Number of the Constitutional Court's decision: Decision 33/2012.(VII. 17.) AB
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On the basis of constitutional complaints aimed at the establishment of the unconstitutionality of a statute, the plenary session of the Constitutional Court – with dissenting opinions by dr. István Balsai, dr. Egon Dienes-Oehm, dr. Barnabás Lenkovics, dr. Béla Pokol, dr. István Stumpf, dr. Péter Szalay and dr. Mária Szívós Judges of the Constitutional Court – has adopted the following

decision:

The Constitutional Court holds that Section 90 item *ha)* and Section 230 of the Act CLXII of 2011 on the legal status and the remuneration of judges are unconstitutional, and therefore annuls them with a retroactive force taking effect as from the date of 1 January 2012.

The Constitutional Court publishes this Decision in the Hungarian Official Gazette.

Reasoning

I

[1] 1. The Constitutional Court received several constitutional complaints signed by numerous petitioners – on the basis of Section 26 para. (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC) – aimed at establishing that the provision found in Section 90 item *ha)* and Section 230 of the Act CLXII of 2011 on the legal status and the remuneration of judges (hereinafter: ASJ), defining the age limit of retirement applicable to judges as the upper age limit of practising as a judge is contrary to the Fundamental Law. The petitioners also contested the transitional provision found in Section 230 of ASJ and related to Section 90 item *ha).*

[2] With regard to the fact that the petitioners raised a constitutional concern about the provisions of the same statute on the basis of the same constitutional reasons, the Constitutional Court consolidated the petitions – in accordance with Section 58 para. (2) of ACC – and ruled upon them in a single procedure.

[3] 2. According to the petitioners, the contested provision of ASJ violates the Fundamental Law of Hungary (hereinafter: Fundamental Law) as it is contrary to Article B) para. (1), Article I para. (1), Article II, Article VI para. (1), Article XIII para. (1), Article XV para. (2), Article XXIII para (8) and Article 26 para. (2) of the Fundamental Law.

[4] a) First of all, the petitioners stated in their complaint that the contested provision of ASJ requiring the discharge of judges when they reach the age limit of retirement applicable to judges was in violation of the rule of equal rights enshrined in Article XV para. (2) of the Fundamental Law. In accordance with Section 18 para. (1) of the Act LXXXI of 1997 on social security pension (hereinafter: ASSP), the age limit of retirement is determined in a differentiated way depending on the year of birth. Accordingly, there are different upper age limits of practising as a judge. The petitioners hold that the distinction is arbitrary, as by way of this regulation the legislator differentiates between the subjects of the law who belong to the same homogeneous group of the society – i.e. judges – on the basis of their age, without any reasonable ground.

[5] They explain that "the discrimination is not eliminated by the fact that all judges may uniformly maintain their judicial status until reaching the age limit of retirement applicable to him or her. The termination of the judicial status cannot be linked to the progressive introduction of changes in the provision of social security pension."

[6] Section 18 of ASSP followed constitutional concerns in determining the age limit of old age retirement in a differentiated way, in order to introduce the higher general age limit of retirement – specified in the age of 65 – with a view to avoid the immediate restriction of rights. Decreasing the upper age limit of practising as a judge is a deprivation of a right falling within the powers of the legislator, but it can only be implemented

in line with the criteria of constitutionality. The enforcement of the prohibition of discrimination is one of these fundamental constitutional requirements.

[7] One of the petitioners points out in a supplementary motion that the contested regulation differentiates without constitutional justification between the judges concerned with regard to a fundamental right regulated in Article XXIII para. (8) of the Fundamental Law, the right to hold a public office.

[8] To support their arguments based on the injury of equality, the petitioners refer to the practice of the Court of the European Union founded on Article 21 of the Charter of Fundamental Rights and Directive 2008/78/EC.

[9] b) The age limit of old age retirement as introduced by ASJ violates the human dignity of judges, their private and family life as well as their reputation. In connection with the interpretation of the right to human dignity, the complainants hold, with reference to the Constitutional Court's Decision 37/2011. (V. 10.) AB: "Practising the profession of a judge is under a constant and double statutory protection from the moment of making a decision to become a judge. The law guarantees the obligation to maintain their status as a judge until reaching the upper age limit of 70, and the remuneration of a judge is also guaranteed by the law. (…) These are the foundations upon which a judge may build his or her human dignity and the existence forms (attributes) such as the right of disposal, the rights to self-identity and to privacy, as well as the right to the free development of one's personality. The state may adopt arbitrary laws injuring the personality rights of judges, and may not create life situations tousling their private and family lives, breaking their connections, eroding their reputation and depriving them of their proprietary expectations guaranteed by the law."

[10] By way of the immediate termination of their judicial service status, – taking into account that pensions amount approximately to 30% of the judges' remuneration – the circumstances of the judges' lives change dramatically; they fall into a defenceless situation, seriously violating their human dignity.

[11] c) In the opinion of the petitioners, decreasing the upper age limit applicable to judges – as regulated in ASJ – also violates the right to property according to Article XIII of the Fundamental Law. With reference to the established practice of the Constitutional Court, the petitioners claim that the introduction of the new upper age limit deprived the judges of their property expectations for several years without providing appropriate time for preparation, thus violating their fundamental rights. With regard to the violation of the right to property – by way of reference to Article Q) of the Fundamental Law – the petitioners quote Article 1 of the First Additional Protocol of the European Convention of Human Rights on the protection of property and its interpretation in the practice of the European Court of Human Rights.

[12] d) They hold that the contested regulation also violates the provision found in Article 26 para. (2) of the Fundamental Law according to which the judicial service status of judge – with the exception of the president of the Curia – can only be maintained until reaching the age limit of general old age retirement. According to the petition, this provision of the Fundamental Law links the termination of the judicial service status of judges to reaching the uniform age limit of general old age retirement, applicable the same way to all judges, and not the retirement age limits applicable to the single judges. In the opinion of the petitioners, this general old age retirement age limit is 65 years, as contained in Section 18 of ASSP.

[13] e) There is a constitutional complaint – initiating the review of Section 230 of ASJ as well – claiming that the challenged regulations violate Article 26 para. (1) of the Fundamental Law, the principle of judicial independence. According to this petition, the ASJ is contrary to the principle of irremovability as an element of judicial independence, as the provision concerned allows for the rapid discharge of the affected judges within three months. Judicial independence has several elements, components. Judicial independence is not a fundamental right, it serves the interests of the ones seeking justice, and it is not a privilege of the judge. At the same time, it is not only a principle of the judiciary or of organisation and management, but in certain elements it is the right or the obligation guaranteed in the Fundamental Law for a person holding a judicial office. This interpretation is supported by the fact that, for the purpose of granting the neutrality belonging to judicial independence, Article 26 para. (1) of the Fundamental Law prohibits judges to be members of a party or to engage in a political activity, which means that a direct obligation is imposed on the person holding a judicial office. Therefore in a constitutional complaint reference can be made to specific rights entitling judges, originating in judicial independence. Irremovability is an element of judicial independence, and it means – among others – that a judge cannot be deprived of his/her office against his/her will prior to reaching the upper age limit. The decrease of the retirement age limit of judicial service in ASJ was a significant cut implemented abruptly, without the necessary gradation. Therefore Section 90 item *ha)* and Section 230 of ASJ are contrary to the principle of judicial independence, the irremovability of judges.

[14] 3. In the procedure, the Constitutional Court considered the fact that Section 90 item *ha)* and Section 230 of ASJ are more than abstract rules, as due to the new regulation of the retirement of judges, twenty out of the seventy-four occupied judicial posts will become vacant until the end of June. According to the Government's data, the new regulation affects altogether 274 judges. The judicial service relationships of 228 judges were terminated as from 30 June 2012, and there are 46 more judges whose status would be terminated by the end of the year. The President of the Republic discharged 194 judges in the Decision 96/2012. (V.2.) KE.

[15] Regarding the countries of the European Union, the upper age limit of judicial service is higher than 62 years in all member states, with the exception of Slovakia, where the age limit is 62 years. In the majority of the countries – including Poland, Romania and the Czech Republic – the upper age limit is between 65 and 70 years. In Spain judges may stay in office until the age of 75; in the UK the age limit is 75 years, although it is going to be decreased *pro futuro* to 70 years. In contrast with the European regulation, according to the constitution of the United States, it is an important guarantee of judicial independence that judges may stay in office until they are able to do it appropriately. In theory it means staying in office for a lifetime: there is no age limit for the members of the Supreme Court and in sixteen member states; in the states where they have an age limit, it is between 70 and 75 years.

II

[16] The Decision of the Constitutional Court is based on the following statutory provisions:

[17] 1. The provisions of the Fundamental Law relevant in respect of the petition are as follows:

[18] "Article B)

[19] (1) Hungary shall be an independent, democratic State under the rule of law."

[20] "Article I

[21] (1) The inviolable and inalienable fundamental rights of MAN shall be respected. It shall be the primary obligation of the State to protect these rights."

[22] "Article II

[23] Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception."

[24] "Article VI

[25] (1) Everyone shall have the right to have their private and family life, home, communications and good reputation respected.

[26] "Article XIII

[27] (1) Everyone shall have the right to property and succession. Property shall entail social responsibility."

[28] "Article XV

[29] (2) Hungary shall guarantee the fundamental rights to everyone without any discrimination, in particular on grounds of race, colour, sex, disability, language, religion, political or other opinion, national or social origin, property, birth or any other status."

[30] "Article XXIII

[31] (8) Every Hungarian citizen shall have the right to hold public office according their suitability, qualifications and professional competence. Public offices that shall not be held by members or officers of political parties shall be specified in an Act."

[32] "Article 26

[33] (1) Judges shall be independent and only subordinated to Acts; they shall not be given instructions as to their judicial activities. Judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act Judges shall not be members of a political party or engage in any political activity.

[34] (2) Professional judges shall be appointed – as laid down in a cardinal Act – by the President of the Republic. Only persons having reached the age of thirty years may be appointed judge. Except for the President of the Curia, the service relationship of judges shall terminate upon their reaching the general retirement age.

[35] 2. According to the transitory provisions of the Fundamental Law of Hungary:

[36] „12. "Article 12

[37] (1) If the judge reached prior to 1 January, 2012 the general old age retirement age limit specified in Article 26 para. (2) of the Fundamental Law, their judicial service relationship shall be terminated as from 30 June 2012. If the judge shall reach between 1 January, 2012 and 31 December 2012 the general old age retirement age limit specified in Article 26 para. (2) of the Fundamental Law, their judicial service relationship shall be terminated as from 31 December 2012."

[38] 3. The provisions of ASJ challenged by the petitioners are as follows:

[39] "Section 90 The judge shall be discharged

[…]

[40] *h)* if the judge

[41] *ha)* reached the retirement age limit applicable to them (hereinafter: "upper age limit"), with the exception of the President of the Curia, or (…)"

[42] The regulation of ASJ closely related to the challenged provision:

[43] "Section 230 (1) The provisions of this Act shall be applied to the judges who reached the upper age limit before 1 January 2013 with the derogation specified in paragraphs (2) and (3).

[44] (2) If the judge reached the upper age limit before 1 January 2012, the starting date of their discharge shall be 1 January 2012 and the closing date of it shall be 30 June 2012, with the judicial office terminating on 30 June 2012. The motion on discharge shall be made at a date allowing passing the decision on discharge not later than on 30 June 2012.

[45] (3) If the judge reached the upper age limit between 1 January 2012 and 31 December 2012, the starting date of their discharge shall be 1 July 2012 and the closing date of it shall be 31 December 2012, with the judicial office terminating on 31. December 2012. The motion on discharge shall be made at a date allowing passing the decision on discharge not later than on 31 December 2012.

