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BAKA V. HUNGARY
(Application No. 20261/12)

WRITTEN COMMENTS

BY

THE HELSINKI FOUNDATION FOR HUMAN RIGHTS

1. INTRODUCTION

Pursuant to the letter of Mr Søren Prebensen, Deputy Grand Chamber Registrar, dated 29 January 2015, and our letter of 10 February 2015, the Helsinki Foundation for Human Rights (hereinafter referred to as "**HFHR**") with its seat in Warsaw, Poland, would like to present its new written comments on the case of *Baka v. Hungary* before the Grand Chamber. We would like to remind the Court that on 10 April 2013 the HFHR submitted its written comments on the case before the Chamber.

Our new written comments expand our previous observations. They are limited to the points of law and address only the general principles involved in the case, without commenting on the facts or merits. We focus in particular on the questions of domestic and international standards of judicial independence and irremovability and the application of these principles to presidents of courts. In addition, we discuss the issue of limits of sovereign states' power to introduce constitutional reforms of justice systems.

2. GUARANTEES OF JUDICIAL INDEPENDENCE

2.1. Judicial independence and irremovability in domestic constitutions

The principles of judicial independence and irremovability have to be seen as necessary conditions of the rule of law. Because of this, the majority of contemporary constitutions contain specific provisions to protect them. For instance, according to art. 97(2) of the German Constitution, "Judges appointed permanently to full-time positions may be involuntarily dismissed (...) or retired before the expiration of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws."[1] According to art. 82(2) of the Constitution of the Czech Republic, judges may not be removed and any exceptions to this rule, especially on the grounds of disciplinary misbehaviour, have to be specified in law.[2] The Constitution of Croatia enumerates grounds for removal and gives the judge a right to appeal against the decision before the Constitutional Court.[3]

The Constitution of Poland also contains provisions on irremovability of judges. Article 180 of the Constitution declares that judges are irremovable and may be removed "only (...) by virtue of a

[1] https://www.constituteproject.org/constitution/German_Federal_Republic_2012?lang=en.
[2] https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en.
[3] Art. 123 of the Constitution of Croatia (https://www.constituteproject.org/constitution/Croatia_2010?lang=en).

court judgment and only in those instances prescribed in statute. (...) A judge may be retired as a result of illness or infirmity which prevents him from discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute." The guarantee of irremovability is not absolute and may be derogated from in exceptional, justified circumstances specified in law. Generally, statutory grounds for removal are limited to resignation, inability to perform duties due to a health condition and disciplinary action.

As confirmed in the case law of the Polish Constitutional Tribunal, the principle of irremovability has two aspects: institutional (part of the constitutional regulation of the justice system) and as an individual right of access to an independent court.[4] On the other hand, the Constitution does not give a judge a subjective constitutional right not to be removed from his/her position.[5]

2.2. International standards of judicial independence

The international standards of judicial independence were developed in documents issued by international organizations,[6] lawyers' and judges' associations,[7] groups of experts,[8] as well as in case law of international courts. All of these sources emphasise that the independence of the judiciary is a key element of a democratic legal system, necessary for effective protection of human rights.

Basic guarantees of judicial independence include, among others, irremovability[9] and non-transferability of judges,[10] salary protection,[11] the existence of effective judicial self-governance, as well as proper methods of appointment of judges.[12]

Regarding the principle of irremovability, it is worth recalling opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE). According to the opinion, a judge's tenure should be guaranteed until he or she reaches mandatory retirement age or until their fixed term of office expires. Exceptions to the principle of irremovability may also be triggered by disciplinary sanctions. All offences for which a judge may be removed from office should be precisely defined in law. Disciplinary proceedings should be conducted by an independent authority, in compliance with due process requirements.

Another important document, Recommendation CM/Rec(2010)12 of the Committee of Ministers, specifies that "(49) Security of tenure and irremovability are key elements of the independence of judges" and that "(50) (...) a permanent appointment should only be terminated in cases of serious breaches of disciplinary or criminal provisions established by law, or where the judge can no longer perform judicial functions. Early retirement should be possible only at the request of the judge concerned or on medical grounds.(...)".[13]

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[4] See especially judgment of the Constitutional Tribunal of 24 October 2007 (ref. no. SK 7/06).

