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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

HUNGARY

OPINION

ON THE AMENDMENTS TO THE ACT ON THE ORGANISATION AND ADMINISTRATION OF THE COURTS AND THE ACT ON THE LEGAL STATUS AND REMUNERATION OF JUDGES ADOPTED BY THE HUNGARIAN PARLIAMENT IN DECEMBER 2020

Adopted by the Venice Commission
at its 128th Plenary Session
(Venise and online, 15-16 October 2021)

on the basis of comments by

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Ms Kateřina ŠIMÁČKOVÁ (Substitute Member, Czech Republic)

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I. Introduction

1. By letter of 5 February 2021, the Chairperson of the Committee on the Honouring of Obligations and Commitments (Monitoring Committee) of the Parliamentary Assembly of the Council of Europe (PACE), requested an opinion of the Venice Commission "on the legislative and constitutional package adopted by the Hungarian Parliament in December 2020". As a first opinion on the constitutional amendments has been adopted in July 2021,[1] this opinion will only cover the amendments concerning the judiciary (CDL-REF(2021)056).

2. Mr Paolo Carozza, Mr António Henriques Gaspar and Ms Kateřina Šimáčková acted as rapporteurs for this opinion.

3. Due to the health situation, it was not possible to travel to Budapest. On 7, 9 and 10 September 2021, the rapporteurs as well as Ms Martina Silvestri and Mr Taras Pashuk from the Secretariat held online meetings with the Ministry of Justice, the Supreme Court (*Kúria,* hereinafter referred to as '*Curia*'), the National Judicial Council, the National Office for the Judiciary, the Association of Judges, the representatives of political parties from the parliamentarian majority and opposition, as well as with civil society. The Commission is grateful to the authorities for the excellent organisation of these meetings.

4. This opinion was prepared in reliance on the English translation of Act CLXV of 2020 amending certain laws in the field of justice (CDL-REF(2021)056), as well as Act CLXI of 2011 on the organisation and administration of the Courts (CDL-REF(2021)057) and Act CLXII of 2011 on the legal status and remuneration of judges (CDL-REF(2021)058) prior to the amendments. The translation may not accurately reflect the original version on all points.

5. This opinion was drafted on the basis of comments by the rapporteurs and the results of the virtual meetings and written comments from stakeholders. Following an exchange of views with Mr Oszkár Ökrös, State Secretary in the Ministry of Justice of Hungary, it was adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021).

II. Background

6. The Hungarian Act CLXI of 2011 on the organisation and administration of the Courts (hereinafter, "AOAC") and Act CLXII of 2011 on the legal status and remuneration of judges (hereinafter, "ALSRJ") have already been subject of two previous Venice Commission opinions: (1) Opinion on the Cardinal Acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001, adopted by the Venice Commission in October 2012 (hereinafter, "the 2012 Opinion"), and (2) 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 the Courts of Hungary, adopted by the Venice Commission in March 2012.

7. The 2012 Opinion had noted, among other issues, that "*the powers of the NJO [i.e., National Judicial Office] remain very extensive to be wielded by a single person and their effective supervision remains difficult*"[2] and it had expressed criticism towards the system governing the National Judicial Council (NJC), in that it weakens the latter and its capacity to control the activities of the President of the NJO.[3] Moreover, the Venice Commission had raised concerns regarding the uniformity procedure (the possibility for the Curia to take decisions binding for all courts to ensure the uniform application of the law) and its potential impact on the internal

[1] Venice Commission, *Opinion on the constitutional amendments adopted by the Hungarian parliament in December 2020*, CDL-AD(2021)029.
[2] Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020, para 88.
[3] Venice Commission, *op. cit.*, CDL-AD(2012)020, para. 35.

independence of the judiciary.[4] In light of this, the 2012 Opinion had made a list of recommendations some of which are still valid and, as they have not been addressed in the successive amendments, will be recalled in this opinion.

8. It is noteworthy that in December 2019, the Hungarian Parliament adopted substantial amendments to these laws governing the judiciary, some of which are relevant to be reported here as contextual information for better understanding of the following developments. The Commission has learned that the number of judicial posts in the Curia is not set by statute but is determined by the NJO President. Judges are appointed to the Curia by its President, following a call for applications, on the basis of an opinion of the Curia's competent department and of an assessment and ranking of candidates by the Curia's judicial council. Following the 2019 legislative changes, members of the Constitutional Court, who are elected by Parliament, may request to be appointed as a judge after the termination of their mandate, without the need to follow the normal appointment procedure. Moreover, the Curia President is elected by Parliament following a proposal from the President of the Republic, from among judges – not necessarily of the Curia – with at least five years' experience as a judge. As of 1 January 2020, rules on selecting the Curia President were also amended, allowing time served as a senior legal secretary at the Constitutional Court or at an international court to be taken into account when calculating the 'experience as a judge'.[5]

9. In compliance with this new procedure, since 2020, nine Constitutional Court members have obtained the status of a judge and have been appointed as Curia judges, one of them being nominated as President and taking functions on 1st January 2021, despite the negative opinion of the National Judicial Council.[6]

10. This opinion is on further amendments to the laws at issue, which were part of an Omnibus Act amending 22 legislative Acts in the field of justice (Act CLXV of 2020, hereafter "the Omnibus Act"). In the night of 10 November 2020, while a lockdown was being ordered in Hungary because of the COVID-19 pandemic, a complex government-sponsored package of amendments, composed of the Omnibus Act, the Ninth Amendment to the Fundamental Law,[7] and amendments to the election legislation,[8] were submitted to Parliament.

