Hungarian Helsinki Committee

EÖTVÖS KÁROLY POLICY INSTITUTE

HUNGARIAN CIVIL LIBERTIES UNION HCLU

# Analysis of the proposed amendment of the cardinal laws on the legal status of judges and the organisation and administration of courts in Hungary in light of the opinion of the Venice Commission

27 April 2012

In our earlier analysis on the new cardinal laws providing for the operation of the justice system of Hungary we considered the adoption of these cardinal laws a "tragedy" in light of the principle of the rule of law.[1] We sought to draw the attention of the general public to the fact that these cardinal laws – presented as a reform by the governing majority – try to make the operation of the judicial system faster and more efficient, but in the meantime they eliminate the institutional safeguards of judicial independence, which is the ultimate guarantee in terms of the principle of the rule of law. This criticism was rejected and was once again claimed to be ill-founded by the Government[2] and it was stressed that "the Hungarian reform of justice matters comes up to the expectations also in international comparison, and the new regulation does not violate judicial independence, not even to the smallest extent."[3] However, the newest opinion of the Venice Commission concerning Hungary does not support the standpoint of the governing majority of Hungary in this case either.

The Venice Commission, being the Council of Europe's advisory body on constitutional matters, has thoroughly examined the new Hungarian rules on the organisation and administration of courts and on the legal status of judges. The Venice Commission, which aims to uphold the three underlying principles of Europe's constitutional heritage, democracy, human rights and the rule of law, voiced harsh criticism in its opinion dated March 2012,[4] stating that it considers the new

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[1] Hungarian Helsinki Committee – Hungarian Civil Liberties Union – Eötvös Károly Institute: *Opinion on the Acts of Parliament on Courts, Judges and the Prosecution Service in Hungary*, February 2012. Available at: http://helsinki.hu/wp-content/uploads/NGO_Analysis_on_New_Hungarian_Laws_Concerning_Courts_and_Prosecution_2012.pdf, http://tasz.hu/files/tasz/imce/2011/ngo_analysis_on_new_hungarian_laws_concerning_courts_and_prosecution_2012.pdf.

[2] See: http://www.fidesz.hu/index.php?Cikk=176804, http://www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=128&p_felsz=22&p_szoveg=&p_felszig=22, http://hvg.hu/itthon/20111103_repassy_igazsagszolgaltatas.

[3] See the parliamentary speech of Róbert Répássy, official of the Ministray of Public Administration and Justice: http://www.parlament.hu/internet/plsql/ogy_naplo.naplo_fadat?p_ckl=39&p_uln=128&p_felsz=22&p_szoveg=&p_felszig=22. See also the statements of Bence Rétvári, MP of the KDNP, ministry official: http://www.hirado.hu/Hirek/2011/11/03/09/Repassy_nem_csorbul_a_biroi_fuggetlenseg.aspx, http://www.fidesz.hu/index.php?Cikk=176804.

[4] 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

Hungarian system of the administration of justice fundamentally unacceptable. The Venice Commission's almost 30-page long opinion concludes after expressing serious concerns regarding certain elements of the regulations that "the reform as a whole threatens the independence of the judiciary."[5]From the standpoint of international comparison, the Venice Commission highlights that the cardinal laws introduce "a unique system of judicial administration, which exists in no other European country."

The Government has initiated an amendment of the two cardinal laws in question, apparently as a result of the Venice Commission's opinion.[6] However, this governmental response is not comforting at all. First, the Bill submitted by the Government to the Parliament reacts only partially to the detailed criticism as set out by the opinion of the Venice Commission; thus, as presented in the analysis below, many suggestions of the Venice Commission remain without any legislative response. However, it is even more important to stress that rephrasing individual rules of the two cardinal laws does obviously not eliminate the conceptional problems of the regulation.

The Government handles the opinion of the Venice Commission as if it would only question the adequacy of certain legal provisions and as if the cardinal laws would otherwise be based on an adequate regulatory concept. However, the opinion of the Venice Commission points out conceptional problems regarding the new system, which cannot be eliminated by correcting a few obvious failures of the cardinal laws. In order to establish regulations complying with European standards, the legislator should re-think the aim and principles of the regulation, and new legal provisions should be set up afterwards, on the basis of a new, rephrased concept. As mentioned above, the Venice Commission concluded in its opinion that the current reform as a whole "threatens the independence of the judiciary."

The Hungarian Government has to realize that the basic concept of the regulation is a mistake and does not comply with the general European principles of constitutionality. The most important fault of the new regulation is that it does not look at judicial independence as an unavoidable underlying principle of any system based on the rule of law. Accordingly, the new rules do not protect judicial independence by establishing guarantees and the power concentrated in the hands of the head of the administration of courts is not counterbalanced or made controllable. It follows from this approach that the amendments proposed by the Bill of the Government do not provide any substantial progress in terms of the independent operation of the judiciary. Mosaic-like changes are not capable of handling systemic problems. For example, taking away a few competences from the President of the National Judicial Office (NJO) does not substantially restrict the powers concentrated in his or her hands. Such an amendment will be successful only if cutting back competences goes hand in hand with widening the autonomy of the National Judicial Council (NJC), increasing the accountability of the President of the NJO, widening the scope of the Preisdent's political liability for his or her decisions and the scope of the remedies against the President's decisions.

It is also clear that the deficiency in legitimacy pointed out by the Venice Commission, flowing from the circumstances under which the cardinal laws were adopted, may not be rectified by amending individual legal provisions. Related concerns include the speedy manner in which the laws were adopted and the lack of adequate consultation with the opposition and with civil

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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.

[5] Opinion of the Venice Commission, § 117.

