Decision 36/2013 (XII. 5.) AB

On a finding of unconstitutionality by conflict with the Fundamental Law and international treaties of certain provisions of Act CLXI of 2011 on the Organisation and Administration of the Courts and certain provisions of Act XIX of 1998 on Criminal Procedure

In the matter of constitutional complaints seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and ex officio review of the infringement of an international treaty of certain legal acts, with the concurring reasoning by Justice Dr. Miklós Lévay, as well as with the dissenting opinions by Justices Dr István Balsai, Dr Egon Dienes-Oehm, Dr Imre Juhász, Dr László Kiss, Dr Barnabás Lenkovics, Dr Béla Pokol, Dr László Salamon and Dr Mária Szívós, the Constitutional Court, sitting as the Full Court, has adopted the following

decision:

1. The Constitutional Court holds that Sections 62 to 63 of Act CLXI of 2011 on the Organisation and Administration of the Courts, as in force from 1 January 2012 to 16 July 2012, were contrary to the Fundamental Law and at the same time in breach of an international treaty.

2 The Constitutional Court further holds that Section 20/A of Act XIX of 1998 on Criminal Procedure, as in force from 7 January 2011 to 31 July 2013, was contrary to the Fundamental Law and at the same time contrary to an international treaty.

3. The Constitutional Court terminates its proceedings sought for the finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of Sections 11 (3) and 31 (2) of the transitional provisions of the Fundamental Law of Hungary.

4. The Constitutional Court hereby rejects the petition seeking a review of the infringement of an international treaty by Sections 62, 63 and 64 of Act CLXI of 2011 on the Organisation and Administration of the Courts and Section 20/A of Act XIX of 1998 on Criminal Procedure.

5. The Constitutional Court finally rejects the petition seeking a finding of unconstitutionality by conflict with the Fundamental Law and international treaty as well as the annulment of Decision No 22/2012 (II. 16.) OBHE of the President of the National Office for the Judiciary.

The Constitutional Court shall publish its Decision in the Hungarian Official Gazette.

Reasoning

I

[1] Fourteen petitioners, all of them accused in criminal cases, have lodged a constitutional complaint with the Constitutional Court against the designation of the courts that will hear their cases.

[2] 1.1 In the constitutional complaint first received by the Constitutional Court, the petitioners, as Sixteenth and Seventeenth Defendants in the capacity of accused persons, charged with the crime of infringement of copyright or copyright-related rights causing particularly great financial loss and other offences in the proceedings brought against them before the Budapest-Capital Regional Court in case No B.41/2012 and pending before the Regional Court of Balassagyarmat Court under No 9.B.39/2012, initiated, in connection with Decision No 22/2012 (II. 16.) OBHE of the President of the National Office for the Judiciary concerning the designation of the court seised, a procedure sought for a finding of unconstitutionality by non-conformity with the Fundamental Law, violation of an international treaty and annulment of Article 11 (3) of the Transitional Provisions of the Fundamental Law of Hungary (hereinafter referred to as the "Transitional Provisions"), Sections 62, 63 and 64 of Act CLXI of 2011 on the Organisation and Administration of the Courts (hereinafter referred to as the "Courts Organisation Act"'), Section 20/A of Act XIX of 1998 on Criminal Procedure (hereinafter referred to as the "Code of Criminal Procedure"), and Decision No 22/2012 (II. 16.) OBHE of the President of the National Office for the Judiciary (hereinafter referred to as the "Decision by the President of the National Office for the Judiciary").

[3] According to the petitioners, both the challenged provisions and the Decision by the President of the National Office for the Judiciary based on them are contrary to the Fundamental Law and also violate an international treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the "Convention"), promulgated by Act XXXI of 1993. The fact that the contested provisions leave it to the unbridled discretion of the President of the National Office for the Judiciary to designate the court hearing the case, in particular the right to a lawful judge, the principle of impartiality (in particular as regards the appearance of impartiality) and the principle of equality of arms, constitutes a breach of the requirement of a fair trial (Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Convention). It is also contrary to the principle of a fair trial for the President of the National Office for the Judiciary to be required to seek the opinion of the Prosecutor General alone in criminal cases. The right of defence is infringed by the fact that the conditions for the effective exercise of the rights of defence are not met because of distance (travel, increased costs, difficulty of obtaining access to documents and participating in the proceedings, etc.). The total absence of any legal remedy against the decision of the President of the National Office for the Judiciary infringes Article XXVIII (7) of the Fundamental Law and Article 13 of the Convention.

[4] The constitutional complaint was based on Section 26 (1) of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the "Constitutional Court Act") with regard to the challenged legal provisions, and on Section 27 of the Constitutional Court Act with regard to the decision of the President of the National Office for the Judiciary. In relation to the Decision by the President of the National Office for the Judiciary, they explained that, in their

view this decision is a decision on the merits of an individual case falling within the competence of the President of the National Office for the Judiciary [who, in their view, is a judge within the meaning of Section 69 (1) to (2) of the Courts Organisation Act], and as such, terminates the proceedings; thus, the Decision falls within the scope of Section 27 of the Constitutional Court Act.

[5] 1.2 In their subsequently filed addendum to the petition, the petitioners, in addition to further justification of the initial petition, also sought a finding of a violation of Section 11 (3) of the Transitional Provisions. In support of this, they referred to the decision of the Constitutional Court 61/2011 (VII. 13.) AB in Case No 1718/B/2010 (ABH 2011, 290).

[6] 1.3 In their second addendum to their petition, the petitioners, maintaining their initial petition, added a new statement of reasons, in which they contested the criteria for the designation of the competent court, referring to the opinion of the European Commission for Democracy through Law (Venice Commission) No 683/2012, adopted in October 2012.

[7] 2. In the constitutional complaint which arrived subsequently at the Constitutional Court, the petitioners, in the criminal case pending before the Regional Court of Kecskemét under No. 1.B.73/2012, which was brought before Budapest-Capital Regional Court under No. B.54/2012, on account of the Decision No 21/2012 (II. 16.) OBHE of the President of the National Office for the Judiciary on the designation of the competent court, initiated a finding of unconstitutionality by conflict with the Fundamental Law and retroactive annulment of Article 11 (3) and the last sentence of Article 31 (2) of the Transitional Provisions, Sections 62, 63 and 64 of the Courts Organisation Act and Section 20/A of the Code of Criminal Procedure. The constitutional complaint was brought on the basis of Section 26 (1) of the Constitutional Court Act and, "in the alternative, Section 26 (2)" of the Constitutional Court Act.