11. The package was adopted by Parliament on 15 December 2020 and most of the amendments to the AOAC and the ALSRJ (hereinafter, "the 2020 amendments") came into force on 1st January 2021. According to the information received by the Commission, the Curia President may set up judicial panels composed of a presiding judge and four judges for certain groups of cases, following a non-binding opinion of the department concerned and of the judicial council of the Curia. Further, the Curia makes uniformity decisions which are binding on courts. When a chamber wishes to deviate from the Curia's published case law, it must stay the proceedings and request a uniformity decision. The uniformity panel can be chaired by the Curia President or Vice President; its eight members are selected by the chair on an *ad hoc* basis from among judges of the given department. Moreover, the parties may lodge a uniformity complaint against a final decision of the Curia if it deviates from the Curia's published case law. The uniformity complaint panel is chaired by the Curia President or Vice President; its eight members are selected by the chair based on an algorithm. The uniformity complaint panel may quash final decisions handed down by the chambers in individual cases.[9]

[4] Venice Commission, *op. cit.*, CDL-AD(2012)020, paras. 50-53.
[5] See 2020 Rule of Law Report of the European Commission, Country Chapter on the rule of law situation in Hungary, pages 6-7. The Venice Commission refers to this report as one among other background documents which it used as a factual source of information.
[6] 2020 Rule of Law Report of the European Commission, *op. cit.,* pages 5-6.
[7] Already analysed in the Venice Commission Opinion CDL-AD(2021)029, *op. cit*.
[8] Act CLXVII of 2020.
[9] 2021 Rule of Law Report of the European Commission, *op. cit.*, pages 3-4. The Curia swiftly responded to Chapter I of the European Commission's report, 'in order to clarify the inaccuracies in the text. The responses of Curia were

12. The 2020 amendments touch upon the following issues:

a) the allocation of cases, notably the power of the President of the Curia to increase the members (from three to five) of adjudicating chambers for a certain type of cases;
b) the new rules of the uniformity complaint procedure;
c) the ranking of judges;
d) the rules governing the legal status of the Vice-President, the Secretary General and the Deputy Secretary General of the Curia; and
e) the secondment of judges to other bodies.

13. While the first four points are related to the Curia and the role of its President, the last point concerns the prerogatives of the President of the NJO.[10]

III. Analysis

A. Preliminary observations

14. Although the 2020 amendments have a limited scope and appear to be mainly of a technical nature, the Venice Commission deems it appropriate to locate them into their context to analyse them in light of the aforementioned context.

15. In particular, as a preliminary remark, the Venice Commission observes that the regime of appointment of the President of the Curia introduced with the 2019 amendments could pose serious risks of politicisation and important consequences for the independence of the judiciary, or the perception thereof by the public, considering the crucial role of this position in the judicial system. This is even more relevant when taking into account the limited guarantees of independence which apply after the appointment, given that the President of the Curia can be dismissed or disqualified from office upon a simple majority decision of the Parliament,[11] "*if considered unworthy of office due to some action, or acts committed or omitted*"[12] – a vague and weak criterion for removal from office.

16. As concerns the possibility for constitutional court judges to request to become judges of the Supreme Court, the Venice Commission considers it important to highlight that in most systems with separate and specialised constitutional courts, the nature of the judicial function is different at constitutional courts as compared with supreme (ordinary) courts. In particular, the system of appointments to constitutional courts is usually more open to political considerations than ordinary courts. This does not mean that the appointment of a judge from a constitutional court to a supreme court is dangerous or unacceptable; it only means that it opens the door to a potential politicisation of the supreme court, and the approach should therefore be cautious.

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presented in the form of comments to the Commission's report. The comments are available at https://kuria-birosag.hu/sites/default/files/press/comments_curia_rol-rep-2021_final.pdf. Furthermore, at pages 6-7, the report also provided relevant contextual information on the practice of the President of the NJO who continued to annul the procedures for selecting court presidents and to appoint ad interim court presidents without the approval of the NJC. The NJO President has continued the practice of cancelling selection procedures for court presidents and other court managers, even where there were suitable applicants supported by their peers. During the COVID-19 pandemic, the selection of court presidents was repeatedly delayed and vacant posts either remained empty or were filled by the NJO President on a temporary basis, or the mandate of court managers was extended by legislation. It is worth noting that court presidents exercise powers that are relevant to judges' career perspectives.

[10] The Venice Commission has examined the issue of the qualifications to become President of the Curia or President of the NJO in an abstract manner, with no reference to the personal qualifications of the current postholders.

[11] Section 115(1)(e) and (f), and 115(2) AOAC.

[12] Section 74 AOAC.

17. For these reasons, considering the manner in which the President of the Curia is appointed, his or her extensive powers and central role in the Hungarian judicial system and in order to avoid any risk of political influence, the Venice Commission invites the Hungarian authorities to adopt a cautious approach when selecting a constitutional court judge to undertake this position.

