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Abstract	<p>This chapter discusses the rules for the selection of Hungarian judges and constitutional court justices. Besides providing an in-depth analysis of the relevant legal provisions, it also aims to shed light on their broader socio-political context. In conclusion, this paper argues that the selection of constitutional court justices qualitatively differs from that of ordinary judges. In the case of judges, mostly professional requirements prevail, while the appointment of constitutional court justices is deeply pervaded by political motives. Therefore, it can be argued that the political preferences of the government could certainly distort the selection of the members of the constitutional court, whilst professionalism is certainly a value of the ordinary judiciary. Lastly, it should also be mentioned that the representation of social and political diversity is definitely not a main criterion of judicial selection in general.</p>	

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Chapter 9 1

How to Become a Judge in Hungary? 2

From the Professionalism of the Judiciary 3

to the Political Ties of the Constitutional Court 4

Balázs Fekete 5

Abstract This chapter discusses the rules for the selection of Hungarian judges and constitutional court justices. Besides providing an in-depth analysis of the relevant legal provisions, it also aims to shed light on their broader socio-political context. In conclusion, this paper argues that the selection of constitutional court justices qualitatively differs from that of ordinary judges. In the case of judges, mostly professional requirements prevail, while the appointment of constitutional court justices is deeply pervaded by political motives. Therefore, it can be argued that the political preferences of the government could certainly distort the selection of the members of the constitutional court, whilst professionalism is certainly a value of the ordinary judiciary. Lastly, it should also be mentioned that the representation of social and political diversity is definitely not a main criterion of judicial selection in general. 6-16

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1 Introductory Questions: Twenty-Five Years 17

After the Transition 18

A comprehensive discussion of all the factors influencing the actual system of judicial selection in Hungary is impossible in this national report since – due to the complexity of the influences that affected Hungarian society and law in the last 25 years¹ – it would require a much more elaborate treatment. However, this does 19-22

I am especially grateful to Dr Hörcherné Marosi Ildikó and Dr András Osztoivits, judges of the Supreme Court of Hungary (Curia), who provided me with many useful insights.

¹For a discussion of the politico-social transition see RL Tőkés, *Hungary's Negotiated Revolution. Economic Reform, Social Change and Political Succession* (Cambridge, Cambridge University Press, 1996); for a comprehensive analysis of post-transitory legal developments see A Jakab, P Takács and AF Tatham (eds), *The Transformation of the Hungarian Legal Order 1985–2005* (Alphen aan den Rijn, Kluwer Law International, 2007).

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23 not mean that the major factors cannot be identified and briefly explained. This
24 report will focus on four of them: (i) the latest reform of the Hungarian judiciary and
25 its actual structure; (ii) the role of judge-made law in Hungarian law; (iii) the lack
26 of general lay participation; (iv) and the 'closed nature' of the judiciary from a
27 social perspective.

28 The year of 2010 was an obvious turning point in the working of the Hungarian
29 judiciary.² Both its functioning and structure had been widely criticized prior to
30 2010,³ but due to subsequent coalition governments having no qualified majority to
31 change the cardinal laws setting forth rules for the judiciary, many potential reforms
32 had no real chances to be realized.⁴ However, this situation changed dramatically in
33 the April of 2010 when the former opposition party, the rightist FIDESZ – Magyar
34 Polgári Szövetség (FIDESZ – Hungarian Civic Alliance) acquired more than the
35 qualified majority of the parliamentary seats.⁵ Between 2010 and 2012 the government
36 reformed the entire system of judiciary in many steps. It was declared that these

²Retrospectively, the year 2010 may only be compared to 1989 in this sense. 1989, the year of the political transition, also seriously affected the Hungarian judiciary in many ways. Although a comprehensive reform had not happened in this period, many important steps were taken to establish an independent judiciary able to function in a pluralist democracy based on the rule of law. For instance, the judiciary gradually acquired institutional autonomy via a decentralization process and the political activity of judges became strictly prohibited. However, since there was no institutional 'purge' in order to clear the judiciary from those who were involved in the former regime, the judiciary continued its work almost with the same personnel, see Z Fleck, 'A bírói függetlenség állapota' (2002) 6 28, 30–31; Z Fleck, 'Jogintézmények átépítése (Bevezetés a közép-európai új demokráciák bírói jogalkalmazásának szociológiájába)' (2003) 1 *Kontroll* 28, 34–38.

³For instance: the Eötvös Károly Intézet (Eötvös Károly Institute), a liberal think-tank, carried out a comprehensive research project on the problems of the judiciary and argued for substantial reforms in 2008. The accountability of the courts has to be enhanced and, furthermore, general transparency has also to be improved, argued the institute's experts. For details, see the final report in Hungarian, P Hack, L Majtényi and J Szoboszlai, 'László Majtényi and Judit Szoboszlai 2008. Bírói függetlenség, számonkérhetőség, igazságszolgáltatási reformok' (2008), available at http://www.ekint.org/ekint_files/File/tanulmanyok/biroi_fuggetlenseg.pdf.

⁴A two-thirds, or qualified, majority has a particular importance in the Hungarian constitutional system. Firstly, modifications of the Constitution can only be passed by a qualified majority, that is, the *pouvoir constituant* is linked to two-thirds of the parliamentary seats. Furthermore, the renewal of the most important Acts setting forth the basic constitutional institutions also need qualified majority voting. Cooperation amongst the various coalition parties within the government is necessary and – if the coalition parties behind the government fail to obtain a two-third majority – the parliamentary opposition will also be involved in the decision-making process. That is, the qualified majority requirement to pass a bill of constitutional importance guarantees a minimal cooperation between the government and opposition and it efficiently paves the way for compromises.

