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Opinion on the Acts of Parliament on Courts, Judges and the Prosecution Service in Hungary

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On 28 November 2011, the governing majority of the Hungarian Parliament adopted four Acts of Parliament concerning the justice system of Hungary:

- Act CLXI of 2011 on the Organisation and Administration of Courts (hereafter referred to as: Court Organisation Act),[1]
- Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereafter referred to as: Act on the Legal Status of Judges),[2]
- Act CLXIII of 2011 on the Prosecution Service (hereafter referred to as: Prosecution Service Act),[3] and
- Act CLXIV of 2011 on the Legal Status of the Chief Public Prosecutor, Prosecutors and Other Prosecution Service Employees and on Prosecutors' Career Path (hereafter referred to as: Act on the Legal Status of Prosecutors). [4]

The four cardinal laws above were submitted to the Parliament only on 21 October, were promulgated on 2 December 2011, and entered into force on 1 January 2012.

I. Legislative context of cardinal laws concerning the justice system

The recent acts were not the first time that the governing majority decided on fundamental questions related to the justice system and the judiciary.

Firstly, an amendment of Act LXIX of 1999 on Petty Offences adopted in August 2010 set out that trainee judges without a judicial appointment may proceed in certain cases and may e.g. decide on the confinement of those committing petty offences, including juveniles, even though the independence of trainee judges was not guaranteed sufficiently. This violated the European Convention on Human Rights, and former rules allowing trainee judges to decide in cases in merit

[1] In Hungarian: *A bíróságok szervezetéről és igazgatásáról szóló 2011. évi CLXI. törvény.*
[2] In Hungarian: *A bírák jogállásáról és javadalmazásáról szóló 2011. évi CLXII. törvény.*
[3] In Hungarian: *Az ügyészségről szóló 2011. évi CLXIII. törvény.*
[4] In Hungarian: *A legfőbb ügyész, az ügyészek és más ügyészségi alkalmazottak jogállásáról és az ügyészi életpályáról szóló 2011. évi CLXIV. törvény.*

were found unconstitutional and were quashed by the Constitutional Court of Hungary in 2008.[5] In order to "solve" constitutional problems, the Constitution was amended parallel with Act LXIX of 1999 on Petty Offences and it was included in Article 46 (3) of the Constitution that trainee judges may in certain cases act as a substitute for "ordinary" judges. Thus, the Constitution was amended on an ad-hoc basis, solely in order to legitimise an unconstitutional proposal, but without ensuring the actual independence of trainee judges. The general reasoning of the Bill amending the Constitution even stated that since allowing trainee judges to decide in cases in merit was formerly found unconstitutional by the Constitutional Court, the Constitution shall be amended to address constitutional concerns. Accordingly, the Constitutional Court is no longer in the position to declare the provisions above unconstitutional. The respective provisions were included later on in Article 27 (3) of the Fundamental Law.

Secondly, the so-called "nullification law", adopted in March 2011,[6] should be referred to. The law nullified condemning court decisions brought in connection with the rioters of Autumn 2006 in cases in which the court decisions were based solely on the testimonies of police officers or solely on police reports. By overruling individual court decisions, the Parliament severely violated the rule of law, the principle of the division of powers and the independence of the judiciary.

As of 1 January 2012, the Fundamental Law has decreased the mandatory retirement age of judges to 62 years from 70 years. As a result of the rule, close to 300 senior judges will have to retire, among them a significant number of the judges serving at higher courts and the majority of the leaders of the higher courts, thus the governing majority may replace practically the entire leadership of the judiciary. Experienced judges will be replaced by judges that are expected to acquire the minimum necessary knowledge during a one-week crash-course.[7]

Furthermore, amendments of Act XIX of 1998 on the Criminal Procedure adopted in July 2011 authorised prosecutors to – upon the decision of the Chief Public Prosecutor – press charges before a court other than the legally designated court if it is deemed necessary for the sake of the speed of the proceedings in certain special cases. However, these legal provisions were abolished by the Constitutional Court on 19 December 2011.[8] As a reaction, the Parliament inserted this possibility – extending to all criminal cases – into the Transitory Provisions of the Fundamental Law on 23 December 2011, so the Constitutional Court will no longer be able to decide on the constitutionality of these rules. (Further amendments quashed by the Constitutional Court included provisions allowing 120-hour long custody without a judicial review, interrogations in the first 48 hours of detention without a defense counsel in certain special cases and the withholding of information regarding the reasons for arrest. These amendments also violated the European Convention on Human Rights and new EU directives to be adopted.)

The list is not over: as a coup de grâce to the independence of the judiciary, the ruling parties removed András Baka, the President of the Supreme Court (*Legfelsőbb Bíróság*) and the National Council of Justice (*Országos Igazságszolgáltatási Tanács*) from his office as of 1 January 2012, even though he was elected by the Parliament in 2009 for six years. The removal was explained by the changes in the court system, including the transformation of the Supreme Court. However, there are no valid reasons in constitutional law for breaching the requirement of non-removal, as it is an essential feature of independence. The arbitrary nature of the removal of András Baka is obvious if we consider that the main tasks of the Curia, as the "new" highest judicial forum, are the same as that of the former Supreme Court, that all other judicial leaders (with the exception

[5] Decision 1/2008. (I. 11.) of the Constitutional Court
[6] In Hungarian: *A 2006 őszi tömegoszlatásokkal összefüggő elítélések orvoslásáról szóló 2011. évi XVI. törvény.*
[7] http://mba.birosag.hu/engine.aspx?page=mba_kozpontikepzesiterv
[8] Decision 166/2011. (XII. 20.) of the Constitutional Court

of the Vice-President of the Supreme Court) remained in office, and that the truly fundamental changes concerning the system of the Parliamentary Commissioners (Ombudspersons) did not prevent the governing majority from keeping the former Parliamentary Commissioner for Civil Rights Máté Szabó in office as the newly established Commissioner for Fundamental Rights.[9]

The legislative steps presented above reveal a lot about the current Government's approach towards the justice system as a whole.

