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Assessment of the Amended Hungarian Laws on the Judiciary

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We live in such times in Hungary nowadays that it has become almost commonplace that the developments concerning Hungarian constitutionality get harsh criticism from the Venice Commission, a body deemed authoritative in constitutional matters throughout Europe. Of the six opinions issued by Venice Commission in its systematic review of the constitutional changes in Hungary, the opinion criticising the radical transformation of the organization and administration of courts was one of those which created the greatest stir.[1] The extent of the criticism is demonstrated by the fact that this was the only opinion of the Venice Commission which induced the Hungarian Government to amend the concerned laws. Minister of Administration and Justice, Tibor Navracsics submitted a Bill to the Parliament as early as March 2012 on the amendment of the new Acts of Parliament on the organisation and administration of courts and on the legal status of judges.[2] According to the Minister's parliamentary exposé, the aim of the proposed amendment was explicitly to comply with the requirements set out by the Venice Commission.

In contrast with the pace of legislation that has become the norm in the last two years, the Parliament was not in a hurry to adopt the amendment: the Venice Commission's opinion was published in February 2012, while the Bill was adopted only in the beginning of July 2012,[3] a full five months later. It is worth comparing this timeframe with that required for the adoption of the two new cardinal laws, which consisted of more hundreds of articles and entirely re-regulated the justice system; in the case of the cardinal laws, 38 days have passed between the submission of the relevant Bills and the final vote on them, while getting to the final vote on the amendment took 108 days from the submission of the Bill, even though the amendment was comparatively insignificant (it affected approx. 30 articles).

National and international criticisms of the new Hungarian justice system, among them, the opinion of the Venice Commission, has centred on the system of the administration of courts, in particular the imbalance of power, the centralization of governance in the hands of one individual, and on the new administrative powers of the President of the National Judicial Office (NJO), which effectively constitute a violation of the right to a fair trial. Thus, in order to ensure that the new court system of Hungary complies with the international minimum in terms of the

[1] CDL-AD(2012)001, 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, adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012). Hereafter referred to as: opinion of the Venice Commission. Available at: http://www.venice.coe.int/docs/2012/CDL-AD(2012)001-e.pdf.

[2] Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: "AOAC"); Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter: "ALSRJ").

[3] Act CXI of 2012 on Amending Act CLXI of 2011 on the Organisation and Administration of Courts and Act CLXII of 2011 on the Legal Status and Remuneration of Judges.

rule of law, it is necessary to eliminate the centralized character of the administration of courts and to establish rules protecting the right of citizens to an impartial and fair court procedure. The Hungarian Government's response shall be assessed in the light of these factors

Even though the Government was apparently successful in convincing the public that it had complied with the requirements set out by the Venice Commission and enacted thorough changes, the truth is that the amendments on the whole are insufficient and cannot be regarded as a conceptual modification of the reformed judicial system, which, according to the Venice Commission, "threatens the independence of the judiciary"[4] as a whole. By transferring some of the powers from the President of the NJO to the National Judicial Council (NJC), the amendment has indeed diluted the concentration of power with regards to the administration of courts, but the system still remains centralized. It is also true that due to the amendment, the hand of the President of the NJO is less free than before in terms of transferring cases and judges, but sufficient guarantees of enforcement of the right to a fair trial have not been put in place. These statements will be substantiated in the detailed analysis below.

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1. The Fundamental Law does not ensure the basic guarantees of judicial independence

In its opinion on the Fundamental Law of Hungary, the Venice Commission regretted that the Fundamental Law "only establishes very general framework for the operation of the judiciary in Hungary, leaving it to a cardinal law to define the detailed rules for the organisation and administration of courts, and of the legal state and remuneration of judges",[5] which are intended to ensure the constitutionality of the courts' functioning. In its opinion issued in February 2012, the Venice Commission reinforced that "some principles, as well as the general structure, composition and main powers of the [NJC] and [NJO], should have been developed"[6] in the Fundamental Law itself. Due to the lack of clear provisions enshrined in the Fundamental Law, the constitutional protection of judicial independence remains uncertain. The latter is well-demonstrated by the example of the Constitutional Court's recent decision on the "forced retirement" of judges,[7] where the Constitutional Court could derive the unconstitutionality of removing judges only from the rather vague concept of the "historical constitution".

