S. Naismith
Section Registrar

European Court of Human Rights
Council of Europe
67075 Strasbourg – Cedex
France

Budapest, 25 March 2013

Subject: Third party intervention concerning the case Baka v. Hungary (Application no. 20261/12)

Dear Sir,

In response to your letter dated 5 March 2013, the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Institute hereby respectfully present our submissions as a third party intervention concerning the case Baka v. Hungary (Application no. 20261/12), communicated to the Government of Hungary on 29 November 2012.

As indicated in our request, we believe that the individual rights violations suffered by Mr Baka at the same time constitute an integral part and follow the general pattern of the weakening of the system of checks and balances that has taken place in the past three years in Hungary. With its two-third majority gained at the 2010 general elections, the ruling coalition has taken numerous legislative steps removing important elements from the system of checks and balances, undermining the rule of law, and weakening the control of independent institutions over the executive, with special regard to the judiciary. Furthermore, the ruling majority has resorted to adopting legal norms to conceal individual measures targeted against certain individuals on numerous occasions. We believe that the case of Mr Baka is an outstanding example of how the violations of individual fundamental rights are intertwined with the processes threatening the rule of law.

As requested in your letter which granted us leave to make a submission in the case Baka v. Hungary, below we outline the following issues related to the case which are of our particular interest and which threaten the rule of law in Hungary: (i) legislative steps aimed at the early removal of public officials; (ii) examples of "individualised" legislation; (iii) legislation with retroactive effect; and (iv) legislative steps threatening the independence of the judiciary.

1. Legislative steps aimed at the early removal of state officials

András Baka was not the only state official who was dismissed prematurely by the current governing majority, before the end of his statutorily determined mandate. Individual decisions removing certain position holders were in all cases included in and settled by Acts of Parliament, which is a method clearly violating the principle of the rule of law. Both the way of dismissing Mr Baka and the way of depriving him from benefits an outgoing Supreme Court President would be normally entitled to by amending the respective legislation, as described under Section A. 5. of the Statement of Facts, follow the general pattern of the legislative method outlined by the examples below.

1.1. Early removal of the Supreme Court's Vice-President

Former Vice-President of the Supreme Court, Lajos Erményi, was appointed as Vice-President by the President of the Republic upon Mr Baka's proposal as of 15 November 2009, for six years, thus until 15 November 2015. However, he was also removed from his office as of 1 January 2012 by Article 185 (1) of Act CLXI of 2011 on the Organisation and Administration of Courts, which stated that the mandate of the Vice-President of the Supreme Court shall be terminated when the Fundamental Law enters into force. (This is the same provision of Act CLXI of 2011 which sets out that the mandate of the President of the Supreme Court shall be terminated when the Fundamental Law enters into force.) Thus, the Vice-President was also removed from his office prematurely, almost four years before the end of his six-year term.

The Vice-President submitted a constitutional complaint to the Constitutional Court (CC), claiming that, on the basis of the related case-law of the CC, his removal violates the rule of law, the ban of retroactive legislation and his right to remedy. However, in its Decision IV/2309/2012., passed with only eight votes to seven of the altogether 15 judges, the CC rejected the complaint. The CC stated that the dismissal had not violated the Fundamental Law, since the reform of the court system and the changes affecting the tasks and powers of the Vice-President constituted a sufficient reason for his dismissal, taking also into consideration that the office of the Vice-President was "a position of trust". The CC stated that since the Vice-President shall substitute the President of the Curia with full powers if the need arises, the changes affecting the President's tasks and powers provided a basis for the Vice-President's dismissal.

