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Stakeholder Submission to the UN Human Rights Council's Universal Periodic Review

Hungary: 25th Session

Independence of Lawyers and Judges in Hungary

About the IBAHRI:

Established in 1947, the International Bar Association (IBA) is the world's leading organisation of international legal practitioners, bar associations and law societies. The IBA influences the development of international law and shapes the future of the legal profession throughout the world. It has a membership of over 55,000 individual lawyers and 206 bar associations and law societies spanning all continents and has considerable experience in providing assistance to the global legal community.

The IBAHRI was established in 1995 and works across the IBA helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession worldwide. The IBAHRI holds that lawyers and judges play a fundamental role in facilitating access to justice, ensuring accountability of the state and upholding the rule of law. When the legal profession is not able to function independently or effectively, this gives rise to human rights violations, impunity and injustice.

1. Methodology

- 1.1. Since Hungary underwent the first UPR cycle on 5 May 2011, the IBAHRI has conducted two fact-finding missions to the country to examine the independence of the judiciary and legal profession and the rule of law.
- 1.2. The IBAHRI's first mission was conducted in March 2012 and assessed the impact of legislative reforms, comprising the new Fundamental Law of Hungary (the Hungarian Constitution) of 1 January 2012 and accompanying legislation, on the independent functioning of the judiciary and the rule of law. The resulting report, published in September 2012, presented the IBAHRI's findings and recommendations.¹
- 1.3. In June 2015, the IBAHRI undertook a follow-up mission to examine the implementation of the IBAHRI's 2012 recommendations and re-assess the situation of the rule of law in the country. The mission report will be published in October 2015. Both fact-finding missions were organised with the support of the Hungarian Bar Association.
- 1.4. The information and recommendations in this submission are based on the findings from the IBAHRI's 2015 fact-finding mission.

2. Normative Framework

A. Scope of international obligations

- 2.1. Hungary is a party to all of the main United Nations (UN) human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR). Hungary ratified the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) on 12 January 2012 in line with recommendations of the UPR 2011.
- 2.2. Article Q(2) of the Fundamental Law requires Hungary to ensure that Hungarian law is in conformity with international law. Article Q(3) provides that, 'Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by publication in pieces of legislation.' Article 1(2)(d) of the Fundamental Law requires parliament to 'authorise recognition of the binding nature of any international agreement subject to its responsibilities and competences'.

¹ IBAHRI Report, *Courting Controversy: the Impact of the Recent Reforms on the Independence of the Judiciary and the Rule of Law in Hungary* (September 2012), available in English at: www.ibanet.org/Article/Detail.aspx?ArticleUid=f95a6bf2-99cf-42c8-9c24-d3b7a531207c.

B. Independence of the judiciary

Judicial administration

- 2.3. International law requires that the body responsible for overseeing all functions associated with the administration of justice, including the management of judges' careers, acts independently of the executive and legislative powers.²
- 2.4. Specifically, the UN Special Rapporteur on the independence of judges and lawyers has recommended that judges be selected and appointed by an independent body that should have a plural and balanced composition and in which judges form a majority.³ On judicial promotions, the Special Rapporteur recommends that 'final decisions on promotions should be preferably taken by an independent body in charge of the selection of judges, composed of at least a majority of judges'.⁴
- 2.5. The Fundamental Law of Hungary and implementing legislation introduced reform to, among other issues, the administration of justice in Hungary. Cardinal Act CLXI of 2011 on the Organisation and Administration of Courts (AOAC) established two new judicial institutions: the National Judicial Office (NJO), whose president is elected by the Hungarian legislature on the recommendation of the President of the Hungary;⁵ and the National Judicial Council (NJC), an autonomous judicial body comprised solely of judges elected by their peers. The mandate of these two institutions is set out in the Fundamental Law at Article 25(5): 'The central responsibilities of the administration of the courts shall be performed by the President of the [NJO]. The [NJC] shall supervise the central administration of the courts. The [NJC] and other bodies of judicial self-government shall participate in the administration of the courts.'
- 2.6. The reformed composition of the NJC contrasts positively with the previous model of Hungary's High Judicial Council, the National Council for the Judiciary, whose membership included the Minister of Justice and two members of parliament, and is to be welcomed.
- 2.7. However, under the current distribution of judicial functions, the IBAHRI finds that the NJC holds insufficient power to supervise the administration of justice effectively and thereby guarantee judicial independence.
- 2.8. In two Communications from the UN Special Rapporteur on the independence of judges and lawyers to the Government of Hungary pursuant to Human Rights Council resolution 17/2, dated 14 May 2012 and 3 July 2013, the Special Rapporteur expressed concern at the

² UN Human Rights Committee, General Comment No 32, UN Doc CCPR/C/GC/32, 99th session, Geneva, 9–27 July 2007, [19] states: 'The requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and legislature.'

³ Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, UN Doc A/HRC/11/41, 24 March 2009, [28].

⁴ *Ibid*, Report of the Special Rapporteur (2009) [71].

⁵ Fundamental Law Article 25 (6).

broad powers held by the president of the NJO (PNJO) from the perspective of an independent justice system.⁶

- 2.9. While Hungary has taken positive steps since 2012 to transfer select functions from the PNJO to the NJC, the former retains a key role in the selection, appointment and termination of judicial positions;⁷ can transfer and assign judges;⁸ and has a role in judicial discipline.⁹
- 2.10. With reference to judicial appointments, the PNJO can decide to annul a call for judicial applications with the result that none of the applicants shortlisted by the selection panel of judges is appointed. While the NJC can veto a decision taken by the PNJO relating to a judicial appointment,¹⁰ it is the PNJO who makes a recommendation to the President of the Hungary for the appointment and dismissal of judges. The PNJO also has the exclusive power to appoint and remove heads of courts, including presidents and vice-presidents of the Courts of Appeal.¹¹

Recommendation 1

Implement the recommendations of the UN Special Rapporteurs on the independence of judges and lawyers and review the judicial appointments procedure to ensure that a genuinely plural body with a majority of judges elected by their peers makes the final decision on the selection, appointment and promotion of judges.

Recommendation 2

Grant all functions relating to judicial transfer, suspension and cessation of judicial functions to the independent body of judicial self-government, the NJC, to guarantee the independent functioning of the judiciary.

The Constitutional Court

- 2.11. The UN Basic Principles on the Independence of the Judiciary provide that it is ‘the duty of all governmental and other institutions to respect and observe the independence of the judiciary’.¹² Principle 3 of the UN Basic Principles states that ‘The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.’

⁶ See, Communications of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, 14 May 2012 (UN Doc UA G/SO 214 (3-3-16) HUN 1/2012) and 3 July 2013 (UN Doc AL G/SO 214 (3-3-16) HUN 3/2013) accessible at [https://spdb.ohchr.org/hrdb/20th/UA_Hungary_29.02.12_\(1.2012\).pdf](https://spdb.ohchr.org/hrdb/20th/UA_Hungary_29.02.12_(1.2012).pdf), and [https://spdb.ohchr.org/hrdb/24th/public_-_AL_Hungary_03.07.13_\(3.2013\).pdf](https://spdb.ohchr.org/hrdb/24th/public_-_AL_Hungary_03.07.13_(3.2013).pdf), respectively.

⁷ The PNJO presents a proposal to the President of Hungary regarding the appointment and removal of judges (AOAC, s 76 (5) (b)), but independently appoints and removes presidents of court (AOAC, s 128(2)).

⁸ Act CLXII of 2011 on the Legal Status and Remuneration of Judges, ss 34 and 33, respectively.

⁹ AOAC s 76 (6) (d).

¹⁰ *Ibid*, s 103 (3) (c).

¹¹ *Ibid*, s 128 (2).

¹² The UN Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, UN Doc A/COND.121/22/Rev.1.

- 2.12. The Fundamental Law restricted the Constitutional Court's jurisdiction on taxation and budgetary matters while state debt exceeds half of Hungary's gross domestic product (GDP).¹³
- 2.13. The adoption of the Fourth Amendment to the Fundamental Law further restricted the Constitutional Court's jurisdiction. This amendment repealed Constitutional Court decisions taken prior to 1 January 2012; limited its power to review the Fundamental Law and amendments thereto; and extended the limitation on the Court's jurisdiction to review financial legislation to laws passed 'even if state debt no longer exceeds half of the [GDP]'.¹⁴ These restrictions were not lifted by the subsequent Fifth Amendment to the Fundamental Law.
- 2.14. This restriction of the Constitutional Court's jurisdiction undermines the independence of the judiciary.