III

[46] The Constitutional Court first examined whether any of the petitions the procedure is based upon comply with the requirements specified with regard to constitutional complaints in the Fundamental Law and in ACC.

[47] They filed their complaint on the basis of Section 26 para. (2) of ACC. The significance of it lies – among others – in the fact that these complaints are aimed directly at a statute, by claiming individual interest and being personally affected. The statute challenged by the constitutional complaint can be reviewed on the merits when at least one complaint complies with the requirements.

[48] The complaint on the basis of Section 30 and Section 26 para. (2) of ACC can be submitted within 180 days upon the challenged statute taking force. ASJ entered into force of 1 January 2012. The complaints were filed between 13 January and 23 February 2012, thus within the statutory deadline.

[49] The petitioners specify in the complaint the statutory provision that forms the basis of the competence of the Constitutional Court. They identify the exact statutory provision contested, and also their right regulated in the Fundamental Law and violated by the challenged rule. They provide detailed reasons about why the challenged regulation is contrary to the Fundamental Law. The complaints contain an express request to annul the statute deemed to be contrary to the Fundamental Law. Accordingly the petitions contain all the elements required by Section 52 para. (1) of ACC with regard to the petitions submitted to the Constitutional Court.

[50] In compliance with the ACC, in case of a constitutional complaint, the Constitutional Court has to pass a decision on the admissibility of the complaint, too.

[51] On the basis of Section 56 para. (2) of ACC, when the Constitutional Court decides upon this issue, it shall examine – within its discretionary powers – the statutory conditions related to the content of the constitutional complaint to decide upon its admissibility, in particular the condition of being personally affected under Section 26-27, the exhaustion of legal remedies, and the conditions set under Sections 29-31.

[52] The requirements related to the contents of the complaint submitted by the petitioners are determined by Article 24 para. (2) of the Fundamental Law and by Section 26 para. (2) of ASJ.

[53] The relevant provision of Article 24 of the Fundamental Law:

[54] "(2) The Constitutional Court shall (…)

[55] *c)* review, on the basis of a constitutional complaint, the conformity with the Fundamental Law of the rules of law applied in a particular case;"

[56] According to Section 26 para. (2) of ASJ, Constitutional Court proceedings may also be initiated by exception, if

[57] "*a)* due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and

[58] *b)* there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy."

[59] According to the above rules, the complaint regulated in Section 26 para. (2) of ACC can be filed for the review of a legal provision that has become effective directly in a concrete case, without a judicial decision. In line with the challenged regulation, judges who reach the retirement age limit applicable to them have to be discharged. Consequently, with regard to discharging judges who reach the retirement age limit, this rule is implemented directly in an individual case, with the decision of the employer and the president of the republic, but without a judicial decision. In this case, the relevant part of the discharging resolution containing the decision on the discharge is a formal one, since the statutory regulation is cogent rule which does not allow for any exception. With respect to the judges who reach the age limit of retirement before 1 January 2013, Section 230 of ASJ specifies concrete dates for the termination of their judicial service relationships, therefore their legal relation indeed ends by way of the Act becoming effective.

[60] According to the provision of ACC quoted above, exhausting legal remedies is a precondition of filing the complaint, or it can also be filed directly if there is no "procedure for legal remedy designed to repair the violation of rights". According to Section 90 of ASJ, reaching the retirement age limit applicable to the judge is a cause of discharge. The rules of ASJ do not exclude the possibility for the judge discharged by the president of the republic to start a legal debate of service on the basis of Section 145 of ASJ. However, as the contested provision is a cogent rule, there is no room for discretion in the question of discharge, and the judge has to be discharged to make his or her judicial service relationship end on the date specified in Section 230 of ASJ. In the legal debate of service, the relevant part of the court's procedure is a formal one – the court can only examine whether the judge in question reached the retirement age limit and if the statutory deadlines and procedural rules have been complied with in the course of discharging him or her –, thus it cannot be regarded as a legal remedy suitable for effectively curing the injury of rights contained in the complaint filed by the affected parties. In the opinion of the Constitutional Court, filing a complaint under Section 26 para. (2) of ACC may not be conditional upon the requirement of exhausting a legal remedy, which – following from the relevant legal regulations – is not suitable to cure the injury of the complainant's right.

[61] A constitutional complaint can be filed by anyone whose right guaranteed in the Fundamental Law is violated by a legal provision applied or becoming effective in a concrete case. It means that being personally affected is a condition of the admissibility of the complaint, namely that the legal provision deemed by the complainant to be contrary to the Fundamental Law shall provide a rule directly, factually and actually affecting the concrete legal relationship of the complainant in person, resulting in the violation of the complainant's fundamental rights.

[62] With regard to assessing the admissibility of the complaints, the petitioners who had cases in which the application, i.e. the implementation, of the challenged legal regulation has been started, or it has been completed by way of the discharge contained in the decision of the president of the republic, were considered by the Constitutional Court to be affected persons.

For the judges whose discharge period had started – according to Section 230 para. (2) of ASJ – on 1 of January, and who received the decision on their discharge on 30 June, the judicial service relationship was terminated. Based on Section 94 paras (3)-(4), the affected judges are subject to legal effects and restrictions even prior to the above date. According to these rules:

[64] In the case of retirement due to reaching the upper age limit the period of discharge of the judges is 6 months. The judges shall be exempted from the obligation to work for 3 months.

[65] If the judge is relieved from the obligation to work, he or she may not pass a judgement, and in case of being a court executive, he or she may not act as such, he or she may not exercise the voting and the administrative rights connected to the judicial office.

[66] The Constitutional Court holds that a person can also be considered as affected when no actions serving the purpose of applying or enforcing the legal regulation have taken place yet, but the force of the law resulted in a legal situation from which it is evident that the violation of rights complained about would inevitably take place within a directly foreseeable timeframe.

[67] Regarding the judges who reach the upper age limit in the year 2012, the force of the statutory regulation – on the basis of Section 230 para. (3) of ASJ – creates a legal situation according to which it can be established beyond doubt that for the affected judges the violation of the right complained about would unavoidably take place within a short period of time In the case of judges affected by this regulation, it is evident that, on the basis of the cogent provisions found in Section 230 para. (3) of ASJ – they are going to start their discharge period on 1 July 2012 and their judicial office shall be terminated on 31 December 2012.

[68] As demonstrated by the documents attached to the complaint (copy of the bar exam certificate, copy of the document of appointment), and taking into account the regulations – explained above – on the discharge of judges, the vast majority of the judges who signed the complaints are already serving their discharge period based on the law. All petitions have signatories who already serve their discharge periods and ones who are going to be discharged this year on the basis of the Act.

[69] Taking it into account, the Constitutional Court established that the complainants can be regarded as personally affected which is relevant with regard to the admissibility of the petitions.

[70] The petitions also comply with the requirements regulated in Section 29 of ACC. The complaints ask for establishing that the regulations affecting the constitutional rights of the judges performing an activity regulated in the Fundamental Law are contrary to the Fundamental Law. Therefore the petitions are aimed at the review of a question of fundamental importance in constitutional law.

[71] Taking all the above into account, the Constitutional Court admitted the complaints and judged upon them on the merits.

IV

[72] 1. Based on the petitions, the Constitutional Court first examined whether Article 26 para. (1) of the Fundamental Law, the constitutional rule on judicial independence, can be linked to Section 90 item *ha)* and Section 230 of ASJ.

[73] The Constitutional Court also has to take into account when examining the questions risen in the present case that Article R) of the Fundamental Law contains a particular rule of interpretation.

[74] According to Article R) para. (3) of the new constitution, "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith contained therein, and with the achievements of our historical constitution." This rule does not emphasize the historical constitution in itself, but the importance of its achievements. It is a duty of the Constitutional Court to determine on the basis of the Fundamental Law which elements of the historical constitution should be regarded as achievements.

[75] It is a minimum requirement of the consolidated interpretation of the Hungarian historical constitution to accept that the Acts of Parliament constituting the civic transformation completed in the 19th century form part of the historical constitution. These had been the Acts that had created – upon significant precedents – a solid fundament of legal institutions that served as a basis for building a modern state under the rule of law. Therefore when the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions.

[76] There are at least two historical resources one should take into consideration in the present case: Act IV of 1896 and Act IX of 1871.

[77] In Hungary, the process towards guaranteeing the independent judicial activity of judges started by regulating the irrevocable status of judges – by making a distinction between the judiciary and public administration. Act IV of 1869 on exercising the judicial power contained the following: the judiciary shall be separated from public administration, thus the public administration and the judicial authorities shall not interfere in each other's scope of competence (Section 1); professional judges shall be appointed by the king under endorsement by the minister of justice (Section 3). A lawfully appointed judge shall not be removed from office, except in the cases and in the manner specified in the Act (Section 15); the judge can only be transferred – by relocating him to another court or another authority, or even by promoting him – in the cases specified in the Act, or upon his free will (Section 16). These provisions contain the most important elements considered as the guarantees of judicial independence; on the personal side, the rules on appointment, discharge, removal from office or transfer, and promotion; on the organisational side, the separation of the scopes of competence.

[78] Section 17 of the Act IV of 1869 on exercising judicial power established that "upon reaching the age of 70, the judge shall retire, except when called upon by the minister of justice to remain in office and it is the will of the judge to continue the service." According to the explanation of the Act, the judge "otherwise can only be sent to retirement if he is not able to perform his official duties any more due to a physical or mental deficiency. The pension system of judges is regulated in a specific Act of the Parliament." It was the first regulation in the Hungarian legal history stipulating the upper age limit of bearing a judicial office, representing both full historical respect paid to the judicial status and a well defined and concrete normative content strongly needed in a bourgeois State under the rule of law. In the 19th century the age of 70 was the empirical upper age limit of one's active intellectual performing capacity, and today this age limit is considered to be shifted even higher.

[79] Act IX of 1871 regulated (among others) the retirement of judges. This Act partly repeated the provisions found in the Act quoted above, and it also regulated in details (in two chapters) the temporal limitations affecting the personal status right of the judge (transferability to another court) and the conditions of retirement. The Act shows the respect paid by the legislator towards judges, as since 1869 the judicial office had been an independent "state" status. This legislative attitude should surely be counted amongst the achievements of our historical constitution.

[80] The principle of judicial independence, with all of its elements, is an achievement beyond doubt. Therefore the Constitutional Court establishes that judicial independence, and the resulting principle of irremovability, is not only a normative rule of the Fundamental Law, but also an achievement of the historical constitution. Thus it is an interpreting principle obligatory to everybody, based on the provisions of the Fundamental Law, and which is to be applied also in the course of exploring other potential contents of the Fundamental Law.

[81] The requirement of irremovability has already been considered before by the Constitutional Court as an element of judicial independence [Decisions 21/2010. (II. 25.) AB and 1/2008. (I. 11.) AB].

[82] 2. Also in Hungary, the legal relationships of judicial service enjoy increased constitutional protection as compared to other legal relations in public service. In addition to the right to bear a public office, the constitutional protection of the service relationship of judges results from Article 26 para. (1) of the Fundamental Law, too. According to this provision of the Fundamental Law, judges are independent and answer only to the law. The independence of judges is the most important guarantee of the independence of the judiciary.