18. On another preliminary note, given that some amendments impact the role of the President of the NJO,[13] and taking into account the above-mentioned considerations with regard to the excessive powers assigned to this figure,[14] the Venice Commission takes the opportunity to recall the previous recommendations regarding the President of the NJO which have not been addressed by the authorities and therefore still remain valid:

> "*93. […]*
> *5. the Vice-President of the NJO, who is selected by the President of the NJO, should not become the interim President of the NJO;*
> *6. the obligation of the President of the NJO to state the reasons of his or her decisions should be made a general rule; the limitation by the clause "where applicable" should be removed if it could be interpreted as giving discretion to the President of the NJO whether or not to state reasons for his or her decisions;*
> *7. the NJC's principles to be applied by the President of the NJO when deviating from the shortlist of candidate judges should explicitly be made opposable to the President of the NJO in judicial proceedings;*
> *8. the possibility for the President of the NJO to declare the appointment procedure unsuccessful should be removed; the President of the NJO should be obliged to make a proposal for appointment of the candidate ranked first when the NJC disagrees with the change of the ranking;*
> *9. an unsuccessful candidate should be able to contest the ranking of candidate judges on the ground that it was not based on objective criteria based on merit and not only on procedural grounds;*
> *10. the supervision of judges by chairs and division heads of courts and tribunals in the uniformisation procedure should be removed;*
> *11. the maximum frequency of transfers of judges ("one year every three years") should be reduced substantially; it should not be possible to transfer a judge so often;*
> *12. the Legislator should revise the judiciary acts in order to re-attribute cardinal or ordinary law level status to each section as required by the contents of the provision;*
> *13. the NJC should not be composed exclusively of judges; the 'users of the judicial system' such as advocates, representatives of civil society and the academia should be included as full members (not upon ad hoc invitation and with consultative status only)[15];*
> *14. the system of continuing rotation of the presidency and the membership in the NJC for only one term, which weakens the NJC, should be reconsidered.*"[16]

B. The process of adoption of the 2020 amendments

19. As already noted in the opinion on the constitutional amendments,[17] the bill was submitted to Parliament as part of a major package introducing several legislative amendments, during a state of emergency declared earlier on that same day. The whole package was adopted by Parliament

[13] See section G below.
[14] See para. 7 and footnote 9 above.
[15] *On the importance of a pluralistic composition of judicial councils, see the Report on the Independence of the Judicial System Part I: The Independence of Judges (CDL-AD(2010)004, adopted by the Venice Commission at its 82nd Plenary Session, Venice, 12-13 March 2010).*
[16] Venice Commission, *op. cit.*, CDL-AD(2012)020, para. 93.
[17] Venice Commission, CDL-AD(2021)029, *op. cit.*, para. 12.

a few weeks later, apparently without public consultation and the amendment at stake came into force after only a couple of weeks.

20. The swift procedure that was followed, apparently without consultation, is not in line with the Venice Commission's recommendations in the Rule of Law Checklist,[18] nor is it compatible with the Commission's Report on Respect for democracy, human rights and the rule of law during states of emergency[19] and the Report on the Role of the opposition in a democratic Parliament.[20] Furthermore, it appears not to be in line with Hungarian law, as public consultation is mandatory for bills or constitutional amendments prepared by Ministers.[21] No reason has been offered as to why such a fast-track process was necessary or appropriate. Nor are there reasons based on the content of the Act or the situation at hand for it to be adopted during a state of emergency, when there is a real risk that no meaningful democratic discussion of government bills can take place, particularly when there are severe restrictions on the fundamental rights to gather, discuss, protest, and demonstrate.[22]

21. This problem of lack of public consultation was also highlighted by the HR Commissioner Dunja Mijatović in her statement in November 2020.[23]

22. The same observation applies to the legislative changes examined in this opinion: the adoption of legislative changes without public consultation is contrary to both domestic and international rules and standards and is, therefore, worrisome in the opinion of the Venice Commission.

C. The allocation of cases

23. The new wording of Section 10(2) AOAC provides that the President of the Curia may decide that a five-judge chambers shall hear and determine certain categories of cases, instead of the usual three-judge composition.[24]

24. The rules on allocation of cases are important, both as method for a balanced distribution of work among judges and for the organisation and management of the workload of the court, as well as an instrument to guarantee impartiality and independence of judges, preventing the risk of manipulation or arbitrariness in the allocation of a case to a specific judge.

25. It is therefore to be examined how cases are allocated and whether the new power of the President of the Curia complies with the requirements of the right to a lawful judge.

26. Article 6 paragraph 1 of the European Convention on Human Rights (hereinafter, "Convention") requires that a court or tribunal be "established by law". This is also confirmed by the well-established case law of the European Court of Human Rights (hereinafter, "ECtHR"). As

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[18] Venice Commission, *Rule of Law Checklist*, CDL-AD(2016)007, point 5.
[19] Venice Commission, *Report on Respect for democracy, human rights and the rule of law during states of emergency: Reflections*, CDL-AD(2020)014, para. 84.
[20] Venice Commission, *Report on the Role of the opposition in a democratic Parliament*, CDL-AD(2010)025, paras 106 - 115.
[21] Act CXXXI of 2010 on Social Participation in the Preparation of Laws, Articles 1 and 8 (1)-(2).
[22] On 11 November 2020, the government introduced a blanket ban on demonstrations (Government Decree 484/2020. (XI. 10.), Articles 4(1) and 5(1)-(2)).
[23] https://www.coe.int/en/web/commissioner/-/commissioner-urges-hungary-s-parliament-to-postpone-the-vote-on-draft-bills-that-if-adopted-will-have-far-reaching-adverse-effects-on-human-rights-in-
[24] Section 10(2) AOAC: "*Where one or more branches are concerned, the President of the Kúria (Curia) may, following consultation with the college affected, decide that chambers composed of five judges shall have exclusive power to hear and determine the cases specified in Subsection (1) of Section 24. This shall be indicated in the case allocation rules of the Kúria.*2 Note that the consultation with the college (i.e. the judicial collegium concerned) is not binding on the President.

it has been stated by the ECtHR in *Lavents v. Latvia*[25] or *Ilatovskiy v. Russia*,[26] the principle that a court must always be established by law reflects the principle of the rule of law and is inherent in the system of the Convention; furthermore, '*the phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but also the composition of the bench in each case*.'[27] The requirement for a court or tribunal to be "established by law" therefore means that case allocation to a certain type of panel/chamber must be determined in advance by a law.

