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Fruzsina Gárdos-Orosz[1]

The appointment and removal of judges in Hungary – efforts, reforms and constitutional controversies[2]

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Słowa kluczowe: sędziowie, konstytucyjne kontrowersje, reformy sądownictwa

Summary

This paper aims to contribute to a better understanding of the rules of appointment and removal of Hungarian judges with special focus on constitutional controversies that got a wide national and international publicity. Besides providing an overview of the relevant legal provisions, I shed light on the constitutional difficulties the 2011 judicial reform faced. The independence of the judicial branch and the individual judge as basic constitutional principles require that judges are selected under high professional stand-

[1] Authot is a Research Fellow in the Institute for Legal Studies, Center for Social Sciences of the Hungarian Academy of Sciences, and Associate Professor in the National University of Public Service, Faculty of Public Administration, e-mail: Orosz.Fruzsina@tk.mta.hu.

[2] This paper is the written version of my contribution at the conference entitled "Status of the Judge in the Era of Judicialisation: Czech-Hungarian Experience" organized by the Czech Academy of Sciences, Institute for State and Law and the Hungarian Academy of Sciences, Institute for Legal Studies, Center for Social Sciences on the 5 March 2015 in Prague. The contribution is extensively inspired by the draft paper of F. Balázs, *How to become a Judge in Hungary? From the professionalism of the judiciary to the political ties of the Constitutional Court,* [in:] *Fair reflection of society in judicial systems. A comparative study. Springer,* ed. S. Turenne, Dordrecht et al, 2015, pp. 169–186 forthcoming. I also largely appreciated the comments and suggestions of F. Balázs on this paper and I am grateful for the literature he recommended.

ards following the most transparent and adequate procedural rules. The 2011 judicial reform in Hungary with the implementation of two cardinal acts on the judiciary certainly aimed to guarantee more professionalism. The question rather was if it could observe the existing independence at the same time? Some elements of the reform provoked reaction from both national and international fora arguing the violation of basic rule of law standards. The national and international, scholarly, political and also judicial pressure was followed by the partial consolidation of the original text of the cardinal acts.

Streszczenie

Powoływanie i odwoływanie sędziów na Węgrzech – starania, reformy i konstytucyjne kontrowersje

Celem artykułu jest wyjaśnienie zasad powoływania i odwoływania węgierskich sędziów, ze szczególnym uwzględnieniem sporów konstytucyjnych, które towarzyszyły tego rodzaju działaniom. Opracowanie stanowi nie tylko analizę odpowiednich przepisów prawnych, ale rzuca także światło na trudności związane z konstytucyjnymi reformami sądownictwa, mającymi miejsce w 2011 r. Niezależność sądów i sędziów, będąca jedną z podstawowych zasad konstytucyjnych, wymaga aby sędziowie spełniali wysokie standardy zawodowe, byli wybierani w oparciu o obowiązujące normy prawne, przy zastosowaniu transparentnej procedury. Reforma sądownictwa z 2011 r. wiązała się z uchwaleniem dwóch ustaw, które miały zapewnić większy profesjonalizm w sprawowaniu władzy sądowniczej na Węgrzech. Czy wpłynęły one na większą niezależność sędziów? Niektóre elementy reformy wywołały dyskusję w kraju i za granicą, a jej przeciwnicy zarzucają, że naruszyła ona podstawowe zasady prawa.

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I.

State institutions appointing judges must be independent. The appointment procedure of judges must be objective and transparent in order to appoint judges who are fully independent of political, social or economic pressures. The appointing state institution must be independent from the government and from the legislative branch as well. The selection of judges must be based on the criteria of professionalism and independence. The appoint-

ment of judges cannot remain entirely within the task of the judiciary, and it is of high importance to ensure social and professional control over the appointing state institutions. The removal of judges must be also regulated by strict and detailed procedural standards that guarantee that removal is an ultimate choice when a judge encroaches on basic professional disciplinary standards. – read the above rule of law requirements in all Hungarian constitutional law textbooks[3], scholarly comments[4] and in the former case law of the Hungarian Constitutional Court[5].

In Hungary many constitutional controversies emerged in recent years concerning the system of the appointment and removal of judges, I will show some of these dilemmas in this paper. Hungary first became a case study for constitutionalists when in 2011 the legislator decided to reform the judiciary starting with the forced retirement, or premature "removal" of judges at the standard retirement age of around 62 instead of the age limit of 70 with a long tradition in Hungarian public law[6].