Assessment of the amendment

The amendment does not respond to the Venice Commission's remarks at all in this respect. The Government's complete disregard for the Venice Commission's suggestions has resulted in the continuing omission from the Fundamental Law of those provisions which would in the long run and comfortingly guarantee the independence of the judiciary and the stability of the court system.

2. The legal status of the President of the NJO and the lack of judicial self-government

According to the Venice Commission's viewpoint, in the field of administration, including the administration of judges, a long term in office requires the introduction of proportionate checks

[4] Opinion of the Venice Commission, paragraph 117.
[5] CDL-AD(2011)016, Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011), paragraph 102 . Available at: http://www.venice.coe.int/docs/2011/CDL-AD%282011%29016-e.pdf.
[6] Opinion of the Venice Commission, paragraph 20.
[7] Decision 33/2012. (VII. 17.) of the Constitutional Court.

and balances. However, the Venice Commission had "strong doubts that this control is sufficiently provided"[8] by the new cardinal laws governing the President of the NJO, who is elected for nine years by the Parliament.

Assessment of the amendment

The amendment abolished the former, unconstitutional rule allowing the President of the NJO to remain in office after his or her term has ended until the new President of the NJO has been elected by the Parliament. As a result, the critical situation in which the President of the NJO continues to exercise his or her powers after the expiration of his or her nine-year term without democratic legitimacy may not occur in the future. At the same time, it is inexplicable why Tibor Navracsics (MP of the Fidesz and Minister of Administration of Justice) has withdrawn the amendment he himself proposed, which would have excluded the re-election of the President of the NJO.[9] It is incomprehensible why he would decrease the guarantees ensuring the independence of the President of the NJO, even though he originally stated that this additional amendment would serve the aim of complying with the suggestions of the Venice Commission.

Since further rules on the legal status of the President of the NJO are not affected by the amendment, on the whole it does not solve the constitutional problem created by the situation in which one official may exercise important powers for an extremely long period of time without any meaningful control. This control would be fulfilled by a "real" judicial self-governance, but the amendment fails to endow the NJC with the necessary powers and conditions. Since the President of the NJO is elected by the Parliament instead of the judges, its decisions may not be regarded as the "embodiment" of judicial self-governance.

3. The dependence of judges and the NCJ upon the President of the NJO

Even though the Venice Commission acknowledged in its opinion that the President of the NJO is accountable to the NJC to a certain degree, the Commission also clarified that this control is limited, since the NJC and its members – being exclusively judges – are in many ways dependent on the President, whose activity the NJC should supervise. This dependence is not eliminated by the recent amendments.

Assessment of the amendment

<u>The dependence of judges upon the President of the NJO</u>

I. The amendment grants the NJC a seemingly unrestricted right to veto the decision of the President of the NJO or – in case of applications to the Curia – the President of the Curia in deviating from the established ranking (shortlist) of candidates for judicial positions, in other words, in cases when the President of the NJO would like to appoint a second- or third-ranked candidate [ALSRJ, Articles 18 (3)–(4) and 19; AOAC, Article 103 (3) c)–d)]. In the appointments of court leaders the NJC has a right to veto only if the person the President of the NJO desired to appoint did not receive the support of the majority of the judicial body entitled to make a recommendation for appointment ("reviewing board"). However, the President of the NJO and the President of the Curia are required to provide their reasons for deviating from the recommendations shall be provided in every case [AOAC, Article 132 (5)–(6)]. Accordingly, the discretionary power of the President of the NJO in terms of appointing judges and judicial leaders is theoretically eliminated by the amendment.

However, the amendment introduces the possibility that the President of the NJO or the President of the Curia may also declare the call for applications to judicial positions unsuccessful,

[8] Opinion of the Venice Commission, paragraph 30.
[9] Proposed amendment T/6393/18.

which renders the NJC's disapproval and powers moot in this respect. In other words, if the President of the NJO does not agree with the decision of the NJC regarding deviation from the shortlist, he or she may easily impede the first-ranked candidate from filling the position by declaring the call for applications unsuccessful. Furthermore, the President of the NJO is not even obliged to provide reasons for doing so. [ALSRJ, Articles 18 (4), 19 and 20]

