatically declared unconstitutional if certain conditions were met. The Constitutional Court established [in its judgment no. 5/2007. (II. 27.) AB] that '[t]he shortening of fixed-term appointments of State officials may only result from objective or subjective statutory causes (resignation, decease, establishment of incompatibility, application of a specified cause for dismissal or another reason directly affecting the term of office, such as structural modification of the institution)' (ABH 2007, 120, 126). The Constitutional Court holds that, in addition to organisational restructuring, an important change in the organisation's functions, that is, in its powers and tasks, may warrant legislative intervention. Specifically, by the time of the selection of the executive in office, competencies required for the new functions of the organisation could not have been assessed. However, it cannot be ruled out that the organisation's new tasks would require a person with different attitudes, professional experience and practice.

[35] Accordingly, the Constitutional Court had to examine in the present case whether the entry into force of the Fundamental Law affected the functions and tasks of the highest judicial forum in a way which would justify the premature termination of the Vice-President's term of office.

[36] The Supreme Court was renamed *Kúria*. The Fundamental Law and the new AOAC modified thoroughly the central administration of the judicial system. Article 11 of the Transitional Provisions of the Fundamental Law separated the professional guidance of judicial activities and the organisational management of the judicial system from each other, on both an institutional and personal level. It provided that the successors to the Supreme Court, the National Council of Justice and its President are to be the *Kúria* in respect of adjudicating activities, and, in respect of court management – unless otherwise provided in a cardinal Act – the President of the National Judicial Office. It is because of this modification of the central management of the judiciary that Article 11 § 2 of the Transitional Provisions terminated the term of office of the President of the Supreme Court and of the President and the members of the National Council of Justice upon the entry into force of the Fundamental Law. This provision does not put an end to the Vice-President's term of office, despite the fact that his mandate was regulated in the Constitution.

[37] With the entry into force of the Fundamental Law and the new AOAC, the functions of the *Kúria* broadened and new tasks have been assigned to it. Pursuant to the Fundamental Law, it was given jurisdiction to supervise the legality of municipal

council regulations and to establish whether or not local government had failed to comply with their legislation-related statutory obligations. The new AOAC contains a new chapter on the local government chamber of the *Kúria* as well as detailed regulations on the procedural rules related to the above-mentioned competences.

[38] The *Kúria*'s competences in safeguarding the uniform application of law [coherence of the case-law] have also been extended. Besides adopting resolutions to promote the unity of jurisprudence [*jogegységi határozat*], it became competent to publish judicial resolutions of theoretical importance [*elvi bírósági határozat*] and to analyse the case-law on the basis of final and binding decisions.

[39] Since safeguarding the consistent application of law became one of the main tasks of the *Kúria*, its President became responsible, besides internal management of the *Kúria*, for providing professional guidance on the monitoring, development and consistency of the case-law with regard to the entire court system.

[40] The new AOAC, in its separate chapter on the uniform application of law, contains more detailed and in-depth regulations as regards the tasks and powers already contained in the old AOAC and vests new tasks in both the judicial organisation as a whole and in its executives. Whereas the relevant chapter of the old AOAC referred to the President of the Supreme Court only twice, the new AOAC designates the President or the Vice-President as holders of thirteen specific tasks and powers. In particular, the presidents of the Court of Appeals must inform the President of the *Kúria* about any decision of theoretical importance adopted by a court under their supervision, about emerging practice based on divergent principles or about final judgments based on divergent principles. The Presidents and Heads of Divisions of High Courts, as well as the Heads of Regional Administrative and Labour Law Divisions, have similar obligations to inform the President of the *Kúria* directly. A proposal for the publication of a decision of theoretical importance must be addressed to the President of the *Kúria*, and it is the President of the *Kúria* who should be notified by the President of the National Judicial Office about the necessity of initiating a uniformity procedure.

[41] It is the President of the *Kúria* who defines on an annual basis the subjects to be examined by the case-law analysis groups. He or she appoints the heads and members of these groups. If the analysis indicates the need for legislative amendments, it is the President of the *Kúria* who proposes to the President of the National Judicial Office that he or she submit such a motion. It is the President of the *Kúria* who proposes to the Publication Panel the publication of a decision qualifying as a decision of theoretical importance. He or she is entitled to order that uniformity procedure be conducted, based on a proposal from the President of the *Kúria*, who also presides in such proceedings (in addition to the Vice-President and the Head or Deputy-head of the competent Division). In uniformity proceedings related to more than one Division, it is only the President or Vice-President of the *Kúria* who may preside. Similarly, if the aim of the uniformity proceedings is to modify or abrogate a previous uniformity resolution or to take a stance on a question of principle, the uniformity panel may only be presided by the President or the Vice-President of the *Kúria*.

[42] Section 123(2) of the new AOAC provides that 'the Vice-President of the *Kúria* may replace the President ... with full power'. It is therefore clear that the modification of the judicial system seriously affects not only the President's but also the Vice-President's functions. It follows from the possibility of a replacement exercising the full power of the President (which may occur at any time if the President is hindered for any reason or if the position is vacant) that there must be constant and close cooperation between the President and the Vice-President. Besides

acting as a replacement, the Vice-President 'fulfils the tasks vested in him by the Rules of Court' (see section 123(2) of the new AOAC). This legal authority enables the Vice-President to fulfil some of the President's tasks on a constant basis and to relieve him or her [of certain duties].

[43] In the Constitutional Court's opinion, the full-scale restructuring of the judicial system and the important changes relating to the functions and tasks of the *Kúria* and its President have significantly modified the legal position of the President compared to the date that the Vice-President was appointed. All this necessarily entails the simultaneous modification of the functions, tasks and competences of the Vice-President.

[44] In the light of these changes, the relationship of trust between the President and the Vice-President, enshrined in Constitutional and statutory regulations, is of increased importance.

[45] Consequently, the Constitutional Court finds that these changes provide sufficient justification for the premature termination of the applicant's term of office.

..."

56. Seven judges dissented and considered that the changes with regard to the judicial system, the new *Kúria* and the person of its President had not fundamentally affected the status of the Vice-President. The position of the Vice-President within the organisation of the supreme judicial instance did not change. Under the 1997 Organisation and Administration of the Courts Act, the Vice-President had already been entitled to replace the President of the Supreme Court with regard only to managerial tasks at the Supreme Court but not with regard to his or her functions as President of the National Council of Justice. The dissenting judges concluded that the premature termination of the applicant's term of office had weakened the guarantees for the separation of powers, had been contrary to the prohibition on retrospective legislation, and had breached the principle of the rule of law and the right to a remedy.

III. RELEVANT MATERIALS CONCERNING THE SITUATION IN HUNGARY, INCLUDING THE TERMINATION OF THE APPLICANT'S MANDATE AS PRESIDENT OF THE SUPREME COURT

A. Opinions of the Venice Commission

57. The relevant extracts from the Opinion on the Fundamental Law of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)016), read as follows.

"107. According to Article 25 (1) of the new Constitution, the 'Curia' (the Hungarian historical name for the Supreme Court) will be the highest justice authority of Hungary. In the absence of transitional provisions and despite the fact that the election rules for its president remain unchanged in the new Constitution a question arises: will this change of the judicial body's name result in replacement of the

Supreme Court's president by a new president of the 'Curia'? As to the judges, they 'shall be appointed by the President of the Republic as defined by a cardinal Act' (Article 26 (2)). This also leaves of margin of interpretation as to the need to change (or not) the composition of the supreme body.

108. As stipulated by Article 26 (2), the general retirement age will also be applied to judges. While it understands that the lowering of the judge's retirement age (from 70 to 62) is part of the envisaged reform of the judicial system, the Commission finds this measure questionable in the light of the core principles and rules pertaining to the independence, the status and immovability of judges. According to different sources, this provision entails that around 300 of the most experienced judges will be obliged to retire within a year. Correspondingly, around 300 vacancies will need to be filled. This may undermine the operational capacity of the courts and affect continuity and legal security and might also open the way for undue influence on the composition of the judiciary. In the absence of sufficiently clear information on the reasons having led to this decision, the Commission trusts that adequate solutions will be found, in the context of the reform, to address, in line with the requirements of the rule of law, the difficulties and challenges engendered by this measure.

...

140. As previously indicated, the reference in [the] second paragraph of the Closing Provisions to the 1949 Constitution seems to be in contradiction with the statement, in the Preamble, by which the Hungarian 1949 Constitution is declared as invalid. The Venice Commission tends to interpret this apparent inconsistency as a confirmation of the fact that the said statement does not have legal significance. Nevertheless, it is recommended that this is specifically clarified by the Hungarian authorities. The adoption of transitional provisions (as required by the third paragraph of the Closing Provisions), of particular importance in the light of the existence, for certain provisions of the new Constitution, of possibly diverging interpretations, could be used as an excellent opportunity for providing the necessary clarifications. This should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution."

58. In the Position of the Government of Hungary on this Opinion, transmitted by the Minister for Foreign Affairs of Hungary on 6 July 2011 (see CDL(2011)058), the Government fully subscribed to the suggestion in paragraph 140 of the Opinion and assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.

59. The relevant extracts from the Opinion on the Legal Status and Remuneration of Judges Act (Act CLXII of 2011) and the Organisation and Administration of the Courts Act (Act CLXI of 2011), adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012, CDL-AD(2012)001), read as follows.

"**2. The President of the *Curia***

111. In its opinion on the new Constitution, the Venice Commission appealed to the Hungarian authorities that the occasion of adopting transitional provisions 'should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution'. In its reply to the Venice Commission, the Hungarian Government pointed out that 'Hungary fully subscribes to this suggestion and assures the Commission that the drafting of transitional provisions will not be used to unduly put an end to the terms of office of persons elected under the previous legal regime.'

112. Article 25 of the Fundamental Law provides that the supreme judicial body shall be the *Curia*. According to Article 11 of the Temporary Provisions of the Fundamental Law, the *Curia* is the heir (legal successor) to the Supreme Court. All judges of the Supreme Court remained in office as judges with the exception of its President. Section 114 [of the Organisation and Administration of the Courts Act] established a new criterion for the election of the new President, which leads to the ineligibility of the former President of the Supreme Court as President of the *Curia*. This criterion refers to the time served as a judge in Hungary, not counting the time served as a judge for instance in a European Court. Many believe that the new criterion was aimed at preventing an individual person – the actual president of the Supreme Court – from being eligible for the post of the President of the *Curia*. Although the Law was formulated in a general way, its effect was directed against a specific person. Laws of this type are contrary to the rule of law.

113. Other countries have rules that accept time periods that judges have spent abroad. Section 28.3 [of the Legal Status and Remuneration of Judges Act] states that a judge's long-term secondment abroad shall be regarded as time completed at the service post occupied prior to the commencement of his or her time abroad. The Law does not provide for a minimum time a judge must have spent in Hungary before being posted abroad. Therefore, regulations of equivalence between national and international functions should be established, particularly with regard to requirements that a person has to fulfil in order to be appointed e.g. President of the *Curia*. Furthermore, it is highly uncommon to enact regulations that are retroactive and lead to the removal from a high function such as the President of the *Curia*.

114. The unequal treatment between the judges of the Supreme Court and their President is difficult to justify. The Hungarian authorities seem to argue that the nature of the tasks of the President of the *Curia* and of the Supreme Court are radically different, and that the latter would be more engaged in administrative matters as the President of the previous National Council of the Judiciary, whereas the President of the *Curia* would deal more with substantive law and ensure the uniformity of the case-law. However, this argument is not convincing. The experience of the European Court of Human Rights could be particularly useful for the tasks of the President of the *Curia*.

115. Since the provision of the Fundamental Law concerning the eligibility to become President of the *Curia* might be understood as an attempt to get rid of a specific person who would be a candidate for the President, who has served as president of the predecessor of the *Curia*, the law can operate as a kind of a sanction of the former president of the Supreme Court. Even if this is not the case, the impression that this might be the case, bears the risk of causing a chilling effect, thus threatening the independence of the judiciary."

60. The relevant extracts from the Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of the above-mentioned

Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012, CDL-AD(2012)020), read as follows.

"XII. Transitional issues – Retirement of judges and President of the *Curia*

74. The amendments to the [Legal Status and Remuneration of Judges Act – Law no. CLXII of 2011] did not pertain to the criticisms expressed in the Opinion of the Venice Commission on the provisions on the retirement age. All those judges who would have reached the age limit by 31 December 2012 at the latest were released by presidential order of 7 July 2012.

75. The Venice Commission acknowledges the judgment no. 33/2012 (VII. 17.) AB határozat of 16 July 2012 of the Hungarian Constitutional Court, which declared the sudden reduction of the upper-age limit for judges unconstitutional. It trusts that the Hungarian authorities will respect this judgment and ensure its implementation, i.e. re-instate the former judges to their previous positions. It seems that the labour courts have started to reinstate the retired judges. The Venice Commission's delegation has however learned that the implementation of this judgment has resulted in considerable legal uncertainty. While the legal basis of early retirement was annulled with *ex tunc* effect, the individual resolutions of the President of Hungary, which dismissed some ten per cent of the Hungarian judges, are considered to remain in force, even if their legal basis had ceased to exist. The President of Hungary did not repeal them. The Legislator should adopt provisions re-instating the dismissed judges in their previous position without requiring them to go through a re-appointment procedure.

76. The President of the NJO [National Judicial Office] invited the judges concerned to appeal to the labour courts in order to have their dismissal reversed. Several judges already won their cases before the labour courts, but these judgments were appealed against by the President of the NJO because she disagreed with their reasoning. Most importantly, even final judgments of the labour courts would not result in a reinstatement of the judges concerned in their previous position, but they will go through a new appointment process and could be assigned to other courts than those, which they belonged to before their dismissal.

77. In September 2012, the Hungarian Government introduced the legislative proposal T/8289, which would amend the Transitory Provisions of the Fundamental Law, introducing a new retirement age of 65 years for judges and prosecutors. Judges who are older than 65 would (after their re-appointment) be able to continue in office for one year before they would have to retire. The legislative proposal remains however silent on how the dismissed judges should be reinstated, leaving open only the way through the labour courts.

78. The Commission's delegation was told that automatic reinstatement would be impossible because new judges had been appointed in the meantime and not all judges wished to be reinstated. The Commission is of the opinion that it should be possible to find a legislative solution that takes into account the various cases.

79. Furthermore, the legislative proposal provides that judges who are over the age of 62 cannot have leading positions in the courts. This concerns reinstated judges but in the future also all other judges who turn 63. They would lose their leading position and would have to terminate their career as an ordinary judge. Apart from the fact that these judges are the most experienced to lead the courts, such a limitation constitutes evident age discrimination. The delegation was told that these experienced judges should train younger judges rather than hold leading positions in courts. This

argument is hard to follow because younger judges learn from older ones precisely when they see how they act in leading positions.

80. The situation of the dismissed judges is very unsatisfactory. The Legislator should adopt provisions re-instating dismissed judges who so wish in their previous position without requiring them to go through a re-appointment procedure.

81. The Hungarian Legislator did not address the remarks on the eligibility to become President of the *Curia*, which should be revised."

B. The Council of Europe Commissioner for Human Rights

61. The relevant extracts from the press release published on 12 January 2012 by the Council of Europe Commissioner for Human Rights read as follows:

"Furthermore, the Commissioner has noted steps taken in Hungary which might undermine the independence of the judiciary. As a consequence of the lowering of the retirement age for judges, more than 200 new judges will now have to be appointed. This measure has been accompanied by a change in the procedure for such appointments, which now rests on the decision of a single politically appointed individual. Moreover, the Commissioner considers it unfortunate that, as a consequence of the new law on the judiciary, the mandate of the President of the Supreme Court has been terminated before the end of the regular term. 'The approach whereby judges are appointed by the President of the National Judicial Office, who is nominated by the government for nine years, gives rise to serious reservations. The judiciary must be protected from undue political interference.'"

C. The Parliamentary Assembly of the Council of Europe

62. On 10 June 2013 the Committee on the Honouring of Obligations and Commitments by the Member States (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe adopted a report on the Request for the opening of a monitoring procedure in respect of Hungary. The Monitoring Committee recommended opening a monitoring procedure in respect of Hungary because of serious and sustained concerns about the extent to which the country was complying with its obligations to uphold the highest possible standards in democracy, human rights and the rule of law. The relevant extracts of the explanatory memorandum to the report concerning the applicant's case read as follows.

"4.3.3. The dismissal of the President of the Supreme Court

113. The Curia that was established by the Fundamental Law is the legal successor to the Supreme Court of Hungary. The Cardinal Act on the Judiciary therefore provides that all judges of the Supreme Court can serve until the end of their mandate. However, an exception was made for the President of the Supreme Court, who needed to be re-elected. In addition, a new election criterion for the President of the Supreme Court was adopted. According to this new criterion, a candidate must have at least five years' experience as a judge in Hungary. Time served on international tribunals is not taken into account.

> 114. The unequal treatment of the President of the Supreme Court is highly questionable. These new provisions are widely seen as being solely adopted to dismiss the sitting President of the Supreme Court, Mr Baka, who in the past had been critical of the government's policies of judicial reform and who had successfully challenged a number of government decisions and laws before the Constitutional Court. Mr Baka was the Hungarian Judge to the European Court of Human Rights from 1991 to 2007, and was elected President of the Supreme Court by the Hungarian parliament in June 2009. Mr Baka had not previously served a five year term as a judge in Hungary, and was therefore, despite his 17 years of experience as a judge on the ECHR, ineligible for the post of President of the Curia. The widespread perception that these legal provisions were adopted against a specific person is strengthened by the fact that, in June 2011, the parliament adopted a decision that suspended all appointment procedures for judges until 1 January 2012, when Mr Baka would no longer be in office. This despite the backlog in cases that is often mentioned by the authorities as one of the underlying reasons for the reform of the judiciary. As mentioned by the Venice Commission, generally formulated legal provisions that are in reality directed against a specific person or persons are contrary to the rule of law. In addition the politically motivated dismissal of the President of a Supreme Court could have a chilling effect that could threaten the independence of the judiciary."

63. On 25 June 2013 the Parliamentary Assembly decided not to open a monitoring procedure in respect of Hungary, but resolved to follow the situation in the country closely. The Parliamentary Assembly called on the Hungarian authorities to continue their open and constructive dialogue with the Venice Commission (Resolution 1941 (2013)).

D. The European Union

1. The European Commission

64. On 12 December 2011 the then EU Justice Commissioner, Viviane Reding, wrote a letter to the Hungarian authorities raising concerns about the retirement age of judges. An annex to the letter also raised the issues of the President of the new National Judicial Office and the transformation of the Supreme Court into the *Kúria*, in particular the early termination of the applicant's mandate as President of the Supreme Court before the end of the expected term. The Hungarian authorities replied and on 11 January 2012 the European Commission issued a statement on the situation of Hungary.

65. On 17 January 2012 the Commission decided to open "accelerated" infringement proceedings against Hungary concerning, *inter alia*, the new retirement age for judges, prosecutors and public notaries from 70 years to the general pensionable age (62 years).[5] The Commission stated that EU rules (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, p. 16) prohibited discrimination at the workplace on

5. Article 258 of the Treaty on the Functioning of the European Union (TFEU) gives the Commission, as guardian of the Treaties, the power to take legal action against a member State which is not respecting its obligations under EU law.

grounds of age. Under the case-law of the Court of Justice of the European Union (CJEU), an objective and proportionate justification was needed if a government were to decide to lower the retirement age for one group of people and not for others. The Commission did not find any objective justification for treating judges and prosecutors differently from other groups, notably at a time when retirement ages across Europe were being progressively increased.

66. With regard to other measures affecting the independence of the judiciary, the Commission asked Hungary for more information regarding the new legislation on the organisation of the courts. In its press release IP/12/24, the Commission stated as follows:

> "Under the law, the president of a new National Judicial Office concentrates powers concerning the operational management of the courts, human resources, budget and allocation of cases. ... In addition, the mandate of the former president of the Supreme Court, who was elected for six years in June 2009, was prematurely terminated at the end of 2011.
>
> In contrast, other former judges of the Supreme Court continue their mandate as judges of the new Curia, which has replaced the Supreme Court ..."

67. On 7 March 2012 the Commission decided to send Hungary a reasoned opinion on the measures regarding the retirement age of judges and an administrative letter asking for further clarifications about the independence of the judiciary, particularly in relation to the powers attributed to the President of the National Judicial Office (powers to designate a court in a given case) and the transfer of judges without their consent.

68. On 25 April 2012 the Commission noted that there were ongoing discussions between the Hungarian authorities and the Council of Europe and its Venice Commission, and that amendments to the legislation on the administration of justice were under discussion in the Hungarian Parliament. It decided to keep the matter under close review and to reserve its right to launch infringement proceedings also on this matter. With regard to the mandatory retirement age of judges, the Commission decided that the case should be brought before the CJEU.

2. The Court of Justice of the European Union

69. On 7 June 2012 the European Commission brought an action against Hungary before the CJEU with regard to the lowering of the mandatory retirement age of judges, prosecutors and notaries. In its judgment of 6 November 2012 in *Commission v. Hungary*, C-286/12, EU:C:2012:687, the CJEU declared that by adopting a national scheme requiring the compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 – giving rise to a difference in treatment on grounds of age which was not proportionate as regards the objectives pursued – Hungary had failed to fulfil its obligations under Council Directive 2000/78/EC (see

paragraph 65 above). The CJEU observed that the categories of persons concerned by the provisions in issue benefited, until their entry into force, from a derogation allowing them to remain in office until the age of 70, which gave rise, in those persons, to a well-founded expectation that they would be able to remain in office until that age. However, the provisions in issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures to protect the legitimate expectations of the persons concerned.

70. In its judgment of 8 April 2014 in *Commission v. Hungary*, C-288/12, EU:C:2014:237, the CJEU examined the case of a former Hungarian data-protection supervisor whose mandate had been terminated upon the entry into force of the Fundamental Law, well before the end of his term. The case was brought before the CJEU by the European Commission in the context of a separate infringement procedure concerning Hungary's obligations under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31, in relation to the requirement that the data-protection supervisory authority be independent. The relevant extracts from the judgment read as follows.

> "57. In the present case, Article 15(1) of the Law of 1993, applicable to the Supervisor pursuant to Article 23(2) of the Law of 1992, provided that the Supervisor could be called upon to vacate office only upon expiry of his term of office or upon death, resignation, declaration of a conflict of interest, compulsory retirement or compulsory resignation. The last three situations require a decision of the Parliament to be adopted by a two-thirds majority. Moreover, compulsory retirement and compulsory resignation cannot take place except in limited circumstances, set out in Article 15(5) and (6) of that regulation respectively.
>
> 58. It is common ground that the Supervisor was not compelled to vacate office pursuant to one of those provisions and, in particular, that the Supervisor did not officially resign.
>
> 59. It follows that Hungary compelled the Supervisor to vacate office in contravention of the safeguards established by statute in order to protect his term of office, thereby compromising his independence for the purposes of the second subparagraph of Article 28(1) of Directive 95/46. The fact that it was because of institutional changes that he was compelled to vacate office before serving his full term cannot render that situation compatible with the requirement under that provision of independence for supervisory authorities ...
>
> 60. It is true that Member States are free to adopt or amend the institutional model that they consider to be the most appropriate for their supervisory authorities. In doing so, however, they must ensure that the independence of the supervisory authority under the second subparagraph of Article 28(1) of Directive 95/46 is not compromised, which entails the obligation to allow that authority to serve its full term of office ...
>
> 61. Moreover, even if – as Hungary maintains – the Supervisor and the Authority are fundamentally different in terms of their organisation and structure, those two bodies are, in essence, entrusted with identical tasks, that is to say, the tasks for which

national supervisory authorities are responsible pursuant to Directive 95/46, as is apparent from the duties respectively entrusted to them and the continuity between their respective handling of files, as guaranteed under Article 75(1) and (2) of the Law of 2011. A mere change in institutional model cannot therefore objectively justify compelling the person entrusted with the duties of Supervisor to vacate office before expiry of his full term, without providing for transitional measures to ensure that he is allowed to serve his term of office in full.

62. In the light of all the foregoing considerations, it must be held that, by prematurely bringing to an end the term served by the supervisory authority for the protection of personal data, Hungary has failed to fulfil its obligations under Directive 95/46."

3. The European Parliament

71. The European Parliament, in its resolution of 16 February 2012 on recent political developments in Hungary (2012/2511(RSP)), expressed serious concern at the situation in Hungary in relation, among other things, to the exercise of democracy, the rule of law, respect for and protection of human and social rights, and the system of checks and balances. It explained that under the Fundamental Law and its Transitional Provisions, the Supreme Court had been renamed the *Kúria*, and the six-year mandate of the former President of the Supreme Court had ended prematurely after two years. The European Parliament called on the European Commission to monitor closely the possible amendments and the implementation of the criticised laws and their compliance with European treaties, and to conduct a thorough study to ensure

"the full independence of the judiciary, in particular ensuring that the National Judicial Authority, the Prosecutor's Office and the courts in general are governed free from political influence, and that the mandate of independently-appointed judges cannot be arbitrarily shortened".