⁵For a general introduction on the post-2010 political and constitutional developments see: J Kiss, 'From the 1989 Constitution to the 2011 Fundamental Law' in GA Tóth (ed), *Constitution for a Disunited Nation*, 1 (Budapest-New York, CEU Press, 2011) and P Smuk, 'In the Beginning there was a Constitution...', in P Smuk (ed), *The Transformation of the Hungarian Legal System 2010–2013*, 1111 (Budapest, Complex, 2013).

reforms⁶ would focus on creating a more centralized and accountable administration of justice as well as trying to establish a more efficient and faster judicial activity – whatever these terms may mean – and, consequently, they significantly overhauled both the judiciary and the Constitutional Court (CC).⁷ An important part of the judicial reform was the substantial change of the selection procedure of both ordinary judges and CC justices. This report will analyze the recent state of affairs; however, it will also refer to the former rules, where contrasting is necessary for clarification.

In order to understand the actual role of judges in the Hungarian legal system their relationship to judge-made law should also be highlighted. Officially, Hungarian adjudication does not work on the basis of precedents. There is no reference to the obligation to follow former judicial decisions (*stare decisis*) either in the Basic Law or in the relevant Acts. Moreover, legal scholarship also agrees that former judgments have no normative value in general; judges may apply them as subsidiary sources of interpretation, if any.⁸ The sole exception is the practice of the CC: this line of case-law is frequently cited as authority. Furthermore, the Supreme Court is entitled to ensure the coherence of the case law of the lower level courts by adopting so-called ‘uniformity decisions’.⁹ These decisions summarize the Curia’s understanding of a complex legal problem that led to divergent interpretations by the ordinary courts.¹⁰ In sum, one may conclude that judge-made

⁶For an in-depth and critical analysis see the Opinion of the Venice Commission (Opinion 663/2012 European Commission for Democracy through Law), spec 7–16 (the President of the NOJ and its competences); 16–18 (appointment of judges), European Commission for Democracy through Law, *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, Opinion 663/2012.

The legislator changed some of the criticized points following the delivery of this opinion, for example the strong privileges of the President of the NOJ in the selection process were redesigned in order to make it more balanced.

⁷As for the judiciary see: A Osztoyits, ‘The New Organizational System of the Hungarian Courts’, in P Smuk (ed), *The Transformation of the Hungarian Legal System 2010–2013*, 131 (Budapest, Complex, 2013). On the Constitutional Court see: L Csink and B Schanda, ‘The Constitutional Court’, in L Csink, B Schanda and AZs Varga (eds), *The Basic Law of Hungary. A First Commentary*, 293 (Dublin, Clarus Press, 2012), F Gárdos-Orosz, ‘The Hungarian Constitutional Court in Transition from Actio Popularis to Constitutional Complaint’ (2012) 53 *Acta Juridica Hungarica* 302; F Gárdos-Orosz, Fruzsina, ‘Citizens’ Rights to Constitutional Adjudication’, in P Smuk (ed), *The Transformation of the Hungarian Legal System 2010–2013*, 117 (Budapest: Complex, 2013).

⁸The President of the Supreme Court (Curia), Péter Darák, summarized the actual status of judge-made law in the Hungarian law. He argued that due to the principle of separation of powers the judiciary cannot act as legislator, so judge-made law cannot have general relevance as a binding precedent (P Darák, ‘A belső bírói fórumok, az oktatás és az informális csatornák szerepe az ítélkezési gyakorlat egységesítésében (előadás)’ (2012), available at http://www.lb.hu/sites/default/files/sajto/darakp_eloadas.pdf.)

⁹Fundamental Law Art 25 (3).

¹⁰From 1954, the various chambers of Supreme Court started to prepare their positions (later: opinions) on questions which couldn’t be decided either by relying on the existing legal provisions or when an apparently divergent case-law existed at the lower levels of the judiciary. These ‘chamber opinions’ have gradually become reference points for the lower level courts (Z Zódi, ‘Búcsú a kollégiumi véleményről?’ 2014 (manuscript with the author).

57 law has a very restricted role in Hungarian law: only the CC and Curia may have
58 some impact in official terms.

59 However, recent empirical research that analyzed more than 60,000 judgments
60 reached rather different conclusions. Zsolt Zódi argues that judges in Hungary rely
61 on previous case law much more frequently than they publicly acknowledge. If a
62 judgment has at least an abstract, it is rather likely that it will be cited as relevant
63 authority with respect to the specific legal issue that it settles. Nonetheless, it is
64 argued by Zódi that, regardless of frequent references to former decisions, the spirit
65 of Hungarian law cannot be compared to that of the common law, since judges do
66 not regard the former judgments as a starting point to make creative decisions, but
67 consider them as simple and particular rules to be followed. In other words, judges
68 do not think as judges of the common law world generally do as they do not use the
69 conventional tools of common law thinking, such as distinguishing, arguing pro or
70 contra when applying or disregarding a precedent, using landmark cases as authori-
71 ties, and so on. In contrast, they consider the ratio decidendi of former judgments as
72 simple rules to help their work ('headnote positivism') when they are unable to refer
73 to official state rules. In sum, judge-made law has a high relevance in Hungarian
74 law, however not in a common law sense but as very specific rules filling in the gaps
75 of state legislation.¹¹

76 Lay participation in the work of judiciary has only a very limited tradition. In
77 fact, it is only possible in some parts of criminal proceedings, in cases of serious
78 crimes,¹² and in labor law related trials – and even then, only at the first instance of
79 the procedure. Lay participants are called assessors and their main task is to help the
80 judge when making the judgment. Normally, one judge and two assessors form a
81 council if lay participation is required by the law, and they have to decide the case
82 together. The legislator emphasizes that the rights and obligations of the judges and
83 the assessors in the council are identical¹³; however, this does not mean that the
84 assessors deviate from the judge's interpretation of legal issues in practice.¹⁴ They
85 provide assistance in decision-making by helping the judge mostly with questions.
86 Four types of assessors exist in Hungarian law: general, teacher, labour affairs
87 specialist and military affairs specialist. Political neutrality and professional

¹¹ See: Z Zódi, 'A korábbi esetekre történő hivatkozások mintázatai a Magyar bíróságok ítéleteiben', MTA Law Working Papers 2014/01, available at http://jog.tk.mta.hu/uploads/files/mtalwp/2014_01_Zodi_Zsolt.pdf; Z Zódi, 'Analysis of Citations Patterns of Hungarian Judicial Decisions. Is Hungarian Legal System Really Converging to Case Laws?' (2014), available at <http://ssrn.com/abstract=2410070>.