We believe that the decision is deficient from the point of view of both substance and procedure. Firstly, it is in clear contradiction with the CC's earlier decisions in which the body found that removing state officials having a fix-term mandate before the end of their term through the adoption of legal norms is unconstitutional.[1] These decisions were based on different reasons, including the ban of settling individual cases through legislation, the ban of legislation with retroactive effect and the violation of the right to remedy. It also needs to be added that in those previous cases the concerned officials were the president and vice presidents of the Hungarian Financial Supervisory Authority, the president and vice presidents of the Hungarian Energy Office, and the presidents and vice-presidents of the Hungarian Competition Authority. While these are undoubtedly important positions, all of them are positions in organisations subordinated to the government, so from the point of view of the separation of powers and the system of checks and balances their importance, and the importance of their independence is not comparable to that of the top positions in the judiciary, i.e. the president and the vice-president of the Supreme Court. In fact, the level of protection of the independence of judicial top positions should have been higher than that of the positions concerned by the earlier CC decisions. Therefore, we see absolutely no reason for the CC to deviate from its earlier stance, according to which "that the term office of position holders listed in the Constitution (e.g. President of the Republic, Constitutional Court judges, President of the State Audit Office, *President of the Supreme Court*, Chief Public Prosecutor) should span across governmental cycles is a safeguard of the functioning of a democratic state governed by the rule of law, the importance of which goes beyond the interest attached to the continuity of administration".[2]

We also agree with the seven judges dissenting from the instant decision, who held that no such structural or organisational changes took place with regard to the judicial system and especially to the Vice-President's powers and function that could justify his early removal. The dissenting judges held that the removal had weakened the guarantees of the separation of powers, it was contrary to the ban on retroactive law-making and therefore violated the principle of the rule of law enshrined in Article

[1] Decisions 7/2004. (III. 24), 5/2007. (II. 27.) and 183/2010. (X. 28.) of the CC
[2] Decision 7/2004. (III. 24) of the CC

B paragraph 1 of the Fundamental Law, moreover, the removal by an Act of Parliament deprived the Vice-President of his right to legal remedy violating Article XXVIII paragraph 7 of Fundamental law.

It shall be also added that the decision was passed with the vote of six of those judges who have been elected members of the CC as a result of the court-packing efforts of the ruling majority: since the general elections in 2010, the governing majority increased the number of CC judges from 11 to 15 and adopted rules which allow for the two-thirds majority to propose and elect CC judges without the consent of the opposition, and most judges elected in the present parliamentary term on the basis of the new rules are closely linked to the ruling majority, including MPs of the Fidesz. The newest judge in the panel, László Salamon, who was elected a CC judge in December 2012, had been an MP of the ruling coalition parties since 1996, voted in favour of Act CLXI of 2011 on the Organisation and Administration of Courts (i.e. the law about the constitutionality of which the CC had to decide), and was the head of the Parliamentary Committee on Constitutional Matters at the time the above law was adopted. However, even though under Article 62 (2) of Act CLI of 2011, a CC judge "shall not participate in adjudicating a petition if – due to his/her close and personal connection to the subject matter of the case – he/she may not be expected to deliver an impartial, objective and unbiased decision in the case", his participation in the voting on the law was not regarded as such, so Mr. Salamon was not excluded from the vote over the constitutional complaint. Taking into consideration the tightness of the vote (8-7), this was a significant procedural failure.

The case also proves that due to the packing of the CC and the new judges' undeniable affiliation with the ruling coalition, the constitutional complaint does not provide an effective domestic remedy to victims of rights abuses related to the weakening of the system of checks and balances, which makes the close scrutiny of the ECHR all the more crucial.

1.2. Early removal of Ombudspersons, including the Data Protection Commissioner

The Fundamental Law and the related legislation replaced the former four Ombudspersons of Hungary – the Parliamentary Commissioner for Civil Rights, the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, the Parliamentary Commissioner for Future Generations and the Data Protection Commissioner – with the sole Commissioner for Fundamental Rights as of 1 January 2012.[3] The reasoning of the Fundamental Law did not provide any clear reason for these structural changes, which have been criticised by professionals and NGOs, who claimed that the restructuring decreases the level of protection of fundamental rights.[4]

According to Article 15 of the Transitional Provisions to the Fundamental Law, the Parliamentary Commissioner for Civil Rights in charge, Máté Szabó, became the Commissioner for Fundamental Rights, while the Parliamentary Commissioner for the Rights of National and Ethnic Minorities, Ernő Kállai, and the Parliamentary Commissioner for Future Generations, Sándor Fülöp, became Deputy Commissioners. Mr Kállai was elected by the Parliament as of 2 July 2007 for six years upon the proposal of the President of Hungary,[5] while Mr Fülöp was elected by the Parliament on 26 May 2008 also for six years.[6] Consequently, their mandate as independent Ombudspersons was terminated before the end of their original term of office. Furthermore, as Deputy Commissioners they have far less powers and resources than before. In August 2012, Mr Fülöp announced that the new legal rules and the reduced resources of his office do not allow him to carry out his tasks properly, and he resigned from his office.