[83] The Constitutional Court attributed great importance to the organisational and status-related guarantees in the guarantee-system of judicial independence. "The institutional protection of judicial independence and autonomy by way of safeguarding laws is an unquestionable value, as an important guarantee of the enforcement of human and civic rights as well as of the rule of law. The overlapping, connected and supplementary provisions of the Constitution, the ASJ and the Act LXVII of 1997 on the legal status and the remuneration of judges together build a triple protective system, excluding the restricting of the sovereignty of judicial power." [Decision 54/2001. (XI. 29.) AB, ABH 2001, 421, 433–434.; Decision 13/2002. (III. 20.) AB, ABH 2002, 85, 97.] Personal independence is a part of judicial independence. It means that judges may not be ordered, and they may not be discharged or removed against their will – only for reasons – and through a procedure – specified in a cardinal Act. It is an element of personal independence that the office of a professional judge is a "lifetime" tenure. (Acts on the judiciary usually differentiate between the persons exercising a judicial function on the basis of what type of judge is concerned: a distinction is made between

professional and lay judges, jurymen or assessors; one of the elements of the differentiation is defining the tenure of professional judges as an assignment "for lifetime", in contrast with lay judges or jurymen whose mandate is for a fixed term.)

[84] ASJ plays a paramount role in the individual aspect of judicial independence, as it is designed to guarantee in the regulation of the legal relationship of judicial service the freedom of status necessary for unbiased judicial work. In the context of judicial independence, one may conclude that securing the stability of the legal relationships of judicial service is a requirement based on the Fundamental Law, demanding extra guarantees in comparison with other legal relations. The guarantees include that it takes a cardinal Act to regulate the reasons of terminating the judicial service, the term of exercising the profession, and the upper age limit under which judges are irremovable; judicial service relationships can only be terminated – in the absence of the agreement of the judge – on exceptional basis (in case of a serious disciplinary misdemeanour, committing a crime, becoming incapable to practice the profession). The irremovability of judges guaranteed by the Fundamental Law is a personal guarantee, which secures the autonomy of judges in passing judgements by excluding the possibility of causing any disadvantage to the judges related to their legal relationship of service because of passing a judgement in line with the laws and their conscience. At the same time, the right of the subjects of the procedure to an "independent judge" is a right guaranteed in Article XXVIII para. (1) of the Fundamental Law. The irremovability of judges is, at the same time, a guarantee of the right to an independent and impartial court. Taking it into account, the legislator must determine the upper age limit of practicing the judicial profession in a manner that makes it unambiguous and calculable.

[85] According to paragraphs 49-50 of the recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe entitled "on judges: independence, efficiency and responsibilities", the statutorily determined security of tenure and irremovability are guaranteeing provisions and key elements of the independence of judges. The recommendation also refers to the guaranteed tenure, requiring it to last until a mandatory retirement age, where such exists.

[86] 3.1. The Fundamental Law only contains the most important rules pertaining to courts. As required by Article 25 para. (7) and Article 26 para. (1) of the Fundamental Law, the detailed rules of the organisation of courts and of the legal status of judges shall be laid down in a cardinal Act. Although the Fundamental Law requires the detailed rules on the legal status of judges to be regulated in a cardinal Act, including the regulation of the establishment and the termination of judicial office, the Fundamental Law specifically provides – embedded into the provisions on judicial independence – that judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act." This way, the Fundamental Law itself considers irremovability from office to be an element not only of the legal status of judges, but also of judicial independence.

[87] The regulations on the termination of the legal relationship of judges is an essential element of the legal status of judges in the context of their personal independence and of their irremovability. The Fundamental Law contains provisions directly related to the above: specifying the reaching of the general old age retirement age limit as one of the cases of termination, and exempting the president of the Curia from the general rule. However, the Fundamental Law does not specify the actual age of the age limit; it is referred to be regulated by a cardinal Act. In general, judges can be discharged after they become entitled to receive pension, as they can only be removed from their office for a reason specified in a cardinal Act, and their profession is "for a lifetime". As far as judges are concerned, the age of retirement – which is, first of all, a question of legal status and not of retirement policy – and the age of becoming entitled to receive pension can only be separated if the effect and the consequences of it would not be disadvantageous to them. (In the present case, the conditions of being entitled to receive pension, as applicable to the affected judges, have not changed: most of the affected judges have already become entitled to receive pension prior to 31 December 2011, and in appropriate cases they could serve in a judicial office along with receiving pension. It was the upper age limit of the legal relationship of judicial service that changed.) Retirement can be linked to an age either older or younger than the retirement age limit applicable to persons engaged in another profession. In case of changing the age limit, constitutional importance of it does not merely lie in determining the age limit, but in the manner and the deadline of introducing the new age limit, i.e. the consequences it has on judges.

[88] The Fundamental Law does not specify the level of the age limit of general old age retirement. Similarly, ASJ does not contain a concrete age, although it contains provisions on the removal from office.

[89] The transitional provisions of the Fundamental Law apply the same wording as the Fundamental Law concerning "the general retirement age". The transitional provisions assume that there are judges who have reached the age limit of general old age retirement on 31 December 2011. Neither the transitional provisions of the Fundamental Law contain a clear indication of what the general retirement age is.

[90] The general retirement age is not a concept of normative law in the sense that the Acts of Parliament implementing the Fundamental Law do not contain a concrete age limit under this name. Since the adoption of the Fundamental Law and its transitional provisions, significant elements of the pension system have been changed, and further changes might come along in the future (with regard to the age limits as well). No cardinal Act contains any age limit of retirement, although it could also be possible under other rules of the Fundamental Law: Article 40 on the pension system.

[91] 3.2. The ASSP contains an age limit of retirement, but it is not a general one. The normative law contains the concept used by ASJ: "the age limit of retirement applicable to him or her". According to the provisions in force before 1 January 2012, this age limit could have been the age of 60 or the age of 59 – depending on the date of birth and on gender – (Section 18/A of ASSP), and also the age of 60, the age of 60 plus 183 days, the age of 61, the age of 61 plus 183 days, the age of 62 and the age of 62 plus 183 days – depending on the date of birth and on gender – (Section 18/B of ASSP).

[92] Before the unification of the age limits of retirement, different age limits were applicable to men and women: the age limit was 60 years for men and 55 years for women. Between 1 January 1994 and 31 December 2002, this age limit was first increased gradually to the age of 60, followed by another gradual increase from 1 January 1997 to the age of 62.

[93] At present, in the normative law, ASSP contains the general rules on the age limits of retirement. However, ASSP does not contain any wording of age limit either in the form of "applicable to him or her" or a "general" one. Section 18 of ASSP contains a provision on "old age" retirement – without any further attribute. At present, this refers to the age between 62 and 65, depending on one's date of birth. The differentiation of ages is the result of the gradual introduction of the latest increase of the age limit (from 62 to 65), because it has different effects on the different age groups according to their date of birth.

[94] 3.3.1. It is the responsibility of the Constitutional Court to define the framework of interpreting the term of the "general age limit of retirement" of judges. In the course of the interpretation, the rules pertaining in general to interpreting the constitution are to be followed, namely no meaning of any rule can be established in a manner that could empty out another rule. The Fundamental Law is a closed system without contradictions. [The principle of the singularity (closed-nature) of the Constitution was expressly established in the parallel reasonings attached to the Constitutional Court's Decision 48/1991. (IX. 26.) AB (ABH 1991, 217, 242.) examining the legal status of the president of the republic. This principle was subsequently taken over by the Decision 36/1992. (VI. 10.) AB examining the appointing scope of competence of the president of the republic: "The Constitutional Court interprets the Constitution not only in proceedings specifically so requesting it, but in every procedure reviewing the constitutionality of legal rules. Thus the meaning of specific provisions of the Constitution emerge only in the process of ever newer interpretations, in which the Constitutional Court considers both the unique features of the case at hand and its own previous interpretations. The propositions formed on the basis of individual interpretations – such as the requirements of affirmative action or the limits of the restrictions of fundamental rights – are further interpreted and refined by the Constitutional Court in the process of their application. The focus of the interpretation of a given constitutional provision may shift but the interpretations must give rise to a system without contradictions. (ABH 1992, 207, 210)] The provisions of the Fundamental Law should – and can only be – also be interpreted with due regard to each other. Therefore the general age limit can only be interpreted in a manner not resulting in the violation of the essential elements of judicial independence.

[95] Particular attention has to be paid to the way and the direction of the changes in the regulation on the termination of the judicial office. If the direction of the changes is decreasing the age limit of the age of retirement of judges, it has different implications related to the elements of judicial independence on the judges being close to the age limit, than on other judges. The closer the judge is to the planned new age limit, the more concerns can be raised about the violation of the principle of irremovability, and the longer the period of expected further judicial work is, the less concerns can be raised.

[96] 3.3.2. According to the Fundamental Law, "the service relationship of judges shall terminate upon their reaching the general retirement age". The Fundamental Law does not contain any provision about the application of the above rule – without regard to what does it mean concerning the concrete level of the general retirement age –: from what starting date and during which period of time is it applicable. The level of the general old age retirement age limit and the period of time open for its application are interlinked in the course of enforcing the principle of judicial irremovability. The bigger the difference is between the general old age retirement age limit and the upper age limit of judicial service in force before the new Fundamental Law has taken effect, the age of 70, the longer is the period of time needed for the introduction of the new age limit.

[97] The transitory provisions of the Fundamental Law do not specify the level of the age limit of general old age retirement.

[98] Nevertheless, they specify the period of time required for its application. As this period of time is relatively short – in a given case it can be as short as three months – the decrease of the upper age limit of judicial service can only be of relatively small size, since in a case to the contrary the principle of judicial irremovability could be violated. In other words, it means that the closer the affected judge is to the age of 70 with regard to the date specified in Article 12 para. (1) of the transitory provisions of the Fundamental Law, the less grounds are there to refer to the violation of judicial independence, and vice versa: the longer this period is, the more justifiable is the violation of the principle of irremovability.

[99] 3.3.3. According to the transitory provisions of the Fundamental Law, the service relationship of judges shall be "terminated" on the dates specified in Article 12 para. (1). Article 9 para. (3) item *k)* of the Fundamental Law establishes that professional judges shall be appointed by the president of the republic. The service relationship shall be terminated by way of discharge. ASJ contains the cases of discharge and its detailed provisions. The service relationship of judges shall be established by way of appointment, judges shall be appointed by the president of the republic [Section 3 paras (1)–(2) of ASJ]. According to Section 98 of ASJ, "The termination of the judicial service relationship shall be established by the discharge." With regard to the judicial service relationship, discharge is a general measure terminating the service relation; the causes leading to it are listed by the Act under the cases of discharge. Judges can only be discharged by the president of the republic, similarly to their appointment. This act of public law shall be separated from the actual causes leading to the termination of the service relationship. The termination of the judicial service relationship shall be established by the discharge. As the judge shall be discharged by the president of the republic, it follows from the provisions referred to above, that the legal consequences connected to the termination of the judicial service relationship cannot take effect before the publication of the decision of the president of the republic. Consequently Article 12 para. (1) of the transitory provisions of the Fundamental Law is not a directly enforced regulation, since it only exerts effects through the ASJ's rules on discharge.

[100] Similarly: the legal relationship of service of the judges discharged on the basis of an Act declared unconstitutional shall not be restored by virtue of the Constitutional Court's decision, and their legal status should be settled according to the provisions of ASJ.