[6] Bill T/6393 on the Amendment of Act CLXI of 2011 on the Organisation and Administration of Courts and Act CLXII of 2011 on the Legal Status and Remuneration of Judges. Hereafter referred to as: Bill.

society.[7] These deficiencies can only be rectified by beginning the legislative process anew. The Bill submitted by the Government does not even attempt to address problems related to the circumstances surrounding the adoption of the relevant laws.

Neither is amending the cardinal laws in itself an adequate response to the Venice Commission's important observation that some issues requiring regulation on a constitutional level were not established on the adequate level of regulation.[8] In line with the opinion of the Venice Commission, we believe it necessary to include rules constituting constitutional guarantees with respect to courts in the Fundamental Law, since provisions enacted on a lower regulatory level may not adequately guarantee the independence of the judiciary and the stability of the court system. Supplementing the Venice Commission's opinion, we would like to add that only rules aimed at guaranteeing constitutionality in the long run should be included in the constitution. Provisions in service of the actual interests of the ruling government should not be included in the constitution; this is in direct opposition to how the governing majority proceeded in the case of the Transitional Provisions of the Fundamental Law. (Certain rules were included in the Transitional Provisions presumably in order to ensure that the Constitutional Court would not be in the position to review the constitutionality of these rules.[9])

If the Hungarian Government does not fully comply with the requirements set out by the Venice Commission, there may be unpredictable consequences which extend beyond mere declarations of international experts and political bodies against the new regulation and the new system. The independence of the judiciary and guaranteeing fair trials are indispensable criteria on the scale of values created by the rule of law, and their violation affects the whole legal system. Through their adjudication activities, courts guarantee that fundamental freedoms and other rights prevail and that public administration operates in a lawful way. These functions are endangered even if judicial independence is only seemingly threatened and political will does not find its way to judges adjudicating cases. Any display of force by governments aimed at the judicial branch – even if it does not affect the adjudicating activities of judges directly – creates an environment in which both judges and the parties seeking justice before courts may rightfully assume that judges are under political pressure. This may shake the trust of the general public in the independence of the judiciary and the impartiality of judicial procedures. It is an even more serious situation if party politics actually infiltrate the operation of courts, since this leads to immediate anomalies: courts will seek to serve the governmental will instead of doing justice – numerous examples may be cited in this regard from Hungarian history. This may result in a total loss of confidence in the court system. Sacrificing the independence of the judiciary and the public's trust in it may not be justified by any decent political goal.

The Government should address all the concerns of the Venice Commission in a satisfactory manner. The current proposed amendments contemplate only partially the changes required by the Venice Commission. Furthermore, rewriting individual provisions of the relevant laws may not rectify conceptional problems undergirding these laws. In order to make it clear in what aspects the legislator fails to provide responses to the Venice Commission's criticism, we analyze below the opinion of the Venice Commission and the amendments included in the Bill. We would like to emphasize in this respect that the suggestions of the Venice Commission detailed below should be used to create new laws with the intention of fully ensuringjudicial independence and the right to a fair trial, instead of merely amending the current laws which are based on a fundamentally flawed concept.

[7] Opinion of the Venice Commission, § 9.
[8] Opinion of the Venice Commission, § 20.
[9] This is also mentioned by the Venice Commission in § 90 of its opinion.

## Detailed analysis

The conclusion of the Venice Commission's opinion on Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: AOAC) and Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter: ALSRJ) is that the two Acts of Parliament (taken in conjunction with the Fundamental Law and the Transitional Provisions of the Fundamental Law) "have brought about a radical change of the judicial system" and "the reform as a whole threatens the independence of the judiciary. It introduces a unique system of judicial administration, which exists in no other European country."[10] The depth of the Commission's criticism is shown by its assessment that the essential elements of the reform "not only contradict European standards for the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR."[11]

According to the Venice Commission, the main problem with the two cardinal laws is the "concentration of powers in the hands of one person, i.e. the President of the NJO. […] [I]n no other member state of the Council of Europe are such important powers, including the power to select judges and senior office holders, vested in one single person. Neither the way in which the President of the NJO is designated, nor the way in which the exercise of his or her functions is controlled, can reassure the Venice Commission. The President is indeed the crucial decision-maker of practically every aspect of the organisation of the judicial system and he or she has wide discretionary powers that are mostly not subject to judicial control. The President is elected without consultation of the members of the judiciary and not accountable in a meaningful way to anybody except in cases of violation of the law. The very long term of office (nine years) adds to these concerns."[12]

The opinion of the Venice Commission identifies 16 major points in the two cardinal laws which need revision:[13]

1. the regulation of a number of organisational issues on the level of cardinal laws,
2. the election of the President of the NJO for a nine year period, which can be indefinitely extended by a blocking majority of one-third of members of Parliament,
3. the very extensive list of competences of the President of the NJO, which are not subject to a veto by the NJC or subject to judicial control,
4. the attribution of the powers of the President of the NJO to an individual person, without providing for sufficient accountability,
5. the absence of an obligation for the President of the NJO to motivate all decisions,
6. the composition of the NJC exclusive of judges, without the membership of other actors (advocates, civil society),
7. the restriction of the NJC on mere recommendations / opinions in most of its powers,
8. the lack of a veto by the NJC against the appointment of court presidents by the President of the NJO,
9. the system of supervision of judges by the court presidents who have to report to the superior courts, up to the *Curia*, about judgments, which deviate from earlier case-law (uniformisation procedure),
10. the strong influence of the President of the NJO on the appointment of court presidents and other senior judges,

[10] Opinion of the Venice Commission, §§ 116-117.
[11] Opinion of the Venice Commission, § 120.
[12] Opinion of the Venice Commission, § 118.
[13] Opinion of the Venice Commission, § 119.