IV. INTERNATIONAL AND COUNCIL OF EUROPE MATERIALS ON THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES

A. The United Nations

72. The Basic Principles on the Independence of the Judiciary were adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, which took place in Milan in 1985. They were endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The relevant points read as follows.

"8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges

shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

...

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

...

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

...

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings."

73. In its General Comment No. 32 on Article 14 of the International Covenant on Civil and Political Rights (Right to equality before courts and tribunals and to a fair trial) published on 23 August 2007, the UN Human Rights Committee stated as follows (footnotes omitted).

"19. The requirement of competence, independence and impartiality of a tribunal in the sense of Article 14, paragraph 1, is an absolute right that is not subject to any exception. 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. States should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal. It is necessary to protect judges against conflicts of interest and intimidation. In order to safeguard their independence, the status of judges, including their term of office, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

20. Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary. The same is true, for instance, for the dismissal by the executive of judges alleged to be corrupt, without following any of the procedures provided for by the law."

74. In the decision of the UN Human Rights Committee (CCPR) in *Pastukhov v. Belarus*, Communication No. 814/1998, UN Doc. CCPR/C/78/D/814/1998 (2003), the Committee stated as follows.

> "7.3 The Committee takes note of the author's claim that he could not be removed from the bench since he had, in accordance with the law in force at the time, been elected a judge on 28 April 1994 for a term of office of 11 years. The Committee also notes that presidential decree of 24 January 1997 No. 106 was not based on the replacement of the Constitutional Court with a new court but that the decree referred to the author in person and the sole reason given in the presidential decree for the dismissal of the author was stated as the expiry of his term as Constitutional Court judge, which was manifestly not the case. Furthermore, no effective judicial protections were available to the author to contest his dismissal by the executive. In these circumstances, the Committee considers that the author's dismissal from his position as a judge of the Constitutional Court, several years before the expiry of the term for which he had been appointed, constituted an attack on the independence of the judiciary and failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of Article 25 (c) of the Covenant, read in conjunction with Article 14, paragraph 1, on the independence of the judiciary and the provisions of Article 2."

75. In the decision of the UN Human Rights Committee (CCPR) in *Mundyo Busyo et al. v. Democratic Republic of the Congo*, Communication No. 933/2000, UN Doc. CCPR/C/78/D/933/2000 (2003), the Committee held as follows (footnotes omitted).

> "5.2 The Committee notes that the authors have made specific and detailed allegations relating to their dismissal, which was not in conformity with the established legal procedures and safeguards. The Committee notes in this regard that the Minister of Justice, in his statement of June 1999 ..., and the Attorney-General of the Republic, in the report by the Public Prosecutor's Office of 19 September 2000 ... recognize that the established procedures and safeguards for dismissal were not respected. Furthermore, the Committee considers that the circumstances referred to in Presidential Decree No. 144 could not be accepted by it in this specific case as grounds justifying the fact that the dismissal measures were in conformity with the law and, in particular, with Article 4 of the Covenant. The Presidential Decree merely refers to specific circumstances without, however, specifying the nature and extent of derogations from the rights provided for in domestic legislation and in the Covenant and without demonstrating that these derogations are strictly required and how long they are to last. Moreover, the Committee notes that the Democratic Republic of the Congo failed to inform the international community that it had availed itself of the right of derogation, as stipulated in Article 4, paragraph 3, of the Covenant. In accordance with its jurisprudence, the Committee recalls, moreover, that the principle of access to public service on general terms of equality implies that the State has a duty to ensure that it does not discriminate against anyone. This principle is all the more applicable to persons employed in the public service and to those who have been dismissed. With regard to Article 14, paragraph 1, of the Covenant, the Committee notes the absence of any reply from the State party and also notes, on the one hand, that the authors did not benefit from the guarantees to which they were entitled in their capacity as judges and by virtue of which they should have been brought before the Supreme Council of the Judiciary in accordance with the law, and on the other hand, that the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place ... thus damaging the equitable hearing of the case. Consequently, the Committee considers that those dismissals

constitute an attack on the independence of the judiciary protected by Article 14, paragraph 1, of the Covenant. The dismissal of the authors was ordered on grounds that cannot be accepted by the Committee as a justification of the failure to respect the established procedures and guarantees that all citizens must be able to enjoy on general terms of equality. In the absence of a reply from the State party, and inasmuch as the Supreme Court, by its ruling of 26 September 2001, has deprived the authors of all remedies by declaring their appeals inadmissible on the grounds that Presidential Decree No. 144 constituted an act of Government, the Committee considers that, in this specific case, the facts show that there has been a violation of Article 25, paragraph (c), read in conjunction with Article 14, paragraph 1, on the independence of the judiciary, and of Article 2, paragraph 1, of the Covenant."

76. In the decision of the UN Human Rights Committee (CCPR) in *Bandaranayake v. Sri Lanka*, Communication No. 1376/2005, UN Doc. CCPR/C/93/D/1376/2005 (2008), the Committee noted as follows (footnotes omitted).

"7.1 The Committee observes that Article 25 (c) of the Covenant confers a right to access, on general terms of equality, to public service, and recalls its jurisprudence that, to ensure access on general terms of equality, not only the criteria but also the 'procedures for appointment, promotion, suspension and dismissal must be objective and reasonable'. A procedure is not objective or reasonable if it does not respect the requirements of basic procedural fairness. The Committee also considers that the right of equal access to public service includes the right not to be arbitrarily dismissed from public service. The Committee notes the author's claim that the procedure leading to his dismissal was neither objective nor reasonable. Despite numerous requests, he did not receive a copy of the proceedings from his first hearing before the JSC [Judicial Service Commission] on 18 November 1998; this is confirmed in the Supreme Court decision of 6 September 2004, and is not contested by the State party. Nor did he receive the findings of the Committee of Inquiry, on the basis of which he was dismissed by the JSC. The decision of the Court of Appeal confirms that these documents were never provided to him, in accordance with the express provision of Rule 18 of the JSC rules.

7.2 ... The Committee finds that the JSC's failure to provide the author with all of the documentation necessary to ensure that he had a fair hearing, in particular its failure to inform him of the reasoning behind the Committee of Inquiry's guilty verdict, on the basis of which he was ultimately dismissed, in their combination, amounts to a dismissal procedure which did not respect the requirements of basic procedural fairness and thus was unreasonable and arbitrary. For these reasons, the Committee finds that the conduct of the dismissal procedure was conducted neither objectively nor reasonably and it failed to respect the author's right of access, on general terms of equality, to public service in his country. Consequently, there has been a violation of Article 25 (c) of the Covenant.

7.3 The Committee recalls its general comment [no. 32] on Article 14, that a dismissal of a judge in violation of Article 25 (c) of the Covenant, may amount to a violation of this guarantee, read in conjunction with Article 14, paragraph 1 providing for the independence of the judiciary. As set out in the same general comment, the Committee recalls that 'judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law.' For the reasons set out in paragraph 7.2 above, the dismissal procedure did not respect the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an

attack on the independence of the judiciary. For this reason the Committee concludes that the author's rights under Article 25 (c) in conjunction with Article 14, paragraph 1, have been violated."

B. The Council of Europe

77. The relevant extracts from the European Charter on the Statute for Judges of 8 to 10 July 1998[6] read as follows.

"1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

...

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

...

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof."

78. The relevant extracts from the appendix to Recommendation CM/Rec (2010)12 of the Committee of Ministers of the Council of Europe to member States on judges: independence, efficiency and responsibilities, adopted on 17 November 2010, provide as follows.

"Tenure and irremovability

49. Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.

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6. Adopted by participants from European countries and two international associations for judges at a meeting held in Strasbourg on 8 to 10 July 1998 (organised under the auspices of the Council of Europe). The Charter was endorsed by the meeting of the Presidents of the Supreme Courts of Central and Eastern European countries in Kyiv on 12 to 14 October 1998, and again by judges and representatives from ministries of justice of twenty-five European countries at a meeting held in Lisbon on 8 to 10 April 1999.

50. The terms of office of judges should be established by law. A permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.

...

52. A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system."

79. The relevant passages of Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges, adopted on 23 November 2001, read as follows.

"*Tenure – irremovability and discipline*

57. It is a fundamental tenet of judicial independence that tenure is guaranteed until a mandatory retirement age or the expiry of a fixed term of office: see the UN basic principles [on the Independence of the Judiciary], paragraph 12; Recommendation No. R (94) 12 [of the Committee of Ministers on the independence, efficiency and role of judges] Principle I(2)(a)(ii) and (3) and Principle VI (1) and (2). The European Charter [on the Statute for Judges] affirms that this principle extends to appointment or assignment to a different office or location without consent (other than in case of court re-organisation or temporarily), but both it and Recommendation No. R (94) 12 contemplate that transfer to other duties may be ordered by way of disciplinary sanction.

...

59. The existence of exceptions to irremovability, particularly those deriving from disciplinary sanctions, leads immediately to consideration of the body and method by which, and basis upon which, judges may be disciplined. Recommendation No. R (94) 12, Principle VI(2) and (3), insists on the need for precise definition of offences for which a judge may be removed from office and for disciplinary procedures complying with the due process requirements of the Convention on Human Rights. Beyond that it says only that 'States should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself'. The European Charter assigns this role to the independent authority which it suggests should 'intervene' in all aspects of the selection and career of every judge.

60. **The CCJE considered**

(a) that the irremovability of judges should be an express element of the independence enshrined at the highest internal level (...);

(b) that the intervention of an independent authority, with procedures guaranteeing full rights of defence, is of particular importance in matters of discipline; and

(c) that it would be useful to prepare standards defining not just the conduct which may lead to removal from office, but also all conduct which may lead to any disciplinary steps or change of status, including for example a move to a different court or area. ..."

80. The relevant extracts from Opinion no. 3 (2002) of the CCJE on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality, adopted on 19 November 2002, read as follows.

"**b. Impartiality and extra-judicial conduct of judges**

...

31. More generally, it is necessary to consider the participation of judges in public debates of a political nature. In order to preserve public confidence in the judicial system, judges should not expose themselves to political attacks that are incompatible with the neutrality required by the judiciary.

...

33. The discussions within the CCJE have shown the need to strike a balance between the judges' freedom of opinion and expression and the requirement of neutrality. It is therefore necessary for judges, even though their membership of a political party or their participation in public debate on the major problems of society cannot be proscribed, to refrain at least from any political activity liable to compromise their independence or jeopardise the appearance of impartiality.

34. However, judges should be allowed to participate in certain debates concerning national judicial policy. They should be able to be consulted and play an active part in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system. ..."

81. The Magna Carta of Judges (Fundamental Principles) was adopted by the CCJE in November 2010. The relevant sections read as follows.

"**Rule of law and justice**

1. The judiciary is one of the three powers of any democratic state. Its mission is to guarantee the very existence of the Rule of Law and, thus, to ensure the proper application of the law in an impartial, just, fair and efficient manner.

Judicial Independence

2. Judicial independence and impartiality are essential prerequisites for the operation of justice.

3. Judicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, other judges and society in general, by means of national rules at the highest level. The State and each judge are responsible for promoting and protecting judicial independence.

4. Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment, nomination until the age of retirement, promotions, irremovability, training, judicial immunity, discipline, remuneration and financing of the judiciary.

Guarantees of independence

...

6. Disciplinary proceedings shall take place before an independent body with the possibility of recourse before a court.

...

9. The judiciary shall be involved in all decisions which affect the practice of judicial functions (organisation of courts, procedures, other legislation)."

82. The Venice Commission, in its Opinion on the draft law on introducing amendments and addenda to the Judicial Code of Armenia (term of office of court presidents), adopted at its 99th Plenary Session (Venice, 13-14 June 2014, CDL-AD(2014)021), observed with regard to the proposed termination of office of court presidents appointed for an indefinite term as follows.

"**V. The second question**

46. As far as the second question is concerned, the proposed termination of office of court chairpersons appointed for an indefinite time by the new (amended) law, raises certain concerns.

47. As it was stated above among theoretical considerations, retroactivity of a new regulation is doubtful in general. If it affects rights ensured by or legitimate expectations based on the law before the amendment took effect, there should be compelling reasons to justify it. Moreover, the interest of maintaining the independence of the Judiciary and the good administration of justice requires that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions.

48. There is no doubt that the Draft Law will negatively affect the Court presidents, who already have been appointed until retirement. According to the proposed transitional rule of Article 10.2 of the Draft Law the chairpersons of the courts of first instance and the courts of appeal appointed prior to the entry into force of the law shall hold office until 1 January 2015.

49. It might be argued that the court presidents who have already been appointed until retirement had legitimate expectations that their past appointments will not be re-opened and terminated before their retirement age. Such expectations could originate from the provisions of the Judicial Code itself, namely Article 4 (court chairmen are judges) and Article 14.2 ("A judge shall hold office until the age of 65").

50. The dismissal of judges on such a short notice practically means that after the entry into force of the amendment elections for court chairpersons should be organised, and after the elections all the mandate of chairpersons appointed before the amendment (except the chairperson of the Court of Cassation) is terminated. This radical change could give the impression that the only reason of the transitional rule is to create the opportunity of a radical change of court chairpersons.

51. The Venice Commission observes that the principle of legal certainty with the protection of legitimate expectations and the independence of the Judiciary and the effective administration of justice – if no compelling reasons can be given – require a significantly longer period for the removal of the court presidents from their offices.

52. As far as the justification or compelling reasons for such a transitional rule are concerned, the amendments are proposed at the background of the possible estimation of the role of the court chairpersons in Armenia that could involuntarily create a situation when court chairpersons may exercise some influence on other judges of the court. The Venice Commission notes, however, that the powers of court presidents, as defined in Article 25 of the Judicial Code are essentially of an administrative character. Although the proposed reform serves the legitimate aim of avoiding any undue influence of the court presidents on other judges, it does not appear from the rationale that the need of the removal of the sitting presidents of these courts from

their office is so urgent as to justify such a radical and immediate removal of court presidents from their office.

53. The Commission therefore concludes that such a radical change of chairpersons has no justification within the amendment and it does not follow from the rules of the Constitution of the Republic of Armenia. As already said, the proposed rules might give an impression that a radical change of court persons was their only purpose. Such an appearance is necessarily contrary to the principle of the independence of the Judiciary.

54. A smoother transitional rule, e.g. termination of office after a four year period beginning with the entry in force of the amendment in case would be less disturbing."

83. In the Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, on the draft law on amendments to the Organic Law on General Courts of Georgia, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014, CDL-AD(2014)031), the issue of the termination of the mandates of court presidents was examined as follows (footnotes omitted).

"**3. Termination of certain mandates with the enactment of the Draft amendment law (Art. 2 of the Draft amendment law)**

95. According to Article 2 (3) of the Draft amendment law, upon enactment of this draft law, the mandate of chairpersons of district courts and courts of appeal and deputy chairpersons of courts of appeal shall be terminated. Article 2(4) terminates in the same manner the mandate of chairpersons of court chambers/court panels/investigation panels and Article 2(5) provides for the reappointment of court managers.

96. The amendments provide no justification for such a wide ranging termination of judicial mandates.

97. The Venice Commission and the Directorate consider that the interest of maintaining the independence of the judiciary and the good administration of justice requires that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions. Also, although currently the term of office of court presidents is limited to five years from the date of their appointment, it might still be argued that the court presidents had legitimate expectations that their past appointments will not be terminated before the term of five years as set out in the Organic Law. This radical change of court presidents could give the impression that the only reason of the transitional rules is to create the opportunity of such a change, which could undermine public trust in the judiciary.

98. For these reasons, such dismissal of court presidents with the enactment of the amendment law can be justified only if compelling reasons are given. However, it does not appear from the explanatory note provided by the authorities, the meetings held in Tbilisi, and from the draft amendment law itself that the need of the removal of the sitting presidents of these courts from their office is so urgent as to justify such a wide ranging termination of judicial mandates.

99. For these reasons, it is recommended that the Article 2 of the Draft amendment law be removed and the sitting court presidents stay in office until the end of their term."

C. The Inter-American Court of Human Rights

84. The Inter-American Court of Human Rights, in its case-law concerning the removal of judges, has referred to the UN Basic Principles on the Independence of the Judiciary and to General Comment No. 32 of the UN Human Rights Committee. The case of *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* (preliminary objection, merits, reparations and costs), judgment of 23 August 2013, Series C No. 266, concerned the removal of twenty-seven judges of the Supreme Court of Justice of Ecuador through a parliamentary resolution. The Inter-American Court found that the State had violated Article 8 § 1 (right to a fair trial), in conjunction with Article 1 § 1 (obligation to respect rights) of the American Convention on Human Rights, to the detriment of the victims, because they had been dismissed from office by a body without jurisdiction, which moreover had not granted them an opportunity to be heard. Furthermore, the Court found a violation of Article 8 § 1 in conjunction with Article 23 § 1 (c) (right to have access, under general conditions of equality, to the public service of his country) and Article 1 § 1 of the American Convention, given the arbitrary effects on the tenure in office of the judiciary and the consequent effects on judicial independence, to the detriment of the twenty-seven victims. It noted as follows as regards the general standards on judicial independence (footnotes omitted).

> "1(1). General standards on judicial independence
>
> 144. In its case law, the Court has indicated that the scope of judicial guarantees and effective judicial protection for judges must be examined in relation to the standards on judicial independence. In the case of *Reverón Trujillo v. Venezuela*, the Court emphasized that judges, unlike other public officials, enjoy specific guarantees due to the independence required of the judiciary, which the Court has understood as 'essential for the exercise of the judiciary.' The Court has reiterated that one of the main objectives of the separation of public powers is to guarantee the independence of judges. The purpose of protection is to ensure that the judicial system in general, and its members in particular, are not subject to possible undue restrictions in the exercise their duties by bodies outside the Judiciary, or even by judges who exercise functions of review or appeal. In line with the case law of this Court and of the European Court of Human Rights, and in accordance with the United Nations Basic Principles on the Independence of the Judiciary (hereinafter 'Basic Principles'), the following guarantees are derived from judicial independence: an appropriate process of appointment, guaranteed tenure and guarantees against external pressures.
>
> 145. Regarding the scope of security of tenure relevant to this case, the Basic Principles establish that '[t]he term of office of judges [...] shall be adequately secured by law' and that '[j]udges, whether appointed or elected, shall have guaranteed tenure until the mandatory retirement age or the expiry of the term of office, where such exists.' Moreover, the Human Rights Committee has stated that judges may be dismissed only on grounds of serious misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the Constitution or the law. This Court has accepted these principles and has stated that the authority responsible for the process of removing a judge must act independently and impartially in the procedure established for that purpose and must allow for the

exercise of the right to defense. This is so because the free removal of judges raises the objective doubt of the observer regarding the judges' real possibilities of ruling on specific disputes without fear of reprisals.

...

147. Nevertheless, judges do not have absolute guarantees of tenure in their positions. International human rights law accepts that judges may be dismissed for conduct that is clearly unacceptable. In General Comment No. 32, the Human Rights Committee has established that judges may be dismissed only for reasons of serious misconduct or incompetence. ...

148. In addition, other standards draw a distinction between the sanctions applicable, emphasizing that the guarantee of immovability implies that dismissal is the result of serious misconduct, while other sanctions may be considered in the event of negligence or incompetence. ...

150. Furthermore, regarding the protection afforded by Article 23(1) (c) of the American Convention in the cases of *Apitz Barbera et al.*, and *Reverón Trujillo*, this Court specified that Article 23(1) (c) does not establish the right to participate in government, but to do so 'under general conditions of equality.' This means that respect for and guarantee of this right are fulfilled when there are 'clear procedures and objective criteria for appointment, promotion, suspension and dismissal' and that 'persons are not subject to discrimination' in the exercise of this right. In this respect, the Court has pointed out that equality of opportunities in access to and tenure in office guarantee freedom from all interference or political pressure.

151. Likewise, the Court has stated that a judge's guarantee of tenure is related to the right to remain in public office, under general conditions of equality. Indeed, in the case of *Reverón Trujillo* it established that 'access in equal conditions would constitute an insufficient guarantee if it were not accompanied by the effective protection of the continuance in what is accessed.'

152. For its part, in cases of arbitrary dismissal of Judges the Human Rights Committee has considered that failure to observe the basic requirements of due process violates the right to due process enshrined in Article 14 of the International Covenant on Civil and Political Rights (the counterpart of Article 8 of the American Convention), in conjunction with the right to have access under general conditions of equality to public office in the country, as provided for under Article 25(c) International Covenant on Civil and Political Rights (the counterpart of Article 23(1)(c) of the American Convention).

153. The foregoing serves to clarify some aspects of the Court's jurisprudence. Indeed, in the case of *Reverón Trujillo v. Venezuela*, the Court concluded that the right to be heard by an independent tribunal, enshrined in Article 8(1) of the Convention, only implied that a citizen has a right to be judged by an independent judge. However, it is important to point out that judicial independence should not only be analyzed in relation to justiciable matters, given that the judge must have a series of guarantees that allow for judicial independence. The Court considers it pertinent to specify that the violation of the guarantee of judicial independence, as it relates to a judge's tenure and stability in his position, must be examined in light of the conventional rights of a judge who is affected by a State decision that arbitrarily affects the term of his appointment. In that sense, the institutional guarantee of judicial independence is directly related to a judge's right to remain in his post, as a consequence of the guarantee of tenure in office.

154. Finally, the Court has emphasized that the State must guarantee the independent exercise of the judiciary, both in its institutional aspect, that is, in terms of the judicial branch as a system, and in its individual aspect, that is, in relation to a particular individual judge. The Court deems it pertinent to point out that the objective dimension is related to essential aspects for the Rule of Law, such as the principle of separation of powers, and the important role played by the judiciary in a democracy. Consequently, this objective dimension transcends the figure of the judge and collectively affects society as a whole. Likewise, there is a direct connection between the objective dimension of judicial independence and the right of judges to have access to and remain in public service, under general conditions of equality, as an expression of their guaranteed tenure.

155. Bearing in mind the aforementioned standards, the Court considers that: i) respect for judicial guarantees implies respect for judicial independence; ii) the scope of judicial independence translates into a judge's subjective right to be dismissed from his position exclusively for the reasons permitted, either by means of a process that complies with judicial guarantees or because the term or period of his mandate has expired, and iii) when a judge's tenure is affected in an arbitrary manner, the right to judicial independence enshrined in Article 8(1) of the American Convention is violated, in conjunction with the right to access and remain in public office, on general terms of equality, established in Article 23(1)(c) of the American Convention."

85. The Inter-American Court reiterated the same principles and reached a similar conclusion in the cases of *Constitutional Tribunal (Camba Campos et al.) v. Ecuador* (preliminary objections, merits, reparations and costs), judgment of 28 August 2013, §§ 188-99, Series C No. 268, and *López Lone et al. v. Honduras* (preliminary objection, merits, reparations and costs), 5 October 2015, §§ 190-202 and 239-40, Series C No. 302.

D. Other international texts

86. The Universal Charter of the Judge was approved by the International Association of Judges on 17 November 1999. Its Article 8 reads as follows:

Security of office

"A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Any change to the judicial obligatory retirement age must not have retroactive effect."

87. The International Bar Association's Minimum Standards of Judicial Independence (1982) read in their relevant part as follows:

"20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.

(b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

88. The applicant complained that he had been denied access to a tribunal to defend his rights in relation to his premature dismissal as President of the Supreme Court. He contended that his dismissal was the result of legislation at constitutional level, thereby depriving him of any possibility of seeking judicial review, even by the Constitutional Court. He relied on Article 6 § 1 of the Convention, which reads in its relevant parts as follows:

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

A. The Chamber judgment

89. In its judgment of 27 May 2014, the Chamber found that there had been a violation of Article 6 § 1 of the Convention. It noted that the criterion introduced in *Vilho Eskelinen and Others v. Finland* ([GC], no. 63235/00, ECHR 2007-II) in respect of the applicability of Article 6 to disputes concerning civil servants was indistinguishable from the merits of the applicant's complaint under this provision (access to a court). It therefore joined the issue of its competence *ratione materiae* to the merits (see paragraph 71 of the Chamber judgment). In applying the test introduced in the above-mentioned judgment (hereafter "the *Vilho Eskelinen* test"), the Chamber observed that under Hungarian law judges of the Supreme Court, including their president, were not expressly excluded from the right of access to a court. In fact, domestic law expressly provided for the right to a court in the event of dismissal of a court executive (see paragraph 74 of the Chamber judgment). Rather than by express exclusion, the applicant's access to a court had been impeded by the fact that the impugned measure – the premature termination of his mandate as President of the Supreme Court – had been written into the new Constitution itself and had therefore not been subject to any form of judicial review, including by the Constitutional Court. In those circumstances, the nature of the impugned measure itself rendered the applicant's access to a court impossible "in practice" (see paragraph 75 of the Chamber judgment). Therefore, it could not be concluded that the national law had "expressly excluded access to a court" for the applicant's claim. The first condition of the *Vilho Eskelinen* test had

not been met and Article 6 applied under its civil head (see paragraph 76 of the Chamber judgment).

