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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**DRAFT 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**

**on the basis of comments by**  
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## I. Introduction

1. In reply to a letter by the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, the Minister for Foreign Affairs of Hungary, Mr Martonyi, requested the Venice Commission by a letter of 20 January 2012 to provide opinions on Hungarian Laws concerning:

- the independence of the judiciary,
- freedom of religion, faith and creed and
- elections to Parliament.

2. In addition, by letter of 1 February 2012, the Chair of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, Mr Herkel, asked the Venice Commission to provide opinions on five further Hungarian laws concerning:

- freedom of information,
- the Constitutional Court,
- prosecution,
- nationality issues and
- family protection.

3. The present Opinion deals with the independence of the judiciary, namely Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts.

4. On 20-21 February 2012, a delegation of the Commission, composed of Mr Dimitrijevic, Mr Hoffmann-Riem, Mr Grabenwarter, Ms Suchocka and Mr Velaers, accompanied by Mr Markert, Mr Dürr and Ms Martin from the Secretariat, visited Budapest. As regards the judiciary, the delegation met with (in chronological order) the Minister for Foreign Affairs, Mr Martonyi, the President of the Constitutional Court, Mr Paczolay, the President of the Association of Judges, Mr Makai, the Minister of State for Justice, Mr Répassy, the President of the Curia, Mr Darak, the Constitutional, Judicial and Standing Orders Committee of Parliament, the President of the National Judicial Office, Ms Hando, as well as with NGOs. The present opinion takes into account the results of this visit. The Venice Commission is grateful to the Hungarian authorities for the excellent co-operation in the organisation of this visit and for the explanations provided.

5. *The present opinion was adopted by the Commission at its ... plenary session (Venice, ...).*

## II. Preliminary remarks

6. The present opinion should be seen in the context of the Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (Venice, 17-18 June 2011)<sup>1</sup>. By letter of 9 January 2012 addressed to the President of the Venice Commission, the Hungarian Deputy Prime Minister, Mr Tibor Navracsics, kindly provided explanations on the adoption of the cardinal acts referred to in the Constitution (Fundamental Law), including the acts on the judiciary. The Transitional Provisions to the Fundamental Law, adopted in December 2011, which include provisions which are not of transitional nature, also have to be taken into account in this context.

7. The present opinion is based on an English translation of the Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter referred to as ALSRJ) and of Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary (hereinafter referred to as AOAC).

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<sup>1</sup>CDL-AD(2011)016, see also document CDL(2011)058 Position of the Government of Hungary on the opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011) transmitted by the Minister for Foreign Affairs of the Republic of Hungary on 6 July 2011

The translation may not accurately reflect the original version on all points and, consequently, certain comments may be due to problems of translation.

8. When analysing a given piece of legislation, the Venice Commission takes also into account the way of its implementation and the determining factors thereof. The latter refers to the concrete contexts of the respective country, namely its legal and political culture. Every context requires provisions adapted to its specificities and demands. It is due to the decisive role of the concrete contexts, that an allegedly deficient regulation can result in a non-deficient outcome. Nevertheless, the aim of legal reform should be to provide an institutional and regulatory environment that is least likely to be misused.

9. In its opinion on the New Constitution, the Venice Commission expressed its hope that there would be “co-operation between the majority coalition and the opposition in the preparation of the implementing legislation”. In its reply to the Opinion, the Government fully subscribed to this idea.<sup>2</sup> The visit of the delegation of the Commission showed that the cardinal laws were adopted in a speedy way, not allowing for adequate consultation of the opposition and civil society. The adoption of a large amount of legislation in a very short time period may also explain why some issues in the cardinal laws examined set out in the present Opinion do not meet to European standards.

10. When the Venice Commission examines the powers of a state institution, it may criticise for instance overwhelming or unfettered powers or other structural problems. The Commission wants to stress that criticising legal provisions providing such powers does not mean that the Commission would criticise the current post-holders.

### **III. Standards on the independence of the judiciary**

11. On the national Hungarian level independence of the individual judge – not the judiciary as such – is enshrined in Article 26.1 Fundamental Law in the following terms.

*“Judges shall be independent and only subordinated to Acts; they shall not be given instructions as to their judicial activities. Judges may only be removed from office for the reasons and in a procedure specified in a Cardinal Act. Judges shall not be members of a political party or engage in any political activity.”*

12. The independence of the judiciary follows from the principle of separation of powers, which is prominently stated in Article C.1 Fundamental Law:

*“The functioning of the Hungarian State shall be based on the principle of the separation of powers.”*

13. Finally, Article XXVIII.1 Fundamental Law<sup>3</sup> grants the individual a right to a fair trial expressly including an independent court.

14. On the European level, the independence of the judiciary also follows from the right to a fair trial under Article 6 of the European Convention on Human Rights (ECHR)<sup>4</sup> and the pertinent case-law of the European Court of Human Rights. Article 47(2) of the EU Charter is similar in content. According to Article 6 ECHR, everyone [...] is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The independence of the tribunal can be regarded as one of the essential guarantees of Art 6 ECHR and does not only apply to the tribunal but also to the individual judge. Major factors that

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<sup>2</sup>Page 2.

<sup>3</sup> “Everyone shall be entitled to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial conducted by an independent and impartial court established by an Act.”

<sup>4</sup> “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

support the independence of judges are the provided length of his term of office, the principle of irremovability, and the freedom from directives.

15. Apart from the ECHR, the most authoritative text on the independence of the judiciary at the European level is Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe to member states on judges: independence, efficiency and responsibilities<sup>5</sup>. Furthermore, standards for regulations on the judiciary are supplied both in the Venice Commission's Reports on Judicial Appointments<sup>6</sup> and on the Independence of the Judicial system, Part I: The independence of judges<sup>7</sup> as well as the opinions of the Consultative Council of European Judges (CCJE), in particular Opinion No 1 "On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges"<sup>8</sup>. At the international level, the UN's "Basic Principles on the Independence of the Judiciary"<sup>9</sup> and the "Bangalore Principles of Judicial Conduct of 2002"<sup>10</sup> are most relevant.

#### IV. Level of regulation

16. In its Opinion on the Constitution of Hungary<sup>11</sup> the Venice Commission regretted that

*"The 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... It is recommended that a clear reference to the principle of the independence of the judicial power and concrete guarantees for the autonomous administration of the judiciary be included in the relevant cardinal law ... This part of the Constitution also contains rather vague and general provisions. This entails a significant degree of uncertainty with regard to the content of the planned reform and gives reason to concern as it leaves scope for any radical changes".*

This means that the two laws have to be considered against the background of a Constitution which provides insufficiently detailed guarantees for the independence of the judiciary.

17. Section 175 AOAC declares Sections 1–8, Sections 12–15, Chapter II, Chapter III, Section 45, Chapter V, Parts Three and Four, Chapters X and XI and further Sections 177–195, Section 197, Section 207 and Section 209 AOAC as cardinal acts according to Article 25.7 of the Fundamental Law. Similarly, Section 237 ALSRJ declares Sub-titles 1 to 4, Chapter III, sub-titles 19–22, sub-titles 25–30, Chapters V–X, Chapter XII, Chapter XIII, Sections 223 and 224, Sections 226–233 and Section 236 as cardinal Acts according to Article 25.7 and Article 26.1 and 26.2 of the Fundamental Law. This means that large parts of the AOAC and the ALSRJ are considered to be cardinal acts.<sup>12</sup>

18. According to Article T.4 of the Fundamental Law, cardinal acts have to be adopted by the Hungarian Parliament with a two thirds majority. In its Opinion on the New Constitution of Hungary, the Venice Commission has acknowledged that a "certain quorum may be fully justified in specific cases, such as issues forming the core of fundamental rights, judicial

<sup>5</sup> which replaces Recommendation (94) 12 - <https://wcd.coe.int/ViewDoc.jsp?id=1707137&Site=CM>.

<sup>6</sup> CDL-AD(2007)028.

<sup>7</sup> CDL-AD(2011)004

<sup>8</sup> CCJE (2001) OP No 1.

<sup>9</sup> GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

<sup>10</sup> [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

<sup>11</sup> CDL-AD(2011)016, paragraphs. 102 et seq.

<sup>12</sup> CDL-AD(2011)016, Opinion on the New Constitution of Hungary, adopted by the Venice Commission at its 87<sup>th</sup> Plenary Session (Venice, 17-18 June 2011), para. 24.

guarantees or the rules of procedure of the Parliament.”<sup>13</sup> The Commission however also recommended restricting “the fields and scope of cardinal laws in the Constitution to areas where there are strong justifications for the requirement of a two-thirds majority.” The Venice Commission argued on the basis of Article 3 of the first protocol to the ECHR: “When 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. This also increases the risk, for the future adoption of eventually necessary reforms, of long-lasting political conflicts and undue pressure and costs for society.”

19. Both Acts examined in this Opinion contain very detailed rules on every aspect of the organisation and administration of courts and on the legal status and remuneration of judges. In order to avoid the above mentioned problems, the Venice Commission is of the opinion that the “cardinal elements” in these laws should have been restricted to fundamental principles and important rules on the issue and that the merely technical details should have been regulated by ordinary laws, which can more easily be adapted by a simple majority in Parliament whenever this is deemed to be necessary. Furthermore there are some provisions, which probably should not have been regulated even at the level of ordinary law.<sup>14</sup>

20. To sum up, the level of regulation of judicial issues in Hungary does not seem satisfactory. While some principles as well as the general structure, composition and main powers of the National Council of Judges and National Judicial Office should have been developed in the Constitution itself, a lot of detail could have been left to ordinary laws not requiring a qualified majority in parliament.