11. the power of the President of the NJO to initiate the uniformisation procedure, which contradicts his or her administrative role,
12. long probationary periods for judges, and in particular, the fact that they can be renewed multiple times,
13. the possibilities to transfer judges against their will and the harsh consequences of a refusal ("exemption" and automatic dismissal),
14. the absence of sufficient fair trial guarantees in evaluation and disciplinary proceedings,
15. the transfer of cases by the President of the NJO to another court, especially the absence of objective criteria for the selection of cases to be transferred and the court to which the cases are to be transferred,
16. the regulation on early retirement of judges.

## 1. The regulation of a number of organisational issues on the level of cardinal laws

*Opinion of the Venice Commission (§§ 16-20)*

In its opinion on the new Constitution of Hungary (the Fundamental Law), the Venice Commission has already regretted that "[t]he new Constitution only establishes a 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«".[14] Several provisions of the two Acts of Parliament in question qualify as cardinal rules, thus they may be amended only with a two-thirds majority. In its opinion on the Fundamental Law of Hungary, the Venice Commission recommended the restriction of the fields and scope of cardinal laws in the Fundamental Law to areas where there are strong justifications for the requirement of a two-thirds majority,[15] and stated that "[w]hen not only the fundamental principles but also very specific and »detailed rules« on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk", since it becomes impossible for the political majority to exercise its powers.

Several technical rules of the two Acts of Parliament in question qualify as cardinal rules, even though there is no reason for taking them out of the scope of the majority principle. (Absurd examples include the right of the President of the *Curia* to travel first class on airplanes and to access special airport lounges.)[16] At the same time, it would have been reasonable to include the general rules of the organisation of courts and the composition and most important competences of the NJO and the NJC in the Fundamental Law.

*Proposed amendments*

The Bill does not respond to the above suggestions of the Venice Commission.

*Assessment of the Bill*

The proposed amendments do not take into consideration the opinion of the Venice Commission regarding the regulation of a number of organisational issues on the level of cardinal laws.

[14] 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.
[15] 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), paragraphs 27.
[16] Article 153 (3) and (4) of ALSRJ

## 2. The election of the President of the NJO for a nine year period, which can be indefinitely extended

*Opinion of the Venice Commission (§§ 28-31)*

According to the new Hungarian rules, the President of the NJO shall be elected by the Parliament for nine years with a two-thirds majority. Government representatives informed the Venice Commission that the nine-year mandate is intended to separate the term of office of the President from that of Parliament, in compliance with the requirement of the division of powers. The Venice Commission stated that this is "in principle a positive approach." However, "in the field of administration, including the administration of judges, the longer a person is in office, the more his or her powers need to be controlled. The Commission has however strong doubts that this control is sufficiently provided by the cardinal laws."

Furthermore, if the Parliament is not able to elect a new President with a two-thirds majority after the nine-year term of office has expired, the mandate of the President of the NJO is prolonged until the new President of the NJO has been elected or until the old President reaches the mandatory retirement age. In the view of the Venice Commission "in situations where no sufficient majority is obtained in Parliament to elect a new President, an alternative (among others) could be to have a Vice-President of the NJO acting as *interim* president." However, this "presupposes that the vice-presidents are not selected by the President alone."

*Proposed amendments*

The Bill does not introduce any changes with respect to the nine-year mandate or the possibility for the indefinite extension of the President's term of office. Tibor Navracsics, MP (and Minister) of the Fidesz suggested a related amendment setting out that the President of the NJO may not be re-elected.[17]

*Assessment of the Bill*

The Bill does not respond to the criticism related to the legal status of the President of the NJO, but at the same time it restricts the competences of the President (see the analysis of the related provisions below). However, according to our assessment, the proposed changes regarding the competences of the President do not solve the essence of the problem raised by the Venice Commission, i.e. that a person, who is not elected by the judiciary and therefore his or her decisions may not be regarded as the "embodiment" of judicial self-governance, may exercise important powers for an extremely long period of time without any control. The Bill does not change the fact that the President of the NJO may exercise presidential powers after the expiration of the nine-year term of office until the new President of the NJO has been elected, even though the democratic legitimacy of exercising presidential powers during this transitional period is highly questionable.

## 3-5. Competences, liability and accountability of the President of the NJO and the absence of an obligation to motivate decisions

*Opinion of the Venice Commission (§§ 33-43)*

The opinion of the Venice Commission lists 66 competences of the President of the NJO, and states that some of these competences fall within the usual competences of a head of judicial administration, but others do not, and some of them "are described in rather broad terms without clear criteria governing their application." This raises concerns, "especially because they are exercised by a single person," and not by a representative body.

[17] Proposed amendment T/6393/18.

According to the opinion of the Venice Commission, transparency regarding the activities of the President of the NJO is only partly ensured, since there is no obligation to include in the reports of the President the criteria applied in the course of decision-making. Thus, the reasons behind his or her decisions need not be made public, which is especially troubling because, as elaborated on above, provisions concerning the exercise of competences grant the President an extremely wide scope of action [e.g. re-assigning judges to another service post out of "service interests" – ALSRJ, Article 31 (2); filling judicial positions without a general call for applications – ALSRJ, Article 9 (3)]. This threatens the legitimacy of individual decisions, since the concrete application of these substantially discretionary powers may not be justified due to the indefinite legal concepts used (i.e. the "service interest" is an undefined term; the President of the NJO is not obliged to provide any reasons for his or her decision to call for applications or neglect to engage in this process).