90. Furthermore, even assuming that the national legislative framework had specifically denied the applicant the right of access to a court, the Chamber considered that the applicant's exclusion from that right had not been justified. The mere fact that the applicant was in a sector or department which participated in the exercise of power conferred by public law was not in itself decisive. In the applicant's case, the Government had not adduced any arguments to show that the subject matter of the dispute had been linked to the exercise of State power in such a way that the exclusion of the Article 6 guarantees had been objectively justified. In this regard, the Chamber considered it significant that, unlike the applicant, the former Vice-President of the Supreme Court had been able to challenge the premature termination of his mandate before the Constitutional Court (see paragraph 77 of the Chamber judgment).

91. In the light of the above considerations, the Chamber found that it was competent *ratione materiae* and that there had been a violation of the applicant's right of access to a tribunal competent to examine the premature termination of his mandate as President of the Supreme Court, as guaranteed by Article 6 § 1 of the Convention. The Chamber accordingly dismissed the Government's preliminary objection (see paragraph 79 of the Chamber judgment).

B. The parties' submissions to the Grand Chamber

1. The applicant

92. The applicant contended that the case raises a genuine and serious dispute over a "right" within the meaning of Article 6 § 1. As a result of the impugned interference, he had been *de facto* dismissed from the post of President of the Supreme Court. The legislative measures terminating his mandate had interfered with his explicit and unconditional right enshrined in the domestic law and, in particular, the Constitution, to fulfil his mandate. Given that he had been transferred to a post with a lower grade and had been subject to a reduction in his remuneration, the facts of the case boiled down to an employment dispute.

93. According to the applicant, in order to determine the "civil" nature of his right, the relevant test was the *Vilho Eskelinen* test, which applies irrespective of which of the rights contained in Article 6 § 1 is considered to have been violated (access to a court or other guarantees). He considered that none of the conditions of the test that would render Article 6 inapplicable to his dispute had been met. As regards the first condition, an implied bar was not enough; the national law must expressly exclude access to a court for a certain post or category of staff, and that exclusion must be of an abstract nature, that is, it must concern all office holders and not a

specified person. The impugned legislative act terminating his mandate concerned him alone. Hungarian law, rather than excluding access to a court for the post or category of staff in question, expressly ensured that a court executive had the right of access to a court in the event of his or her dismissal. Furthermore, the impugned measure terminating his mandate was unforeseeable and of an abusive nature. As regards the second condition of the *Vilho Eskelinen* test, the applicant's legal status, far from being incomparable with that of the other court executives, did not involve any special exercise of discretionary powers intrinsic to State sovereignty to an extent that would justify the exclusion of his access to a court in relation to his dismissal. Although he performed some special tasks within the judiciary (coordination, guidance and advocacy, aimed at the continuous development of the judiciary), from the perspective of the separation of powers he did not have a stronger "bond of trust and loyalty" with the State than his colleagues. He shared the very same judicial independence. At the hearing the applicant submitted that judges, unlike other public officials, enjoy specific guarantees owing to the independence required of the judiciary.

94. Therefore, in the applicant's view, Article 6 § 1 was applicable and had been breached, since he had been deprived of his right of access to a tribunal to examine the premature termination of his mandate as President of the Supreme Court.

2. The Government

95. The Government submitted a preliminary objection as to the applicability of Article 6 § 1 of the Convention. They maintained that the *Vilho Eskelinen* test was intended for cases which did not concern the right of access to a court but rather the applicability of the procedural guarantees provided for by Article 6 § 1. In any event, they were of the opinion that the two cumulative conditions of the test had been met, rendering Article 6 inapplicable. Firstly, contrary to the conclusions of the Chamber judgment (see paragraph 75 of the Chamber judgment), the nature of the impugned measure itself had rendered the applicant's access to a court impossible not "in practice", but "in law". It would be unreasonable to expect the legislature to enact a provision expressly excluding access to a court in respect of measures that are obviously and undisputedly not subject to any form of judicial review. As regards the second condition, the applicant's post involved by its very nature the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State (the Government referred to *Harabin v. Slovakia* (dec.), no. 62584/00, 9 July 2002, concerning the President of the Supreme Court of the Slovak Republic; and *Apay v. Turkey* (dec.), no. 3964/05, 11 December 2007, and *Nazsiz v. Turkey* (dec.), no. 22412/05, 26 May 2009, both concerning public prosecutors). If public prosecutors had been found by the Court to fall

within the category of public servants exercising discretionary powers intrinsic to State sovereignty, it was surprising that the President of the Supreme Court of Hungary, whose privileges were regulated among those of the highest-ranking public officials, had not been found by the Chamber to fall into that category. In the light of the constitutional status of the President of the Supreme Court, it seemed to be quite arbitrary to conclude that the termination of his mandate was not linked to the exercise of State power to at least the same extent as termination of the employment of public prosecutors.

96. At the hearing the Government added that the second condition of the *Vilho Eskelinen* test is essentially a re-wording of the *Pellegrin* test (*Pellegrin v. France* [GC], no. 28541/95, § 66, ECHR 1999-VIII), under which disputes raised by public servants whose duties typify the specific activities of the public service, in so far as the latter is acting as a depositary of public authority responsible for protecting the general interests of the State, fall outside the scope of Article 6 § 1 of the Convention. They further submitted that no individual right of judges to independence can be derived from Article 6.

97. In conclusion, in the Government's view, since Article 6 was not applicable in the present case, there had been no violation of the applicant's right of access to a court in respect of his civil rights and obligations.

C. Submissions of third-party interveners

98. The International Commission of Jurists observed that the special and fundamental role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law, is recognised within the Convention, both explicitly and implicitly. This special role must accordingly be given significant weight in assessing any restrictions imposed by the other branches of the State on Convention rights applicable to judges. In order to preserve the special role of the judiciary, the Convention should be interpreted in a manner that limits the scope for the executive or legislative branch to justify the imposition of restrictions on Article 6 rights of judges in employment disputes on grounds of legitimate interest. The power exercised by a judge, although quintessentially of a public nature, is both structurally and inherently distinct from that of public servants of the executive or legislature. The International Commission of Jurists submitted that under the second condition of the *Vilho Eskelinen* test it would rarely, if ever, be objectively justifiable in the public interest for the executive or legislative branches to impose measures excluding the application of Article 6 § 1 to employment disputes involving judges, particularly in those cases that affected judicial independence, and, therefore, the separation of powers and

the rule of law. This would include cases relating to security of tenure and removal of judges.

99. The International Commission of Jurists referred to the international standards concerning the security of tenure of judges, including those relating to procedural guarantees in cases of removal (see paragraphs 72-79, 81 and 84 above). It submitted that in the light of these principles, in cases concerning the employment of judges and their security of tenure, there should be a particularly strong presumption that Article 6 § 1 of the Convention applied. Effective access to justice and fair procedures in resolving disputes on the tenure, removal or conditions of service of judges are important safeguards for judicial independence. When assessing any justification advanced by the State for excluding judges' access to a court in respect of their career and security of tenure, consideration should be given to the strong public interest of upholding the role, independence and integrity of the judiciary in a democratic society under the rule of law. Although the individual judge may be the immediate beneficiary of the full protection of his or her Article 6 rights, the protection ultimately benefits all persons entitled under Article 6 § 1 to an "independent and impartial tribunal".

D. The Court's assessment

1. Principles established by the Court's case-law

100. The Court reiterates that for Article 6 § 1 in its "civil" limb to be applicable, there must be a dispute ("*contestation*" in the French text) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law, irrespective of whether that right is protected under the Convention. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question, mere tenuous connections or remote consequences not being sufficient to bring Article 6 § 1 into play (see, among many other authorities, *Boulois v. Luxembourg* [GC], no. 37575/04, § 90, ECHR 2012, and *Bochan v. Ukraine (no. 2)* [GC], no. 22251/08, § 42, ECHR 2015).

101. Article 6 § 1 does not guarantee any particular content for (civil) "rights and obligations" in the substantive law of the Contracting States: the Court may not create by way of interpretation of Article 6 § 1 a substantive right which has no legal basis in the State concerned (see, for example, *Roche v. the United Kingdom* [GC], no. 32555/96, § 119, ECHR 2005-X, and *Boulois*, cited above, § 91).

102. As to the "civil" nature of the right, the Court had held, before the judgment in *Vilho Eskelinen and Others*, that employment disputes between the authorities and public servants whose duties typified the specific activities of the public service, in so far as the latter was acting as the

depositary of public authority responsible for protecting the general interests of the State, were not "civil" and were therefore excluded from the scope of Article 6 § 1 of the Convention (see *Pellegrin*, cited above, § 66). Following the functional criterion adopted in *Pellegrin*, employment disputes involving posts in the judiciary were excluded from the scope of Article 6 § 1 because, although the judiciary was not part of the ordinary civil service, it was nonetheless considered part of typical public service (see *Pitkevich v. Russia* (dec.), no. 47936/99, 8 February 2001; as regards the president of a Supreme Court, see *Harabin* (dec.), cited above).

103. By further defining the scope of the "civil" concept in *Vilho Eskelinen and Others*, the Court developed new criteria for the applicability of Article 6 § 1 to employment disputes concerning civil servants. According to these criteria, in order for the respondent State to be able to rely before the Court on the applicant's status as a civil servant in excluding the protection embodied in Article 6, two conditions must be fulfilled. Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In order for the exclusion to be justified, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists, to use the words of the Court in *Pellegrin*, a "special bond of trust and loyalty" between the civil servant and the State, as employer. It is also for the State to show that the subject matter of the dispute in issue is related to the exercise of State power or that it has called into question the special bond. Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified (see *Vilho Eskelinen and Others*, cited above, § 62).

104. Whilst the Court stated in the *Vilho Eskelinen and Others* judgment that its reasoning in that case was limited to the situation of civil servants (§ 61, ibid.), the Grand Chamber notes that the criteria established in that judgment have been applied by different Chambers of the Court to disputes regarding judges (see *G. v. Finland*, no. 33173/05, 27 January 2009; *Oleksandr Volkov v. Ukraine*, no. 21722/11, ECHR 2013; *Di Giovanni v. Italy*, no. 51160/06, 9 July 2013; and *Tsanova-Gecheva v. Bulgaria*, no. 43800/12, 15 September 2015), including presidents of Supreme Courts (see *Olujić v. Croatia*, no. 22330/05, 5 February 2009, and *Harabin v. Slovakia*, no. 58688/11, 20 November 2012). The Grand Chamber sees no reason to depart from this approach. Although the judiciary is not part of the

ordinary civil service, it is considered part of typical public service (see *Pitkevich*, cited above).

105. The Court also notes that the criteria set out in the *Vilho Eskelinen and Others* judgment have been applied to all types of disputes concerning civil servants and judges, including those relating to recruitment/appointment (see *Juričić v. Croatia*, no. 58222/09, 26 July 2011), career/promotion (see *Dzhidzheva-Trendafilova v. Bulgaria* (dec.), no. 12628/09, 9 October 2012), transfer (see *Ohneberg v. Austria*, no. 10781/08, § 25, 18 September 2012) and termination of service (see *Olujić*, cited above, as regards the disciplinary dismissal of the President of the Supreme Court, and *Nazsiz*, cited above, concerning the disciplinary dismissal of a public prosecutor). In *G. v. Finland* (cited above, §§ 31-34), where the Government had maintained that a judge's right to remain in office was special and could not be equated with "ordinary labour disputes" within the meaning of the *Vilho Eskelinen and Others* judgment, the Court implicitly rejected that argument and applied the principles laid down in *Vilho Eskelinen and Others*. More explicitly, in *Bayer v. Germany*, no. 8453/04, § 38, 16 July 2009, concerning the removal from office of a publicly employed bailiff following disciplinary proceedings, the Court held that disputes relating to "salaries, allowances or similar entitlements" were no more than non-exhaustive examples of the "ordinary labour disputes" to which Article 6 should in principle apply under the *Vilho Eskelinen* test. In *Olujić* (cited above, § 34), the Court stated that the *Vilho Eskelinen and Others* judgment, which intended that a presumption of applicability of Article 6 should exist, also encompassed cases of dismissal.

106. The Court would further emphasise that, contrary to what the Government suggested, the *Vilho Eskelinen* test concerning the applicability of Article 6 § 1 is pertinent to cases concerning the right of access to a court (see, for instance, *Nedelcho Popov v. Bulgaria*, no. 61360/00, 22 November 2007, and *Suküt v. Turkey* (dec.), no. 59773/00, 11 September 2007), just as much as it is for cases concerning the other guarantees embodied in this provision (as, for example, in *Vilho Eskelinen and Others*, cited above, which concerned the right to an oral hearing and the right to a decision within a reasonable time). The Grand Chamber, when deciding on the applicability of Article 6 § 1 in the light of the said test, sees no reason to make a distinction between the various guarantees.

2. Application of the above principles to the present case

(a) Applicability of Article 6 of the Convention

(i) Existence of a right

107. The Court notes that on 22 June 2009 the applicant was elected President of the Supreme Court for a period of six years by Parliamentary decision no. 55/2009, pursuant to Article 48 § 1 of the 1949 Constitution.

The rules governing the tenure of the President of the Supreme Court were contained not in the 1949 Constitution but, during its term of validity until 31 December 2011, in Law no. LXVI of 1997 – the Organisation and Administration of the Courts Act (see paragraphs 40-43 above). Section 62 of that Act listed the president of a court among the so-called "court executives", that is, judges responsible for the management and administration of courts. Since the applicant was elected President of the Supreme Court under Article 48 § 1 of the 1949 Constitution, he became a "court executive". Under section 69 of the 1997 Organisation and Administration of the Courts Act, court executives were appointed for six years, with the undisputed consequence that the applicant's term of office as President of the Supreme Court should in principle have been six years (from 22 June 2009 until 22 June 2015). Section 73 of the Act contained an exhaustive list of reasons for terminating the mandates of court executives (mutual agreement, resignation, dismissal, expiry of the period of the term of office and termination of the person's judicial office). As this provision indicates, unless a term of office was terminated on the ground of its expiry or that the person's judicial mandate had come to an end (sub-sections (d) and (e)), the only permissible grounds were mutual agreement, resignation or dismissal (sub-sections (a) to (c)). Furthermore, as regards the latter, pursuant to section 74/A(1), the only possible ground for dismissal was demonstrable incompetence in performing the managerial position, in which event the incumbent was entitled to seek judicial review of the dismissal before the Service Tribunal (see paragraph 43 above). It thus transpires from the terms of the said provisions that there existed a right for an office holder to serve a term of office until such time as it expired, or until his or her judicial mandate came to an end. This is further shown by the fact that, should the office be terminated at an earlier stage against that person's consent, namely by way of dismissal, he or she would have standing to apply for judicial review of that decision (see, *mutatis mutandis*, *Zander v. Sweden*, 25 November 1993, § 24, Series A no. 279-B).

108. Moreover, the protection of the applicant's entitlement to serve his full term as President of the Supreme Court was supported by constitutional principles regarding the independence of the judiciary and the irremovability of judges. Article 48 § 3 of the 1949 Constitution established that judges could only be removed from office on the grounds and in accordance with the procedures specified by law. Article 50 § 3 of the Constitution guaranteed the independence of judges (see paragraph 38 above).

109. Accordingly, in the light of the domestic legislative framework in force at the time of his election and during his mandate, the Court considers that the applicant could arguably claim to have had an entitlement under Hungarian law to protection against removal from his office as President of the Supreme Court during that period. In this connection, it attaches some weight to the fact that the Constitutional Court did not dismiss the former

Vice-President of the Supreme Court's constitutional complaint against the premature termination of his position as lacking a legal basis (see paragraph 55 above). Before rejecting the complaint, the Constitutional Court examined it on the merits and in so doing it determined the dispute over the former Vice-President's equivalent right to serve his full term.

110. Lastly, the Court considers that the fact that the applicant's mandate was terminated *ex lege* by operation of the new legislation which came into force on 1 January 2012 (section 185 of Law no. CLXI of 2011 on the organisation and administration of the courts and section 11 of the Transitional Provisions of the Fundamental Law) under the new Fundamental Law, could not remove, retrospectively, the arguability of his right under the applicable rules in force at the time of his election. As noted above, these rules clearly established a presidential term of six years and the specific grounds on which it could be terminated. Since it was this new legislation which set aside the former rules, it constituted the object of that very "dispute" in regard to which the Article 6 § 1 fair-trial guarantees were arguably to apply. In the circumstances of the present case, the question of whether a right existed under domestic law cannot therefore be answered on the basis of the new legislation.

111. In the light of the foregoing, the Court considers that in the present case there was a genuine and serious dispute over a "right" which the applicant could claim on arguable grounds under domestic law (see, *mutatis mutandis*, *Vilho Eskelinen and Others*, cited above, § 41, and *Savino and Others v. Italy*, nos. 17214/05 and 2 others, §§ 68-69, 28 April 2009).

(ii) "Civil" nature of the right: the Vilho Eskelinen *test*

112. The Court must now determine whether the "right" claimed by the applicant was "civil" within the autonomous meaning of Article 6 § 1, in the light of the criteria developed in the *Vilho Eskelinen and Others* judgment.

113. As regards the first condition of the *Vilho Eskelinen* test, that is, whether national law "expressly excluded" access to a court for the post or category of staff in question, the Court notes that in the few cases in which it has found that that condition had been fulfilled, the exclusion from access to a court for the post in question was clear and "express". For instance, in *Suküt*, cited above, concerning the early retirement of an army officer on disciplinary grounds, Turkish constitutional law clearly specified that the decisions of the Supreme Military Council were not subject to judicial review. The same was true for the decisions of the Supreme Council of Judges and Public Prosecutors (see *Apay*, and *Nazsiz*, both cited above, concerning respectively the appointment and the disciplinary dismissal of public prosecutors; see also *Özpınar v. Turkey*, no. 20999/04, § 30, 19 October 2010, concerning the removal from office of a judge on disciplinary grounds). In *Nedeltcho Popov*, cited above, a provision of the Bulgarian Labour Code clearly provided that the domestic courts did not

have jurisdiction to review disputes regarding dismissals from certain posts in the Council of Ministers, including the post held by the applicant (chief adviser). Although that restriction was later declared unconstitutional (with no retroactive effect), the Court noted that "at the time of the applicant's dismissal" he did not have a right of access to a court under national law to bring an action for unfair dismissal (ibid., § 38).

114. The Court considers that the present case should be distinguished from the above-mentioned cases in that the applicant, as the holder of the office in question in the period before the dispute arose, was not "expressly" excluded from the right of access to a court. On the contrary, domestic law expressly provided for the right to a court in those limited circumstances in which the dismissal of a court executive was permissible: the dismissed court executive was indeed entitled to contest his or her dismissal before the Service Tribunal (see paragraph 43 above). In this respect, judicial protection was available under domestic law for cases of dismissal, in line with the international and Council of Europe standards on the independence of the judiciary and the procedural safeguards applicable in cases of removal of judges (see, in particular, point 20 of the UN Basic Principles on the Independence of the Judiciary in paragraph 72 above; General Comment No. 32 of the UN Human Rights Committee in paragraph 73 above; the relevant case-law of the Human Rights Committee in paragraphs 74-76 above; paragraphs 1.3, 5.1 and 7.2 of the European Charter on the Statute for Judges in paragraph 77 above; paragraphs 59-60 of Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) on standards concerning the independence of the judiciary and the irremovability of judges in paragraph 79 above; paragraph 6 of the Magna Carta of Judges of the CCJE in paragraph 81 above; and the case-law of the Inter-American Court of Human Rights in paragraph 84 above).

115. Nonetheless, the applicant's access to a court was impeded by the fact that the impugned measure, namely the premature termination of his mandate as President of the Supreme Court, was included in the transitional provisions of the Organisation and Administration of the Courts Act, which came into force on 1 January 2012. This precluded him from contesting that measure before the Service Tribunal, which he would have been able to do in the event of a dismissal on the basis of the existing legal framework (see paragraph 43 above). Moreover, and unlike the Vice-President of the Supreme Court, whose mandate was also terminated at the statutory level by the transitional provisions of the Organisation and Administration of the Courts Act, the termination of the applicant's mandate was provided for in the Transitional Provisions of the Fundamental Law, which also came into force on 1 January 2012 (see paragraph 49 above). In those particular circumstances, the applicant, unlike the former Vice-President of the Supreme Court (see paragraph 55 above), did not file a constitutional complaint with the Constitutional Court against the statutory provision terminating his term of office.

116. In the light of the above considerations the Court is of the view that, in the specific circumstances of the present case, it must determine whether access to a court had been excluded under domestic law before, rather than at the time when, the impugned measure concerning the applicant was adopted. To hold otherwise would mean that the impugned measure itself, which constituted the alleged interference with the applicant's "right", could at the same time be the legal basis for the exclusion of the applicant's claim from access to a court. This would open the way to abuse, allowing Contracting States to bar access to a court in respect of individual measures concerning their public servants, by simply including those measures in an *ad hoc* statutory provision not subject to judicial review.

117. Indeed, the Court would emphasise that, in order for national legislation excluding access to a court to have any effect under Article 6 § 1 in a particular case, it should be compatible with the rule of law. This concept, which is expressly mentioned in the Preamble to the Convention and is inherent in all the Articles of the Convention, requires, *inter alia*, that any interference must in principle be based on an instrument of general application (see, *mutatis mutandis*, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, § 99, 25 October 2012; see also, *mutatis mutandis*, concerning legislative interferences and the rule of law, *Stran Greek Refineries and Stratis Andreadis v. Greece*, 9 December 1994, §§ 47-50, Series A no. 301-B). The Venice Commission has also held in relation to the applicant's case that laws which are directed against a specific person are contrary to the rule of law (see paragraph 59 above).

118. In the light of the foregoing, it cannot be concluded that national law "expressly excluded access to a court" for a claim based on the alleged unlawfulness of the termination of the applicant's mandate. The first condition of the *Vilho Eskelinen* test has not therefore been met and Article 6 applies under its civil head. Given that the two conditions for excluding the application of Article 6 must be fulfilled, the Court considers that it is not necessary to examine whether the second condition of the *Vilho Eskelinen* test would have been met (see, for instance, *Karaduman and Tandoğan v. Turkey*, nos. 41296/04 and 41298/04, § 9, 3 June 2008).

119. It follows that the Government's preliminary objection as to the applicability of Article 6 § 1 of the Convention must be dismissed.

(b) Compliance with Article 6 § 1 of the Convention

120. The Court reiterates that the right of access to a court – that is, the right to institute proceedings before the courts in civil matters – constitutes an element which is inherent in the right set out in Article 6 § 1 of the Convention, which lays down the guarantees as regards both the organisation and composition of the court, and the conduct of the proceedings. The whole makes up the right to a fair trial secured by

Article 6 § 1 (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). However, the right of access to the courts is not absolute and may be subject to limitations that do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see *Markovic and Others v. Italy* [GC], no. 1398/03, § 99, ECHR 2006-XIV, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 230, ECHR 2012).

121. In the present case, the premature termination of the applicant's mandate as President of the Supreme Court was not reviewed, nor was it open to review, by an ordinary tribunal or other body exercising judicial powers. This lack of judicial review was the result of legislation whose compatibility with the requirements of the rule of law is doubtful (see paragraph 117 above). Although its above findings with regard to the issue of applicability do not prejudge its consideration of the question of compliance (see *Vilho Eskelinen and Others*, § 64, and *Tsanova-Gecheva*, § 87, both cited above), the Court cannot but note the growing importance which international and Council of Europe instruments, as well as the case-law of international courts and the practice of other international bodies, are attaching to procedural fairness in cases involving the removal or dismissal of judges, including the intervention of an authority independent of the executive and legislative powers in respect of every decision affecting the termination of office of a judge (see paragraphs 72-77, 79, 81 and 84 above). Bearing this in mind, the Court considers that the respondent State impaired the very essence of the applicant's right of access to a court.

122. There has accordingly been a violation of the applicant's right of access to a court, as guaranteed by Article 6 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

123. The applicant complained that his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice, concerning legislative reforms affecting the judiciary. He alleged that there had been a breach of Article 10 of the Convention, which provides in its relevant parts as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or

crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Chamber judgment

124. In its judgment the Chamber considered that the facts of the case and the sequence of events showed that the early termination of the applicant's mandate as President of the Supreme Court was not the result of restructuring of the supreme judicial authority, as the Government had contended, but a consequence of the views and criticisms he had publicly expressed in his professional capacity. The proposals to terminate his mandate and the new eligibility criterion for the post of President of the *Kúria* had all been submitted to Parliament after the applicant had publicly expressed his views on a number of legislative reforms, and had been adopted within an extremely short time (see paragraph 94 of the Chamber judgment). The fact that the functions of the President of the National Council of Justice had been separated from those of the President of the new *Kúria* was not in itself sufficient to conclude that the functions to which the applicant had been elected had ceased to exist after the entry into force of the Fundamental Law. The early termination of his mandate thus constituted an interference with the exercise of his right to freedom of expression (see paragraph 97 of the judgment).