First the Hungarian Constitutional Court held in a 7–7 decision that the new provision was unconsitutional[7], and then the decision of the European Court of Justice stated that the Hungarian law violated an EU directive prohibiting discrimination on the ground of age[8]. Although it was not possible any more to reach the original *status quo*, as the new judges mainly in leading positions were already appointed in the positions of their removed col-

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[3] J. Petrétei, *Magyarország alkotmányjoga II. Államszervezet* (második javított változat) Kodifikátor Alapítvány, 2014. See also the deskbook prepared for the judges Z. Balogh et seq.: *Alaptörvény, államszervezet*, http.//támop412.elte.hu/OBH/Alaptörvény/Államszervezet (30.06.2015).

[4] P. Hack, *Az igazságszolgáltatásról alkotott kép. A korrupció kezelése magyar igazságszolgáltatási rendszerben,* [in:] P. Hack, B. Garai, *Az igazságszolgáltatási rendszerek átláthatósága. A Transparency International 2007. évi korrupciós világjelentésének változata*, Transparency International, Budapest 2008, pp. 9–30. P. Hack, *A bíráskodás politikai függetlensége Magyaroszágon*, "Fundamentum" 2002, no. 1, p. 20.

[5] E.g. 19/1999 (VI. 25.) CC Decision. 97/2009 (X. 16.) CC decision.

[6] See a comprehensive analyses on how legislation and constitution-making became a means of everyday's party politics in Hungary in P. Sonnevend, A. Jakab, L. Csink, *The constitution as an instrument of everyday party politics: The Basic Law of Hungary,* [in:] *Constitutional Crises int he European Constitutional Era. Theory, Law and Politics in Hungary and in Romania*, eds. A. von Bogdandy, P. Sonnevend, CH.Beck-Jart- Nomos 2015.

[7] 33/2012 (VII. 17.) CC Decision.

[8] C-286/12.

leagues, these decisions signaled that all state reforms must remain within the rule of law framework that aims to guarantee limited government and thus the protection of human rights. The Act CLXII of 2011 on the legal status and remuneration of judges (hereinafter: the Act)[9] and Act CLXI of 2011 on the organisation and administration of courts[10] are the two cardinal acts[11] that governed the reform of the judiciary in Hungary introducing new structures, new concepts and detailed rules both on the appointment and the removal of judges. These acts will be in the focus of my study.

II.

During the transition to a constitutional state in 1989–1990 the establishment of an independent judiciary was a core aim. It was, however a challenge as well, as the framework of the peaceful transition required to observe stability of the judiciary. This meant that former judges were not replaced by ne ones. It required that adaptation of the judiciary to the new rules, new concepts of constitutional democracy. Certainly, as change was easy and effective for ones it was difficult and slow for the others. There certainly occurred cases following from the nature of peaceful transition when a criminal court judge who served the authoritarian regime became a judge in the new democratic regime. This understanding of the observation of the integrity of the judiciary raised many criticism both from moral and professional point of views[12]. Although many scholars and state actors believed that it is possible to resocialize even judges who work at criminal courts many critisims touched upon both the structure and the operation of the judiciary prior to 2010[13]. However, even

[9] Read in English: http://www.venice.coe.int/Ibforms/documents/default.aspx?pdffile=CDL-REF(2012)006-e (30.06.2015). In this paper I will refer to the terminology and adopt the formulations of this translation of the examined provisions of the cardinal acts.

[10] See the English translation at http://www.venice.coe.int/Ibforms/documents/?pdf=CDL-REF(2012)007-e (30.06.2015).

[11] Cardinal Act is the traditional name of the laws accepted with a two-thirds majority of the MP's present, used by the Fundamental Law of Hungary.

[12] Z. Fleck, *A bírói függetlenség állapota*, "Fundamentum" 2002, no. 6, pp. 30–31.

[13] For instance the Eötvös Károly Intézet (Eötvös Károly Institute), a liberal think-tank, carried out a comprehensive research on the problems of judiciary as Ill as argued for

the coalition government of 1994–1998 having the two thirds majority could not implement a successful reform procedure[14], thus for 2010 when the rightist FIDESZ – Magyar Polgári Szövetség (FIDESZ – Hungarian Civic Alliance) with a party coalition acquired more than the qualified majority of the parliamentary seats[15], it was in time to launch a reform procedure. Between 2010 and 2012 the government reformed the entire system of judiciary. The constitutional amending power and the legislator centralized the administration of the court system. The centralization aimed at receiving a more focused and effective administration[16]. An important part of the judicial reform was the substantial change of the appointment and the disciplinary and inaptitude proceedings as many of the critics of the former system claimed that these basic notions of the effective, qualified and independent judiciary are not regulated properly[17].

