

The Early Retirement Age of the Hungarian Judges

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INTRODUCTION

The retirement age for Hungarian judges was reduced from seventy years to sixty-two years, starting on the day the new constitution, entitled the Fundamental Law of Hungary entered into force on 1 January 2012.¹ This change forced around 274 judges into early retirement. Those judges included six of the twenty court presidents at the county level, four of the five appeals court presidents, and twenty of the seventy-four Supreme Court judges. First, in mid-2012, the Hungarian Constitutional Court declared the unconstitutionality of this regulation.² Also, the Opinion of the Venice Commission of the Council of Europe of 15 October 2012 called upon the Hungarian legislators to adopt provisions reinstating the dismissed judges in their previous positions without requiring them to go through a re-appointment procedure. In November, the European Court of Justice (ECJ) in *Commission v. Hungary* established the violation of EU law.³ But unfortunately, none of these decisions were really able to reinstate the fired judges into their original position and stop the Hungarian government from seriously undermining further the independence of the judiciary and weakening other checks and balances with its constitutional reform.⁴

In addition, on 1 January 2012, the Fundamental Law terminated the term of office of András Baka, President of the Supreme Court, three and a half

¹ For the 'official' English translation of the Fundamental Law, see www.parlament.hu/documents/125505/138409/Fundamental+law/73811993-c377-428d-9808-ee03d6fb8178

² Decision 33/2012 (VII.17). ³ ECJ, 6 November 2012, Case C—286/12.

⁴ See a more detailed analysis on the lack of checks and balances in M. Bánkúti, G. Halmai and K. L. Scheppele, "From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions" in G. A. Tóth (Ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, CEU Press, Budapest, 2012.

years before its normal date of expiry. Mr. Baka turned to the European Court of Human Rights (ECtHR) complaining that he was dismissed in connection with his views and public position expressed in his capacity as President of the Supreme Court on issues of fundamental importance for the judiciary. On 23 June 2016 the Grand Chamber of the ECtHR, similarly to the prior second chamber judgment of 27 May 2014, stated that Hungary had infringed upon Mr. Baka's rights, because his removal may have been related to his criticism of the transformation of the organization of the courts.⁵ Although the judgment indicates the violation of judicial independence by the State of Hungary, due to the nature of the individual complaint procedure of the ECtHR, it could not explicitly rule on this. Equally, while the ECtHR could provide some financial compensation to Mr. Baka, it was not able to reinstate him to his former position. So, due to the nature of the referrals to these three courts, only the Hungarian Constitutional Court was able to reinstate the judges, and both the Hungarian Court and the ECJ was in the position to reinforce national judicial independence, while the ECtHR could not possibly achieve either of these goals, only to provide some remedy for the applicant Chief Justice.

Both the forced early retirement of the judges, especially those in leading position at various courts, and the early dismissal of the President of the Supreme Court were aimed at limiting the independence of the judiciary and bypassing one of the most important checks and balances of the executive power. This was set against the background of the rise of the populist Fidesz Party and its victory in the April 2010 elections, which gave the party and the new prime minister, Viktor Orbán, the necessary two-thirds parliamentary majority to effect constitutional change. Therefore, it is important to investigate what a national review powers, such as the Constitutional Court, and the judicial institutions of both the European Union and the Council of Europe can do to force one of their Member States to comply with the common European principles and values.

THE INDEPENDENCE OF THE JUDICIARY AFTER THE FUNDAMENTAL LAW

Beyond the new retirement age of the judges, the general independence of the judiciary has been essentially changed since the Fundamental Law took effect in 2012. However, the original text of the Fundamental Law of 2011 did not

⁵ Baka v. Hungary, Judgment of 23 June 2016. Application no. 20261/12.

provide sufficient guarantee of judicial autonomy. The passages of the Fundamental Law pertaining to the administration of justice were missing a number of important guarantees and symbolic elements. These deficiencies permitted changes to public law that could threaten the autonomy of the courts. Unlike the previously effective constitution, the Fundamental Law made no mention of the judicial levels and did not name the elements of the judicial system. It did not deal with the administration of the courts: even prior to 1997 the wording of paragraph (5) of Section 25, which mentions the participation of organs of judicial self-government in court administration, proved to be an insufficient guarantee in the face of excessively broad interpretations of government powers.⁶ The Fundamental Law, therefore, does not prevent the creation of an administration model in which there are no counterbalances to central governmental powers.

The classic constitutional principle of equality under the law is also missing from among the guiding principles pertaining to the operation of the judicial system. A declaration that the courts are the protectors of constitutional order, and of rights and lawful interests, is absent from the Chapter on the courts. The wording that “[The] Courts shall administer justice” does not guarantee the courts’ monopoly on administering justice. Thus, a classic element of the division of powers is also missing.