125. The Chamber considered that the interference had not been "necessary in a democratic society" (see paragraph 98 of the judgment). The applicant's impugned opinion concerned four legislative reforms affecting the judiciary. Issues concerning the functioning of the justice system constituted questions of public interest, the debate of which enjoyed the protection of Article 10 of the Convention. It had been not only the applicant's right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary. As regards the proportionality of the interference, the applicant's term of office as President of the Supreme Court had been terminated three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. The Chamber reiterated that the fear of sanction had a "chilling effect" on the exercise of freedom of expression and, in particular, risked discouraging judges from making critical remarks about public institutions or policies (see paragraph 101 of the judgment). In addition, the impugned measure had not been subject to effective judicial review by the domestic courts. The Chamber therefore found that the interference with the applicant's right to freedom of expression had not been necessary in a democratic society (see paragraph 103 of the judgment).

B. The parties' submissions

1. The applicant

126. The applicant requested that the Grand Chamber confirm the Chamber judgment as far as Article 10 was concerned. There was a unanimous perception at both national and international level that a causal link existed between the expression of his opinion on the legislative reforms in question and the legislative measures entailing his premature removal. The chain of events and the very significant amount of evidence furnished by him all supported that causal link. The interviews given by the two members of the parliamentary majority and the Government's assurances to the Venice Commission all pre-dated the applicant's speech in Parliament on 3 November 2011, after which the proposals to terminate his mandate and to abolish his post-term allowances had been submitted. The alleged link between the changes affecting the Supreme Court on the one hand, and the termination of his mandate on the other, had merely been created subsequently by the Government as a pretext. The applicant noted in this regard that none of the proposals for the termination of his mandate were supported by an explanatory memorandum justifying the measure in question by the fundamental changes in the functions and tasks of the supreme judicial authority. They referred only to the entry into force of the new Fundamental Law, which could hardly be seen as a sufficient and acceptable reason in the circumstances of the case. In any event, both the functions of the new *Kúria* and the role of its president remained essentially the same. The fact that the managerial tasks attached to the position of the President of the National Council of Justice, which was accessorial to that of the President of the Supreme Court, had been taken away, affected in no way whatsoever the validity of his election to the presidency of the supreme judicial body.

127. The *Kúria*'s new tasks (such as reviewing the legality of local government regulations) had not significantly modified the institution's nature or the role of its head. Such a change could not justify in itself the termination of the fixed-term mandate of any court president. But even if the function of the Supreme Court had changed, transitional measures should have provided him with the possibility of serving his term of office in full (he referred, on this point, to the judgment of the CJEU of 8 April 2014 in *Commission v. Hungary* on the premature removal of the former Hungarian data-protection supervisor, see paragraph 70 above, which should apply *a fortiori* to a Supreme Court president). He pointed out that in a democratic society governed by the rule of law no reconsideration, either by the legislature or by the executive, of the suitability of any elected judicial official could be allowed before the expiry of the term of office (without prejudice to the legally provided grounds for dismissal or revocation). Furthermore, the only purpose of introducing the new

eligibility criterion (five years of judicial service) had been to provide justification for his removal, albeit retroactively. To support his version of the events, the applicant referred to several statements in the Hungarian and international press, as well as to reports by international institutions (notably the Venice Commission).

128. The applicant invited the Grand Chamber to confirm the Chamber's approach and assess the facts and the sequence of events "in their entirety". He referred to the Court's case-law regarding the assessment of evidence, according to which proof may follow from the co-existence of sufficiently strong, clear and concordant inferences. In view of the prima facie evidence provided by the applicant and the fact that the reasons behind his removal lay within the exclusive knowledge of the Government, the burden of proof should shift onto the Government. The applicant was convinced that he had not only demonstrated that the Government's *ex post* explanation was neither satisfactory nor convincing, but also proved beyond reasonable doubt the existence of a serious interference with his freedom of expression by an abundant number of sufficiently strong, clear and concordant inferences.

129. The applicant further argued that such an interference was not "prescribed by law", since the impugned legislative provisions were arbitrary, abusive, retrospective and incompatible with the principle of the rule of law. It was also difficult to conceive that there could be any "legitimate aim" at all pursued in imposing a punitive restriction on the proper fulfilment of legal duties incumbent on a State official such as the applicant, whose duty as head of the judiciary was to provide an opinion on the legislative reforms in question.

130. Finally, the applicant considered that the interference was not "necessary in a democratic society". The expression of his views had had the purpose of protecting the very basics of the rule of law, the independence and the proper functioning of the judiciary, which were questions of public interest. State measures that operated against such an activity could never be regarded as necessary in a democratic society. In response to his criticisms, not only had he been removed from his function but all of the benefits and allowances due to an outgoing president had also been discontinued, without any judicial review. He contended that the impugned interference had not only violated his freedom of expression but, in a broader perspective – through the violation of the security of tenure and the chilling effect that these events exerted on other judges –, had also compromised the independence of the judiciary.

2. The Government

131. The Government were of the opinion that this part of the application was manifestly ill-founded. There had been no interference with the applicant's freedom of expression, since the termination of his mandate

as President of the Supreme Court had no relation to the opinions expressed by him. The fact that the public expression of his opinions pre-dated the termination of his mandate was not sufficient to prove that there was a causal relationship between them. The applicant's mandate had been terminated because of the fundamental changes in the functions of the supreme judicial authority in Hungary. The function to which he had been elected (comprising a mixture of administrative and judicial functions) had ceased to exist upon the entry into force of the new Fundamental Law of Hungary. His activities had been mostly connected with the functions of the President of the National Council of Justice, which had been separated from the functions of the President of the *Kúria*. In addition, the functions and competences of the *Kúria* itself had also been changed and broadened (it had been given a new power to supervise the legality of local-government regulations, and new tasks in securing the consistency of the case-law). Relying on the Constitutional Court's judgment of 19 March 2013 concerning the termination of the mandate of the former Vice-President of the Supreme Court (see paragraph 55 above), the Government noted that the major changes in the functions of the President of the *Kúria* as compared to the President of the Supreme Court justified the reconsideration of the applicant's suitability for the post of administrative head of the *Kúria*, having regard to his professional expertise and previous professional career.

132. Furthermore, the Government contended that the new criterion for the election of the President of the *Kúria* (five years of judicial service in Hungary) had been introduced in order to guarantee the influence of the judiciary in the selection of candidates for that post, with the aim of de-politicising the selection process and enhancing the independence of the judiciary. At the hearing they submitted that judicial service at an international court could not be equated with national judicial service from the point of view of the independence of the judiciary.

133. As regards the sequence of events (see paragraph 96 of the Chamber judgment), the Government pointed out that the interviews referred to were given after the applicant had publicly expressed his views on the legislative reforms concerned. At the same time, these interviews were given prior to the submission to Parliament of the final version of the bill on the organisational changes of the judicial system, in which the new functions of the *Kúria* were regulated in detail.

134. As to the lack of judicial review, the Government submitted that the inclusion of a requirement of a judicial remedy in Article 10 cases would be contrary to the wording of Article 6 § 1 and the Court's case-law on disputes regarding public officials. In accordance with the principle of subsidiarity and the doctrine of the margin of appreciation, the Government were of the opinion that it was for the national legislature to decide what eligibility criteria they found appropriate for the highest ranking judicial post in Hungary and no provision of the Convention could be interpreted to require that that decision be subjected to judicial review.

135. Should the Court find that there had been an interference with the applicant's right to freedom of expression, the Government considered that the measure complained of was necessary in a democratic society for maintaining the authority and impartiality of the judiciary within the meaning of Article 10 § 2. Having regard to the circumstances of his election and the fact that his functions were more administrative/managerial than judicial in nature, the applicant's removal from his position should be assessed in the light of the rules governing the removal of political appointees rather than those governing the removal of judges. When it came to the selection of the most suitable candidate for a position of head of a given organisation with redefined functions, the views of the candidate concerning the newly reformed organisation were legitimately taken into account by any employer. Moreover, the measure was proportionate and could have had no chilling effect, since the applicant had been allowed to remain as a judge in the new *Kúria*.

C. Submissions of third-party interveners

136. The Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Institute observed before the Chamber that the present case was an outstanding example of how violations of individual fundamental rights were intertwined with processes threatening the rule of law. In their view, this case was part of a general pattern of weakening of the system of checks and balances that had taken place in the past years in Hungary. They referred to other legislative steps aimed at the early removal of individual State officials, notably the Supreme Court's Vice-President, whose constitutional complaint had been examined by the Constitutional Court. These third parties also referred to other examples of legislation targeting individuals, retrospective legislation and other legislative measures threatening the independence of the judiciary. They maintained that this case should be examined in the general context of events in Hungary and in the light of the importance of the rule of law and the independence of the judiciary. The widespread use of legislation targeting individuals could remove a wide range of significant issues from judicial scrutiny. The Court should therefore delve "behind the appearances" and examine the real purpose of such legislation and the effect that it might have on individuals' Convention rights.

137. The Helsinki Foundation for Human Rights, based in Poland, submitted before the Grand Chamber that presidents of courts were also covered by the guarantees of judicial independence and occupational stability. A conclusion to the contrary would give political authorities the power to exert pressure on the judiciary through arbitrary removals of court presidents which would be unacceptable in democratic States. In their opinion, any case of removal of a president of one of the highest domestic

courts, in circumstances which could raise justified concerns as to the actual reasons for removal, should be reviewed by the Court with utmost scrutiny and would require a particularly compelling justification for its lawfulness. The third party referred to the international and comparative-law standards on judicial independence and irremovability of judges, including presidents of courts. In this respect, for instance, the Constitutional Court of the Czech Republic had in a judgment of 11 July 2006 interpreted the principle of judicial irremovability as protecting against arbitrary removal from high judicial office and held that the Constitution required that court presidents and deputy court presidents could be removed only "on the grounds foreseen in the law and on the basis of a decision of a court". The Constitutional Court had reiterated this principle in a judgment of 6 October 2010, in which it had stated that "[i]t is not possible to construct a duality in the legal position of the chairman of a court as an official of State administration, on one hand, and judge, on the other hand. This is still one and the same person, in whom the actions of both offices are joined".

138. In the view of the Helsinki Foundation for Human Rights, while States had the power to undertake far-reaching constitutional reforms, this power had to be limited by the requirements of the principles of the rule of law. To avoid violations of the principle of judicial independence, thorough constitutional reforms of justice systems should be accompanied by proper transitional rules protecting judges who already held their offices. Lastly, they noted that the possibility for the executive or the legislature to remove judges might not only violate the subjective rights of the judge removed, but also threaten the effectiveness of the guarantees contained in Article 6 of the Convention.

139. The International Commission of Jurists took the view that the Convention should be interpreted to preclude restrictions on freedom of expression applicable to judges that would impair the right and the duty of the judiciary to speak out in protection of judicial independence. It referred in this connection to international standards that recognise that each judge is "responsible for promoting and protecting judicial independence" (see paragraph 81 above). The possible scope for limitations to the right to freedom of expression of civil servants, as established in *Vogt v. Germany* (26 September 1995, Series A no. 323), should, when applied to judges, be interpreted in the light of the specific role of the judiciary as an independent branch of State power, in accordance with the principles of the separation of powers and the rule of law. Provided that the dignity of judicial office was upheld and the essence and appearance of independence and impartiality of the judiciary not undermined, the State should therefore respect and protect the right and duty of judges to express their opinions, particularly in matters concerning the administration of justice and respect for and protection of judicial independence and of the rule of law.

D. The Court's assessment

1. Existence of an interference

(a) The application of Article 10 of the Convention to measures against members of the judiciary

140. The Court has recognised in its case-law the applicability of Article 10 to civil servants in general (see *Vogt*, cited above, § 53, and *Guja v. Moldova* [GC], no. 14277/04, § 52, ECHR 2008), and members of the judiciary (see *Wille v. Liechtenstein* [GC], no. 28396/95, §§ 41-42, ECHR 1999-VII, and *Harabin v. Slovakia* (dec.), no. 62584/00, ECHR 2004-VI ("*Harabin* (dec.) 2004"), concerning the former President of the Supreme Court of the Slovak Republic). However, in cases concerning disciplinary proceedings against judges or their removal or appointment, the Court has had to ascertain first whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression – in the form of a "formality, condition, restriction or penalty" – or whether the impugned measure merely affected the exercise of the right to hold a public post in the administration of justice, a right not secured in the Convention. In order to answer this question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation. For a recapitulation of the relevant case-law, see *Wille*, cited above, §§ 42-43; *Harabin* (dec.) 2004, cited above; *Kayasu v. Turkey*, nos. 64119/00 and 76292/01, §§ 77-79, 13 November 2008; *Kudeshkina v. Russia*, no. 29492/05, § 79, 26 February 2009; *Poyraz v. Turkey*, no. 15966/06, §§ 55-57, 7 December 2010; and the judgment in *Harabin*, cited above, § 149.

141. In *Wille*, cited above, the Court found that a letter sent to the applicant (the President of the Liechtenstein Administrative Court) by the Prince of Liechtenstein announcing the latter's intention not to reappoint the applicant to a public post constituted a "reprimand for the previous exercise by the applicant of his right to freedom of expression" (ibid., § 50). The Court observed that, in that letter, the Prince had criticised the content of the applicant's public lecture on the powers of the Constitutional Court and announced the intention to sanction him because of his opinion on certain questions of constitutional law. The Court therefore concluded that Article 10 was applicable and that there had been an interference with the applicant's right to freedom of expression. Similarly, in *Kudeshkina* (cited above), the Court observed that the decision to bar the applicant from holding judicial office had been prompted by her statements to the media. Neither the applicant's eligibility for public service nor her professional ability to exercise judicial functions formed part of the arguments before the domestic authorities. Accordingly, the measure complained of essentially related to freedom of expression, and not to the holding of a public post in the administration of justice, the right to which is not secured by the

Convention (see *Kudeshkina*, §§ 79-80; see also, as regards the disciplinary dismissal of a public prosecutor, *Kayasu*, cited above, §§ 77-81).

142. On the contrary, in other cases the Court found that the measure complained of lay, as such, within the sphere of holding a public post within the administration of justice, and was unrelated to the exercise of freedom of expression. In *Harabin* (dec.) 2004, cited above, the Court considered that the Government's proposal to dismiss the applicant as President of the Supreme Court (based on a report by the Minister of Justice) essentially related to the applicant's ability to exercise his functions, that is, to the appraisal of his professional qualifications and personal qualities in the context of his activities and attitudes relating to State administration of the Supreme Court. The report submitted by the Minister of Justice referred, among other things, to the applicant's failure to initiate the dismissal of a Supreme Court judge who had attacked an official of the Ministry of Justice and to his alleged failure to apply professional criteria when proposing candidates to fill the posts at the Supreme Court. Although it also referred to the views expressed by the applicant on a draft amendment to the Constitution (raising concerns about the separation of powers and the independence of the judiciary), the documents before the Court did not indicate that the proposal to remove the applicant was "exclusively or preponderantly prompted by those views". Similarly, in the *Harabin* judgment (cited above), it was the applicant's professional behaviour in the context of the administration of justice which represented the essential aspect of the case. The disciplinary proceedings against him (after refusing to allow an audit by Ministry of Finance staff that he considered should have been conducted by the Supreme Audit Office) related to the discharge of his duties as President of the Supreme Court, and therefore lay within the sphere of his employment in the civil service. Furthermore, the disciplinary offence of which he had been found guilty did not involve any statements or views expressed by him in the context of a public debate. The Court accordingly concluded that the disputed measure did not constitute an interference with Article 10 rights and declared the relevant complaint inadmissible as being manifestly ill-founded (ibid., §§ 150-53).

(b) Whether there had been an interference in the present case

143. As stated above, the Court must first ascertain whether the measure complained of amounted to an interference with the applicant's exercise of freedom of expression. In order to answer that question, the scope of the measure must be determined by putting it in the context of the facts of the case and of the relevant legislation (see *Wille*, cited above, § 43). Having regard to the facts of the present case and the nature of the allegations made, the Court considers that this issue should be examined in the light of the general principles emerging from its case-law on the assessment of evidence. It reiterates in this connection that in assessing evidence, it has

adopted the standard of proof "beyond reasonable doubt". However, it has never been its purpose to borrow the approach of the national legal systems which use that standard. The Court's role is not to rule on criminal guilt or civil liability but on Contracting States' responsibility under the Convention. The specificity of its task under Article 19 of the Convention – to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention – conditions its approach to the issues of evidence and proof (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147, ECHR 2005-VII). The Court adopts those conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts in their entirety and from the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (ibid.). It has been the Court's practice to allow flexibility in this respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved. In certain instances, only the Government have access to information capable of corroborating or refuting the applicant's allegations; consequently, a rigorous application of the principle *affirmanti, non neganti, incumbit probatio* is impossible (see *Fadeyeva v. Russia*, no. 55723/00, § 79, ECHR 2005-IV). Although these principles have mainly been applied in the context of Articles 2 and 3 of the Convention (see *Aktaş v. Turkey*, no. 24351/94, § 79, 24 April 2003, and *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, §§ 151-52, ECHR 2012), the Court observes that there are examples in which they have been applied in respect of other Convention rights (Article 5 in *Creangă v. Romania* [GC], no. 29226/03, §§ 88-90, 23 February 2012; Article 8 in *Fadeyeva*, cited above; Article 11 in *Makhmudov v. Russia*, no. 35082/04, §§ 68-73, 26 July 2007; and Article 14 in *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, §§ 177-79, ECHR 2007-IV).

144. These principles are particularly relevant in the present case, where no domestic court ever examined the applicant's allegations and the reasons for the termination of his mandate as President of the Supreme Court. It is against this background that the Grand Chamber agrees with the Chamber's approach according to which the facts of the case and the sequence of events have to be assessed and considered "in their entirety" (compare with *Ivanova v. Bulgaria*, no. 52435/99, §§ 83-84, 12 April 2007).

145. The Court deems it necessary to note the sequence of events in the present case. It notes at the outset that the applicant, in his professional capacity as President of the Supreme Court and the National Council of Justice, publicly expressed his views on various legislative reforms affecting the judiciary. On 12 February 2011 the applicant's spokesperson explained to a newspaper the concerns felt by the applicant in relation to the Nullification Bill ordering the annulment of final convictions (see

paragraph 16 above). On 24 March 2011 he delivered a speech in Parliament on certain aspects of the draft version of the new Fundamental Law of Hungary (see paragraph 18 above). On 7 April 2011 the applicant, together with other court presidents, addressed a letter to the President of the Republic and the Prime Minister in which they criticised the proposal in the draft version of the Fundamental Law of Hungary to reduce the mandatory retirement age of judges (see paragraph 19 above). On 11 April 2011 the applicant addressed a letter to the Prime Minister in which he again criticised the proposal on the retirement age of judges, stressing that the proposal was humiliating and that it infringed the principles of the independence and irremovability of judges (see paragraph 20 above). On 14 April 2011 the applicant in his capacity as President of the National Council of Justice, together with the plenary of the Supreme Court and other court presidents, issued a public communiqué criticising again the new retirement age of judges, as well as the proposal to modify the National Council of Justice (see paragraph 21 above). In their communiqué, they expressed the view that the new retirement age had been regulated in the Fundamental Law to avoid any possibility of judicial review by the Constitutional Court, and suggested that there had been political motivation behind that approach. On 4 August 2011 the applicant challenged certain new legislation on judicial proceedings before the Constitutional Court (see paragraph 22 above). On 3 November 2011 the applicant delivered another speech before Parliament, in which he raised his concerns about the proposal to replace the National Council of Justice by an external administration (the National Judicial Office) entrusted with the management of the courts (see paragraph 23 above). In his speech, the applicant strongly criticised the proposal, and stated that the new body would have "excessive", "unconstitutional" and "uncontrollable" powers. The applicant again criticised the new retirement age of judges, stating that it would have a severe effect on the Supreme Court.

146. The Court further notes that two members of the parliamentary majority, one of whom was State Secretary of Justice, gave interviews on 14 April and 19 October 2011, declaring that the President of the Supreme Court would remain as President of the new *Kúria* and that only the name of the institution would change (see paragraph 25 above). On 6 July 2011 the Government had assured the Venice Commission that the drafting of the transitional provisions of the Fundamental Law would not be used to unduly put an end to the terms of office of persons elected under the previous legal regime (see paragraph 26 above). The Court does not accept the Government's argument that the fact that those two interviews were given after the applicant had expressed some of his criticisms proves that the contested measure was not ultimately a consequence of those criticisms. All of the proposals to terminate his mandate as President of the Supreme Court were made public and submitted to Parliament between 19 and 23 November 2011, shortly after his parliamentary speech of 3 November

2011, and were adopted within a strikingly short time. The termination of the applicant's mandate came into effect on 1 January 2012, when the Fundamental Law came into force and the new *Kúria* became the legal successor to the Supreme Court.

147. Moreover, the Court observes that on 9 November 2011 the Organisation and Administration of the Courts Bill was amended and a new criterion was introduced as regards eligibility for the post of President of the *Kúria* (see paragraphs 35 and 50 above). The candidates for that post had to be judges appointed for an indeterminate term, having served at least five years as a judge in Hungary. The time served as a judge in an international court was not covered, which resulted in the applicant's ineligibility for the post of President of the new *Kúria*.

148. In the Court's view, having regard to the sequence of events in their entirety, rather than as separate and distinct incidents, there is prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate. This is corroborated by the numerous documents submitted by the applicant which refer to the widespread perception that such a causal link existed. These include not only articles published in both the Hungarian and foreign press, but also texts adopted by Council of Europe institutions (see the position of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe in paragraph 62, and the position of the Venice Commission in paragraph 59 above).

149. The Court is of the view that once there is prima facie evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government. This is particularly important in the case at hand, since the reasons behind the termination of the applicant's mandate lie within the knowledge of the Government and were never established or reviewed by an independent court or body, in contrast to the case of the former Vice-President of the Supreme Court. The Court notes that the explanations given at the relevant time in the bills introducing the amendments on the termination of the applicant's mandate were not very detailed. The bills referred in general terms to the new Fundamental Law of Hungary, the succession of the Supreme Court and the modifications to the court system resulting from that Law, without explaining the changes that prompted the premature termination of the applicant's mandate as President. This cannot be considered sufficient in the circumstances of the present case, in view of the fact that the previous bills submitted during the legislative process had not mentioned the termination of the applicant's mandate (see paragraph 30 above, versions of 21 October and 17 November 2011), and that previous declarations by the Government and members of the parliamentary majority had indicated precisely the opposite, namely that the applicant's mandate would not be terminated upon the entry into force of the Fundamental Law (see paragraphs 25-26 above). Furthermore, neither the applicant's ability to exercise his functions as

president of the supreme judicial body nor his professional conduct were called into question by the domestic authorities (see, conversely, *Harabin* (dec.) 2004, cited above, and the judgment in *Harabin*, cited above, § 151).

150. As to the reasons put forward by the Government to justify the impugned measure before the Court, it is not apparent that the changes made to the functions of the supreme judicial authority or the tasks of its president were of such a fundamental nature that they could or should have prompted the premature termination of the applicant's mandate. The Government pointed out that the function to which the applicant had been elected had ceased to exist, since his activities were mostly connected with the managerial functions of the President of the National Council of Justice, which – following the entry into force of the Fundamental Law – were separated from the functions of the President of the *Kúria*. In this respect, the Court would emphasise that the position of the President of the National Council of Justice seemed to be auxiliary to that of the President of the Supreme Court and not the other way round. Furthermore, if the applicant was deemed competent to exercise both functions at the time of his election, the fact that one of them was subsequently removed should not in principle affect his suitability to continue exercising the other function. With regard to the alleged changes in the competences of the supreme judicial body, they do not appear to be of such a fundamental nature. The main new competence attributed to the *Kúria* was the power to review the legality of local government regulations and to establish local governments' failure to comply with statutory legislative obligations. As to the role in safeguarding the consistency of the case-law, that had already existed previously (see Article 47 § 2 of the former Constitution, which mentioned uniformity resolutions), although new means to carry out this task were introduced under the new legislation, with more detailed regulations (creation of groups analysing the case-law, publication of guiding decisions from lower courts).

151. Consequently, the Court considers that the Government have failed to show convincingly that the impugned measure was prompted by the elimination of the applicant's post and functions in the context of the reform of the supreme judicial authority. Accordingly, it agrees with the applicant that the premature termination of his mandate was prompted by the views and criticisms that he had publicly expressed in his professional capacity.

152. In view of the above, the Court concludes that the premature termination of the applicant's mandate as President of the Supreme Court constituted an interference with the exercise of his right to freedom of expression, as guaranteed by Article 10 of the Convention (see, *mutatis mutandis*, *Wille*, cited above, § 51, and *Kudeshkina*, cited above, § 80). It remains therefore to be examined whether the interference was justified under Article 10 § 2.