¹² The main rule: assessors have to be involved in the trial if the crime committed can be punished by a prison sentence longer than 8 years. See: Act XIX of 1998 on the criminal procedure. 14. § (1) a.

¹³ Ibid, 14 § (6).

¹⁴ For a historical introduction and a critical discussion see: a Badó and M Bencze, 'Reforming the Hungarian Lay Justice System, in P Cserne, I H Szilágyi, K Miklós, M Paksy, P Takács and S Tattay (eds), *Theatrum Legale Mundi Symbola Cs. Varga Oblata*, 1 (Budapest, Szent István Társulat, 2007). Interestingly, Badó and Bencze stress the possible civil expertise of lay assessors as an 'added value' to adjudication, but they do not mention their role in the representation of social diversity or minority interests.

excellence are the main requirements for the assessors. Generally, civil society, the education sector and trade unions have the right to recommend future assessors, but the final decision is made by representatives of the local communities.¹⁵

Lastly, it should also be mentioned, in order to get a refined picture, that the Hungarian judiciary has been strongly criticized by experts of sociology of the law because of its 'closed nature' in the last 25 years. By this term 'closed nature' they mean that the judiciary has continuously been functioning on the basis of its own logic and rules, that is, solely internal professional interests dominated it. For instance, the previous system for the selection of judges basically gave unlimited discretion to presidents of the local and county courts.¹⁶ That is, these presidents could decide on the appointment of future judges free of any outside influence; the former law even emphasized that these presidents were not bound by the suggestions of the competent judicial body.¹⁷ Zoltán Fleck argues that these mechanisms made the judicial career a completely closed sphere, mostly due to existing family and other connections.¹⁸ Additionally, the over-emphasis of judicial independence, a natural consequence of a post-authoritarian situation, also led to the formation of an oligarchic and uncontrolled system of internal administration of justice in which the presidents of regional courts were the main players.¹⁹

The worst consequence of this situation has been that critics and external, often professional, considerations could not make their mark as a decisive influence. The judiciary, especially the various court presidents even up to the highest level, has been extremely reluctant to react to or respond any criticism. They usually refer to the constitutional relevance of judicial independence and they often consider criticism coming from academia, other professionals or politicians as threat to this highly esteemed constitutional requirement.²⁰ Even though the reforms of 2010–2012 changed the judiciary on many points – as has been the case with the selection of judges, today's Hungarian judiciary still seems to be a particular world within the body of society as whole; it is almost totally resistant to opinions and critics, either professional or civil ones. As a sign of its closed nature, the judiciary has only exceptionally engaged in public discussion about its work and judgments.²¹

¹⁵ Act CLXII of 2011 on the status and the payment of judges 215. § (1).

¹⁶ Act LXVII of 1997 on the status and the payment of judges 8. § (2).

¹⁷ *Ibid.*, 8. § (3).

¹⁸ Fleck, 'A bírói függetlenség állapota', 33.

¹⁹ *ibid.*

²⁰ Cf Fleck, 'A bírói függetlenség lángja és füstje' (2006) *BUKSZ* 18: 256 at 260.

²¹ For instance, in the early 90s a Romani man was sentenced because he – allegedly – committed homicide in his village. The criminal process was unfounded and the local court also made manifest legal mistakes when establishing the homicide. In the end, the man committed suicide; his lawyer appealed against the sentence, but the appeal was unsuccessful. The lawyer then wrote a drama on this case and following its online publication the regional court held a press conference to explain its position to the public. Beforehand, it had nothing to say about the case (the Pusoma case). See: I H Szilágyi, 'Nincs kegyelem – senkinek', in H Szilágyi, T Nagy and B Fekete (eds), *Iustitia mesél*, 89 (Budapest, Szent István Társulat, 2013).

118 **2 Rules and Procedures**119 **2.1 The Selection of Judges**

120 To become a judge in Hungary a potential candidate must meet manifold criteria,
121 and a relatively complex and long procedure has to be exhausted. The Act CLXII of
122 2011 (the Act) introduced a new model, which contains all the basic rules. The rules
123 are rather complex: therefore, this report discusses the eligibility criteria first, and
124 then analyzes the procedure of appointment in detail.

125 As a preliminary point, it should be stressed that there is no special selection
126 procedure for judges of the appellate courts and the Supreme Court. Candidates
127 working at the lower levels of judiciary (district courts or regional courts) may be
128 promoted to these higher courts through the general appointment process.²²

129 **2.1.1 Eligibility Criteria: Statutory, Human**
130 **and the Protection of Integrity**

131 The basic statutory eligibility criteria for judicial appointment are specified by the
132 Act as follows. It requires that the candidate (i) shall be older than 30 years; (ii) shall
133 have Hungarian citizenship; (iii) shall possess a full legal capacity to act under
134 private law; (iv) shall have a degree in law; (v) shall have passed a successful 'final
135 state exam' before the appointment, (vi) shall make a declaration on his/her assets
136 as is required by the law; (vii) shall have 1 year's experience as a court secretary;
137 and (viii) shall be eligible to act as a judge as proven by the so-called entry exam.²³
138 This entry exam is intended to test the candidate's general physical and mental
139 fitness to work as a judge.²⁴ Additionally, the Act also contains a general exclusion
140 clause, namely, those who have a criminal record are excluded from any appointment
141 in the judiciary.²⁵

²²The act uses the term '*magasabb bírői álláshely*' (literally translated: higher judicial position) to indicate the appointment specificities of the position on the Appellate or the Supreme Court.