Section 28 of the Fundamental Law addresses the judicial interpretation of law, with a text that defies interpretation. The statement that judges should interpret legal norms not only in accordance with the Fundamental Law but also based on the assumption that they serve common sense, the public good and a moral and economic purpose is obscure and therefore gives rise to legal uncertainty. Concerns relating to the interpretation of legislation are also raised by the section of the Fundamental Law that permits the restriction of fundamental rights on the basis of constitutional values, the substance of which is obscure: “A fundamental right may be restricted to allow the exercise of another fundamental right or to defend any constitutional value to the extent absolutely necessary, in proportion to the desired goal and in respect of the essential content of such fundamental right.”⁷

The constitutional reforms of 2011–2013 have also seriously undermined the independence of the ordinary judiciary through changing the appointment

⁶ Fleck Zoltán, Gadó Gábor, Halmai Gábor, Hegyi Szabolcs, Juhász Gábor, Kis János, Körtvélyesi Zsolt, Majtényi Balázs, Tóth Gábor Attila, ‘Vélemény Magyarország Alaptörvényéről. Amicus Brief a Velencei Bizottságnak’ [Opinion on Hungary’s Fundamental Law. Amicus Brief for the Venice Commission], *Fundamentum*, 2011/1, 61–77, at 72.

⁷ Article I (3) of the Fundamental Law.

and reassignment process for judges. According to the cardinal acts, the head of the National Judicial Office can select either any judge from among the top three candidates recommended by the judicial council of the court where the appointment would be made, or alternatively could decide not to choose any of them. If s/he decides against the top candidate, or against any of the candidates listed, s/he only has to report the reasons to the National Judicial Council, a new body that has a merely advisory role in this matter. While formally the President of the Republic must sign off on all new judicial appointments, the decision of the head of the National Judicial Office alone is necessary in order to promote or demote a judge presently sitting anywhere in the judiciary. The new law contains no procedures through which a sitting judge can contest such a reassignment.

On January 17, the European Commission started accelerated infringement proceedings against Hungary over three issues jointly regulated by the Constitution and the new Cardinal Acts on the Structure of the Judiciary and the Legal Status of Judges⁸: the sudden and mandatory lowering of the retirement age of the judges was one of them. On 16 February, the European Parliament called on the European Commission to request the opinion of the Venice Commission on the legislative package consisting of the new constitution, the Transitional Provisions, and the cardinal acts as a whole, including the one on the judiciary.⁹ The Venice Commission noted in its initial review of the Fundamental Law that the independence of the judiciary was insufficiently protected in the constitution itself.¹⁰ At that time the Venice Commission recommended that a clearer statement of the independence of the judiciary be included in the cardinal acts on the judiciary, though it also noted that explicit commitments to the separation of powers and the right to a fair trial helped in assuring that the constitution intended to protect the judiciary as an institution.

On 1 April 2013, the Fourth Amendment to the Fundamental Law took effect, rebuffing requests by the European Union; the Council of Europe urged the government to seek the opinion of the Venice Commission before bringing the amendment into force. The Fourth Amendment entrenches in the constitution itself powers of the President of the National Judicial Office (NJO) that the Venice Commission has previously criticized as excessive. In

⁸ Act CLXI of 2011 on the Organization and Administration of the Judiciary and Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

⁹ European Parliament resolution of 16 February 2012 on the recent political developments in Hungary (2012/2511(RSP)).

¹⁰ Opinion on the Fundamental Law of Hungary, Adopted by the Venice Commission at its 87th Plenary Session, 17–18 June 2011, Opinion no. 621/2011, Strasbourg, 20 June 2011, para. 102.

Article 13(1) of the Fourth Amendment, the president of the NJO is given the power to perform the central responsibilities of administration while the judicial self-governing organizations merely participate in this task. In addition, Article 14 of the Fourth Amendment gives the president of the NJO the power to move particular cases from the courts to which they have been assigned by law to any other court of her choosing.

Upon the request of the Secretary General of the Council of Europe, the Venice Commission at its plenary session on 14–15 June adopted opinion 720/2013 on the Fourth Amendment to the Fundamental Law of Hungary.¹¹ The opinion comes to the conclusion that the Fourth Amendment perpetuates the problematic position of the President of the National Judicial Office endangers the constitutional system of checks and balances.

Upon the request of the European Parliament, its Committee on Civil Liberties, Justice and Home Affairs (LIBE) also prepared a report on the Hungarian constitutional situation, including the impacts of the Fourth Amendment to the Fundamental Law of Hungary.¹² The report is named after Rui Tavares, the Portuguese MEP who was the rapporteur on a detailed study of the Hungarian constitutional developments since 2010. On 3 July 2013, the report passed with a surprisingly lopsided vote: 370 in favour, 248 against and 82 abstentions. In a Parliament with a slight majority of the right, this tally refuted the Hungarian government's claim that the report was merely a conspiracy of the left.¹³

¹¹ Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14–15 June 2013, at [www.venice.coe.int/WebForms/documents/?pdf=CDL-AD\(2013\)012-e](http://www.venice.coe.int/WebForms/documents/?pdf=CDL-AD(2013)012-e)