II. In its opinion, the Venice Commission stated that the "irremovability of judges is an important aspect of their independence".[10] The threat of being transferred from one court or tribunal to another "might be used to exercise pressure on [judges] and to attack their independence".[11] Therefore, transfers may be permissible only in exceptional cases and with the consent of the judge (except in cases of disciplinary sanctions or reform of the organisation of the judicial system). However, the original text of Article 31 of the ALSRJ explicitly entitled the president of the tribunal and of the NJO to re-assign judges without their consent to a judicial position at another court on a temporary basis out of "service interests or for the promotion of his or her professional development" (every three years for a maximum of one year). The ALSRJ also made it possible to transfer judges because of the re-organization of courts, and set out that if the judge does not agree to the transfer, he or she is automatically "exempted from office" for six months and his or her service relationship is terminated [ALSRJ, Articles 34, 90 j) and 94 (3)]. The latter rule was abolished by the amendment, but the president of the tribunal or of the NJO still have the right to transfer judges to another service post (to another court) without their consent, for a maximum of one year, every three years, in order to ensure "the even distribution of caseload between courts" (ALSRJ, Article 31). The precondition of "ensuring the even distribution of caseload between courts" is not any more clear-cut than the former term of "service interests"; thus, the President of the NJO still has wide discretion and too many possibilities in terms of transferring judges.

III. The amendment created the possibility for judges to submit a constitutional complaint to the Constitutional Court against regulations issued by the President of the NJO, if relevant conditions set out by the Constitutional Court Act prevail. Furthermore, judges may turn to administrative and labour law courts to dispute the decisions of the President of the NJO affecting their service relationship, reached in the President's role regarding matters of human resources, provided that the question does not fall within the jurisdiction of the service courts (AOAC, Article 77/A).

Introducing possibilities for a remedy on behalf of the judges strengthens the control over the President of the NJO to a certain extent, and at the same time it decreases the defencelessness of judges before the President of the NJO. However, uncertainty persists as to what extent the possibility of submitting a constitutional complaint may restrict the power of President of the NJO in reality. For example, it is remains a question whether the Constitutional Court will admit at all constitutional complaints based on the violation of judicial independence or will instead decide that these cases are not about the violation of the rights of individual judges enshrined in the Fundamental Law, but rather concern the violation of a constitutional principle, which may not serve as the basis for a constitutional complaint.

Composition of the NJC

The amendment widened the circle of those who may participate with consultation rights in the meetings of the NJC. Accordingly, in addition to the President of the NJO and the Minister responsible for justice matters, the president of the Hungarian Bar Association, the president of the Hungarian Chamber of Civil Law Notaries, the Chief Public Prosecutor, ad hoc experts invited by the President of the NJC or by those with consultation rights, and the representatives

[10] Opinion of the Venice Commission, paragraph 76.
[11] Opinion of the Venice Commission, paragraph 76.

of NGOs and other interest groups invited by the President of the NJC [AOAC, Article 106 (1)] may be present at the meetings. However, granting consultation rights to certain stakeholders does not amount to ensuring the pluralistic structure of the NJC, as strongly advocated by the Venice Commission, since those entitled to vote in the course of decision-making within the NJC are still only the judges, who are dependent on the President of the NJO.

The budgetary independence of the NJC

According to the text of the amendment, the NJC creates its budget itself, but this is in practice overruled by the provision setting out that the NJC shall agree on its budget with the President of the NJO [AOAC, 104 (1)]. The rule that the budget of the NJC appears separately within the budget of the NJO does not mean any protection from a budgetary point of view, since it does not grant the NJC the right to dispose of its own budget.

The participation of the NJO's President in the *in camera* meetings of the NJC

As a result of the amendment, the President of the NJO is no longer allowed to participate in the *in camera* meetings of the NJC. This, in principle, strengthens the autonomy of the NJC, but its affect is restricted by the fact that the NJC may decide to hold an *in camera* meeting only for certain reasons (especially for protection of secrecy or protection of inherent rights). Thus, when it is not necessary to hold an *in camera* meeting due to one of these reasons, the President of the NJO may and will be present in the meeting, which could be problematic in several cases (e.g., the debate over a regulation issued by the President of the NJO will obviously have a different character if he or she is present at the meeting).