[3] Fundamental Law of Hungary, Article 30 (1)-(2)
[4] See e.g.: Gábor Halmai: *A nem alkotmányos alkotmány és az ellene való orvosság*, in: Élet és Irodalom, 23 December 2010, Vol. LIV, (23.12.2010) No. 51–52.; Eötvös Károly Institute – Hungarian Civil Liberties Union – Hungarian Helsinki Committee: *The Third Wave – the New Constitution of Hungary,* 14 April 2011, available at: http://helsinki.hu/wp-content/uploads/Hungarian_NGOs_assessing_the_draft_Constitution_of_Hungary_20110414.pdf, p. 5.
[5] 52/2007. (VI. 13.) Parliamentary Decree
[6] 58/2008. (V. 29.) Parliamentary Decree

The organisational restructuring also resulted in an infringement procedure against Hungary, since the mandate of the Data Protection Commissioner, András Jóri, being the data protection authority of Hungary in terms of EU law, was also terminated prematurely. Mr Jóri was elected for six years by the Parliament on 29 September 2008 as Data Protection Commissioner.[7] However, Article 16 of the Transitional Provisions to the Fundamental Law set out that as of 1 January 2012 the mandate of the Data Protection Commissioner shall terminate. Furthermore, Article VI (3) of the Fundamental Law provided that the protection of personal data and the freedom of information shall be monitored by an "independent authority". Act CXII of 2011 on the Right to Informational Self-determination and the Freedom of Information (in force since 1 January 2012) established the Authority for Data Protection and Freedom of Information instead of the Data Protection Commissioner. The new authority is an administrative body, thus a part of the executive, the President of which is not elected but appointed by the President of Hungary upon the proposal of the Prime Minister.[8] Mr Jóri was not offered the office of the President of the newly established authority. Instead, Attila Péterfalvi was appointed as head of the new authority in November 2011.

On 17 January 2012, the EC launched accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary.[9] On 7 March 2012, the EC sent a reasoned opinion to Hungary[10] concerning the independence of the data protection supervisor, stating that it remains concerned about the following: (i) the premature termination of the Data Protection Commissioner's six-year term, arguing that the government has not provided any valid arguments as to why there are no interim measures allowing the former Data Protection Commissioner to stay in office until the end of his term; and that (ii) the President of Hungary – following a proposal from the Prime Minister – may dismiss the new supervisor on too broad and vaguely defined grounds. Finally, the EC brought an action against Hungary on 8 June 2012 before the Court of Justice of the European Union on the ground that Hungary has failed to fulfill its obligations under the Data Protection Directive by removing the data protection supervisor from his office before time.[11] Mr Jóri also filed an application to the ECHR because of his dismissal; the application is pending.

It has to be added that – similarly to Mr Baka – the former Data Protection Commissioner had a quite conflicted relationship with the governing majority. In July 2010, he strongly criticised the practice of the city of Hódmezővásárhely, the mayor of which was an MP and the leader of the parliamentary faction of Fidesz (currently Secretary of State of the Prime Minister's Office), since the city published the names of those who applied for social allowances but failed to collect them or rejected the public work offered to them.[12] Since the list was not removed by the city, the Data Protection Commissioner formally ordered its removal, which was challenged by the city before the court, which rejected the claim.[13]

In March 2011, Mr. Jóri claimed that the draft Fundamental Law does not guarantee the freedom of information.[14] On 7 June 2011 he issued a statement concluding that the protection of personal data is not ensured in the course of the data management related to the so-called Social Consultation initiated by the Government, and, therefore the questionnaires shall be destroyed after the responses