## **V. Guarantees for the independence of the judiciary as a whole**

21. In its Opinion on the new Constitution of Hungary, the Venice Commission pointed out that the independence of the judiciary as such was not guaranteed in itself, but only via the principle of separation of powers. Thus, it called for a “clear statement that courts constitute a separate power and shall be independent”.<sup>15</sup> Furthermore, it recommended „that a clear reference to the principle of the independence of the judicial power and concrete guarantees for the autonomous administration of the judiciary be included in the relevant cardinal law”.<sup>16</sup>

22. While Section 3 AOAC refers only to the independence of the individual judge, Section 65 AOAC refers to “the constitutional principle of judicial independence”, which could be understood as reference to a principle of independence of the judiciary as such. However, the constitutional provisions pertaining to the judiciary are “rather vague and general”, the Venice Commission encouraged the Hungarian authorities “to ensure that any future changes in the area of the judiciary and the envisaged reform as a whole are fully in line with the requirements of the separation of powers and the rule of law, and that effective guarantees are available for the independence, impartiality and stability of judges.”<sup>17</sup> The preamble to the AOAC indicates as the purpose of this Act “to fully realise the principle of independence of the judiciary”. This can be seen as an implementation of the recommendation of the Venice Commission.

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<sup>13</sup>Section 175 AOAC and Section 237 ALSRJ themselves are not cardinal acts. This could facilitate a readjustment of the provisions being considered as cardinal acts.

<sup>14</sup>Including for example regulations of access to airport lounges and governmental holiday residences for the President of the Curia, Sections 153.4 and 155 ALSRJ.

<sup>15</sup>CDL-AD(2011)016, paragraph 102.

<sup>16</sup>CDL-AD(2011)016, paragraph 102.

<sup>17</sup>CDL-AD(2011)016, paragraph 104.

## 1. The National Judicial Office

23. Hungary was the first former communist country, which established a strong National Council of Judges (NCJ) with wide competences. Court administration was removed from the executive and attributed to the NCJ, an independent body in which judges had a strong representation. The NCJ took over a majority of the competences of the Ministry of Justice. This was seen as significant progress in creating a truly independent judiciary in Hungary. There were however critical voices pointing out that the NCJ had a tendency not to embrace all relevant aspect of a well functioning judiciary in its decisions. Since the NCJ met only once a month, the Office of the NCJ run many of its operations. Some observers asserted that the real power rested with this office, which had inherited many staff members from the now defunct courts department within the Ministry of Justice.<sup>18</sup>

24. In his reply to the letter by the President of the Venice Commission, Deputy Prime Minister Navracsics pointed out that the NCJ could not take decisions requiring immediate action because it met only once a month; its members were mostly judges in leading positions who controlled their own activity. During its visit to Budapest, the delegation of the Venice Commission was further told that the previous NCJ was unable to effectively address certain systemic problems (e.g. the overburdening of certain courts, especial in Budapest as compared to other regions). The Venice Commission cannot evaluate shortcomings of the former NJC on its own, but has to rely on the findings of the Hungarian government. In light of the assumption of serious deficiencies of the NJC, the new parliamentary majority introduced the NJO with a strong position of its President.

25. The Commission fully acknowledges the need to establish an efficient and operational administration of justice. The Commission has however serious doubts about the reform model chosen, which concentrates these very large competences in the hand of one single person, the President of the newly established National Judicial Office (NJO)<sup>19</sup>.

26. The States enjoy a large margin of appreciation in establishing a system for the administration of justice and various models exist in Europe. However, in none of member states of the Council of Europe such important powers are vested in a single person, lacking sufficient democratic accountability. In countries where the Minister of Justice appoints judges, the Minister is directly accountable to Parliament, has a shorter mandate and tends to be personally involved only in the most important cases.

27. The Commission's delegation was told that the model was chosen to shield the judiciary from direct influence from the Government. This goal is to be welcomed. The price for the solution chosen was however the sacrifice of judicial self-government and all influence from society on the judicial system. The Commission was not able to find out why the existing NCJ was not reformed in order to increase its efficiency and to abolish deficiencies. This could have been done for example by exempting its judicial members from other duties in order to allow for more frequent meetings, by ensuring that instead of court leaders more junior judges sit in the Council, by replacing representatives of Parliament by a substantial component of the "users" of the judicial system – advocates and civil society (who unfortunately remain completely outside the new system chosen).

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<sup>18</sup>Monitoring the EU Accession Process: Judicial Independence, report on Hungary, Open Society Institute, Budapest 2001, p. 189.

<sup>19</sup>The NJO has no real powers in itself, but is regarded by the Hungarian authorities as "the work organisation under him [i. e. the President]".

28. Section 66 AOAC reads as follows: “The President of the NJO shall be elected by Parliament from among judges appointed for an indefinite period of time and having at least 5 years of judicial service. The President shall be elected for 9 years with two-thirds of the votes.”

29. These provisions do not require any specific administrative or management qualities or any special experience in this field as one would expect, but only 5 years of judicial service. The AOAC ensures that the President of the NJO will have the confidence of a two thirds majority of the Parliament<sup>20</sup>.

30. The delegation of the Commission was informed that the term of office of nine years has been chosen for a number of high officials under the new Fundamental Law and the cardinal laws (e.g. the Prosecutor General, Article 29 Fundamental Law). The long mandate of the President of the NJO intends to separate the term of office of the President from that of Parliament, which 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.

31. In addition, Section 70.4 AOAC creates the problem of the replacement of the office-holder. Section 70.4 provides that the President of the NJO remains in office until a new person is elected. If there is no 2/3 majority for a new president in Parliament, this can easily lead to a situation that the person in office continues even for a much longer period than the nine years. In situations, when no sufficient majority is found 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. This however presupposes that the Vice-Presidents are not selected by the President alone.

32. The President of the NJO has inherited all the administrative powers of the former National Council of Justice and its President. It is worth noting, that in the description of the aims of their reform of the judiciary the Hungarian authorities did not refer to an “institution” but vested the powers in a “person” instead. This focus on a single person is also shown by the provision of Section 76.2.c AOAC according to which the President of the NJO makes proposals for his own Vice-Presidents.

#### **a) Competences**

33. Both the AOAC and the ALSRJ reflect an overwhelmingly strong position of the President as the Head of the National Judicial Office. It is not a single competence, but a whole set of provisions that establish this strong position. According to Section 76 AOAC the President of the NJO shall:

- draw up and annually update the programme containing the long-term tasks of the administration of courts and the conditions thereof,
- draw up in line with legal provisions – as normative instructions – all the mandatory rules and regulations applicable to courts, furthermore he/she shall adopt recommendations and decisions in order to perform his/her administrative tasks,

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<sup>20</sup> The first President of the NJO was indeed elected with the votes of the governing parties, which have a two-thirds majority. During the visit of the Commission delegation to Budapest, the representatives of the opposition parties informed the delegation that they did not vote for the candidate due to her close links with leading Fidesz politicians.



- represent courts,
- initiate legislation concerning courts,
- express his/her opinion on draft legislation concerning courts – with the exception of municipal decrees – having collected and processed the opinions of courts through the NJO,
- Participate in the sessions of the parliamentary committees as an observer when legislative proposals directly concerning courts are on the agenda.
- manage the activities of the NJO,
- establish the rules of organisation and operation of the NJO, and
- make proposals concerning the appointment and relief of the Vice-President of the NJO.
- draw up his/her proposal concerning the budget of courts and the report on the implementation of the budget – requesting and communicating the opinions of the NJO, furthermore that of the President of the Curia with respect to the Curia – which the Government shall put forward to Parliament as part of the Act on the State Budget and its implementing provisions without amendment,
- he/she shall participate as an invited guest at the meeting of the Budget Committee of Parliament and the Government when discussing the Act on the State Budget and on implementing regulations concerning the chapter on the budget of courts,
- carry out the duties of the head of the organisation managing the chapter with respect to the chapter on the courts in the Act on the State Budget with the proviso that during the year he/she may re-distribute the appropriations for the Curia towards budgetary organisations included in the chapter with the consent of the President of the Curia, with the exception of re-allocations necessitated by changes in the headcount of budgetary organisations,
- exercise tasks relating to the financial management of the chapter on courts,
- manage the internal audit of courts,
- determine the annual budget for fringe benefits in collaboration with interest organisations, and
- determine the detailed conditions and levels of other benefits in collaboration with interest organisations.
- determine the necessary number of judges with respect to administrative and labour courts, district courts functioning in the territorial jurisdiction of tribunals, which is based on the headcount included in the chapter on the courts' budget in the Act on the State Budget and on the indicators of the average workload of court and out-of-court proceedings,
- designate another court to proceed instead of the presiding court if so necessitated by the objective of adjudicating cases within a reasonable period of time,
- in especially justified cases, order the adjudication of cases concerning a broad spectrum of society or cases of outstanding importance with a view to public interest as a matter of urgency,
- decide on the collection of judicial statistical data and on central duties concerning data processing, as well as
- define and if necessary revise annually the data sheets and methodology to measure judges' workloads; he/she shall, at least once a year, review workloads and changes in national data concerning the management of cases and shall define the average national workload of court and out-of-court proceedings with respect to every judicial tier and stage of cases.
- publish vacancies for judges,
- put forward a proposal to the President of the Republic concerning the appointment and relief of judges,