[8] According to the petitioners, the contested provisions, which gave the President of the National Office for the Judiciary the possibility to designate another court instead of the court of general territorial competence, are contrary to the Fundamental Law, namely they violate Article XXVIII (1), (3) and (7) of the Fundamental Law. The most important constitutional misgivings, set out in detail in the petition are as follows:

- the requirement of a fair trial laid down in Article XXVIII (1) of the Fundamental Law, in particular the right to a lawful judge, the principle of impartiality (in particular with regard to the appearance of impartiality), the principle of equality of arms and the requirement to hear cases within a reasonable time, is infringed by the fact that the contested provisions allow the President of the National Office for the Judiciary to derogate from the general rules of territorial competence of the Code of Criminal Procedure;

- the right of defence under Article XXVIII (3) of the Fundamental Law is infringed if the conditions for the effective exercise of the rights of the defence are not met owing to distance (travel, increased costs, difficulty of obtaining documents and participating in procedural steps, etc.); and

- the total absence of any legal redress against the decision of the President of the National Office for the Judiciary is contrary to Article XXVIII (7) of the Fundamental Law.

[9] According to the petitioners, the principle of the rule of law laid down in Article B (1) of the Fundamental Law and the requirement of legal certainty deriving from it are infringed by the fact that the contested provisions differ substantially in the regulation of the powers granted to the President of the National Office for the Judiciary.

[10] The petitioners also drew attention to the conflict of the contested provisions with the Convention.

[11] They requested a review of the unconstitutionality of the last sentence of Section 31 (2) of the Transitional Provisions with reference to Section B (1) of the Fundamental Law, because in their view this provision did not allow for a substantive review of their constitutional complaint.

[12] 3. The Constitutional Court took a position first on the admissibility of constitutional complaints. It found that both complaints complied with the formal and substantive requirements of the Constitutional Court Act and therefore admitted the petitions. In view of the substantive identity of the provisions challenged and the constitutional objections, the cases were consolidated on the basis of the provisions of Section 58 (2) of the Constitutional Court Act , and reviewed the petitions in a single procedure.

[13] 4. During the proceedings of the Constitutional Court, the National Assembly amended the Fundamental Law several times. Thus, with the Fourth Amendment to the Fundamental Law of Hungary, the institution of the reallocation of cases between courts was introduced into the Fundamental Law. Under Article 27 (4) of the Fundamental Law, the President of the National Office for the Judiciary could designate a court of identical material competence other than the court of general territorial competence to hear cases specified in a cardinal Act, in order to ensure the fundamental right to a court decision within a reasonable time and a balanced caseload of the courts, as provided for by a cardinal Act. However, with the Fifth Amendment to the Fundamental Law of Hungary, the National Assembly repealed Article 27 (4) effective as of 1 October 2013.

[14] 5. The Constitutional Court also found that the provisions of the Courts Organisation Act and Code of Criminal Procedure challenged in the constitutional complaints were repealed by the legislator with Act CXXXI of 2013 on the Amendment of Certain Acts in Connection with the Fourth Amendment of the Fundamental Law as of 1 August 2013.

[15] As a rule, the Constitutional Court reviews the unconstitutionality / conflict with the Fundamental Law of existing and effective legislation. Pursuant to Section 41 (3) of the Constitutional Court Act, the Constitutional Court may find the unconstitutionality by conflict with the Fundamental Law of a repealed statute only if the statute should still be applied in a specific case, that is, the Constitutional Court's competence to review the constitutionality of a repealed or amended statutory provision only extends to the question of its applicability. (*See* Order 335/B/1990 AB, ABH 1990, 261.) In view of the foregoing, the Constitutional Court in the present case reviewed the wording of the provisions at issue as applied in the cases on which the constitutional complaints were based, or as it was in force at the time.

[16] 6. The Constitutional Court contacted the President of the National Office for the Judiciary, who provided information on the cases underlying the present case and the criteria taken into

account in her decision. At his request, the Constitutional Court also heard her in person. During her hearing, the President of the National Office for the Judiciary stressed, first of all, that the vast majority of the criminal cases which are still pending are being dealt with by Budapest-Capital Regional Court. She pointed out that the proportion of "mega-cases" and particularly complex cases is higher among the cases pending in the capital. However, this high proportion also determines the length of time taken by incoming cases, since the backlog of cases before the judge determines the expected length of time taken by incoming cases, even if the proportion of incoming cases per judge is average or slightly higher than the national average. Both on average over the last 10 years and for the year preceding the designation, the caseload of Budapest-Capital Regional Court was outstanding. The difference in the number of pending cases between courts can be up to five times for criminal cases and up to seven times for civil cases. This problem has become the most serious problem of the post-regime-change court administration system at any time. This situation did not arise overnight and therefore cannot be solved overnight. Over the past decade, several attempts have been made to address the disproportionality and ensure timeliness: initiating legislative amendments, increasing administrative control, empowering court secretaries and administrators, and distributing the number of judges more proportionally. However, no radical changes have been or could be made in the latter area. There are two ways to find a quick solution: either assign judges to where the cases are or allocate cases to where the judges are. The former can be done by assigning judges, the latter by reallocating cases. In the first week of January 2012, the President of the National Office for the Judiciary was confronted with a complete lack of internal rules and, with the assistance of the heads of Divisions of the Curia, Budapest-Capital Regional Court of Appeal and Budapest-Capital Regional Court, a recommendation was drafted, reviewing the practice in 2011, which laid down detailed rules for the conduct of cases. He stressed that although this recommendation was published only after the decisions in the cases concerned by the present proceedings, it is clear from the documents sent that the provisions contained therein have already been fully implemented in these proceedings.

[17] In the case, the Prosecutor General expressed his position in writing and the Constitutional Court also contacted the Minister of Public Administration and Justice.

II

[18] 1. The relevant provisions of the Fundamental Law read as follows:

"Section B (1) Hungary shall be an independent democratic State governed by the rule of law."

"Section Q) (2) In order to comply with its obligations under international law, Hungary shall ensure that Hungarian law is in conformity with international law.

(3) Hungary shall accept the generally recognised rules of international law. Other sources of international law shall become part of the Hungarian legal system by promulgation in laws."

"Section XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.

[...]

(3) Persons subject to criminal proceedings shall have the right of defence at all stages of the procedure. Defence counsels shall not be held liable for their opinion expressed while providing legal defence.

[...]

(7) Everyone shall have the right to seek legal remedy against any court, authority or other administrative decision which violates his or her rights or legitimate interests."