II. Opinion on the Court Organisation Act and on the Act on the Legal Status of Judges

A) The regulatory concept

Even though the new arrangement of the system for the administration of courts was presented as a new model by the legislator, the Court Organisation Act does not alter the system of administration, but only changes the mechanism of adopting decisions of an administrative nature. The regulatory concept seems to comply with the concept widely relied upon by the governing majority in the last one and a half years, namely that the centralisation and concentration of powers is the only good solution in every area.

The new organisational and administrative system means nothing more in reality than the amendment of the former Hungarian model of the administration of courts. In itself, changing the former system could be a welcome legislative step, since the Hungarian system of the administration of courts, governed by the National Council of Justice (*Országos Igazságszolgáltatási Tanács*), has been widely criticised in the past years. The National Council of Justice was criticised for defending the principle of judicial independence to such an extent that the operation of the justice system almost became an internal issue of judges, the operation of courts had become non-transparent and there was no place for accountability. Judges and judicial leaders were also criticised. The internal, self-governing system of administration allowed judges to elect their administrative leaders from among themselves. Unfortunately, this possibility was used to elect presidents of county courts to the National Council of Justice, adding to their already significant influence. Thus, county court leaders monitored their own courts and themselves while acting as administrative leaders, which obviously weakened the efficiency of the control mechanisms. Consequently, they usually found that everything is in order, and could more easily achieve an increase in the number of staff members of their courts or obtain rewards for the extra workload related to lengthy proceedings.

Accordingly, the internal system of court administration obviously had to be reformed at the time of adopting the Fundamental Law and the Court Organisation Act.

Although the Court Organisation Act modified the rules of the internal administration model, it did not address the problems above. Instead, the administration of courts has become fully

[9] See also: Alternative answer of NGOs to Viviane Reding, European Commission Vice-President, Commissioner in charge of Justice, Fundamental Rights and Citizenship; available at: http://helsinki.hu/wp-content/uploads/Letter-to-Viviane-Reding-29-12-11.pdf, pp. 7-8.
It should be added that when NGOs, opposition party politicians and the Venice Commission voiced their concerns that renaming the highest judicial forum may be followed by the removal of the President of the Supreme Court, politicians making statements in the name of the governing party vigorously denied this intent. For example, Gergely Gulyás stated explicitly in an interview for Inforadio that the Curia will be the successor of the Supreme Court and the renamed body will be lead by András Baka (http://inforadio.hu/hir/belfold/hir-426973).

centralised, and the mechanism of decision-making has been transformed in the name of efficiency and timeliness: collective decision-making (the National Council of Justice) has been replaced with a one-person decision-making mechanism, the President of the newly established National Judicial Office (*Országos Bírósági Hivatal,* NJO).

> *Court Organisation Act, Article 65*
> *Observing the constitutional principle of judicial independence the President of the NJO shall fulfil the central duties of court administration and the management duties with respect to the chapter on courts in the Act on the State Budget, and shall supervise the administrative activities of the presidents of regional courts of appeal and tribunals.*[10]

A negative result of the new regulation may be that the efficiency of the court system cannot be measured in the future, since it is not clear from the regulatory concept what kind of aspects, features or statistical data were taken into account by the political decision-makers while, as stated, they were striving to establish an efficient and speedy justice system. Since there are no reference points, it may be stated any time in the future that the Court Organisation Act has been successful and, as a result of the changes, courts operate in a better way. Therefore, since efficiency may not be measured, the legislator cannot face any failure.

The one-person leadership puts an end to the internal, oligarchic fights within the NCJ, but the President of the NJO may administer courts in a non-transparent way, without any control mechanisms in place.

Under Article 66 of the Court Organisation Act, the President of the NJO is elected for nine years, but if the election for a new President is unsuccessful, he or she may remain in office automatically until the new President is elected, thus for an indefinite period of time.

> *Court Organisation Act, Article 66*
> *The President of the NJO shall be elected by Parliament from among judges appointed for an indefinite period of time and having at least 5 years of judicial service. The President shall be elected for 9 years with two-thirds of the votes.*
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> *Court Organisation Act, Article 70*
> *(1) The office of the President of the NJO shall be terminated:*
> *a) upon the expiry of the term of office,*
> *(4) If the termination of the office of the President of the NJO is based on Paragraph (1) a) and Parliament did not elect a new President before the termination of office, the President of the NJO shall exercise presidential powers until the new President of the NJO has been elected.*

The President of the NJO performs all the tasks of the former National Council of Justice alone: he or she shall issue administrative regulations, recommendations and decisions, shall supervise the activities of judicial leaders, and shall decide on the appointment of judges and on basically all organisational and personal matters related to courts.

> *Court Organisation Act, Article 76*
> *(1) In his/her general central administrative position the President of the NJO shall (...)*
> *b) draw up in line with legal provisions – as normative instructions – all the mandatory rules and regulations applicable to courts, furthermore he/she shall adopt recommendations and decisions in order to perform his/her*

[10] The source of the citations from the Court Organisation Act is the English translation of the Court Organisation Act available on the website of the Venice Commission: http://www.venice.coe.int/docs/2012/CDL-REF%282012%29007-e.pdf.