2. As to whether the interference was justified

(a) "Prescribed by law"

153. The Court notes that the termination of the applicant's mandate as President of the Supreme Court was provided for by section 11(2) of the Transitional Provisions of the Fundamental Law of Hungary and section 185(1) of the Organisation and Administration of the Courts Act, which both came into force on 1 January 2012. The applicant contended that these provisions could not be regarded as "law" for the purposes of the Convention, given their individualised, retrospective and arbitrary nature.

154. As to the individualised nature of the legislation in issue, the Court has already expressed some doubts in paragraphs 117 and 121 above as to whether the legislation in question was compliant with the requirements of the rule of law. However, the Court will proceed on the assumption that the interference was "prescribed by law" for the purposes of paragraph 2 of Article 10, as the impugned interference breaches Article 10 for other reasons (see paragraph 175 below).

(b) Legitimate aim

155. The Government argued that the termination of the applicant's mandate as President of the Supreme Court was aimed at maintaining the authority and impartiality of the judiciary within the meaning of Article 10 § 2. They referred to the circumstances of the applicant's election as President of the Supreme Court in 2009 and to the fact that his office was very much of an administrative and "governmental" nature, which justified the termination of his mandate with a view to increasing the independence of the judiciary.

156. The Court accepts that changing the rules for electing the president of a country's highest judicial body with a view to reinforcing the independence of the person holding that position can be linked to the legitimate aim of "maintaining the authority and impartiality of the judiciary" within the meaning of Article 10 § 2. The Court takes the view, however, that a State Party cannot legitimately invoke the independence of the judiciary in order to justify a measure such as the premature termination of the mandate of a court president for reasons that had not been established by law and which did not relate to any grounds of professional incompetence or misconduct. The Court considers that this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously, and for the reasons set out above (see paragraphs 151-52), a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office holder in the judiciary. As stated above in the context of Article 6, it was also a measure which interfered with his right to serve his full six-year term as President of the Supreme Court, as recognised under domestic law. In these

circumstances, rather than serving the aim of maintaining the independence of the judiciary, the premature termination of the applicant's mandate as President of the Supreme Court appeared to be incompatible with that aim.

157. It follows that the Court cannot accept that the interference complained of pursued the legitimate aim relied on by the Government for the purposes of Article 10 § 2. Where it has been shown that the interference did not pursue a "legitimate aim", it is not necessary to investigate whether it was "necessary in a democratic society" (see *Khuzhin and Others v. Russia*, no. 13470/02, § 117, 23 October 2008). However, in the particular circumstances of the present case and having regard to the parties' submissions, the Court considers it important also to examine whether the impugned interference was "necessary in a democratic society".

(c) "Necessary in a democratic society"

(i) General principles on freedom of expression

158. The general principles concerning the necessity of an interference with freedom of expression, reiterated many times by the Court since its judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), were restated more recently in *Morice v. France* [GC], no. 29369/10, § 124, ECHR 2015; *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, ECHR 2015; and *Perinçek v. Switzerland* [GC], no. 27510/08, § 196, ECHR 2015, as follows.

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities

applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

159. Moreover, as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, 7 February 2012). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case, in particular, for remarks on the functioning of the judiciary (see *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010, and *Morice*, cited above, § 125).

160. The Court reiterates that the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of the interference. As the Court has previously pointed out, interference with freedom of expression may have a chilling effect on the exercise of that freedom (see *Guja*, cited above, § 95, and *Morice*, cited above, § 127).

161. Lastly, in order to assess the justification of an impugned measure, it must be borne in mind that the fairness of proceedings and the procedural guarantees afforded to the applicant are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, *mutatis mutandis*, *Castells v. Spain*, 23 April 1992, §§ 47-48, Series A no. 236; *Association Ekin v. France*, no. 39288/98, § 61, ECHR 2001-VIII; *Colombani and Others v. France*, no. 51279/99, § 66, ECHR 2002-V; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 95, ECHR 2005-II; *Kyprianou v. Cyprus* [GC], no. 73797/01, §§ 171 and 181, ECHR 2005-XIII; *Mamère v. France*, no. 12697/03, §§ 23-24, ECHR 2006-XIII; *Kudeshkina*, cited above, § 83; and *Morice*, cited above, § 155). The Court has already found that the absence of an effective judicial review may support the finding of a violation of Article 10 (see, in particular, *Lombardi Vallauri v. Italy*, no. 39128/05, §§ 45-56, 20 October 2009). Indeed, as the Court has previously held in the context of Article 10, "[t]he quality of ... judicial review of the necessity of the measure is of particular importance in this respect, including to the operation of the relevant margin of appreciation" (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08 § 108, ECHR 2013).

(ii) General principles on freedom of expression of judges

162. While the Court has admitted that it is legitimate for a State to impose on civil servants, on account of their status, a duty of discretion, civil servants are individuals and, as such, qualify for the protection of Article 10 of the Convention (see *Vogt*, cited above, § 53, and *Guja*, cited above, § 70). It therefore falls to the Court, having regard to the circumstances of each case, to determine whether a fair balance has been struck between the fundamental right of the individual to freedom of expression and the legitimate interest of a democratic State in ensuring that its civil service properly furthers the purposes enumerated in Article 10 § 2. In carrying out this review, the Court will bear in mind that whenever a civil servant's right to freedom of expression is in issue the "duties and responsibilities" referred to in Article 10 § 2 assume a special significance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim (see *Vogt*, cited above, § 53, and *Albayrak v. Turkey*, no. 38406/97, § 41, 31 January 2008).

163. Given the prominent place among State organs that the judiciary occupies in a democratic society, the Court reiterates that this approach also applies in the event of restrictions on the freedom of expression of a judge in connection with the performance of his or her functions, albeit the judiciary is not part of the ordinary civil service (see *Albayrak*, cited above, § 42, and *Pitkevich*, cited above).

164. The Court has recognised that it can be expected of public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called in question (see *Wille*, cited above, § 64; *Kayasu*, cited above, § 92; *Kudeshkina*, cited above, § 86; and *Di Giovanni*, cited above, § 71). The dissemination of even accurate information must be carried out with moderation and propriety (see *Kudeshkina*, cited above, § 93). The Court has on many occasions emphasised the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties (ibid., § 86, and *Morice*, cited above, § 128). It is for this reason that judicial authorities, in so far as concerns the exercise of their adjudicatory function, are required to exercise maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges (see *Olujić*, cited above, § 59).

165. At the same time, the Court has also stressed that having regard in particular to the growing importance attached to the separation of powers and the importance of safeguarding the independence of the judiciary, any interference with the freedom of expression of a judge in a position such as the applicant's calls for close scrutiny on the part of the Court (see *Harabin* (dec.) 2004, cited above; see also *Wille*, cited above, § 64). Furthermore,

questions concerning the functioning of the justice system fall within the public interest, the debate of which generally enjoys a high degree of protection under Article 10 (see *Kudeshkina*, § 86, and *Morice*, § 128, both cited above). Even if an issue under debate has political implications, this is not in itself sufficient to prevent a judge from making a statement on the matter (see *Wille*, cited above, § 67). Issues relating to the separation of powers can involve very important matters in a democratic society which the public has a legitimate interest in being informed about and which fall within the scope of political debate (see *Guja*, cited above, § 88).

166. In the context of Article 10 of the Convention, the Court must take account of the circumstances and overall background against which the statements in question were made (see, *mutatis mutandis*, *Morice*, § 162). It must look at the impugned interference in the light of the case as a whole (see *Wille*, § 63, and *Albayrak*, § 40, both cited above), attaching particular importance to the office held by the applicant, his statements and the context in which they were made.

167. Finally, the Court reiterates the "chilling effect" that the fear of sanction has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary (see *Kudeshkina*, cited above, §§ 99-100). This effect, which works to the detriment of society as a whole, is also a factor that concerns the proportionality of the sanction or punitive measure imposed (ibid., § 99).

(iii) Application of those principles in the present case

168. The Court reiterates its finding (see paragraph 151 above) that the impugned interference was prompted by the views and criticisms that the applicant had publicly expressed in the exercise of his right to freedom of expression. It observes in this regard that the applicant expressed his views on the legislative reforms in issue in his professional capacity as President of the Supreme Court and of the National Council of Justice. It was not only his right but also his duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary, after having gathered and summarised the opinions of lower courts (see paragraph 44 above). The applicant also used his power to challenge some of the relevant legislation before the Constitutional Court and used the possibility to express his opinion directly before Parliament on two occasions, in accordance with parliamentary rules (see paragraph 46 above). The Court therefore attaches particular importance to the office held by the applicant, whose functions and duties included expressing his views on the legislative reforms which were likely to have an impact on the judiciary and its independence. It refers in this connection to the Council of Europe instruments, which recognise that each judge is responsible for promoting and protecting judicial independence (see paragraph 3 of the Magna Carta

of Judges in paragraph 81 above) and that judges and the judiciary should be consulted and involved in the preparation of legislation concerning their statute and, more generally, the functioning of the judicial system (see paragraph 34 of Opinion no. 3 (2002) of the CCJE in paragraph 80 above; and paragraph 9 of the Magna Carta of Judges in paragraph 81 above).

169. In this regard, the Court is not convinced by the Government's argument that the applicant's functions as President of the Supreme Court were more administrative than judicial in nature, and that the removal from his position "should be assessed in the light of the rules governing the removal of political appointees rather than those governing the removal of judges", in which case the authorities could legitimately take into account the applicant's views on the reform of the judiciary.

170. The present case should also be distinguished from other cases in which the issue at stake was public confidence in the judiciary and the need to protect such confidence against destructive attacks (see *Di Giovanni*, § 81, and *Kudeshkina*, § 86, both cited above). Although the Government relied on the need to maintain the authority and impartiality of the judiciary, the views and statements publicly expressed by the applicant did not contain attacks against other members of the judiciary (compare with *Di Giovanni* and *Poyraz*, both cited above); nor did they concern criticisms with regard to the conduct of the judiciary dealing with pending proceedings (see *Kudeshkina*, cited above, § 94).

171. On the contrary, the applicant expressed his views and criticisms on constitutional and legislative reforms affecting the judiciary, on issues related to the functioning and reform of the judicial system, the independence and irremovability of judges, and the lowering of the retirement age for judges, all of which are questions of public interest (see, *mutatis mutandis*, *Kudeshkina*, §§ 86 and 94). His statements did not go beyond mere criticism from a strictly professional perspective. Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State.

172. Furthermore, although the applicant remained in office as judge and president of a civil division of the new *Kúria*, he was removed from the office of President of the Supreme Court three and a half years before the end of the fixed term applicable under the legislation in force at the time of his election. This can hardly be reconciled with the particular consideration to be given to the nature of the judicial function as an independent branch of State power and to the principle of the irremovability of judges, which – according to the Court's case-law and international and Council of Europe instruments – is a key element for the maintenance of judicial independence (see the principles on the irremovability of judges emerging from the Court's case-law under Article 6 § 1 in *Fruni v. Slovakia*, no. 8014/07,

§ 145, 21 June 2011, and *Henryk Urban and Ryszard Urban v. Poland*, no. 23614/08, § 53, 30 November 2010; see the international and Council of Europe materials in paragraphs 72-79 and 81-85 above; see also, *mutatis mutandis*, the judgment of 8 April 2014 of the CJEU in the case of *Commission v. Hungary*, concerning the premature removal from office of the former data-protection supervisor, in paragraph 70 above). Against this background, it appears that the premature removal of the applicant from his position as President of the Supreme Court defeated, rather than served, the very purpose of maintaining the independence of the judiciary, contrary to what has been argued by the Government.

173. Furthermore, the premature termination of the applicant's mandate undoubtedly had a "chilling effect" in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

174. Finally, due account should be taken of the procedural aspect of Article 10 (see the case-law referred to in paragraph 161 above). In the light of the considerations that led it to find a violation of Article 6 § 1 of the Convention, the Court considers that the impugned restrictions on the applicant's exercise of his right to freedom of expression under Article 10 of the Convention were not accompanied by effective and adequate safeguards against abuse.

175. In sum, even assuming that the reasons relied on by the respondent State were relevant, they cannot be regarded as sufficient to show that the interference complained of was "necessary in a democratic society", notwithstanding the margin of appreciation available to the national authorities.

176. Accordingly, there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10

177. The applicant complained before the Chamber, under Article 13 of the Convention taken in conjunction with Article 10, that he had been deprived of an effective domestic remedy in relation to the premature termination of his mandate as President of the Supreme Court. The applicant did not explicitly raise this complaint before the Grand Chamber. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

178. The Government contended that Article 13 was not applicable in the present case, since the applicant could not be considered to have an arguable claim under Article 10.

179. The Chamber considered that, in view of its finding of a violation of Article 6 of the Convention, it was not necessary to rule on the applicant's complaint under Article 13 taken in conjunction with Article 10 (see paragraph 113 of the Chamber judgment).

180. The Court reiterates that Article 13 requires a remedy in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see *Boyle and Rice v. the United Kingdom*, 27 April 1988, § 52, Series A no. 131).

181. The Court notes, however, that the role of Article 6 in relation to Article 13 is that of a *lex specialis*, the requirements of Article 13 being absorbed by the more stringent requirements of Article 6 (see, for example, *Kuznetsov and Others v. Russia*, no. 184/02, § 87, 11 January 2007, and *Efendiyeva v. Azerbaijan*, no. 31556/03, § 59, 25 October 2007). Given the Court's findings under Article 6 § 1 of the Convention (see paragraph 122 above), the present complaint does not give rise to any separate issue (see, for instance, *Oleksandr Volkov*, cited above, § 189).

182. Consequently, the Court holds that it is not necessary to examine the complaint under Article 13 of the Convention taken in conjunction with Article 10 separately.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLES 6 § 1 AND 10

183. The applicant complained before the Chamber that he had been treated differently from other office holders in analogous situations (other court executives, the President of the Constitutional Court), as a consequence of his having expressed politically controversial opinions. The measures directed against him therefore constituted unjustified differential treatment on the ground of "other opinion". He relied on Article 14 of the Convention, taken in conjunction with Articles 6 § 1 and 10. The applicant did not explicitly raise this complaint before the Grand Chamber. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

184. The Government argued that since Article 6 was not applicable in the present case, Article 14, taken in conjunction with that provision, was not applicable either. As regards the applicant's complaint under Article 14 read in conjunction with Article 10, they were of the opinion that this complaint was essentially the same as the one under Article 10. In any

event, the Government noted that the applicant's position as President of the Supreme Court differed from that of other judges and other holders of public office elected by Parliament. His public-law status was more comparable to that of the Prime Minister, the President of the Republic and the President of the Constitutional Court, none of whom had the right of access to a court in case of removal. The Government submitted that the tasks and functions of other judges of the Supreme Court or presidents of lower courts were not at all or not significantly affected by the organisational changes in the judicial system and that therefore they were not in a situation comparable to that of the applicant.

185. The Chamber considered that, having regard to its findings under Article 6 § 1 and Article 10 of the Convention, there was no need to examine separately the applicant's complaint under Article 14 taken in conjunction with these two provisions.

186. The Grand Chamber considers that the applicant's complaint under Article 14 of the Convention amounts essentially to the same complaints which the Court has already examined under Article 6 § 1 and Article 10. Having regard to its findings of violations in respect of these Articles (see paragraphs 122 and 176 above), the Grand Chamber finds, as did the Chamber, that no separate issue arises under Article 14 and accordingly makes no separate finding under that Article (see, for instance, *Otegi Mondragon v. Spain*, no. 2034/07, § 65, ECHR 2011).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

187. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

188. The applicant claimed that as a result of the premature termination of his mandate as President of the Supreme Court and the entry into force of retrospective legislation concerning the remuneration of his post (see paragraph 52 above), he had lost his salary as President, other benefits attached to that position, as well as the post-term benefits (severance allowance for six months and pension supplement for life) to which he would have been entitled as former President of the Supreme Court. He provided a detailed calculation of his claim for pecuniary damage, which amounted to 742,520 euros (EUR). The applicant argued that there was a clear causal connection between the pecuniary damage claimed and the violation of Article 10 of the Convention.

189. The applicant also claimed that as a consequence of the premature termination of his mandate, his professional career and reputation had been damaged and he had suffered considerable frustration. He sought an award of just satisfaction in respect of non-pecuniary damage in the amount of EUR 20,000.

190. Although the Government did not dispute that the applicant's loss of salary amounted to EUR 59,319, they contested the applicant's total claims for just satisfaction as being excessive. In particular, the Government noted that the applicant's claims mostly related to his complaint under Article 1 of Protocol No. 1, which had been declared inadmissible by the Chamber.

191. Without speculating on the exact amount of the salary and the benefits which the applicant would have received if the violations of the Convention had not occurred and if he had been able to remain in the post of President of the Supreme Court until the end of his term, the Court observes that the applicant has incurred pecuniary loss. It also considers that the applicant must have sustained non-pecuniary damage which the finding of a violation of the Convention in this judgment does not suffice to remedy. Making an assessment on an equitable basis and in the light of all the information in its possession, the Court considers it reasonable to award the applicant an aggregate sum of EUR 70,000, all heads of damage combined, plus any tax that may be chargeable on that amount (see, *mutatis mutandis*, *Kayasu*, cited above, § 128).

B. Costs and expenses

192. The applicant claimed EUR 153,532 for the costs and expenses incurred in the proceedings before the Chamber and EUR 27,338.70 for the costs and expenses incurred in the proceedings before the Grand Chamber (including those of the public hearing before the Grand Chamber). He submitted detailed time sheets indicating the amount of hours spent by his lawyers for the preparation of the case before the Court: 669.5 hours of legal work, charged at an hourly rate of EUR 190.50, and 406.9 hours of paralegal work, including translations, charged at an hourly rate of EUR 63.50, in respect of the proceedings before the Chamber; and 135.6 hours of legal work and 13.4 hours of paralegal work in respect of the proceedings before the Grand Chamber, charged at the same hourly rates. The applicant's total claim for costs and expenses came to EUR 180,870.70.

193. The Government contested these claims. They considered that the costs incurred on account of claiming damages related to the applicant's complaint under Article 1 of Protocol No. 1 could not be considered to have been necessarily incurred and reasonable. The Government also submitted that the applicant's claims for costs and expenses related to the public hearing before the Grand Chamber were excessive and exaggerated.

194. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum.

195. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicant the sum of EUR 30,000 for the costs and expenses incurred before it.

C. Default interest

196. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, by fifteen votes to two, that there has been a violation of Article 6 § 1 of the Convention;

2. *Holds*, by fifteen votes to two, that there has been a violation of Article 10 of the Convention;

3. *Holds*, unanimously, that there is no need to examine the complaint under Article 13 of the Convention in conjunction with Article 10;

4. *Holds*, unanimously, that there is no need to examine the complaint under Article 14 of the Convention in conjunction with Article 6 § 1 and Article 10;

5. *Holds*, by fifteen votes to two,
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 70,000 (seventy thousand euros), plus any tax that may be chargeable, in respect of pecuniary and non-pecuniary damage;
      (ii) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 June 2016.

Johan Callewaert	Luis López Guerra
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Judges Pinto de Albuquerque and Dedov;
(b) concurring opinion of Judge Sicilianos;
(c) dissenting opinion of Judge Pejchal;
(d) dissenting opinion of Judge Wojtyczek.

L.L.G
J.C.

JOINT CONCURRING OPINION OF JUDGES PINTO DE ALBUQUERQUE AND DEDOV

1. We share wholeheartedly the findings of the Grand Chamber of the European Court of Human Rights ("the Court") in the present case, and most of its reasoning. Nevertheless, we consider that much was left unsaid in the written judgment. Some important features of this case were either not dealt with at all or merely touched upon indirectly. In view of the crucial importance of this case for the rule of law, the independence of the judiciary and the determination of the Court's role in upholding these values in Europe, we find it imperative to state, *urbi et orbi*, what was left unsaid.

Firstly, the nature of section 11(2) of the Transitional Provisions of the Fundamental Law of 31 December 2011 is not clearly identified. Secondly, the Court seems to take for granted its jurisdiction to assess the compatibility of constitutional provisions with the European Convention on Human Rights ("the Convention"), without explaining the grounds and breadth of its remit. Both the substance and the procedure for adopting the impugned provisions were assessed under the presumption that the Court had a "natural" or "legal" *Kompetenz-Kompetenz* to verify the Convention compliance of the constitutional reforms in question, including on issues related to the independence of the judiciary and the rule of law. Thirdly, for the purposes of its assessment of the constitutional reform, the Court acknowledges the applicant's right of access to a court as a right under domestic law, although the issue of the premature termination of the applicant's mandate as President of the Supreme Court was included in a transitional constitutional provision with the deliberate purpose of precluding him from contesting it before the Service Tribunal. The Court found this right of access to be a given by reading into the domestic law the international standards on judicial independence, which are – for the most part – soft law. In straightforward terms, the Court not only ascribes direct effect in the Hungarian legal order to the Article 6 guarantee of judicial independence and right of access to a court; it goes further and affirms the Convention's supra-constitutional effect, in order to override the contradicting domestic constitutional provision. In so doing, the Court affirms itself as the European Constitutional Court, with power to declare domestic constitutional provisions devoid of any legal effects within the relevant domestic legal order.

Unconstitutional constitutional norms

2. The applicant complains that he did not have access to a court or any other body performing a judicial function that could be classified as a "court" for the purposes of the *Vilho Eskelinen* test. He argues that the constitution-making majority in the legislature deliberately chose to enact a

legislative act at the highest level of the hierarchy of laws in order to preclude his access to the Constitutional Court.[1] At the same time, he claims that the first condition of the *Vilho Eskelinen* test was not met, in that his right of access to a court was not excluded by domestic law. The logical contradiction in the applicant's reasoning is pointed out by the Government, who argue that, since the Fundamental Law is part of domestic law and it excluded access to a court, then access to a court is in fact excluded by domestic law. Furthermore, in view of the special constitutional status of the President of the Supreme Court compared with other judges and the administrative heads of lower courts – given that none of the other judges or court executives were elected by Parliament and enjoyed the same privileges as the applicant, and no court executive other than the President of the Supreme Court was excluded from supervision by the National Council of Justice – the applicant's mandate as President of the Supreme Court was, again according to the Government, of a "governmental" nature. Therefore the termination of his mandate could be justified on the ground of "political considerations". Thus, the first condition of the *Vilho Eskelinen* test, if this test is at all applicable, should be considered satisfied.

3. Law no. XX of 1949 on the Constitution of the Republic of Hungary, as revised in 1989-90, was in force until 31 December 2011. On 25 April 2011 the new Fundamental Law of Hungary was adopted. It came into force on 1 January 2012. Article Q of the Fundamental Law states as follows:

> "(1) In order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.
>
> (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law be in conformity with international law.
>
> (3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in legal regulations."

4. In the present case, the Court is confronted with a transitional constitutional provision, namely section 11(2) of the Transitional Provisions of the Fundamental Law, which, read alone or in conjunction with section 185 of Law no. CLXI of 2011 on the organisation and administration of the courts, had the effect of depriving one specific person – the applicant – of his mandate as President of the Supreme Court, without the possibility of access to a court.

5. In spite of this constitutional and infra-constitutional framework, the Court considers, in paragraph 107 of the judgment, that domestic law provided for a "right for an office holder to serve a term of office until such time as it expired, or until his or her judicial mandate came to an end", invoking Articles 48 § 3 and 50 § 3 of the 1949 Constitution and sections 73

1. Paragraph 22 of his written submissions of 8 April 2015.

and 74/A of Law no. LXVI of 1997 on the organisation and administration of the courts. This was the legal framework in force at the time of the applicant's election and during his mandate, until 31 December 2011. The Court adds that, in the event of unconsented premature termination of the mandate, the office holder had "standing to apply for judicial review of that decision", invoking, *mutatis mutandis*, *Zander v. Sweden*.[2] Accordingly, it concludes in paragraph 109 that at the time of his election and during his mandate, the applicant had an arguable claim to have had an entitlement under Hungarian law to protection against arbitrary removal from his office as President of the Supreme Court. In other words, the Court reads into the domestic legal framework at it stood on 1 January 2012 a right, on the basis of the Court's case-law, to apply for judicial review of a decision to terminate the mandate of the President of the Supreme Court.

6. In paragraph 110, the Court reiterates that the termination *ex lege* of the applicant's mandate could not "remove, retrospectively, the arguability of his rights under the applicable rules in force at the time of his election", refusing explicitly to reply to the question of whether a right existed under the domestic law on the basis of the new constitutional legislation. Paragraph 114 of the judgment provides the ultimate legal basis upon which that question is answered. The Court refers to the "international and Council of Europe standards on the independence of the judiciary and the procedural safeguards applicable in cases of removal of judges", including the UN Basic Principles on the Independence of the Judiciary, the UN Human Rights Committee's General Comment No. 32, the "relevant case-law" of the Human Rights Committee, the European Charter on the Statute for Judges, the Consultative Council of European Judges (CCJE) Opinion no. 1, the Magna Carta of Judges (Fundamental Principles) of the CCJE and even the relevant case-law of the Inter-American Court of Human Rights (IACtHR). To put this clearly: the Court invokes the soft law of the Council of Europe and other international organisations and also a case from another international court as a legal basis not only to sustain the principle of the independence of the judiciary *in abstracto*, but also to assert *in concreto* the existence of the applicant's individual civil right to irremovability and of access to a court to protect that right in the Hungarian legal framework on 1 January 2012.