²³Act CLXII of 2011 on the status and the payment of judges 4 § (1).

²⁴This entry exam in Hungarian is called '*pályalkalmassági vizsga*': this term means an exam where the eligibility of a candidate to fulfill a position is to be measured. A common decree of the Ministry of Justice and Ministry of Public Health sets forth the detailed rules (1/1999 (I 18) IM-EüM együttes rendelet). Professional experts (doctors, psychologists and psychiatrist) affiliated to the Research Institutes of Justice Affairs (*Igazságügyi Szakértői és Kutató Intézetek*) are entitled to manage this exam. The candidate has to succeed in front of a committee composed of three experts. The committee decides unanimously on the eligibility, and it has to prepare a reasoned professional opinion. Appeal against the decision is possible. In this case a so-called Appellate Committee composed of five experts has to make the final decision. The main components of the exam are a general physical examination, neuropsychiatry examination and general psychological examination, incl. exploration and tests (Rorschach etc.)

²⁵Act CLXII of 2011 on the status and the payment of judges 4. § (2).

The first seven criteria are of an objective nature, that is, their verification only requires checking the candidates' files. Whether or not a candidate may fulfill them is a question not requiring any sophisticated decision. However, criterion eight is a qualitatively different one, since a strong subjective assessment is necessary to decide upon it.

The legislator specified two points that must be scrutinized during this entry exam, which is managed by a committee composed of professional experts. Firstly, the committee has to examine in detail if the candidate has any mental or physical deficiencies that may exclude his or her work as a judge. Secondly, it also has to map the candidate's personality including his or her intelligence and character.²⁶ Obviously, these cannot be more than broad guidelines, but – beyond giving general guidance to the committee – other, more specific points are also necessary in order to ensure the predictability and reliability of the process.

Therefore, in Appendix Five, the Act lists twenty skills and competences that are to be checked when taking this entry exam. Many aspects of this list are telling. Firstly, it reveals how the Hungarian legislator envisages the ideal judge and what may make someone a proper candidate. Secondly, it also points to the personal and professional capabilities which are considered as important components in the professional life of a judge.

These skills and competences can be grouped around the following points²⁷:

1. General human competences (decision-making capacity; capacity to cooperate; analytical thinking; ability to foresee; creativity; capacity to analyze situations and problems; organizing and planning skills).
2. Virtues (self-discipline; responsibility; integrity; confidence; subtlety; reliability; personal autonomy).
3. Problem-solving skills (proper skills to handle conflicts; capacity to cope with problems).
4. Professional skills (oral and written communication skills; capacity to apply professional knowledge; professional objectivity).

Thus, the candidates go through a relatively detailed and in-depth subjective evaluation from a general human point of view. They are not only required to fulfill basic statutory criteria, but their personality is to be scrutinized, too. Hence, an important assumption that profoundly influenced the legislator's mind about judges is reflected here: they are not only persons meeting certain criteria specified by the law, but they have to be much more. They have to be human beings capable of making responsible decisions concerning others' lives. In other words, human virtues and skills are also needed when judging, since judges are not simply people of the law, but must also be able to manage human situations when deciding cases. However, there is no reference to the necessity of social sensitivity as a value.

Lastly, it should also be mentioned, that the Act raises serious requirements in respect of the integrity of judges. Because of the relatively recent experiences of the

²⁶ *ibid.*, 6. §.

²⁷ *ibid.*, Appendix 5.

183 Socialist past, political activity is generally prohibited. Naturally, this does not
184 mean that judges cannot have political views or commitments, but participation in
185 political activities and membership in associations or bodies having a political
186 nature is banned by the law. Generally, they have to refrain from any political
187 activity; specifically, either membership in political parties or in representative
188 bodies such as the national Parliament or the European Parliament are generally
189 excluded.²⁸ Furthermore, judges cannot hold any major positions in the national
190 government and cannot participate in the work of local administration.²⁹ In sum, the
191 legislator requires judges to be absolutely politically neutral in both the institutional
192 and the professional sense.

193 In addition, the integrity of judges is protected from various other directions.
194 Besides their professional work, judges can only engage in scientific, educational,
195 coaching, refereeing, artistic, editorial, and technological activities, or others
196 protected under the law of intellectual property. Moreover, these are not general
197 exemptions from the main rule, but a further condition also has to be met if a judge
198 wants to participate in such an activity. The law specifies that judges are only
199 allowed to do the aforementioned activities if these do not endanger their independence
200 and impartiality and do not hinder the fulfillment of their judicial obligations.
201 This means that the professional integrity of judges is the most prominent concern
202 of the legislator and anything that may endanger it to any extent openly contravenes
203 both the spirit and the letter of the law.³⁰ Finally, positions in economic undertakings
204 and participation in arbitration panels as arbitrators are also strictly prohibited.³¹

205 All in all, the law strives to protect Hungarian judges from various influences. In
206 doing so, it mostly sets forth detailed rules with respect to the positions that are
207 incompatible with the judicial function. Moreover, it also lists some activities that
208 may be acceptable for a professional judge, but only where they do not endanger the
209 judge's integrity. Typically, judges may teach some courses in the law faculties, or
210 they may undertake some literary activities, including publication.

211 **2.1.2 The Procedure of Selection: Bodies, Steps and Standards**

212 Three different judicial bodies are involved in the selection process. Of course, their
213 level of involvement differs to a certain extent, since two of them have only a
214 marginal impact on the outcome as compared to the first one.