27. Furthermore, pursuant to a recommendation by the Council of Ministers, "*The allocation of cases within a court should follow objective pre-established criteria in order to safeguard the right to an independent and impartial judge. It should not be influenced by the wishes of a party to the case or anyone otherwise interested in the outcome of the case.*"[28]

28. As long as the assignment of individual cases is based on pre-existing general criteria and it respects the principles formulated in the Venice Commission Report on the independence of the judicial system, it should not raise concerns. The right to a lawful judge, according to the Venice Commission, is described as follows:

> *"79. […] It is not enough if only the court (or the judicial branch) competent for a certain case is determined in advance. That 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.*
> *80. 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. Ideally, this allocation should be subject to review.*
> *82. […] Conclusion No. 16: 'As an expression of the principle of the natural or lawful judge pre-established by law, the allocation of cases to individual judges should be based on objective and transparent criteria established in advance by the law or by special regulations on the basis of the law, e.g. in court regulations. Exceptions should be motivated'."*[29]

[25] ECtHR, *Lavents v. Latvia*, 28 February 2003, para 114.
[26] ECtHR, *Ilatovskiy v. Russia*, 9 October 2009.
[27] ECtHR, *Lavents v. Latvia*, 28 February 2003, para 114; ECtHR, *Ilatovskiy v. Russia*, 9 October 2009, para 36.
[28] Council of Europe, *Recommendation on judges: independence, efficiency and responsibilities*, CM/Rec(2010)12, para 24.
[29] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, paras. 79-80 and 82.

29. In the Hungarian system, Sections 9, 10 and 11 AOAC provide the general criteria for the president of the Court to establish the case allocation system and its exceptions, which is then set up in internal rules of procedure. However, the new Section 10(2) AOAC does not provide any criteria for the President of the Curia to decide under which circumstances a certain category of cases should be assigned to a five-judges panel and leaves this decision to his/her discretion. It is true that, according to Section 151(1)(d), the judicial council of the Curia gives an opinion on the case-allocation system of the Curia, while the college affected, according to the new Section 10(2) AOAC, gives an opinion on the introduction of panels of five; however, these opinions are non-binding and the final decision lies in the hands of the President of the Curia.

30. During the online meetings, several interlocutors[30] referred to the case allocation system as a complex one that is not fully transparent and clearly understandable by the parties and that has been changed already nine times in 2021. They argued that the broad discretion left to the President of the Curia has been questioned in combination with his or her power to decide on the appointment of new judges and to appoint temporary judges, in a period when the Curia has many vacant positions due to the new competences assigned to the institution in the last few years.[31] Above all, the main criticism has been raised with regard to the concentration of powers in the hands of the President of the Curia, that may be perceived as a politicised figure in the eyes of the citizens for the manner in which he or she has been appointed.[32]

31. In contrast, the representatives of the Curia explained that the complexity of the cases to be dealt with by the Curia has increased in the course of the last years, especially considering the various international and European standards to be taken into consideration. For this reason, a higher number of judges in the panel would better serve the purpose of ensuring a qualitative justice. Meanwhile, the representatives of the Curia underlined that even though the number of judges at the Curia has increased, that is still not adequate to fulfil all new tasks assigned to the Curia, that is understaffed with respect to its workload. Moreover, the Curia explained that "*[i]t is true that the case-allocation-scheme was modified frequently. The reason of the changes is that the case allocation is more and more automatic.*"[33]

32. The Venice Commission considers that the competence of the presidents of the courts to define the allocation rules, as long as there are general rules fixed in advance, is a possible solution, which does not affect, as such, core international and European standards, provided that the rules are drawn up taking into account the opinion of judges and on the basis of objective circumstances, according to reasonable criteria set in the law itself. Deciding that certain types of cases must be heard by a chamber composed of five judges may be a sensible option, since in higher courts, especially in supreme courts, the reinforcement of collegiality in the formation of judgment increases the guarantees and can contribute to the consistency of jurisprudence and to better justice. In the specific case, the Venice Commission considers that the criteria established by law are suitable for the President of the Curia to set up an adequate case allocation system in the internal rules of procedure, but it would be advisable to determine in the law itself what are the criteria for increasing to five the number of judges sitting in the panel for certain types of cases.

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[30] i.e. Civil Society Organisations, Association of judges, National Judicial Council.
[31] Reference is principally made to the 2019 amendments and their consequences.
[32] See paras. 8-9 and section A above.
[33] Curia's reply to Chapter 1 of the 2021 EC Rule of Law Report, Comment 7: "*This requires that every change – retirement and appointment of new judges, allocation of different types of cases to the panels – must be reflected. In brief: the frequent change of the scheme is an inevitable consequence, a sine qua non condition – of the automatic case allocation" , and that "[t]he opinion of the chamber and of the judicial council on the case-allocation-scheme is not binding, but the some centuries old tradition of the Kúria as part of constitutional acquis of Hungary in reality prohibits the President to decide against them. E. g. in 2021 the changes in the case-allocation-scheme was adopted with strong support – the latest percent of votes 100% (Criminal Chamber), 76% (Civil Chamber), 95% (Administrative Chamber). All the suggestions (100%) by the judicial council were accepted and incorporated in the scheme*".