¹² www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0229&language=EN

¹³ With about 50 of the 754 MEPs absent, the total number of 'yes' votes was still larger than the total number of MEPs of all of the left parties combined. In short, even if all MEPs had been present, the left alone still could not account for all of those votes. And since the 82 abstentions had the effect of allowing the report to go forward, they should be read as soft 'yesses' rather than undecided or negative votes. Most of the abstentions no doubt came from Fidesz's own party in the European Parliament, the European People's Party (EPP). Many EPP members signaled ahead of time that they could not back Orbán but also would not vote overtly against the position of their party, which officially supported him without whipping the votes. Fidesz had been counting on party discipline to save it. But then it became clear that Fidesz was terribly isolated within the EPP. The tally on the final report was not a roll-call vote, so we do not know for sure who voted for it in the end. But the roll-call votes on the proposed amendments to the bill revealed that many members of the EPP and the even-more-conservative group of European Conservatives and Reformists (ERC) voted to keep the report from being diluted at crucial junctures. Each attempt to weaken the report was rejected openly by 18–22 EPP votes and by 8–12 ERC votes. We can guess that the MEPs who rejected the hostile changes must have voted in favour of the report in the end, along with even more of their colleagues who

The report contains the following to-do list for the Hungarian government on the independence of the judiciary:

- to fully guarantee the independence of the judiciary by ensuring that the principles of irremovability and guaranteed term of office of judges, the rules governing the structure and composition of the governing bodies of the judiciary and the safeguards on the independence of the Constitutional Court are enshrined in the Fundamental Law;
- to promptly and correctly implement the aforementioned decisions of the Court of Justice of the European Union of 6 November 2012 and of the Hungarian Constitutional Court, by enabling the dismissed judges who so wished to be reinstated in their previous positions, including those presiding judges whose original executive posts are no longer vacant;
- to establish objective selection criteria, or to mandate the National Judicial Council to establish such criteria, with a view to ensuring that the rules on the transfer of cases respect the right to a fair trial and the principle of a lawful judge;
- to implement the remaining recommendations laid down in the already cited opinions of the Venice Commission.

These harsh criticisms forced the governing majority to slightly amend its initial idea concerning the administration of courts, the core of which has been the creation of a centralized one-man-led administrative organ with an exceptionally broad jurisdiction and competence lacking any substantial control or balances. Hence the Fifth Amendment to the Fundamental Law enacted in September 2013 abolished the right of the President of the NJO to appoint a court other than a court of general competence to proceed, and gave some rather formal functions in the general management of the courts to the National Council of Judges, composed by elected judges and the President of the Curia.¹⁴

could vote anonymously at that point. See Kim Lane Scheppele, In Praise of the Tavares Report, *Hungarian Spectrum*, 4 July 2013, <http://hungarianspectrum.wordpress.com/2013/07/03/kim-lane-scheppele-in-praise-of-the-tavares-report/>

¹⁴ Three Hungarian human rights NGOs, the Hungarian Helsinki Committee, the Eötvös Károly Policy Institute and the Hungarian Civil Liberties Union call this latter part of the amendment rather cosmetic. See Comments on the Fifth Amendment to the Fundamental Law of Hungary, 18 September 2013, http://helsinki.hu/wp-content/uploads/NGO_comments_on_the_5th_Amendment_to_the_Fundamental_Law_October2013.pdf

THE GOVERNMENT'S ACTION LOWERING THE RETIREMENT AGE

In April 2011, immediately before the final vote on the Fundamental Law of Hungary and without any consultation or impact study, the text of the Transitional Provisions of the new constitution came to include a new rule that changed, from one day to the next, the upper age limit for serving judges from seventy years to sixty-two for the general age of pension entitlement. This amendment, chiefly due to the lack of preparation, professional grounding and the speed of its introduction, clearly breached the principles pertaining to the protection of the judges' status. In an act adopted in June 2011, the Parliament suspended all appointment procedures (including for judges who were already submitted) until 1 January 2012. This moratorium withdrew the authority of the President of the Supreme Court András Baka to appoint judicial leaders, reserving the power to appoint these judges for the new administration.

THE DECISION OF THE CONSTITUTIONAL COURT: VIOLATION OF JUDICIAL INDEPENDENCE

More than one hundred prematurely retired judges brought their cases to the Constitutional Court, and in July 2012, the Court declared that the suddenly lowered retirement age for judges was unconstitutional and therefore retroactively null and void. The Court held that the lowering of the retirement age violated the independence of judges because it was an arbitrary change in their status. Without allowing for a longer phase-in period, so that the judges would have time to plan and adjust their lives to a new term of office, the sudden change in the retirement age constituted an interference with judicial independence. The majority opinion argued that tenure and irremovability are key elements in the independence of judges. The majority also relied upon the fact that in all EU Member States the retirement age of judges is higher than sixty-two years (except for Slovakia, where it is the same as in the new Hungarian regulation).