[19] 2. The provisions of the Convention concerned read as follows:

"Section 6, Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

"Section 13, Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

[20] 3. The challenged provisions of the Transitional Provisions read as follows:

"Article 11 (3) In the interest of the enforcement of the fundamental right to a court decision within a reasonable time guaranteed by Article XXVIII (1) of the Fundamental Law, and until a balanced distribution of caseload between the courts has been realised, the President of the National Office for the Judiciary may designate a court other than the court of general territorial competence but with the same material competence to adjudicate any case."

"Article 31 (2) The National Assembly shall adopt the Transitional Provisions under Articles 19 (3) (a) and 24 (3) of Act XX of 1949 on the Constitution of the Republic of Hungary, in accordance with point 3 of the Closing Provisions of the Fundamental Law of Hungary. The Transitional Provisions shall form part of the Fundamental Law."

[21] 4. The challenged provisions of the Courts Organisation Act:

"Section 62 (1) The President of the National Office for the Judiciary may exceptionally designate another court of identical material competence to hear the case instead of the territorially competent court, if the case or a specific group of cases received by the court in

the given period cannot be heard within a reasonable time otherwise due to the extraordinary and disproportionate workload of the court and the designation does not impose a disproportionate burden on the designated court.

(2) The President of the Regional Court of Appeal or the President of the Regional Court, as well as the Prosecutor General, may submit a motion for designation to the President of the National Office for the Judiciary within 15 days of the receipt of the case.

(3) The motion for designation shall state the reasons why the case or a specific group of cases received by the court within the period specified in Subsection (1) cannot be dealt with within a reasonable time and shall list the case management, staffing and other data justifying the extraordinary and disproportionate workload of the court.

Section 63 (1) Within 8 days of the receipt of the petition, the President of the National Office for the Judiciary shall assess whether the motion for designation is well-founded in view of the case management, staff and other data and the particularities of the case concerned by the designation, and which court may be designated for the proceedings. The President of the National Office for the Judiciary shall request the opinion of the court or, in the case of a criminal case where the moving party is not the Prosecutor General, of the Prosecutor General, and may request information or an opinion from any court; the request shall be complied with without delay.

(2) The President of the National Office for the Judiciary shall decide on the designation within 8 days of receipt of the opinions and information referred to in Subsection (1) by dismissing the motion if it is unfounded, or by designating another court if the motion is well-founded.

(3) The President of the National Office for the Judiciary shall notify the moving party of the decision, and, in case of designation of another court, the designated court, and, if the designation concerns a criminal case, the Prosecutor General.

Section 64 No new designation under this Chapter shall be made in the case concerned by the designation."

[22] 5. The challenged provision of the Code of Criminal Procedure reads as follows:

"Section 20/A The President of the National Office for the Judiciary shall designate another court of identical material competence to hear the case instead of the territorially competent court, if the exceptional workload of the court means that it cannot be otherwise ensured that the cases can be heard within a reasonable period of time, and the designation does not impose a disproportionate burden on the designated court."

III

[23] The constitutional complaints are partly well-founded.

[24] 1. The Constitutional Court's position on the continued applicability of its decisions made before the entry into force of the Fundamental Law is that it "may apply in new cases the arguments connected to the issues of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law took effect, provided that »it is possible on the basis of the specific provisions, having identical or similar content as that of the previous Constitution, and of the rules of interpretation of the Fundamental Law.« {Decision 22/2012 (V. 11.) AB, Reasoning [40]}. The use of the statements of principle expressed in the decisions based on the previous Constitution therefore required a comparison of the content of the relevant provisions of the previous Constitution and the Fundamental Law and a consideration of the rules of interpretation of the Fundamental Law. However, as a result of the Fourth Amendment to the Fundamental Law, the use of the arguments contained in the decisions of the Constitutional Court taken before the entry into force of the Fundamental Law as a result of this comparison must be justified in sufficient detail, pursuant to point 5 of the Closing and Miscellaneous Provisions. However, it is possible to disregard the legal principles set out in the previous Constitutional Court's decision even if the content of certain provisions of the previous Constitution and the Fundamental Law are identical, and a change in the legislation may entail a reassessment of the constitutional issue raised. The development of constitutional law in Hungary and in Europe, and the regularities of constitutional law, necessarily have an impact on the interpretation of the Fundamental Law. The Constitutional Court may use the arguments, legal principles and constitutional contexts developed in its previous decisions in connection with constitutional issues to be examined in new cases, if the content of the relevant section of the Fundamental Law is in conformity with the Constitution, the contextual consistency of the Fundamental Law as a whole, the consideration of the rules of interpretation of the Fundamental Law and the applicability of the findings on the basis of the specific case do not constitute an obstacle and it is deemed necessary to include them in the reasoning of the decision to be taken. The Constitutional Court may, subject to the above conditions, refer to or cite the arguments and legal principles elaborated in its previous decisions, indicating the repealed decision as a source, and presenting the content or text of the substantive constitutional issue arising in the given case to the extent and scope necessary for the decision of the case. In a democratic State governed by the rule of law, the reasons and sources of constitutional law must be accessible and verifiable for everyone, and the need for legal certainty requires that the considerations in the decision be transparent and comprehensible. Public reasoning is the essential basis for the justification of a decision. The Constitutional Court always reviews the applicability of the arguments set out in previous decisions on a case-by-case basis, in the context of the specific case." {Decision 13/2013 (VI. 17.) AB, Reasoning [30] to [34]}. In the present case, the constitutional issues raised in the petitions, including the rule of law and the consequent requirement of legal certainty, the right to a fair trial, including the right to an impartial and fair tribunal, and the right to legal remedy, are regulated by the Constitution and the Fundamental Law with the same content, and therefore the Constitutional Court has taken into account the provisions of its previous decisions in its proceedings.

[25] 2.1 In the present case, the petitioners alleged a violation of the guarantees of justice enshrined in international human rights instruments, notably the Convention. Pursuant to Section 32 (2) of the Constitutional Court Act, a quarter of the members of the National

Assembly, the Government, the President of the Curia, the Prosecutor General, the Commissioner for Fundamental Rights and, under certain conditions, a judge acting in a particular case may submit a petition for the infringement of an international treaty. Given that the petitioners are not among those entitled to submit a petition, the Constitutional Court rejected the petition in this part on the basis of Section 64 (b) of the Constitutional Court Act.