215 The National Office for the Judiciary (NOJ), which began work in 2012, is
216 certainly the key institution in the selection of Hungarian judges. It is generally
217 responsible for the administration of the courts. The President of the NOJ, who is
218 appointed by a qualified majority of Parliament for 9 years,³² is a prominent actor,

²⁸ *ibid.* 39 § (1)–(2)

²⁹ *ibid.*

³⁰ *ibid.* 40 § (1).

³¹ *ibid.* 40 § (2) and (5).

³² Act CLXI of 2011 on the organization and administration of courts, 66 §.

since she has various duties related to the everyday work of courts. Chief amongst them are (i) issuing regulations and recommendations for the courts³³; (ii) representation of the courts in official relationships³⁴; (iii) assessment of any legislative proposals that may affect the judiciary³⁵; (iv) preparation of the draft annual budget for the entire court system and participation when both the government and the budgetary committee of the Parliament discusses it³⁶; (v) supervision of the work of the courts³⁷; (vi) recommendation of a candidate to the President of the Republic to be appointed as a judge³⁸; and a broad duty of disclosure on both her activity and the work of the judiciary.³⁹ It can hardly be questioned that the NOJ, and especially its President, have a comprehensive regulatory competence over the entire Hungarian judiciary.

The National Judicial Council (NJC) is the highest-level self-governing body in the Hungarian judiciary. It is composed of 15 members elected by a convention of representatives of the Hungarian courts. The main task of the NJC is twofold. Firstly, it supervises the activity of the NOJ,⁴⁰ that is, it functions as a counterbalance to the rather broad competences of the NOJ. Secondly, as the first session of the NJC declared in March 2012, it also tries to represent judges when making proposals and decisions relating to the work of the courts. In sum, the NJC represents the community of Hungarian judges as a democratically elected board and scrutinizes the work of the administration of the judiciary.

Lastly, due to their role in the selection procedure, the so-called judicial councils (JCs) must also be mentioned. Each regional court – actually there are twenty regional courts – shall elect a self-governing body called a JC. These JCs are elected by the regional convention of judges and they can have five to fifteen members.⁴¹ One of their main duties is that they participate in the selection process by hearing the candidates and ranking them. Additionally, the JCs also have some advisory competences on budgetary and personal questions.

Now that the bodies involved have been set out, the selection process can be analyzed in detail. It is composed of the following five major steps, from the announcement to a possible legal remedy.

- (i) It starts with the announcement of a call for application, since a judge can only be appointed if an open application process was accomplished beforehand. The law requires that this process be an open and non-discriminatory one, that is, it

³³ *ibid.* 76 § (1) b.

³⁴ *ibid.* 76 § (1) c.

³⁵ *ibid.* 76 § (1) e.

³⁶ *ibid.* 76 § (3) a-b.

³⁷ *ibid.* 76 § (3) e.

³⁸ *ibid.* 76 § (5) b.

³⁹ *ibid.* 76 § (8) a-f.

⁴⁰ *ibid.* 103 § (1) a-c.

⁴¹ *ibid.* 147 § and 148. § (1).

252 has to be transparent and it has to provide an equal chance to each candidate.⁴²
253 There are only very limited exceptions under this general rule. If a judge were
254 working in a special position somewhere in the general administration (e.g. in a
255 ministry as an expert) and his or her mandate ended, he or she can be appointed
256 to an ordinary position without going through the full application process.⁴³

257 The announcement of this call for application is the privilege of the President of
258 the NOJ. In practice, if there is a vacancy at a court, the court's president has to
259 inform the President of the NOJ about it within 8 days.⁴⁴ Thereafter, the staff of the
260 NOJ prepares the detailed call for application and the President of the NOJ makes
261 an official announcement.

262 This document has to include all the criteria necessary for the appointment,
263 including the statutory ones and perhaps other ones. The call shall be published in
264 the official journal of the judiciary as well as on the central webpage of the admin-
265 istration of justice (www.birosag.hu).⁴⁵ If there are any applications, they have to be
266 sent directly to the president of the given court (District Court, Administrative and
267 Labour Court, Regional Court, Regional Court of Appeal or Curia of Hungary)
268 depending on type of the open call for application.⁴⁶

269 (ii) When the application deadline expires, the hearing phase starts. Each candidate
270 has to be heard by the competent regional or higher level judicial council.
271 Having met and heard the candidates the judicial council assesses their
272 performance and professional capacities by giving points according to various
273 standards.⁴⁷ Then it ranks the candidates and prepares their ranking by indicating
274 the best candidate, the second one and so and so forth.⁴⁸ Interestingly, the
275 law prescribes that candidates with the same results shall be ranked according
276 to their performance during the personal hearing which is only one component
277 from the twelve to be assessed. Therefore the personal impressions of the
278 members of the judicial council have a higher priority compared to the profes-
279 sional capacities proved by various documents if two almost identical candi-
280 dates shall be measured. If these candidates even got the same points during

⁴² Act CLXII of 2011 on the status and the payment of judges, 7 § (1)–(2).

⁴³ *ibid.* 8 § (2).

⁴⁴ *ibid.* 9 § (2).

⁴⁵ *ibid.* 10 § (1)–(3).

⁴⁶ *ibid.* 11 § (1).

⁴⁷ This assessment is based on a decree of the Ministry of Public Administration and Justice (7/2011 (III 4) KIM rendelet). This decree provides a very detailed list of the points that may be given for a certain requirements. For instance, having a PhD is worth 15 points, law school teaching 5, while the impressions of the personal hearing can be assessed from 0 to 20 points at the discretion of the given judicial council (see Appendix 1) The whole system of points looks to be proportionate and fair, the only surprising component is the discretionary 20 points for the personal hearing that might seem to be slightly disproportionate as compared to the other professional activities and results.