Moreover, the change in the judicial retirement age was made not in the cardinal acts on the judiciary, but instead in an amendment to unrelated law on pensions¹⁵ that did not have the high level of constitutional entrenchment that the Constitution required with regard to the key features of judicial appointments. Finally, the retirement age, though generally forcing judges to retire at age sixty-two instead of at age seventy, was different for different categories of judges in the pension law, and there had been no adequate

¹⁵ Act No. LXXXI. Of 1997 on social security retirement benefits

explanation for why judges should be treated differently depending on their prior expected dates of retirement.

The Court added that the principle of judicial irremovability has long been entrenched in Hungarian law, pointing out that judicial protection from arbitrary dismissal had been guaranteed since the first judiciary act of 1869. In that law, the retirement age for judges had been set at seventy years and it had never been altered since. Hungary's historic constitution, according to the Court, entrenched the retirement age at seventy.

Judges elected through the governing party's new two-thirds parliamentary majority, without the consent of any opposition party, wrote a number of dissenting opinions explaining their views. Some (Justices Balsai and Dienes-Oehm) argued that judicial independence only guarantees independence of decision-making in the concrete case and does not guarantee a continuing judicial appointment. As a result, judges may never be removed from particular cases, but the Constitution does not protect them from being removed from their positions by a general law. Others (Justices Szívós, Lenkovic and Szalay) noted that the retirement age was lowered both in the pension law and also in a constitutional amendment, which meant to them that the Court could not review it because the Court had no power to review constitutional amendments. These justices had a point: different sources of law said different things on the retirement age. But only the constitution said that judges must retire by the "general retirement age", and that is precisely what the Court's majority opinion said was problematic in the new pension law, because, in fact, no retirement age was "general." Still others (Justices Pokol and Stumpf) argued that the judges had no standing to bring the case in the first place either because they should have gone first to the labour courts (Pokol) or because they had already been fired and so their cases were moot (Stumpf).

It is interesting to note that even the majority decision was dominated by internal argumentation based on Hungarian constitutional law quoting only one relevant recommendation of the Council of Europe.¹⁶ Although the judges knew that the ECJ was also dealing with the case, they avoided involving the issue of age discrimination in their review, seeking assistance in the law of the EU to interpret the amendments of the Fundamental Law in the Transitory Provisions, or seeking direct contact to the Luxembourg court through initiating a preliminary ruling procedure.¹⁷

¹⁶ Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities.

¹⁷ See Nóra Chronowski, "The Fundamental Law within the Network of Multi-Level European Constitutionalism", in Zoltán Sente, Fanni Mandák and Zsuzsanna Fejes (eds.), *Challenges*

Prime Minister Orbán was furious with the Court for obstructing his attempt to remake the judiciary. In a press conference the day after the Constitutional Court ruling, Orbán angrily insisted that the system would remain in place even after it had been declared unconstitutional.¹⁸ And unfortunately he had a point, namely that the Constitutional Court decided the case more than one year after the petitions of the judges have arrived, and by that time all of the judges had already been fired. Even the majority reasoning states that the decision itself cannot automatically reinstate the status of the judges, who were fired on the basis of an unconstitutional and retroactively annulled legal norm. The President of the NJO, who was entitled to ask the President of the Republic to reinstate the judges, argued that the judges should seek remedy before a labour court, but even if they were reinstated by order of the courts, the newly hired and promoted judges would not be displaced.¹⁹ The President of Hungary also announced that he had no power to withdraw his own previous decision, in which he released all the judges who reached the age of sixty-two.²⁰

THE JUDGMENT OF THE EUROPEAN COURT OF JUSTICE:
AGE DISCRIMINATION

In this situation, taking the view that the changes in the judges' retirement scheme constituted a breach of the EU age discrimination provisions of Directive 2000/78/EC, the European Commission sent a letter of formal notice and a reasoned opinion to Hungary. Since the Hungarian government disputed the violation, the Commission referred the case to the Court of Justice and submitted a request for the accelerated procedure. The president of the Court granted the accelerated procedure.²¹

and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law, L'Harmattan, Paris, 2015, 231–32.

¹⁸ "Döntöttek: Alkotmányellenes a Bírók Kényszernyugdíjazása." Stop, 16 July 2012. Accessed 23 Februar 2015, www.stop.hu/belfold/dontottek-alkotmanyellenes-a-birok-kenyszernyugdijazasa/1065707/.

¹⁹ MTI [Hungarian Press Agency] on 16 July 2012: www.szon.hu/birak-nyugdijazasa-c-az-ab-dontese-nincs-kozvetlen-hatassal-a-nyugdijazasokra/2032533

²⁰ "Notice the Constitutional Court IV / 2096/2012 in Relation to Resolution No. Office of the President. July 26, 2012. Accessed February 23, 2015. www.keh.hu/sajtokozlomenyek/1631-Kozlomeny_az_Alkotmanybirosag_IV20962012_szamu_hatarozataval_kapcsolatban&pnr=1. (Statement of the Office of the President). Interestingly enough, the last group of judges were released by the president just days before the decision of the Constitutional Court was announced, which indicates that the president knew the content of the decision in preparation.