The Venice Commission acknowledges that the President of the NJO will be accountable to the NJC to a certain degree (the NJC may indeed examine the central administrative activity of the President of the NJO and flag problems, and it may express opinions on the rules and recommendations issued by the President of the NJO and on the budget of courts and the report on the implementation thereof). However, this control is quite limited, since the NJC is in many ways dependent on the person whose activity it should supervise. First of all, since all its members are judges, they are potential subject to a number of allegedly neutral administrative measures (such as assignment and transfer to lower level courts), which in actuality could easily create a chilling effect. Second, it is up to the NJO to ensure the operational conditions for the NJC. Third, the President of the NJO may attend even the *in camera* meetings of the NJC.

In addition to all of the above, the President of the NJO may be removed from office only on the narrowly defined grounds of "unworthiness of his/her position," and even these removal powers may be impeded by a parliamentary minority.

Accordingly, the Venice Commission formed the following suggestions:

a) The decisions of the President of the NJO should be reasoned explicitly, referring to legally established criteria.
b) Binding decisions of the President of the NJO should be subject to judicial review.
c) A means of increasing the NJO's accountability might be to strengthen the NCJ, e.g., by allowing attorneys at law or civil society representatives to participate in it, or to find new ways to provide for accountability to Parliament or to increase the responsibility of the Minister for Justice, of course in a manner that does not jeopardize the independence of the judiciary.
d) It would be important to reduce the powers of the President of the NJO.

*Proposed amendments*

The Bill responds to the above suggestions of the Venice Commission through the following changes:

1. If the President of the NJO appoints another court to proceed (transfer of cases), he or she may do so only by taking into account the relevant principles set out by the NJC, and the President of the NJO shall detail in his or her decisions how these principles were taken into account [Article 2 of the Bill].
2. The President of the NJO will be obliged to submit interim reports (i.e. reports between the annual reports) to the parliamentary committee dealing with justice matters once a year [Article 4 (4) of the Bill].

3. Reports of the President of the NJO shall include the reasoning behind the appointment and removal of judges and judicial leaders and behind the re-assignment of judges, along with the circumstances surrounding the exercise of power in case transfers [Article 5 (2) of the Bill].
4. In addition to the President of the NJO and the Minister responsible for justice matters, the following may also participate with consultation rights in the meetings of the NJC: the president of the Hungarian Bar Association, the Chief Public Prosecutor, ad hoc experts invited by the President of the NJC or by those with consultation rights, and the representatives of NGOs and other interest groups invited by the President of the NJO [Article 9 (1) of the Bill].
5. In principle, the President of the NJO will not participate in the *in camera* meetings of the NJC [Article 9 (3) of the Bill].
6. The NCJ must approve any decisions made by the President of the NJO to deviate from the ranking of candidates to judicial positions or to disregard the recommendations related to the appointment of judges to leading positions [Articles 6 (4), 10 (2) and 14 of the Bill].
7. The NJC will create its budget itself with the approval of the President of the NJO; the budget of the NJC appears separately within the budget of the NJO (Article 7 of the Bill).
8. The NJC, and not the President of the NJO, may, in especially justified circumstances, order the adjudication of cases as a "matter of urgency" if it concerns a broad spectrum of society or is of outstanding importance with regards to the public interest [Article 6 (3) of the Bill].
9. The Bill would transfer the power from President of the NJO to the NJC to grant derogation in cases of conflict of interest between a court leader and a relative of that court leader adjudicating in a subordinate organisational unit [Articles 6 (4), 13 and 25 of the Bill].
10. The NJC, not the President of the NJO, in the case that a judge resigns, retires or reaches the upper age limit, may agree to a notice period shorter than 3 months, and/or may relieve judges of their duties during the notice period [Articles 6 (4), 13 and 25 of the Bill].

*Assessment of the Bill*

The Bill restricts the competences of the President of the NJO substantially in some areas. For example, under this version of the law, establishing the operational conditions of the NJC would no longer be the exclusive competence of the President of the NJO. Furthermore, the Bill requires the NJC to approve any decision of the President of the NJO to deviate from the ranking of candidates to judicial positions or to disregard the recommendations related to the appointment of judges to leading positions. Nevertheless, under the proposed amendments, the President of the NJO could not only suggest another candidate for the given judicial position after the NJC's first decision, but could also declare the call for applications unsuccessful, which renders the NJC's disapproval moot. In other words, if the President of the NJO does not agree with the decision of the NJC, 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 declaring the call for applications unsuccessful.

All in all, the proposed amendments restrict the competences of the President of the NJO substantially. However, if we examine the proposed amendments ony by one, it becomes obvious that substantial problems are not solved by the Bill of the Government.

1. As to the power of transferring cases to another court, there are still no legal provisions which would set out the criteria on the basis of which the President of the NJO may exercise his or her power to assign a case to a particular court; thus courts assigned in this way will not be lawful under the new rules either.
2. Neither the legally designated court, nor the court assigned by the President of the NJO or the parties involved in the procedure have the right to challenge the decision on the transfer of the case.
3. The NJC establishes its own budget, but this is effectively overruled by the provision requiring the NJO President's approval of the budget. This in practice means that the NCJ does not establish its budget on its own. Furthermore, the fact that its budget appears separately within the budget of the NJO does not provide any "defence" in terms of budgetary matters, since this does not grant the NJC any right to dispose of its own budget.
4. Widening the circle of those participating at the meetings of the NJC is also a Janus-faced solution, since granting consultation rights to certain stakeholders does not amount to ensuring the pluralistic structure of the NJC, as strongly advocated by the Venice Commission.
5. The Bill does not provide for judicial review of the binding decisions of the President of the NJO.
6. All in all, the NJC will continue to remain dependent on the President of the NJO even under the proposed amendments. Not only does the new version do little to clarify competences defined by vague legal notions, it only introduces new undefined terms (e.g. the Bill exchanges the term "service interest" with "the even distribution of caseload," without providing any definition as to what "even" should mean in this respect).