[5] See judgment of the Constitutional Tribunal of 7 November 2005 (ref. no. P 20/04) .

[6] See e.g. the United Nations Basic Principles on the Independence of the Judiciary (1985; hereinafter: UN Basic Principles; http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx).

[7] See e.g. the International Bar Association's Resolution on Minimum Standards of Judicial Independence (1982; hereinafter: IBA Resolution; http://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29).

[8] See e.g. the Mount Scopus Approved Revised International Standards of Judicial Independence (2008; hereinafter: Mount Scopus Standards; http://www.jiwp.org/#!mt-scopus-standards/c14de).

[9] See e.g. Opinion no. 1 (2001) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges (https://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/CCJE%20Opinion%201_EN.pdf).

[10] See e.g. Art. 8 of the Universal Charter of the Judge (https://www.domstol.dk/om/otherlanguages/english/publications/Publications/The%20universal%20charter%20of%20the%20jugde.pdf).

[11] See point 14 of the New Delhi Code of Minimum Standards of Judicial Independence.

[12] See principle 4 of the Mt. Scopus Standards.

[13] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (https://wcd.coe.int/ViewDoc.jsp?id=1707137).

The significance of irremovability of judges is also emphasised in the UN Basic Principles:[14] "(18) Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. (...) (20) Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings." Similar recommendations are provided in the European Charter on the Statute for Judges[15] and the Universal Charter of the Judge.[16]

Some international documents do not exclude the possibility of the legislature's participation in removal of judges. According to the Beijing Statement of Principles on the Independence of the Judiciary in the LAWASIA Region (hereinafter: Beijing Statement),[17] such a solution is permissible in countries whose culture and history justifies it. In such cases, removal of judges by parliaments should be made on objective, justified grounds (and in compliance with the judge's right to a fair hearing). Similarly, Mt. Scopus Standards provide that the legislature may be empowered to remove judges, however, only on the basis of a recommendation of a judicial commission or pursuant to constitutional provisions or validly enacted legislation, in order to avoid any arbitrariness.

Important standards were also developed by the Inter-American Court of Human Rights (hereinafter: "IACHR"). For instance, in the judgment in the case of *Apitz-Barbera v. Venezuela*, the IACHR underlined that "one of the principle purposes of the separation of public powers is to guarantee the independence of judges."[18] This judicial autonomy must be guaranteed in terms of both its institutional aspect (regarding the system of justice) and its individual aspect (regarding the judge as an individual). This approach was continued *inter alia* in the case of *Camba Campos et al. v. Ecuador* in which the IACHR added that judges have subjective rights not to be prematurely removed from office for reasons other than specified in law and in accordance with fair procedure.[19]

3. INDEPENDENCE AND IRREMOVABILITY OF PRESIDENTS OF COURTS

The Government of Hungary justified the removal of the Applicant by referring to the special legal status of the President of the Supreme Court and explaining that the Applicant has not been excluded from the judiciary and in fact continues to serve as a chairperson of a civil law bench in *Kuria*. However, in our opinion, although states may indeed have a wider margin of appreciation for removals of presidents of courts, the principle of judicial independence prohibits arbitrary dismissals.

3.1. Independence and irremovability of presidents of courts in domestic laws

In Poland, the constitutional principle of irremovability, strictly understood, protects against complete exclusion from the judiciary as opposed to removal from the position of president of a court.[20] Nevertheless, some of its guarantees are applicable also to presidents of courts because tolerating arbitrary removals of them by the executive or the legislature would allow political organs to exert pressure on the judiciary to achieve political aims.

The danger connected with the abuse of power in the form of a right to remove presidents of the highest courts by the organs of the executive to achieve political aims can be shown on the

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[14] See note 6.

[15] See points: 1.3, 5.1, 7.1, 7.2 of the European Charter on the Statute for Judges of 8-10 July 1998; http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf.

[16] See Art. 8 of the Universal Charter of the Judge.

[17] http://lawasia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf .

[18] Judgment of IACHR of 5 August 2008 in the case of *Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela* (http://www.corteidh.or.cr/docs/casos/articulos/seriec_182_ing.pdf).