²¹ Order of the President of the Court of Justice of 13 July 2012 in Case C-286/12.

The Court ruled in November 2012 that Hungary had failed to fulfil its obligations under the Directive, since the national compulsory retirement scheme gave rise to a difference in treatment on grounds of age, which was not proportionate in regard to the objectives pursued.²² In the judgment the ECJ emphasized that the case was admissible despite the fact that the Hungarian Constitutional Court declared part of the contested national law unconstitutional and repealed those provisions retrospectively from 1 January 2012. The reason for this was, first of all, that the decision of the national Court did not affect the termination of the judges' employment relationships. Therefore, these persons were not automatically reinstated to their position, but were obliged to bring proceedings for their reinstatements, and the outcome of such proceedings was uncertain.

Regarding the substance of the case, the Court of Justice held that the compulsory retirement gave rise to a difference in treatment based directly on age because the national measures of compulsory retirement directly imposed less favourable treatment of individuals engaged in those professions, as compared with younger employees in the same profession who could remain in their post since they had not reached the age limit. After finding discrimination on the ground of age, the ECJ examined whether according to Article 6(1) of the Directive the challenged provisions were objectively and reasonably justified by a legitimate aim, and whether the means of achieving that aim were appropriate and necessary. In this respect, the Court first examined the standardization of the compulsory retirement age in the public sector, and found that it can constitute a legitimate employment policy objective and that, in principle, the Hungarian measures were appropriate means of achieving this aim²³. But on the other hand, the Court stated that the contested provisions were not necessary to achieve this objective because they abruptly and significantly lowered the compulsory retirement age, without introducing transitional measures²⁴ to protect the legitimate expectations of the persons concerned that they would remain in office until the age of seventy.²⁵

Similar to the Hungarian Constitutional Court, the ECJ took into account that after 1 January 2012, judges had a very short period to prepare for the consequences of the new law, and to take the necessary financial measures since they were required to retire after six months or, at best, one year. As a

²² ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*.

²³ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, §§ 61–62.

²⁴ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, §§ 67 and 69–70.

²⁵ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, §§ 68 and 71–72.

result, the interests of judges affected by the lowered retirement age were not taken into account in the same way as those of other public sector employees.

Regarding the second objective of the law, namely to establish a more balanced age structure facilitating access for young lawyers to these professions, the Court also acknowledged that such an objective can constitute a legitimate aim of employment and labour market policy.²⁶ But again, the chosen measures were not appropriate to achieve that objective, because the positions would be occupied for a long time by young lawyers who entered the profession in 2012 and 2013 due to their colleagues' early retirement, and for whom the compulsory retirement age would be raised progressively from sixty-two to sixty-five²⁷. Therefore the short-term effects were liable to call into question the possibility of achieving a truly balanced age structure in the medium and long terms.

The decisive element of the Court's analysis in the case was the proportionality of Hungarian law, that is, whether it was appropriate and necessary with regard to the goals highlighted.²⁸ *Commission v. Hungary* was the first judgment where the Court of Justice found a standard national statutory retirement measure to be in violation of EU law. The other peculiarity of the case was that the application of a strict proportionality test, a "balancing approach," changed the outcome of the case. However, the justices acknowledged the right of Member States to use pensionable age to manage the labour market as such, thus national laws encouraging retirement at a certain age are still in principle presumptively proportionate, but the provisions are not necessary if they abruptly and significantly lower the age limit for retirement without introducing transitional measures to protect the legitimate expectations of the persons concerned. This means that the strict proportionality analysis applies to the execution of such changes; in other words, if a Member State wants to change the age limit, it has to provide a sufficient anticipation period.

The decision of the Court of Justice did not touch upon the issue of independence of the judiciary, unlike the Advocate General, who similarly to the Hungarian Constitutional Court argued that the sudden retirement of a large number of judges raises doubts concerning the independence of the judiciary, since this principle includes the precept that the executive has to avoid any external intervention or pressure on members of the court. According to the Advocate General's opinion, even if the direct objective of this law was not direct intervention into the judiciary, since it did not concern

²⁶ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, § 77.

²⁷ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, § 78.

²⁸ ECJ, 6 November 2012, Case C—286/12, *Commission v. Hungary*, § 79.

individual judges or cases, the principle of judicial independence requires that even indirect breaches of this principle must be avoided.²⁹

THE AFTERMATH OF THE DECISIONS

In December 2012, shortly after the ECJ's judgment, the Hungarian government submitted a new bill to pass special rules for those who were unlawfully dismissed and to comply with the requirements following from the Court of Justice decision. Act 20 of 2013 was passed on 11 March 2013 and entered into force on 25 March 2013. According to this new law, the retirement age of judges, prosecutors and notaries will be gradually reduced from seventy years to sixty-five years by 1 January 2023. In the meantime, the general statutory retirement age will be increased to sixty-five years. This means that judges who would be entitled to an old-age pension will have to choose between receiving the pension and working as a judge. Any affected judge will have sixty days to make the decision, and if he/she fails to request the suspension of the payment of pension, he/she will be dismissed in a fast-track disciplinary proceeding.