### 6-8. The composition and competences of the National Judicial Council

*Opinion of the Venice Commission (§§ 44-52)*

The composition of the NJC is too homogenous; its members are exclusively judges. This can easily lead to mere introspection and a lack of both public accountability and understanding of external needs and demands, especially those of the "users" of the judicial system or representatives of the academia. Accordingly, the Venice Commission calls for a more pluralistic NJC, only claiming that a substantial part of the members ought to be judges.

With regard to the competences of the NJC, the Venice Commission notes that the NJC has practically no decision-making power, and instead may only submit proposals and opinions, so it "can hardly conduct effective supervision." According to the standpoint of the Venice Commission, the weak competences of the NJC do not comply with the provision of the Fundamental Law stating that "the organs of judicial self-government shall participate in the administration of the courts."[18]

The fact that the term of the President of the NJC is only half a year makes it impossible to establish a strong presidential position, and the mandate of the President of the NJC will be terminated even if he or she has proven to be suitable for the task, since the President's term of office may not be prolonged.

*Proposed amendments*

Besides the amendments affecting the NJC already presented above, the following amendment also aims at strengthening the role of the organs of judicial self-government in the administration of the courts. Under the Bill, the full meeting of the *Curia* and the so-called all-judges conference

[18] Article 25 (5) of the Fundamental Law.

of any regional court of appeal or tribunal may request that the NJC put on its agenda and discuss any issue falling under the NCJ's competence. Issues shall be put on the agenda upon the proposal of at least one-third of the members of the NJC (Articles 8 and 11 of the Bill).

*Assessment of the Bill*

As discussed above, the amendments aimed at weakening the powers of the President of the NJO (i.e. requiring NJC approval for decisions of the President of the NJO to deviate from the ranking of candidates to judicial positions or to disregard the recommendations related to the appointment of judges to leading positions and giving the right to order the adjudication of cases as a matter urgency to the NJC instead of the President of the NJO) are appropriate, but they are insufficient.

The proposed amendment related to the agenda of the NJC does not contribute substantially to the participation of the organs of judicial self-government in the administration of the courts. As set out clearly by the Venice Commission, the mere right to comment is not equivalent to participation. The provision in question solely concerns the issues to be put on the agenda of the NJC; it does not alter the competences of the NJC. Accordingly, the concerns expressed with regard to the competences of the President of the NJO are still valid; even though the Bill grants the NJC real decision-making powers in terms of the appointment of judges and judicial leaders, it still fails to guarantee NJC participation in other administrative matters and does little to safeguard the NJC's independence in the face of the threat of the less-than-neutral competences of the President of the NJO.

**9. and 11. The system of supervision of judges by the court presidents (uniformisation procedure) and the right of the President of the NJO to initiate the uniformisation procedure**

*Opinion of the Venice Commission (§§ 69-75)*

The independence of judges has two aspects that complement each other. First, there is external independence, which shields the judge from any influence deriving from other state powers, then there is internal independence, which ensures that a judge makes decisions only on the basis of the constitution and laws and is not influenced by any other factors, especially the instructions given by higher-ranking judges. Even though a framework for internal independence is set out by the ALSRJ, "a certain hierarchical interference in the rulings of the lower courts and tribunals is established in several other provisions of the AOAC." The Venice Commission acknowledges that the uniformisation procedure (also referred to as "law standardisation procedure" by the Venice Commission) was already in existence in the 1997 Hungarian law on courts.

In its opinion, the Venice Commission underlines the need for consistency of legal interpretation and implementation. However, unlike the *stare decisis* doctrine or a continental appeal system, the system established in the AOAC "provides for an active interference in the administration of justice of the lower courts and tribunals." The provisions of the AOAC setting out that presidents and division heads of courts and tribunals shall continuously monitor the administration of justice by the courts under their supervision, and that presidents and division heads have to inform the higher levels of the courts, up to the *Curia*, of judgments handed down contrary to "theoretical issues" and "theoretical grounds", turn court presidents into supervisors of the adjudication of the judges in their courts (Article 26-27 of AOAC). It appears from Article 67 of the ALSRJ that the evaluation of judges will be conducted on the basis of an activity assessment, of which data such as "decisions of second instance and review decisions" form a part. This seems to suggest that non-compliance with rulings of the higher courts will negatively

influence the evaluation of judges. This can have "a chilling effect on the independence of the individual judge."

Widespread publication of the judgments of courts, together with reasonable possibilities to appeal judgments to higher courts will usually suffice in ensuring consistent legal interpretation and implementation without hampering judicial independence. As such, some kind of uniformity procedure may be acceptable if there are sufficient guarantees that it does not have a negative influence on the career of judges. However, this system of supervision must be seen in the context of the concentration of powers within the judicial system.

According to the Venice Commission, the law standardisation procedure "also adds to the dominant position of the President of the NJO." The President is entitled to submit proposals aimed at the initiation of a law standardisation procedure to the President of the *Curia* under Article 27 (4) of the AOAC if he or she notices in the course of the fulfilment of his or her duties that it is necessary in the interest of the standard application of law. The current President of the NJO has informed the delegation of the Venice Commission that she intends to use this competence. However, the Venice Commission is of the opinion that this competence, which, unfortunately, goes beyond the administrative and management duties of the President of the NJO (Article 65 of the AOAC), should be removed from the AOAC.

*Proposed amendments*

The Bill does not deal with the criticism targeting the system of supervision. However, it does establish that the President of the NJO does not have the right to initiate a law standardisation procedure, but may notify the President of the *Curia* if in his or her view it is necessary to conduct a law standardisation procedure in the interest of the standard application of law (Article 1).