⁴⁸ Act CLXII of 2011 on the status and the payment of judges. 14 § (1).

- the hearing the judicial council shall select between them by a simple majority, 281
 and the decisive reasons are to be explained in an opinion.⁴⁹ 282
- (iii) When the given court's judicial council has prepared the final ranking of the 283
 candidates, it shall forward it to either the President of the Regional Court, or 284
 the President of the Regional Court of Appeal or the President of the Curia. 285
 The presidents of the higher courts, as a second level forum, may accept the 286
 ranking of the judicial council, i.e., they may agree that the candidate who was 287
 considered the best one is the proper choice for the given position. However, 288
 they may also deviate from it by arguing that the second or the third best 289
 candidate should get the position. In both cases, the position of the president 290
 involved has to be forwarded to the President of the NOJ in 8 days. When 291
 arguing for the second or the third best candidate, a reasoned opinion also 292
 has to be submitted, explaining why they have changed the original ranking 293
 prepared by the judicial council.⁵⁰ 294
- (iv) The final decision in the whole application process is again the privilege of 295
 the President of the NOJ.⁵¹ There are two main options for the President of the 296
 NOJ. On the one hand, if she agrees with the ranking submitted she has to 297
 request from the President of the Republic the appointment of the candidate if 298
 he or she is not already a judge, since, formally, judges are appointed by the 299
 President of the Republic in Hungary.⁵² If the candidate is already a judge and 300
 he or she applied for a higher position, the President of the NOJ appoints him 301
 or her to this position at the given court.⁵³ 302

However, the President of the NOJ may deviate from the ranking submitted and 303
 she may recommend the second or third best candidate. The President of the NOJ 304
 has no unlimited power in the selection of the candidates: she is bound by the 305
 original ranking prepared by the judicial councils. If she does so, the President of 306
 the NOJ shall submit a reasoned opinion specifying the reasons for the deviation 307
 from the original ranking to the National Judicial Council (NJC). The NJC shall 308
 decide in 15 days. If it agrees with President of the NOJ, the candidate can be 309
 promoted or placed to the given position; if it disagrees, the President of the NOJ 310
 has three options. Firstly, she may promote the first place candidate; secondly, she 311
 may suggest a new candidate; or thirdly, she may declare the whole application 312
 process unsuccessful.⁵⁴ If the third option is taken, a new application process has 313
 to be announced.⁵⁵ 314

⁴⁹ *ibid.* 15 § (2).

⁵⁰ *ibid.* 16 § (1)–(2).

⁵¹ Or, in a very special case if the candidate applied for a position at the Curia the President of the Curia has to decide, *ibid.* 17 §.

⁵² *ibid.* 3 § (1)–(2).

⁵³ *ibid.* 18 § (1)–(2).

⁵⁴ *ibid.* 18 § (3).

⁵⁵ *ibid.* 20 §.

315 (v) Lastly, there is a remedy against the outcome of the application process. Within
316 15 days from the announcement of the appointment of the successful candidate
317 in the Official Journal, the other candidates who applied for the same position
318 may object to the outcome if they believe that the official requirements of the
319 appointment were not met. The objection shall be submitted to the President of
320 the NOJ and she shall forward it to the Budapest Administrative and Labour
321 Court. This court has an exclusive jurisdiction on these claims, and it can only
322 check whether or not all the official criteria as they are incorporated in the Act
323 were respected during the application procedure.⁵⁶

324 Finally, having introduced the bodies involved as well as having given an
325 overview of the procedure, the standards of selection should be analyzed. The law
326 sets forth an exhaustive list of all those points that might be evaluated when deciding
327 on each candidate.⁵⁷ This list contains 14 components that should be assessed by the
328 JCs. Basically, three of them are of a clear subjective nature (the opinion of the
329 judicial division at a given court if the candidate applies for a higher judicial
330 position, the result of the above-mentioned entry exam, and the opinion of the
331 judicial council before the hearing is made). One of them – the evaluation of the
332 candidate's previous work – is partially subjective, since the judicial council cannot
333 deviate from the candidate's last periodic work assessments; that is, the subjective
334 element come from the side of those who made the last assessment not from the
335 judicial council making the selection.⁵⁸ The other eight are relatively objective,
336 meaning that they are based on objective factors such as work experience, degrees
337 or other qualifications. As for the time element, the length of the candidate's previous
338 legal or judicial practice has to be taken into account. Other standards of evaluation
339 can be the result of the professional legal examination; a PhD or other doctoral
340 degree; other professional legal degrees (including MAs, LLMs, or specialized
341 secondary degrees); foreign study experience; knowledge of foreign languages;
342 scholarly publications, participation in the compulsory and elective courses provided
343 by the National Judicial Academy; and other relevant professional experience, for
344 instance lecturing in a law school.

345 In sum, the appropriateness of future judges is evaluated from various directions
346 in Hungary. First of all, there is a subjective dimension. On the one hand, the candi-
347 dates have to prove their competence before different bodies. The entry exam mea-
348 suring the necessary skills is conducted in front of a committee composed of official
349 experts (psychologists etc.), while the given judicial council also has to check each
350 candidate from a professional point of view. On the other, the evaluation of others,

⁵⁶ *ibid.* 21 §.

⁵⁷ *ibid.* 14 (4) §.