[7] 104/2008. (X. 3.) Parliamentary Decree
[8] Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 40 (1)
[9] *European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary*, IP/12/24, Strasbourg, 17 January 2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24.
[10] *Hungary – infringements: Commission takes further legal steps on measures affecting the judiciary and the independence of the data protection authority, notes some progress on central bank independence, but further evidence and clarification needed*, MEMO/12/165, Brussels, 7 March 2013, available at: http://europa.eu/rapid/press-release_MEMO-12-165_en.htm?locale=en.
[11] European Commission v Hungary, Case C-288/12
[12] See e.g.: http://hvg.hu/itthon/20100727_lazar_janos_hodmezovasarhely (27 July 2010).
[13] See e.g.: http://hvg.hu/itthon/20110623_marad_hodmezovasarhely_szegyenlista (23 June 2011).
[14] See e.g.: http://hvg.hu/itthon/20110329_alkotmany_jori_andras (29 March 2011).

have been recorded.[15] (In the framework of the Social Consultation, questionnaires with individual bar codes were sent out to citizens, including questions closely related to the political agenda of the governing majority.) The spokesperson of the Prime Minister stated that the central agency responsible for the Social Consultation had more times personally consulted with Mr Jóri before the Social Consultation, and that Mr Jóri had not raised any concerns in relation to the protection of personal data. The spokesperson also stated that they presume that Mr Jóri had "personal motives" for issuing the above standpoint, since the Fundamental Law mentions only one Ombudsperson and Mr Jóri is "obviously uncertain regarding his personal career".[16] The Minister of Public Administration and Justice also stated in the Parliament that the Data Protection Commissioner had not expressed any concern regarding the issue "until he got to know that the position of the Data Protection Commissioner would cease according to the Fundamental Law and the new law and is replaced by an authority. Since then he has conducted a desperate war against any data protection laws proposed by this Government."[17] Mr Jóri contested the above statements, stated that he had not been consulted before the Social Consultation, and initiates lawsuits against the spokesperson of the Prime Minister, the Minister and the responsible central agency for damaging his reputation.[18] In September 2011, he warned that the new data protection authority is not independent and that the protection of personal data may be threatened.[19]

1.3. Early removal of members of the National Election Committee

On 21 June 2010, a new provision was included under Article 23 (6) of Act C of 1997 on the Election Procedure, setting out that members of the National Election Committee shall be re-elected not only before the parliamentary elections, but also before the European Parliament elections and the municipal elections, and that this also applies to members of the National Election Committee currently in office.[20] Since the next municipal elections were scheduled to October 2010, the mandate of the elected members of the National Election Committee was terminated in July 2010, even though they were elected in February 2010 for a term of four years (i.e. until the next parliamentary elections).[21]

1.4. Early removal of Vice-Presidents of the Hungarian Competition Authority

On 5 July 2010, Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition was amended:[22] the new provision included in the law set out that the mandate of the Vice-Presidents of the Hungarian Competition Authority shall be terminated if the term of the Competition Authority's President is over. The amendment also stated that the new provision shall also be applied to the Vice-Presidents in office. Since the mandate of the President of the Competition Authority in office terminated in the autumn of 2010, this would have meant that the mandate of the Vice-Presidents appointed for six years in September 2009 would have been terminated prematurely, only after one year in office. Consequently, the Prime Minister could have proposed both a new President and new Vice-Presidents to be appointed in November 2010. However, the respective Bill was sent to the CC by the President of Hungary, which ruled in its Decision 183/2010. (X. 28.) that the Bill violated the rule of law by adopting an individual decision in the form of legislation with a retroactive effect, and therefore annulled the respective provisions. It needs to be added that this decision was adopted before the number of CC judges was raised from 11 to 15 and the ruling coalition filled the court with closely affiliated candidates.

[15] ABI-1642-4/2011/H, 7 June 2012
[16] See e.g.: http://hvg.hu/itthon/20110607_jori_szerint_aggalyos_szocialis_konzultac (7 June 2011).
[17] See e.g.: http://atv.hu/cikk/20120229_navracsicsot_es_szijjartot_perli_jori (29 February 2012).
[18] See e.g.: http://hvg.hu/itthon/20110821_szemelyisegi_jogi_perek_adatvedelmi_ombud (21 August 2011).
[19] See e.g.: http://hvg.hu/itthon/20110928_jori_andras_ombudsman (28 September 2011).
[20] Act LX of 2010 on Amending Act C of 1997 on the Election Procedure
[21] 1/2010. (II. 18.) Parliamentary Decree
[22] T/369 on Amending the Act LVII of 1996 on the Prohibition of Unfair Market Practices and the Restriction of Competition

2. "Individualised" legislation

As shown by the examples below, the ruling majority has used the legislation not only to remove officials prematurely, but also to put or keep in position or pay a favour to its own party members or affiliates.