administrative tasks, (...)
(2) In his/her role of managing the NJO the President of the NJO shall
a) manage the activities of the NJO,
b) establish the rules of organisation and operation of the NJO, and
c) make proposals concerning the appointment and relief of the Vice-President of the NJO.
(3) In his/her role concerning the budgets of courts the President of the NJO shall
a) draw up his/her proposal concerning the budget of courts and the report on the implementation of the budget – requesting and communicating the opinions of the NJO, furthermore that of the President of the Curia with respect to the Curia – which the Government shall put forward to Parliament as part of the Act on the State Budget and its implementing provisions without amendment, (…)
e) manage the internal audit of courts, (…)
(4) In his/her role regarding statistical data collection, case distribution and the measuring of workloads the President of the NJO shall (…)
b) designate another court to proceed instead of the presiding court if so necessitated by the objective of adjudicating cases within a reasonable period of time,
c) in especially justified cases, order the adjudication of cases concerning a broad spectrum of society or cases of outstanding importance with a view to public interest as a matter urgency,
d) decide on the collection of judicial statistical data and on central duties concerning data processing, (…)
(5) In his/her role regarding matters of human resources, the President of the NJO shall
a) publish vacancies for judges,
b) put forward a proposal to the President of the Republic concerning the appointment and relief of judges, (…)
e) designate, in line with the Act on the Legal Status and Remuneration of Judges, the judges adjudicating cases defined in Article 17 (5) and (6) and in Article 448 (2) of the Act on Criminal Procedure [criminal procedures against juveniles], furthermore upon the recommendation of the President of the tribunal he/she shall designate the judges presiding in administrative and labour cases at the tribunals,
f) may post judges to the Curia, to the NJO, to the Ministry led by the Minister responsible for justice affairs, and shall decide upon the termination of the appointment and reappointment of the judge to an actual judicial position,
g) adopt a decision on the transfer of the judge, (…)
m) appoint and relieve the court leaders defined by law, (…)
(6) In his/her role concerning the administration of courts, the President of the NJO
a) shall approve the rules of organisation and operation of regional courts of appeal and tribunals,
b) shall manage and control – with the exception of Presidents of district, administrative and labour courts – the administrative activities of court Presidents, in the course of which he/she shall monitor the observance of rules on the administration of courts, the observance of procedural deadlines and procedural rules, (...)

At the same time, the National Judicial Council (*Országos Bírói Tanács,* NJC), consisting of 14 judges and the President of the Curia (the former Supreme Court), does not have any substantial power: it may only comment on the measures of the President of the NJO and make suggestions to alter presidential decisions (which suggestions can be disregarded without any consequence), thus it may not perform any real control over the President.

In the framework of its "supervisory" power, the NJC may, among other duties, recommend the President of the NJO to initiate the adoption of a law concerning courts, shall comment on the regulations and recommendations of the President of the NJO, along with the proposal on the budgetary chapter for courts and its implementation. Furthermore, the NJC shall supervise the implementation of the court system's budget.

Court Organisation Act, Article 88
(1) The NJC is the supervisory body of the central administration of courts.
(3) The NJC shall be composed of 15 members, which are the following: the President of the Curia and 14

judges.

Court Organisation Act, Article 103
(1) In the area of general central administration the NJC
a) shall examine the central administrative activity of the President of the NJO and signal any problems,
b) shall make proposals to the President of the NJO initiating legislative activity concerning courts, and
c) shall express opinions on the rules and recommendations issued by the President of the NJO.
(2) In terms of budgets the NJC
a) shall express its opinion on the budget of courts and the report on the implementation thereof,
b) shall examine the economic and financial management of courts, (…)
(3) In the area of human resources the NJC
a) shall publish an annual opinion on the practices of the NJO and the President of the Curia with respect to evaluating the applications of judges and court leaders, (...)
e) shall express preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview, (...)
g) shall express a preliminary opinion on the applicant in the case specified in Article 132 (6). [See explanation below.]

B) Judicial independence

While the deficiency of the former model of administration was that judicial independence was placed before any other interest, the new administrative model, and the one-person decision-making mechanism, directly threatens the formerly protected judicial independence. The former self-governing system, lead by the National Council of Justice, was criticised harshly precisely because courts enforced their autonomy and the principle of judicial independence for its own sake. The new cardinal laws create an organisational and administrative system in which the independence of judges, being an unquestionable criterion of constitutionality, is threatened. It may be interpreted that, as the first step of this process, the principle of the independence of judges was "left out" from the Fundamental Law.

In the new model, the appointment of judges – except of judges of the Supreme Court – is placed in the hands of the President of the NJO.

Court Organisation Act, Article 76
(5) In his/her role regarding matters of human resources, the President of the NJO shall
a) publish vacancies for judges,
b) put forward a proposal to the President of the Republic concerning the appointment and relief of judges, (…)

Act on the Legal Status of Judges, Article 17
Applications [for judicial positions]shall be assessed by the President of the NJO or, in the case of applications invited for a position at the Curia, by the President of the Curia.[11]

The fact that the President of the NJO is not bound by the recommendation of the council of judges, who assess applications and hear applicants for judicial positions, while deciding on appointments (i.e. about the recommendation on appointments, to be submitted to the President of Hungary) may lead to questioning the independence of judges appointed. The President of the NJO may not only veto the appointment of a given judge, but has full liberty in selecting the

[11] The source of the citations from the Act on the Legal Status of Judges is the English translation of the Court Organisation Act available on the website of the Venice Commission: http://www.venice.coe.int/docs/2012/CDL-REF%282012%29006-e.pdf.

judges to be appointed. Therefore, the President of the NJO may recommend the applicant ranked as second or third by the council of judges. The only limitation in this regard is that the President of the NJO shall inform the NJC about the reasons for overruling the ranking, but the approval of the NJC is not necessary.

Act on the Legal Status of Judges, Article 18
(3) The President of the NJO may decide to deviate from the shortlist and propose the second or third candidate on the list to fill the post.
(4) If the proposed candidate is not a judge, the President of the NJO shall forward the application to the President of the Republic for appointment within 8 working days. The NJC shall be informed of the reasons for the deviation in writing when the application is forwarded to President of the Republic, and shall disclose its reasons at the following NJC session. The written information provided by the President of NJO to the NJC and the verbal information given at the following NJC session shall not affect the proposal to the President of the Republic and the appointment.