*Assessment of the Bill*

The Venice Commission suggested removing altogether the provision setting out the NJO President's right to initiate a uniformisation procedure, not merely downgrading the power to an advisory one. The Venice Commission clearly states that the duties of the President of the NJO are administrative and managerial and that supervising the adjudication process goes beyond these powers. By allowing this advisory role for the NJO President in the law standardisation procedure, the proposed amendments conserve the very supervisory responsibility which the Venice Commission criticizes. In our view, Article 27 (4) should be simply repealed.

## 10. The strong influence of the President of the NJO on the appointment of court presidents and other senior judges

*Opinion of the Venice Commission (§§ 62-65)*

Presidents and vice-presidents of regional courts of appeal and tribunals, the division heads of regional courts of appeal and tribunals and the heads and deputy heads of the regional administrative and labour divisions are appointed by the President of the NJO (Article 128 of the AOAC). Appointment procedure is regulated by the AOAC, but the AOAC does not include any criteria for deciding on these appointments. In this way the AOAC gives the President of the NJO "excessive weight in the appointment of court presidents" and he or she can move forward with such appointments even if the NJC disagrees. The opinion of the Venice Commission goes as follows: "one cannot exclude the risk that the President of the NJO could appoint certain court presidents mainly because they are in line with his or her position. This is especially relevant in the light of the fact that the early retirement of judges […], taken together with the actual

'moratorium' for appointment during the second half of 2011 [see below], is likely to result in the vacancy of numerous positions of court leaders, which will all be filled by the new procedure."

In the view of the Venice Commission, the AOAC "should be amended to provide for better checks of the power of the President of the NJO. One way of doing this might be to give a reformed NJC a greater role, at least a veto over the appointment of court presidents."

*Proposed amendments (Article 10 of the Bill)*

Article 128 of the AOAC regulates the right to appoint judicial leaders, while Article 131 concerns the right to comment on related applications before someone is appointed to a leading judicial position. The Bill adds to Article 132 (4) of the AOAC that the person vested with the right to make the appointment shall reach the decision by taking into account the recommendation of the judicial body authorised to comment on applications (the "reviewing board"). However, Article 132 (4), which provides that the person authorised to make the appointment shall not be bound by the recommendation of the reviewing board, and that he or she must only provide reasons for his or her decision to the NJC in writing, remains untouched. (The President of the *Curia* and that of the NJO shall inform the NJC about his or her reasons, and this shall not affect the appointment of the court leader. [Article 132 (5) of the AOAC])

Furthermore, the Bill amends Article 132 (6) of the AOAC such that if the Presidents of the *Curia* and of the NJO intend to appoint a judicial leader who did not gain majority support from the judicial body tasked with issuing a recommendation in this regard, they may only go ahead with the appointment if the NJC agrees to it.

*Assessment of the Bill*

The first amendment referenced practically does not change the current rules, since it only sets out explicitly the obligation to take the recommendation of the judicial body into account. The second amendment presented above introduces the possibility of a veto, strongly advocated by the Venice Commission, but only in the most serious instances of deviation from the opinion of the reviewing board. Namely, the NJC becomes involved in the process only if the candidate which the President of the NJO intends to appoint was supported by less then a majority of the reviewing board. Ideally, the NJC's approval would be necessary every time the President of the NJO intended to deviate from the ranking set up by the reviewing board.

It may be noted in addition to the criticisms included in the opinion of the Venice Commission that the AOAC also grants too many powers to the presidents of tribunals when vesting them with the right to appoint not only their own vice-presidents, but also the presidents, vice-presidents, task force heads and deputy task force heads of district courts [Article 128 (5) of the AOAC].

## 12. Appointment of judges for a fixed period repetitively

*Opinion of the Venice Commission (§§ 66-68)*

Judicial appointments for a fixed period (referred to as a "probationary period" by the Venice Commission) are deemed problematic by the Venice Commission from the point of view of judicial independence, since judges might feel pressure to decide cases in a particular way. The ALSRJ even provides for the possibility of repetitive appointments for fixed periods. Furthermore, usually a person who intends to become a judge would first become court secretary and, in some cases, stay in this position for up to six years. This means that a person who is already acting in a judicial function (according to the Fundamental Law, court secretaries may

also exercise judicial functions) "could remain in a precarious situation for up to nine years" and may behave in a different manner than a judge who has permanent tenure ("pre-emptive obedience"). Accordingly, judicial appointments for a fixed period are inherently problematic, and the additional time as court secretary only further aggravates this problem.

In the view of the Venice Commission, the introduction of probationary periods should go hand in hand with safeguards regarding the decision on a permanent appointment. If probationary appointments are considered indispensable, a "refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office." (The Venice Commission notes that in Austria for example candidate judges are evaluated during their probationary period during which they are allowed to assist in the preparation of judgments, but cannot yet make judicial decisions themselves.)

*Proposed amendments (Article 16 of the Bill)*

The Bill would reduce the possible instances of repetitive, temporary appointments, mandating that judges may be appointed for a fixed, "probationary" period only twice.

*Assessment of the Bill*

Apart from declaring that judges may be appointed for a fixed period only twice, the Bill does not contain any further amendments regarding the issue. The proposed amendments thus disregard the Venice Commission's perspective that fixed-period judicial appointments are inherently problematic, and the possibility to appoint a judge for a fixed period more than once is maintained. Taken together with the period spent as a court secretary, the status of a judge may still remain uncertain for up to nine years.

According to the Bill, court secretaries continue to exercise the power to make independent detention and sentencing decisions in misdemeanour cases. The right of court secretaries to decide in such cases severely violates the procedural guarantees aimed at protecting the right to personal liberty. As recognized by the Constitutional Court of Hungary,[19] deprivation of personal liberty is a serious restriction of a fundamental right which requires a decision by an independent and impartial court.