2.1. "Lex Borkai"

On 8 July 2010, a Bill aimed at amending Article 40/B (4) of the Constitution was submitted by two MPs of the Fidesz, setting out that that members of the Hungarian Armed Forces, the Police and the national security services may not be nominated in parliamentary elections, in the European Parliament elections, in the election of local councillors and mayors and in the election of representatives of minority self-governments while in service and for a period of five years following the termination or ceasing of their service relationship. However, it turned out at the session of the Parliamentary Committee on National Defence and Law Enforcement held on 12 July 2010 that if the amendment is adopted, Zsolt Borkai, that time mayor of the city of Győr, MP of the Fidesz, will not be allowed to be nominated in the municipal elections in Autumn 2010, since he was a professional member of the Hungarian Armed Forces until 2006, a fact to which participants of the session referred to openly.[23] The Bill was revoked on the very same day, and was replaced by another Bill by the same MPs, setting out only a three-year ban. The latter Bill was adopted on 22 July 2010.[24]

2.2. "Lex Szapáry"

On 29 November 2010, the Parliament adopted a Bill submitted by an MP of the Fidesz on 18 November, amending Act LVIII of 2010 on the Legal Status of Government Officials in a way that the Prime Minister may grant an exemption from the general 70-year age limit for government officials if the appointment was necessary for fulfilling a mandate as head of a foreign service agency.[25] It was alleged that the amendment was necessary for allowing the appointment of the 72-year old György Szapáry, the chief economic advisor of Prime Minister Viktor Orbán to Ambassador of the Republic of Hungary to the United States of America, who was heard by the Parliamentary Committee for Foreign Affairs on 16 November 2011 as a candidate for the function.[26]

2.3. "Lex Szász"

In the course of the parliamentary debate of future Act CXXIV of 2010 on the Amendment of Act XC of 2010 on the Adoption and Amendment of Certain Acts of Parliament on Economical and Fiscal Matters, providing for retroactive taxation for the years 2005–2010 and imposing a special tax of 98% on severance payments of certain public sphere workers (see context below), an amendment to the Bill was submitted by the fraction leader of the Fidesz on 16 November 2010, just before the final vote on the Bill, setting out among other things that the 98% tax obligation shall not apply to those severance payments which were paid after 1 January 2005 on the basis of a court decision declaring that the termination of the employment before 1 January 2005 had been unlawful.[27] It was alleged that the amendment was necessary in order to ensure that the severance payment of Károly Szász, President of the Hungarian Financial Supervisory Authority between 2000 and 2004 and reappointed by the ruling majority in 2010, does not fall under the tax obligation. On the basis of the amendment, Éva Sáray, Vice-President of the Hungarian Financial Supervisory Authority between

[23] Minutes of the meeting of the Parliamentary Committee of on National Defence and Law Enforcement on 12 July 2010, available at: http://www.parlament.hu/biz39/bizjkv39/HOB/1007121.pdf.
[24] Amendment of the Constitution of 11 August 2010 – on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary
[25] Act CXXXVIII of 2010 on the Amendment of Act LVIII of 2010 on the Legal Status of Government Officials
[26] See e.g.: http://nol.hu/lap/mo/20101119-lex_szapary__ujabb_szemelyre_szabott_torveny.
[27] T/1447/23.

2002 and 2004 and reappointed in 2010, was also exempted from the tax obligation.[28] Both of the above officials were dismissed in May 2004, but a court decisions delivered in December 2007 ruled that they were dismissed unlawfully and were entitled to their severance payments. If all severance payments paid after 1 January 2005 had fallen under the 98% taxation, it would have burdened their payments as well.