[19] Judgment of IACHR of 28 August 2013 in the case of *The Constitutional Tribunal (Camba Campos et al.) v. Ecuador*, para 199 (http://www.corteidh.or.cr/docs/casos/articulos/seriec_268_ing.pdf).

[20] L. Garlicki, *Komentarz do Art. 183* [*Comments on Article 180*] in: in: *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom IV* [*Commentary to the Constitution of the Republic of Poland. Vol. IV*], L. Garlicki (ed.), Warsaw 2005, p. 4.

example of the dismissal of the President of the Supreme Administrative Court by the President of Poland in 1992. So far this has been the only case of a removal of a president of one of the highest courts in Poland by a political organ after 1989. Although the dismissal took place upon the voluntary resignation of the President of the Court, Professor Adam Zieliński, it provoked huge controversy. According to media reports,[21] Prof. Zieliński decided to resign from his office due to a conflict with the then President of Poland, Lech Wałęsa – it was an "open secret" that President Wałęsa was dissatisfied with one of the Supreme Administrative Court's judgments and even tried to intervene in that case. President Wałęsa accepted Prof. Zieliński's resignation and removed him from office, despite a recommendation from the General Assembly of the Supreme Administrative Court that Prof. Zieliński should remain in office. From a formal point of view, the decision of President Wałęsa did not violate the law because according to the rules in force at the time, the General Assembly's opinion was not binding. Nevertheless, the President's decision was widely criticised by lawyers[22] and the media. Critics of the President indicated that his decision violated the principle of independence of the judiciary[23] and that it had the potential to create a dangerous precedent and that each next president of the court would consult his/her judgments with the President in order to avoid removal from office.[24] It was also argued that the law should be amended in order to avoid such situations in the future and ensure real independence of judges.[25]

Controversies around the removal of Prof. Zieliński led to adoption of the new Act on the Supreme Administrative Court in 1995, which provided that the President could remove the President of the Supreme Administrative Court only upon the binding consent of its General Assembly. It is worth to mention that during the debates over the project in Senate, this solution was criticized by one senator as overreaction on removal of Prof. Zieliński "Are not we threaten by the risk of juristocracy, violating the principle of separation of powers? Is not this the effect of some turn in completely opposite direction after the incident with removal of, very well-deserved, Prof. Zieliński?"[26] Nevertheless, subsequent regulations never returned to the model based on arbitrary powers of the President to remove chairpersons of courts.

Current Polish statutory law exhaustively regulates permitted grounds and the procedure for removal of presidents of common courts. According to Art. 27 of the Act of 27 July 2001 on the system of common courts, presidents and vice-presidents of Circuit Courts and Courts of Appeal may be removed by the Minister of Justice only in cases of gross non-compliance with their duties or when due to other reasons, continued exercise of their function cannot be reconciled with the interests of the system of justice. What is more, the Minister of Justice has to consult his or her plans of removing a president or a vice-president of the court with the National Judiciary Council. A negative opinion of the latter is binding on the Minister.

In a the judgment of 18 February 2004 (ref. no. K 12/03), the Constitutional Tribunal referred to constitutional standards of removing presidents of common courts. The Tribunal emphasised that the fact that presidents of courts perform administrative functions does not deprive them of guarantees of independence. This is because the adjudicatory and administrative functions of presidents of courts

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[21] See e.g. S. Podemski, *Prezydent i Sędzia* [*The President and the Judge*], "Polityka", no. 19/1992, p. 5; Author unknown, *Odlewnia niezgody* [*The foundry of disagreement*], "Gazeta Wyborcza", 28 April 1992, p. 2; P. Amsterdamski, *Prezydenckie wyroki* [*The President's judgments*], "Gazeta Wyborcza", 4 May 1992, p. 3; P. Ambroziewicz, *Odlewnia kadr pracowniczych* [*The foundry of employees*], "Prawo i Życie", no. 19/1992, p. 4.

[22] J. Ciapała, *Prezydent w systemie ustrojowym Polski (1989-1997)* [*The President in the political system of Poland (1989-1997)*], Warsaw 1999, p. 304.

[23] See publications referred to in note 21.