- post judges – following their first appointment to the court – according to the winning application and in line with the Act on the Legal Status and Remuneration of Judges,
- appoint military judges into the military chamber and upon the termination of their professional service with the Hungarian Army shall put them into another judicial post,
- designate, in line with the Act on the Legal Status and Remuneration of Judges, the judges adjudicating cases defined in Section 17 (5) and (6) and in Section 448 (2) of the Act on Criminal Procedure, furthermore upon the recommendation of the President of the tribunal he/she shall designate the judges presiding in administrative and labour cases at the tribunals,
- may post judges to the Curia, to the NJO, to the Ministry led by the Minister responsible for justice affairs, and shall decide upon the termination of the appointment and re-appointment of the judge to an actual judicial position,
- adopt a decision on the transfer of the judge,
- adopt a decision on the posting of the judge to another venue of service, if the posting does not take place between the tribunal and the administrative and labour court operating in its territorial jurisdiction or between the district court or district courts operating in the territorial jurisdiction of the tribunal or between the administrative and labour courts operating in the territorial jurisdiction of the tribunal and the district courts,
- take a decision concerning the long-term foreign secondments of judges,
- decide whether or not the territorial jurisdiction of the court has diminished to a degree which make the further employment of the judge there impossible,
- in the case of resignations of judges, he/she may agree to a notice period shorter than 3 months, and/or may relieve the judge of his/her duties for the notice period in full or in part,
- in the case of a judge retiring or reaching the upper age limit he/she shall make a decision concerning the relief of the judge of his/her duties during the notice period in line with the Act on the Legal Status and Remuneration of Judges,
- appoint and relieve the court leaders defined by law,
- may grant a derogation in the case of a conflict of interest between a court leader and his/her relative adjudicating in an organisational unit under the leadership of the court leader, and
- establish the number of lay-judges to be elected by the electing body to individual courts, taking into account the ratio of voters in the minority register, and the number of citizens with suffrage in the concerned settlements in a way that at least one lay-judge shall be elected by each minority local government.
- shall approve the rules of organisation and operation of regional courts of appeal and tribunals,
- shall manage and control – with the exception of Presidents of district, administrative and labour courts – the administrative activities of court Presidents, in the course of which he/she shall monitor the observance of rules on the administration of courts, the observance of procedural deadlines and procedural rules,
- shall inspect court leaders under his/her appointment authority, and
- depending on the conclusions of the inspection according to Points b) and c) shall take the necessary measures and control the implementation thereof, he/she may suggest that disciplinary proceedings be initiated.
- shall decide upon central training tasks and shall monitor the implementation thereof, furthermore, shall determine regional training duties, and
- shall draw up the rules of the training system of courts and rules on meeting the training obligations.
- shall inform the NJC about his/her activities every six months,

- shall inform the Presidents of the Curia, regional courts of appeal and tribunals of his/her activities on an annual basis,
- shall report annually to Parliament on the general situation of courts and the administrative activities of courts,
- shall be responsible for publishing the compilation of court rulings,
- at the request of the Minister responsible for Justice shall order the collection of data in court for the purpose of preparing legislative acts, furthermore for the purpose of examining the enforcement of laws, and
- shall provide information at the request of the Minister responsible for Justice – requesting the opinions of courts, if necessary – in questions necessary for legislative activities concerning the organisation and administration of courts, furthermore in questions relating to the application of law by courts.
- shall carry out duties regarding financial disclosure statements of Presidents of regional courts of appeal and tribunals,
- shall initiate with the NJO the awarding of the following titles “honorary/titular tribunal judge”, “honorary/titular judge of the regional court of appeal”, “honorary/titular judge of the Curia”, “councillor of the Curia”, furthermore the awarding of titles ‘chief councillor’, ‘councillor’ to judicial employees and the awarding of decorations, prizes, diplomas or plaques,
- shall ensure that interest organisations can exercise their rights, and
- shall perform other duties referred to his/her scope of authority by law.

34. The list in Section 76 AOAC is not complete, however. The ALSRJ and other provisions of the AOAC provide a number of additional competences, which are relevant for judicial independence. The President of the NJO:

- can initiate the “standardisation procedure” (Section 27.4 AOAC, see below);
- appoints a panel of judicial experts for conducting professional aptitude tests (Section 6.2 ALSRJ);
- can change the ranking of candidates (Section 18.3 ALSRJ) established by panel of judges (Section 14.1 ALSRJ); the President of the NJO only “informs” the National Judicial Council of the reasons.
- can assign a judicial position to another court (Section 9.3 ALSRJ);
- can give orders on temporary assignments of judges to other courts without the consent of the judge concerned (Section 31.1 and 31.3 ALSRJ).
- provides posts to judges who worked at the NJO to judicial posts “without the invitation of applications” (Section 58.3 ALSRJ),
- determines the data content (form) of annual activity statements of judges (Section 67 ALSRJ),
- determines the procedure for the evaluation of judges (Sections 72.2.e and 73 ALSRJ)
- keeps disciplinary decisions (Section 84.5 and 125.1 ALSRJ),
- proposes the exemption of judges to the President of the Republic (Section 96 ALSRJ),
- is represented in disciplinary proceedings (Section 122.4 ALSRJ)
- keeps financial disclosure statements in an electronic registration system (Sections 199.2, 201.3, 202.1 ALSRJ)
- delegates “any other duties” to court chairs (Section 119.o AOAC)

35. **These powers are very comprehensive. Some of them are usual competences of the head of judicial administration. Others are not. Some of them are described in rather broad terms without clear criteria governing their application. This leads to concerns , the more so with respect to them being exercised by a single person.** There are other concerns as well. For instance, the right to initiate legislation (Section 76.1.d

AOAC) seems to contradict Article 6.1 of the Fundamental Law, which grants the right to initiate legislation exclusively to the President of the Republic, the Government, any Parliamentary Committee or any Member of Parliament. Moreover, it seems to be at variance with Section 65 AOAC, which describes the duties of the President of the NJO as administrative, managerial and supervisory only. Arguably, Section 76.1.d AOAC shall supply a mere right to suggest to the above organs to initiate legislation and should thus be reformulated in more precise terms.

36. Even if most of the competences of the President of the NJO do not relate to decision making in individual cases, many of the powers listed above are closely related to the position of the judge who takes these decisions. The President of the NJO is not only a strong court “administrator”, he or she also intervenes very close to judicial decision making through the right to the transfer of cases to another court, his or her influence on individual judges and on the internal structure of the judiciary. The strong role of the President of the NJO with respect to judicial appointments is of particular importance in the present context since, due to the lowering of the retirement age of judges, many important position in the judicial system have to be filled in a short period of time and since in 2011 there was a moratorium on new judicial appointments pending the introduction of the new system.

#### **b) Accountability**

37. The Venice Commission acknowledges that the Acts provide for the transparency of the activities of the President of the NJO. The President will report on his or her activities to the National Judicial Council every six months, and annually to the Presidents of the Curia, of the Regional Courts of Appeal and of the tribunals. Moreover he or she will also submit an annual report to Parliament on the general situation of the courts and on their administration (Section 76.8.a-c AOAC). In order to inform the larger public, the rules of the President of the NJO, his or her annual report on the general situation and administration of courts, the minutes of the interviews of the applicants for a leading position and the decisions and procedural decisions will be published (Section 77 AOAC). Such reporting is indeed important for transparency, however reporting as such is not sufficient. **The AOAC should also relate the reports to the criteria relevant for the decision reported upon** (e.g. reasons for deviating from the ranking, reasons for selecting individual cases for transfer to another court) and which criteria may be applied (for instance in relation to the ranking of candidates to a position as a judge).

38. Taking into account the long term of office (nine years according to Section 66, 2<sup>nd</sup> sentence AOAC) and the extremely wide competences (Section 76 AOAC and several provisions of the ALSRL)), the office of President of the NJO must be subject to high democratic legitimisation and strict accountability. Reporting of activities is an essential element of accountability, but not a sufficient one. Regarding democratic legitimacy, one can differentiate between personal legitimisation and substantial legitimisation. Since the President of the NJO is installed directly by Parliament (regardless of the question, whether the required majority of two-thirds means a superior personal legitimisation compared to a simple majority) he/she has a strong personal legitimisation. On the contrary, the substantial legitimisation, that is the question whether a regulation is rather dense or leaves a broad leeway in decision making, appears to be deficient. Many enabling clauses do not supply sufficient substantial criteria for their execution resorting to vague terms such as “service interests” (Section 31.2 ALSRJ) or no criteria at all, for instance the assignment of a vacant position to another court (Section 9.3 ALSRJ).

39. The Venice Commission also acknowledges that the President of the NJO will to a certain degree be accountable to the National Judicial Council (NJC). The NJC can indeed examine the central administrative activity of the President of the NJO and signal problems, it can make proposals to the President of the NJO initiating legislative activity concerning courts, 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 (Section 103.1.a-c, 103.2.a).