Judges has always been nominated on the basis of a professional evaluation that was made by judicial councils of the involved courts. Since the democratic transition of 1989–1990 the President of the Republic appoints the future judges on the basis of the proposal of the judiciary. The President of the Republic definitely serves this representation of the whole society as art. 9 (1) of the Fundamental Law orders that "[t]he Head of State of Hungary shall be the President of the Republic, who shall embody the unity of the nation and be the guardian of the democratic functioning of the state organisation".

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substantial reforms in 2008. The accountability of the courts had to be enhanced, furthermore, the general transparency was also to be improved, argued the experts of the institute. For details, see the final report in Hungarian: P. Hack, L. Majtényi, J. Szoboszlai, *Bírói függetlenség, számonkérhetőség, igazságszolgáltatási reformok*. 2008, http://www.ekint.org/ekint_files/File/tanulmanyok/biroi_fuggetlenseg.pdf (30.06.2015).

[14] In Hungary a two-thirds majority of all MP's is necessary to adopt the constitution and also to amend it. Cardinal acts that govern basic constitutional institutions such as the judiciary are adopted with a two-thirds majority of the MP's present.

[15] For a general introduction on the post-2010 political and constitutional developments see J. Kis, *From the 1989 Constitution to the 2011 Fundamental Law*, [in:] *Constitution for a Disunited Nation*, ed. A.T. Gábor. Budapest-New York 2011, pp. 1–21; and P. Smuk, *In the Beginning there was a Constitution..,* [in:] *The Transformation of the Hungarian Legal System 2010–2013*, ed. P. Smuk, Budapest 2013, pp. 11–30.

[16] A. Osztovits, *The New Organizational System of the Hungarian Courts*, [in:] *The Transformation of the Hungarian*, op.cit., pp. 131–144.

[17] Z. Fleck, *Bíróságok mérlegen*, I–II, Budapest 2008.

Critisism still argue that lay participation in the selection process as a source of advisory opinion might be useful in order to reach an even more elevated respect and obedience towards the judiciary. If candidates were opined by non-professionals representing the value- and interest plurality of the society during the selection process, openness and sensibility towards the understanding of the social and economic environment of the adjudication might become a more important quality of the judge[18].

Critisism also reached the judiciary in the last 25 years, because it was almost impossible to become a judge in case arriving from "outside". To become a judge it was advisable to have an internal promoter. The presidents of the regional courts were not bound by the suggestions of the competent judicial body when nominating judges[19]. Zoltán Fleck who made the most extensive study on the judiciary after the transition argues that these mechanisms made the career of a judge enclosed from the society, the profession, immune from competition, real life and ctritisism[20].

Even though the reforms of 2010–2012 changed the position of judges on many points – as has been the case with the appointment and removal of judges that I discuss in this paper –, the concept of independence meaning that the udiciary refuses to take part in public debate and claims immunity from criticism in most cases remained a valid understanding of the status of a judge in society and state functioning[21].

As to the judicial reform of 2011 and the selection and appointment of judges, three civil societies, the Hungarian Helsinki Commitee, the Eötvös Károly Policy Institute and the Hungarian Civil Liberties Union jointly claimed in a 2012 opinion that "while the deficiency of the former model of administration was that judicial independence was placed before any other interest, the new administrative model, and the one-person decision-making mechanism, directly threatens the formerly protected judicial independence"[22]. The Venice Commission also argued as a general remark on

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[18] F. Balázs, *How to become a Judge in Hungary?*, op.cit.

[19] *Act* LXVII of 1997 on the legal status and the remuneration of judges 8. § (3).

[20] Z. Fleck, *A bírói függetlenség*, op.cit., p. 33.

[21] F. Balázs, *How to become a Judge in Hungary?*, op.cit.

[22] Opinion on the Acts of Parliament on Courts, Judges and the Prosecution Service in Hungary of February 2012. II. Chapter http://helsinki.hu/wp-content/uploads/NGO_

the reform (also in its first and second opinion of 2012) that the President of the National Judicial Office has unnecessaraly overwhelming competencies provided by the law[23]. Following the national and international criticism of many provisions of the acts of parliament on courts, judges and the prosecution service in Hungary, certain provisions of the Acts were already amended[24] and the Fundamental Law was also amended[25]. The Hungarian Government finally acquired the judgment of the Hungarian Constitutional Court in an ex post facto constitutional review procedure whether certain critisised parts of the cardinal acts on the judiciary are conform with the Fundamental Law. The Constitutional Court in its decision 13/2013 (VI. 17.) ruled that the provisions, partly already amended as compared to the originally adopted text, are in conformity with the Fundamental Law. However, as I will explain, the President of the National Judicial Office still has great competence in the selection system and as one remaining problematic element, she can change the ranking of the already selected candidates if not willing to nominate the appointee at the first place in the original ranking.