2.4. Remunerations for high ranking public officials after the termination of their office

As it is mentioned in Section A.5. of the Statement of Facts, Act XXXIX of 2000 was repealed as from 1 January 2012, as a result of which Mr. Baka was deprived of the benefits he would have been entitled as an outgoing Supreme Court President. In this regard it needs to be pointed out that with respect to all the other high ranking public officials to whom the repealed Act had pertained, these entitlements were quickly reinstated. The benefits for outgoing Presidents of the Republic, Prime Ministers, CC Presidents and Presidents of the Parliament are now regulated in Act CX on the Status and Remuneration of the President of the Republic (Articles 17-22), Act CLI of 2011 on the Constitutional Court (Article 20), Act XLIII of 2010 on Central Organs of State Administration and the Status of Ministers and State Secretaries (Article 27) and Act XXXVI of 2012 on the Parliament (Articles 121-122) respectively. Therefore, it is certain that the repealing of the Act was not motivated by austerity considerations, and strengthens the suspicion to the level of certainty that the measure targeted Mr Baka personally.

From the point of view of individualised legislation, the developments concerning the President of the Republic deserve special attention. Under Articles 15-17 of Act XXXIX of 2000, former Presidents of the Republic were only entitled to a residence, vehicle usage and a secretariat of two employees if they served the full five years of their mandate. Under the new regulation (Act CX on the Status and Remuneration of the President of the Republic), this precondition is not in place any more. This is important, because Pál Schmitt – former Fidesz MEP and MP, who was elected President in June 2010 – resigned in April 2012 after it was found that he resorted to plagiarism when writing his doctoral thesis. In June 2012, the ruling coalition amended Article 12 (5) of the Fundamental Law to prescribe that the status of not only Presidents but also of former Presidents of the Republic shall be regulated in cardinal laws (i.e. laws that can only be adopted and amended with a two-third majority). According to news sources, the underlying reason was to make sure that the provisions on Pál Schmitt's benefits may not be amended with simple majority of the votes.[29]

3. Legislation with retroactive affect

Intervening in established legal relationships and depriving persons of benefits and payments retroactively has also been a recurring legislative method of the ruling majority. The examples below outline legislative steps which lead to similar results in terms of right to property as the premature dismissal of Mr Baka and his retroactive deprivation of the benefits to which an outgoing President of the Supreme Court would be normally entitled to as described under Section A. 5. of the Statement of Facts.

3.1. Retroactive taxation

A Bill adopted on 22 July 2010[30] amended Article 70/I of the Constitution allowing for retroactive taxation of incomes gained "in an immoral way". Based on this, an Act of Parliament[31] introduced a special tax of 98% on certain revenues as of 1 January 2010 (severance payments above HUF 2

[28] See e.g.: http://hirszerzo.hu/profit/2010/11/16/20101116_vegkielegites_szasz_lazar.
[29] See for instance: http://www.origo.hu/itthon/20120601-alaptorveny-modositassal-tenn-sarkalatossa-schmitt-pal-juttatasait-matolcsy-gyorgy.html
[30] Amendment of the Constitution of 11 August 2010 – on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary
[31] Act XC of 2010 on the Adoption and Amendment of Certain Acts of Parliament on Economical and Fiscal Matters

million HUF [cca. € 6,500] paid to a certain group of employees working in the public sphere). Thus, the Act of Parliament created a tax obligation for the period preceding its promulgation, and, consequently, violated the ban on retroactive legislation. In its Decision 184/2010. (X. 28.), the CC repealed the legislation, and issued a press statement about the case on 26 October 2010. On the same day, the head of the Fidesz faction announced that he would submit a Bill on taxes to the Parliament with the very same content and will initiate the restriction of the powers of the CC with respect to budgetary and tax matters.[32] Accordingly, a Bill aimed at amending the Constitution (restricting the CC's powers and amending Article 70/I again) and a new Bill on retroactive taxation (the future Act CXXIV of 2010)[33] were submitted to the Parliament. The Bill amending the Constitution was adopted on 16 November 2010,[34] and created the constitutional basis for retroactive taxation with a refined text. However, in its Decision 37/2011. (V. 10.) issued in May 2011, the CC repealed provisions of Act CXXIV of 2010 allowing retroactive taxation for the years 2005–2010 with a wording that left open the possibility for the governing majority to reintroduce retroactive taxation for the year 2010. Cases related to this matter are pending before the ECHR.