Recommendation 3

Implement the UN Basic Principles on the Independence of the Judiciary and repeal all provisions of national law that represent a restriction on the Court's jurisdiction.

Pre-trial detention

- 2.15. The right to freedom of liberty is enshrined in Article 9 of the ICCPR. Deprivation of liberty must be an exceptional measure and is fundamental to the presumption of innocence and the right to a fair trial.
- 2.16. An amendment to Act XIX of 1998 on the Code of Criminal Proceedings (ACCP) abolished the limitation on pre-trial detention of four years in cases where the penalty of imprisonment is more than 15 years, or life. The amendment is in conflict with the right to fair trial within a reasonable time under Article 14 of the ICCPR, and creates a tension with Article 64/A (1) a) of the ACCP, which requires the authorities to proceed without delay. The amendment is further likely to discourage expedition in the investigation and prosecution of offences to the detriment of the human rights of affected pre-trial detainees.

Recommendation 4

Uphold international law and impose a reasonable limit on the period of pre-trial detention for all crimes and consider the use of alternatives to pre-trial detention.

¹³ Fundamental Law Article 37 (4).

¹⁴ Fundamental Law Article 37 (5).

Civil society

- 2.17. UN Human Rights Council resolution 27/31 on civil society space acknowledges the ‘crucial importance of the active involvement of civil society, at all levels, in processes of governance and in promoting good governance, including through transparency and accountability, at all levels, which is indispensable for building peaceful, prosperous and democratic societies’.¹⁵
- 2.18. The Special Rapporteur on the rights to freedom of peaceful assembly and of association states that ‘civil society is an essential component for the promotion of human rights, democracy and the rule of law: therefore states should create and maintain a safe and enabling environment in which [civil society organisations] can operate free from hindrance and insecurity’.¹⁶
- 2.19. Contrary to international standards, Hungary has displayed a tendency not to engage with civil society. The period permitted for civil society organisations (CSOs) to comment on draft human rights legislation has on occasion been clearly insufficient. An amendment to the Asylum Act – which comprised 17 pages consisting of 45 sections – was published on 19 June 2015. The deadline given for submitting comments was the same day, 19 June 2015. The draft law implementing OPCAT was accorded one day only for public consultation.
- 2.20. The space for civil society activity has recently faced restriction. In 2014, Hungary began inspections into and initiated a state audit against over 50 CSOs who received funding from an EEA/Norway grant for non-governmental organisations.
- 2.21. Members of Hungary’s governing coalition have also made public verbal attacks against civil society activity, including an insinuation by Hungary’s Prime Minister that CSO representatives were paid ‘political activists who are trying to help foreign interests’.¹⁷
- 2.22. One deeply regrettable repercussion of the hostile public statements made against CSOs by members of government has been the withdrawal of certain eminent CSOs from the government’s inter-ministerial Human Rights Working Group,¹⁸ an important initiative that was established in February 2012 as a result of Hungary’s 2011 UPR.

¹⁵ Human Rights Council Resolution on Civil Society Space, UN Doc A/HRC/REC/27/31 (3 October 2014).

¹⁶ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, (UN Doc A/HRC/23/39, 24 April 2013).

¹⁷ See, Transparency International, Hungarian Civil Liberties Union, Hungarian Helsinki Committee and Eötvös Károly Policy Institute *Timelines of governmental attacks against NGOs*, (12 August 2015), available at http://helsinki.hu/wp-content/uploads/Timeline_of_gov_attacks_against_HU_NGOs_12082015.pdf.

¹⁸ Open letter, in Hungarian only, by the NGO the Hungarian Civil Liberties Union (18 September 2014), available at http://tasz.hu/files/tasz/imce/emberi_jogi_mcs_kilepes_20140918.pdf.

Recommendation 5

Allow sufficient time for public debate and consultation on draft legislation, particularly on human rights legislation and invite the meaningful participation of CSOs.

Recommendation 6

Ensure an enabling environment for CSOs, thus providing crucial protection for the rule of law, and seek to rebuild an atmosphere in which responsible dialogue between government and CSOs is possible.