[24] P. Amsterdamski, *op. cit.*

[25] P. Ambroziewicz, *op. cit.*

[26] Statement of senator L. Lackorzyński, transcript of the meeting of Senate of 16 March 1995, p. 15 (http://ww2.senat.pl/k3/dok/sten/042/42spr.pdf).

cannot be strictly separated and thus in order to ensure the independence of the judiciary, removal proceedings have to ensure the proper role of judicial self-government bodies.

The constitutional and statutory guarantees of independence of the First President of the Supreme Court are even stronger. Article 183(3) of the Constitution specifies the method of appointment of the First President of the Supreme Court but it does not regulate the procedure for his/her removal or authorise the Parliament to regulate this question in statute. According to the legal doctrine, this means that the First President of the Supreme Court cannot be dismissed before the end of his or her term of office, which is justified by the principle of independence of courts.[27] A similar conclusion can be applied to the question of irremovability of the President of the Supreme Administrative Court and the President of the Constitutional Tribunal. The legal doctrine points out that even if statutes could provide a possibility of removal of the presidents of the highest courts, grounds for removal would have to be limited to exceptional circumstances.[28] Some scholars, on the other hand, argue that the procedure for removing the President of the Supreme Court would have to include the participation of the General Assembly of the Supreme Court in order to be in line with the principle of autonomy of the Supreme Court.[29] Nevertheless, currently in force Act on the Supreme Court does not provide any grounds or procedure for removal of the First President of the Supreme Court.[30] Deputy Presidents may be removed by the President of Poland but only upon the motion of the First President of the Supreme Court.[31]

What is unusual in the Applicant's removal is the fact that it did not take place on the basis of a decision of executive bodies, but by virtue of an act of legislature. As indicated above, there has never been an analogous situation in Poland. However, the case law of the Constitutional Tribunal on the legislative shortening of terms of office of other independent constitutional bodies makes it clear that the legislature may not act arbitrarily. In the judgment of 26 May 1998 (ref. no. K 17/98), the Constitutional Tribunal held that shortening terms of office of independent organs by the statute adopted with a retroactive force, would be permissible only in exceptional circumstances. In addition, any legislative interference with the length of a term of office of a given organ has to be proportionate. The Constitutional Tribunal applied these principles in its judgment of 23 March 2006 (ref. no. K 4/06). It ruled that the statute that terminated terms of office of members of the National Council of Radio and Television with immediate effect on grounds unrelated to previously existing statutory grounds for dismissal and without occurrence of extraordinary circumstances, was unconstitutional.

Further, an analysis of constitutional provisions of some other European countries suggests that chief judges should not be completely deprived of guarantees of occupational stability.

For instance, according to art. 129 of the Constitution of Bulgaria, Chairpersons of the Supreme Court of Cassation and the Supreme Administrative Court can be removed by the President of the Republic upon a proposal from the Supreme Judicial Council. The President can also remove them following a proposal of one-fourth of Members of the National Assembly, adopted by a two-thirds majority of the National Assembly, but only on grounds enumerated in the Constitution.[32]

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[27] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [*The Constitution of the Republic of Poland. Commentary*], Warsaw 2012, p. 916.

[28] Regarding the possibility of removal of the President of the Supreme Administrative Court see: T. Kuczyński, *Komentarz do Art. 44 ustawy - Prawo o ustroju sądów administracyjnych* [*Comments on Article 44 of the Act on the organisation of administrative courts*] in: *Prawo o ustroju sądów administracyjnych* [*Act on the organisation of administrative courts*], T. Kuczyński, M. Masternak-Kubiak (eds.), LEX 2009, no. 44174.

[29] L. Garlicki, *Komentarz do Art. 183* [*Comments on Article 183*] in: *op. cit.*, p. 9.

[30] The same situation concerns chairpersons of the Constitutional Tribunal and the Supreme Administrative Court.

[31] Art. 10 and Art. 13 § 2 of the Act on the Supreme Court of 23 November 2003. Before the entrance into force of this statute, the First President of the Supreme Court could be removed by Sejm upon the motion of the President of Poland (see Art. 29.2 of the Act on the Supreme Court of 20 September 1984).

[32] Article 129 of the Constitution of Bulgaria (https://www.constituteproject.org/constitution/Bulgaria_2007?lang=en).

