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THE VENICE COMMISSION'S OPINION ON THE INDEPENDENCE OF THE HUNGARIAN JUDICIARY

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The Venice Commission issued a new opinion concerning the Hungarian legal system on 19 March, examining two cardinal laws regulating the judiciary ([Opinion no. 663/2012](#)). This is only the first of a long series of opinions that are going to be delivered by the Venice Commission, since it received several requests of opinion at the beginning of this year. The Hungarian Foreign Minister, János Martonyi, asked the Venice Commission to provide opinions on the Hungarian cardinal laws concerning the independence of the judiciary, freedom of religion and parliamentary elections. Moreover, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe also requested the Venice Commission to provide its opinion on five further Hungarian cardinal laws, namely those concerning freedom of information, the Constitutional Court, prosecution, nationality issues and family protection.

This new opinion assesses two cardinal laws: Act CLXII of 2011 on the legal status and remuneration of judges (hereinafter: ALSRJ, its English translation available [here](#)) and Act CLXI of 2011 on the organisation and administration of courts (hereinafter: AOAC, its English translation available [here](#)). It is still based on comments by the same five scholars as

the other two opinions delivered last year (see more about these in a [previous post](#) on this blog), and also this time a delegation of the Commission had visited Budapest in order to meet and discuss with representatives of the Hungarian government, the Constitutional Court, the judiciary and NGOs. A group of Hungarian legal scholars submitted another amicus brief (available [here](#), in English), in which they offer a critical analysis of all the nine cardinal laws which will be subject of scrutiny by the Venice Commission. They state that the system of checks and balances has been diminished by the new legal framework for several reasons. According to their opinion, the shortening of the mandate of the sitting judges by 8 years and centralisation of the administration of justice in the hands of one single person, the President of the newly established National Judicial Office (*Országos Bírósági Hivatal* in Hungarian, hereinafter: NJO), violate the independence of the judiciary.

The Venice Commission has already expressed its opinion on the provisions of the Fundamental Law regulating the court system (Articles 25-28) in its [second Opinion](#) delivered in June 2011. At that time, however, the Commission did not have at its disposal the two cardinal laws which were adopted by the Hungarian Parliament on 28 November 2011. In fact, the main concern of the Commission was that the Fundamental Law established only a very general framework and contains rather vague provisions (see par. 102-104). However, already in the 621/2011 Opinion exclusively based on the new constitution the Venice Commission criticised the lowering of the judge's retirement age from 70 to 62 which "might open the way for undue influence on the composition of the judiciary" (par. 108), and wondered whether changing the Supreme Court's (*Legfelsőbb Bíróság* in Hungarian) name into Curia (*Kúria* in Hungarian) will result in the replacement of its President (par. 106). The Commission then explicitly recommended that the transitional provisions (to be adopted on the basis of the third paragraph of the Closing Provisions) "should not be used as a means to put an end to the term of office of persons elected or appointed under the previous Constitution" (par. 140).

Actually the Hungarian government promised in its official response

(available [here](#), in English) that “Hungary fully subscribes to this suggestion and assures the Commission that the drafting of transitional provisions will not be used” for this purpose. In the reality instead the contrary happened and the President of the Supreme Court was removed from office. It was made possible by Article 11 par. 2 of the Transitional Provisions (an English translation of these Provisions may be found in the [amicus brief](#)) which expressly provides for the ending of the mandate of the Supreme Court’s President with the entering into force of the new Fundamental Law. The re-appointment of the former President was then made impossible by a new requirement established by the AOAC. According to Art. 114 of this Act the President of the Curia shall be elected from among judges with at least 5 years of judicial service. The former President of the Supreme Court András Baka did not fulfil this requirement, since he had served as a judge of the European Court of Human Rights in Strasbourg for 17 years (from 1991 to 2008), and before had been a professor of law. As the Venice Commission points out, “many believe that the new criterion was aimed at preventing an individual person from being eligible for the post of the President of the *Curia*” (par. 112). The authors of the amicus brief assert that the logic of this personnel change was purely political, since Baka criticised the new laws on the administration of justice, in particular the lowering of the judges’ retirement age (see p. 65). The Venice Commission argues that there should be a rule accepting time periods that judges have spent abroad, as provided in other countries (par. 113), and explicitly states that the new provision “might be understood as an attempt to get rid of a specific person” and “can operate as a kind of a sanction of the former president of the Supreme Court” (par. 115).