[101] 3.4. At the time of adopting the Fundamental Law, the age limit of terminating the service relationship of judges was the age of 70 [Act LXVII of 1997 on the legal status and the remuneration of judges, Section 57 para. (2), hereinafter: "old ASJ"]. The assignment of the appointed professional judges and the allocation of the cases were based on the assumption that the assigned judges shall act in the cases allocated to them, until reaching the above age, and judges can only be separated from the cases on the basis of a serious cause. In the Hungarian legal system, the prohibition of taking away the case from the judge is worded in a cardinal Act. According to the Act CLXI of 2011 on the organisation and the administration of courts (hereinafter: AOC), no one can be deprived of their lawful judge [Section 8 para. (1)]. The lawful judge is the judge operating at the court that has competence and jurisdiction according to the rules of procedure, and assigned in line with the predefined case allocation rules. Although no unconditional automation is enforced in the assignment of judges, and there are possibilities to deviate from the case allocation rules in the cases regulated by the procedural Acts, or through an administrative way, for an important reason affecting the operation of the court, the guarantee of the lawful judge would clearly be violated by any Act causing the decrease of the tenure of judicial service, implemented in a relatively short period of time, i.e. causing the swift removal of the judge from the judicial office. In the present case, if, with regard to the examined provisions of ASJ on the removal of judges, the contents of Section 18 of ASSP should or could have to be taken into account, that Act would surely be considered as such an Act. This is caused, among others, by the

fact that at the time of allocating the cases, the termination of the office of the assigned judge could not be foreseen.

[102] 3.5. With regard to one of the cases of judicial office, referring to the upper age limit, the formulation and the wording of ASJ is different than the general old age retirement age limit mentioned in the Fundamental Law [Article 26 para. (2)] and in the transitory provisions of the Fundamental Law [Article 12 para. (1)].

[103] In ASJ, the age limit applicable to the judge refers to a subjective age limit, which depends on many individual circumstances (e.g. age, gender). As opposed to the above, the "general" age limit in the Fundamental Law is an objective age limit, which needs to be applicable to "everyone" because of its general nature. The general retirement age is used in the singular in the Fundamental Law, consequently the "general" age limit should be a uniform one. (Reaching the age of 65 could be such an age limit, and at the present there is no higher retirement age limit in ASSP. It is, however, another problem how much time would it take to introduce it in a constitutional way to be applicable to judges, in compliance with the principle of judicial independence.) In contrast with the above, the age limit applicable to judges in ASJ is a "moving" limit due to the reference to ASSP, and it can only be regarded as "general" in the sense of being a uniform limit for the specific age groups, but it is different for the various age groups.

[104] In the regulation of the termination of the judicial office, the ASJ uses the term "the age limit of old age retirement applicable to him or her". This is the concept linked to the upper age limit of being a judge. The contested regulations of ASJ can be interpreted in a way (and indeed it has been interpreted this way in all of the cases that serve as the basis for the petitions) that the cardinal Act applies a provision of reference: it refers to the moving age limit depending on the age as found in ASSP, which is a non cardinal Act. This age limit is between the ages of 62 and 65, which is significantly less than the age of 70, the concrete upper age limit of being a judge, as it was regulated in the old ASJ.

[105] The result of applying ASSP by way of ASJ is that the affected judges are removed from office in a quite short time – within 3 months, with regard to other provisions on discharge, including Section 94 para. (3) – and they are separated from the cases they are working with. This is a violation of judicial independence, not only for reasons of merit, but also for formal reasons. The upper age limit of being a judge has to be regulated in a cardinal Act. Therefore the Constitutional Court established that Section 90 item *ha)* and Section 230 of ASJ are contrary to Article 26 para. (1) of the Fundamental Law. As long as there is no cardinal Act regulating the upper age limit of judicial service in line with Article 26 para. (1) of the Fundamental Law, judges may not be discharged for this reason against their will.

[106] 3.6. The level of the upper age limit of judicial service can be established relatively broadly by the Fundamental Law or – in the lack of such a provision – by a cardinal Act. No concrete age is deductible from the Fundamental Law. However, it follows from the Fundamental Law that introducing a new age limit – provided that it means a decrease of the upper age limit and not an increase of the earlier limit – can only be implemented gradually, offering adequate transition period, without violating the principle of the irremovability of judges.

[107] Taking all the above into account, the Constitutional Court established that Section 90 item *ha)* and Section 230 of ASJ are contrary to the Fundamental Law, and therefore annulled these provisions.

[108] Pursuant to Section 45 para. (1) of the ACC, the annulled statutory provision shall cease to be in force on the date following the day of publication of the Constitutional Court's decision in the Official Gazette. According to Section 45 para. (4) of the ACC, the Constitutional Court may provide differently about repealing the statutory provision deemed to be in conflict with the Fundamental Law, if this is justified by the protection of the Fundamental Law, legal certainty or by a particularly important interest of the party initiating the procedure. In the present case the Constitutional Court held that both the particularly important interest of the parties initiating the procedure and the interest of legal certainty justify the deviation from the general rule of annulment, taking into account that most of the judges who submitted complaints on the basis of the provisions deemed to be in conflict with the Fundamental Law have already been discharged and the service relationship of other judges is expected to be terminated this year. Therefore the Constitutional Court annulled the legal provision contrary to the Fundamental Law with retroactive effect from the day of 1 January 2012.

[109] As the Constitutional Court established that Section 90 item *ha)* and Section 230 of ASJ were contrary to the Fundamental Law on the basis of Article 26 para. (1) of the Fundamental Law, it has not examined

their further conflicts with other provisions of the Fundamental Law as alleged in the constitutional complaints.

[110] The publication of the Decision of the Constitutional Court in the Hungarian Official Gazette is based upon Section 44 para. (1) of the ACC.

Budapest, 16 July 2012

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President of the Constitutional Court
Judge of the Constitutional Court, Rapporteur

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Dr. Mária Szívós
Judge of the Constitutional Court

Dissenting opinion by Dr. István Balsai, Judge of the Constitutional Court

[111] I do not agree with the Constitutional Court's decision adopted in the case IV/2096/2012. In line with the power vested on me by Section 66 para. (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC), I attach a dissenting opinion to the decision.

[112] In the case concerned, we had to decide whether the new statutory regulation on the legal status of judges defining the upper age limit of the legal relationship of judicial service in the age limit of old age retirement entitling to receive pension under the social security system was compatible with the Fundamental Law. To rule upon the above, we examined three questions that seemed to be different but interlinked: 1.) the framework of interpretation applicable to the concept of "general retirement age" contained in Article 26 para. (2) third sentence of the Fundamental Law and in Article 12 para. (1) of the transitory provisions of the Fundamental Law. 2.) in what details should a cardinal Act contain the causes resulting in the termination of the legal relationship of judicial service; 3.) is it in line with – or directly linked to – the principle of judicial independence and the guarantee of the lawful judge to adopt a legislation regulating the termination of the

legal relationship of judicial service in the date of reaching the age limit of retirement by specifying this age limit lower than the upper age limit of judicial service regulated before.

[113] My opinion is different than the one found in the adopted decision in the respect of all the three questions. My position is based partly on the provisions of the Fundamental Law and partly on the previous practice of the Constitutional Court:

[114] 1. As I do not agree with interpreting certain provisions of the Fundamental Law contrary to their aim and with emptying them out, I wish to point out the following in principle: According to the Avowal of National Faith of the Fundamental Law, Our Fundamental Law "shall be a covenant among Hungarians past, present and future. It is a living framework expressing the nation's will and the form in which we wish to live." According to Article B paras (3) and (4) of the Fundamental Law: the source of public power shall be the people, who shall exercise their power through their elected representatives. As stated in Article 1 para. (1) of the Fundamental Law, Hungary's principal organ of popular representation shall be Parliament that created the Fundamental Law of our country. According to Article R) para. (1) of the Fundamental Law, the Fundamental Law shall be the foundation of the legal system of Hungary. According to Article 24) para. (1) of the Fundamental Law, the Constitutional Court shall be the principal organ for the protection of the Fundamental Law. It is the responsibility of the Constitutional Court to define the interpreting framework of the provisions of the Fundamental Law. According to Article R) para. (3) of the Fundamental Law, the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, with the Avowal of National Faith contained therein, and with the achievements of our historical constitution. Thus, in the course of defining the framework of interpretation, the Constitutional Court may not interpret any provision of the Fundamental Law contrary to its aim, and it may not deteriorate its meaning in order to declare that the legislative concept adopted by the freely elected Parliament was contrary to the Fundamental Law. The Constitutional Court was mandated by the Parliament, as the constitution-setting power of our country, to be the supreme guardian of the Fundamental Law. At the present moment, all constitutional organs of our country are facing a historical duty, and their historical responsibility is to build a constitutional democracy resting on the values of the Fundamental Law. In this situation, the Constitutional Court, as the supreme guardian of the Fundamental Law has got a prominent responsibility. It would be contrary to this responsibility to interpret any provision of the Fundamental Law contrary to its content and its aim, and to deteriorate its enforcement. Contrary to the reasoning found in the adopted decision, I am convinced that the general age limit contained in Article 26 para. (2) of the Fundamental Law and in Article 12 para. (1) of the transitory provisions of the Fundamental Law – in line with my arguments detailed under point 3 – are not directly related to judicial independence, therefore its interpretation in compliance with its aim would not violate judicial independence. The creators of the Fundamental Law would surely not have intended to cause any of the Fundamental Law's provisions to become emptied out.

[115] It was the position in principle of the majority decision that the meaning of the "general retirement age" found in Article 26 para. (2) of the Fundamental Law was different than that of the concept of "the age limit of retirement applicable to him or her" found in the contested provision of ASJ. The adopted decision used the following arguments to support this: "in ASJ, the age limit applicable to the judge refers to a subjective age limit, which depends on many individual circumstances (e.g. age, gender). As opposed to the above, »the general« age limit in the Fundamental Law is an objective age limit, which needs to be applicable to »everyone« because of its general nature. The general retirement age is used in the singular in the Fundamental Law, consequently the »general« age limit should be a uniform one. (…) In contrast with the above, the age limit applicable to judges in ASJ is a »moving« limit due to the reference to ASSP, and it can only be regarded as »general« in the sense of being a uniform limit for the specific age groups, but it is different for the various age groups."

[113] I do not agree with the above reasoning as it attributes to the Fundamental Law's rule a meaning, which is contrary to its aim. As stated in Article XIX para. (4) of the Fundamental Law, Hungary shall contribute to ensuring a livelihood for the elderly by maintaining a unified state pension system based on social solidarity. The National Pension Policy Concept is based on the above provision of the Fundamental Law. Within the framework of the above concept, the legislator stated – in addition to maintaining the dividing-levying character – a general aim of strengthening the links between the contributions (pension contributions, membership fees) and the pension benefits (pension and pension services), i.e. to develop the insurance element of the pension sub-system for the purpose of budgetary severity and to improve the efficiency of providing benefits. This was the basis of reforming the Act LXXXI of 1997 on social security pension (hereinafter: ASSP), and from 1 January 2012 all types of old age retirements and benefits applicable before

the age limit were removed from the category of pensions under own right. It resulted in eliminating – among others – the institutions of the preferential age limit, the advanced old age pension and the advanced old age pension with decreased amount. Section 18 of ASSP defined the old age retirement age limits entitling for social security pension on a gradual basis depending on the year of birth, in a unified manner with regard to each age class. Consequently, today in Hungary, the social security laws in force define a single old age retirement age limit applicable to a given person, age class, depending on the year of birth. This retirement age limit is applicable to everyone. Based on the reasonable interpretation of the law, this age limit can be nothing else, but the general retirement age contained in Article 26 para. (2) of the Fundamental Law and in Article 12 para. (1) of the transitory provisions of the Fundamental Law, specified by the legislator as the upper age limit of judicial service. Any other interpretation of the concept of general retirement age would violate the obligation of interpreting the Fundamental Law enshrined in Article R) para. (3) of the Fundamental Law, and it would result in emptying out the relevant provision of the Fundamental Law.