The same concerns may be raised in connection with the appointment of judges to leading positions, since the recommendation of the different judicial bodies concerning the appointments to these positions may be disregarded by the President of the NJO and the President of the Curia. A person may also be appointed as a judicial leader if he or she did not get the support of the majority of the relevant judicial body's members – in this case the NJC shall submit a preliminary opinion on the applicant, but the President of the NJO or the Curia are not obliged to comply with this opinion.

Court Organisation Act, Article 103
(3) In the area of human resources the NJC (...)
g) shall express a preliminary opinion on the applicant in the case specified in Article 132 (6).

Court Organisation Act, Article 132
(4) The person authorised to make the appointment [of a court leader] shall not be bound by the recommendation of the reviewing board, however, he shall justify his decision in departure from the recommendation in writing.
(5) In the case of a decision in departure from the recommendation of the reviewing board, the President of the NJO and the President of the Curia shall inform the NJC of the reasons for such departure in writing, simultaneously with the appointment, and shall state his reasons at the next meeting of the NJC. The written report submitted by the President of the NJO or the President of the Curia to the NJC and the verbal information provided at the next meeting of the NJC shall not affect the appointment of the court leader.
(6) If the President of the NJO or the President of the Curia wishes to appoint a candidate who did not obtain the majority support of the reviewing board, Paragraph (5) shall govern, with the proviso that he shall obtain the prior opinion of the NJC on the candidate before making the appointment. The candidate may only be appointed thereafter, in the light of the opinion of the NJC.

Judicial independence is further threatened by Article 62 (1) of the Court Organisation Act. This provision sets out that the President of the NJO may, in exceptional cases, appoint a court other than the legally designated court to proceed in a given case if the initial court's extraordinary and disproportionate caseload results in a situation by which the case will not be concluded in reasonable time. Thus, parties are deprived of their designated judge under the aegis of efficiency, and this will result that the independence of the court appointed becomes arguable.

Court Organisation Act, Article 62 (1)
(1) The President of the NJO may, as an exception, appoint a court with the same competence for the assessment of a case instead of the competent court if the case or a specific group of cases received by the court during a given

period cannot otherwise be assessed within a reasonable time due to the extraordinary and disproportionate work load of the court and if the appointment does not result in a disproportionate burden for the appointed court.

On the basis of the above it seems that the legislator's goal is either to ensure the possibility of exerting political influence or to sacrifice the fundamental constitutional principle of judicial independence in the favour of efficiency.

C) Efficiency and timeliness

According to the general reasoning of the Court Organisation Act, the Hungarian justice system was strongly criticised as to its predictability and timeliness (i.e. the requirement that procedures are not protracted unreasonably). According to the logic of the legislator, a predictable and timely justice system may be established if the court system itself has an efficient and operational central administration, which is able to react to social and economical changes rapidly. The general reasoning states that the one-person decision-making guarantees the rapid and operational administration.

The efficiency and the timeliness of the justice system go hand in hand, and they do not depend on the way of decision-making, while respecting the principle of judicial independence is the precondition of efficiency. In our view courts operate in an efficient way if judicial tasks are performed within a reasonable time, under the quality control of the public, in a transparent and accountable way. Furthermore, the client-friendly nature of courts shall also be kept in mind. Thus, the notion of efficiency consists of several elements, and whether decisions are reached by one person or more is surely not a decisive factor in this regard.

Even though statistical data on the timeliness of the justice system and on the lengthy procedures exceeding one, two or five years before different courts are available, no data were referred to by the legislator in the reasoning of the Bill.[12] If the legislator had taken a glance at the statistical data then it would have been clear that the problem of lengthy procedures is not a national problem, but is a characteristic of a few courts, such as the Metropolitan Court and the Pest County Court.

It is obvious that in order to increase efficiency it is necessary to analyse the available statistical data, the caseload, the number of judges and types of cases, since this is the only way of defining the right method for establishing a faster, more rational or even more professional justice system. Unfortunately, the legislator failed to carry out any impact analysis in this regard.

D) Transparency

The transparency of the justice system has been decreased: as a consequence of the new rules, the controlling functions expected in the public nature of the centralised system of courts, are almost entirely missing. While increasing the transparency of the justice system is an irreversible international trend, the new Hungarian rules have the audacity to decrease it, narrowing the range of information available for the public.

So far, decisions, recommendations and regulations of the National Council of Justice, along with its budget and the annual reports published by the President of the National Council of Justice were public, whereas internal decisions were not. As to the sittings of the National Council of

[12] The data on the caseload of courts is available also for the public: http://www.birosag.hu/engine.aspx?page=Birosag_Statisztikak . Furthermore, the reports of the President of the National Council of Justice also contained statistical data: http://www.birosag.hu/engine.aspx?page=OIT_ParlamentiTajekoztatok.

Justice, only the summaries of the minutes were available. In the last couple of years, the National Council of Justice, due to the professional criticism targeting the non-transparent features of the justice system and the constantly emerging problems in this regard, clearly tried to develop transparency. Even though it was not entirely successful, publicity was increased to a certain extent. Consequently, transparency regarding the justice system was narrowed at a time when the National Council of Justice moved towards a wider publicity. Thus, the new rules mean a retreat compared to the former practice.

According to the Court Organisation Act, decisions of the omnipotent President of the NJO shall be published on an intranet network available only for judges. However, the annual report of the President of the NJO and the minutes of the hearings of judicial leaders to be appointed by the President of the NJO, thus practically every judicial leader besides those at the Curia, will be available for the public. The latter means a development in terms of public availability, but it is not enough to counterbalance the totally non-transparent way of operation as far as the President of the NJO is concerned.