33. Furthermore, even though the practice and tradition of the Curia, as inferred above, may prove that the President of the Curia tends to follow the opinion of the relevant college and the judicial council, it would be recommendable to make their opinion public and binding in order to ensure the transparency of the process and increase the trust of the citizens in the good and impartial functioning of the judiciary, given the reported complexity of the case allocation system.

34. Finally, the Venice Commission is of the view that such extensive powers and roles could only be entrusted to the President of the Curia if the system provided for sufficient guarantees of independence, including on the manner of appointment and dismissal.

D. The uniformity procedures

35. Sections 25-42 AOAC are intended to indicate the reasons, the conditions, and the procedure for uniformity (unification) of jurisprudence. Unification of jurisprudence is a very common competence of supreme courts. The effect of uniformity decisions pursues general interests of certainty and security, and even in the absence of the rule of precedent it may be compatible with the principle of independence of judges. These are consolidated assertions set forth by the Consultative Council of European Judges (hereinafter, "CCJE"). [34]

36. In the Hungarian system, the Curia "*shall adopt uniformity decisions, adjudicate uniformity complaints, perform jurisprudence analysis of cases resolved by final or definitive decisions*".[35]

37. The system of uniformity decisions has been in place for several years and had already been analysed by the Venice Commission in its 2012 Opinion, which raised some concerns with regard to the internal independence of the judiciary.[36] Despite the fact that this system has not been modified with the 2020 amendments, the Venice Commission finds it relevant to recall certain recommendations that remain valid (see the next sub-section, 1. Internal independence and uniformity decisions).

38. As to the uniformity complaint procedure, it is a new legal remedy introduced with the amendments of 2019, with further modifications added through the amendments of 2020 (Sections 41/A to 41/D). The institution of this individual legal remedy appears to comply with the Venice Commission's requirements[37] to ensure the uniform application of the law as a response to the motion of the parties to the proceedings, as opposed to a top-down approach excluding

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[34] CCJE, Opinion No. 20 (2017), paras. 33-35, https://rm.coe.int/opinion-ccje-en-20/16809ccaa5: ""*33. According to the stare decisis doctrine in common law countries, only superior courts and, under some conditions, courts of the same level may depart from a previous precedent, whereas lower courts are generally bound by precedents of higher courts. Therefore, the latter is not considered to be incompatible with the requirements of judicial independence.*
34. On the contrary, in many civil law countries, the (constitutional) guarantee of independence of judges is construed as meaning, inter alia, that judges are, in their decision-making, bound (only) by the Constitution, international treaties and statutes, not by judicial decisions of hierarchically superior courts, reached in previous similar cases. It is thus accepted that also inferior courts may depart from settled case law of hierarchically superior courts. The CCJE agrees that different legal traditions may lead to different perceptions as to the interface between precedents of higher courts and judicial independence of judges in lower courts and that these different approaches may continue to coexist.
35. It is however essential that, firstly, when the lower court may depart from the case law established on the superior level, the requirements concerning reasons, […] fully apply. Secondly, in case when a lower court departs from the case law of a higher court, a possibility of appeal should in general be open to such higher court. The latter should have the last word concerning the disputed issue and should be in a position to determine whether it will insist on its previous case law, or whether it will agree with the arguments of the lower court that the case law should be changed."
[35] Section 25 AOAC.
[36] Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020, paras. 50-53.
[37] Venice Commission, *Report on the Independence of the Judicial System Part I: The Independence of Judges*, CDL-AD(2010)004, paras. 68-71.

them from the decisional process. Nevertheless, certain aspects of this institution, in particular the rules for the composition of chambers, deserve further attention (see sub-section 2 below, The uniformity complaint procedure – Composition of chambers).

1. Internal independence and uniformity decisions

39. In its Report on the independence of the judicial system[38], the Venice Commission underlined that "*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*"[39] and stated the following:

> *"70. The practice of guidelines adopted by the Supreme Court or another highest court and binding on lower courts which exists in certain post-Soviet countries is problematic in this respect.*
> *71. The Venice Commission has always upheld the principle of the independence of each individual judge:*
> "*Lastly, granting the Supreme Court the power to supervise the activities of the general courts (Article 51, paragraph 1) would seem to be contrary to the principle of the independence of such general courts. While the Supreme Court must have the authority to set aside, or to modify, the judgments of lower courts, it should not supervise them."* (CDL-INF(1997)6 at 6)."
> *"Under a system of judicial independence the higher courts ensure the consistency of case law throughout the territory of the country through their decisions in the individual cases. Lower courts will, without being in the Civil Law as opposed to the Common Law tradition formally bound by judicial precedents, tend to follow the principles developed in the decisions of the higher courts in order to avoid that their decisions are quashed on appeal. In addition, special procedural rules may ensure consistency between the various judicial branches.""*[40]

40. From this perspective, the task of the Curia to unify case-law is not problematic in itself. In fact, it is a rather common power of supreme courts to unify case law of ordinary courts and to render judgments with binding precedential force even in continental legal systems. Interestingly, the Curia itself has referred to this task as its '*most important task*'[41] and has stated that the legislative change at issue follows a more general trend of the continental legal systems to adhere to a limited system of precedent. The Curia also stated that the mechanism complies with the requirements of the Venice Commission regarding the uniform application of laws. In this regard, the Venice Commission finds that also the requirement that ordinary courts must respect the precedent-like judgments of the Curia and must justify their decision not to follow such judgments, is not problematic.