[26] 2.2 Pursuant to Section 32 (1) of the Constitutional Court Act, the Constitutional Court shall review the conflict of laws with international treaties *ex officio* in the course of any of its proceedings. Whether or not it exercises its right to proceed *ex officio* depends on its own decision, which it takes into account the circumstances of the case and the gravity and consequences of the conflict in question. In deciding whether such a review is justified, the Constitutional Court has regard to the considerations set out in general terms in the context of the amendment of the Constitution, as set out in its Decision 61/2011 (VII. 13.): "In the case of certain fundamental rights, the Constitution formulates the substance of the fundamental right in the same manner as an international treaty (for example, the Covenant on Civil and Political Rights and the European Convention on Human Rights). In these cases, the level of protection of the fundamental right granted by the Constitutional Court must in no case be lower than the level of protection of international law (typically as developed by the Strasbourg Court of Human Rights). It follows from the principle of *pacta sunt servanda* [Article 7 (1) of the Constitution, Article Q (2) and (3) of the Fundamental Law] that the Constitutional Court must therefore follow the Strasbourg case law and the level of protection of fundamental rights set out therein, even if its own precedent decisions do not necessarily follow." {ABH 2011, 290, 321; *see* Decision 166/2011 (XII. 20.) AB, ABH 2011, 545.; Decision 43/2012 (XII. 20.) AB, Reasoning [67]}.

[27] In its proceedings, the Constitutional Court therefore also reviewed whether the contested provisions were contrary to an international treaty.

[28] 2.3 In the event that a given domestic law has the same content as a right contained in the Convention or one of its additional protocols, or if it serves to fulfil an obligation to ensure such a right, it also follows from Article Q of the Fundamental Law that the Constitutional Court must refrain from interpreting the given law (or legal provision) in such a fashion that the inevitable consequence would be a breach of the international legal obligation undertaken and Hungary's repeated condemnation before the Court.

[29] 3. In accordance with the provisions under review of the Courts Organisation Act (Sections 62 and 63) and the Code of Criminal Procedure (Section 20/A), the President of the National Office for the Judiciary could, on the motion of the President of the Regional Court of Appeal, the President of the Regional Court or the Prosecutor General, exceptionally designate another court of equal jurisdiction to hear the case instead of the competent court if the case or a specific group of cases brought before the court in the given period could not be heard within a reasonable time otherwise due to the extraordinary and disproportionate workload of the court and the designation did not impose a disproportionate burden on the designated court. The decision on the designation was taken by the President of the National Office for the Judiciary on the basis of the reasons given in the application for designation (why it could not be dealt with within a reasonable time, the case load, staffing and other data demonstrating

the exceptional and disproportionate workload of the court), the opinion of the court concerned by the designation and, in the case of criminal cases, the opinion of the Prosecutor General.. The designation was notified by the President of the National Office for the Judiciary to the moving party, the designated court and the Prosecutor General. The provisions under review did not provide for any appeal against the designation. In accordance with Section 64 of the Courts Organisation Act, this designation was applicable only once in a given case.

[30] In the petitioners' detailed and reasoned view, the above-mentioned rules on the designation of the court seised of a matter infringe the most important guarantees of court procedure enshrined in the Fundamental Law and the Convention: the right to a fair trial (including the right to a lawful judge, the right to an impartial trial, the rights of the defence and the principle of equality of arms), the right of the defence and the right to legal remedy.

[31] 3.1 The starting point of the Constitutional Court in its review of the right to a fair trial is that the requirement of a fair trial is a quality that can be judged by taking into account the totality and circumstances of the proceedings [Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 95]. In its Decisions, the Constitutional Court has set out, on a case-by-case basis, the specific criteria required by a fair trial. It has emphasised that there is no other fundamental right or constitutional objective that can be weighed against the right to a fair trial, because it is itself the result of a process of balancing [Decision 14/2002 (III. 20.) AB, ABH 2002, 101, 108; Decision 15/2002 (III. 29.) AB, ABH 2002, 116, 118-120; Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, 211; Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 256]. In line with the practice of the Constitutional Court, a procedure may be unfair, unjust or inequitable, or unfair, notwithstanding the absence of certain details, as well as in compliance with all the detailed rules [Decision 6/1998 (III. 11.) AB, ABH 1998, 91, 95].

[32] 3.2 Among the requirements of a fair trial, the Constitutional Court has so far dealt with the right to a lawful judge, invoked in both complaints, and the prohibition of deprivation of the lawful judge in few cases. Under Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Convention, everyone has the right to have his or her case heard by a court established by law. The requirement of a court established by law includes the right to a lawful judge, that is to say, to have a judicial forum (judge) in a particular case governed by the general rules of material and territorial competence laid down in the procedural laws. This constitutional principle is formulated in the Basic Principles of the Courts Organisation Act as follows: No one can be deprived of his right to a lawful judge [Section 8 (1)]. The judge to be appointed for a case in due course of the law shall be selected from the panel of judges of the court vested with material and territorial competence according to the case allocation rules [Section 8 (2)]. A lawful judge is therefore: a judge appointed in accordance with a predetermined case allocation plan in a court with material and territorial competence predetermined by law. In order to ensure objectivity and impartiality, and to exclude arbitrariness, the order of assignment of cases is established by the president of the court in the preceding year and may be modified in the current year only for reasons of service or for important reasons affecting the functioning of the court [Section 9 (1)]. It follows that the assignment of judges to cases may be constitutionally based on objective grounds only by applying predetermined general rules.

[33] In its Decision 993/B/2008 AB, the Constitutional Court stressed that "the »prohibition of deprivation of the right to a lawful judge« [...] is a guarantee for the participants in the proceedings, against the arbitrary allocation of cases, of which the system of service roster based on the rules of the Courts Organisation Act is only one element. In assessing who is to be regarded as the judge of a particular case, the other provisions of the procedural Act relating, *inter alia*, to material and territorial competence, the rules governing appeals and the requirement of a fair trial are to be given the same weight. And it is precisely in the interests of equality before the law that those provisions guarantee to all persons the assistance of a judge who can clearly be expected to give an objective ruling on the case" (ABH 2009, 2352, 2354-2355).