Court Organisation Act, Article 77
(5) The decisions and procedural decisions taken by the President of the NJO in the course of the operations of the NJO shall be published on the intranet.

Articles 103 and 107 of the Court Organisation Act also restrict public data regarding the National Judicial Council, even though the body merely has any substantive function. Only the annual plan of its sittings and the short summaries of its sittings are available for the public. However, summaries are compiled concerning decisions affecting the administration of courts and the activities of judges to a wider extent, but only if deemed to be of public interest by the NJC. Minutes on the sittings, containing extensive information, are not available for the public, but only for judges via the intranet.

Only Article 103 of the Court Organisation Act provides some insight for the public into the system of justice: the opinions of the NJC on the practice of deciding on applications for judicial and leading judicial positions, as performed by the President of the NJO and by the President of the Curia, are made public.

Court Organisation Act, Article 103
(3) In the area of human resources the NJC
a) shall publish an annual opinion on the practices of the NJO and the President of the Curia with respect to evaluating the applications of judges and court leaders, (…)

Court Organisation Act, Article 107
(1) The NJO shall prepare the minutes of the meeting of the NJC and a summary of the decisions concerning the broader context of administration of courts and the activities of judges which might draw public interest. The agendas included in the summary and the content of the summary shall be decided upon by the NJC at the meeting. The summary shall not contain any agenda discussed in a closed meeting.

Court Organisation Act, Article 108
(1) The annual plan of meetings of the NJC and a summary of the meeting, as well as the minutes of the preliminary opinions on the persons nominated as President of the Curia and President of the NJO shall be published on the central website.
(2) The minutes of the NJC meeting shall be put on the intranet, except in the case of a closed NJC meeting.

III. Opinion on the Prosecution Service Act and on the Act on the Legal Status of Prosecutors

Even though the new acts on the Prosecution Service and the legal status of prosecutors were presented as a "reform" by the Ministry of Public Administration and Justice, they cannot be regarded as such. As to the formal aspects, the Bills were preceded by neither thorough professional preparation, nor public debate. The governing majority continued its usual practice, and did not provide enough time for commenting on the Bills: not more than one day was provided to comment on the 29 and 97-page-long draft Bills regarding the prosecutors and the Prosecution Service, thus there was no occasion for a meaningful public debate. Moreover, no reform was carried out from a substantial point of view either, since no progress was made regarding the operation of the respective institutions.

A) The regulatory concept

Traditionally, the Prosecution Service may have two functions: enforcement of the state's criminal policy and – usually in European countries and under strict conditions – public interest litigation and legal supervision. If the aim is that the Prosecution Service enforces criminal policy, then it should be assigned under the executive branch and one of the Ministers shall be in charge of governing it. However, if the Prosecution Service is expected to perform public interest litigation as well as legal supervision, it should have real political independence and high autonomy. The Hungarian system used to be a mixture of these two models above, while its organisational structure followed the Soviet model. In Hungary, the Chief Public Prosecutor is elected by the Parliament, thus the Prosecution Service is formally controlled by the legislature and is independent from the Government. At the same time, the Prosecution Service is a hierarchical organisation operating on the basis of a strict system of instructions (orders).

The new Acts of Parliament, on the one hand, declare the Prosecution Service's independence and autonomy. However, on the other hand, they also contain elements that are typical of a Prosecution Service subordinated to the Government. As a result, the system remains a hybrid model, where the Prosecution Service is neither controlled by, nor responsible to, any other body. The strict system of instruction is consistent with the constitutional function of the Prosecution Service as declared by Article 29 of the Fundamental Law. However, the system of instruction does not correspond to the significant powers of the Prosecution Service in terms of litigation and legal supervision as set out by the Prosecution Service Act. Furthermore, the Prosecution Service may easily become a political tool in the hands of the party which elected the current Chief Public Prosecutor.

Fundamental Law, Article 29
(1) The Supreme [i.e. Chief Public] Prosecutor and prosecution services shall contribute to the administration of justice by enforcing the State's demand for punishment. Prosecution services shall prosecute offences, take action against any other unlawful act or omission, and shall promote the prevention of unlawful acts.
(2) By statutory definition, the Supreme [i.e. Chief Public] Prosecutor and prosecution services shall:
a) exercise rights in conjunction with investigations,
b) represent public accusation in court proceedings,

c) supervise the legitimacy of penal enforcement,
d) exercise other responsibilities and competences defined by law.[13]

Prosecution Service Act, Article 3
(1) The Prosecution Service is an independent, autonomous constitutional organisation, subordinated only to Acts of Parliament.

In our view, the main characteristics of the system set up by the Prosecution Service Act and the Act on the Legal Status of Prosecutors are the following:

- the centralised nature of the Prosecution Service is upheld by the new rules;
- the Chief Public Prosecutor's term of office has been extended to 9 years, which leads to the institution's further separation from the parliamentary cycle and also strengthens the independence of the Prosecution Service from the other branches of power;
- the Chief Public Prosecutor's wide-ranging decision-making powers, not limited by Acts of Parliament and not controlled by anyone, increase the Chief Public Prosecutor's power in terms of governing the Prosecution Service;
- participation in the operation of the justice system is declared to be the main task of prosecutors, and in order to fulfil this task they are vested with too much power in terms of criminal procedures;
- legal supervision performed by the Prosecution Service is not limited to public authorities, but is extended to a significant extent to economic and non-governmental organisations as well, moreover, the Prosecution Service has extensive wide possibilities to carry out public interest litigation.