To become a judge in Hungary in 2015, a potential candidate shall meet manifold criteria and has to face a relatively complex and long procedure. Act CLXII of 2011 on the legal status and the remuneration of judges that

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Analysis_on_New_Hungarian_Laws_Concerning_Courts_and_Prosecution_2012.pdf (30.06.2015).

[23] Opinion 663/2012 of the Venice Commission of March 2012 on the legal status of judges and on the organisation and administration of courts, the President of the NJO and its competences – pp. 7–16, appointment of judges – pp. 16–18, http://www.venice.coe.int/Ibforms/documents/?pdf=CDL-AD(2012)001-e (30.06.2015); Opinion 683/2012 of the Venice Commission of October 2012 on the cardinal acts on the judiciary http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e (30.06.2015); Opinion 720/2013 of the Venice Commission of June 2013 on the Forth Amendment of the Fundamental Law, pp. 16–17 on the Judiciary, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e (30.06.2015).

[24] Act CXI. of 2012 on the amendment of the acts on the administration and organisation of judges and ont he legal status of judges. Act CXXXI of 2013 on the amendment of certain Acts related to the Fourth Amendment of the Fundamental Law.

[25] See the explanation of the changes of consolidating nature (a separate chapter on the judiciary) in the joint opinion of three leading constitutional law NGOs of Hungary: http://helsinki.hu/wp-content/uploads/NGO_comments_on_the_5th_Amendment_to_the_Fundamental_Law_October2013.pdf (30.06.2015).

introduced the new model as compared to the earlier. The rules are well detailed, therefore, this account aims only to provide an overview on the participating constitutional institutions (1) the eligibility criteria and status of judges (2), and then on the procedure of appointment (3) and removal of judges (4). Constitutional controversies and constitutional context will be in the main focus of this account.

III.

Before the nomination of a judge arrives to the President of the Republic, three different judicial institutions are involved in the appointment process[26]. The President of the National Judicial Office, the National Judicial Council and Judicial Councils at local level.

Prior to 2012 the National Council of Justice as a self-governing body was charged with the administration of courts. The new regulation founded in the Fundamental Law, claimed that the old institution was slow, corrupt and nepotist, and therefore introduced new institutions dividing the powers of central administration two groups. The task of central administration of courts is performed by the President of the NJO elected by the two-thirds majority of the Parliament for 9 years[27], supported by the Office. The administrative work of the NJO's President is supervised by the National Judicial Council[28]. In order to secure operability the president of the NJO was vested with extensive duties, competencies and responsibility for the central administration[29]. Among her many tasks, under art. 76 of the act on the administration of courts, in his/her role regarding matters of human resources,

[26] See a useful chart and a summary of the appointment process and eligibility cririteria on the Ibpage of the judiciary in English: http://birosag.hu/sites/default/files/allomanyok/translators/english/the_appointment_and_the_evaluation_of_the_judges.pdf. (30.06.2015). In this chapter and in the next two ones on the eligibility, status and the appointment of judges I extensively rely on the English translation of this comprehensive summary, however in a critical reading.

[27] Fundamental Law art. 25 (5)-(6). Act CLXI of 2011 on the organization and administration of courts 66. §.

[28] 103–112.§ of the Act CLXI of 2011 on the organization and administration of courts.

[29] Ibidem, § 76.

the President of the NJO publishes 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, 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 reappointment of the judge to an actual judicial position. The President of the NJO may adopt a decision on the transfer of the judge, and adopt a decision on the posting of the judge to another venue of service. She decides whether or not the territorial jurisdiction of the court has diminished to a degree which make the further employment of the judge there impossible.

The National Judicial Council (NJC), that also has important role in the appointment procedure of judges and in the general administration of courts[30], although much less important than that of the President of the NJO. The NJC is composed of 15 members elected by a covenant of the representatives of the Hungarian courts[31].