In Lithuania, the President of the Supreme Court may be dismissed by the *Seimas* in impeachment proceedings "for a gross violation of the Constitution, breach of oath, or when it transpires that a crime has been committed."[33] The Latvian Act on Judicial Power[34] specifies that in general, the Chief Justice of the Supreme Court may be removed by the *Saeima*, following a recommendation of the Council for the Judiciary on specific grounds. Due to disciplinary reasons, the Chief Justice may be dismissed from office by the *Saeima*, following a recommendation of the Judicial Disciplinary Board, on the basis of an opinion of the Plenary Session of the Supreme Court. If the judge was convicted by a final judgment he/she may be removed by the *Saeima*, upon a recommendation of the Minister for Justice.

According to the Estonian Law on Courts, the Chief Justice of the Supreme Court may be removed by the *Riigikogu* on a proposal of the President of the Republic; however, the procedure may be initiated if it is justified on the grounds specified in law. If the removal is going to take place on the basis of the inability of the Chief Justice to perform his/her duties due to a health condition, the decision whether to remove him or her or not belongs to the Supreme Court *en banc*.[35]

Very high constitutional standards for removal of presidents of courts were developed in the case law of the Constitutional Court of the Czech Republic. In a judgment of 11 July 2006,[36] the Constitutional Court reviewed the constitutionality of the statute according to which chief judges and deputy chief judges of the Supreme Court and the Supreme Administrative Court could be removed by the State official who appointed them if they failed to carry out their duties properly. The Constitutional Court held that although the principle "he who appoints, may remove" is "inherent in a system of state administration", it cannot be applied to the system of administration of courts. This is because "[a]ll actions taken by the chief judges and deputy chief judges of a court are at the same time actions which can indirectly influence the exercise of judicial power, and can, in consequence, represent a certain encroachment by the executive power upon the judiciary." The Constitutional Court interpreted the principle of judicial irremovability as protecting against arbitrary removal from high judicial offices and held that the Constitution required that chief judges and deputy chief judges may be removed only "on the grounds foreseen in the law and on the basis of a decision of a court." The Constitutional Court reiterated this principle in the judgment of 6 October 2010, where it stated that "it is not possible to construct a duality in the legal position of the chairman of a court as an official of state administration, on one hand, and a judge, on the other hand. This is still one and the same person, in whom the actions of both offices are joined."[37]

3.2. Irremovability of presidents of courts in international law

International instruments focus mostly on irremovability of judges understood as a prohibition of arbitrary exclusion of judges from the judiciary. However, similar to the domestic constitutional provisions analysed above, there should be no doubt as to the fact that they do not allow state officials to freely remove presidents of courts.

In the context of the present case, it is worth recalling the opinion of the Venice Commission on the draft law amendments to the Judicial Code of Armenia. The draft amendments provided, *inter alia*, that a short time after their expected entry into force, the terms of office of presidents of Armenian courts would expire. The Venice Commission noted that such a law may violate the

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[33] Article 116 of the Constitution of Lithuania (https://www.constituteproject.org/constitution/Lithuania_2006?lang=en).

[34] On the basis of the English translation available at: http://www.legislationline.org/download/action/download/id/3927/file/Latvia_Law_On_Judicial_Power_1992_Am2009_en.pdf

[35] On the basis of the English translation of the §§ 27 and 99 of the Courts Act available at: http://www.legislationline.org/download/.
action/download/id/5137/file/Estonia_Courts%20Act_2002_am2013_en.pdf.

[36] Judgment of the Constitutional Court of the Czech Republic of 11 July 2006 (ref. no. Pl. ÚS 18/06).

[37] Judgment of the Constitutional Court of the Czech Republic of 6 October 2010 (ref. no. Pl. ÚS 39/08).

principle of legal certainty and harm the legitimate expectations of chairpersons. Moreover, it could give the impression that the true purpose of the new law would be to change court chairmen completely, which would obviously be inconsistent with the principle of judicial independence. Therefore, in order to comply with the requirements of the principle of judicial independence, a state has to provide a sufficiently long period for the removal of court presidents, unless it provides compelling reasons for the opposite.[38]

Moreover, attempts to remove chief judges on political grounds have always provoked strong reactions of the international community.