3.2. Retroactive legislation concerning the pension of armed forces service members

On 28 November 2011, the Parliament adopted Act CLXVII of 2011[35] which deprived former police officers, fire fighters, penitentiary workers, members of the military, etc. (altogether 42 thousand persons) of part of their pensions: the special "early" pension (i.e. pension under the general pension age limit) of armed forces service members was ceased, and degraded to a certain kind of social benefit, which is easier to reduce and revoke in the future than pensions. Furthermore, it was also set out that the amount of the new social benefit shall be decreased with the actual rate of the personal income tax, which means that the rate of the decrease of the benefit is not foreseeable, because if the tax provisions change the amount of the benefit will have to be changed accordingly.

It should be highlighted that constitutional concerns related to the above curtailment of the rights of former service members of the armed forces were secured by amending the Constitution. On 6 June 2011[36] the Parliament included a new Article 70/E (3) into the Constitution, as a result of which the rules curtailing the rights of former service members could not be effectively challenged before the CC. The effect of this provision was extended by Article 19 (5) of the Transitional Provisions to the Fundamental Law of Hungary until 31 December 2012. The aim of this extension was to exclude the possibility of filing a constitutional complaint: under the relevant rules a constitutional complaint may be submitted within 180 days from the day when the law contrary to the Fundamental Law enters into effect, so by the time the constitutional basis for the retroactive curtailment ceased to exist, the deadline of filing a complaint was already over.

Because of the measures above several thousands of former police officers and other former service member pensioners submitted applications the ECHR for the alleged discriminatory treatment that they have suffered in conjunction with the violation of their right to property.[37]

[32] See e.g.: http://www.origo.hu/itthon/20101026-alkotmanyellenes-a-98-szazalekos-kulonado.html.
[33] Act CXXIV of 2010 on the Amendment of Act XC of 2010 on the Adoption and Amendment of Certain Acts of Parliament on Economical and Fiscal Matters
[34] Act CXIX of 2010 on the amendment of Act XX of 1949 on the Constitution of the Republic of Hungary
[35] Act CLXVII of 2011 on the Termination of Old Age Pension for People Younger than the General Retirement Age, on Social Benefit for People Before General Retirement Age and on Armed Services Benefit
[36] Act LXI of 2011 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary Necessary in Order to Adopt Certain Interim Provisions Related to the Fundamental Law
[37] See e.g.: http://www.origo.hu/itthon/20111224-a-strasbourgi-birosaghoz-fordulnak-a-korengedmenyes-nyugdij-miatt-fegyveresek.html.

4. Legislative steps threatening the independence of the judiciary

As referred to in our request, in our view the early dismissal of Mr Baka was an integral part of a series of legislative steps which seriously threaten the independence of the judiciary in Hungary. These laws are referred to in the Statement of Facts and have been examined in detail by the Venice Commission of the Council of Europe two times. Therefore, below we outline only the latest developments which have aggravated the threat to the independence of the judiciary.

4.1. Structural changes in the administration of courts

As referred to under Section A. 2. of the Statement of Facts, the former judicial body in charge of administrating courts has been replaced by a one-person decision-making mechanism, the President of the National Judicial Office (NJO). The model and the extensive powers of the NJO's President were criticized by the Venice Commission in both of its opinions, and it was stated that since the President of the NJO is „an external actor from the viewpoint of the judiciary, it cannot be regarded as an organ of judicial self-government".[38] Neglecting this assessment, the Fourth Amendment to the Fundamental Law of Hungary, adopted on 11 March 2013, included the President of the NJO in the Fundamental Law and included under Article 25 (5) that he/she "manages the central administrative affairs of the courts".[39] Furthermore, suggestions expressed in the second opinion of the Venice Commission have remained mostly unanswered by the Parliament.