40. However, it must be pointed out, that the NJC as the institution for the supervision of the President of the NJO is dependent on the latter in many ways – the President of the NJO controls those who should control the President. First of all, since all its members are judges, they are potential subjects to a number of allegedly neutral administrative measures such as transfers to lower level courts (Section 34.2 ALSRJ), which can easily result in a chilling effect. Second, it is up to the NJO to ensure the operational conditions for the NJC (Section 104.1 AOAC). The negative implications of this on the independence of the NJC from the NJO are obvious. Third, the President of the NJO shall attend even the *in camera* meetings of the NJC (Section 106.1, 2<sup>nd</sup> sentence AOAC) and the NJO shall prepare the minutes thereof (Section 107.1, 1<sup>st</sup> sentence AOAC). The mere presence of the President of the NJO in every meeting may prevent critical thoughts from being voiced, thus amounting to a massive chilling effect. It also grants him/her a perfect insight into each and every process within the NJC.

41. When a removal procedure is nevertheless envisaged, it can only be initiated via a motion to Parliament on the narrowly defined grounds of “unworthiness of his/her position” by the President of the Republic or by the NJC based on a two-thirds majority of a vote of all its members (Section 74.1 AOAC). It follows from Section 70.2, 2<sup>nd</sup> sentence AOAC and inversely from the appointment that the Parliament can only decide on the removal by way of a two-thirds majority, *i. e.* a comparably small minority of 34 % of the members of Parliament will be given a right to veto the removal decision. This is a serious obstacle for the removal procedure.

42. Summing up, **with the principal supervisory organ depending on him/her and unreasonably high procedural obstacles in the way of a removal procedure, the accountability of the President of the NJO is clearly insufficient.** This lack of accountability directly affects his/her democratic legitimisation, since once Parliament has installed him/her, it has no sufficient means to control him/her, but even more, if his/her term expires and no candidate gains the support of two-thirds of the members of Parliament, the President of the NJO will simply retain his/her office (Section 70.4 AOAC), possibly until he/she reaches the upper age limit. Thus, once the Parliament has installed the President of the NJO, it places a lot of power completely in the hands of one individual.

43. In order to be in compliance with the rule of law, the Venice Commission is of the opinion that the new system has to be modified. The accountability of the President of the NJO must be increased. For this purpose **the AOAC as well as the ALSRJ should prescribe that the decisions of the President of the NJO should be explicitly motivated, referring to legally established criteria, and that binding decisions should be subject to judicial review. A way to increase accountability might be to strengthen a reformed NCJ (with a pluralistic structure, see below No 43) or to find new ways - established in models used in other democratic states - to provide for accountability to the Parliament or to increase the responsibility of the Minister of Justice, of course in a way not jeopardizing the independence of the judiciary. In addition, it will be necessary to reduce the powers of the President of the NJO**

## 2. The National Judicial Council

44. The Venice Commission has always taken a firm stand in favour of independent judicial councils with decisive influence decisions on the appointment and career of judges,<sup>21</sup> while not necessarily excluding systems with a decision making process within the sphere of a minister of justice who is accountable in Parliament, provided such a system works in the country concerned without negatively affecting judicial independence.

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<sup>21</sup> CDL-AD(2010)004, paragraphs 31 *et seq.*, 82.4, 82.6.

45. The newly established NJC is described as the “supervisory body of the central administration of courts” in Section 88.1 AOAC. It has fifteen members, including *ex officio* the president of the curia, and shall be composed of judges exclusively, who are elected by majority vote of the meeting of delegated judges.<sup>22</sup> This composition appears problematic with a view to its uniformity, which can easily lead to mere introspection and a lack of both public accountability and understanding for external needs and demands, especially those of the “users” of the judicial system (advocates, civil society) or representatives of the academia. Thus, the Venice Commission underlines the need for the external perspective by calling for a pluralistic composition of judicial councils, only claiming that a substantial part of the members ought to be judges.<sup>23</sup>

46. The duties of the NJC are outlined in Section 103 AOAC which provide that the NJC shall examine the central administrative activity of the President of the NJO and signal any problems,

- shall make proposals to the President of the NJO initiating legislative activity concerning courts, and
- shall express opinions on the rules and recommendations issued by the President of the NJO.
- shall express its opinion on the budget of courts and the report on the implementation thereof,
- shall examine the economic and financial management of courts, and
- shall express opinions on the detailed conditions and levels of other benefits.
- shall publish an annual opinion on the practices of the NJO and the President of the Curia with respect to evaluating the applications of judges and court leaders,
- may award the following titles based on the initiative taken by the President of the NJO: “honorary/titular tribunal judge”, “honorary/titular judge of the regional court of appeal”, “honorary/titular judge of the Curia”, “councillor of the Curia”, furthermore the titles of ‘chief councillor’, ‘councillor’ to judicial employees, furthermore based on the initiative taken by the President of the NJO it may propose the awarding of decorations, prizes, diplomas or plaque, and may approve the awarding of prizes, plaques, diplomas by others,
- shall carry out inspection procedures relating to financial disclosure statements of judges,
- shall appoint the President and members of the disciplinary tribunal of judges,
- shall express preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview,
- shall adopt a decision on renewing the appointment of President and Vice President of the regional courts of appeal, tribunal, administrative and labour court and district court if the President or the Vice President has had already served two terms of office in the same position, and
- shall express a preliminary opinion on the applicant in the case specified in Section 132 (6).
- shall make a proposal for a central training plan, and
- shall express opinions on rules of the training system established for judges and the completion of training obligations.

47. This list clearly shows that - apart from the composition of the disciplinary tribunal of judges - the NJC is almost entirely dependent on the soft power of persuasion. Even with regard to initiating the removal of the President of the NJO from office, which is strongly emphasised by the Hungarian authorities as the “main and most important power”<sup>24</sup>, it

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<sup>22</sup> Section 88.3 *et seq.* AOAC.

<sup>23</sup> CDL-AD(2010)004, paragraph 32.

<sup>24</sup> Annex to the letter by Deputy Prime Minister Navracsics to the President of the Venice Commission, p. 3.

comes in fact as a mere right to submit a respective motion to Parliament. Its decisions are non-binding, its proposals and opinions – just the way the wording indicates – can be ignored. Under these circumstances **the NJC can hardly conduct effective supervision.**

48. Two aspects regarding the personnel structure of the NJC add to its further weakening: According to Section 89.2 AOAC the presidency of the NJC will rotate among its members with each term lasting six months. Whereas this model will prevent the establishment of too hierarchical structures within the NJC and permits the members to meet on an equal footing, it nevertheless comes as a mixed blessing. The continuing rotation of the presidency will not allow for any of the Presidents of the NJC to establish herself/himself as the voice and the face of the Hungarian judiciary. This will limit the external presentation and visibility of the NJC with regard to both the public and the other actors in the field of judicial administration. This adds to the provision of Section 90.2.g AOAC which states a prohibition for being member of the NJC for more than one term (except for the President of the Curia, who will be member *ex officio* during his or her entire term as President of the Curia). On the one hand this restriction can function as means to prevent ossification of personnel structures and allow for the introduction of new ideas; on the other hand it hampers the accumulation of experience and, hence, weakens the NJC, the more so since provisions for a smooth and gradual replacement of members are not included.

49. It follows from Article 25.5 Fundamental Law that “the organs of judicial self-government shall participate in the administration of the courts.” This norm – despite its non-committal terminology – in principle reflects the doctrine of the Venice Commission<sup>25</sup> in this regard as well as the respective Council of Europe standards<sup>26</sup>. The Venice Commission recalls, “that the new Constitution does not contain any reference to the National Council of the Judiciary, the body entrusted by the previous Constitution (Article 50.1) with the administration of the courts. It is therefore not clear whether this body will continue to exist, which solutions will be found to ensure adequate management of courts until the justice reform is effectively implemented and which mechanism will be put in place by the reform. The Venice Commission calls upon the Hungarian authorities to make sure that, whatever the chosen mechanism, strong guarantees will be provided for the independent administration of courts and no room for political intervention will be left.”<sup>27</sup> All this should be taken into account when analysing with a view to judicial self-government the role of the two different institutions, which the new Hungarian laws concerning the judiciary provide for: on the one hand the NJC, on the other hand the President of the NJO (see above).

**50. The NJC is designed as an organ of judicial self-government, with all its members being judges elected by their peers. Nevertheless it has scarcely any significant powers and its role in the administration of the judiciary can be regarded as negligible.**

51. In contrast, the President of the NJO has abundant competences and, hence, is the main actor in judicial administration. However, the mere fact, that only judges are eligible as President of the NJO, does not make the latter an organ of judicial self-government. Instead, this would imply the judges to have a decisive vote in his/her election. **Since the President of the NJO is elected by Parliament, i. e. an external actor from the viewpoint of the judiciary, it cannot be regarded as an organ of judicial self-government.**

52. As a result, **the cardinal acts appear to contradict even the rather feebly formulated right of the judiciary to “participate” in the administration of the courts in Article 25.5 Fundamental Law.** Participation would include at least both a right to be heard on every relevant matter and the power to make a minimum of substantial autonomous decisions.

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<sup>25</sup> CDL-AD(2010)004, paragraph 32.

<sup>26</sup> Cf. Rec. CM(2010)12, paragraphs 26 *et seq.*, 40 *et seq.*

<sup>27</sup> CDL-AD(2011)016, paragraph 106.

Otherwise a right to participation were meaningless and Article 25.5 Fundamental Law deprived of all substance.

## VI. Guarantees for the individual judge

### 1. Incompatibilities

53. The Hungarian authorities underlined the importance of a number of incompatibilities with the office of a judge in order to ensure judicial independence. These are laid down in Sections 39 et seq. ALSRJ and cover *inter alia* membership in political parties, Parliament or the European Parliament. The Venice Commission found, that „states may provide for the incompatibility of the judicial office with other functions. Judges shall not exercise executive functions. Political activity that could interfere with impartiality of judicial powers shall not be authorised.”<sup>28</sup> The Hungarian regulation seems to comply with these standards (though – from a European perspective - there is no need to be as strict as the Hungarian legislation provides for).