B) The Prosecution Service and the Chief Public Prosecutor

The Prosecution Service is strictly a hierarchical system, and is characterised by the right of the prosecutors of "higher instances" to give binding instructions to subordinate prosecutors. Eventually, a single person (the Chief Public Prosecutor) has the right to make the most important decisions concerning the operation of the Prosecution Service, and he or she may govern the whole organisation. Thus, the individual measures of prosecutors are not based on autonomous decisions (in contrast with court decisions). However, the principle that the proper operation of an organisation cannot depend on the person leading the organisation should stand for the Prosecution Service as well: it is rather dangerous if the operation of the organisation depends only on the personal qualities and character of its head (and indeed this is the case with hierarchical organisations). In parliamentary democracies legal guarantees are able to eliminate such dangers. Unfortunately, the new Hungarian laws related to the Prosecution Service lack these kinds of guarantees.

The Chief Public Prosecutor's position may become dangerous especially because the Chief Public Prosecutor has strong rights in terms of issuing instructions (orders).

Prosecution Service Act, Article 12
(1) Prosecutors are subordinated to the Chief Public Prosecutor; they may be instructed only by the Chief Public Prosecutor and by the superior prosecutor.

[13] Official translation, see: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf.

According to the respective provisions of the Prosecution Service Act, the Chief Public Prosecutor has the right to issue orders on the rules regarding competences and jurisdiction within the Prosecution Service, and he or she may also establish autonomous prosecution services for dealing with any task of the Prosecution Service.

Prosecution Service Act, Article 8
(2) Autonomous county and district level prosecution services may be established for carrying out investigation, or, if it is justified, for fulfilling other tasks of the Prosecution Service.
(3) The Prosecution Service's organisation, operation and jurisdiction shall be regulated by the Chief Public Prosecutor's orders, within the framework set up by Acts of Parliament.

The provisions defining superior prosecutors may be overwritten by the Chief Public Prosecutor's order, thus instructing a prosecutor may be removed from his or her original superior's competence. (It has to be added that superior prosecutors – thus the Chief Public Prosecutor and the heads of county level prosecution services *[főügyészség]* – have the right to instruct subordinate prosecutors, may assign any of the subordinate's cases to themselves, and may appoint another prosecutor to deal with a given case. Moreover, heads of the county level prosecution services are responsible for the economic management of the district level prosecution services *[járási ügyészség]* subordinated to them.)

Prosecution Service Act, Article 12
(4) Unless provided otherwise by law or by the order of the Chief Public Prosecutor, the superior prosecutor shall be [the following]. (...)

Prosecution Service Act, Article 13
(1) The superior prosecutor may instruct subordinate prosecutors, may refer any of their cases to his or her own competence, any may appoint another – subordinate – prosecutor to deal with a given case.

Prosecution Service Act, Article 14
(1) The head of the prosecution service organ
a) shall provide for resources in staff and equipment necessary for the operation of the prosecution service within the budgetary framework, (...)
c) shall, with the exceptions set out by the order of the Chief Public Prosecutor, govern the economic management of the prosecution service, (...)
(2) Tasks included in Paragraph (1) a) and c) regarding district level prosecution services shall be performed by the head of the county level prosecution service.

Furthermore, the Chief Public Prosecutor may, at any time, revoke appointments to leading positions within the Prosecution Service (granted by him or her for an indefinite period of time), without being obliged to provide reasons for the decision.

Act on the Legal Status of Prosecutors, Article 25
(1) Appointments to leading positions falling under the competence of the Chief Public Prosecutor are valid for indefinite periods of time, and may be revoked any time without justification. Before revoking the appointment to a leading position, the opinion of the prosecutors' council shall be requested.

Besides listing the rights of the Chief Public Prosecutor in terms of issuing orders and performing control of the Prosecution Service, the respective legal provisions do not set out the substantive and procedural guarantees for exercising these rights. The Chief Public Prosecutor is given a free hand.

Prosecutors have the right to collect information from any public authority, economic entity or other organisation. They also have the right to access court documents without limitation. Moreover, the Chief Public Prosecutor may decide upon which personal and sensitive data should be processed by the Prosecution Service. The serious concerns of the Data Protection Commissioner regarding the rules on personal data processing (Chapter V of the Prosecution Service Act), which were expressed before the Act of Parliament was adopted, were ignored.[14]

Prosecution Service Act, Article 4
(3) In the course of performing his or her tasks and competences, the prosecutor may inspect, without any limitation, documents that emerged in the course of the procedures of courts and law enforcement agencies other than courts, along with registers kept by them, and may request copies of documents and data from the registers. The prosecutor may also address other public authorities, economic and other organisations in order to provide documents or data. The head of the organisation addressed shall comply with the request within the deadline set out by the prosecutor. In the course of criminal proceedings, documents and data shall be purchased according to the provisions of the Code of Criminal Procedure.

Prosecution Service Act, Article 31
(1) In order to fulfil its criminal law, public interest protection, management, statistical and scientific research tasks as set out in an Act of Parliament, the Prosecution Service may process personal and sensitive data through its central, territorial and local data processing organs appointed within the Prosecution Service, with respect to the scope of data listed by an order of the Chief Public Prosecutor.

There is no possibility for a judicial review regarding the prosecutors' decisions, and one may only request the review of a decision from the superior prosecutor. Consequently, as a result of the centralised structure of the organisation, the superior prosecutor reviews the decision of the prosecutor that is instructed by him or herself.

The rule setting out that the procedural rules related to the immunity cases of Members of Parliament shall also be applied in immunity cases of the Chief Public Prosecutor has been maintained by the Prosecution Service Act. The problem is that the Act of Parliament on the legal status of MPs provides that the motion aimed at the waiver of the MPs' immunity shall be filed by the Chief Public Prosecutor to the Speaker of the Parliament, if charges have not been pressed yet.[15] Thus, the Chief Public Prosecutor should file a motion aimed at the waiver of immunity in his or her own case.