7. Reassured by the above-mentioned international-law backup, the Court holds, very innovatively, in paragraph 118 that the new constitutional provision impacting on the irremovability of a specific judge and excluding him from access to a court did not revoke the applicant's individual civil right not to be sacked arbitrarily, which had been protected by infra-constitutional law prior to the entry into force of the above-mentioned new

2. *Zander v. Sweden*, 25 November 1993, Series A no. 279-B. See also paragraph 107 of the present judgment.

constitutional law. Admittedly, the Court concludes that section 11(2) of the Transitional Provisions of the Fundamental Law contradicted not only ordinary law as it stood on 31 December 2011, but also the guarantee of judicial independence, including the guarantee of judges' irremovability, enshrined in Article 48 § 3 of the 1949 Constitution, to which the Court pointedly refers in paragraph 108 of the judgment. This same guarantee of judicial independence had been included in Article 26 § 1 of the new 2011 Fundamental Law itself, which made the impugned transitional provision a remarkable example of an "unconstitutional constitutional provision" (*verfassungswidrige Verfassungsnorm*).[3]

8. The issue is not new in Hungary.[4] A debate on the constitutional status of the Transitional Provisions of the Fundamental Law ensued after the Hungarian Ombudsman requested the Constitutional Court to declare the Transitional Provisions unconstitutional in their entirety – or, in the alternative, in certain provisions – since, in his view, they did not contain transitional measures. The First Amendment of 18 June 2012 to the Fundamental Law clarified that the Transitional Provisions were part of Fundamental Law in order to shield them from review by the Constitutional Court. On 29 December 2012, in its decision no. 45/2012, the Constitutional

3. Such a possibility has been discussed in the constitutional-law literature; see, for example, in Germany, Otto Bachof's seminal *Verfassungswidrige Verfassungsnormen?* (Tübingen, J.C.B. Mohr/Paul Siebeck, 1951), and Gottfried Dietze, "Unconstitutional Constitutional Norms? Constitutional Development in Postwar Germany" in *Virginia Law Review* (January 1956) vol. 42, no. 1, pp. 1-22. For an overview outside Europe, see Aharon Barak, "Unconstitutional Constitutional Amendments" in *Israel Law Review* (2011) vol. 44, pp. 321-41, and Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (London School of Economics and Political Science, 2014).

4. For a summary description of the discussion, see "Keeping the guardian under control: The case of Hungary", Report by Krisztina Kovács, 25 July 2013, CDL-JU(2013)006; Gábor Halmai, "Unconstitutional Constitutional Amendments. Constitutional Courts as Guardians of the Constitution?", *Constellations*, 2 (2012), pp. 182-203; and the very interesting research paper "Analysis of the Performance of Hungary's 'one-party elected' Constitutional Court Judges between 2011 and 2014", by the Eötvös Károly Institute, the Hungarian Civil Liberties Union and the Hungarian Helsinki Committee (2014), available online. See also, specifically on the compatibility of the new constitutional provisions with the constitutional principles of the rule of law and the independence of the judiciary in Hungary, CDL-AD(2011)016-e, Opinion on the new Constitution of Hungary adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), paragraph 140; CDL-AD(2013)012, Opinion 720/2013 of the Venice Commission on the Fourth Amendment of the Fundamental Law of Hungary, Strasbourg 17 June 2013, paragraph 115; and CDL-AD(2012)001, 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, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012), paragraph 118; CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012), paragraph 88.

Court declared null and void some of the provisions on the grounds that they did not comply with the requirement of transitionality.[5] Having acknowledged that "the Constitution-maker may only incorporate into the Fundamental Law subjects of constitutional importance that fall within the subjective regulatory scope of the Fundamental Law", the Hungarian constitutional judges further stated that

> "[t]he constitutional criteria of a democratic State under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic States under the rule of law, as well as the *jus cogens*, which partly overlap with the foregoing. As appropriate, the Constitutional Court may even examine the free enforcement and the constitutionalisation of the substantial requirements, guarantees and values of democratic States under the rule of law".

Hence, in spite of the lack of an explicit and unamendable "eternity clause" in the Fundamental Law[6], the Constitutional Court admitted an inner hierarchy within the said Law, on the basis of which any potential conflict within the Fundamental Law was to be resolved.

9. Yet the Constitutional Court avoided carrying out a substantive review of the Transitional Provisions. This self-restraint by the Constitutional Court of Hungary is hardly compatible with the "constitutional continuity" between the 1949 Constitution and the 2011 Fundamental Law, which share, *inter alia*, the basic principles of the rule of law and the principles of the independence of the judiciary and the irremovability of judges.[7] Such continuity is anchored in the historical rhetoric of the Fundamental Law itself, in the numerous references to the "historical constitution" in its Preamble, and even more clearly in its Article R.3, which states that "the Fundamental Law shall be interpreted in accordance with ... the achievements of our historical constitution".

10. The best evidence of the "constitutional continuity" of the principles of the rule of law and the principles of the independence of the judiciary and

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5. Decision no. 45/2012. (XII. 29.) AB of the Constitutional Court of the Republic of Hungary (item IV.7), ABK January 2013, 2, 29), and Decision no. 166/2011. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 545.

6. Such as is found in Article 112 of the 1814 Norwegian Constitution, Article 139 of the 1947 Italian Constitution, Article 79 § 3 of the 1949 German Basic Law, Article 89 of the 1958 French Constitution, Article 288 of the 1976 Portuguese Constitution and Article 4 of the 1982 Turkish Constitution.

7. See Decision no. 22/2012. (V. 11.) AB of the Constitutional Court of Hungary, ABK June 2012, 94, 97: "In the new cases the Constitutional Court may use the arguments included in its previous decision adopted before the Fundamental Law came into force in relation to the constitutional question ruled upon in the given decision, provided that this is possible on the basis of the concrete provisions and interpretation rules of the Fundamental Law, having the same or similar content as the provisions included in the previous Constitution ... The conclusions of the Constitutional Court pertaining to those basic values, human rights and freedoms, and constitutional institutions, which have not been altered in the Fundamental Law, remain valid."

the irremovability of judges is the discussion held between the majority and the minority within the Constitutional Court in its decision no. 3076/2013 on the constitutional complaint lodged by the Vice-President of the Supreme Court, whose mandate had started before the entry into force of the Fundamental Law.[8] It is worth noting that the main arguments of the seven-judge-strong minority lay in the guarantees of the separation of powers, the prohibition on retrospective legislation, the principle of the rule of law and the right to a remedy.[9] In view of the above-mentioned "constitutional continuity", there is no doubt that these are perennial principles in the Hungarian constitutional order, prior to and after the entry into force of the Fundamental Law, which were directly called into question by the above-mentioned section 11(2) of the Transitional Provisions.

11. Furthermore, according to the established case-law of the Hungarian Constitutional Court at the relevant time, the premature removal *ex lege* of heads of State authorities is constitutional only in exceptional circumstances, for example where there is a structural modification of the institution.[10] The Constitutional Court also emphasised the difference between State officials explicitly mentioned in the Fundamental Law, such as the President of the Supreme Court, and those officials who preside over State organs that are subordinated to the Government. The former are entitled to the highest level of protection: the Constitutional Court has held that "their term of office, spanning over electoral cycles, is a safeguard for the proper functioning of a democratic State governed by the rule of law".[11] It has concluded, for instance, that the introduction of a new ground for termination of the term of office, while it was still running, of the head of a State organ that has a safeguarded constitutional role violates the prohibition on retrospective legislation and the principle of the rule of law.[12]

12. The Hungarian constituent power – the Hungarian Parliament with a two-thirds majority – decided to close the ongoing constitutional debate through Article 12 § 3 of the Fourth Amendment, which amends Article 24 § 5 of the Fundamental Law as follows:

> "The Constitutional Court may only review the Fundamental Law and the amendment thereto for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation."

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8. See paragraph 55 of the present judgment.
9. See paragraph 56 of the present judgment.
10. Decisions concerning the Hungarian Financial Supervisory Authority (no. 7/2004. (III. 24.) AB), the Hungarian Energy Authority (no. 5/2007. (II. 27.) AB) and the Hungarian Competition Authority (183/2010. (X. 28.) AB). For instance, in Decision no. 5/2007, the Constitutional Court noted that there had been no re-organisation of the Authority, merely that its competence had been changed without the abolition of the president's and vice-president's post.
11. Decision no. 7/2004. (III. 24.) AB, cited above.
12. Decision no. 183/2010. (X. 28.) AB, cited above.

Furthermore, Article 19 of the Fourth Amendment introduces point 5 of the Closing and Miscellaneous Provisions, which states that

> "Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings".

The self-confessed legislative purpose was to prohibit the Constitutional Court from reviewing the substantive unconstitutionality of constitutional provisions and from referring to any of the previous decisions made from the point of the Constitutional Court's establishment in 1990 until the introduction of the Fundamental Law on 1 January 2012. This obviously raises, among other issues, grave problems regarding the principles of the rule of law and of legal certainty.[13] Called upon to assess this Amendment, the Constitutional Court held, in its decision no. 12/2013, that it would have jurisdiction to analyse the new provisions incorporated by the Fourth Amendment once its details were outlined in further Acts, in order to ensure that they "make up a system that is free from any inconsistencies with international and European Union commitments".[14] Moreover, after the entry into force of the Fourth Amendment, the Constitutional Court has occasionally referred to its rulings given prior to the entry into force of the Fundamental Law.

13. In sum, the debate on the unconstitutionality of constitutional provisions is not closed in Hungary.[15] In any event, regardless of the Constitutional Court's remit to control the substantive unconstitutionality of constitutional provisions, section 11(2) of the Transitional Provisions is, in essence, an unconstitutional constitutional provision, in the light of the Hungarian "historical constitution" and the "constitutional continuity" of the principles of the independence of the judiciary and the irremovability of judges in both the new Fundamental Law and the 1949 Constitution. On 1 January 2012 the applicant still had an individual civil right not to be removed from his position as President of the Supreme Court during his term of office, unless he was lawfully dismissed, and even in that

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13. See Opinion no. 720/2013, cited above, paragraphs 88-108, for the critique of these changes. The position of the Hungarian Government was based upon the legal opinion of a German scholar, who pleaded for the equal ranking of all constitutional provisions in the Hungarian constitutional framework, and hence denied the possibility of unconstitutional constitutional norms and the Constitutional Court's remit to control the substantive constitutionality of constitutional provisions, although he allowed for the same possibility in the event of a constitutional amendment that would put at risk the principle of "protection of human dignity" – *Grundsatz vom Schutz der Menschenwürde* (*Rechtsgutachten zur Verfassungs- und Europarechtskonformität der Vierten Verfassungsnovelle zum ungarischen Grundgesetz vom 11./25. März 2013*, Prof. Rupert Scholz, Berlin, 18 April 2013).

14. Decision no. 12/2013 (V. 24.) AB of the Constitutional Court of Hungary.

15. See the report by Krisztina Kovács, cited above, referring to the example of the Supreme Court of India.

eventuality he would be entitled to seek legal remedy before the Service Tribunal, both rights being protected by domestic law as interpreted and complemented by relevant international-law standards, which were mostly soft law.

Ad hominem legislation

14. From the Venice Commission's perspective, which the Court endorses in paragraph 117 of the judgment, the impugned legislation was "directed against a specific person", and was therefore "contrary to the rule of law". To phrase this differently, this was legislation conceived to achieve a specific result that was detrimental to a concrete individual (*ad hominem, konkret-individuelles Maßnahmegesetz*), which was secured by a constitutional straitjacket in order to avoid any possibility of judicial review. Quite rightly, the Court backtracked from the previous tolerance shown *vis-à-vis* "special laws laying down specific conditions that apply to one or more named individuals", by citing only partially the *Vistiņš and Perepjolkins* judgment[16], and subscribing to the Venice Commission's crystal-clear position opposing such legislation.

15. For the purposes of Article 6 of the Convention, the Court clarifies that for the first condition of the *Vilho Eskelinen* test to be met, the exclusion must be framed in a general and abstract manner for the relevant post or category of staff or for the measures concerning them, which was not the case here. Hence, the impugned domestic law did not "expressly exclude" access to a court in the applicant's case, simply because it lacked the minimum features of a "law" in a State governed by the rule of law and within the meaning of the Convention requirements of "quality of law". Consequently, the first condition of the *Vilho Eskelinen* test was not fulfilled and Article 6 § 1 of the Convention applies. One cannot but recall the words of Radbruch, in his *Fifth Minute of Legal Philosophy*: "*Es gibt also Rechtsgrundsätze, die stärker sind als jede rechtliche Satzung, so daß ein Gesetz, das ihnen widerspricht, der Geltung bar ist.*" ("There are principles of law, therefore, that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity.")[17]

16. Having reached this conclusion, the Court cannot but take a firm position on the illegitimacy of the aim of section 11(2) of the Transitional Provisions of the Fundamental Law, in conjunction with section 185 of the 2011 Organisation and Administration of the Courts Act, which indeed it does in paragraph 156 of the judgment. For the Court, the illegitimacy of the aim of the above-mentioned provisions is flagrant. The purpose from the

16. See *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, 25 October 2012.
17. Gustave Radbruch, "*Fünf Minuten Rechtsphilosophie*" in *Rhein-Neckar-Zeitung*, 12 September 1945, and, in English, "Five Minutes of Legal Philosophy" (1945) in *Oxford Journal of Legal Studies* (2006) vol. 26, no. 1, pp. 13-15.

very beginning of the legislative procedure was to sacrifice the applicant on the altar of the Government's policy for the judiciary. In other words, the Court finds there is an intimate correlation between, on the one hand, the poor "quality of law" in terms of the applicable standards of the rule of law and, on the other, the *ad hominem* aims pursued by the new legislation.

The direct, supra-constitutional effect of the Convention

17. The Court's direct recourse to international-law standards on judicial independence, including soft-law sources, as a source of law in order to address the applicant's situation is highly remarkable, and laudable. The security of tenure and conditions of service of judges are absolutely necessary elements for the maintenance of judicial independence, according to all international legal standards, including those of the Council of Europe. The Court's own case-law under Article 6 has asserted that the irremovability of the judiciary benefits all persons entitled under Article 6 to an "independent tribunal".[18] There is nothing in these standards to suggest that the principle of irremovability of judges should not apply to the term of office of presidents of courts, irrespective of whether they perform, in addition to their judicial duties, administrative or managerial functions.

18. As the Hungarian Constitutional Court has itself stated in its crucial decision no. 45/2012, the common values of the European States governed by the rule of law are enshrined in international treaties, including – at the very frontline – the Convention.[19] In the present case, the impugned transitional provision flagrantly puts one of these common values, namely the independence of the judiciary, at risk.

19. Hungary's dualist approach in terms of the relationship between its domestic law and international law[20] plays no role whatsoever in the Court's

18. See, for example, *Campbell and Fell v. the United Kingdom*, 28 June 1984, § 80, Series A no. 80; *Cooper v. the United Kingdom* [GC], no. 48843/99, § 118, ECHR 2003-XII; and *Fruni v. Slovakia*, no. 8014/07, § 145, 21 June 2011.

19. Decision no. 45/2012, cited above. See also Decision no. 166/2011. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 545. For example, the French *Conseil d'État* has recognised a judge's individual right to irremovability since its judgment of 27 May 1949 in the *Véron-Réville* case (see *Gazette du Palais*, 10 June 1949, pp. 34-36).

20. On Hungary as a dualist system, see Report on the implementation of international human rights treaties in domestic law and the role of courts, adopted by the Venice Commission at its 100th plenary session (Rome, 10-11 October 2014), CDL-AD(2014)036, paragraph 22; Nóra Chronowski and Erzsébet Csatlós, "Judicial Dialogue or National Monologue? The International Law and Hungarian Courts" in *ELTE Law Journal* (2013-1), pp. 7-29; Nóra Chronowski, Timea Drinóczi and Ildikó Ernszt, "Hungary" in Dinah Shelton (ed.), *International Law and Domestic Legal Systems, Incorporation, Transformation and Persuasion* (Oxford University Press, 2011) pp. 259-87; and Anneli Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge University Press, 2005) pp. 82-87. But "generally recognised rules of international law" are

reasoning, which shows once again that, from the Strasbourg perspective, the classical distinction between monist and dualist systems is totally outdated.[21] Equally irrelevant for the Court is the classification of the principles of independence of the judiciary, the irremovability of judges and access to a court for the protection of such irremovability as a matter of customary international law or even *jus cogens*. For the Court, it suffices to affirm the existence of such principles in general international law, in Council of Europe law and, in particular, in the Convention. The Court does not go so far as to state explicitly that the above-mentioned principles are general principles of law recognised by civilised nations, but implicitly acknowledges it.

20. In this connection, the Court rejects the Government's contention that "[u]nder Article 6, it is not the applicant who has the right to be an independent judge, but [rather] Hungarian citizens and everyone under Hungary's jurisdiction who have the right to an independent judiciary".[22] According to the Government, it is clear from the wording of Article 6 that the holders of rights under Article 6 are those who are parties to judicial proceedings, and not the judges dealing with their cases. Hence, the Government were of the opinion that no individual right of judges to independence could be derived from Article 6, which deprived the applicant of victim status. The Court finds differently, by ascribing direct effect in the domestic legal order to the Article 6 guarantee of independence of the judiciary, and the concomitant right of access to a court to protect that independence. In the Court's opinion, the applicant had not only an arguable claim, but an enforceable individual civil right in domestic law, read through the lens of the Convention and other very pertinent Council of Europe and international-law instruments. Furthermore, by stating that this right prevailed over the contradicting transitional constitutional provision

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applied directly in the Hungarian domestic order, according to Article Q (3) of the Fundamental Law. According to the Constitutional Court, the expression "generally recognised rules of international law" used by both the 1949 Constitution and the 2011 Fundamental Law includes universal customary international law, peremptory norms (*jus cogens*) and general principles of law recognised by civilised nations (see Decision no. 30/1998. (VI. 25.) AB of the Constitutional Court of the Republic of Hungary, ABH 1998, 220).

21. Thus, from the perspective of European human rights law, the differentiation between monistic and dualistic countries is a "false problem". See the excellent text by Andrew Drzemczewski, "Les faux débats entre monisme et dualisme – Droit international et droit français : l'exemple du contentieux des droits de l'homme" in *Boletim da sociedade brasileira de direito internacional* (January/December 1998) Ano 51, Nos. 113/118, p. 100. He added the following illuminating remark: "Where the Committee of Ministers ... supervises execution of the judgments of the European Court of Human Rights, the fact that a State is monistic or dualist, or whether a State has incorporated the provisions of the [European Convention] into its domestic law, is never taken into account" (author's underlining).

22. This opinion was expressed in the Grand Chamber pleadings.

which had hindered the applicant's access to a court, the Court acknowledges the direct, supra-constitutional effect of the Convention guarantee of independence of the judiciary, and the concomitant right of access to a court in order to protect that independence.

21. In view of the clear interference with the core of an Article 6 guarantee and right, the Court cannot turn a blind eye. It is imperative to assert, as a matter of principle, the judicial review of domestic legislation, including constitutional legislation, for the sake of effective and non-illusory protection of human rights in Europe. Regardless of the fact that the applicant was not removed from his office as a judge and was permitted to serve as a Supreme Court judge, his removal from the position of President of the Supreme Court had a chilling effect on the expression of professional opinions by other judges, the independence of the judiciary and the rule of law in Hungary. In this political and social context, the Court perceives a serious risk that all Convention rights and freedoms would be in danger in Hungary, since they would be put in the hands of any given political majority which could manipulate the highest members of the judiciary like pawns in a chess game.[23] The Government's argument that the applicant's removal from office should indeed be subject to political considerations, given that his position was more administrative or "governmental" than judicial and that his views were more of a political than of a professional nature, is therefore flatly rejected by the Court – as is the argument that the organisational and functional changes to the system of court administration and to the competences of the *Kúria*, and the new eligibility criteria, were justified by the need to enhance the independence of the judiciary. The same should have been the case with regard to the Government's point that "judicial service at an international court cannot be equated with national judicial service from the point of view of the independence, or the perceived independence, of the judiciary."[24] Quite apart from an outrageous lack of respect for the judges of the Court, this "Government point" casts doubt on the very independence of this Court.

22. Having fully asserted its constitutional competence, the Court goes on to assess thoroughly the substance of the constitutional and infra-constitutional legislation impugned by the applicant[25] and the procedure that led to it[26], and also its compatibility with the Convention and the above-cited international standards. While the Court's careful assessment of both these aspects merits our full endorsement, one detail should be emphasised, namely that the impugned termination was enacted with extreme rapidity as

23. To quote Prosecutor General Dupin during the July Monarchy, "*un juge qui craint pour sa place ne rend plus la justice*" (cited in Marcel Rousselet, *Histoire de la magistrature française des origines à nos jours* (Plon, Paris) vol. 2, p. 174).
24. This point was made during the pleadings before the Grand Chamber.
25. See paragraph 150 of the judgment.
26. See paragraph 149 of the judgment.

a last-minute amendment to the bill submitted by individual MPs in the form of an "amendment prior to the closing vote", thus circumventing the usual consultative obligations and proper parliamentary debate. From this perspective, the legislative process "might be understood as an attempt to get rid of a specific person who would be a candidate for the President", as the Venice Commission concluded.[27]

The Court as the European Constitutional Court

23. The Council of Europe is an autonomous legal order, based on agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.[28] With more than 217 treaties, the legal order of this international organisation has at its apex an international treaty, the European Convention on Human Rights, which has direct, supra-constitutional effect on the domestic legal orders of the member States of the Council of Europe.[29] More than merely a multilateral agreement on the reciprocal obligations of its Contracting Parties, the Convention creates obligations for Contracting Parties towards all individuals and private entities within their jurisdictions. This means that

27. See paragraph 59 of the judgment.
28. Article 1, paragraph b, of the 1949 Statute of the Council of Europe.
29. See, in this respect, *inter alia*, Greer and Wildhaber, "Revisiting the debate about 'constitutionalising' the ECtHR" in *Human Rights Law Review* 12:4 (2012), pp. 655-87; De Londras, "Dual Functionality and the persistent frailty of the European Court of Human Rights" in *European Human Rights Law Review* (2013) issue 1, pp. 38-46; Arnold, "National and supranational constitutionalism in Europe" in *New Millennium constitutionalism: paradigms of reality and challenges*, Harutyunyan (ed.) (2013) pp. 121-34; Sweet, "Sur la constitutionnalisation de le Convention européenne des droits de l'homme: cinquante ans après son installation, la Cour européenne des droits de l'homme conçue comme une Cour constitutionnelle" in *Revue trimestrielle des droits de l'homme* (2009), pp. 923-44; Levinet, "La Convention européenne des droits de l'homme, socle de la protection des droits de l'homme dans le droit constitutionnel européen"; Gaudin, "Le droit constitutionnel européen, quel droit constitutionnel européen ?" in *Annuaire de droit européen* (2008) vol. 6, pp. 89-123; Costa, "La Cour européenne des droits de l'homme est-elle une cour constitutionnelle ?" in *Mélanges en l'honneur de Jean Gicquet*, Montchrestien (ed.) (2007) pp. 1-15; Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006) pp. 172-73 and 195; Wildhaber, "The role of the European Court of Human Rights: an Evaluation" in *Mediterranean Journal of Human Rights* (2004) 8, pp. 9-29; Alkema, "The European Convention as a constitution and its court as a constitutional court" in *Protection des droits de l'homme, Mélanges à la mémoire de Rolv Ryssdal*, Paul Mahoney et al. (eds.) (Carl Heymanns Verlag KG, Cologne, 2000) pp. 541-63; Flauss, "La Cour européenne des droits de l'homme est-elle une cour constitutionnelle ?" in *La Convention européenne des droits de l'homme : développements récents et nouveaux défis* (Bruylant, Brussels, 1997) pp. 68-92; and Schokkenbroek, "Judicial review by the European Court of Human Rights: constitutionalism at European level" in *Judicial control: comparative essays on judicial review*, Bakker et al. (Antwerp-Apeldoorn, Maklu, 1995) pp. 153-65.