### 2. Appointments of judges

54. Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe provides that

*“44. Decisions concerning the selection and career of judges should be based on objective criteria pre established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.*

...

*46. The authority taking decisions on the selection and career of judges should be independent of the executive and legislative powers. With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers.*

*47. However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary (without prejudice to the rules applicable to councils for the judiciary contained in Chapter IV) should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.”*

55. The procedure of appointment is regulated in detail by the ALSRJ. Section 4.1 ALSRJ provides the criteria for being appointed as a judge and Section 4.2 provides for incompatibilities in a transparent way.

56. The procedure for appointing judges comprises the following steps.

- A position is advertised and candidates have to apply for the position.
- The president of the court concerned informs the President of the NJO when a position becomes vacant.
- The President of the NJO announces the vacancy.
- Candidates apply

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<sup>28</sup> CDL-AD(2010)004, paragraph 82.12.



- A panel of judges hears the candidates and ranks the applications on the basis of points<sup>29</sup> the candidates scored, taking only into consideration the criteria mentioned in Section 14.4 ALSRJ (20 points maximum are awarded for the result of the interview, further competences count as additional points, e.g. training courses or knowledge of foreign languages).
- The ranking of the panel of judges is forwarded to the chair of the tribunal or court of appeal or to the President of the Curia (Section 15.3 ALSRJ).
- They can either agree that the candidate ranked number one fill the position or can recommend the second or third candidate for the position.
- The applications, the ranking of the panel of judges and, eventually, the justified recommendation of the chair of the tribunal or the court are sent to the President of the NJO for assessment, within eight working days (Section 16 ALSRJ)
- The President of the NJO can either agree that the candidate occupying the first place in the shortlist shall be appointed, or may decide to deviate from the shortlist<sup>30</sup> and propose the second or third candidate on the list to fill the post (Section 18.1 and 18.3 ALSRJ).
- Ultimately, the President of the Republic will appoint one of the candidates proposed by the President of the NJO.

57. In Europe, a variety of different systems for judicial appointments exist and even the proposal for appointment by a single individual, such as the President of the NJO, is in principle compatible with the provisions of the ECHR. A priori, the procedure offers guarantees that the appointments of judges be based on merit, applying objective criteria, though the set of substantive and procedural rules do not contain sufficient safeguards in order to exclude that improper considerations play a role.

58. Doubts arise notably as concerns Section 18.3 ALSRJ, which states that the “President of NJO may decide to deviate from the shortlist and propose the second or third candidate on the list to fill the post”. There are no conditions or criteria indicated under which the President of the NJO can deviate from the order of the shortlist. This seems to be a fully discretionary power of the President of the NJO and thus violates the rule of law and the principle of transparency. The Venice Commission was told during its visit in Budapest that the decision cannot be appealed in court. This means that there is no way to check this kind of use of the discretionary power. While there are other legal system in Europe, which do not provide for judicial review of decisions on judicial appointments, in the specific context of a system, where a largely non-accountable person exercises wide discretionary powers, such review appears necessary. In order to enable the courts to review these decisions, the law would have to indicate the criteria to be used by the President of the NJO.

59. The President of the NJO is neither an authority under paragraph 46 of Recommendation CM/Rec(2010)12 (composed of “judges chosen by their peers”), nor under paragraph 47 (“the head of state, the government or the legislative power”). For the latter appointing authorities, Recommendation (2010)12 provides as a safeguard that “an independent and competent authority drawn in substantial part from the judiciary ... should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice.”<sup>31</sup> By analogy to paragraph 47, such a safeguard has to apply to the President of the NJO. Though the President of the NJO cannot freely choose whom to

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<sup>29</sup> The result of the interview can be a maximum of 20 points, to which points for further qualifications are added. Candidates with more than 70 points are usually appointed.

<sup>30</sup> At least in the English translation paragraphs 5 and 6 of Section 143 AOAC seem to contradict each other. Under paragraph 5, the NJO is only informed simultaneously with the appointment of ranking of the candidates is not followed, whereas under paragraph 6 an opinion of the NJO on the appointment shall be sought prior to the appointment. Clearly, paragraph 6 is preferable from the viewpoint of judicial independence.

<sup>31</sup> Highlighting added.

appoint, he or she can prevent a candidate from being appointed. His or her discretion to deviate from the shortlist thus is not in conformity with the spirit of Recommendation CM/Rec(2010)12.

60. **The new system for the appointment of judges, established in the AOAC thus results in a reduction of the guarantees for an objective selection of the candidates.** This will not be compensated by procedural safeguards. No longer a collective organ, the National Council of Judges, will propose the candidates for nomination, but a single person, the President of the NJO. While proposing a candidate for nomination as a judge to the President of the Republic, the President of the NJO is not bound by the ranking drawn up on the basis of objective criteria by the "panel of judges

61. As far as the decision of the President of the Republic is concerned, he or she seems to have the power to select freely between the candidates (though the power to select is restricted to the names on the shortlist). Though one can expect that the President of the Republic will follow the ranking in the list of the President of the NJO, this is not legally guaranteed. In so far, paragraph 47 directly applies.

### 3. Appointments of court leaders

62. As concerns appointments to senior court positions, with the exception of positions at the Curia and deputy division heads, it is the President of the NJO who appoints the chairs and vice-chairs of courts of appeal and tribunals, the division heads of courts of appeal and tribunals and the heads and deputy heads of the regional administrative and labour divisions (Section 128 AOAC). The law regulates the procedure, but does not give criteria for the decision on these appointments.

63. The main elements of the procedure are:

The chair of the court affected by the appointment gives a recommendation to the President of the NJO. Candidates apply and have to submit a career plan; a "candidate's long term plans related to the operation of the court, division or task force and the schedule of the implementation thereof" (section 130 AOAC). The judges of the court concerned express their opinion on the candidates by way of secret ballot (Section 131). The person authorised to make the appointment shall hear candidates (i.e. the President of the NJO for court chairs and vice-chairs, interviews the candidate and the "reviewing board" (probably the judges of the court concerned) and ranks candidates in the order of the votes cast. However, the person authorised to make the appointment (i.e. the President of the NJO for court presidents) is not bound by the recommendation of the reviewing board. He or she has to justify the decision to depart from the ranking in writing (Section 132.2) and has to inform the NJC. The appointment goes ahead, however. Only if the President of the NJO wants to appoint a person who did not even "obtain the majority support of the reviewing board" (probably less than half of the votes cast), the President of the NJO has to wait for the opinion on the NJC. However, if the NJC disagrees with the appointment, the President of the NJO can nonetheless make the appointment (Section 132.6 AOAC). **The AOAC gives the President of the NJO an excessive weight in the appointment of court president. He or she can go ahead with such appointments, even if the NJC disagrees.** Interestingly, the NJC can re-appoint Presidents and Vice-Presidents of various courts if they have already served two terms of office whereas the first and second time appointments are done by the President of the NJO.

64. 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 (see below), taken together with the

actual “moratorium” for appointment during the second half of 2011, is likely to result in the vacancy of numerous position of court leaders, which all will be filled by the new procedure.

**65. The AOAC should be amended to provide for better checks of the power of the President of the NJO. One way might be to give a reformed NJC a greater role, at least a veto over the appointment of court presidents.**

#### **4. Probationary periods**

66. Probationary periods of three years phrased as “appointment for a fixed period” are foreseen in Sections 3.5, 23.1 ALSRJ. The Venice Commission has always held a critical point of view towards probationary periods, stating that „ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence“,<sup>32</sup> “since they might feel under pressure to decide cases in a particular way.”<sup>33</sup>The Council of Ministers of the Council of Europe advocated certain requirements for such a decision, stating that “where recruitment is made for a probationary period or fixed term, the decision on whether to confirm or renew such an appointment should only be taken in accordance with paragraph 44 [*i. e.* based on objective criteria, in particular merit, qualification, skills and capacity, as pre-established by law] so as to ensure that the independence of the judiciary is fully respected.”<sup>34</sup> Hence, in order to meet the proportionality test, the introduction of probationary periods should go hand in hand with safeguards regarding the decision on a permanent appointment. Especially in countries with judicial systems newly established in the 1990ies like in Hungary, there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before 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”<sup>35</sup>.

67. Sections 3.3.c and 25.4 ALSRJ even provide for the possibility of repetitive probationary periods. **The law should *expressis verbis* provide for a maximum limit of cumulative probationary periods** with a view to balance the need for judicial independence on the one hand with the interest of the state on the other.<sup>36</sup>

68. The delegation of the Venice Commission was informed that typically a person intending to become judge would first become court secretary and in some cases holds this position even for up to six years before he or she would be appointed as a regular judge. Under the new Fundamental Law, Court Secretaries can exercise judicial functions in misdemeanour cases<sup>37</sup> (see also below). This means that the person already acting in a judicial function could remain in a precarious situation during up to nine years (six years as court secretary and three years in probationary period). The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, for many years the court secretary or probationary judge will have uncertainty about his or her permanent appointment and - wishing to please superior judges who evaluate his or her performance - may behave in a different way from a judge who has permanent tenure (“pre-emptive obedience”). Probationary periods are problematic already as such. The additional time as court secretary further aggravates this problem.