4.2. Right of the President of the National Judicial Office to transfer cases

The Venice Commission concluded in its second opinion on the Hungarian laws on judiciary that despite the amendments adopted by the Parliament after the Venice Commission's first opinion, "the powers of the President of the NJO remain very extensive to be wielded by a single person and their effective supervision remains difficult".[40] The Venice Commission indicated that one of pressing nature is the NJO's President's right to transfer cases, i.e. to reassign cases to another court instead of the court designated by the respective procedural laws. This power of the President of the NJO was based on Article 11 (3) of the Transitional Provisions of the Fundamental Law, which stated that the President of the NJO may execute its power to reassign cases "until a balanced distribution of caseload between courts has been realized". This rule of the Transitional Provisions was abolished by the CC in its Decision 45/2012. (XII. 29.), since it was not considered as being of a transitional nature.

In its second opinion, the Venice Commission concluded the following regarding the transfer of cases: „As the transitional character of the system is not guaranteed by providing a precise time-limit when the transferring of cases will finally end and as it seems impossible to elaborate objective criteria for the selection of cases, the Venice Commission strongly disagrees with the system of transferring cases because it is not in compliance with the principle of the lawful judge, which is an essential component of the rule of law."[41] However, despite this criticism, the Fourth Amendment created a constitutional basis for the NJO's President' right to transfer cases by inserting the former rule of the Transitional Provisions into the Fundamental Law. However, the Fourth Amendment does not only uphold the NJO President's right to transfer cases, but also abolishes the transitional character of the

[38] 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, § 51.
[39] Fourth Amendment to the Fundamental Law of Hungary, Article 13.
[40] Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 88.
[41] Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, § 74.

system of transferring cases.[42] This is in clear contradiction with the standpoint of the Venice Commission, and aggravates the violation of the principle to a lawful judge.

As to the practical aspects of transfers, it needs to be mentioned that some politically sensitive, high-profile cases have been transferred,[43] and according to the website of the NJO, at least 30 cases have been transferred to countryside courts from Budapest.

5. Assessment of the above from the point of view of the ECHR case law

In the Harabin case (Application no. 62584/00, Decision on admissibility of 29 June 2004), the Court emphasised the need to take into account the importance of the separation of powers and the independence of the judiciary in assessing any interference with the freedom of expression of a judge in a leading position. In the Hutten-Czapska case (Application no. 35014/97), it was emphasised that "[i]n assessing compliance […], the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are »practical and effective«. It must look behind appearances and investigate the realities of the situation complained."

We are of the view that if the Court investigates the realities of the present case and examines Mr Baka's individual application in the context of the above outlined developments and in the light of the importance of the rule of law and the independence of the judiciary, it will be clear that the adoption of legislation leading to the premature termination of his position was directly linked to and has to be seen as an – illegitimate – interference with the applicant's freedom of expression.

We would also like to call attention to the dangerous precedent the method of forcing through change in the independent Hungarian institutions may set for other Parties to the Convention. As it was set forth in the Fayed case (Application no. 17101/90): "it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 para. 1 (art. 6-1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims […]". The widespread use of "individualised" legislation is capable of removing a wide range of significant issues from judicial scrutiny. If the Court does not make it clear that it will maintain the right to examine "behind the appearances" the real purpose of such legislation and the effect it may have on the concerned individual's Convention rights, this method may be used as a way to avoid control by Convention enforcement bodies, and not only in Hungary.

Sincerely yours, on behalf of the Hungarian Helsinki Committee, the Hungarian Civil Liberties Union and the Eötvös Károly Institute,

András Kádár
co-chair
Hungarian Helsinki Committee

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[42] The text of the new provision included in the Fundamental Law under Article 27 (4) goes as follows: "In the interest of the enforcement of the fundamental right to a court decision within a reasonable time and a balanced distribution of caseload between the courts, the President of the National Judicial Office may designate a court, for cases defined in a cardinal Act and in a manner defined also in a cardinal Act, other than the court of general competence but with the same jurisdiction to adjudicate the case."

[43] See: Decision 248/2012. (VIII. 21.) of the President of the National Judicial Office. For related news, see: http://index.hu/belfold/2012/08/21/szolnokra_kerult_a_sukoro-ugy/. and Decision 21/2012. (VIII. 21.) of the President of the National Judicial Office. For related news, see: http://index.hu/belfold/2012/04/16/az_ab-hez_fordulnak_a_hagyo-per_ugyvedei/.