Prosecution Service Act, Article 3
(6) In the case of the Chief Public Prosecutor, the procedural rules related to the immunity of Members of Parliament shall be applied. The waiver of immunity is decided on by the Parliament, with the votes of two-thirds of the MPs present; in case immunity is violated, the necessary measures are carried out by the Speaker of the Parliament.

The provisions of the new laws that consider the Chief Public Prosecutor as a high-ranking public officer (he or she may attend any plenary sitting of the Curia[16] and is considered to be in the same position as the President of the Curia as far as remuneration is concerned) show that the prosecution is regarded as at least as important in terms of the justice system as judges. The Prosecution Service also contributes to the proper application of Acts of Parliament in the course of judicial proceedings. This regulatory concept reminds us of the idea of a state organisation

[14] http://hvg.hu/itthon/20111124_jori_adatvedelmi
[15] Article 5 (2) of Act LV of 1990 on the Legal Status of Members of Parliament
[16] The Chief Public Prosecutor's right to participate at the sittings of the highest judicial forum originates from the Soviet times and was ceased by Act LXX of 1997.

based on the unity of the branches of power, rather than that based on the division of powers, as is declared in the Fundamental Law of Hungary.

Prosecution Service Act, Article 11
(2) The Chief Public Prosecutor
a) may attend the sittings of the Parliament and the plenary sittings of the Curia in an advisory capacity, (…)

Act on the Legal Status of Prosecutors, Article 58
(2) In terms of further rights attached to their position, not regulated by the present Act of Parliament, the Chief Public Prosecutor shall be considered as being in the same position as the President of the Curia, the Vice-Chief Public Prosecutor shall be considered as being in the same position as the Vice- President of the Curia, (...)

Prosecution Service Act, Article 2
(1) In order to fulfil the tasks set out in Paragraph (1), the Prosecution Service shall (…)
f) contribute to the proper application of Acts of Parliament in the course of judicial proceedings (the participation of the prosecutor in the litigative and non-litigative civil law, labour law, administrative law and economic law proceedings of courts), (…)

The organisational and financial integration of the Military Prosecution into the Prosecution Service further increases the significance of the Prosecution Service and the role of the Chief Public Prosecutor. Whereas military prosecutors were previously members of the military staff, and were governed by the Minister of Defence, under the new rules they are exclusively governed by the Chief Public Prosecutor. (Even though we do not consider the integration as a failure in itself, the step is worrying in light of the centralisation flowing from the present rules.)

The declared autonomy and independence of the Prosecution Service does not mean what it should: the rules that were supposed to guarantee the Prosecution Service's independence do more to ensure its uncontrolled operation. In reality, the Prosecution Service's declared independence means that it is not responsible to anybody. The Chief Public Prosecutor is elected by a two-third majority of the Parliament upon the proposal of the President of Hungary for nine years, it has to be stressed however, that the Chief Public Prosecutor's mandate does not terminate upon reaching the general retirement age limit, as it does in the case of "ordinary" prosecutors and judges, but only upon reaching the age of 70 years. Furthermore, the Chief Public Prosecutor may also remain in office after reaching the age of 70, or after his or her term of office has been terminated, in cases where a new Chief Public Prosecutor has not yet been elected by the Parliament.

Fundamental Law of Hungary, Article 29
(3) The organisation of prosecution shall be led and directed by the Supreme [i.e. Chief Public] Prosecutor, who shall appoint prosecutors. With the exception of the Supreme [i.e. Chief Public] Prosecutor, no prosecutor may serve who is older than the general retirement age.[17]

Act on the Legal Status of Prosecutors, Article 22
(1) The office of the Chief Public Prosecutor shall be terminated:
a) upon the expiry of the term of office [Fundamental Law Article 29 (4)], (...)
d) upon reaching the age of 70 years, (…)
(2) If the termination of the office of the Chief Public Prosecutor is based on
a) Paragraph (1) a) or

[17] Official translation, see: http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf.

b) Paragraph (1) d),
the Chief Public Prosecutor shall exercise his or her powers as a Chief Public Prosecutor until the new Chief Public Prosecutor's term of office begins.

Theoretically, the rules above could prevent the Prosecution Service from being politically partial, but, taking into consideration the current political circumstances, they rather enable the election of a Chief Public Prosecutor favoured by the Government, and due to the new rules, the current Chief Public Prosecutor is practically immovable from his position. Let us mention that the Government, having a two-third majority in the Parliament, chose to change the rules of election concerning the Chief Public Prosecutor, setting out a two-third majority instead of the former simple majority, but did not exclude the re-election of the Chief Public Prosecutor. (The respective provisions were adopted by the Parliament in November 2010, and the current Chief Public Prosecutor was elected according to these rules on 14 December 2010.) The Prosecution Service is not subordinated to the Government through the Chief Public Prosecutor, as a result the Chief Public Prosecutor does not share the Government's political responsibility (the change of the Government will not affect the Chief Public Prosecutor's person), and the Chief Public Prosecutor is not responsible to the Parliament either: he or she only has the duty to report to the Parliament annually about his or her activities, and Members of Parliament only have the right to pose questions to him or her.[18]

In a constitutional democracy, one of the worst charges a public authority may face is uncontrollability, and the Prosecution Service of Hungary may be accused of this. The Prosecution Service has powerful rights but has no checks and balances under the new legal provisions. Through the Chief Public Prosecutor, the Prosecution Service can be freely used as a tool in the fight for political power.

C) The Prosecution Service's role in the criminal justice system

The controversial situation in which the Prosecution Service is not subordinated to the Government, as well as that which calls for prosecutors to act to the best of their knowledge,[19] while they are totally subordinated to the superior prosecutor and/or the Chief Public Prosecutor in individual cases, has not been solved. The rules concerning the incompatibility and the professional qualification of prosecutors, which determine their capability o represent the charges before the court, do not fit the complete subordination to the superior prosecutor and the Chief Public Prosecutor. Neither the Government, nor the given prosecutor is responsible for the enforcement of the state's criminal policy, but the Chief Public Prosecutor is – and, in turn, he or she is not responsible to anybody.