<sup>32</sup> CDL-AD(2010)004, paragraphs 30, 82.5.

<sup>33</sup> CDL-AD(2008)028, paragraph 40.

<sup>34</sup> Recommendation CM(2010)12, paragraph 51.

<sup>35</sup> CDL-AD(2007)028, paragraph 41.

<sup>36</sup> Cf. paragraph 12.2 German Judiciary Act (DRiG): maximum of five years.

<sup>37</sup> There may be other solutions to deal with probationary judges. In Austria, for instance, candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgments but they cannot yet take judicial decisions, which are reserved to “permanent” judges.

69. The independence of the judge has two aspects, complementing each other. First there is the external independence, shielding the judge from influence by other state powers, but then there is also the internal independence, ensuring that a judge takes decisions only on the basis of the Constitution and laws and not influenced by other factors, especially not by instructions given by higher ranking judges. In its Report on the Independence of the judicial system, the Venice Commission stated: "A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision making activity would be a clear violation of this principle."<sup>38</sup> The CCJE rightly emphasised that "judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law". The internal independence does however not exclude "doctrines such as that of precedent in common law countries (i.e. the obligation of a lower judge to follow a previous decision of a higher court on a point of law directly arising in the later case)."

70. Although the provisions in the cardinal acts guarantee the internal independence of the individual judge (Sections 1.1, 37.5 ALSRJ, less clear Section 58.2 and 61.1 ALSRJ), a certain hierarchical interference in the rulings of the lower courts and tribunals is established in several other provisions of the AOAC. According to Article 25.3 of the Fundamental Law, the Curia shall ensure uniformity of the application of the law by the courts, and make decisions on the uniformity of law which shall be binding on the courts. In the AOAC, the Curia receives the mission to ensure this uniformity not only by ruling on the legal remedy submitted against the decision of the tribunal or the regional court of appeal or by ruling on petitions for review, but also by adopting "an obligatory uniformity decision applicable for courts" (Section 24.1.c AOAC) and by "publishing court rulings and decisions or authoritative rulings" (Section 24.1.d AOAC). Section 25 AOAC reads as follows: "As part of the fulfilment of its duties determined in Article 25 Paragraph (3) of the Fundamental Law, the Curia shall make legal standardisation decisions, shall conduct jurisprudence analyses in cases completed on a final and absolute basis and shall publish authoritative court rulings and authoritative court decisions."

71. The Commission acknowledges that the uniformity procedure already existed in the 1997 Law and that this procedure has its roots even in the 19<sup>th</sup> century. The delegation of the Commission was informed that the Supreme Court had accumulated a 'backlog' in the application of this procedure and that its more frequent and quicker use was one of the main tasks of the Curia.

72. The Venice Commission underlines the need for consistency of legal interpretation and implementation. However, unlike the doctrine of the *stare decisis* 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. According to Section 26.2 AOAC, the chairs and division heads of courts and tribunals shall continuously monitor the administration of justice by the courts under their supervision. According to Section 26.4 chairs and division heads have to inform the higher levels of the courts, up to the Curia, of judgements handed down contrary to "theoretical issues" and "theoretical grounds". This turns court presidents into supervisors of the adjudication of the judges in their courts (see also Section 27 AOAC). The AOAC establishes precise rules on "authoritative Court rulings and decisions" (Section 31 AOAC) and on "law standardisation procedures"(Sections 32 to 44 AOAC). Moreover, it appears from Section 67 ALSRJ that the evaluation of the 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 the non-compliance with the ruling of the higher courts will have a negative influence on the evaluation of the judge. In Budapest, the delegation of the Venice Commission was informed that indeed in practice, the number of cases overruled was taken into account in the evaluation of judges.

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<sup>38</sup>CDL-AD(2010)004, paragraph 82.15.

73. In so far as all rules imply an interference in the administration of justice of the lower courts or tribunals, they can have a chilling effect on the independence of the individual judge and must be deemed in contradiction to the spirit of article 26.1 of the Fundamental Law which reads as follows: "Judges shall be independent and only subordinated to Acts; they shall not be given instructions as to their judicial activities."

74. A wide publication of the judgments of courts of all levels, which will allow for their recognition, together with reasonable possibilities to appeal judgments to higher courts will usually suffice to ensure 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 has to be seen in the context of the concentration of powers within the judicial system.

75. The law standardisation procedure also adds to the dominant position of the President of the NJO. She or he is entitled to submit proposals aimed at the initiation of a law standardisation procedure to the President of the Curia under Section 27.4 AOAC. The current President of the NJO has informed the delegation of the Venice Commission that she intends to use this competence. The Commission is of the opinion that **this competence**, which, in a problematic way, goes beyond the administrative and management duties of the President of the NJO as set out in Section 65 AOAC, **should be removed from the AOAC**.

## 5. Irremovability of judges

76. The irremovability of judges is an important aspect of their independence. 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 and to assault their independence. Therefore transfers against the will of the judge may be permissible only in exceptional cases.<sup>39</sup> Paragraph 52 of Recommendation CM/Rec(2010)12 states: "A judge should not receive a new appointment or be moved to another judicial office without consenting to it, except in cases of disciplinary sanctions or reform of the organisation of the judicial system."

77. The ALSRJ explicitly deals with the possibility of transferring judges. Section 31 entitles the chair 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. Section 34 enables the President of the NJO to transfer a judge to another court if a court is terminated or its competence or territory of jurisdiction is reduced to an extent that it no longer permits the employment of a judge. If the President of the NJO transfers a judge to an inferior court the judge shall retain his former salary and shall be entitled to use the title referring to his or her previous position as a judge.

78. As long as such transfers are made with the agreement of the judge concerned, it seems that these provisions comply with the above-mentioned principles on the transfer of judges, with the exception of the generally phrased and excessively large possibility of transferring a judge "for service reasons", for a maximum of one year every three years, which seems to be too often.

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<sup>39</sup> Temporary secondments also exist in other European countries such as Austria (see Article 88a Austrian Federal Constitution - "*Sprengelrichter*"). However these judges are designated in advance and not *ad hoc* (Not more than 3 per cent of the judges of a court can be *Sprengelrichter* and they can be assigned to another court within the same court district only under strict criteria.)

79. However, **if the judge does not agree to the transfer s/he is automatically “exempted from office” for 6 months and his or her service relationship is terminated** (Sections 90.j and 94.3 ALSRJ). **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 organizational reform- , there must be clear and proportional rules for such actions as well as a right of appeal.**

## 6. Evaluation

80. According to Chapter V ALSRJ the work of judges shall be evaluated. The President of the NJO plays an essential role in the evaluation of judges. He or she identifies the data content of the statement in rules (Section 67 ALSRJ) and determines the cases necessary for evaluation and the detailed rules of investigations. In case of an ineligible evaluation grade, the chair of the court shall call upon the judge to resign his office as a judge within 30 days (Art 81.1 ALSRJ). It seems that the judge is asked to resign without being given the possibility to discuss the outcome of the evaluation (for the possibility to appeal against the result of the evaluation, see Section 79 ALSRJ). Only after the refusal of the judge to resign from his or her office the court of first instance will be notified, and inaptitude proceedings will be conducted, subject to the due application of the rules of disciplinary proceedings (Section 81.2 ALSRJ). Therefore, **fair trial rules are applicable only after the judge has been requested to resign and has refused to do so. This approach is not in line with Art 6 ECHR.**

81. The provision of Section 83 ALSRJ does not deal with the same issue, because the judge, while waiting for the final and absolute decision of the service court in inaptitude proceedings, remains in office, but is not allowed to engage in activities which fall exclusively within the competence of a judge.

## 7. Disciplinary proceedings

82. In its Opinion N°1, the Consultative Council of European Judges (CCJE) rightly pointed out: “A judge who neglects his/her cases through indolence or who is blatantly incompetent when dealing with them should face disciplinary sanctions. Even in such cases, it is important that judges enjoy the protection of a disciplinary proceeding guaranteeing the respect of the principle of independence of the judiciary and carried out before a body free from any political influence, on the basis of clearly defined disciplinary faults: a Head of State, Minister of Justice or any other representative of political authorities cannot take part in the disciplinary body.”

83. According to Chapter VIII ALSRJ, disciplinary proceedings are carried out by the disciplinary service court chamber. Proceedings can be initiated by the President of the NJO (Section 109 ALSRJ). If they were initiated by another person, the President shall be informed. The President has the possibility to propose questions during the hearing and if the President herself/himself is absent, he or she shall be represented by his or her general deputy or the judge appointed by him or her (Section 122.2, 122.4 ALSRJ). One copy of the disciplinary proceedings has to be sent to the President. If the President has initiated the proceedings, he or she has the possibility to appeal against the decisions of the first instance within 15 days (Section 125.2 ALSRJ). It is obvious that the role of the President of the NJO during the disciplinary proceedings – again – is an important and strong one.

**84. Several of the provisions of the ALSRJ fail to offer necessary guarantees in disciplinary proceedings:**

- a) The investigating commissioner “may hear” the judge but seems not obliged to do so (Section 84.2 and 84.3 ALSRJ, see however Section 120.1 ALSRJ).
- b) The chamber of three members - the so called „service court chamber” - dealing with a disciplinary case, is established by the chair of the service courts. There should be an automatic case assignment system, in accordance with the principle of the lawful judge.
- c) According to Section 118.1 ALSRJ, 50 per cent of a judge’s salary may be retained for one month but there are no criteria when this can be done and who decides this issue. This ambiguity can be used to exert pressure on the judge.