4. The right to transfer cases – violation of the right to a fair trial

Former rules left it up to the discretion of the President of the NJO to assign a given case to any court, in order to ensure "the adjudication of cases within a reasonable period of time" [AOAC, Article 76 (4) b); Transitional Provisions of the Fundamental Law of Hungary, Article 11 (3)]. This discretionary power, which endangered the impartiality of courts, was among the powers of the President of the NJO that received the most criticism, since by exercising this right the President of the NJO could effectively influence the outcome of procedures, e.g. by "sending" politically sensitive cases to certain judges or removing such cases from their courtrooms. This danger was strengthened by the fact that Article 9 of the AOAC provided extraordinarily wide discretion for court presidents to alter the internal case distribution schedule of a given court – in other words, the method of distributing cases between the different judges – "for service interests or for important reasons affecting the operation of the court" during the course of the year.

Assessment of the amendment

First of all it should be emphasized that the amendment did not affect the rules of the Transitional Provisions of the Fundamental Law allowing the President of the NJO to reassign cases. The former situation was altered by the amendment inasmuch as instead of having total discretion, currently the President of the NJO must take into account the principles established by the NJC in the course of exercising the power of transferring cases [AOAC, Article 76 (4) b)], and the reasoning of the President's decisions shall cover the application of these principles. It is also a new development that affected parties may appeal to the Curia against the relevant decision of the President of the NJO. These developments undoubtedly restrict the President's discretion more significantly than before (under the original rules, there was no control over the President at all in this respect). However, these limitations do not suffice to preclude the manipulation of court procedures for political, economic or any other motives. As long as the transfer of cases is decided on a discretionary, case-by-case basis, the requirement of a fair trial may be violated.

Manipulation of cases can be precluded only by creating a fully-automated system – in other words, if judges and courts are appointed by virtue of legal provisions. It follows from this that the balance between the right to a lawful judge and to adjudicating cases within a reasonable time should be achieved on the level of legal norms instead of granting the President of the NJO the discretionary right to transfer cases.

Instead of eliminating the right to transfer cases, the amendment intends to improve the situation by introducing the pretence of remedy: according to the current wording of Article 63 (3) of AOAC, "affected parties to the proceedings" may appeal to the Curia against the decision on reassignment (transfer). However, the right to an effective remedy against reassignment is in reality not ensured due to the following reasons.

I. The Curia, deciding upon the appeal, does not have full review power, since it may only review compliance with the relevant legal provisions, but may not review the merits of the decisions on transfer [AOAC, Article 63 (4)].

II. Conditions for transfer, such as "extraordinary and disproportionate caseload" or "reasonable time" are not specified by the AOAC or any other laws, thus, "proving" the violation of the relevant legal provisions is hard if not impossible for the affected parties, since in the absence of exact legal conditions their arguments may be easily rebutted. Furthermore, while Article 62 (3) of AOAC sets out that data on caseload, human resources and other matters shall be included in the proposals for a reassignment of a case, there is no such requirement regarding the decision of the President of the NJO, even though only the latter one will be public. This means that affected parties must appeal against a decision which may not even cite any statistical data. (The decisions currently available on website of the NJO do not contain any concrete numbers.)

III. In addition, the principles to be established by the NJC, which should be taken into account by the President of the NJO in the course of decision-making (see above), do not qualify as legal provisions either; thus, the Curia may not examine whether they have been respected or not.

IV. The effectiveness of the remedy is further undermined by the fact that affected parties are not informed directly about the decision on transferring their cases to another court, but have only eight days to appeal after the decision is published on the Internet, and there is no possibility for an exemption in this regard [AOAC, Article 63 (3)].

Furthermore, due to the introduction of the possibility of an appeal, the same case may be transferred several times, which may result in months passing without any meaningful procedural act. The resulting increase in the length of the proceedings is in direct contradiction with the requirement of enforcing the fundamental right to a court decision within a reasonable time, even though the latter is in theory the legislative aim of the possibility of transferring cases.

The amendment does not affect Article 9 (1) of AOAC either, which enables presidents of courts to alter the internal case distribution schedule of the given court "for service interests or for important reasons affecting the operation of the court" during the course of the year. This completes the possibilities of influencing judicial work. It is true that the President of the NJO reassigns cases to courts instead of concrete judges. However, there is no guarantee that the President of the NJO will not use its powers over the president of the "receiving" court and thus force the president of the court to alter the internal case distribution schedule, through which the President of the NJO may ensure that a given case is assigned to a certain judge. (The President of the NJO appoints court presidents, controls their administrative activities, exercises employer's rights over them, may initiate disciplinary proceedings against them, etc.)