[34] In the present case, the Constitutional Court held that the possibility granted to the President of the National Office for the Judiciary, in the Courts Organisation Act and the Code of Criminal Procedure, to reallocate cases was an exception to the guarantee rules of the right to a lawful judge. Although the contested provisions prescribed that the reallocation of cases could exceptionally take place, no cardinal Act laid down the conditions for such a reallocation. Nor did the legislature specify the criteria for reallocation. As a result, the reallocation of cases, under the provisions at issue, was entirely at the discretion of the President of the National Office for the Judiciary, in the light of the specific case, on the motion of the court seised and / or the Prosecutor General (after obtaining the opinion of the court seised and the Prosecutor General). This fact is not altered by the fact that the President of the National Office for the Judiciary obtained the opinion of several courts for the purpose of the designation, and possibly the possibility of appointing judges, in view of the workload of the courts, acted in accordance with the criteria already prepared and subsequently issued as Presidential Recommendation 3/2012 (II. 20.) OBH of the President of the National Office for the Judiciary, not yet known at the time of the decisions in the cases on which the Constitutional Court proceedings were based, took into account the current workload of the courts and made the appointment in the light of the opinion of the selected court. However, the appointment of the presiding court on the basis of the discretion of the President of the National Office for the Judiciary thus resulted in a breach of the right to a lawful judge under Section XXVIII (1) of the Fundamental Law, which lays down the requirement of a fair trial, since the legal rules did not satisfy the objective test of impartiality.

[35] 3.3 The current Fundamental Law no longer provides a basis for the reallocation of cases and this institution has been removed from the Code of Criminal Procedure and the Courts Organisation Act The Constitutional Court could not disregard the fact that the cases of the complainants are still pending before the courts to which the reallocation has been made.

[36] The Constitutional Court notes that even when the Fundamental Law contained a specific provision on the possibility of reallocating cases (that is, between 1 April 2013 and 30 September 2013), the then applicable Article 27 (4) of the Fundamental Law made the reallocation of cases subject to a specific objective as a condition, that is, it could be made in the interests of 'the fundamental right to a judicial decision within a reasonable time' and 'a balanced caseload of the courts'. The conjunction 'and' is grammatically, and in Hungarian legal terminology, a cumulative relation. Accordingly, ensuring "a balanced caseload of the courts"

cannot in itself be a constitutional basis for the reallocation of cases if it is not also coupled with "the exercise of the fundamental right to a judicial decision within a reasonable time". Since the constitutional legislator itself emphasised the fundamental nature of this right, the possibility of reallocating cases cannot and could not be interpreted as a fundamental right per se that can be exercised independently of the will of the person concerned (the accused in general), *a fortiori* against it.

[37] Since the conjunction "and" clearly presupposed a cumulative relationship between the objectives of Article 27 (4) of the Fundamental Law, it could not give priority, or even primacy, to "a balanced caseload of the courts" at the expense of "the fundamental right to a judicial decision within a reasonable time". This would also be contrary to the principle of judicial interpretation of the law laid down in the second sentence of Section 28 of the Fundamental Law: "When interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good".

[38] As regards the content of the former constitutional phrase "the effective exercise of the fundamental right to a judicial decision within a reasonable time", the Constitutional Court points out that it itself considered it an integral part of a fair trial when interpreting Article 57 (1) of the Constitution. The Constitutional Court recalls that "[t]he broad interpretation of the requirements of a fair trial includes the requirement of adjudication within a reasonable time [...]. The requirement of timeliness is, however, only one of the principles of fairness, the enforcement of which cannot be intensified to the extreme and which cannot prevail over other aspects of fairness and in any event cannot infringe another fundamental right" [Decision 20/2005 (V. 26.) AB, ABH 2005, 202, 228]. "In the view of the Constitutional Court, the State has a constitutional obligation towards society to enforce its right to prosecute without delay" [Decision 14/2004 (V. 7.) AB, ABH 2004, 241, 254]. In the same decision, the Constitutional Court summarised its position that "the normative content of the rule of law and the fundamental constitutional right to a fair trial impose a constitutional requirement on the regulation of criminal proceedings to enforce and adjudicate the State's right to prosecute within a reasonable time. In these decisions, emphasis has been placed on the experience that delays in the adjudication of a right to prosecute have a detrimental effect on the functioning and authority of the criminal justice system. Delays in criminal proceedings make it considerably more difficult to prove the commission of the offence and the identity of the perpetrator, have an adverse effect on the rights and interests of the aggrieved party and have the undesirable consequence of temporally greatly distancing the commission of the offence from the imposition of the penalty " (ABH 2004, 241, 254).

[39] In the context of the right of defence, the Constitutional Court has previously referred to the right of self-determination of the accused, and said that freedom of self-determination is a fundamental constitutional right, which includes the right to refrain from exercising rights, the right not to act. "The procedural aspect of the right to self-determination is manifested in the right of the accused to dispose of his or her own affairs, on the basis of which the defendant decides in criminal proceedings to what extent he or she exercises the procedural rights

granted to him or her and to what extent he or she makes use of the possibilities" [Decision 14/2004 (7 May 2004) AB, ABH 2004, 241, 257].

[40] The above theses of the Constitutional Court are close to the way in which the European Court of Human Rights (hereinafter referred to as the "ECHR") has interpreted the impact of the reasonableness of the duration of the proceedings and the applicant's own conduct on the delay in the context of the right to a judicial decision within a reasonable time. As the Court has pointed out: The accused is under no obligation to cooperate in order to expedite his own conviction [Eckle v. Germany (8130/78), judgement of 15 July 1982, para. 82]. However, the accused does so at his own risk from the point of view of the requirements of a reasonable time: The Court has also emphasised that, in the case of delaying tactics, the applicant cannot plead that the reasonable time has been exceeded, bearing in mind, of course, the specific features of civil and criminal cases [see, to that effect, Unión Alimentaria Sanders SA v. Spain (11681/85), judgement of 7 July 1989, para. 35]. This was subsequently supplemented by the fact that, in examining whether the procedural period was reasonable or whether it was prolonged in relation to the conduct of the applicant, a distinction must be drawn between the use of procedural facilities and their abuse: The use of the facilities provided by law cannot be imputed to the applicant [Yağcı and Sargın v. Turkey (6/1994/453/533-534, judgement of 8 June 1995 in Case 6/1996/6/1995 (6/6/1996-66/1995), para. 66; Judgment of 22 February 2007 in Case 76835/01 Kolomiyets v Russia, paras 27 and 29].