**13-14. The possibility of transferring judges and the absence of sufficient fair trial guarantees in evaluation and disciplinary proceedings**

*Opinion of the Venice Commission (§§ 76-85)*

The irremovability of judges is an important aspect of their independence. Accordingly, in the view of the Venice Commission, judges must not be under the threat of being transferred from one court or tribunal to another, as this threat might be used to exercise pressure on them and to attack their independence. 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, Article 31 of the ALSRJ explicitly entitles the president of the tribunal to re-assign judges without their consent to a judicial position at another service post on a temporary basis out of "service interests," every three years for a maximum of one year, or for the promotion of his or her professional development. (The President of the NJO is also allowed to transfer judges to another court.) The Venice Commission concludes in this regard that the possibility of transferring judges out of service interest is "generally phrased and excessively large," and a transfer for a maximum of one year every three years "seems to be too often," even if the transfer happens with the consent of the judge. However, if the judge does

[19] Decision of the Constituional Court 71/2002. (XII. 17.).

not agree to the transfer he or she is automatically "exempted from office" for six months and his or her service relationship is terminated (Article 90 (j) and 94 (3) of the ALSRJ). In the view of the Venice Commission, this "seems to be an overly harsh automatic sanction. While under certain circumstances transfers may be justified, in exceptional cases even without the consent of the judge – for instance due to an organisational reform – there must be clear and proportional rules for such actions as well as a right of appeal."

According to Chapter V of the ALSRJ, judges shall be evaluated periodically. In case of an unsatisfactory evaluation grade, the president of the court must call upon the judge to resign his or her office as a judge within 30 days [Article 81 (1) of the ALSRJ], and it seems that the judge is asked to resign without being given the possibility to discuss the outcome of the evaluation. Fair trial rules are applicable only after the judge has been asked to resign and has refused to do so (inaptitude proceedings); this approach is, in the view of the Venice Commission, not in line with Article 6 ECHR. The judge remains in office while waiting for the final decision of the service court in inaptitude proceedings, but is not allowed to engage in activities which fall exclusively within the competence of a judge.

*Proposed amendments (Articles 17-23 of the Bill)*

Article 17 of the Bill replaces the term "service interest" with "ensuring the even distribution of caseload between courts." Article 18 makes it possible for judges to submit their own viewpoint concerning the evaluation of their work. Article 19 of the Bill refines the inaptitude proceedings: the investigating commissioner shall hear the judge affected by the procedure and shall obtain the opinion of the leader of the court. Article 20 of the Bill refines the conditions of initiating ineligibility proceedings on health grounds. Article 21 stipulates that judges refusing to agree to a transfer to another court will be entitled to request to work during the exemption period; the President of the NJO is entitled to decide the matter. Article 22 of the Bill introduces a new Article into the ALSRJ, regulating the composition of service courts through a standing order approved by the NJC [see also Article 6 (2) of the Bill], while Article 23 of the Bill narrows the options before the President of the NJO with regards to initiating disciplinary procedures.

*Assessment of the Bill*

The Bill partially complies with the suggestions of the Venice Commission regarding the transfer and removal of judges. The new phrasing "ensuring the even distribution of caseload between courts" is perhaps a bit more precise than the term "service interest," but the ambiguity of the meaning of "even" still allows for arbitrary decisions. The possibility of transferring judges without their consent continues to exist, along with the automatic sanction for refusing to agree to a transfer. The Bill refines the ALSRJ with regard to evaluation procedures, but does not change the current procedure substantially. The Bill only fully complies with the suggestions related to disciplinary proceedings, since it introduces the guarantees of a lawful judge and narrows the scope of the President of the NJO's power in initiating disciplinary procedures.

## 15. The right of the President of the NJO to transfer cases to another court

*Opinion of the Venice Commission (§§ 86-94)*

The allocation of cases is one of the elements of crucial importance for the impartiality of the courts. According to the case law of the European Court of Human Rights, the object of the term "established by law" in Article 6 ECHR is to ensure that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament. Together with the express words of Article 6 ECHR, according to which "the medium" through which access to justice under fair hearing should be ensured

must not only be a tribunal established by law, but also one which is both "independent" and "impartial" in general and specific terms, this implies that the judges or judicial panels entrusted with specific cases should not be selected *ad hoc* and/or *ad personam*, but according to objective and transparent criteria.

The power of transferring cases "involves an element of discretion, which could be misused as a means of putting pressure on judges by overburdening them with cases or by assigning them only low-profile cases. It is also possible to direct politically sensitive cases to certain judges and to avoid allocating them to others. This can be a very effective way of influencing the outcome of the process."

The main rules on transferring courts (Articles 8-9 of AOAC) contain clear criteria, established in advance by the law, as called for by the Venice Commission, but at the same time provide wide latitude to the president of the respective court to alter the distribution schedule due to "important reasons affecting the operation of the court or in the interests of the court." In addition, Article 76 (4) b) of the AOAC enables the President of the NJO to designate another court based on the vague criterion of the interest of "adjudicating cases within a reasonable period of time." [This relates to Articles 11 (3) and 11 (4) of the Transitional Provisions, which were adopted on the constitutional level in order to overcome the annulment of a similar provision on the legislative level by Decision 166/2011. (XII. 20.) of the Constitutional Court].