According to Act 20 of 2013, unlawfully dismissed judges (as well as prosecutors and notaries) have the following three possibilities, which are equally applicable to the earlier judgments and in the transitional period until the age limit will be decreased to sixty-five years. First, if they request reinstatement into their former position, they then shall be fully compensated for their financial losses. The reinstatement of judges who were serving previously as heads of judicial panels is automatic; thus, they shall be reinstated irrespective of whether their post has been filled or not. Any other judges who previously filled a leading administrative position can regain their position only if it has not been filled in the meantime. If the position has been filled, the judge must be reinstated to another position but he/she shall receive the leadership allowance until the end of the leadership term. The judges concerned must make a statement within thirty days of the new Act coming into force should they wish to be reinstated. Second, unlawfully dismissed judges may choose retirement instead of reinstatement. In this case such a judge shall be paid a general compensation of a twelve-month salary, but any damage exceeding this amount shall be enforced in a lawsuit. Third, judges may also choose to be placed in a "reserve" position. These judges will stay retired but may be instructed to work in judicial positions for a maximum of two years in every three years for certain purposes (for example, as a replacement, or to reduce

²⁹ Opinion of the Advocate General Kokott, *European Commission v. Hungary*, C-286/12 [2012], ¶¶ 54–55.

extraordinary workload). In return for this work they will receive an allowance in addition to their pension.

Due to the new regulation, the retirement age of the lawyers concerned will be gradually increased after a long transitional period, and the employment and social situation of the judges affected by the unlawful provisions will be adequately settled.

One hundred and sixty-four of the affected judges launched a court procedure against their employers, and in all cases the labour courts found that the termination of employment was unlawful. Their judgments obliged the employing courts to reinstate the judges in their former employment and executive positions, if the judges asked for reinstatement. Fifty-six of them did so, and they were reinstated as judges, even if not necessarily into their previous leading administrative position, since in most of the cases it has already been filled in the meantime.

Therefore, on 20 November 2013, the European Commission formally closed the legal proceedings launched against Hungary in January 2012 over the country's forced early retirement of around 274 judges. According to the press release, the Commission is satisfied that Hungary has brought its legislation in line with EU law.³⁰

THE DECISION OF THE ECJ: THE EARLY DISMISSAL OF THE CHIEF JUSTICE

While the Hungarian government was able to get rid of many court leaders by the early retirement legislation in the Transitional Provisions of the Fundamental Law, the term of Chief Justice, who was younger than sixty-two, had to be terminated in a different way. But the solution still came through the Fundamental Law, and its Transitional provisions. The Fundamental Law of 25 April 2011 established that the highest judicial body would be the Curia (the historical Hungarian name for the Supreme Court.), and the Transitional Provisions provided that the mandate of the President of the Supreme Court currently in office would be terminated upon the entry into force of the Fundamental Law. That meant that András Baka,³¹ President of the Supreme

³⁰ Commission Press Release, IP/13/1112 (Nov. 20, 2013), http://europa.eu/rapid/press-release_IP-13-1112_en.htm

³¹ András Baka is a Hungarian national who was born in 1952 and lives in Budapest. Before the democratic transition of 1989, he was a researcher at the Legal Institute of the Hungarian Academy of Sciences. After the first democratic election in 1990, he became a member of the Hungarian Parliament as a representative of the Hungarian Democratic Forum, the governing party of Prime Minister József Antall. In 1991, he was nominated to the position of a judge at the

Court, would be fired on 1 January, the same day as the rules on the early retirement of the judges entered into force.

The only formal argument given for removing him was that the Supreme Court's title had been changed to the Curia, even though the structure and the authority of this body is not much modified; only a few technical aspects of its jurisdiction and the official name were changed. It seems hard to escape the conclusion that the logic of this personnel change was purely political: Baka criticized the new laws on the administration of judiciary and some other acts of Parliament concerning judges, including the reduction of the compulsory retirement age of judges. The Venice Commission's (an advisory body of the Council of Europe) report on the Fundamental Law anticipated this problem in two ways: it raised the question whether the change of the name of the highest judicial body would result in replacement of the Supreme Court's president by a new president of the "Curia" at § 107, and it also cautioned that the Transitional Provisions should not terminate the ongoing mandate in office of current office holders at § 140. The termination of Judge Baka's term as president of the Supreme Court/Curia runs directly against both of these cautions.³²

As Baka has been denied access to any Hungarian tribunal to defend his rights relating his premature dismissal, he submitted a complaint to the ECtHR under Article 6 (1) of the European Convention on Human Rights, contending that his dismissal was a result of enactments of both the former and the new Constitution, thereby depriving it of judicial review, even by the Constitutional Court. He also complained under Article 10 of the Convention that he was dismissed in connection with his views and public position expressed in his capacity as President of the Supreme Court on issues of fundamental importance for the judiciary. On 23 June 2016, the Grand Chamber judgment of the ECtHR stated that Hungary had infringed Baka's right to fair trial, and his right to free expression was also infringed, because his removal may have been related to his criticism of the transformation of the organization of the courts.³³

Whereas the mandate of the president was terminated by the Transitional Provisions to the Fundamental Law – an act with a quasi-constitutional

European Court of Human Rights. He served in Strasbourg until 2008. In 2009, he was elected by the Parliament of Hungary as President of the Supreme Court of Hungary for a six-year term, until June 2015.