41. That being said, it is important to emphasise that any unification competence of the Curia must comply with fundamental principles of the separation of powers. It should certainly not be the competence of any court's president alone to select areas in which case law should be unified authoritatively. Furthermore, even after the Curia's unifying decision, all courts and judges must remain competent to assess their cases independently and impartially, and to distinguish new cases from the interpretation previously unified by the Curia. In other words, if later cases are different enough, judges must be able to decide them differently, in all independence and impartiality.

42. The Venice Commission welcomes the amendments inasmuch as they abolish the possibility to publish rulings and decisions of principles and they prohibit to publish resolutions on the

[38] Venice Commission, *op. cit.*, CDL-AD(2010)004.
[39] Venice Commission, *op. cit.*, CDL-AD(2010)004, para. 68.
[40] Venice Commission, *op. cit.*, CDL-AD(2010)004, paras. 70-71.
[41] The Curia's Final explanatory memorandum related to sections 65-74 of Act no. CXXVII of 2019 on certain judicial reforms, p. 1: '*The Curia's most important task is to ensure the uniform application of laws and the courts' uniform jurisprudence.*'

interpretation of the law, on behalf of judicial bodies or the meetings of judicial leaders or judges. However, the Commission notes, as confirmed by the Curia during the online meetings, that the possibility to adopt uniformity decisions on questions of principle with the aim to further develop the interpretation of the law, still persist. Such decisions, which are binding for all courts, are not related to one specific case and can be initiated by the presidents of district court or the heads of the college of the court of appeal and the general court, that have a duty to monitor and supervise courts and their interpretation of law.[42]

43. For the reasons elaborated above, the Venice Commission advises to abolish the possibility to adopt this authoritative type of uniformity decisions.

2. The uniformity complaint procedure – Composition of chambers

44. Section 41/A AOAC provides that "*Uniformity complaints shall be adjudicated by the uniformity complaints chamber.*[43] *The uniformity complaints chamber shall be chaired by the President or the Vice-President of the Kúria (Curia). The uniformity complaints chamber shall consist of the president and at least eight other members. Members are selected by the chair from the colleges of the Kúria, where each college shall be represented by at least one member*."

45. As a preliminary observation, the Venice Commission notes that the consistency, function and purpose of uniformity of jurisprudence, as an element of certainty and security, presupposes a high degree of stability, which does not seem compatible with small judging chambers (nine or ten judges, which the law sets as a minimum, but the Curia reported being the usual practice). When the uniformity cannot be decided, for operational reasons, through the intervention of the plenary of competent judges on the basis of the matter, it is advisable to foresee at least an enlarged chamber, such as a "Grand Chamber", which should represent a transversal view of the composition of the supreme court. From this perspective, the composition of the uniformity complaints chamber (eight members plus the President and the Vice-President – Section 41/A) may have major limitations in view of the function and purpose of uniformity of jurisprudence. Therefore, the Venice Commission recommends increasing the number of judges, at least in the practice if not in the law, sitting in the uniformity complaint chamber.

46. In addition, the composition of the uniformity complaints chambers deserves a closer look. The President of the Curia selects the eight other members among the presidents of chambers[44] on the basis of the case allocation system established by the President of the Curia himself in the internal rules of procedure. The order determined by the case allocation system as described by the Curia is based on the principle of seniority, it takes into account the nature of the case, and it seems to follow strict and objective pre-determined rules.[45] However, the manner in which presidents of chambers are appointed needs to be taken into consideration. Presidents of chambers are appointed by the President of the Curia,[46] following the non-binding opinion of the

[42] Section 26(1) and (2) and Section 27 AOAC.
[43] The English version of the law provided by the Hungarian authorities refer to "chamber" while the written submissions of the Curia refer to "panel".
[44] "Heads of panels" as referred to by the Curia.
[45] "The order is based on the principle of seniority, i.e. on the length of their service as a head of panel, hence, the head of panel with the lengthiest service period makes the top of the list. The members of the uniformity complaint panel are then appointed by the chair thereof from among the heads of panels included in a fixed list drafted by each department and following the above order. In addition, their appointment depends on the nature of the uniformity complaint in a way that the department concerned by the complaint provides four members, while the remaining two departments give two members each to the panel. The appointments are alternately made, on an equal basis and one by one, from the top and the bottom of the fixed lists as the complaints continue to be received. If the two directions of appointment "come across" each other, then the appointments have to restart from the top and the bottom again. The lists for the selection of the panel's members from the department concerned by the complaint and from the two other departments have to be kept separately regarding the order of their appointment." Background material submitted by the Curia to the Venice Commission, page 27.
[46] Section 128(3) AOAC.

competent department or obtaining the consent of the NJC for a candidate not supported by the majority of the competent department.[47] Yet, while a position is vacant, temporary presiding judges can be mandated by the President of the Curia without any specific criteria.[48]

47. On the basis of the information provided by some interlocutors,[49] the current situation is that about 20% of the presiding judges have a temporary status, which makes them inevitably more dependent on the President, who has the power of appointing presiding judges and full discretion when it comes to temporary ones. Hence, while the system chosen by the President of the Curia to set-up the composition of the uniformity complaint chamber seems automatic and neutral, the pool of presiding judges from which the system operates the selection can be considerably influenced by the President of the Curia.