85. The Venice Commission understands the sanctions system laid down in Sections 123 et seq. ALSRJ to provide for the disciplinary tribunal to either definitely remove the judge from office or to apply disciplinary sanctions, which comprise inter alia a “motion seeking removal from office” (Section 124.1.e ALSRJ) that will have effect for a period of three years from its initiation (Section 126.2.c ALSRJ). Moreover, it understands that the warning under Section 123.2 lit a ALSRJ has no formal implication, while the reprimand under Section 124.1.a ALSRJ is seen as a formal disciplinary sanction.

**VII. Allocation of cases**

86. The allocation of cases is one of the elements of crucial importance for the impartiality of the courts. With respect to the allocation of cases the Venice Commission corresponding with the Council of Europe standards<sup>40</sup> holds that “the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law.”<sup>41</sup> According to the ECtHR’s case-law, 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”.<sup>42</sup> Nor, in countries where the law is codified, can the organisation of the judicial system be left to the discretion of the judicial authorities, although this does not mean that the courts do not have some latitude to interpret the relevant national legislation.<sup>43</sup> 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.”<sup>44</sup>

87. „The order in which the individual judge (or panel of judges) within a court is determined in advance, meaning that it is based on general objective principles, is essential. It is desirable to indicate clearly where the ultimate responsibility for proper case allocation is being placed. In national legislation, it is sometimes provided that the court presidents should have the power to assign cases among the individual judges. However, this power 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.”<sup>45</sup>

<sup>40</sup> Recommendation CM(2012)12, paragraph 24.

<sup>41</sup> CDL-AD(2010)004, paragraph 81, 82.16.

<sup>42</sup> See *Zand v. Austria*, application no. 7360/76, Commission report of 12 October 1978, Decisions and Reports (DR) 15, pp. 70 and 80.

<sup>43</sup> See *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, paragraph 98, ECHR 2000-VII.

<sup>44</sup> CDL-AD (2010)004, paragraph 77.

<sup>45</sup> CDL-AD(2010)004, paragraph 79.

88. The right to a lawful judge is enshrined in Section 8.1 AOAC. Section 9 AOAC provides “the case distribution schedule shall be defined no later than 10 December of the preceding year.” Article 9 AOAC devolves the power to determine the distribution schedule upon the President of the respective court, requiring that it shall be „based on the opinions of the chamber of judges and the colleges“. This seems to be a method using “transparent criteria established in advance by the law”<sup>46</sup>, as called for by the Venice Commission.

89. Section 9.1, 2<sup>nd</sup> sentence AOAC, however, provides for wide possibilities to exceptions with the vague terms “important reasons affecting the operation of the court or in the interests of the court”. These criteria are too general also in the light of paragraph 9 of Recommendation CM/Rec(2010)12, which requires that “A case should not be withdrawn from a particular judge without valid reasons. A decision to withdraw a case from a judge should be taken on the basis of objective, pre-established criteria and following a transparent procedure by an authority within the judiciary”.

90. Furthermore, Section 76.4.b AOAC allows for the President of the NJO to designate another court based on the vague criterion of “adjudicating cases within a reasonable period of time”. This relates to Articles 11.3 and 11.4 of the Act on Transitional Provisions. The fact, that some courts in Hungary are so small that the designation of such a court would effectively amount to the designation of a single judge or a special chamber, further adds to this. Even though the reasonable time requirement is part of both Article XXVIII Fundamental Law and Article 6.1 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.<sup>47</sup> Taking into account the importance of the right to the 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.

91. In order to prevent the risk of an abuse of the power to allocate and to bring the provisions in line with Article 6 ECHR, the Venice Commission recommends the Hungarian authorities to use other mechanisms for the distribution of cases, especially the ones outlined by the Venice Commission as follows: „In order to enhance impartiality and independence of the judiciary it is highly recommended that the order in which judges deal with the cases be determined on the basis of general criteria. This can be done for example on the basis of alphabetical order, on the basis of a computerised system or on the basis of objective criteria such as categories of cases. The general rules (including exceptions) should be formulated by the law or by special regulations on the basis of the law, e.g. in court regulations laid down by the presidium or president. It may not always be possible to establish a fully comprehensive abstract system that operates for all cases, leaving no room to decisions regarding allocation in individual cases. There may be circumstances requiring a need to take into account the workload or the specialisation of judges. Especially complex legal issues may require the participation of judges who are expert in that area. Moreover, it may be prudent to place newly appointed judges in a panel with more experienced members for a certain period of time. Furthermore, it may be prudent when a court has to give a principled ruling on a complex or landmark case, that senior judges will sit on that case. The criteria for taking such decisions by the court president or presidium should, however, be defined in advance<sup>48</sup> on the basis of objective criteria. Workload statistics provide objective statistical data but they are not sufficient as a basis of 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. In order to prevent any risk of abuse, **court presidents and the President of the NJO should not have discretion to decide which cases should be transferred or to select the ‘sending’ or ‘receiving’ courts.** In addition,

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<sup>46</sup>CDL-AD(2010)004, paragraph 81.

<sup>47</sup>*Cf. König v. Germany*, ECtHR judgment of 28 June 1978, paragraph 100.

<sup>48</sup>CDL-AD(2010)004, paragraph 80



any such case allocation should be subject to review in order to take into account possible harsh situations where persons without the means to do have to come to a court far away from their home town.“

92. The President of the NJO informed the delegation of the Venice Commission that since the entry into force of the AOAC, she already used Section 76.4.b in nine cases upon request by the President of the Budapest Court, which is overloaded. The cases were assigned to a regional court with a lower caseload. The Commission received statistics, which show that indeed there is a serious imbalance between the workload of courts in Hungary. There may therefore be a basis for an objective system (even though it seems that in the present case, the nine cases were not assigned to one of the least burdened courts). The real problem lies in the selection of some cases, which are transferred, and in the lack of any justification, why it was just these cases, which were selected. The Commission delegation was indeed informed that one of the cases transferred was a highly sensitive case of alleged political corruption

93. During the discussions with the delegation of the Commission, the President of the NJO announced that she would elaborate objective criteria for such case assignments. The Commission welcomes this initiative but 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. It can only be regretted that such case transfers have already taken place in the absence of such criteria.

94. In general, the system of transfer of case should rather be avoided, even if it were completely objective. General measures like the redesigning of court districts or voluntary transfer of judges to the capital should help to overcome the problem of case-load on a more permanent basis. This was also acknowledged by the President of the NJO during the meeting with the Delegation of the Commission.

## **VIII. Other issues**

### **1. Prior exemption of judge before retirement**

95. Sections 90.h.ha, 94.3 and 96.2 ALSRJ provide for those judges reaching the so-called “upper age limit” to be exempted from office six month before the actual retirement date. It seems questionable – even more so in times of strained budgets – to exempt people from office with full payment just because they will retire within the next six month.

96. The Venice Commission was informed that these provisions are just transitional with a view to the reduction of the upper age limit to 62 years and shall allow for smooth and gradual retirement. However, the transitional character of the provisions is not stipulated in the law and it is difficult to find a justification why especially judges need a “smooth and gradual retirement” by exempting them from office.

### **2. Role of Court Secretaries**

97. In its Opinion on the Constitution the Venice Commission stated: “Article 27 (3), stipulating that ‘In cases defined by law, court secretaries may also act within the competence of sole judges subject to Art. 26(1)’, also lacks precision and creates ground for questions. Can the court secretary, who is not a judge, act as a judge? If this will be the case, this provision seems questionable from the perspective of the European standards relating to the status of judges. It is therefore essential that, in the context of the adoption of legislation to determine the specific ‘cases’ referred to by Article 27 (3), the applicable standards are fully respected. In particular, clear mention should be made of the requirements to fulfil in order to discharge judicial duties and more general, of the conditions

which should guarantee the competence, independence, and impartiality of judges and tribunals (cf Article 6 ECHR)” (CDL-AD(2011)016,para. 109). The objections of the Venice Commission were not answered in a sufficient way because Section 15 AOAC again provides that court secretaries can exercise functions of judicial adjudication. **In the cardinal laws, there is a lack of clear indications when and under which conditions court secretaries can act in the competence of a single judge.**

### 3. Liability

98. Rules on the liability of judges are provided for in Sections 131 et seq. ALSRJ. Whereas Section 132 ALSRJ could be read as providing a basis for a claim, the Venice Commission tends to understand it as a regulation of the substantive content of the claim under Section 131 ALSRJ, *i. e.* as a limitation of the actually owed compensation. Otherwise it were not in line with European Standards as it was on the one hand not restricted to the performance of judicial duties<sup>49</sup> and on the other hand the entitlement was not restricted to the state.<sup>50</sup>

### 4. Ineligibility proceedings on health grounds

99. Section 86.1 provides for the possibility for the chair of the court to call upon a judge in writing to resign from his or her office within 30 days, if the judge is unable to fulfil his or her duties on a long-term basis for health reasons. An examination of the judge’s state of health is only conducted if the judge fails to resign his office (Section 86.2). In the light of the radical step, which the chair of the court takes towards the cessation of the judge’s term of office, a prior clarification of facts and examination of the judge’s state of health should be stipulated.