Under art. 103. (3) of the act on the administration and organisation of courts in the area of human resources the NJC íoung other duties 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. It appoints the President and members of the disciplinary tribunal of judges, express preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview, adopts 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 express a preliminary opinion on the applicant in the case the President of the NO would like to deter to the candidate who has the majority support of the reviewing board[32]. I will write about this latter case in the next chapter and explain why it is of high importance that the President of the NJO has to obtain the agreement of the NJC.

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30 Fundamental Law art. 25 (5).

31 88. § of the Act CLXI of 2011 on the organization and administration of courts.

32 Ibidem, § 132. (6).

Lastly, due to their role in the selection procedure, the so-called Judicial Councils (JCs) are to be mentioned[33]. Each regional court shall elect an administrative self-governing body called JC. These JCs are elected by the regional convent of judges and they can have five to fifteen members[34]. One of their main duties is that they participate in the appointment process by interviewing applicants and ranking applications according to scores. Additionally, the JC e.g. expresses its opinion regarding the appointment, position, transfer, posting without his/her consent, furthermore dismissal of the judge, can initiate the inspection or dismissal of the President or the Vice President of the district, administrative and labour courts, express opinions on the annual draft budget of the court and the use of the approved budget, and express opinions about the organisational and operating rules and regulations of the court and the plan for the distribution of cases. The JC has the right to give opinion on all matters regarding the status of a judge[35].

IV.

The right to appoint judges finally lies with the President of Hungary, who, prior to making an appointment, obtains the recommendation of the President of the NJO[36]. Any person who is over 30 years old, is a Hungarian citizen, has no criminal record, has a right to vote, has a university degree in law, has a professional qualification in law, have worked one year in a position in which the professional legal exam is required, undertakes to make the financial disclosure statement specified by law and passes the physical and psychical examination, can be appointed a judge[37].

Judges are first appointed for three years; after this period the President of the NJO can recommend that they are appointed for an indeterminate period[38]. Judges are assigned to courts by the President of the NJO and specialise in civil, criminal and administrative law.

33 Ibidem, § 25. (5).
34 Ibidem, § 147. and § 148. (1).
35 Ibidem, § 151.
36 Fundamental law art. 9. (3) k).
37 4. § of the Act CLXII. of 2011 on the legal status and remuneration of judges.
38 Ibidem, § 23. (1)–(2).

In addition to their work as a judge, judges may engage in activities in the areas of science, literature, art, education etc., but in so doing they may not endanger their independence and impartiality. These activities cannot hinder their official duties. Judges may not become members of parties or engage in political activities. Judges, furthermore may not become members of parliament or locally elected representatives, mayors. As regards to the economic conflict of interests they cannot become or remain managing officers of economic associations[39].

Based on the legal immunity of judges, it is only possible to launch criminal and infringement procedures against hem or apply coercive measures under such procedures – except if caught in the act – if there is an approval of the appointing entity. Judges may renounce of their immunity regarding to infringement procedures[40]. Judges are entitled to receive fees and special benefits. The basic remuneration is defined according to the length of service[41].

V.

In the following lines I will provide a short summary of the second chapter of the Act on the legal status and enumeration of judges relying on the summary that is available on the webpage of the Hungarian judiciary[42].

The President of the Court informs the President of the National Judicial Office when a judge's position becomes empty. The President of the NJO announces a public call for applications to the empty position. The Judicial Council forms an opinion about the applicants and ranks them by giving points to evaluate their skills and attributes.

Regulation of the Minister of Public Administration and Justice 7/2011 (III. 4.) KIM defines what attributes can be taken into account and how many points can be given in each category when the Judicial Council interviews the applicants. The evaluation of the previous work and the opinion

[39] Ibidem, § 39–42.

[40] Ibidem, § 2.

[41] Ibidem, point 12.

[42] Ibidem, Chapter II. The appointment of judges: http://birosag.hu/sites/default/files/allomanyok/translators/english/the_appointment_and_the_evaluation_of_the_judges.pdf (30.06.2015).

of the Judicial Council based on the interview have the most important value in evaluation. Scores can be gained also for language skills. Academic record plays an important role as well, scores are available for publications, lecturing at university and foreign research trip. Special legal qualifications and knowledge is also a fore when competing for a position.

The President of the Court makes a suggestion to the President of the NJO, who should be appointed as a judge at the court. When the President of the Court makes a suggestion to the President of the NOJ he/she can only suggest the applicant who is the 1st, 2nd or the 3rd in the ranking formed by the Judicial Council. If he/she suggests the 2nd or the 3rd, he/she must explain the reasons in a written form.The President of the NOJ submits a proposal to the President of the Republic who should be appointed as a judge. The President of the NOJ can only propose the applicant who is the 1st, 2nd or the 3rd in the ranking formed by the Judicial Council. If he/she suggests the 2nd or the 3rd in order, he/she must explain the reasons to the National Judicial Council (NJC). The 2nd or the 3rd in ranking can only be suggested to be appointed if the NJC gives its consent.