Convention law has not only a declaratory, but also an additional constitutive effect in the domestic legal order. With its transformational role emphatically proclaimed in the Preamble as an instrument for building a closer union of European States and developing human rights on a pan-European wide basis, the Convention is subordinated neither to domestic constitutional rules, nor to allegedly higher rules of international law, since it is the supreme law of the European continent.[30] In Europe, the domestic law of the member States is subordinated to the primacy of the Convention as a constitutional instrument of European public order.[31]

In the present case, this constitutional instrument has been fully used by the Court not only to remedy the harm done to the applicant, but to reproach the political-constitutional choice made in section 11(2) of the Transitional Provisions of the Fundamental Law, in conjunction with section 185 of the 2011 Organisation and Administration of the Courts Act.[32] The memorable paragraph 118 of the judgment, read in the light of paragraph 110, determines that section 11(2) of the Transitional Provisions of the Fundamental Law and section 185 of the 2011 Act lacked legal effect in the domestic order. Since these provisions are null and void *ab initio* and devoid of any legal effects within the domestic legal order, the respondent State is obliged to act as if they have never been enacted. With this finding, the Court is not entering uncharted waters, but merely following the

30. See *Anchugov and Gladkov v. Russia*, nos. 11157/04 and 15162/05, § 50, 4 July 2013; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, §§ 40-41 and 54, ECHR 2009; *Dumitru Popescu v. Romania (no. 2)*, no. 71525/01, § 103, 26 April 2007; and *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 29, *Reports of Judgments and Decisions* 1998-I. Similar principles have been ascertained under the American Convention on Human Rights by the IACtHR, especially since the judgment in "*The Last Temptation of Christ*" *(Olmedo-Bustos et al.) v. Chile* (merits, reparations and costs), 5 February 2001, Series C No. 73 (see Mac-Gregor, "The Constitutionalization of International Law in Latin America, Conventionality Control, The New Doctrine of the Inter-American Court of Human Rights" in *AJIL Unbound* (1 November 2015) and the case-law referred to therein).

31. *Loizidou v. Turkey* (preliminary objections), 23 March 1995, § 75, Series A no. 310. According to Decision no. 61/2011. (VII. 13.) AB of the Constitutional Court of the Republic of Hungary, ABH 2011, 290, 321, it follows from the principle of *pacta sunt servanda* that the Constitutional Court must follow the Court's case-law even if it has not been derived from its own precedents. One example of this is Decision no. 4/2013. (II. 21.) AB of the Constitutional Court of the Republic of Hungary, ABH 2013, 188-211, which followed the Court's judgment in *Vajnai v. Hungary* (no. 33629/06, ECHR 2008), on criminalisation of the use of the five-pointed red star. Lower courts have also provided excellent examples of this attitude, such as the remarkable Decision 5.Pf.20.738/2009/7 by the Budapest-Capital Regional Court of Appeal, delivered in the Hungarian Guard case.

32. The IACtHR has consistently emphasised both the personal-subjective and the institutional-objective aspects of the independence of the judiciary, establishing an intimate relationship between the latter and "essential aspects of the rule of law and the democratic order itself" (*Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* (preliminary objection, merits, reparations and costs) judgment of 23 August 2013, § 154, Series C No. 266).

standard set long ago by *Barrios Altos* for domestic laws which violate the "block of conventionality".[33]

24. Although not stated explicitly, the consequences of the present judgment are unequivocal under Article 46 of the Convention: Hungary must implement the present judgment in good faith and proceed to a declaration of nullity in the domestic order of any domestic legislation, regulation or administrative act breaching the Convention as interpreted by the Court in this judgment; and, in consequence, it must reinstate the applicant as President of the Supreme Court for the entire duration of his interrupted mandate.[34]

Conclusion

25. The Convention today represents the European *jus constitutionale commune*. On the basis of the Convention, the Council of Europe may put forward a strong European constitutional claim, if need be, against any contradicting domestic constitutional claim, regardless of the size of the supporting political majority.[35] In the present case, the Court did exactly that. And rightly so, for the sake of protecting first and foremost the rule of law and the institutional and functional independence of the judiciary in Hungary and, secondarily, the applicant's individual right not to be sacked arbitrarily from his post as President of the Supreme Court. The respondent State could hide behind neither the principle of subsidiarity nor the doctrine of the margin of appreciation. In Europe, there is no cover from duly accepted international human rights law obligations in the thicket of domestic law, including constitutional law. May this highly demanding standard of human rights protection be applied equally to all Contracting Parties to the Convention.

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33. Judgment of the IACtHR in *Barrios Altos v. Peru* (reparations and costs), 30 November 2001, § 44, Series C No. 87, followed by, *inter alia*, the judgment in *Almonacid Arellano et al. v. Chile* (preliminary objections, merits, reparations and costs), 26 September 2006, § 119, Series C No. 154.

34. See, *mutatis mutandis*, *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 208, ECHR 2013.

35. As the IACtHR has quite rightly pointed out, breaches of human rights law may not be whitewashed by a vote of the political majority, even if the vote is democratic and the majority large (judgment of the IACtHR in *Gelman v. Uruguay* (merits and reparations), 24 February 2011, §§ 238-39, Series C No. 221).

CONCURRING OPINION OF JUDGE SICILIANOS

(Translation)

1. I share both the conclusion and the reasoning in the present judgment. However, given this case's more general importance from the perspective of the independence of the judiciary, I should like to make the following observations with regard, more specifically, to the scope of this principle under Article 6 § 1 of the Convention.

Judicial independence in the Court's case-law under Article 6 § 1 of the Convention: the right of persons involved in court proceedings to an independent judge

2. It is well known that the Court has repeatedly insisted, for more than thirty years, that a court must be independent both of the parties and of the executive. The judgment in *Campbell and Fell v. the United Kingdom* (28 June 1984, § 78, Series A no. 80) contains the now classic wording:

> "In determining whether a body can be considered to be 'independent' – notably of the executive and of the parties to the case (see, *inter alia*, the *Le Compte, Van Leuven and De Meyere* [*v. Belgium*] judgment of 23 June 1981, Series A no. 43, § 55) –, the Court has had regard to the manner of appointment of its members and the duration of their term of office (ibid., § 57), the existence of guarantees against outside pressures (see the *Piersack* [*v. Belgium*] judgment of 1 October 1982, Series A no. 53, § 27) and the question whether the body presents an appearance of independence (see the *Delcourt* [*v. Belgium*] judgment of 17 January 1970, Series A no. 11, § 31)."

The Court has added in this regard that what is at stake is "the confidence which such tribunals must inspire in the public" (see *Clarke v. the United Kingdom* (dec.), no. 23695/02, ECHR 2005-X).

3. Similarly, the Court has also emphasised the judiciary's necessary independence from the legislative. Thus, in *Stran Greek Refineries and Stratis Andreadis v. Greece* (9 December 1994, § 49, Series A no. 301-B), it noted in general terms that

> "[t]he principle of the rule of law and the notion of fair trial enshrined in Article 6 ... preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute".

The formula in question, frequently repeated since (see, for example, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 23 October 1997, § 112, *Reports of Judgments and Decisions* 1997-VII; *Zielinski and Pradal and Gonzalez and Others v. France* [GC], nos. 24846/94 and 9 others, § 57, ECHR 1999-VII; *Scordino v. Italy (no. 1)* [GC], no. 36813/97, § 126, ECHR 2006-V; and *Tarbuk v. Croatia*, no. 31360/10, § 49, 11 December 2012), conveys the idea of the separation of powers.

4. The principle of the independence of the judiciary is not simply a matter of its relations with the executive and the legislative branches. It also concerns judicial independence within the system of the administration of justice itself. Judges must be free, in their individual capacity, not only from any external influence, but also from any "inside" influence. This "internal judicial independence" implies that judges do not receive instructions and are not subjected to pressure from their colleagues or from persons exercising administrative responsibilities in a court, such as the president of a court or the president of a court's section (see *Parlov-Tkalčić v. Croatia*, no. 24810/06, § 86, 22 December 2009, and *Agrokompleks v. Ukraine*, no. 23465/03, § 137, 6 October 2011; see also *Moiseyev v. Russia*, no. 62936/00, § 182, 9 October 2008). The absence of sufficient guarantees ensuring judges' independence within the judicial branch, and especially *vis-à-vis* their superiors within the judicial hierarchy, could lead the Court to conclude that an applicant's doubts as to the independence and impartiality of a court may be said to have been objectively justified (see *Parlov-Tkalčić*, cited above, § 86; *Agrokompleks*, cited above, § 137; *Moiseyev*, cited above, § 184; and *Daktaras v. Lithuania*, no. 42095/98, §§ 36 and 38, ECHR 2000-X).

5. Thus, the Court's case-law has addressed several aspects of the principle of judicial independence: independence *vis-à-vis* the parties, independence from the executive and legislative powers, and internal judicial independence. However, all these aspects of judicial independence have been assessed from the perspective of the right of "everyone ... to a fair and public hearing ... by an independent and impartial tribunal established by law ...". In other words, the letter of Article 6 § 1 of the Convention has led the Court to analyse the issue of judicial independence from the perspective of *the rights of persons involved in court proceedings* and not from that of *judges' subjective right* to have their own independence guaranteed and respected by the State.

6. The present case lent itself, *a priori*, to an examination of this latter aspect. However, under Article 6 the applicant relied solely on the more traditional aspect of the right to a fair hearing, namely the right of access to a court. In those circumstances, the Court, quite rightly, restricted its assessment to the right relied upon. Nonetheless, the principle of judicial independence is omnipresent in the judgment. In the Facts part, the Court quotes numerous international, universal and regional texts, including case-law examples concerning judicial independence and the related principle of the irremovability of judges (see paragraphs 72-87 of the judgment). In the Law part, these principles are examined *in extenso* from the perspective of the applicant's right to freedom of expression.

The non-binding international texts: judicial independence includes the judge's subjective right to independence

7. Of the non-binding texts quoted in the judgment, several emphasise the judge's subjective right to his or her independence. Thus, after having asserted that "[j]udicial independence and impartiality are essential prerequisites for the operation of justice", the Magna Carta of Judges (Fundamental Principles), adopted by the CCJE in November 2010, adds (as quoted in paragraph 81 of the judgment, with italics added) that

> "[j]udicial independence shall be statutory, functional and financial. It shall be guaranteed with regard to the other powers of the State, to those seeking justice, *other judges* and society in general, by means of national rules at the highest level ..."

Similarly, the Venice Commission has considered that "the interest of maintaining the independence of the judiciary and the good administration of justice requires that the judiciary be protected against arbitrary dismissal and interference in the exercise of the functions" (Opinion quoted in paragraph 82 of the judgment; see also paragraph 97 of the Joint Opinion of the Venice Commission and the Directorate of Human Rights (DHR) of the Directorate General of Human Rights and the Rule of Law (DGI) of the Council of Europe, quoted in paragraph 83 of the judgment).

The International Covenant on Civil and Political Rights and the American Convention on Human Rights: essentially the same wording as the European Convention

8. Beyond these non-binding texts and opinions, the interpretation of conventions and agreements containing similar or even identical wording to that of Article 6 of the Convention with regard to the right to an "independent tribunal" is of even greater importance. It should be noted that Article 14 § 1 of the International Covenant on Civil and Political Rights (ICCPR) states that

> "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...".

Article 8 § 1 of the American Convention on Human Rights also contains a similar provision:

> "Every person has the right to a hearing, with due guarantees ... by a competent, independent, and impartial tribunal, previously established by law ..."

In other words, the wording of these two binding instruments, like that of the Convention, approaches the issue of judicial independence in terms of the rights of persons involved in court proceedings, and not from the perspective of the judge's subjective right to have his or her own independence guaranteed and respected by the State (including within the judiciary).

The case-law of the Human Rights Committee: highlighting the judge's right to independence

9. In spite of the above-cited wording of Article 14 § 1 of the ICCPR, the Human Rights Committee has nonetheless on several occasions approached the issue from the perspective of the rights of judges themselves, and of the State's obligations towards them in safeguarding their independence. Here, we would refer primarily to General Comment No. 32 on Article 14 of the ICCPR (right to equality before courts and tribunals and to a fair trial). This General Comment emphasises the various aspects of the guarantee of independence from the perspective of the judges themselves (appointment, qualifications, security of tenure, remuneration, promotion, transfers, suspensions, dismissal, disciplinary measures, etc.), and the measures that the States should take to guarantee judges' effective independence and their protection from "any form of political influence in their decision-making", and from conflicts of interest and intimidation (see the passages quoted in paragraph 73 of the judgment).

10. This General Comment codifies, as it were, the Committee's practice, including with regard to "individual communications" concerning the right to a fair hearing. Thus, we note that the Committee has received various communications from judges themselves, alleging, in particular, that they were dismissed (or that their mandates were ended prematurely) in breach of the established procedures and safeguards. In these cases it has found that "those dismissals constitute[d] an attack on the independence of the judiciary protected by Article 14, paragraph 1, of the [ICCPR]" (see *Mundyo Busyo et al. v. Democratic Republic of Congo*, Communication No. 933/2000, 19 September 2003, passage quoted in paragraph 75 of the present judgment). Admittedly, in this case, as in others, it dealt with this type of communication under a combination of Article 14 § 1 of the ICCPR and Article 25 (c), which recognises the right of every citizen to have access, "on general terms of equality, to public service in his country". It is also true that the right of access to public office is not, as such, expressly protected by the Convention.[1] However, as is clear from the above-cited wording in the *Mundyo Busyo et al.* case, the Committee in that case examined the impugned dismissal not only under Article 14 § 1 of the ICCPR in combination with Article 25 (c), but also from the perspective of judicial independence as protected on an autonomous basis by Article 14. This approach was confirmed in the decision of the UN Human Rights Committee (CCPR) in *Bandaranayake v. Sri Lanka*, Communication

1. It is well known that Article 3 of Protocol No. 1, although developed and supplemented through case-law, is more limited in scope than Article 25 of the ICCPR.

No. 1376/2005, UN Doc. CCPR/C/93/D/1376/2005 (2008), where the Committee found, *inter alia*, that "the dismissal procedure [had] not respect[ed] the requirements of basic procedural fairness and failed to ensure that the author benefited from the necessary guarantees to which he was entitled in his capacity as a judge, thus constituting an attack on the independence of the judiciary" (see paragraph 76 of the present judgment).

The case-law of the Inter-American Court of Human Rights: from the right to an independent judge to the judge's right to independence

11. Similar observations apply, *mutatis mutandis*, with regard to the recent case-law of the Inter-American Court of Human Rights on the same subject, quoted in paragraphs 84 and 85 of the present judgment. In this connection, it is significant that the Inter-American Court in its judgment in *Supreme Court of Justice (Quintana Coello et al.) v. Ecuador* (preliminary objection, merits, reparations and costs), judgment of 23 August 2013, Series C No. 266, on the removal by parliamentary resolution of twenty-seven judges of the Supreme Court of Justice of Ecuador, built on its earlier case-law on the right to an independent judge, guaranteed by Article 8 § 1 of the American Convention in terms, as we have seen, that are practically identical to those used in Article 6 § 1 of the Convention. The text in paragraph 153 of that judgment (quoted in paragraph 84 of the present judgment) is particularly enlightening in this regard.

> "The foregoing serves to clarify some aspects of the Court's jurisprudence. Indeed, in the case of *Reverón Trujillo v. Venezuela*, the Court concluded that the right to be heard by an independent tribunal, enshrined in Article 8(1) of the Convention, only implied that a citizen has a right to be judged by an independent judge. However, it is important to point out that judicial independence should not only be analyzed in relation to justiciable matters, given that the judge must have a series of guarantees that allow for judicial independence. The Court considers it pertinent to specify that the violation of the guarantee of judicial independence, as it relates to a judge's tenure and stability in his position, must be examined in light of the conventional rights of a judge who is affected by a State decision that arbitrarily affects the term of his appointment. In that sense, the institutional guarantee of judicial independence is directly related to a judge's right to remain in his post, as a consequence of the guarantee of tenure in office."

12. This case-law was confirmed in two judgments, namely *Constitutional Tribunal (Camba Campos et al.) v. Ecuador* (preliminary objections, merits, reparations and costs), 28 August 2013, Series C No. 268, and *López Lone et al. v. Honduras* (preliminary objection, merits, reparations and costs), 5 October 2015, Series C No. 302. Thus, in the view of the Inter-American Court, it now appears established that Article 8 § 1 of the American Convention recognises not only the right of persons appearing before a court to an independent judge, but also the right of judges

themselves to have their independence safeguarded and respected by the State.

Towards a subjective right to judicial independence, protected by the Convention?

13. The above considerations give rise to the question of whether Article 6 § 1 of the Convention can be interpreted in such a way as to recognise, in parallel to the right of persons involved in court proceedings to have their cases heard by an impartial court, a subjective right for judges to have their individual independence safeguarded and respected by the State. A positive response to this question would indicate that the judges themselves could rely on Article 6, without necessarily having to prove that an interference with their independence had simultaneously amounted to an unjustified interference in the exercise of their right to freedom of expression or another right enshrined in the Convention. In other words, such an interpretation would strengthen the protection granted to judicial independence under the Convention.

14. It is well known that in *Golder v. the United Kingdom* (21 February 1975, Series A no. 18) the Court interpreted the Convention teleologically, for the purpose of identifying the right of access to a court in Article 6 § 1. After noting that the provision in question "does not state a right of access to the courts or tribunals in express terms" (ibid., § 28), it referred to all of the principles of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, including the importance of the preamble, which is "very useful for the determination of the 'object' and 'purpose' of the instrument to be construed" (ibid., § 34). In a similar vein, it drew attention to the "profound belief" of the signatory Governments in the rule of law, referred to in the preamble, and the key role of this concept in the Convention system. It concluded in this regard that "in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts" (ibid.). It also reiterated the terms of Article 31 § 1 (c) of the Vienna Convention, which indicates that account is to be taken also of "any relevant rules of international law applicable in the relations between the parties", including the "general principles of law recognized by civilized nations" within the meaning of Article 38 § 1 (c) of the Statute of the International Court of Justice. It noted that one of those principles forbids the denial of justice. Taking all of these aspects into consideration, it reached the still renowned conclusion that "[i]t would be inconceivable ... that Article 6 § 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court ... the right of access constitutes an

element which is inherent in the right stated by Article 6 § 1" (ibid., §§ 35-36).

15. The Court has since reiterated on numerous occasions the importance of the principle of the rule of law in the context of Article 6 of the Convention (see, purely by way of indication, *Siegle v. Romania*, no. 23456/04, § 32, 16 April 2013; *Varnienė v. Lithuania*, no. 42916/04, § 37, 12 November 2013; *Solomun v. Croatia*, no. 679/11, § 46, 2 April 2015; *Ustimenko v. Ukraine*, no. 32053/13, § 46, 29 October 2015; and *Amirkhanyan v. Armenia*, no. 22343/08, § 33, 3 December 2015), and also of the need to take account of the relevant rules of international law in interpreting and applying the Convention (see, among many other authorities, *Hassan v. the United Kingdom* [GC], no. 29750/09, §§ 100 and 102, ECHR 2014). In my opinion, however, the rule of law is hardly imaginable without an obligation on the State to offer safeguards for the protection of judicial independence and, hence, without the corresponding right of judges themselves to independence. Moreover, as is clear from the entirety of the international-law materials cited in the present judgment, judicial independence is today an integral part of the general principles of international law which must be taken into account in interpreting the Convention. Equally, an interpretation of Article 6 § 1 which finds that it protects the judge's subjective right to independence would be perfectly compatible with that provision's object and purpose. In this connection, I subscribe to the idea, set out in the Magna Carta of Judges, to the effect that "[j]udicial independence and impartiality are essential prerequisites for the operation of justice" (text quoted in paragraph 7 above). Indeed, how can one hope that persons involved in court proceedings will enjoy the right to an independent judge if judges themselves are not afforded safeguards capable of ensuring that independence? In my opinion, a subjective right of this sort for judges is inherent in the safeguards of the first paragraph of Article 6, and in the concept of a fair hearing. I believe that this approach is borne out by the above-mentioned case-law of the Human Rights Committee and of the Inter-American Court of Human Rights.

DISSENTING OPINION OF JUDGE PEJCHAL

To my regret, I have to dissent with regard to the finding of a violation of the Convention. I could not vote with the majority.

I can agree with the majority that this case is about freedom. But what is freedom? In his famous magnum opus *Law, Legislation and Liberty*, Friedrich Hayek stated as follows regarding the discipline of freedom:

> "Man has not developed in freedom. The member of the little band to which he had had to stick in order to survive was anything but free. Freedom is an artefact of civilization that released man from the trammels of the small group, the momentary moods of which even the leader had to obey. Freedom was made possible by the gradual evolution of the discipline of civilization which is at the same time the discipline of freedom. It protects him by impersonal abstract rules against arbitrary violence of others, and enables each individual to try to build for himself a protected domain with which nobody else is allowed to interfere and within which he can use his own knowledge for his own purposes. We owe our freedom to restraints of freedom."

I am convinced that the present case concerns the discipline of freedom. An individual who is one of the most senior representatives of the State must demonstrate the highest standard with regard to the discipline of freedom. Part of this discipline involves a strict separation of service to the community on the one hand, and one's own interests on the other. The Convention protects (in Hayek's words) all free citizens in a community "against arbitrary violence of others, and enables each individual to try to build for himself a protected domain with which nobody else is allowed to interfere and within which he can use his own knowledge for his own purposes".

The present case is rather straightforward. The applicant – a holder of State power (in the form of judicial office) – freely chose the means (and the content) of his "official speeches" to comment on the situation of or changes to the Hungarian judiciary. Presumably, he acted to the best of his knowledge and belief. But this presumption can only be mere speculation. Nobody can know the real motivation for his actions.

Most probably his "official speeches" did not convince even the President of the Republic or the members of parliament when they reached the decision that, in future, one of the holders of State power (in the form of judicial office) would not be the applicant, but someone else. Again, however, this is mere speculation. The decision by the President of the Republic and the members of parliament could have had an entirely different motivation.

Moreover, it is to be observed that the applicant's originally critical attitude was subsequently transformed into a supportive stance with regard to the action taken by the President of the Republic, the Government and the Parliament. How else can we explain the fact that the applicant ultimately accepted a high judicial function as "chairman of a civil bench of the

Kúria", a post that he continues to hold?! (See paragraph 13 of the Government of Hungary's memorial, dated 8 April 2015.)

In other words, no court (including an international court) can review, in the framework of the democratic rule of law, the reasons for the votes cast by the members of parliament in a free election. In my opinion, in the absence of a ruling by the Court on the free nature of the election in question, it is impossible to examine *de facto* the reasons for which a particular individual was elected to carry out the functions of the President of the *Kúria*. It is within the respondent State's margin of appreciation to lay down the conditions that a candidate must fulfil in order to be able to run for the post of President of the *Kúria*.

It is possible to imagine a scenario in which, following the adoption of amendments to the Hungarian Constitution, the applicant would be nominated by the President of the Republic and elected by the members of parliament to functions (President of the *Kúria*, President of the National Judicial Office) held by other persons at the material time. In such a scenario, would it also be possible to find a violation of the Convention? I do not suppose so.

In my opinion, an international court established by the member States of an international organisation cannot *de facto* decide on the question of who may or may not hold the highest judicial office in a sovereign democratic State, governed by the rule of law, which has equal standing to the other member States of that international organisation.

I am profoundly convinced that the Court is unable to apply any Article of the Convention or the Protocols thereto in the present case. A judge of this Court must also fulfil his or her duty to abide by the discipline of freedom.

DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I fully agree with the majority that judicial independence is a fundamental standard for a State governed by the rule of law. Nonetheless, although in my view there has been an unjustified interference with judicial independence in the instant case, I have voted, for the reasons set forth below, against finding a violation of the applicant's subjective rights under the Convention.

2. The existing paradigm of human rights protection is based on a clear distinction between the individual and the public authorities. The aim of the European Convention on Human Rights, and of other international human rights treaties, was to protect the subjective rights of individuals against public authority. This human rights protection paradigm developed in the context of the European legal tradition (see the references to a "common understanding and observance" of human rights and a "common heritage of political traditions" in the Preamble to the Convention). This legal tradition encompasses a certain number of deeply rooted fundamental concepts and distinctions. One should note here, in particular, the distinctions between: (1) official and private actions; (2) objective law and subjective rights; and (3) the Constitution and infra-constitutional legal rules. The approach adopted by the majority in the instant case sets aside those fundamental legal concepts and distinctions, and substantially transforms the paradigm of human rights protection in Europe.

3. The applicant in the instant case held the offices of President of the Supreme Court and President of the National Council of Justice in Hungary. Before the 2011 constitutional reform the President of the Supreme Court exercised mainly administrative powers, but also had certain powers related to the judicial function. He also represented the Supreme Court and performed certain tasks on its behalf. In particular, the President of the Supreme Court was entitled to speak for the Supreme Court and to take the floor in the Hungarian Parliament.

4. The applicant complains about State interference with actions undertaken in his official capacity. He does not complain about any interference with acts undertaken by him in a private capacity.

In cases where an applicant holds public office it is necessary to distinguish between the private person (the holder of the office) and the State organ in question (the office held). A person holding a public office may act either in an official capacity or in a private capacity. This distinction is much easier to draw in the case of collegial State organs, where a collective act or utterance is typically an official act, although one cannot exclude the possibility that on certain occasions members of a State organ may collegially perform private acts. In the case of single-person State organs, it may be much more difficult to draw a clear line between acts undertaken by an individual in his or her private capacity, on the one

hand, and the actions of the State organ itself, on the other. Personal views may then more easily influence the content of official acts.