[41] 3.4 The Constitutional Court in its Decision 166/2011 (XII. 20.) AB (hereinafter referred to as the "2011 Court Decision", ABH 2011, 545.), taking into account the case law of the ECHR: "the reallocation of a group of cases from a court acting under the general rules of territorial competence to the territorial competence of another court is compatible with the Convention only if its substantive and procedural rules and preconditions are laid down by the legislature using transparent, predetermined, clear and objective parameters, leaving no (or only minimal) room for discretion and where the actual decision can be taken by the independent, impartial court system's own institutions. Since the provision in question does not contain such elements, it does not satisfy the requirements of Article 6 (1) of the Convention, and in particular what is known as the objective test, and is therefore contrary to international law." (ABH 2011, 545, 564.) Although the Constitutional Court criticised the legislative solution of making the choice of the court or tribunal "in cases of major importance" dependent on the decision of the public prosecutor, the Constitutional Court very clearly indicated the narrow limits within which a derogation from the general rules could still be compatible with the Convention. The constitutional and international law limits on the reallocation of cases were therefore clear to the legislator since the 2011 Court Decision, even though the powers of the President of the National Office for the Judiciary could not, in the nature of things, be the subject of a specific review in the 2011 Court Decision. However, the Constitutional Court notes that, at the time of the adoption of the 2011 Court Decision.

[42] The Constitutional Court further notes that the Venice Commission reached essentially the same conclusion in relation to the legislation at issue in the present case. [*See* document CDL-AD(2012)001 *Avis sur la loi CLXII de 2011 sur le statut juridique et la rémunération des juges et la loi CLXI de 2011 sur l'organisation et l'administration des tribunaux de la Hongrie adopté par*

la Commission de Venise lors de sa 90e session plénière (*Venise*, *16-17 mars 2012*)]. See also the Venice Commission's decision adopted on 13 October 2012 [in document CDL-AD(2012)020, Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary, adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012) Chapter XXI, §§ 60-74, (pp. 12-14), paras 90-91 (p. 18) and in document CDL-AD(2013)012 [Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15 June 2013) paras 73-74 (p. 17)].

[43] Therefore, the Constitutional Court found that the provisions of the Courts Organisation Act and the Code of Criminal Procedure at issue did not comply with Section 6(1) of the Convention as regards the right to a lawful judge.

[44] 3.5 The Constitutional Court " has made a number of comparisons with international law, in other words, it has looked at the legislation of other European and other foreign countries on the same subject [...]. In its inquiries, the Constitutional Court has typically sought to review the reasons for and purpose of the introduction of the legislation at issue, looking for common elements and contrasts, often concluding that the legislation under consideration varies considerably, not only between overseas and European States, but also between European States.

[45] The assessment of the constitutionality of a legal institution in another country may vary depending on the constitution of that State, the way in which the legislation fits into the legal system, and the historical and political context. Therefore, while recognising that it may be helpful to take into account foreign experience in assessing a regulatory solution, the Constitutional Court cannot consider the example of a foreign country as a per se determinative factor in assessing conformity with the Constitution (Fundamental Law). [...] In the light of these aspects, it may be stated that the mere fact that a legal institution or regulatory solution exists in one or more foreign (or even European democratic) countries is not decisive for the assessment of conformity with the Fundamental Law, and thus cannot be a sufficient reason for restricting a right guaranteed in the Fundamental Law of Hungary." {Decision 6/2013 (III. 1.) AB, Reasoning [109] to [111]}. The Constitutional Court considers it important to note, however, that the English, French, Danish and Dutch examples often cited as "models" for the solution currently under review actually differ significantly from the Hungarian legislation. None of them is essentially or fundamentally identical to the Hungarian solution, and certainly not to the form of the solution currently under review. For example, either the case categories were reallocated or the right of appeal was granted to the accused. Either the judiciary decided or its involvement was indispensable.

[46] 3.6 The Constitutional Court recalls that the Fourth Amendment to the Fundamental Law, irrespective of the fact that Article Q of the Fundamental Law already laid down the fundamental rules of the relationship between Hungarian law and international law, based on the wording of Article 7 (1) of the Constitution, but with its conscious adaptation, again devoted a special point in the final provisions to the continuity of international legal obligations and the importance of their observance. The entry into force of the Fundamental Law shall not affect the validity of laws, instruments of public law and other legal instruments of State

administration, individual decisions taken and international legal obligations entered into before its entry into force.

[47] The Constitutional Court has held that in this point the drafter has in fact expressed his attachment to a fundamental rule of international law, which was proclaimed by the Permanent International Court of Justice when it refused to accept that Germany could be exempted from its obligations under the Treaty of Versailles by virtue of its internal act (declaration of neutrality) (CPJI: The Wimbledon steamer case, 17 August 1923, Série A n° 1, pp. 29-30). The Permanent International Court of Justice, raising the bar even higher in the case of Polish nationals in Danzig, also stated that "a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force" (CPJI: Advisory Opinion on the Treatment of Polish Nationals in Danzig, 4 February 1932, Série A/B n° 44, p. 24). Since they were enunciated, these articles have been decisive: they form the basis for the conflict-free coexistence of international law and national constitutions and are now reflected in the Fundamental Law. The Constitutional Court has therefore also taken into account Article 8 of the Closing and Miscellaneous Provisions of the Fundamental Law when interpreting Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Convention.

[48] 3.7 In the 2011 Court Decision, the Constitutional Court also explained its position, recalling its previous decisions also taking into account Strasbourg case law, in relation to the requirement of the impartiality of the court, "that the »fundamental constitutional right to an impartial court requires the court to be free from prejudice and impartiality towards the person subject to proceedings. This is both an expectation of the judge himself, of his conduct and attitude, and an objective requirement relating to the regulation of the procedure: any situation which might give rise to justifiable doubts as to the impartiality of the judge must be avoided« [...] [The] Constitutional Court referred to what is known as the double test applied by the ECHR, which, in the context of the subjective test, reviews the personal conduct of the judge acting as judge, that is to say, whether there were any manifestations during the proceedings from which it might be inferred that he lacked impartiality. The objective approach is to review whether there was an objectively justifiable reason for the presumption of lack of impartiality [...], that is to say, whether the rules in question ensure the requirement of impartiality, including the fact that the procedure cannot objectively give rise to doubts as to impartiality on the part of the public, in particular the persons seeking justice [...]. As the ECHR has pointed out: »Moreover, the existence of national procedures for ensuring impartiality, namely rules regulating the withdrawal of judges, is a relevant factor. Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public (*see* Mežnarić v. Croatia, no. 71615/01, para. 27, 15 July 2005)« (Huseyn and Others v Azerbaijan, para. 162)" (ABH 2011, 545, 558-559). In the present case, the Constitutional Court has also considered as a guideline the theses which the ECHR, although not in a criminal case, has stated in a case "concerning a reclassification of the judicial workload in order to lighten the workload of the judiciary, namely that »the paramount

importance of judicial independence and legal certainty for the rule of law call for particular clarity of the rules applied in any one case and for clear safeguards to ensure objectivity and transparency, and, above all, to avoid any appearance of arbitrariness in the assignment of particular cases to judges.« In this context, »the applicable rules, both substantive and procedural, were far from being exhaustive and left significant latitude to the president of the court in issue«, the Slovak Government failed to demonstrate convincingly that the »reassignment of the applicant company's individual case was on objective grounds and whether any administrative discretion in its reassignment was exercised within transparent parameters« (DMD GROUP a.s. v. Slovakia, 5 October 2010, paras 66, 67-68 and 70)" (the2011 Court Decision, ABH 2011, 545, 561.)