### 5. Participation of court staff in the selection of judges

100. A noteworthy example of participation and codetermination can be found in Section 131.3.e and g AOAC, which allow for the “court staff” to express their opinion on candidates for chairs at lower courts. The term “court staff”, however, seem to be misleading, since it usually comprises the administrative and non-judicial staff, whereas participation in such issues should be available first and foremost to the judges of the respective court. Moreover, the possibility to expressing one’s opinion directly is unnecessarily restricted to lower courts. Finally, the effects of the vote remain unclear. Even though it does not have to be binding, it should at least be listed among the criteria to be taken into account by the person authorised to make the appointment in Section 132.2 AOAC.

### 6. Tie vote

101. According to Section 153.2 AOAC in case of a tied vote in the judicial council of the Curia, a court of appeal or tribunal the vote of the President is decisive. Arguably, this refers to the President of the respective judicial council. Nevertheless this can easily be misunderstood with regard to the fact that the previous notion of a “President” in Section 152.3 AOAC refers to the President of the respective court, who shall take part in the meetings as a permanent guest. Hence, Section 153.2 AOAC should provide for a more precise formulation.

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<sup>49</sup> Recommendation CM(2010)12, paragraph 71.

<sup>50</sup> Recommendation CM(2010)12, paragraph 67.

## IX. Transitional issues

### 1. Retirement age

102. In the course of the reform of the judiciary the Hungarian Parliament intended “to introduce a sector-neutral regulation regarding the consequences of reaching the retirement age”. The Venice Commission was informed<sup>51</sup>, that the general retirement age, that is the minimum threshold for retirement with full pension, for judges had been 62, while they had the choice to continue their office until reaching the upper age limit, that is the limit for mandatory retirement, of 70 years. Under Article 12 of the Transitional Provisions of the Fundamental Law and the ALSRJ, the upper age limit should be merged with the retirement age to the effect that everyone reaching the retirement age would actually have to retire. Exceptions with a view to maintaining the upper age limit of 70 years for “certain public law officers” (these appear to be the Chief Prosecutor, the President of the Court of Auditors and the judges of the Constitutional Court) were nevertheless provided.

103. The Venice Commission understands that the general retirement age of 62 years will gradually be increased to 63 years, at first, in 2014 and to 65 years in the long run, depending on the date of birth. It notes that this retirement age is regarded as a minimum threshold with regard to many sectors that maintain the upper age limit of 70 years, whereas it is in principle regarded as a maximum limit for the judiciary.

104. The Venice Commission examines this issue not from the special angle of age discrimination but from its incidence on judicial independence. From this viewpoint, the retroactive effect of the new regulation raises concerns. A whole generation of judges, who were doing their jobs without obvious shortcomings and who were entitled – and they expected - to continue to work as a judge, have to leave the judicial system. The 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 why questions related to the motives behind the new regulation were raised in the public.

105. The sudden change of the upper age limit creates the problem that a significant part of nearly ten percent of the Hungarian judges will retire within a short period (between 225 and 270 out of 2900 judges in Hungary). The argument 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”, must be dismissed as not being sufficiently proven.

106. Furthermore, the Venice Commission is worried about the provision in Act CXXXI which amends Act LXVII of 1997 on the Legal status and Remuneration of Judges and which provides that no new judges could be appointed already six month before the entry of the new legislations of the judiciary. During the meetings in Budapest, this provision was referred to as the “moratorium” on judicial appointments. This provision seems not 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 performed under the new system, giving the newly elected President of the NJO the essential role in these appointments. Having in mind the heavy workload of several courts, it seems difficult to justify forcing judges to early retirement on the one hand while not providing for a speedy filling of the gap on the other.

107. The Venice Commission emphasises the importance of a balanced age structure with respect to both the judiciary and the public service as a whole. It underlines the argument of the Hungarian authorities, that “professionals belong[ing] to different age groups can contribute to a high standard of professional activity”.

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<sup>51</sup> Annex to the letter by Deputy Prime Minister Navracsics to the President of the Venice Commission, p. 7.

108. The Venice Commission's 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. Judges, who wish to remain in office, would be able to apply to the NJC, which would grant their request on the basis of their "professional and medical" aptitude. It seems unclear why the professional aptitude needs to be verified. If the judge was able to fulfil his or her work it seems obvious that he or she is "professionally able" to continue to work. On the other hand, the evaluation of the medical fitness may be justified.

109. 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 seems to be problematic especially with a view to the situation in which the quota is exhausted in the course of a year. From then on, all future requests for the rest of the year have to be rejected. This would create a new issue of discrimination between the judges.

110. Thus, the Hungarian authorities are invited to provide for a less intrusive and not hasty solution for a gradual decrease of the upper age limit. It is at least recommended to extend the transitional period in order to protect current judges' legitimate interests.

## **7. The President of the Curia**

111. In its opinion on the New Constitution the Venice Commission had appealed to the Hungarian authorities that the occasion of adopting transitional 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".<sup>52</sup> In its reply to the Venice Commission, the Hungarian Government pointed out that "Hungary fully subscribes to this suggestion and assures the Commission that the drafting of transitional provisions will not be used to unduly put an end to the terms of office of persons elected under the previous legal regime."<sup>53</sup>

112 Art. 25 of the Fundamental Law provides that the supreme judicial body shall be the Curia. According to Art. 11 of the Temporary Provisions of the Fundamental Law, the Curia is the heir (legal successor) of the Supreme Court. All judges of the Supreme Court remained in office as judges with the exception of its President. Section 114 AOAC established a new criterion for the election of the new President, which leads to the ineligibility of the former President of the Supreme Court as President of the Curia. This criterion refers to the time serving as a judge in Hungary, not counting the time as a judge for instance in a European Court. Many believe that the new criterion was aimed at preventing an individual person – the actual president of the Supreme Court - from being eligible for the post of the President of the Curia. Though the law was formulated in a general way, its effect was directed against a specific person. Laws of this type are contrary to the rule of law.

113. Other countries do have rules that appreciate time periods that judges have spent abroad. Section 28, par. 3 ALSRJ states that a judge's long-term secondment abroad shall be regarded as time completed at the service post occupied prior to the commencement of his time abroad. The law does not provide for a minimum time a judge must have spent in Hungary before being posted abroad. Therefore, regulations of equivalence between national and international functions should be established, particularly with regard to requirements that a person has to fulfil in order to be appointed e.g. President of the Curia. Furthermore, it is highly uncommon to enact regulations that are retroactive and lead to the cession of a high function such as the President of the Curia.

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<sup>52</sup>Paragraph 140.

<sup>53</sup>Page 12.

114. The unequal treatment between the judges of the Supreme Court and their President is difficult to justify. The Hungarian authorities seem to argue that the nature of the tasks of the President of the Curia and of the Supreme Court are radically different, the latter would be more engaged in administrative matters as the President of the previous National Council of the Judiciary, whereas the President of the Curia would deal more with substantive law and ensure the uniformity of the case-law. However this argument does not convince. Experience at the European Court of Human Rights could be particularly useful for the tasks of the President of the Curia.

115. Since the provision of the Fundamental law related to the eligibility as the President of the Curia might be understood as an attempt to get rid of a specific candidate for the President, who has served as president of the predecessor of the Curia, the law can be understood as a kind of a sanction of the former president of the Supreme Court. Even if this is not the case, the impression, that it might be the case, bears risks of a chilling effect, thus threatening the independence of the judiciary.

## **X. Conclusions**

116. The adoption of the Fundamental Law but even more so the adoption of the Act on the Legal Status and Remuneration of Judges and the Act on the Organisation and Administration of Courts of Hungary as well as the Transitional provisions of the Fundamental Law have brought about a radical change of the judicial system.

117. The Commission identified a number of positive elements in the AOAC and the ALSRJ, The Commission has indeed no doubt that there was a need for reform of the previous system. But it also identified elements which seem to be problematic. Even if it might be possible to justify some of these elements in the framework of the Hungarian tradition, the reform as a whole threatens the independence of the judiciary.

118. The main problem is the concentration of powers in the hands of the President of the NJO, who acts as a single person. Although States enjoy a large margin of appreciation in establishing a system for the administration of justice, in no other member state of the Council of Europe such important powers, including the power to select judges and senior office holders, are vested in a 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 in practically every respect regarding the organisation of the judicial system and he or she has wide discretionary powers mainly 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 unless in cases of violation of the law. The very long term of office (9 years) adds to these concerns

119. These strong powers including in the field of judicial appointments are exacerbated – inter alia - by the following elements:

- the system of supervision (uniformisation procedure), taken together with the strong influence of the President of the NJO on the appointment of court presidents who initiate this uniformisation procedure,
- repetitive probationary periods,
- possibilities of transfer of judges against their will and the harsh consequences of a refusal and
- the transfer of cases by the President of the NJO to another court.

120. These issues taken together and looked at also in the light of other problems addressed in this opinion, the Commission comes to the conclusion that the essential elements of the reform not only contradict European standards of the organisation of the judiciary, especially its independence, but are also problematic as concerns the right to a fair trial under Article 6 ECHR. The present opinion tries to indicate how these issues could be overcome through amendments of the newly enacted norms.

121. In its opinion on the New Constitution, the Venice Commission had expressed its hope that its recommendations be taken into account “by amending the Constitution where necessary”.<sup>54</sup> The Commission remains of the opinion that basic tenets of the independence of the judiciary including strong checks and balances should be regulated in the Constitution itself and that the Fundamental Law should be amended accordingly.

122. The Venice Commission remains at the disposal of the Hungarian authorities for assistance in this and other areas.

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<sup>54</sup>Paragraph 150.