[117] 2. According to Article 26 para. (1) second sentence of the Fundamental Law, judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act. The majority decision established that the challenged provisions of ASJ are contrary to the Fundamental Law by reason of a formal cause within the scope of the legislative procedure. According to the decision, it is incompatible with the relevant provision of the Fundamental Law to use a legislative technique of specifying the general retirement age as the upper age limit of judicial service, when the limit of the general retirement age is contained in a non-cardinal Act, the ASSP.

[118] Article T) para. (4) of the Fundamental Law provides the definition of a cardinal Act. According to the above rule of the Fundamental Law, a majority of two-thirds of the votes of the Members of Parliament present is required to adopt and to amend a cardinal Act. The Fundamental Law specifies the fundamental rights and the basic institutions that can only be regulated in cardinal Acts. According to the regulatory system of the Fundamental Law, cardinal Acts and simple Acts are in a hierarchic relation. Article 24 para. (3) of the Constitution formerly in force ruled that a majority of two-thirds of the votes of the Members of Parliament is required to adopt certain decisions specified in the Constitution. Essentially, this constitutional rule – similarly to the regulatory concept of the Fundamental Law – provided that the regulation of certain fundamental institutions and fundamental rights require qualified majority legislation due to reasons of guarantee. In the Decision 20/2012. (V. 11.) AB the Constitutional Court established that if the regulatory concept of the Fundamental Law was the same as, or it was similar to, the provisions of the Constitution, which was formerly in force, then the established practice of the Constitutional Court shall be considered applicable in the new cases as well. (Official Gazette 2012/57, 9737, 9739–9740.) Based on all the above, I checked the Constitutional Court's established practice regarding the constitutionality of the requirement of qualified majority as connected to the rule of law conditions of the legislative process. In line with this practice, I concluded that the constitutional requirement of qualified majority is not only a formal requirement of the legislative procedure, but at the same time it is a constitutional guarantee, the essence of which is the wide scale agreement between the members of the Parliament. (Decision 1/1999. (II. 24.) AB, ABH 1999, 25) As a result, the Parliament must adopt an Act comprehensively regulating the question, with the voting rate specified in the Constitution, and at the same time it also means that an Act adopted with a qualified majority can not be constitutionally amended or repealed with an Act adopted with a simple majority. Another requirement established by the Constitutional Court towards the legislation was that transposing any provision conceptually connected to a qualified majority Act or belonging to the essence of such an Act can only be ruled by way of legislation enjoying the same qualified majority. [Decision 4/1993.(II. 12.) AB, ABH 1993, 48, 69.; Decision 31/2001. (VII. 11.) AB, ABH 2001, 258, 260–264.] At the same time, it does not follow from the Constitution that all the regulatory details connected to the legislative subject requiring qualified majority should be regulated in a qualified majority Act. According to the established practice of the Constitutional Court, the essential elements of the regulatory subject should be contained in the Act of qualified majority. In other words, an Act adopted with simple majority can only contain rules that fall outside the conceptual framework of the qualified majority Act. In the course of examining the rule of law conditions of the legislative process, the Constitutional Court takes into account the essential elements of the regulation's concept. [Decision 102/E/1998. AB, ABH 2007, 1182, 1185.; Decision 31/2001. (VII. 11.) AB, ABH 2001, 258, 260–264.]

[119] I hold that the Constitutional Court's established practice is to be followed in the present case, too. In my opinion, the primary task is to define the exact scope of the regulations to be covered by the cardinal Acts

specified in the Fundamental Law. After defining the regulatory scope, we should have sought an answer to the question whether the essential elements of the concept of the regulation in force could be found in the cardinal Acts. According to Article 25 para. (7) and Article 26 para. (1) second sentence of the Fundamental Law, the detailed rules of the organisation and administration of courts and of the legal status of judges, and the remuneration of judges, including certain questions related to their removal from office shall be laid down in a cardinal Act. The legislator adopted cardinal Acts with titles being the same as the denomination contained in the Fundamental Law. With regard to the termination of the legal relationship of service of judges, ASJ provides a list of the causes that imply the discharge of a judge. The causes of discharge are listed exhaustively; there can be no other cause of discharge than the ones listed in the cardinal Act. The Act under constitutional review provides that a judge has to be discharged when they reach the age limit of retirement applicable to him or her. Consequently, the legislator linked the termination of the service relationship of judges with reaching the retirement age entitling to receive old age pension, i.e. the retirement of judges.

[120] The Parliament, as the supreme organ of popular representation in Hungary enjoys a wide scale of discretion in determining the content of a cardinal Act, namely to define the scope of the regulation and to specify the exact issues to be regulated with a qualified majority. It is a requirement, however, resulting from the Fundamental Law, that the legal regulation adopted for the purpose of the direct implementation of the provision in the Fundamental Law should be a cardinal Act, and at the same time it should contain the essential elements of the regulation's concept. However, the legislative guarantee provided by the cardinal Act may not cover every detail of the scope of regulation, and it does not mean that no single majority Act could provide any regulation related to the given regulatory scope. In the case concerned, the question to be answered should have been what the essential element of the regulatory concept was. In my opinion, it is beyond doubt that the conceptual question, which belongs to the main direction of the regulation of the legal status of judges is that the legal relationship of judicial service can last until reaching the general retirement age. Therefore I am convinced that the legislator complied with the requirements stemming from Article 26 para. (1) of the Fundamental Law and from the Constitutional Court's established practice regarding the rule of law conditions of the legislation, as it regulated in a cardinal Act the subject of the regulation, i.e. the conceptual question affecting the legal status of judges. I am certain that since the determination of the specific conditions of entitlement to old age pension, such as the age limit and the duration of service, pertaining to the whole society and not only to judges, are questions that fall outside the conceptual realm of the Act on the legal status and the remuneration of judges, the legislator is not expected to regulate these issues in a cardinal Act. Similarly to the case under review, the legislator is not expected to regulate in a cardinal Act the legal institutions of disposing capacity under civil law or the subsidiary punishment of prohibition from public affairs just because they are linked to the specific causes of terminating the judicial service relationship.

[121] 3. The third question to be answered in the case concerned is whether the rule of judicial independence contained in Article 26 para. (1) of the Fundamental Law and the right to fair trial enshrined in Article XXVIII para. (1) of the Fundamental Law were violated because of regulating the termination of judicial service at the date of reaching the retirement age, if this age limit is lower than the upper age limit of judicial service determined before.

[122] I share the opinion expressed in the decision that the right to fair trial guaranteed in Article XXVIII para. (1) of the Fundamental Law includes the right to an independent and lawful judge. According to the above Article of the Fundamental Law, everyone shall be entitled to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial conducted by an independent and impartial court established by an Act. Accordingly, the primary beneficiaries of the right to an independent and lawful judge are not the judges, but the clients or the subjects of court procedures; the guarantees are provided in their interest and to their benefit. This is why I hold that the constitutional content of the right to fair trial can only be justified in relation to the adjudicating activity of the judge. Article 26 para. (1) first sentence of the Fundamental Law contains the principle of judicial independence. This provision is similar to Article 50 para. (3) of the Constitution formerly in force, with an additional guarantee stating that judges shall not be given instructions as to their judicial activities. The rules of the new Fundamental Law reaffirm my constitutional certainty that the constitutional content of judicial independence and certain personal and organisational guarantees connected to it serve the purpose of guaranteeing that the judicial activities of the judges are free from any pressure. In this regard I hold that the Decision 19/1999. (VI. 25.) AB should be followed, according to which, "judicial independence – in its

individual aspect – is a guarantee of the judge's organisational and status-related freedom, in the interest of allowing the judge to pass mandatory and enforceable decisions in individual cases by ruling upon legal debates and remedying injuries of rights, without any pressure, on the basis of the Acts and the law in general, in accordance with one's internal conviction." (ABH 1999, 150, 153) Consequently, the primary constitutional duty of the legislator is to use its own set of tools to guarantee for the judges independent adjudicating activity free from pressure, based on the judges' internal conviction. The question of the irremovability of judges can only be raised in the context of the adjudicating activity free from external pressure, i.e. in the respect of concrete cases. Regulating irremovability with regard to concrete cases is a guarantee clause and at the same time it is one of the pledges of the adjudicating independence of judges, but under no circumstances could it be considered as an absolute principle without any exception. Both the legislator and the executives in charge of managing the courts' organisation, as well as the judges acting in the concrete cases are entitled to hand over the pending cases to other judges, as regulated by the law. The legislator has already amended several times the competence and jurisdiction rules of the procedural rights, for reasons of efficiency, because of obligations under international law, and for other reasons. The final result of such amendments is that the judges of pending cases are deprived of the possibility to act in those cases. [see: Section 308 para. (1) of the Act XIX of 1998 on the criminal procedure (hereinafter: ACrP) and Section 310 para. (4) of ACrP, as well as Section 158 para. (2) of the Act III of 1952 on the civil procedure (hereinafter: ACiP) and Section 129 para. (1) of ACiP] In other words, in the present case, the legislator assigns other judges with the task of acting in pending cases, and it has not raised any constitutional concern before. It is similar to the case when the legislator removes certain groups of cases from the competence of judges, e.g. in the course of decriminalisation, when offences of lesser weight are qualified as misdemeanours. If a judge is placed to another post for reasons of service within the judicial system or to facilitate the professional development of the judge, then the final result of such measures is depriving the judge from the cases in process. (see: Sections 31–33 of the Act CLXII of 2011 on the legal status and the remuneration of judges) There are also examples of the judge deciding on letting another judge deal with the case allocated to him or her. It happens when – with regard to the subject of the procedure or the persons participating in the procedure – the judge forwards the case to another judge in order to unify the cases, or when the judge decides upon separating the case in process and transfers the files of the separated case [see in: Section 72 paras (1)–(4) of ACrP, Section 265 para. (1) of ACrP, as well as Section 149 para. (3) and Section 335/B para. (1) of ACiP]. Still the constitutionality of all these statutorily regulated measures based on staff management, litigation economy or efficiency is not questioned. Thus the irremovability of judge with regard to a specific case is not an absolute requirement. It is my firm legal conviction that the constitutional law content of the irremovability of judges can only be interpreted within the scope of pressure-free adjudicating activity. As a consequence, only the constitutional demand for pressure-free adjudicating activity can set the limitations within which the judge enjoys irremovability. The constitutional aim of this guarantee is on the one hand to allow passing independent and impartial judicial decisions on the rights and obligations in the litigation and on the accusation raised against any person, and on the other hand to exclude the possibility of imposing any staff management or labour disadvantage on the judge in the course of, in connection with, or because of such independent and impartial adjudicating activity. Accordingly, this is one of the guarantees of the right to an independent and lawful judge stemming from the fundamental right to fair trial enshrined in Article XXVIII para. (1) of the Fundamental Law. Consequently, the constitutional limitation about the regulation on the upper age limit of judicial service is that it can not violate the independent and impartial adjudicating activity free from pressure.

[123] The regulatory concept under review sets the upper age limit of exercising the judicial profession in the general retirement age applicable to everyone. Therefore, in the case under review, the question that should have been asked is whether specifying the general retirement age as a cause of terminating the judicial service can be regarded as a legislative influence on dealing with the cases in process to a degree endangering the independent, impartial and unbiased adjudicating activity in the cases concerned. I am sure that this is the question upon which one can establish whether Section 90 item *ha)* and Section 230 of ASJ are contrary to the Fundamental Law or not.