In 2000 the UN Special Rapporteur on the independence of judges and lawyers criticised the plans of the Slovakian Government to remove the then President of the Supreme Court, Stefan Harabin. The Government argued that the principle of irremovability did not apply to presidents of courts because while acting in the capacity of court president, the judge is part of public administration. The Special Rapporteur found such argumentation "untenable" – treating the President of the Supreme Court just as an official of public administration violates the very essence of judicial independence. It was "inconceivable that a judge elected by Parliament to be President of the Supreme Court for a fixed term could be removed from the office of President on mere allegations by the Government (...)." The Special Rapporteur underlined that judges are entitled to due process and if they are going to be removed prematurely, this has to be done in accordance with fair trial standards.

Recently, the UN Special Rapporteur on the independence of judges and lawyers condemned the impeachment of the Chief Justice of the Supreme Court of Sri Lanka, Shirani Bandaranayake. The impeachment proceedings were not transparent and did not protect the Chief Justice's right to a fair trial. There were also many indications that they were politically motivated. The Special Rapporteur underlined that "[t]he irremovability of judges is one of the main pillars guaranteeing the independence of the judiciary and only in exceptional circumstances may this principle be transgressed" and that "[j]udges may be dismissed only on serious grounds of misconduct or incompetence, after a procedure that complies with due process and fair trial guarantees (...)".[39] Disciplinary proceedings in the case of S. Bandaranayake were also condemned by the EU High Representative of the Union for Foreign Affairs and Security Policy, Catherine Ashton.[40] Moreover, special statements and reports in this case were issued by the International Commission of Jurists[41] and the International Bar Association.[42]

4. CONSTITUTIONAL REFORMS AND JUDICIAL INDEPENDENCE

The important fact of the *Baka v. Hungary* case, underlined by the Government, is that the removal of the Applicant was done in connection with a thorough constitutional reform of the Hungarian justice system. In our view, although the power of sovereign states to undertake even far-reaching constitutional reforms may not be questioned, it cannot be deemed absolute and has to be limited by the requirements of the principles of the rule of law.

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[38] Opinion on introducing amendments and addenda to the Judicial Code of Armenia, CDL-AD(2014)021, para 46-54.

[39] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12790&LangID=E.

[40] http://europa.eu/rapid/press-release_PESC-13-21_en.htm.

[41] http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJ-Open-letter-on-the-impeachment-Dr-Bandaranayake.pdf

[42] International Bar Accociation's Human Rights Institute, *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka*, April 2013, available at: http://www.ibanet.org/Document/Default.aspx?DocumentUid=F4E48C69-F851-459E-8681-2E5FC50C61BC.

Many constitutions contain explicit provisions that exclude the possibility of amending certain constitutional provisions (known as "eternal clauses").[43] The most famous examples of such eternal clauses are provided in the German Basic Law, which prohibits amendments that could affect, among others, the protection of human dignity and Germany's characteristic as a democratic and social federal state. Taking into account its importance for the proper functioning of democratic states, it is not surprising that the principle of independence of the judiciary is sometimes included among those unamendable norms (e.g. in Portugal[44] and Romania[45]).

In certain other countries the principle of the prohibition of amending the most fundamental constitutional provisions was developed in the jurisprudence of constitutional courts. This is the case of, for example, India, where the Supreme Court held that the legislator cannot change the basic structure of the Constitution, which also includes the principle of the independence of the judiciary.[46] In its judgment in the case of *S. P. Gupta v. President of India and Others*,[47] the Supreme Court explained that "[t]he concept of independence of the judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity." The Supreme Court used the concept of the basic structure to invalidate constitutional amendments which gave the state government the power to modify or quash final orders of administrative tribunals or which limited the judicial review powers of courts.[48]

A similar approach was adopted by the Supreme Court of Bangladesh in the judgment in the so-called "Eighth Amendment case".[49] The judgment concerned a constitutional amendment that created six permanent Benches of the High Court Division outside the capital city. All the benches were independent of each other so in fact, new judicial bodies were established. Justice Chowdhury, speaking for the majority, held that "[b]asic structural pillars of the Constitution cannot be changed by amendment. The structural pillars of Parliament and Judiciary are basic and fundamental. (...) [A]mendment of Article 100 is *ultra vires* because it has destroyed the essential limb of the judiciary namely, of the Supreme Court of Bangladesh by setting up rival courts to the High Court Division (...)". Moreover, the amendment violated the principle of non-transferability by giving the Chief Justice a discretionary power to transfer judges between benches.