[49] The Constitutional Court also took into account in this case that the President of the National Office for the Judiciary designated only the court and not the judge, the selection of the latter was the responsibility of the President of the designated court, and the accused could file an objection of bias against the judge or (if the conditions for this were met) against the designated court itself. However, this possibility did not in itself ensure compliance with the requirements of either the Fundamental Law or the Convention.

[50] In the 2011 Court Decision, the Constitutional Court based its assessment of the reallocation of cases, *inter alia*, on the judgements in Coëme and Others v. Belgium (32492/96, 32547/96, 32548/96, 33209/96 and 33210/96) of 22 June 2000. The Venice Commission, in a document referred to above [CDL-AD(2012)001 *Avis sur la loi CLXII de 2011 sur le statut juridique et la rémunération des juges et la loi CLXI de 2011 sur l'organisation et l'administration des tribunaux de la Hongrie adopté par la Commission de Venise lors de sa 90e session plénière, p. 25, § 86* and related footnote 43], also considered the Coëme case to be authoritative. The Constitutional Court notes that the Coëme v. Belgium case has been referred to on several occasions by the Court of Justice since then: some of the references concerned the principles of *nullum crimen sine lege* and *nulla poena sine lege* and, in this context, the normative principle [*see* Khodorkovsky and Lebedev v. Russia (11082/06 and 13772/05), 2013, pp. 25 July 2013, para. 789; Del Rio Prada v. Spain (42750/09), 21 October 2013, para. 78; Kasymakhonov and Saybatalov v. Russia (26261/05 and 26377/06), 2013, para. 14 March 2013, para 77; Vyerentsov v Ukraine (20372/11), 11 April 2013, paras 62, 64 and 177]; another reference was made in the context of the interpretation of the indictment [Dimitar Krastev v. Bulgaria (26524/04), 12 February 2013, para 71.], and two references [Ullens de Schooten and Rezabek v. Belgium (3989/07 and 38353/07), 20 September 2011, paragraph 57, and Kaçiu and Kotorri v Albania (33192/07 and 33194/07), 25 June 2013, paragraph 139] in a context which is relevant to the present case.

[51] In the Ullens de Schooten case, in the context of the Belgian court of first instance's dismissal of a request for a preliminary ruling from the Court of Justice of the European Union, it is stated that "[i]t should further be observed that the Court does not rule out the possibility that, where a preliminary reference mechanism exists, refusal by a domestic court to grant a request for such a referral may, in certain circumstances, infringe the fairness of proceedings, even if that court is not ruling in the last instance, whether the preliminary ruling would be given by a domestic court or a Community court." (Ullens de Schooten, paragraph 59)

[52] And in the case of Albania, where, in the context of a court order for military judges to try a criminal case not involving the military or the police, due to the case overload of the courts, the Court recalled that "[t]he phrase 'established by law' covers not only the legislation concerning the establishment and jurisdiction of a tribunal […], but also the composition of the bench in each case. A "tribunal" referred to in Article 6 (1) of the Convention must also satisfy a series of other conditions, including the independence of its members and the length of their terms of office, impartiality and the existence of procedural safeguards (*see* Coëme and Others v. Belgium, para. 99)" (Kaçiu and Kotorri, cited above, § 139).

"The Court considers legitimate the reason for the transfer of the judges, namely to ensure the impartiality and independence of the bench. It is not for the Court to examine whether the authorities should have transferred judges from other ordinary courts of appeal, the matter remaining with the respondent Government's discretion, but to ascertain whether the manner in which the transfer was effected and guarantees surrounding it were Article 6 compliant." (Kaçiu and Kotorri, paragraph 142)

[53] The Constitutional Court notes that the ECHR has found the relevant part of the Albanian legislation and its specific practice on this point to be in conformity with the requirements of the Convention.

[54] Here, the appointment is initiated by the head of the competent court before the Minister of Justice, who, if he agrees, submits the case to the Albanian National Council of Justice (Këshilli i lartë i Drejtësise), whose ex officio members are the Head of State, the President of the Supreme Court and the Minister of Justice, three of whom are elected by the Parliament from among jurists with fifteen years of experience, and nine of whose members are elected by the National Conference of Judges. The case will therefore remain before the court with jurisdiction under the law, and the decision will be taken by a panel which, although mixed in composition, has a two-thirds majority of judges.

[55] The Constitutional Court, in the light of the principles set out in the judgements in Coëme and Others v Belgium, 22 June 2000, § 102-103; DMD GROUP a.s. v Slovakia, 5 October 2010, § 60, as well as in the 2011 Court Decision in this case, the Court held that the reallocation of a case or a group of cases from a court acting under the general rules of territorial competence to another court is compatible with the Convention only if its substantive and procedural rules and preconditions are laid down by the legislature in a transparent, predetermined, clear and objective manner, using parameters which leave no (or only minimal) room for discretion. In the present case, the Constitutional Court found that the provisions of the Courts Organisation Act and the Code of Criminal Procedure under review failed to meet the requirements of impartiality and the appearance of impartiality arising from both the Fundamental Law and the Convention. The objective requirement of impartiality is satisfied only if the legislation provides sufficient guarantees to exclude any doubt.

[56] In the view of the Constitutional Court, the mere fact that no objection is raised against the specific conduct of the judicial council actually acting in the proceedings pending cannot either establish or compensate for the inherent violation of the principle *nullum judicium sine lege*. The Constitutional Court points out that this principle has also been invoked in the course

of the proceedings, for example after the Constitutional Court adopted Decision 45/2012 (XII. 29) AB on the Transitional Provisions of the Fundamental Law.

[57] In the meantime, the situation has been further complicated and the compatibility with the Fundamental Law and the Convention has been made even more difficult from the point of view of the principle *nullum judicium sine lege* by the fact that the reallocated proceedings are no longer backed by a valid *lex* nor by a valid *clause* in the Fundamental Law.