[124] According to the regulation under examination, reaching the general retirement age entitling to receive social security pension is one of the causes of terminating one's legal relationship of judicial service. The challenged regulations of ASJ apply to all judges in a uniform manner, without making any differentiation between judges, and they do not provide any rules on the individual groups of cases, single cases, the further dealing with cases and the method or the way of dealing with cases. Putting the ASJ into force has not resulted in any provision that would endanger – either directly or indirectly – the impartial, independent and unbiased adjudication in the cases in process. The impartial, independent and unbiased adjudication of the

single cases in process would not be broken at all by the fact that a new judge takes over and finishes a case because of the retirement of the former judge. Indeed, should it be to the contrary with regard to the enforcement of the independence and the impartiality of the judicial work, it would cause to raise serious concerns and doubts and it would be regarded as a deficit of the rule of law. I truly believe that a regulatory concept linking the termination of judicial service with reaching the general retirement age cannot be considered a legislation violating the pressure-free adjudicating activity of the court and of the judge guaranteed in the Fundamental Law. The fact that the applicable retirement age is lower than the upper age limit of judicial service determined earlier would not – and if the court complies with the requirements of the rule of law, can not – violate the independent and impartial, unbiased adjudicating activity.

[125] As I explained above, the right to a lawful judge and the independence of judges are rights the primary beneficiaries of which are not the judges, but the participants of the court procedure. Based on the review of the constitutional complaints, one can establish that most of the complaining judges do not contest the violation of judicial independence or the right to a lawful judge, as they refer to the prohibition of discrimination under Article XV para. (2) of the Fundamental Law, the right to property under Article XIII para. (1) of the Fundamental Law and the right to hold a public office under Article XXIII para. (8) of the Fundamental Law. According to their arguments, the new regulation deprives them of a proprietary expectation of many years and, quoting the petitions, "tousling their private and family lives, breaking their connections, eroding their reputation". Thus the original complaint of the vast majority of the judges was not about the legislator arbitrarily depriving them of their current cases or about not having enough time to finish the cases allocated to them. In fact, the majority of the alleged injuries found in the constitutional complaints are related to the decrease of the income of the complainant judges – most of them already actually receiving pension benefits – due to the termination of their judicial service at the date of reaching the retirement age entitling them to receive old age pension. However, remedying this injury is first of all a question of budgetary nature and not a constitutional issue.

[126] On the basis of the above reasoning, I hold that Section 90 item *ha)* and Section 230 of ASJ are not contrary to the Fundamental Law, either for formal reasons, or on the ground of their content. This is why I have formulated my dissenting opinion.

Budapest, 16 July 2012

Dr. István Balsai
Judge of the Constitutional Court

Dissenting opinion by Dr. Egon Dienes-Oehm, Judge of the Constitutional Court

[127] I do not agree with the holdings of the Decision and the reasoning thereof.

[128] 1. The annulling provisions of the decision and their reasoning are based on Article 26 para. (1) of the Fundamental Law. However, this starting point is erroneous; therefore the conclusions built on it are unfounded with regard to the subject of the constitutional complaint.

[129] The provision of the Fundamental Law in question is not the constitutional ground of the regulation on the age limit and the retirement of judges; it is a rule in the Fundamental Law guaranteeing and founding the principle of judicial independence. As defining the constitutional requirements related to the removability from a judicial office is one of the most important elements of judicial independence, it is evident that the regulation pertaining to this issue can be found in this provision.

[130] However, in the present case, the termination of the judicial service because of reaching the upper age limit or the general retirement age are outside the scope of removability, as it is regulated separately under Article 26 para. (2) of the Fundamental Law.

[131] 2. In the present case, the subject of the constitutional complaint is terminating the legal relationship of judicial service and – the closely related – retirement of the judges earlier than it was regulated by the law in force before the Fundamental Law.

[132] Obviously, in this question, only Article 26 para. (2) of the Fundamental Law can be the provision applicable in the course of the constitutional review and the decision making. This rule is the constitutional "*lex specialis*", which determines the starting and the commencing date of the service relationship of judges. Accordingly, all further regulations related to the above issue and the retirement of judges should be built on this provision.

[133] In my opinion, in the present case, the following should have been taken into account:

[134] i) According to Article 26 para. (2) of the Fundamental Law, "the service relationship of judges shall terminate upon their reaching the general retirement age". At the date of adopting and putting into force the Fundamental Law, it was impossible to regulate the upper age limit of exercising the judicial profession by specifying a concrete year, as, according to the pension system in force, the general retirement age is – temporarily (during a decade) – in a constant change (gradually increasing). It is evident, however, that the above constitutional provision is applicable to all judges, therefore with regard to the judges who were born between the years 1952 and 1957 – in accordance with the relevant rules of the pension system in force – the general retirement age is not the same year.

[135] ii) In line with Section 18 para. (1) of the Act LXXI of 1997 on social security pension, the general retirement age means an age increasing by a half year in every one and a half year between putting the Fundamental Law into force and the year 2022; compared to the general retirement age in force on 1 January 2012, the age limit shall reach the final state of 65 years by 2022. Accordingly, during this period of 10 years the general retirement age of the judges who were born between 1952 and 1957 can be different: it may vary between the age of 62 and 65, depending on the year of birth of each judge.

[136] iii) Following from the previous paragraph and reaffirming the interpretation thereof, Article 12 of the transitory provisions of the Fundamental Law provides – with regard to the judges who have already reached the general retirement age of 62 years earlier, and the judges who reach the retirement age limit this year – that the legal relationship of service shall be terminated on 30 June 2012 for the former ones and on 31 December for the latter ones.

[137] Based on the facts mentioned here, it is evident that the provisions annulled in the decision cannot be regarded – conceptually – to be contrary to the Fundamental Law. Section 90 item *ha)* of the Act CLXII of 2011 is nothing more than an implementing regulation, implementing Article 26 para. (2) of the Fundamental Law without the slightest change of the merit (content) of it, also supported by Article 12 para. (1) of the transitory provisions. The same implementing character can be seen in the case of Section 230 of the Act CLXII of 2011, since it has the same content as the text of Article 12 para. (1) of the transitory provisions.

[138] Consequently the majority decision is indeed contrary to Article 26 para. (2) of the Fundamental Law as the provision of the Fundamental Law exclusively applicable to the present case.

[139] 3. Taking into account the arguments found in the previous section, one can also conclude that in the present case the constitutional complaint was in fact contesting Article 26 para. (2) of the Fundamental Law, since – as supported by the interpretation of Article 12 para. (1) of the transitory provisions – it does not allow any regulatory space for the statutory regulation complained about in the petition.

[140] The Constitutional Court has no competence to review the constitutionality of the provisions of the Fundamental Law.

[141] Accordingly the constitutional complaints filed against Section 90 item *ha)* of the Act CLXII of 2011 on the legal status and the remuneration of judges (and extended, after admittance of the petition, to Section 230 of the Act) should have been rejected without examination on the merits. I have already recorded this opinion of mine when the petitions were admitted by the majority.

Budapest, 16 July 2012

Dr. Egon Dienes-Oehm

Judge of the Constitutional Court

Dissenting opinion by Dr. Barnabás Lenkovics, Judge of the Constitutional Court

[142] I disagree with the holdings of the decision for the following reasons.

[143] In my opinion, with regard to the constitutionality of Section 90 item *ha)* and Section 230 of ASJ, the constitutional requirements deductible from Article XXVIII, Article 26 para. (1) of the Fundamental Law and Article 26 para. (2) of the Fundamental Law are contradicting each other.

[144] 1. I can accept that introducing – unexpectedly, without any gradation and without granting a time for preparation – the two statutory provisions [Section 90 item *ha)* and Section 230 of ASJ] is a direct violation of the right to a lawful judge enshrined in the Fundamental Law [Article XXVIII para. (1)], and the independence of judges [Article 26 para. (1)], and they together affect indirectly the rule of law [Article B) para. (1)] and the principle of the division of power [Article C) para. (1)]. I hold that each of the above principles and their totality as well are constitutional (indeed civilisation-setting) fundamental values that enjoy prominent protection in the Fundamental Law, in compliance with the Avowal of National Faith and with the achievements of our historical constitution [Article R) para. (3)]. I agree with the parts of the decision's reasoning that are in line with the above, and in that respect I do hold that the contested regulations are contrary to the Fundamental Law.

[145] 2. At the same time, I can't accept the annulment of the contested statutory provisions as they are in line with other provisions of the Fundamental Law and with the transitory provisions of the Fundamental Law of Hungary (hereinafter: TPFL).

[146] The decision does not clarify the interrelation between the relevant provisions of the Fundamental Law, of TPFL and of ASJ (hierarchy of the sources of law, the concrete content of the challenged provisions).

[147] Article N) para. (1) of the Fundamental Law raised to constitutional level the "principle of balanced, transparent and sustainable budget management", and para. (3) obliged also the Constitutional Court to pay respect to this principle. Article XIX para. (4) promises to maintain „a unified state pension system" based on social solidarity. According to Article 26 para. (2), the service relationship of judges shall terminate upon their "reaching the general retirement age".

[148] Although Article 8 of TPFL is setting a rule that putting into force the Fundamental Law shall not affect the mandate of the persons appointed prior to that date, Articles 9–18 provide a list of taxative exemptions. The list includes (in Article 12) judges as well, whose service relationship shall be affected by putting into force the Fundamental Law. The detailed regulations – of implementing nature – of the above can be found in Article 12 of TPFL and – in line with that – in Section 90 item *ha)* and Section 230 of ASJ. According to the above provisions, shortening the service relationship of judges is not contrary to the Fundamental Law.

[149] 3. Thus there are two clearly contradicting provisions in the Fundamental Law regarding the legal status of judges, leading to a grave constitutional inconsistency. However, the Constitutional Court is not empowered to remedy this inconsistency, because favouring either provision would be a violation of the other. Only the Parliament – as a constitution-setting power – can resolve a contradiction within the Fundamental Law [Article 1 para. (2) item a) and Article 31 para. (2) of TPFL], and the Constitutional Court – as the main guardian of the Fundamental Law – can draw the attention of the Parliament to it [Article 24 para. (1) of the Fundamental Law].

[150] The Constitutional Court could have also pointed out that by introducing the retirement of judges in a gradual way and by allowing an appropriate period of preparation, the legislator could have met both constitutional requirements.

Budapest, 16 July 2012

Dr. Barnabás Lenkovics

Judge of the Constitutional Court

I second the above dissenting opinion.

Budapest, 16 July 2012.

Dr. Péter Szalay
Judge of the Constitutional Court

Dissenting opinion by Dr. Béla Pokol, Judge of the Constitutional Court

[151] I don't agree either with the reception of the case or the annulment of the received case and its reasoning.

[152] 1. As far the reception is concerned, in my opinion, the constitutional complaints should have been rejected for two reasons.