⁵⁸ See: *ibid.* 68 §. This Article requires that the work of judges in a permanent post has to be assessed in the third year following the appointment, then in each subsequent 8 years this assessment is to be repeated. This periodic assessment is ordered by the president of the given court, while it is carried out by the head of the competent chamber or a judge nominated by her or him (70–71 §)

mostly colleagues, also are of a clear relevance, for instance the opinion of the judicial division or the previous employer. 351
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Secondly, the professional requirements – as they are confirmed by official documents provided by various national or international institutions – are also rather demanding. If a candidate has a PhD degree in law, or at least he or she has special, secondary legal qualifications other than the basic law degree, it is a clear advantage. Additionally, life-long learning activities, such as participation in the program of the Judicial Academy, and academic publication activity, may also be assessed positively. Lastly, and it might be the most promising point on a comparative scale, either foreign studies, work experience or foreign language skills are also to be evaluated. That is, the candidates are more or less ‘forced’ by this selection system to have a broader view than a strictly national understanding of law, and this may have positive repercussions for the functioning of the whole judiciary in the longer run. 353
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2.2 The Selection of the Members of the Constitutional Court 365

Certain features of the process for the selection of CC justices might be striking when comparing them to the selection procedure for ‘ordinary’ judges. As a general introduction, partly explaining these differences, two points should be highlighted in order to better understand the role of the CC in the recent Hungarian legal culture. Firstly, the CC – created by Act XXXII of 1989 in order to introduce judicial review, and at work since 1 January 1990 – was one of the main public actors during the first 10 years of the post-Socialist transition process. Under the presidency of László Sólyom (1990–1999), who was also the President of the Hungarian Republic from 2005 to 2010, certain decisions of the CC had a high social and political relevance.⁵⁹ Therefore, it has not been simply regarded as a distant court dealing with abstract legal principles and problems, but as a body making important social and other policy choices. That is, its activity has always been interpreted in a political context, and, as a natural consequence, the political sphere regarded it as a potential playground. 366
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Secondly, as was the case for the ordinary judiciary, the legislator introduced a new model of constitutional justice from 2010 in many respects, and it also changed, inter alia, the rules for the selection of CC justices. These reforms reflected some points of the earlier criticism, but the reforms themselves have also been criticized as they are in favor of the actual government. 380
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⁵⁹Perhaps the most famous examples of this kind of CC decisions are: 23/1990 (X 31) AB határozat (annulling the death penalty on the basis of the value of human life and human dignity); 43/1995 (VI 30) AB határozat (annulling some parts of the Act on economic stability [Act XLVIII of 1995] and introducing serious restrictions in the field of maternity and family allowances in order to improve the budgetary balance).

385 Partly due to the earlier criticism and partly to the strongly political nature of
386 the work of the CC, the statutory eligibility criteria for CC justices are not as sophis-
387 ticated as they are for ordinary judges; they rather reflect a minimal consensus on
388 the most necessary requirements. Strictly speaking, only one subparagraph of one
389 article in the relevant law deals with the question of eligibility. Needless to say, this
390 approach greatly differs from that of the law regulating the selection of ordinary
391 judges. The legislator provided only that the potential candidates must have no
392 criminal record; they shall be Hungarian citizens; they shall have a degree in law;
393 and they shall be older than 45 years.⁶⁰ Theoretically, any Hungarian lawyer who is
394 older than 45 years meets these requirements.

395 As for professional competence, the law specifies a qualitative requirement. The
396 candidate shall have an outstanding knowledge of jurisprudence, meaning that he or
397 she is a professor of law or he or she holds the title Doctor of the Hungarian Academy
398 of Sciences in the field of legal studies. Additionally, in case the candidate has no
399 such a professorship or doctoral degree proving this outstanding legal background,
400 he or she has to have at least 20 years of professional legal experience.⁶¹

401 As for integrity, some political concerns are addressed by the legislator; however,
402 not as absolute prohibitions, as in the case of the ordinary judiciary. Strictly
403 speaking, the rules of integrity for CC justices are not as demanding. The rules
404 address the time dimension of this problem, since if a candidate used to be a member
405 of the government, a leading functionary of a political party, or the holder of a major
406 governmental position, he or she cannot be appointed to the CC in the following
407 4 years.⁶² Furthermore, in order to avoid other conflicts of interests, CC justices
408 shall refrain from any other governmental activities (at both national and subna-
409 tional levels) and business positions.⁶³ Thus, other professional activities are gener-
410 ally prohibited, and there is only one very limited exception: the academic sphere.
411 Holding an academic position or a professorship, provided that it does not impede
412 the CC justice's judicial tasks, is expressly allowed by the law.⁶⁴ The fact that a
413 majority of CC justices have in some way been linked to legal education or the
414 academic sphere since the birth of the CC may properly explain this exception.

415 In the selection process of CC justices the Hungarian Parliament is the decisive
416 actor. This is not surprising: the political nature and relevance of the CC's work
417 implies that the political sphere intends to have as much influence over the selection
418 as possible.⁶⁵ It starts with the so-called Nomination Committee, a committee of the
419 Hungarian Parliament. It was established in the summer of 2010, and is composed
420 of 15 MPs from which 8 are currently MPs of the governing party (FIDESZ). Its

⁶⁰Act CLI of 2011 on the Constitutional Court 6. § (1).

⁶¹*ibid.* 6 § (1) c.

⁶²*ibid.* 6 § (4).

⁶³*ibid.* 10 § (1).

⁶⁴*ibid.*

⁶⁵For a comparative and prospective analysis see K Kelemen, 'Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model for Hungary' (2013) 54 *Acta Juridica Hungarica* 5.

main task is to propose candidates to a vacant CC justice position, if any.⁶⁶ Without the support of at least 8 MPs, an appointment process cannot start, and in the current context, when the Fidesz MPs are the majority of this committee, someone may only become a CC justice candidate with the support of the governing party.

Another committee of the Parliament also plays a certain role in the selection process. The candidates shall be heard by the parliamentary committee of constitutional affairs, which has to formulate an opinion on the eligibility of the candidates. However, this opinion has only an informative value for the Parliament's plenary session, since it is not binding.⁶⁷

Lastly, the final decision is made at the plenary session of the Parliament by a qualified majority. Currently, the government party is capable of passing any Act requiring a qualified majority alone. Thus, only those candidates whose political preferences and position do not openly contravene the government's public policy choices have any chance to be nominated.