Strengthening the prosecutors' right in disposing over the charge in a criminal procedure is problematic (their monopoly in terms of pressing or dropping the charges is balanced only by the institution of the substitute public prosecution[20]). The Prosecution Service Act is remarkably generous concerning the review of decisions taken by the prosecutor in the course of criminal procedures (pressing, dropping, postponing, waiving or modifying the charge, referring the case

[18] Parliamentary control would require the possibility of posing interpellations, as it was included in the previous Constitution of Hungary, but this means of accountability towards the Parliament was also abolished in 2010. (The right to pose interpellations did not cover the Chief Public Prosecutor's decisions brought in individual cases – see Decision 3/2004. (II. 17.) of the Constitutional Court.)

[19] *Prosecution Service Act, Article 7 (2)*
Prosecutors shall proceed according to the Acts of Parliament, in a consistent and equitable way, and shall perform their duties as required by their mandate as a prosecutor to the best of their professional knowledge. (...)

[20] Article 53 of Act XIX of 1998 on the Code of Criminal Procedure

to mediation[21]). Prosecutors' decisions and other measures taken in criminal procedures may be reviewed *ex officio*, however, the review is only "particularly justified" (i.e. it is not obligatory) even in cases of ill-founded decisions, explicit infringement of legal provisions or emergence of new facts. However, prosecuting crimes coherently is the main duty of the prosecutors and they are responsible for the justification and legality of their decisions.

Prosecution Service Act, Article 17
(2) In order to conduct the criminal procedure effectively, and in the fastest possible way, the prosecutor shall, in the course of the investigation, decide upon the case and the tasks to be carried out in the course of the investigation. The prosecutor shall be responsible for his or her measures concerning the investigation, for the procedural acts carried out by him or her, for the justification and legality of measures carried out and for the decisions brought by him or her.

Prosecution Service Act, Article 20
(2) The ex officio review is particularly justified if the decision or measure to be reviewed is ill-founded or is against the law, or if a new fact or circumstance that emerged may result in pressing charges.

Furthermore, as discussed above, prosecutors may – upon the decision of the Chief Public Prosecutor – press charges before a court other than the legally designated court if it is deemed necessary for the sake of the speed of the proceedings. This possibility is expressly included in the Transitory Provisions of the Fundamental Law.

D) Public interest litigation and legal supervision

The new legal provisions extend the Chief Public Prosecutor's right to file a lawsuit in civil cases and to monitor and legally supervise civil associations. This extension could be justified only if the prosecutor/Chief Public Prosecutor would be responsible to the Parliament (at the same time, in that case the strict subordination of the prosecutors would not be reasonable).

The prosecutor's right to file a lawsuit is justified only in cases concerning the reinforcement of private interests that are not defended by another person or organisation, since in these cases the lack of private defence makes this interest public. The prosecutor's other important role in the civil procedure is to take part in one-party procedures in which the Prosecution Service is the only one who is able to initiate a procedure in order to prevent or remedy violations. The general right to legal supervision, including supervising procedures before and out of the courts, is the inheritance of the Soviet-type rules of civil procedure. This general right to file a lawsuit or to take any legal action in the name of private actors in civil cases was declared to be unconstitutional in 1994 by the Constitutional Court, since it violated the parties' right to personal autonomy. The new Prosecution Service Act is reminiscent of the prosecution service that was formed to serve the aims of the centralised socialist state.

The list of the cases included in the Prosecution Service Act in which prosecutors have the right to litigate is non-exhausting. The prosecutor is entitled to file a lawsuit in any case that was declared by law to be "a matter of common interest", even when in clear opposition to the parties' will. Moreover, the probability of a "common interest" shall not be proved, but becomes *presumptio juris*. Furthermore, the prosecutor may also have the right to appeal in proceedings which he or she did not take part in, even if the judgement of the case was not delivered to him or her formally.

[21] Article 28 (7) of Act XIX of 1998 on the Code of Criminal Procedure

Prosecution Service Act, Article 27
(4) The prosecutor shall have the right to appeal against decisions brought in litigative and non-litigative court procedures, if the decision shall be delivered to him or her in any way on the basis of an Act of Parliament. In cases determined by an Act of Parliament, the prosecutor shall also have the right to appeal if he or she did not take part in the procedure as a party, or if there was no obligation to inform him or her about the decision.
(6) If an Act of Parliament empowers the prosecutor to initiate a court procedure, the common interest nature of the procedure shall be presumed.

Above all, the Prosecution Service Act authorises the prosecutor for privileged usage of personal data collected in criminal proceedings in the course of civil litigation, which, essentially, legalises the possibility of misusing sensitive data.

According to the latest related judgement of the Constitutional Court, the prosecutor's right to supervise civil associations shall be limited to the cases of necessity and by the requirement of proportionality.[22] Still, the new Prosecution Service Act strengthens the means of the prosecutor in this regard. The prosecutor shall have the right to examine whether the association operates according to not only the law but also to its own statutes and in this way the law provides the prosecutor with the right to access all documents of the association.

E) Conclusion

Under the new laws on the Prosecution Service the legislator continued removing checks and balances from the Hungarian constitutional system, which has led to the further dismantling of the rule of law. The new Acts of Parliament are about furthering the unchecked and non-transparent, therefore arbitrary, power of one of the most important organisations of the state. Analysing the legal provisions makes it clear that the Hungarian constitutional democracy has become the victim of an abrupt and failed legislation once again.

[22] See: Decision 11/2011. (III. 9.) of the Constitutional Court.