³² Opinion on the Fundamental Law of Hungary, Adopted by the Venice Commission at its 87th Plenary Session, 17–18 June 2011. Opinion no. 621 / 2011, Strasbourg, 20 June 2011. [www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e)

³³ Baka v. Hungary, Judgment of 23 June 2016. Application no. 20261/12

status – only the vice president could lodge a constitutional complaint, as his term was terminated pursuant to the Act on the organization and administration of courts. The Constitutional Court with a narrow majority of 8 to 7 found that the transformation of the organization of the courts and the significant modification of the scope of responsibilities of the Curia, its presidents and vice president provide sufficient constitutional justification for the shortening of their mandates.³⁴ In other words, while President Baka's access to the Constitutional Court has been denied, his deputy's challenge was rejected, and as he did not turn to the ECtHR, he did not get any financial compensation either. Neither of the two could have been reinstated by the Strasbourg Court anyway.

With its limited power to influence a Member State's compliance with the Convention through deciding individual cases, the Committee of Ministers of the Council of Europe in 2004 adopted a resolution and a recommendation which provided the political ground for future pilot judgments. The Resolution invited the Court "to identify in its judgments . . . what it consider[ed] to be an underlying systemic problem and the source of that problem, in particular when it [was] likely to give rise to numerous applications".³⁵ In turn, the Recommendation adopted conjointly was addressed to member states and pointed out that, in addition to individual remedies, states have a general obligation to solve the problems underlying the violations found.³⁶

Given that Central and East European states only enabled access to the Council of Europe in the 1990s,³⁷ it seems questionable whether it would have been possible and advisable for the ECtHR to issue such a pilot judgment, designed to force governments to repeal rules incompatible with Europe's fundamental values in the *Baka* case. In other words, the question is whether the legal solution of the dismissal of the Chief Justice represented a systemic defeat of the national law, which should be solved *in abstracto*. Unfortunately, the answer to this question is no. It is true that the rule

³⁴ Decision 3076/2013. (III. 27.)

³⁵ Resolution Res(2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, 12 May 2004, available at: <https://wcd.coe.int/ViewDoc.jsp?id.743257&Site.CM&BackColorInternet.9999CC&BackColorIntranet.FFB55&BackColorLogged.FFAC75>

³⁶ Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies, 12 May 2004; (2004) 26 HRLJ 116, available at: <https://wcd.coe.int/ViewDoc.jsp?id.743317&Site.CM&BackColorInternet.9999CC&BackColorIntranet.FFB55&BackColorLogged.FFAC75>

³⁷ About pilot judgment against these new Member States of the CoE, see W. Sadurski, 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments', *Human Rights Law Review*, 9:3 (2009), 397–453.

regarding the early dismissal of the incumbent Chief Justice Baka seems to be a normative one, meaning that it is applied every time a similar situation occurs. In reality, the rule applied in the case of the termination of Baka's term will not be applied ever again, as it was a transitory provision of the Fundamental Law to solve this one concrete case. For this reason, this concrete rule cannot be the subject of a pilot judgment, because this institution aims at changing unacceptable abstract norms in a national legal system, and this is not the case here. As this rule was made a transitory provision, after Baka's dismissal it does not even exist anymore, and therefore even a pilot judgment would have been unable to force the Hungarian government to repeal it.

CONCLUSION: A HAPPY ENDING?

Seemingly the three judgments in one way or another have been successful in solving this legal conflict. It is true that the common conclusion of the three decisions on the retirement age issue is that it is not the termination of employment due to the retirement age which is unlawful, but its rapid execution without an appropriate transitional period.

Apart from this joint conclusion, the three decisions show remarkable differences in several respects. The Constitutional Court did not examine the aims and focused merely on the institutional, larger constitutional effects of the new law, namely the rapid turnover of one-tenth of the Hungarian judiciary. The Constitutional Court could also have, at least partly, based its judgment on the social consequences of this measure, and at least try to solve the problems of the fired judges. On the other hand, the issue of the joint European values and constitutional principles, such as judicial independence, were neglected by the judgment of the ECJ, and age discrimination became their exclusive concern. As to the third judgment, that of the ECtHR, even though provided remedy for the dismissed applicant Chief Justice, due to the jurisdictional limitations of the Court, it was unable to address the issue of judicial independence.