[153] A) The reception of the case was implemented through an exceptional way applicable to constitutional complaints, despite of the fact that the contested regulation had no direct effect and the persons concerned were directly affected by way of an individual decision of the employer, thus there was no possibility to apply the exceptional rule under Article 26 para. (2) of the Fundamental Law. The constitutional complaints could only have been filed according to paragraph (1) of the same Article, and as the judicial legal remedies have not been exhausted yet, as it is required there, the Constitutional Court should have had to reject the petitions in line with the law. Although part III of the decision's reasoning admits that in the present case the provision has not become directly effective, and the individual legal effects upon the petitioners were the results of the employer's individual decisions allowing for a judicial way of legal remedies, the Constitutional Court argued that the judicial way of legal remedies can "only be a formal one", therefore it was not suitable to remedy the injured rights of the petitioners. This reasoning is, however, based on the blurring of the injury of rights and of a constitutional injury. It is the legal nature of statutory legislation to strive for clarity, from which the judge can draw – more or less in a mechanical way as appropriate – the premises of the judgement to be adopted in an individual case. Of course, in many cases, it only means providing the framework of principles, allowing the judge to exercise discretion, but in both cases – either with or without discretion – the judge states what is rightful in the individual case and whether there has been an injury of rights in the disputed case or not. Then turning to the Constitutional Court and claiming a constitutional injury means that although there has been no injury of rights on the basis of the simple statutory law or according to another legal provision, but according to the fundamental rights and the principles contained in the Fundamental Law, one may conclude that the rules themselves of the law concerned are contrary to the Fundamental Law. Thus, contrary to the arguments found in the reasoning of the decision, the clear legal regulation is not "unsuitable" to remedy the injury of rights and it means more than a "formal legal remedy" – that can be set aside as the precondition of submitting a constitutional complaint –, but this is the way of remedying the injury of rights by ordinary courts, the final result of which can be a conclusion that there was no injury of rights or a higher judicial forum has remedied the injury. Only after exhausting the way of judicial remedies can one claim a constitutional injury, contesting at the Constitutional Court the constitutionality of a simple statutory regulation or legal provision. The arguing found in the decision and contested in the dissenting opinion expands to a large degree the exceptional way of the constitutional complaints based on Section 26 para. (2) of ACC, and essentially makes a general rule of it, as the existence of the clear legal regulation – that is the basis of this argumentation and of the decision of reception – is characteristic for the majority of the legal system, and such an argumentation, as a precedent, may induce a tide of constitutional complaints in the future. In my dissenting opinion I would like to warn against this dangerous development, as according to the experiences in the neighbouring countries, tens of thousands of constitutional complaints may be filed each year to the Constitutional Court, making the Court's work impossible. (According to the latest studies on the work of the Constitutional Court of Romania, they had received 12 thousand constitutional complaints in the year 2010, making it impossible to perform work on the merits of the cases, and it was necessary to amend with urgency the Romanian Act on

the Constitutional Court to allow the continuation of their work. There were similar news about the waves of constitutional complaints filed to the Czech, Slovak, Slovene, German and Spanish constitutional courts.)

[154] B) The other argument supporting the rejection of reception is that Section 90 item *ha)* and Section 230 of ASJ, contested by the constitutional complaint, simply repeat Article 26 para. (2) of the Fundamental Law and Article 12 para. (1) of the transitory provisions of the Fundamental Law of Hungary. Thus the Constitutional Court should have noticed this situation, and as the contents of the contested provisions are regulations found in the Fundamental Law, the reception of the constitutional complaints should have been rejected, since the Constitutional Court is not competent to examine such complaints.

[155] 2. Supposing – but not allowing – the receipt of the complaints, some elements of the reasoning used for the annulment of the decision should be questioned as well. I would like to touch upon only one of those elements in my dissenting opinion.

[156] I think it is necessary to stress the problems related to recalling the reminiscences of legal history under point 1 of part IV of the reasoning, with regard to the fact that the reasoning used the Acts 1896:IV and 1871:IX on the status of judges and on the retirement of judges as arguments against the decrease of the judicial retirement age of 70 years. Although Article R) of the Fundamental Law mentions the achievements of our historical constitution as a foundation in the light of which the Fundamental Law can be interpreted, we have to be very careful about it, as this institution is not well elaborated at the moment. The quotations of legal history from these Acts found in the reasoning are only fragments of past regulations. Holding that they are mandatory rules today, and thinking that they possess normative force acting against the will and the laws of the legislative majority of today, would actually question the concept of changeable law. Thus, in my opinion, Article R) cannot be applied this way, as it would be against the concept of changeable modern law. In addition to that, it can be a very dangerous precedent, as the potential petitioning lawyers of today would be ready to use – to support their constitutional complaints – dozens of Acts from the 1800's years that could be referred to against any present statutory regulation, as the "achievements of our historical constitution". It could very soon result in creating a pseudo-legal historical dimension of argumentation in the multitude of constitutional complaints, where hundreds of articled clerks would be assigned to work on tendentiously processing and using various sources of legal history. This could finally result in nothing else but dishonouring the concept of the historical constitution, so before being so careless to take this path, it would be better to devote a separate analysis – perhaps in the framework of a separate thematic session – to considering the possibilities of applying Article R).

Budapest, 16 July 2012

Dr. Béla Pokol
Judge of the Constitutional Court

Dissenting opinion by Dr. István Stumpf, Judge of the Constitutional Court

[157] The Constitutional Court's decision on the annulment with a retroactive force as from the date of taking effect on 1 January 2012 of Section 90 item *ha)* and Section 230 of the Act CLXII of 2011 on the legal status and the remuneration of judges was not well founded and therefore I disagree with it.

[158] On statutory level, Section 90 item *ha)* determines the new upper age limit of judges. This new age limit shall be applicable to judges in office as regulated in Section 230 of ASJ. According to the latter provision, the office of the judges who reach the age limit by the end of 2011 shall be ended by the day of 30 June 2012. In line with that provision, Pál Schmitt president of the republic discharged 194 judges in the Decision 96/2012. (V.2.) KE as from 30 June 2012. Therefore the mandate of the affected judges was terminated on 30 June 2012; their service relationship ended on 30 June 2012.

[159] The decision of the Constitutional Court was only adopted after the date of 30 June 2012. It means that the decision is *post festum* with regard to the closed legal relationships. Still the Constitutional Court annuls Section 90 item *ha)* and Section 230 of ASJ with a retroactive force as from 1 January 2012, i.e. in a way that should offer a chance to intervene posteriorly with the legal relationships that have already been closed.

However, the decision establishes that "the legal relationship of service of the judges discharged on the basis of an Act declared unconstitutional shall not be restored by virtue of the Constitutional Court's decision, and their legal status should be settled according to the provisions of ASJ." Nevertheless, the decision leaves the question of the subsequent settling of the legal status completely open, not to mention the legal consequences of the annulment with retroactive force.

[160] *Ex tunc* annulment is seldom applied by the Constitutional Court, and it has usually regulated its legal effects on the concrete case individually.

[161] Let's take the example of the Decision 45/1997. (IX. 19.) AB. In addition to the annulment, the petitioner asked the Constitutional Court to order the prohibition of applying the annulled legal provision in the pending case. However, the Constitutional Court rejected the latter request, stating that „in view of the retroactive annulment" it „was not necessary to provide for the prohibition of application in the concrete case" in process (ABH 1997, 311, 319). This way the Constitutional Court enforced the retroactive annulment to a pending case, and the legal consequences applied by the Constitutional Court were the same as that of the prohibition of application.

[162] Another example is the recent Decison 2/2009. (I. 23.) AB. In this decision the Constitutional Court annulled certain procedural regulations with retroactive effect as from the date of their promulgation. In the decision adopted on the basis of judicial initiatives, the consequence of retroactive annulment drawn by the Constitutional Court was that the annulled provisions should not be applied in the pending procedures that had formed the basis of the concrete normative review (ABH 2009, 51, 60).

[163] Differently from the previous examples, there is no pending procedure at the time of adopting the decision in the present case: the discharges took place and they have been put in effect. Naturally, if the Constitutional Court had adopted its decision before 30 June 2012, the situation would have been different. (In the matter concerned, the first petition was submitted to the Court on 13 January 2012, and the constitutional complaint was admitted on 28 February.) Had the decision been adopted in due time, the retroactive annulment could have even resulted in causing the discharge of the affected judges not to take place at all, or at least the discharge have not been put into effect. However, in the case of a decision postponed to a date after 30 June 2012, the retroactive annulment – which could only be justified by the date of adopting the decision – does not offer a chance to intervene into the underlying – and already closed – legal relationships; therefore it is, in fact, unjustified and unnecessary.

[164] The Constitutional Court passed the present decision on the basis of the constitutional petitions filed under Section 26 para. (2) of the Act CLI on the Constitutional Court (hereinafter: ACC). It is an important element, as according to this provision of ACC, the procedure of the Constitutional Court can be initiated if "due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and (…) there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy." Consequently, it is a precondition of initiating such a constitutional complaint that the complainant should not launch a judicial procedure aimed at remedying the violation of rights. Therefore in the case of a so called direct complaint in line with Section 26 para. (2) of ACC, there is no possibility under procedural law to enforce in a judicial way the legal consequence of the retroactive annulment of Section 90 item *ha)* and Section 230 of ASJ, held unconstitutional by the Constitutional Court. Thus at the time of adopting the decision, it was unjustified and unnecessary – also in this respect, i.e. due to missing judicial enforcement – to use annulment with retroactive force, the basic aim of which would be to open the possibility of intervening into closed legal relationships. (Let me also note the following: it is possible that the complainants have also started a labour dispute at the court, parallel with the Constitutional Court's procedure. However, according to Section 26 para. (2) of ACC, such petitioners could not have filed a constitutional complaint to the Constitutional Court; they could have submitted their complaint to the Constitutional Court on the basis of Article 26 para. (1) of ACC only after closing the labour dispute at the court.)

[165] The Constitutional Court had also the option to actually draw the consequences of the *ex tunc* annulment in the decision, in case of adopting a judgement after 30 June 2012 on the retroactive annulment of Section 90 item *ha)* and Section 230 of ASJ. However the annulling judgement of the Constitutional Court does not provide any clue – with the exception of the vague reference quoted above ("their legal status should be settled according to the provisions of ASJ") about the service relationship of the judges discharged on the basis of the provision that was found to be contrary to the Fundamental Law. As several months have passed since the discharge, this reference is obviously not related any more to Sections 145–146 in force of ASJ about initiating a legal dispute on the judicial service relationship, as it can only be started within a fixed

deadline after the challenged measure. In addition, at the time of adopting the Constitutional Court's decision, there is no obligation specified in ASJ about the mandatory reappointment of the discharged judge – either for a fixed term or for indefinite tenure in accordance with their appointment prior to the discharge – because of being discharged on the basis of a provision that was found to be contrary to the Fundamental Law. [Section 3 para. (4) of ASJ only provides for an obligation of reappointing the judge, if the reinstitution into the judicial office is the result of a labour dispute.] Moreover, if there was such a provision – or it was adopted in the future – on mandatory reappointment, still it would not justify the retroactive annulment of Section 90 item *ha)* and Section 230 of ASJ. In any case, it would be a new appointment from a date following the adoption of the Constitutional Court's decision, and not the resurrection of the earlier legal relationship of service due to the *ext tunc* annulment of Section 90 item *ha)* and Section 230 of ASJ. In the lack of any provision in the ASJ offering a satisfying solution to the given legal situation, the only consequent judgement by the Constitutional Court on the retroactive annulment could have been a decision also containing an express obligation of reinstituting the terminated service relationships of the discharged judges.

[166] In addition to the above, I also disagree with the decision as it was adopted by the Constitutional Court in the competence of examining a constitutional complaint on the basis of a petition that did not comply with the requirements set forth in Section 26 of ASJ. According to Section 26 of ASJ, a constitutional complaint can only be initiated with reference to the violation of the complainant's rights guaranteed in the Fundamental Law. In contrast with the above, the petitioner built the constitutional complaint, resulting in the annulment, upon the principle of judicial independence contained in Article 26 para. (1) of ASJ, the primary aim of which is not the protection of the petitioning judges. Consequently, the discharged judges could not have filed a constitutional complaint by referring to this provision of the Fundamental Law. This is why the Constitutional Court should have rejected such a complaint on the basis of Section 26 of ACC.