3 Closing Remarks 435

One may try to reflect upon the above from various perspectives. In order to provide a more intelligible view of the Hungarian system of judicial recruitment than the simple presentation of the rules this report will discuss four relevant points that may contribute to better understanding.

Firstly, the differences in the selection of CC justices and in the selection of ordinary judges are striking. In the selection of ordinary judges, professional requirements prevail, while the nomination of constitutional justices is deeply pervaded by political motives. That is, one may argue that the actual regulation of the selection of constitutional justices provides a lot of room to make a decision on the basis of the political preferences of the candidates, and professional considerations may only come up as secondary components, if any. Obviously, it does not at all mean that candidates having an excellent profession record cannot be nominated, but it implies that political preferences can seriously distort the selection process as whole. Compared to this, and taking into account the fact that political activity is generally prohibited for judges, the selection procedure of ordinary judges seems to be lacking any political considerations, that is, it has a clear professional character. In sum, although constitutional justice is always about public policy choices and not simply about pure legal questions, a system of selection for constitutional justices having a considerably stronger professional character would be welcome. It may even improve the popular image of the CC, since institutions being closely aligned with the political sphere undoubtedly have a generally negative reputation in Hungarian public opinion.⁶⁸

⁶⁶Act CLI of 2011 on the Constitutional Court 5 § and 7 § (1).

⁶⁷ibid, 7 § (2).

⁶⁸For a detailed analysis see: Z Boda and G Medve-Bálint, 'Institutional trust in Hungary in a comparative perspective: an empirical analysis' in L Füstös and I I Szalma (eds), *European Social Register 2010: Values, Norms and Attitudes in Europe*, 184 (Budapest, MTA PTI – MTA SZI,

457 Secondly, another striking feature of the Hungarian selection system is the lack
458 of lay participation in the selection of either constitutional justices or ordinary
459 judges. Judges are nominated on the basis of a professional evaluation that is made
460 by judicial councils of the relevant courts and, in the final instance, the decision is
461 made by the head of the administration of the judiciary, the President of the NOJ,
462 since the President of the Republic appoints the future judges on the basis of her
463 proposal. For constitutional justices, professional politicians in the Parliament have
464 the final say. Even though civil society may form an opinion on the competence of
465 the candidates, its voice is usually disregarded when making the final decision.
466 Needless to say, this absolute lack of lay participation in both streams of judicial
467 selection is clearly disadvantageous, because it makes it impossible to make the
468 judiciary empathize more with the outer world, that is the society in which and
469 for which it works. If candidates are not evaluated, or at least tested, during the
470 selection process by non-professionals representing the plurality of society's values
471 and interests, openness and sensibility towards non-professional and social points of
472 view cannot really be expected from the future judges. Obviously, this does not
473 mean that the candidates have to be selected by non-professionals, but some kind of
474 lay participation in the selection procedure could be a key point in developing the
475 judges' better social understanding.

476 Third, it should also be mentioned that the selection of constitutional justices has
477 changed in an unfavorable way. Prior to the changes in 2010, justices with varying
478 political preferences entered the CC in a relatively balanced manner. This was due
479 to the fact that no party had a qualified majority, and therefore they necessarily had
480 to cooperate. This cooperation led to decisions on future justices on an equal basis.
481 However, since presently the governing party has a qualified majority, this has
482 paved the way to the selection of justices whose political and public policy
483 preferences do not substantially differ from those of the government.⁶⁹ Because of
484 that, all the new justices nominated following the year 2010 have come from either
485 the political or the intellectual background of the government party, so the represen-
486 tation of other political visions – leftist or liberal – is seemingly unbalanced in the
487 recent cadre of justices. This is a rather unfavorable development, since the CC
488 has become more and more unable to represent the political plurality of Hungarian
489 society and its consequences in public policy choices.

490 Last, one should admit that the selection of ordinary judges is rather sophisticated
491 from a professional aspect. The criteria are manifold and multi-dimensional, and
492 they are also demanding. Future judges need both good professional and academic
493 records as well as general human and professional skills. What is striking at this
494 point is that Hungarian legal education is partially unable to prepare law students to

2010); Z Boda and G Medve-Bálint, 'Does Institutional Trust in East Central Europe Differ from Western Europe?' (2014) 3 *European Quarterly of Political Attitudes and Mentalities* 1.

⁶⁹For a detailed analysis see: Z Szente, 'The Decline of Constitutional Review in Hungary – Towards a Partisan Constitutional Court?' in Z Szente, F Mandák, and Z Fejes (eds), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development – Discussing the New Fundamental Law of Hungary* (Paris, L'Harmattan, 2015), 183.

meet such requirements. Skill development and practical formation are generally absent from the curricula of Hungarian law schools, although some progress has taken place in the last 10 years.⁷⁰ Therefore, the potential candidates should familiarize themselves with these requirements after graduation, mainly during their first years of work as an assistant at a court.

In sum, although the selection of judges is relatively sophisticated in a professional sense and the appointment of CC justices also has its own political logic, neither the sociological nor the political diversity of society is properly reflected when making these decisions.⁷¹ Only professional records, skills and general human values – and political commitments for constitutional justices – count in the eyes of the legislator and in the everyday work of various selection committees. Social and political diversity is still waiting to get a proper place in these procedures.⁷²

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⁷¹Interestingly, Mátyás Bencze, an expert in judicial studies, suggests that the potential judge candidates should spend a certain period in other fields of expertise (for instance: solicitor or prosecutor) since it could improve their sensitivity and understanding toward other standpoints (M Bencze, 'A bírósági rendszer átalakításának értékelése' MTA Law Working Papers, 2014/41, available at http://jog.tk.mta.hu/uploads/files/mtalwp/2014_41_Bencze.pdf).

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