The principle of the rule of law may limit not only the substance of constitutional amendments but also their form. In this context it is worth recalling the judgment of the Constitutional Court of the Czech Republic of 10 September 2009.[50] In this decision, the Court invalidated an *ad hoc* constitutional amendment which terminated the then term of the Parliament. The Constitutional Court held that the amendment violated the principle of generality of law whose purpose is "to ensure separation of the legislative, executive and judicial branches, an equal constitutional framework for analogous situations, and thereby to rule out arbitrariness in the application of state authority, and enable a guarantee of the protection of individual rights in the form of a right to judicial protection."

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[43] See e.g. G. Halmai, *Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?*, "Constellations", Volume 19, Issue 2, 2012, pp. 182–203; A. Barak, *Unconstitutional Constitutional Amendments*, "Israel Law Review", Volume 44, 2011, pp. 321-341.

[44] Article 288(m) of the Constitution of Portugal.

[45] Article 152(1) of the Constitution of Romania.

[46] M. Mate, *Two Paths to Judicial Power: The Basic Structure Doctrine and Public Interest Litigation in Comparative Perspective*, "San Diego International Law Journal", Vol. 12(2010), p. 194.

[47] Judgment of the Supreme Court of India of 30 December 1981 in the case of *S.P. Gupta vs President of India and Others*, AIR 1982 SC 149, 1981 Supp (1) SCC 87, 1982 2 SCR 365, available at: http://indiankanoon.org/doc/1294854/.

[48] S. Farasat, *Judicial appointments amendment violates basic structure principle of judicial independence*, (http://blog.mylaw.net/judicial-appointments-amendment-violates-basic-structure-principle-of-judicial-independence/).

[49] Judgment of the Supreme Court of Bangladesh of 2 September 1989 in the case of *Anwar Hossain Chowdhury vs. Bangladesh*, 1989, 18 CLC (AD) [1895] (http://www.clcbd.org/judgment/1895.html).

[50] Judgment of the Supreme Court of the Czech Republic of 10 September 2009 (ref. no. Pl. ÚS 27/09).

The Court explained that acceptance of *ad-hoc* individual constitutional amendments could create a dangerous precedent, which would allow to change the Constitution in order to achieve "momentary, utilitarian, political reasons". In addition, the act under review was adopted with retroactive effect, which is also incompatible with the standards of the rule of law. It seems logical that for similar reasons, removal of a president of a court through an amendment of the Constitution enacted retroactively would also be unconstitutional.

Of course, there is no worldwide or pan-European consensus regarding the possibility of constitutional review of constitutional amendments. Nevertheless, even in those countries whose constitutional systems do not provide for such a solution, the legislator's discretion is absolute. States have to meet requirements that stem from their participation in the international community and, as shown above, the necessity to respect judicial independence is one of such requirements.

Several international documents clarify that the principle of judicial independence implies that reforms undertaken by governments should not negatively affect judges already holding their offices. This requirement is explicitly stated in the Mt Scopus Standards. According to this document, changes in conditions of judicial service should not be applied retroactively "unless the changes improve the terms of service and are generally applied". In addition, when the legislator decides to reorganise or abolish courts, judges who serve in these courts may be affected only if they are transferred to another court on the same or comparable conditions. An identical recommendation is provided in the International Bar Association's Resolution on Minimum Standards of Judicial Independence (1982).

It is also worth recalling Recommendation 16.3 of the Measures for the Effective Implementation of the Bangalore Principles,[51] according to which "[t]he abolition of a court of which a judge is a member should not be accepted as a reason or an occasion for the removal of the judge." A very similar recommendation is provided in point 29 of the Beijing Statement.