[167] Moreover, I also disagree with the decision as it is actually setting for the legislator a requirement, which would be impossible to comply with, and the annulment of Section 90 item *ha)* and Section 230 of ASJ is based on the violation of this requirement. On the one hand, the decision establishes that, on the basis of Article 26 para. (2) of the Fundamental Law, the legislator enjoys a relatively wide discretion to determine the upper age limit of the judicial service. The condition of decreasing the upper age limit is to do it progressively, by providing adequate transition period, as otherwise Article 26 para. (2) of the Fundamental Law would be violated. On the other hand, the decision refers to Article 12 para. (1) of the transitory provisions of the Fundamental Law of Hungary (31 December 2011) (hereinafter: TPFL), which sets the concrete date of terminating the judicial service relationship of the affected judges due to the introduction of the new upper age limit. Although this provision is not regarded by the decision as a directly enforceable rule, the Constitutional Court holds that TPFL can exert its effects through the discharge regulations of ASJ. Since the majority decision relies both on the Fundamental Law and TPFL, it leaves uncertainty about how the legislator could apply the requirements of both norms at the same time, as they seem to contradict each other. Indeed, if the legislator would like to comply with Article 26 para. (2) of the Fundamental Law, specifying that the service relationship of judges can last until reaching the general retirement age (which is obviously different from the earlier upper age limit of judges set in 70 years, and neither is it higher than that), and for that reason it decreases the upper age limit, and it implements – at the same time – Article 12 para. (1) of TPFL containing well defined age limits, then the legislator cannot, and could not – in the future –, be in a position of decreasing the upper age limit of judicial service progressively and by securing due transitory period, as required in the interpretation made by the Constitutional Court. Therefore, as long as the provisions of both the Fundamental Law and the TPFL are in force, and their interrelation is not clarified adequately, in the case of jointly applying the two norms, the legislator is (and will be) predestined to act contrary to the Fundamental Law, according to the majority opinion represented in the Constitutional Court's decision.

Budapest, 16 July 2012

Dr. István Stumpf
Judge of the Constitutional Court

Dissenting opinion by Dr. Mária Szívós, Judge of the Constitutional Court

[168] 1. I do not agree with the Constitutional Court's decision, which establishes that Section 90 item *ha)* and Section 230 of the Act CLXII of 2011 on the legal status and the remuneration of judges (hereinafter: ASJ) are contrary to the Fundamental Law and annuls them. In my opinion, the violation of the Fundamental Law is not deductible from the right to fair trial enshrined in Article XXVIII para. (1) of the Fundamental Law and from the provisions granting judicial independence under Article 26 para. (1) of the Fundamental Law.

[169] 2. Let me note, before presenting my arguments against the decision of the Constitutional Court, that neither did I agree with admitting the petitions. The constitutional petitions were admitted on the basis of Section 26 para. (2) of the Act CLI of 2011 on the Constitutional Court (hereinafter: ACC). According to this provision, the procedure of the Constitutional Court can also be initiated on an exceptional basis if due to the application of a legal provision contrary to the Fundamental Law, or when such legal provision becomes effective, rights were violated directly, without a judicial decision, and there is no procedure for legal remedy designed to repair the violation of rights, or the petitioner has already exhausted the possibilities for remedy.

[170] Despite of the above, the Constitutional Court laid down in its decision that at the time of admitting the complaints, the injury of rights had not been taken place and it "would inevitably take place within a directly foreseeable timeframe". Thus the rules challenged by the petitioners did not have a directly enforceable effect on them, as they are only affected directly by the discharge resolution of the president of the republic, against which they should have initiated a labour dispute, therefore Section 26 para (2) of ACC, providing for an exceptional procedure, could not have been applicable in their case. In the lack of exhausting the required judicial way of remedies, the Constitutional Court should have rejected the petitions, as, according to ACC, exhausting the legal remedies is one of the preconditions of the Constitutional Court's procedure, and consequently the Constitutional Court may not exercise discretion about the legal remedies being effective or not in a given case.

[171] 3. I can't accept the decision adopted on the merits of this case for the following reasons. The Constitutional Court established that the wording of ASJ is different from the wording used in the Fundamental Law and in the transitory provisions of the Fundamental Law as the latter ones contain the term of general retirement age, and that ASJ – as a cardinal law – applies a reference rule, referring to the age limit specified in the Act LXXXI of 1997 on social security pension (hereinafter: ASSP). According to the majority decision, this is a violation of judicial independence not only because of the content of it, but for formal reasons as well, and the reasoning of the decision establishes that the upper age limit of judicial service must be specified in a cardinal Act.

[172] In my opinion, the definitions used in the Fundamental Law, in the transitory provisions of the Fundamental Law and in the challenged provision ASJ are interpreted erroneously by the majority decision. According to Article 26 para. (2) of the Fundamental Law, "the service relationship of judges shall terminate upon their reaching the general retirement age". Under Section 90 item *ha)* of ASJ, reaching the retirement age limit applicable to the judge is a cause of discharge.

[173] The above two provisions contain the same, the ASJ repeats the contents of the Fundamental Law with the difference that it takes into account Section 18 of ASSP, according to which the old age retirement age limit shall progressively increase until the year 2022. At present the general old age retirement limit is the age of 62, and it will be the age of 65 from the year 2022. Due to the progressive increase of the general retirement age, in the case of persons born between the years of 1952 and 1957, the general retirement age applicable to the persons born in specific years is different, and it depends on the year of birth of the person concerned.

[174] Article 28 of the Fundamental Law – stating that the text of rules of law shall be interpreted primarily in accordance with their purposes and with the Fundamental Law – must be taken into account also by the Constitutional Court in the course of its procedure. The interpretation in line with the Fundamental Law would be that the regulation of ASJ not only repeats the substantive provisions of the Fundamental Law, but it also adapts to the legal environment in force, namely to the fact that in the present transitory period the general retirement age increases progressively.

[175] In the Decision 121/2009 (XII. 17.) AB, the Constitutional Court pointed out the following: "Today's constitutional system is based on the primacy of the Constitution, the fundamental legal guarantee of which is the Constitutional Court's competence to annul the unconstitutional statutes [Article 32/A para. (2) of the Constitution]. The primacy of the Constitution excludes the possibility that statutes or Acts of Parliament outside the Constitution could regulate the subjects regulated in the Constitution. The provisions of the Constitution can be repeated (either the contents or word-for-word) by legal norms on lower level, but the Constitution will remain the basis of the validity of the repeated provisions." [ABH 2009, 1013, 1024.]

[176] By annulling the challenged provision of ASJ, the majority decision establishes about a statutory provision, repeating the contents of a rule of the Fundamental Law, that it is contrary to the Fundamental Law. By the annulment of the challenged provision of ASJ, the Constitutional Court acted contrary to its primary duty specified by the Fundamental Law – the protection of the Fundamental Law.

[177] The Constitutional Court – after starting the examination of the merits of the case instead of rejecting its admission – should have reached a conclusion that the contents of the challenged provision of ASJ is identical with the provision found in the Fundamental Law, and therefore the complaints should have been rejected due to the lack of competence.

[178] Let me also note that the situation complained about by the petitioners had been the result of the Fundamental Law taking into force and not of the ASJ taking effect, since it had been the Fundamental Law itself which had regulated that the service relationship of judges could last until reaching the general retirement age instead of the age of 70. Therefore the injury of rights alleged by the petitioners was originally caused by the Fundamental Law, and the Constitutional Court has no competence to review it. By the annulment of ASJ's section repeating the provision of the Fundamental Law, the Fundamental Law becomes directly enforceable, thus the legal basis of terminating the service relationship of judges would continue to exist.

[179] 4. I do not agree with establishing the formal violation of judicial independence, i.e. that a cardinal Act should continue the upper age limit of judicial service. According to Article 26 para. (1) of the Fundamental Law, judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act.

[180] The disputed rule of ASJ specifies one of the cases of removal from judicial office in accordance with the Fundamental Law. The Constitutional Court explained in several decisions that in the cases where the Constitution (Fundamental Law) requires regulation in a cardinal Act, the essential, conceptual elements of the given subject should be adopted by two-thirds majority, and with regard to questions outside the above scope, Acts of Parliament adopted by simple majority could be sufficient.

[181] ASJ as a cardinal Act contains an exhaustive list – as required in the Fundamental Law – on the causes of removing a judge. Reaching the retirement age is one of the cases on the list, and it is also in line with the Fundamental Law.

[182] In the present case, the regulatory concept is based on the fact that the cases of removal from judicial office are determined, with a broad scale accord, in a cardinal Act by the Parliament in power. The cases of removal from judicial office cannot be regulated in an Act adopted with single majority, but it is possible with regard to the amendment of the retirement age.

[183] Regulating the case of removing judges in connection with reaching the retirement age forms part of endeavouring equality within the pension system. When the Parliament amends the retirement age, it has an effect not only on judges but also on the whole working population of Hungary. As established by the Constitutional Court in the Decision 1113/B/1996. AB, there are no specific constitutional requirements neither about determining the age limit, nor about changing the established age limit, and in the scope of reforming the social security system, the State enjoys a wide scale of discretion in weighing the aspects of expediency, economy, legal technique and fairness. [ABH 1997, 684, 685.]

[184] I would like to underline that also in other cases of terminating the judicial service – which provisions are declared to form part of the Fundamental Law [e.g. Section 90 items *b)* and *c)* of ASJ] – it is necessary to apply an Act adopted with simple majority, specifying the details of the concept contained in the cardinal Act. [Obviously the Fundamental Law does not require the legislator to transpose for example all statutory definitions found in the specific part of the Criminal Code into the cardinal Act regulating the cases of removing judges from office, just because of taking into account Article 26 para. (2) of the Fundamental Law. As a consequence, in my opinion, the adopted decision annulled the challenged provisions on the basis of a question having a character of legal technique, not reaching the level of the Fundamental Law.]

[185] 5. I also disagree – on the basis of the same principles as explained above – with annulling Section 230 of ASJ, as the content and the context of Section 230 of ASJ is identical with the content of Article 12 of the transitory provisions of the Fundamental Law that are declared to form part of the Fundamental Law.

[186] 6. As established in the reasoning of the decision, ”at the time of adopting the Fundamental Law, the age limit of terminating the service relationship of judges was the age of 70 [Act LXVII of 1997 on the legal status and the remuneration of judges, Section 57 para. (2), hereinafter: “old ASJ”]. The appointed judges and their clients could assume that the assigned judges shall act in the cases allocated to them, until reaching the above age, and judges can only be separated from the cases on the basis of a serious cause.” It should be noted here that there can be numerous organisational or personal reasons resulting in transferring a case from one judge to another. It is an administrative issue related to the organisation and the institution of the judiciary, and not a question of constitutional law.

[187] 7. The adopted decision holds that the independence of judges is injured due to removing judges from their office in a relatively short period of time – three months – and separating them from their cases. This statement is expressly misleading as one should take note of the fact that judges over the age of 62 – being aware of Article 26 of the Fundamental Law – could expect the termination of their service relationship as from 25 April 2011, and the majority of them received pension in addition to being in office, due to the correct application of the provisions of ASSP and the old ASJ. On the other hand, it should be recalled that the Act LXXII of 2011 on the amendment of certain status laws in connection with the Fundamental Law, promulgated on 27 July 2011, contained a regulation stating that, from 1 January 2012, with regard to the cause of terminating the judicial office in the context of reaching a certain age, the age of 70 would be replaced by the general retirement age.

[188] Based on all the above, in my opinion, the regulation cannot be held to be contrary to the Fundamental Law.

Budapest, 16 July 2012

Dr. Mária Szívós
Judge of the Constitutional Court