[58] 3.8 In view of the fact that the Constitutional Court has stated above that the provisions of Sections 62 and 63 of the Courts Organisation Act applied in the cases on which the constitutional complaints are based, as well as Section 20/A of the Code of Criminal Procedure, which is the subject of the present case, are in breach of Article XXVIII (1) of the Fundamental Law and Article 6 (1) of the Convention, due to the violation of several requirements of a fair trial, further consideration of the following points in this regard, following its practice to date [Decision 31/1991 (VI. 5.) AB, ABH 1991, 133, 136], was refrained from in this respect.

[59] 3.9 The petitioners all complained that there was no right of appeal against the decision of the President of the National Office for the Judiciary. Pursuant to Article XXVIII (7) of the Fundamental Law, everyone has the right to appeal against any judicial, authority-rendered or other public administrative decision which adversely affects his or her rights or legitimate interests. In accordance with Article I (3) of the Fundamental Law, a fundamental right may be restricted to the extent strictly necessary and proportionate to the objective pursued, while respecting the essential content of the fundamental right, in order to ensure the exercise of another fundamental right or to protect a constitutional value. Article 13 of the Convention, under the heading 'Right to an effective remedy', provides that anyone whose rights and freedoms as defined in the Convention have been violated has the right to seek an effective remedy before the domestic authority, even if those rights have been violated by persons acting in an official capacity.

[60] According to the consistent practice of the Constitutional Court, the right to legal remedy covers judicial or public administrative decisions as regards its subject matter, and the possibility to appeal to another body or to a higher forum as regards the substance of the decision. The right to appeal may be exercised in accordance with the provisions of the law, and therefore different rules may apply in different proceedings (Decision 5/1992 (I. 30.) AB, ABH 1992, 27, 31; Decision 1437/B/1990 AB, ABH 1992, 453, 454; Decision 513/B/1994. AB decision, ABH 1994, 731, 733-734; Decision 22/1995 (III. 31.) AB, ABH 1995, 108, 109-110; Decision 23/1998 (VI. 9.) AB, ABH 1998, 182, 186; Decision 24/1999 (VI. 30.) AB, ABH 1999, 237, 243-246; and Decision 29/1999 (X. 6.) AB, ABH 1999, 294, 297-298]. An essential, inherent element of any legal remedy is the possibility of legal remedy, that is, the remedy conceptually and substantively includes the possibility of redressing the violation of the right [Decision 23/1998 (VI. 9.) AB, ABH 1998, 182, 186].

[61] Since in this case the legislator did not provide any legal remedy to the persons concerned against a decision that affected their fundamental rights, which were also referred to above, in particular their right to a fair trial, the Constitutional Court found that this legislation was contrary to the Fundamental Law and in breach of an international treaty, as it did not comply

with the requirement of Article XXVIII (7) of the Fundamental Law or Article 13 of the Convention.

[62] 3.10 According to the Constitutional Court Act, the Constitutional Court itself determines the legal consequences applied within the framework of the Fundamental Law and the Constitutional Court Act [Section 39 (3) thereof]. As a rule, the Constitutional Court may determine the unconstitutionality of a repealed statute if the statute should still be applied in a specific case [Section 41 (3) of the Constitutional Court Act]. Pursuant to Section 45 (2) of the Constitutional Court Act, if the Constitutional Court annuls a law applied in an individual case on the basis of a judicial initiative or a constitutional complaint, the annulled law shall not be applied in the case giving rise to the proceedings of the Constitutional Court. Therefore, a finding that the contested provisions of the Courts Organisation Act and the Code of Criminal Procedure are contrary to the Fundamental Law in principle implies, by virtue of the force of law, that they are not applicable in the cases on which the Constitutional Court proceedings are based, and the Constitutional Court did not have to make a specific ruling to that effect.

[63] 4. In its Decision45/2012 (XII. 29.) AB, the Constitutional Court annulled *ex tunc*, *inter alia*, Articles 11(3) and 31 (2) of the Transitional Provisions, which were challenged by the constitutional complaints, on the grounds of invalidity under public law. "Legislative provisions annulled with retroactive effect are void retroactively to the date on which they were enacted, which precludes their application" [Decision 2/2009 (I. 23.) AB, ABH 2009, 51, 60]. The Constitutional Court has held that the retroactively annulled provisions of the Transitional Provisions must be considered as if they had not been validly enacted, and therefore, in view of this, it terminated its proceedings on this part of the constitutional complaints pursuant to Section 59 of the Constitutional Court Act.

[64] 5. In the first constitutional complaint, the petitioners also initiated a review of constitutionality of the decision of the President of the National Office for the Judiciary designating the court to be seised in their case. Section 27 of the Constitutional Court Act allows the filing of a constitutional complaint against a decision on the merits of the case or against any other decision that terminates the court proceedings. With regard to the legal classification of the decision of the President of the National Office for the Judiciary designating the court, the Constitutional Court shares the consistent view of the Curia, expressed in the appeal proceedings, that the decision of the President of the National Office for the Judiciary taken pursuant to Section 62 of the Courts Organisation Act is an administrative decision which is part of the main proceedings but which is subject to a separate procedural order and that, therefore, the question of the designation of the court has no influence on the manner in which the main proceedings are decided.. In the Constitutional Court's view, therefore, the decision of the President of the National Office for the Judiciary designating the court hearing the case does not satisfy the condition laid down in Section 27 of the Constitutional Court Act and the constitutional complaint was therefore rejected in that part.

[65] The publication of the Decision in the Hungarian Official Gazette is based on Section 44 of the Constitutional Court Act.

Budapest, 2 December 2013

Dr. Péter Paczolay, sgd., Chief Justice of the Constitutional Court

Dr. Elemér Balogh, sgd., Justice of the Constitutional Court

Dr. István Balsai, sgd., Justice of the Constitutional Court

Dr. András Bragyova, sgd., Justice of the Constitutional Court

Dr. Egon Dienes-Oehm, sgd., Justice of the Constitutional Court

Dr. Imre Juhász, sgd., Justice of the Constitutional Court

Dr. László Kiss, sgd., Justice of the Constitutional Court

Dr. Péter Kovács, sgd., Justice of the Constitutional Court, Justice-Rapporteur

Dr. Barnabás Lenkovics, sgd., Justice of the Constitutional Court

Dr. Miklós Lévay, sgd., Justice of the Constitutional Court

Dr. Béla Pokol, sgd., Justice of the Constitutional Court

Dr. László Salamon, sgd., Justice of the Constitutional Court

Dr. István Stumpf, sgd., Justice of the Constitutional Court

Dr. Mária Szívós, sgd., Justice of the Constitutional Court