48. In this constellation, the President of the Curia comes to play a central role that could influence in a decisive manner the uniformity complaint chamber and consequently the overall jurisprudence on a relevant matter. In the light of the Commission's concerns that the system lacks sufficient guarantees in relation to the President's appointment and dismissal, the Commission finds that there is a risk of politicisation.

49. Therefore, the Venice Commission recommends removing the prerogative of the President of the Curia to appoint temporary presiding judges or at least to eliminate any margin of discretion in their selection.

E. Ranking of applicant judges

50. Previously, applicant judges were evaluated, *inter alia*, by the minister in charge of the judicial system who had the power to evaluate their accomplishments in acquiring thorough knowledge for the preparation of new legislation working as a judge or court secretary in that ministry.[50] After the legislative change of December 2020, this power was removed from the minister and granted to the President of the Curia who can now assess "*the time of judiciary experience as a judge or court secretary at the relevant body specified in Section 27/A by the head of that body for carrying out powers and responsibilities of a public-law nature within the core activity of the relevant body*."

51. The Hungarian authorities have reacted to this paragraph by noting that "*Section 14(1)a)ab) states that the President of the Curia evaluates only judges or court secretaries assigned to the Curia. The time of judiciary experience as a judge or court secretary at the relevant body specified in Section 27/A however is evaluated by the head of the relevant body*."

52. The Commission notes that this legislative change seems intended to implement previous recommendations of the Venice Commission itself. However, this implementation is far from ideal, to the extent that the President of the Curia is elected and may be dismissed by parliament. As stated in a recommendation of the CoE Committee of Ministers, "*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.*"[51].

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[47] Section 132 (4) and (6) AOAC.
[48] Section 133(2) AOAC.
[49] "*The independence of the members of the panel is also questionable, because it is composed of the presiding judges of the normal panels in a situation where 20 % of these presiding judges of the Curia are not formally appointed, (which means a life-time appointment) but have been only mandated.*" Written replies of the Hungarian Association of judges (MABIE) submitted to the Venice Commission, page 1.
[50] Section 14(1)(a)(ab) ALSRJ.
[51] Council of Europe, *Recommendation on judges: independence, efficiency and responsibilities*, CM/Rec(2010)12, para 46.

F. The rules governing the legal status of the Vice-President, the Secretary General and the Deputy Secretary General of the Curia

53. Section 118(6) AOAC provides that the President of the Curia may delegate a vice-president of his choice to carry out the duties of the secretary-general and deputy secretary-general when their mandate expires. It is not entirely clear why the duties of a secretary general and/or deputy secretary general, i.e. tasks that are administrative and executive in their nature, should be carried out by a judge who is likely to be rather senior. However, this provision does not seem to infringe any international standards of judicial independence.

54. New Section 127(2a) AOAC foresees that the term of the secretary-general and deputy secretary-general be linked to the term of the President of the Curia. While this is not problematic in itself, the Venice Commission wishes to emphasise that any executive decisions concerning the judiciary should, ideally, not be entrusted to one actor such as the President of the Curia.

G. The secondment of judges to other bodies

55. Before the 2020 amendments, the President of the NJO could assign a judge to the NJO, to the Curia, or, in agreement with the minister of justice, to the ministry of justice. After the legislative change, the last option has been removed (Section 27 ALSRJ). This issue does not raise any concerns; rather, it is to be welcomed and appreciated as an implementation of previous recommendations issued by the Venice Commission.

56. At the same time, prior to the 2020 amendments, only administrative judges could be seconded to a state body outside the judiciary. After the examined legislative change,[52] this mechanism was extended to all Hungarian judges. The President of the NJO now has the power to second all judges to state bodies (subject to approval by the head of the given institution and by the presiding judge) and to assign those judges back to judicial positions which may be also higher than the original placement of that judge. This way, judges may be 'promoted' to higher judicial functions by a decision of the NJO President.

57. Amnesty International together with other NGOs have expressed concerns that transfers of judges may result in promotions being given to specific judges at the discretion of the NJO President to the detriment of other qualified judges.[53]

58. The Venice Commission finds that the new rules on the secondary assignment of judges to state bodies would not appear to raise any major concerns so long as clear rules regarding conflict of interest and recusal are also applicable so that the judges are not acting upon the same matters from both the judiciary and the executive sides. Section 62/c(4) provides that judges assigned to the relevant body may not take part in determining a case where the relevant body

[52] Section 27/A ALSRJ: '*(1) The President of [NOJ] may assign a judge: ... (2) Assignment […] may be initiated by the head of the relevant body at the request of the judge, or by the Prosecutor General in the case of the public prosecutor's office. The assignment requires the consent of the president judge exercising employer's rights.*'

[53] Amnesty International, Eötvös Károly Institute, Hungarian Helsinki Committee, Rules on the transfer of judges in Hungary, 16 June 2021, page 5: *According to the legislation, the purpose of such transfer is that the judge concerned gains professional experience and knowledge while at the same time he/she can support the administrative organ with his/her experience as a judge. Administrative organs entitled to employ judges include the Office of the Constitutional Court, the Office of the Commissioner for Fundamental Rights, the State Audit Office, the Prosecution Authority and other central administrative bodies or governmental offices. Judges transferred to an administrative organ get a significantly higher remuneration and bonus during the term of the transfer. The transfer shall be terminated by the NJO President upon request of the judge concerned or based on the request of the leader of the administrative organ. After termination of the transfer, the judge can be appointed to any judicial position at a court equal or higher than the one prior to the assignment and may even be granted a judicial leadership position (become Head of Panel) without an appointment procedure based on full discretion of the NJO President*." According to the Hungarian Helsinki Committee, this opens up "*the possibility of bypassing the application procedure for a much wider circle*" of judges than previously (Information note by the Hungarian Helsinki Committee, 2 June 2021, point 103).

is a party for two years after the termination of their secondment. While this guarantee alone can be regarded as weak and insufficient to cover all possible cases of conflict of interests, it seems from the information provided during the online meetings, that the general rules for conflict of interest and recusal of judges apply and this may be considered a sufficient guarantee of impartiality.