The Constitutional Court, while declaring the legal regulation unconstitutional for the future, missed the opportunity to provide remedy for those who asked for it. This was certainly a political decision by a court, which at the time of the decision was packed by the governing majority, and was constantly threatened existentially by this same majority.³⁸ The ECJ, in contrast, by

³⁸ During the preparation of the Fundamental Law there were widespread rumours that the government seriously considered to degrade the Constitutional Court into a chamber of the Curia.

choosing a rather technical way to tackle the issue on the merits, missed the opportunity to clarify the meaning of judicial independence in the Charter of Fundamental Rights of the European Union, and the criteria for the *de facto* dismissal of the judges. Some commentators argue that it is understandable that the ECJ wanted to stay away from the Hungarian internal politics. They suggested that it was far easier to approach the matter as if they were merely enforcing the existing EU law rather than politically evaluating the constitutional framework of a Member State.³⁹ And this was also a political decision by the ECJ.

Those who praise the judgment of the ECJ argue that it is understandable that the judges in Luxembourg did not touch upon the issue of judicial independence, since it concerns the constitutional order of Member States, which is arguably part of their national identity that the Court of Justice has to respect under Article 4(2) of the Treaty of the European Union (TEU).⁴⁰ But one can wonder why this Article is more important than Article 2 TEU, which guarantees the respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Independence of the judiciary as elements of a democracy governed by the rule of law certainly belongs to these values, which is also a precondition for the enjoyment of human rights, and the ECJ has to protect them, and in the case of conflict with Article 4(2) even give priority to them.⁴¹

³⁹ See Mark Dawson and Elise Muir, "Hungary and the Indirect Protection of EU Fundamental Rights and the Rule of Law", 14 *German Law Journal*, 2013. 1970. More generally, see also Mark Dawson and Elise Muir, "Enforcing Fundamental Values: EU Law and Governance in Hungary and Romania", 4 *Maastricht J. of Eur. and Comp. L.* 469, 2012. Conversely cf. Armin von Bogdandy et al., "Reverse Solange – Protecting the Essence of Fundamental Rights Against EU Member States", *Common Market L. Rev.* 489, 2012.

⁴⁰ See T. Gyulavári and N. Hős, "Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts," *Indust. L.J.*, Vol. 42, No. 3, September 2013, 289–97, at 297.

⁴¹ Realizing that referring to Article 2 TEU in an infringement procedure is unusual, even if not excluded, for the ECJ, there is a proposal for a so-called systematic infringement action, according to which the Commission could signal systemic complaints against a Member State by bundling a group of individual infringement actions together under the banner of Article 2 with the argument that the set of alleged infringements rises to the level of a systemic breach of basic values. See Kim Lane Scheppele, "EU Commission v. Hungary: The Case for the 'Systemic Infringement Action'." *Verfassungsblog on Matters Constitutional*, 22 November 2013. Accessed 23 February 2015. www.verfassungsblog.de/en/the-eu-commission-v-hungary-the-case-for-the-systemic-infringement-action/#.VOuCfrMbA-B.

The mentioned European Parliament Resolution of 3 July 2013 on the Situation of Fundamental Rights: Standards and Practices in Hungary regrets “that not all unlawfully dismissed judges are guaranteed to be reinstated in exactly the same position with the same duties and responsibilities they were holding before their dismissal”.⁴² And the aim of the Hungarian government with the reduction of the retirement age of the judges was exactly to get rid of the most of the court presidents, and replace them with new ones, loyal to the government. Since this aim has been fulfilled, and with this the independence of the judiciary is undermined, the two judgments cannot be deemed as a success of the rule of law in a Member State of the European Union. If the institutions of the European Union are not able to defend the very principles of the Treaty, more and more Member States will be encouraged not to comply with them, as we have just witnessed in the behaviour of the East-Central European countries during the refugee crisis. As a consequence of this dangerous development, the Union will cease to be a community of values.

The judgment of the ECtHR in the case of *Baka v. Hungary* is different from the two other decisions discussed here. On the one hand, it is not about the normative regulation of the retirement age of the judges, which indeed concerned a lot of them, and on the other hand, it was an individual complaint of one applicant, and the remedy directly also concerned also this only person. But there are certainly joint elements in the retirement age cases and the dismissal of the Chief Justice. While the former aimed at getting rid of as many aged court leaders, who were presumably not loyal to the government, as possible, the aim of the early termination of the Supreme Court President’s term was to replace the head of the entire judiciary, who was critical towards the new judicial system, which curtailed the independence of the judiciary. In this respect, the *Baka* case was also an issue of judicial independence, threatened by legislative means, even if this was the new Fundamental Law itself. In such cases the ECtHR could have considered a pilot judgment, but as we just demonstrated, due to the fact that the transitory rules on the early dismissal were applied only at one occasion in the case of Mr. Baka, and are not in force anymore, the ECtHR was unable to issue a pilot judgment. Therefore, contrary to the decisions of Constitutional Court of Hungary and the ECJ, we cannot consider the judgment of the ECtHR as a missed opportunity to enforce judicial independence.

⁴² See ¶ 32 of the so-called “Tavares Report”: European Parliament Resolution on the Situation of Fundamentals Rights: Standards and Practices in Hungary, www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-315

PART VI
Beyond the EU Borders

PROOF