In our view, to avoid violations of the principle of judicial independence, thorough constitutional reforms of justice systems have to be accompanied by proper transitional rules protecting judges already holding their offices. One can find examples of such provisions in some European constitutions. For instance, according to Article 238(1) of the Constitution of Poland, the term of office of constitutional organs elected or appointed before the entry into force of a new Constitution shall end with the completion of the period specified in the law previously in force. If previous provisions did not specify the term of office of a particular body and since the election or appointment, a period longer than specified in the new Constitution has passed, the term of office would expire one year after the Constitution's entry into force. According to Article 12 of the Transitional Provisions to the Constitution of Ukraine, "[j]udges of all courts in Ukraine, elected or appointed prior to the day of entry of this Constitution into force, continue to exercise their authority in accordance with the legislation in force, until the expiration of the term for which they were elected or appointed."[52] Similar rules are provided in art. 111 of the Constitution of the Czech Republic and art. 154(4) of the Constitution of Slovakia.

5. JUDICIAL INDEPENDENCE AND THE ECtHR

Taking into account the abovementioned considerations, the HFHR believes that the removal of the Applicant from his position of the President of the Supreme Court may raise doubts as to the compliance of this decision with the principles of the separation of powers and judicial independence. These two principles have to be seen as foundations of the European human rights system without which any guarantees of fundamental rights would be merely illusory. For this reason, any serious interference with them has to be reviewed with utmost scrutiny.

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[51] Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (Lusaka, 2010) (http://www.judicialintegritygroup.org/resources/documents/BP_Implementation%20Measures_Engl.pdf).

[52] https://www.constituteproject.org/constitution/Ukraine_2014?lang=en.

The competences of the ECtHR to review compatibility of domestic laws and actions with the principle of the separation of powers are limited, nevertheless, there is one crucial aspect of the principle of the separation of powers, the protection of which has an explicit basis in the text of the Convention – namely, the principle of judicial independence. According to art. 6 of the Convention, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Thus, to ensure the effectiveness of this right, states have to establish judicial systems based on independent courts. While assessing the independence of a court, the ECtHR takes various factors into account, *inter alia*: "the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" (*Pohoska v. Poland*, app. no. 33530/06, 10 January 2012, para 34).

What is important in the context of the present case, the ECtHR notices the importance of guarantees of irremovability of judges: "the irremovability of judges by the executive during their term of office must be considered a corollary of their independence and thus included in the guarantees of Article 6 § 1 of the Convention" (*Fruni v. Slovakia*, app. no. 8014/07, 21 June 2011, para 145). For this reason, the ECtHR has ruled that the Polish institution of assessor, who could have been removed at any time by the Minister of Justice, did not meet the requirements of Art. 6 of the Convention (see: *Henryk Urban and Ryszard Urban v. Poland*, app. no. 23614/08, 30 November 2010).

It follows that the possibility of removing judges by the executive or the legislature may not only violate subjective rights of the judge removed but also threaten the effectiveness of guarantees provided in Art. 6 of the Convention. Taking this into account, any significant interference of political authorities in the sphere of judicial autonomy should be permissible only if it is justified by particularly compelling reasons of public interest.

6. CONCLUSION

To conclude, the HFHR would like to underline that the principles of judicial independence and irremovability have to be considered as indispensable to the rule of law and the effectiveness of human rights protection systems. Undue interferences with judicial independence not only harm the rights of judges or the institutional framework of the state but, even more importantly, threaten human rights. For this reason, guarantees of judicial independence can be found not only in domestic law on constitutional or, in some cases, supra-constitutional levels but also in international law. Therefore, states do not have unlimited discretion in undertaking reforms of justice systems which could infringe judicial autonomy. In the context of *Baka v. Hungary,* it is worth emphasising that presidents of courts are not outside of the guarantees of judicial independence and occupational stability. A conclusion to the contrary would give political authorities the power to exert pressure on the judiciary through arbitrary removals of chief judges, which is unacceptable in democratic states. For these reasons, in our opinion, any case of removal of a president of one of the highest domestic courts, in circumstances which could raise justified concerns as to the actual reasons for removal, should be reviewed by the ECtHR with utmost scrutiny and would require a particularly compelling justification for its legality.

These written comments were prepared by Marcin Szwed, LL.M., lawyer of the Helsinki Foundation for Human Rights, under the supervision of Dr. Adam Bodnar and Prof. Ireneusz Kamiński.

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