Even though the reasonable time requirement is part of both the Fundamental Law and the ECHR, it is not absolute, but "forms a field of tension with the often conflicting right to a fair trial with respect to the fact that having and exercising more procedural rights necessarily goes hand in hand with a longer duration of the proceedings. Taking into account the importance of the right to a lawful judge for a fair trial, the state has to resort to other less intrusive means, in particular to provide for a sufficient number of judges and court staff. Solutions by means of arbitrary designation of another court cannot be justified at all." The Venice Commission notes that workload statistics provide objective statistical data, but they are not sufficient as a basis for the decision on transferral, since they do not contain criteria for the selection of certain cases for transferral or for the selection of the individual receiving court. General measures such as the redesigning of court districts or voluntary transfer of judges to the capital should help to overcome the problem of caseload on a more permanent basis. In order to prevent any risk of abuse, court presidents and the President of the NJO should not have the discretion to decide which cases should be transferred or to select the "sending" or "receiving" courts. In addition, any such case allocation should be subject to review in order to take into account possible harsh situations where persons without the means to come to a court that is far away from their home town.

As to the transfer of cases already conducted by the President of the NJO,[20] the Venice Commission notes that the real problem lies in the lack of any justification regarding the selection of the cases. During the discussions with the delegation of the Venice Commission, the President of the NJO announced that she would elaborate objective criteria for such case assignments. However, the Venice Commission "insists that such rules cannot remain on the level of internal guidelines, adopted by the President of the NJO, because they relate to the right of access to a court under Article 6 ECHR. The NCJ should have a decisive role in the establishment of such criteria."

[20] http://www.birosag.hu/resource.aspx?ResourceID=ugyathelyezes

*Proposed amendments [Article 4 (3) of the Bill]*

The Bill sets out that the President of the NJO must take into account the principles established by the NJC in the course of exercising the power of appointing a court other than the legally designated court.

*Assessment of the Bill*

The Bill does not affect the second sentence of Article 9 (1) of AOAC, which, accordingly, continues to grant wide latitutde to the presidents of courts to alter the case distribution schedule "for service interests or for important reasons affecting the operation of the court" during the course of the year.

The right to transfer cases to another court continues to exist. Even though the Bill stipulates that the principles of transferring cases shall be established by the NJC, the President of the NJO has already established these principles: the Presidential Recommendation 3/2012. (II. 20.) on the Designation of the Proceeding Court in order to Ensure the Adjudication of Cases within a Reasonable Period of Time was adopted in February 2012.[21] However, the right of the parties to a lawful judge would also be violated if the principles of transferring cases would really be established by the NJC, since those would also not be criteria enshrined in law. Furthermore, the Transitional Provisions of the Fundamental Law continue to authorize the President of the NJO to transfer cases to another court under the original circumstances.

## 16. The regulation on early retirement of judges

*Opinion of the Venice Commission (§§ 102-110)*

The Venice Commission examined the issue not from the angle of age discrimination, but from its effect on judicial independence. From this point of view "the retroactive effect of the new regulation raises concern" according to the Venice Commission. A whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and expected – to continue to work as judges, now have to retire. The Venice Commission "does not see a material justification for the forced retirement of judges (including many holders of senior court positions). 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." The sudden change of the upper-age limit creates the problem that a significant part of nearly ten per cent of the Hungarian judges will retire within a short period of time (between 225 and 270 out of 2900 judges in Hungary). The Venice Committee dismisses as insufficiently supported by the evidence the argument which has been made, that a higher number of younger judges with "up-to-date qualifications" will increase the performance of the judiciary, since they are expected to be "more suitable to carry a higher workload" as well as "more ambitious and more flexible."

Furthermore, the Venice Commission is worried about the fact that no new judges could have been appointed for six months before the entry into force of the new legislation on the judiciary ("moratorium" on judicial appointments). The Venice Commission notes that the moratorium seems not to be related to the general issue of the retirement age, "but to the will of Parliament to ensure that all new appointments, including numerous appointments of court leaders, will be made under the new system, giving the newly elected President of the NJO the essential role in these appointments. Bearing in mind the heavy workload of several courts, it is difficult to justify forcing judges to retire early, on the one hand, while not providing for a speedy filling of vacancies, on the other."

[21] http://www.birosag.hu/resource.aspx?ResourceID=2012evi_3szamu_ajanlas_elj_birosag_kijelolese1

The Venice Commission notes in its opinion that its delegation has received, from the Hungarian authorities, a copy of the letter to EU Commissioner Reding, which proposes amendments to the system of early retirement. According to the letter, judges who wish to remain in office would be able to apply to the NJC, which would consider their request on the basis of their "professional and medical" fitness. However, it seems unclear for the Venice Commission why the professional aptitude needs to be verified. If the judge is able to fulfil his or her work it seems obvious the he or she is "professionally able" to continue to work. The proposal in the letter further provides that the extension of employment can be granted only within limits (quota) pre-established by the President of the NJO and the NJC. This raises a problem, especially where the quota is exhausted during the course of a year. From then on, all future requests for the rest of the year must be rejected. This could create a new issue of discrimination between judges.

Thus, on the basis of the above, the Venice Commission invites the Hungarian authorities to provide for "a less intrusive and not so hasty solution" for a gradual decrease of the upper-age limit. While there might be good reasons for a fixed retirement age for judges without the possibility of exceptions, in the present situation in Hungary, it is at least recommended in the Venice Commission's view that the transitional period be extended to protect current judges' legitimate interests.

*Proposed amendments*

Article 24 of the Bill would apply the provisions on relieving judges of their duties during the notice period (Article 94 of ALSRJ) equally in the case of judges obliged to retire under the early retirement rules presented above.

*Assessment of the Bill*

The Bill only refines the existing rules on relieving judges of their duties during the six-month notice period; thus in this respect it practically harmonizes the situation of judges affected by early retirement rules with those under the main rule.

The regulation on early retirement of judges fundamentally affects judicial independence. Consequently, disregarding the criticism of the early retirement rules strengthens the suspicion that the aim of imposing these rules was to enable the governing majority to place their own people in judicial positions. 129 vacant judicial positions have been already filled by 1 April 2012.[22]

[22] See also: http://www.mabie.hu/node/1570.