59. Moreover, the practice of secondment of judges to other state bodies has parallels in other European countries and it can prove beneficial for both the judge and the receiving institution, as well as an added value for the judicial institution the judge will return to. However, the concerns raised by the NGOs may be shared as far as the system could be used to institute a practice of bypassing the ordinary processes of promoting judges. Although the rules for transfer or re-assignment of the seconded judge at the end of the period of secondment (Section 58(3) and (4) ALSRJ) have not been changed by the 2020 amendments, the Venice Commission notes that there are no criteria established for the President of the NJO to assign (*de facto* promote) a judge to a higher position (i.e. president of chamber).

60. In sum, the President of the NJO, who already exercises extensive powers with limited supervision,[54] will see his/her power further strengthened by the possibility to facilitate the career development of all judges, not only administrative ones. The Venice Commission therefore recommends establishing clear, transparent and foreseeable conditions for the seconded judges to be assigned to a higher position after the period of secondment.

IV. Conclusion

61. The Venice Commission has been requested by the PACE Monitoring Committee to prepare an opinion on the constitutional and legislative amendments adopted by the Hungarian Parliament in December 2020. This opinion focused on the legislative amendments related to the judiciary.

62. The 2020 amendments have a limited scope and appear to be mainly of a technical nature; however, the Venice Commission deemed it appropriate to locate them in their context and to analyse them in light of previous developments (in particular the 2019 amendments).

63. As previously noted in its opinion on the constitutional amendments, the Venice Commission reiterates its concerns that the amendments were adopted during a state of emergency, apparently without public consultation. The Venice Commission considers that this swift procedure is not in line with its recommendations in the Rule of Law Checklist, nor is it compatible with the Commission's report on the role of the opposition and Report on Respect for democracy, human rights and the rule of law during states of emergency and the Report on the Role of the opposition in a democratic Parliament. Furthermore, it appears not to be in line with Hungarian law, as public consultation is mandatory for bills prepared by Ministers.

64. The legislative amendments affecting the judiciary touch upon the following issues:

a) the allocation of cases, notably the power of the President of the Curia to increase the members (from three to five) of adjudicating panels for a certain type of cases;
b) the new rules of the uniformity complaint procedure;
c) the ranking of judges;
d) the rules governing the legal status of the Vice-President, the Secretary General and the Deputy Secretary General of the Curia; and
e) the secondment of judges to other bodies.

[54] See para. 7 and footnote 9 above, and respective reference to Opinion 2012 and EU RoL Report 2021, as well as para. 18 of section A.

65. Whilst the first four points are related to the Curia and the role of its President, the last point concerns the prerogatives of the President of the National Judicial Office.

66. The Venice Commission would like to make the following *key recommendations*:

a) As to the role of the President of the NJO, the Venice Commission recalls its previous consideration that "*the powers of the [NJO] remain very extensive to be wielded by a single person and their effective supervision remains difficult*".[55] It therefore reiterates those recommendations expressed in the 2012 Opinion which have not been addressed by the authorities (paragraph 18 above).

b) As to the allocation of cases and the power of the President of the Curia to increase the members (from three to five) of adjudicating panels for a certain type of cases, the Venice Commission considers that the criteria established by law are suitable for the President of the Curia to set up an adequate case allocation system in the internal rules of procedure, but it would be advisable to determine in the law itself what are the criteria for increasing to five the number of judges sitting in the panel for certain types of cases. Furthermore, even though the practice and tradition of the Curia may prove that the President of the Curia tends to follow the opinion of the relevant college and the judicial council, it would be advisable to make their opinion public and binding in order to ensure the transparency of the process and increase the trust of the citizens in the good and impartial functioning of the judiciary, given the reported complexity of the case allocation system.

c) As to the uniformity decisions, the Venice Commission welcomes the amendments inasmuch as they abolish the possibility to publish rulings and decisions of principles and they prohibit publication of resolutions on the interpretation of the law, on behalf of judicial bodies or the meetings of judicial leaders or judges. However, it also advises to abolish the possibility to adopt the authoritative type of uniformity decisions that still persist (uniformity decisions on questions of principle with the aim to further develop the interpretation of the law).

d) As to the composition of chambers in the uniformity complaint procedure, the Venice Commission recommends (i) to increase the number of judges, at least in the practice if not in the law, sitting on the uniformity complaint chamber and (ii) to remove the prerogative of the President of the Curia to mandate temporary presiding judges or at least to eliminate any margin of discretion in their selection.

e) As to the secondment of judges to other bodies, the Venice Commission recommends setting up clear, transparent and foreseeable conditions for the seconded judges to be assigned to a higher position after the period of secondment.

67. The Venice Commission remains at the disposal of the Hungarian authorities and the Parliamentary Assembly for further assistance in this matter.

[55] Venice Commission, *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary,* CDL-AD(2012)020, para. 88.