It is important to stress that when acting in a private capacity an individual may undertake freely any actions which are not forbidden by law, and may pursue any interests that he or she wishes, including the most selfish ones. An individual acting in the capacity of a State organ may only undertake actions which are authorised by law and is under an obligation to promote the interests defined by law.

This first fundamental distinction entails a second: namely, the distinction between an individual's status and the status of the State organ that he or she represents. An individual is a holder of rights and duties in his or her relationship with the State. A State organ cannot be a holder of rights. Its status is analysed in terms of its tasks and powers, as well as its interactions with other State organs. Acts performed in an official capacity cannot fall within the ambit of guaranteed rights (see, for instance, under the German Basic Law, B. Bleckmann, *Staatsrecht II – Die Grundrechte* (Cologne – Berlin – Bonn – Munich, Carl Heymans Verlag, 1989), p. 123).

5. For the purpose of adjudicating human rights, it is also necessary to distinguish subjective (individual) rights from objective guarantees of the rule of law. The Convention protects individual rights. Individual rights are legal positions of individual persons, established by legal rules in order to protect the individual interests of the persons concerned, in particular their dignity, life, health, freedom, personal self-fulfilment and property (compare paragraph 158 of the judgment). This connection between individual rights and the individual interests of the right-holder is an essential element of the notion of an individual right. Objective guarantees of the rule of law may have a more or less direct impact on the status of the individual, but are primarily enacted to serve the public interest.

The majority refers several times to the international standards pertaining to the status of judges (see, in particular, paragraphs 114, 121, 168 and 172 of the judgment). Their reasoning gives the impression that those standards are important for the purpose of establishing the scope of the human rights protection to be afforded to persons holding judicial office. In this logic, judges' speech would enjoy stronger protection under the Convention than the speech of other citizens, as the universal guarantees of Article 10 are juxtaposed with the guarantees of judicial independence.

It is important to stress in this context that the office of judge, whether national or international, is first and foremost one of service to the community, in the same way as any other public office invested with public power. The principles of judicial independence and the irremovability of judges belong to the sphere of objective law. Constitutional democracies grant a certain sphere of autonomous power to the judiciary and, through the above-mentioned principles, protect this sphere against encroachments from the legislative and executive branches. Judicial independence and

irremovability are not laid down to protect the individual interests of judges or to facilitate their personal self-fulfilment, but rather to protect the public interest in fair judicial proceedings and the proper functioning of the justice system. They protect those citizens who seek justice, but not the individuals who exercise judicial power. These guarantees cannot be analysed as the individual rights of a judge, even if they co-define (with certain other legal rules) the legal status of the persons holding judicial office. A right-holder may decide freely how to exercise his or her rights and to what extent he or she may assert them through legal remedies. A judge is not free to decide how to assert judicial independence and to what extent it will be asserted before the other State authorities (see below).

The guarantees of judicial independence are not special human rights granted to individual persons holding judicial office, and they do not increase the degree of protection that individuals holding judicial office enjoy as human rights holders. Equally, they do not broaden the scope of the human rights enjoyed by those individuals. On the contrary, judicial integrity and independence may justify deeper interference with judges' rights than in the case of ordinary citizens.

These remarks apply *a fortiori* to the stability of tenure of a court's president, including the president of a Supreme Court. Stability of tenure is granted to a court's president for the sake of the proper exercise of judicial power. No individual interests motivate it. The person holding this office does not have any individual (subjective) right to retain office.

In this context, a clear distinction should be made between, firstly, the objective principles which define the status of the judiciary *vis-à-vis* the legislative and executive powers, and, secondly, the legal rules which define the scope of judges' human rights (in their private capacity) *vis-à-vis* the State.

6. For the purpose of human rights protection, a clear distinction should also be drawn between private and official speech.

Private speech encompasses, *inter alia*, the utterances of public officials, made in their private capacity and expressing their private views on various matters, including public questions. Private speech may therefore invoke the usual disclaimer that the utterance expresses the private views of the speaker and does not necessarily reflect those of the institution. Official speech encompasses utterances made in an official capacity, especially those expressing the official viewpoint of a State organ. The opinions expressed by the speaker are attributable to the institution he or she represents. In any event, it is necessary to distinguish between situations when an official exercises his or her freedom of speech in order to express private views on public matters and those situations when an official uses his or her office to speak on behalf of a public authority.

Speech is, by its very nature, an instrument of action that is available to every individual. Utterances are factual acts which usually do not produce

legal effects, and must be distinguished from acts of State authority, which are open only to public organs invested with State power. However, official speech is a very specific way of exercising public power, which has the potential to influence the behaviour of individuals and the attitude of other State organs. The importance of this tool should not be underestimated in a deliberative democracy. Furthermore, there is a real risk of abusing this instrument, for instance for the purpose of indoctrination or in order to affect the reputation of others.

The function of official speech is not to express private views. Speakers must remember that they present the official point of view of the official organ in question. They speak in the name of the State organ they represent, in order to achieve specific aims. One of the purposes of official speech is to interact with other State organs, within the broader framework of the checks and balances which ensure the separation of powers. In this context, official speech may be used as a tool to protect or assert a State organ's powers *vis-à-vis* other State organs. In any event, official speech is not a matter of freedom but, at most, a matter of discretion in the exercise of public power (compare, under the German Basic Law, H. Bethge, *Artikel 5* in: *Grundgesetz. Kommentar*, M. Sachs (ed.) (Munich, Verlag C.H. Beck 2014), p. 300).

7. The third-party interveners rightly stress the functions of the official speech of judges. The latter have a duty to speak out on matters concerning the administration of justice, in order to defend judicial independence and the rule of law. The majority also recognises the duty of the President of the National Council of Justice to express an opinion on legislative reforms affecting the judiciary (see paragraph 168 of the judgment).

Three elements are important here. Firstly, speaking out is a duty. Although the nature of this duty is not clearly explained in the reasoning, it may be assumed that it is not only a moral but also a legal duty. Secondly, it serves a specific public interest. Thirdly, it is perceived as a tool which serves to protect the position of the judicial branch in its relations with the other branches of State. These are three strong arguments against analysing official judicial speech as an expression of freedom. The sphere of judges' speech cannot be regarded as a domain of personal choice, but instead as a field subject to precise legal obligations, which have been imposed in the public interest and which restrict the choices available to a judge. In other words, judges' official speech is not a matter of individual freedom, but remains very strictly circumscribed and subordinated to the promotion of specific public interests. Public office in the judiciary is not a rostrum for the exercise of free speech.

The notion of freedom of expression enshrined in Article 10 of the Convention presupposes free choice as to whether to speak and what to say. In recognising that the applicant had a duty to speak out in defence of the

public interest, the majority seems to contradict the view that the utterances under consideration were covered by Article 10 of the Convention.

8. In the instant case, the applicant had legal capacity to represent the Supreme Court. The majority expressly recognises that the functions and duties of the President of the Supreme Court include the task of expressing views on legislative reforms which were likely to have an impact on the judiciary and its independence. All the utterances under consideration were made by the applicant in his official capacity (see paragraph 145 of the judgment). This essential circumstance, clearly established by the majority, was not disputed by the parties.

The applicant's utterances did not express his viewpoint as a citizen, but the official point of view of an organ of the Hungarian State. He could not and did not invoke the disclaimer that he was expressing only his private views, and not those of the institution he represented. There is no doubt that the utterances by the applicant which are at the basis of the applicant's complaint fall within the category of official speech.

The decisive issue in the instant case is whether the guarantees of Article 10 apply to official speech. In order to answer this question, it is necessary to understand the differences between private and public speech. Private speech is a matter of freedom of expression. The speaker does not need to have a legal basis to speak. Any utterance which is not prohibited is permitted. In contrast, official speech is a tool of public power. The speaker requires a legal basis to speak in his or her official capacity. There should be a legal basis for any official utterance. The choice as to the manner in which speech is used is not a matter of personal freedom but, at best, one of discretion in exercising public power. A State organ may not exceed the legal limits of discretion.

Applying Article 10 guarantees to official speech would mean that the manner in which a State organ speaks is to be considered a matter of personal freedom. Every communication which is not explicitly prohibited would be permitted. No specific legal basis for State organs to speak would be required and any restriction on official speech would have to comply with Article 10 § 2 of the Convention. Official speech could then, in principle, express private views and serve the personal interest of the right-holder, including the purpose of his or her personal fulfilment. A situation in which official speech interferes with the rights of another person could not be treated as mere State interference with that person's rights, but would instead represent a situation of conflict between the freedom of speech of the public official on the one hand, and the rights of that third person on the other. A very thorough balancing exercise would then be required to resolve the conflict between these conflicting rights. The approach taken by the majority, consisting in applying Article 10 to official speech, turns a matter of discretion in the exercise of a specific public power into a free act, covered by the guarantees of individual freedom. The extension of

Article 10 to official speech thus undermines the effective protection of the individual against the State.

For all those reasons, in my view, Article 10 is not applicable to official speech (compare, under Article 5 of the German Basic Law, C. Starck, *Artikel 5* in: *Kommentar zum Grundgesetz*, H. von Mangoldt, F. Klein, C. Starck (eds.) (Munich, Verlag Franz Vahlen, 1999), vol. 1, p. 659; and H.D. Jarass, B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (Munich, Verlag C.H. Beck, 2004), p. 195, as well as a decision of the German Federal Administrative Court – BVerwGE 104, 323 (326) – cited therein).

9. The second question is whether in the instant case there has been an interference with the applicant's rights.

The applicant was deprived of two public offices (President of the Supreme Court and President of the National Council of Justice), which means that he was deprived of public power. His patrimonial rights were also affected, in that he lost certain pecuniary benefits connected with the two public offices in question.

I note in this context that dismissal from public service is an interference with the rights of the dismissed person. However, the applicant was not dismissed from public service, since he preserved his office as judge.

I agree that depriving someone of pecuniary benefits affects that person's patrimonial rights and may constitute an interference with the human rights protected under Article 1 of Protocol No. 1. However, the Chamber declared these pecuniary grievances, raised in the application under Article 1 of Protocol No. 1, inadmissible, stressing that "[t]here is no right under the Convention to continue to be paid a salary of a particular amount" (see paragraph 105 of the Chamber judgment). As a result, the Grand Chamber could not examine this aspect of the case. It follows that the interference under consideration remains limited to the deprivation of public office.

The majority's reasoning is based on the idea that the deprivation of public power is an interference with individual rights. In my view, the approach adopted by the majority in this respect is extremely problematic from the viewpoint of human rights. Public power can never be part of a natural person's individual status. Although there exists an internationally recognised human right to take part in the conduct of public affairs and to have access to public service (see Article 25 of the International Covenant on Civic and Political Rights), there is no human right to preserve public power. Deprivation of public power may adversely affect the legal position of a State organ, but it does not affect, *per se*, the human rights of the holder of public power. Depending on the circumstances, it may, however, either affect the people (the Nation), who are the ultimate holders of sovereign power in a democratic State, or enable the sovereign people to assert their power *vis-à-vis* their representatives.

The mere fact that an individual was removed from public office entailing the exercise of public power and, in consequence, lost his or her public power should not be regarded *per se* as an interference with human rights. In a parliamentary regime, is a vote of no confidence in the Cabinet (which entails the resignation of its members) an interference with the human rights of those Cabinet members?

10. The third question to be answered is whether there is a causal link between the applicant's utterances and the termination of his mandate. The majority tries to compensate for a lack of sufficient evidence in this respect by establishing, for the purpose of assessing the instant case, new rules pertaining to the allocation of the burden of proof. According to the majority, the applicant must establish a prima facie causal link between his behaviour and the reaction of the authorities. Once this prima facie link has been established, the burden of proof would shift to the Government. In my opinion, the rules on the allocation of the burden of proof have not been applied in the instant case in full conformity with the standards of procedural justice.

Firstly, the rules applied by the majority are not couched in general terms. Surprisingly, the relevant part of the reasoning is worded as follows (see paragraph 149 of the judgment):

> "The Court is of the view that once there is prima facie evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof should shift to the Government."

The reasoning refers here to the specific situation of the applicant, giving the impression that the Court is applying an *ad hoc* rule, devised for the specific case of a specific person. Moreover, this rule is not set out in the general principles applicable to the case, but has been inserted in the analysis of the individual circumstances of the case.

Secondly, the rules on the burden of proof applied by the majority are not set out with sufficient clarity and precision. In particular, the majority does not state explicitly what exactly the Government ought to demonstrate. This lack of precision on such a crucial point obviously affects the outcome of the case.

Thirdly, the rules on the burden of proof are of crucial importance in deciding this case. These rules, as formulated by the Court in the instant case, go beyond a mere concretisation of the general requirement that justification must exist for an interference with rights and, moreover, they determine the scope of relevant factual elements for adjudication in this case. The European Court of Human Rights has previously insisted that a court should not surprise the parties by invoking, *ex officio*, important legal or factual elements which have not been discussed by them (see, in particular, the judgments in the following cases: *Clinique des Acacias and Others v. France*, nos. 65399/01 and 3 others, 13 October 2005; *Čepek v. the Czech Republic*, no. 9815/10, 5 September 2013; *Alexe v. Romania*,

no. 66522/09, 3 May 2016; and *Liga Portuguesa de Futebol Profissional v. Portugal*, no. 4687/11, 17 May 2016). Therefore, in accordance with the Court's case-law on adversarial proceedings, it would have been preferable to draw the parties' attention specifically to the rule of the burden of proof to be applied and to invite them to present their position in the light of this rule. The failure to do so affected the Government's position in the proceedings. The approach adopted seems to depart from the strict standards of a fair trial as developed by the Court itself.

Fourthly, any rule on the allocation of the burden of proof must have sufficient justification. It may be that such a rule does not necessarily reflect a generalisation about facts (based on the principle *praesumptio sumitur de eo quod plerumque fit*), but in any event it has to take into account the factual context in which it operates and have a strong axiological foundation. I note, furthermore, that in European legal culture there is wide acceptance of the principle *affirmanti non neganti incumbit probatio*. Although the Court affirms in the context of Article 2 and 3 cases that "Convention proceedings do not in all cases lend themselves to a strict application of the principle *affirmanti incumbit probatio*" (see, for example, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 49, ECHR 2014), exceptions to this principle require a strong justification. Even if there is no doubt that the Government should be required to justify reforms which entail interference with rights protected under the Convention, in cases such as the instant one the burden of proof as allocated by the Court may be extremely difficult (if even possible) to meet. Under the rules applied by the majority, a constitutional reform causing detrimental consequences to a specific person holding public office (or to a clearly identified group of office holders) who had previously criticised the Government will henceforth usually be considered as an unacceptable interference with that person's freedom of speech. Thus, the question of the allocation of the burden of proof in such cases should be re-examined.

Be that as it may, I am not persuaded that a causal link exists in the instant case. Apparently, the termination of the applicant's mandate was decided because the parliamentary majority in Hungary wanted to place persons holding views closer to its own in two key judicial posts. The impugned measure does not appear to be a sanction for past utterances, but rather a tool to influence the way in which two State organs will operate in the future. In other words, the applicant was most probably replaced not because of what he said or did not say in the past, but because he was considered to be a person who might try, in the future, to use his powers in a way that would hinder the parliamentary majority's policy. Obviously, in a State governed by the rule of law such a consideration can never justify interference with judicial independence.

11. The majority considers that the interference complained of did not pursue any of the legitimate aims listed in Article 10 § 2 (see paragraph 157

of the judgment). Nonetheless, it examines whether the interference was necessary in a democratic society. Such an approach is problematic, since the necessity of interference can be assessed only in the light of a legitimate aim. The existence of a legitimate aim is a logical pre-condition for the proportionality test. A measure must be "proportionate to the legitimate aim pursued" (see paragraph 158 of the judgment). Without any legitimate aim, the whole question of necessity becomes devoid of purpose.

12. In the instant case, the majority – quoting the existing case-law – contends that Article 6 is applicable if the following conditions are met: (1) there is a right at stake, protected by national legislation; and (2) this right has a civil character. Furthermore, the majority alleges that Article 6 is not applicable to employment disputes concerning civil servants if: (3) access by civil servants to domestic courts is excluded in a general, abstract and foreseeable manner, and (4) the exclusion serves a legitimate purpose and is proportionate. In my view, the two first criteria are not met, whereas both criteria 3 and 4, excluding the protection of Article 6, are met.

Firstly, the legal position of the applicant as he was affected by the reform cannot be analysed as a subjective right. There is no doubt that the applicant cannot be removed from his post as judge. In such an event, what would have been at stake would be the individual right of access to public service. However, the case does not concern an individual's dismissal from the office of judge, but the termination of specific administrative positions within the judiciary. It is true that, prior to the constitutional reform, Hungarian legislation provided for a six-year mandate and defined the specific conditions for its termination. However, as explained above, this rule was not enacted to protect the individual interests of the office holder, but rather the public interest in judicial independence. In particular, it was not established to enable the applicant to make plans for his personal future, but to ensure the proper conditions for the exercise of judicial power. A holder of public office entrusted with public power does not enjoy a subjective right not to lose that power.

Even assuming that the applicant's legal position were a subjective right, it would have been necessary to establish the exact nature of this right and to determine who the right-holder is, who the right-debtors are (i.e. the bodies which have the obligation to implement the right) and what the exact content of the right is. In particular, it was necessary to determine the scope of the State organs against whom a right may be asserted. Not all rights recognised in domestic law can be asserted against Parliament acting in its capacity as an ordinary lawmaker, let alone in its capacity as Constitution-maker.

Secondly, litigation on the removal of an individual from the office of President of the Supreme Court or President of the National Council of Justice is not civil in nature, but pertains to the area of public law. It

concerns a public-law dispute between two State organs over their respective positions and the scope of their powers.

Thirdly, it is true that the constitutional rule in question affected one specific person. In my opinion, however, access to a court was ruled out in a general, abstract and foreseeable manner by the very fact that the impugned provisions were constitutional in nature. The constitutional rank of the provisions unequivocally excluded their judicial review *per se*. The majority recognises that there was no doubt that the applicant could not lodge a constitutional complaint before the Constitutional Court (see paragraph 75 of the Chamber judgment).

Fourthly, I agree that the High Contracting Parties must exercise their constituent power in compliance with the obligations stemming from the Convention. At the same time, in establishing the content of those obligations in respect of effective remedies and access to courts, one must also take into account the peculiarities of the constituent power in a democratic State. The exclusion of constitutional measures from judicial review serves the purpose of preserving popular sovereignty, which finds one of its expressions in the freedom of the constituent power. It protects the right of the people to choose freely a constitutional system as a foundation and frame for the exercise of public power. It has a strong basis in Article 3 of Protocol No. 1, which protects the right to elect a legislative organ (see below).

In my view, Article 6 is not applicable to the "right" identified by the majority in the instant case and could not therefore have been violated.

13. One of the difficulties in the present case stems from the hierarchical structure of law. Any rule of lower rank must be compatible with the rules of higher rank and, in particular, all ordinary legislation must be compatible with the Constitution. At the same time, a rule of higher rank may amend rules of lower rank.

The applicant's legal position, examined by the majority, was defined by ordinary legislation. His alleged right was therefore protected by ordinary legislation. The President of the Supreme Court enjoyed protection from the executive and legislative branches of State. He did not enjoy protection from the Constitution-maker. The majority's reasoning is intended to demonstrate that the applicant had a "right" not to be removed from the office of President of the Supreme Court under ordinary legislation. However, at the same time the majority – without even discussing the question – decides that the guarantees introduced by a *pouvoir constitué* can be opposed to the *pouvoir constituant*. The "right" identified by the majority and the "right" protected by domestic legislation are therefore different. The latter protects only against the *pouvoirs constitués*, whereas the former is supposed to offer protection also against the *pouvoir constituant*, under the scrutiny of the European Court of Human Rights.

The majority's argument is developed as though all the legal rules in the Hungarian legal system had the same hierarchical rank. The question arises, however, how guarantees of stability of tenure derived from ordinary legislation could bind the organ representing the sovereign will of the people when it enacts legal rules that have a higher rank in the legal hierarchy. Unlike rights protected by international treaties, rights granted in the national legal system do not – by their very nature – offer protection against constitutional amendments. If the European Convention on Human Rights is capable of transforming constitutional rights which are not covered by the Convention into supra-constitutional rights, then this should have been clearly explained.

Furthermore, the impugned measures were introduced not by way of ordinary legislation but by way of constitutional laws. The national Constitution is the most fundamental expression of popular sovereignty. Its adoption and subsequent modification require a special procedure, with qualified majorities, which ensures strong legitimacy based on consensus between the main political parties or, at least, particularly wide political support for the majority party. Moreover, popular sovereignty means that, in principle, the people have power to appoint and recall the holders of public power. The constitutional autonomy of the State is a precondition of democratic government.

14. In the instant case, the majority finds a violation of Article 6 of the Convention because the applicant could not challenge the impugned constitutional provisions before a domestic court. It therefore finds a violation because judicial review of those provisions was not available in Hungary.

I note that the Court has hitherto never stated that the Convention requires that judicial review of legislation be introduced. On the contrary, it has endorsed the opposite view. It is worth noting that in *Paksas v. Lithuania* ([GC], no. 34932/04, § 114, 6 January 2011), the Court explained that

> "Article 13 of the Convention, which does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 85, Series A no. 98; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 113, ECHR 2002-VI; *Roche v. the United Kingdom* [GC], no. 32555/96, § 137, ECHR 2005-X; and *Tsonyo Tsonev v. Bulgaria*, no. 33726/03, § 47, 1 October 2009), likewise cannot require the provision of a remedy allowing a constitutional precedent with statutory force to be challenged ...".

The Court seems to depart from its own approach in the present case. In certain circumstances at least, judicial review of legal rules would now appear to be a requirement under the Convention.

Furthermore, the majority requires judicial review not only for ordinary legislation but also for constitutional provisions. However, in many

democratic countries judicial review of constitutional laws does not exist. In others, it may be limited to the enactment procedure, whereas the content of constitutional laws is immune from judicial review. Exceptionally, the courts may review the substance of constitutional laws (see, for instance, the judgment of the Supreme Court of India of 24 April 1973, in the case of *His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*., (1973) 4 SCC 225). If the new approach developed by the European Court of Human Rights in the instant case is confirmed in future, this will entail a major transformation of European constitutionalism.

Article 3 of Protocol No. 1 protects the right of citizens to elect a legislative organ. The right to elect a legislative organ is meaningful if that organ enjoys wide legislative powers. This provision is the legal basis for recognising a wide margin of appreciation to the High Contracting Parties under the Convention (see my separate opinion appended to the judgment in *Firth and Others v. the United Kingdom*, nos. 47784/09 and 9 others, 12 August 2014). This applies *a fortiori* to the Constitution-making organs, whose decisions are taken under special procedures ensuring broad political legitimacy at national level. However, under the approach adopted in the instant case, the most important expression of popular sovereignty, namely the national Constitution, would now be subject to scrutiny under the Convention by an international court. Moreover, this scrutiny extends to the actual motives for constitutional reforms. The present judgment is an important step towards substantially limiting the constitutional autonomy of the High Contracting Parties.

15. The majority decided to grant the applicant compensation in respect not only of pecuniary but also of non-pecuniary damage. This part of the judgment triggers two objections. Firstly, it seems difficult to reconcile with the Chamber's decision not to examine the application under Article 1 of Protocol No. 1. Compensation for pecuniary damage would have been appropriate had there been unlawful interference with the applicant's possessions. Secondly and more fundamentally, as stated above, the measure under consideration was an interference with judicial independence, not with the applicant's individual rights.

16. I would like to point out another problematic consequence of the judgment in the instant case. Freedom always presupposes responsibility. Stressing judges' freedom of speech when they are acting in their official capacity entails stricter personal liability on the part of judges for their actions. If judges acting in their official capacity are to be entitled to claim that they are exercising their human rights, and even to receive pecuniary compensation for unlawful interference with their official acts, then they should also be held personally liable for any infringement of the law. This judgment may be used as an argument in favour of broadening judges' personal liability for their official acts in general.

17. Finally, I note that the majority, in devising its argumentation for the reasoning, decided to ignore the legal issues and arguments raised by the minority. The public will judge whether this choice strengthens the persuasive force of the judgment.

18. In conclusion, I should like to stress that, in my view, the instant case is a public-law dispute between two organs of the Hungarian State: the Supreme Court and Parliament, acting in its capacity as the constituent power. It concerns fundamental questions of the rule of law in general and judicial independence in particular, but it remains outside the scope of the jurisdiction of the European Court of Human Rights. Other tools exist for protecting judicial independence within the framework of the Council of Europe and within the European Union.

The majority decided to consider that certain legal positions of State organs are covered by the provisions of the Convention, extending their applicability to State organs. Moreover, legal rules pertaining to judicial independence are interpreted in a manner which seems to transform them into special human rights granted to judges. In this way the Court has extended its jurisdiction to certain public-law disputes between State organs, by trying to characterise them as human rights disputes. This is a major change in the European paradigm of human rights protection and a challenge to the European legal tradition. I am concerned that this approach, consisting in tacitly recognising human rights to State organs, may – in a longer-term perspective – undermine the efficiency of human rights protection in Europe.