As to the lowering of the compulsory retirement age for judges, in the new Opinion the Venice Commission examines the question more extensively and arrives at the same conclusion, so that the new regulation raises concern. In particular, the Commission “does not see a material justification for the forced retirement of judges”, and “the lack of convincing justifications may be one of the reasons for which questions related to the motives behind the new regulation were raised in public”

(par. 104). It does not accept the argument made by the Hungarian government that a higher number of younger judges with “up-to-date qualifications” increases the performance of the judiciary since they are expected to be more suitable to carry a heavy workload as well as more ambitious and flexible. According to the Commission this assertion is not sufficiently proven (par. 105). As the amicus brief points out, the result of the new regulation is that 236 judges have to retire early, including eight of the 20 county court presidents, two of the five court of appeal presidents and 20 of the 80 Supreme Court judges (see p. 63). The legal scholars also find it very problematic that in June 2011 the Parliament suspended all appointment procedures until the entering into force of the new constitution and the new cardinal laws. The Venice Commission shares these concerns and points out the contradiction of this “moratorium” on judicial appointments. According to this provision the vacancies created by judges retiring in the second half of 2011 could not be filled in immediately, but new judges could be appointed only after 1 January 2012, once the new rules entered into force. It is quite clear for the Venice Commission that the intention was “to ensure that all new appointments, including numerous appointments of court leaders, made under the new system, giving the newly elected President of the National Judicial Office the essential role in these appointments” (par. 106).

Indeed, the other main concern expressed by the Venice Commission regards the powers of the President of the newly created NJO. The Commission asserts that “in none of the member states of the Council of Europe have such important powers been vested in a single person, lacking sufficient democratic accountability” (par. 26). The Opinion proposes some alternatives that would have been more suitable to solve the shortcomings of the pre-existing system which was allegedly unable to address effectively certain systemic problems because of the very infrequent meetings (once a month) of the National Council of Judges (*Országos Igazságszolgáltatási Tanács* in Hungarian). According to the Venice Commission a reform could have been done, for example, by exempting the judicial members of the Council from other duties or by replacing representatives of Parliament by advocated and civil society

(who remain completely outside in the new system), instead of concentrating large competences in the hand of one individual person, the President of the newly established NJO (par. 27). In the Commission's opinion her term of office (9 years) is too long and the rule that provides for the automatic renewal of her appointment if there is no two-third majority for a new president in the Parliament is very problematic, given that the current government holds a two-thirds majority of Parliament and the first President of the NJO was indeed elected with the votes of the governing parties only. What the Venice Commission does not mention in its Opinion, probably because they do not want to go into political issues, but is a well-known fact for anybody who follows the Hungarian news, and is expressly stated by the authors of the amicus brief, is that the first occupant of the office is the wife of one of the authors of the new Fundamental Law, a politician of the governing political party (see p. 66).

Besides the term of office and its automatic renewal in absence of a two-third majority, a serious concern expressed by many in relation to the President of the NJO and shared by the Venice Commission is its "overwhelmingly strong position" (par. 33). Art. 76 AOAC contains a very long list of powers conferred to the President of the NJO which is not even complete, as the ALSRJ provides a number of additional competences. The complete list is composed of 65 items, among which the right to initiate legislation concerning courts (art. 76, par. 1, point d) AOAC) that, according to the Venice Commission, contradicts Art. 65 AOAC, which describes the duties of the President of the NJO as administrative, managerial and supervisory (par. 35). In the Commission's opinion the main problem is that many of these powers are closely related to the position of the judge who makes the decision in individual cases, like the right of transferring cases to another court, her strong role in judicial appointments and influence on the internal structure of the judiciary (art. 76, par. 5-6, AOAC).

The Venice Commission deals with other aspects of the two cardinal laws as well, like the accountability of the President of the NJO, the composition and powers of the National Judicial Council (*Országos Bírói Tanács* in Hungarian), the appointment of judges and court leaders, the role of court secretaries and the allocation of cases. The Opinion issued in March 2012

concludes clearly that “the reform as a whole threatens the independence of the judiciary” and “introduces a unique system of judicial administration, which exists in no other European country” (par. 117). For the Venice Commission the two Hungarian cardinal laws “not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to fair trial under Article 6” of the European Convention of Human Rights (par. 120).

On 14 March, a few days before the publication of the 663/2012 Opinion and based on its draft, the Hungarian government informed the Venice Commission that it was willing to introduce amendments to the two cardinal laws (available [here](#)). The 663/2012 Opinion refers to it, but does not take it into consideration, because it had no time to examine the proposals (par. 122).

The provision applies also to the mandate of the President and members of the National Judicial Office.

It is provided for by Art. 9 of Act no. CXXXI of 2011 amending the former Act on the legal status and remuneration of judges (Act no. LXVII of 1997). The title of this Act is “transitional rules on the appointment of judges aiming at guaranteeing the conclusion of procedures within a reasonable time”. Its text is available [here](#) (in Hungarian).

The politician in question is József Szájer, currently member of the European Parliament.

According to the Venice Commission this duty contradicts also Article 6, par. 1, of the new constitution granting the right to initiate legislation exclusively to the President of the Republic, the Government, a parliamentary committee and a member of the Parliament. However, on this point the Commission may not be right, because Art. 6, par. 1 does grant this right to the above mentioned organs, but does not make reference to exclusivity. It simply rules that they “may propose bills” (or,

according to a different translation, “may initiate the adoption of Acts of Parliament”).