The President of the Republic has the right to decide upon the appointment of a judge. Those applicants who were not appointed have the right to file a complaint against the decision. The complaint shall be adjudicated by the Administrative and Labour Court.

If the successful applicant is already a judge, then there is no need for a re-appointment procedure: the judge is transferred by the President of the NJO to the new position. This means that there are not special requirements for taking higher positions in the judicial system. Lower court judges are usually promoted to higher positions[43].

VI.

The Minister of Justice and Administration of Hungary turned to the Constitutional court on October 15. 2015 in an abstract ex post facto review procedure in order to ask for the constitutional review of Act CLXII of 2011 on

[43] See a detailed summary of this procedure at F. Balázs, *How to become a Judge in Hungary?*, op.cit.

the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts[44]. The reason of this constitutional review was primarily the consequence of the opinions of the Venice Commission adopted in March and in October 2012[45]. The Governent in its submission asked about the constitutional assessment of the critics of the Venice Commission.

The Venice Commission claimed in its opinion adopted in October 2012, and therefore the Government asked the Constitutional Court if it is conform to the constitution that under art. 18. (3) of the Act on the legal status of judges, the President of the NJO may decide to deviate from the shortlist of ranking under certain circumstances and propose the second or third candidate on the list to fill the post. Under art. 20 of the same act furthermore, the candidacy proceedings could qualify as unsuccessful in certain cases if the President of the NJO decides so. When the President of the NJO wishes to change the ranking she must apply the general principles established by the NJC[46] and if, in the specific case, the NJC must consents to this change[47]. The President of the NJO also has to give detailed reasons in writing in case of any decision departing from the recommendation of the reviewing board[48]. The provisions under constitutional review provide for a possibility for the uncussessful applicant to ask for the judicial review of the decision. However, the possibility of objection is limited to cases when the successful candidate does not meet the requirements for becoming a judge, or if the successful candidate does not meet the conditions that were listed int he call[49].

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[44] See the analyses of this decision of the Hungarian Constitutional Court in Hungarian P. Sólyom, *Az alkotmánybíróság határozata a bírósági törvények felülvizsgálatáról. Velencei Bizottság kontra Alkotmánybíróság*, "JeMa" 2014/2, pp. 13–28. Kiss György 2012 Az Alkotmánybíróság határozata a bírák jogállásáról és javadalmazásáról szóló törvény egyes rendelkezéseinek alkotmányellenességéről. Pécsi Munkajogi Közlemények V évolyam 1. szám 141–150.

[45] Opinion 663/2012 of the Venice Commission of March 2012 on the legal status of judges and on the organisation and administration of courts and Opinion 683/2012 of the Venice Commission of October 2012 on the cardinal acts on the judiciary.

[46] Ibidem, § 15. (2).

[47] § 103. (3) of the Act CLXI of 2011 on the organization and administration of courts and ibidem, § 132. (6).

[48] Ibidem, § 132. (4).

[49] § 21. of the Act CLXII. of 2011 on the legal status and remuneration of judges.

The Vinice Commission in its opinion claimed that the "judicial review of the decisions on the appointments of judges seems to be rather limited. (...) This means that when the successful candidate meets these requirements and conditions, no judicial review will be possible, even if this candidate was appointed following a deviation from the ranking, without applying the general principles established by the NJC and/or without the consent of the NJC with this deviation. This also seems to imply that an unsuccessful candidate cannot contest the ranking on the ground that it was not based on objective criteria based on merit". Furthermore the system also "implies that the President of the NJO can declare unsuccessful an application procedure when he or she changed the ranking but this change is not approved by the NJC. This means that the President can block the career of a candidate, even if he or she has been ranked first by the reviewing board and if the NJC disagrees with the change in ranking"[50].

The Hungarian Constitutional Court in its decision 13/2013 (VI. 17.) found that it is a satisfactory constitutional guarantee that the NJC has to agree with all decisions of the President of the NJO regarding the final appointment. The Constitutional Court furhter argued that the successful judicial review of the decision on the recommendation to the President of the Republic on the appointment of a judge is also possible on the bases of the lack of the consent of the NJC to the appointment. This means that although it is true that there is no successful appointment is case the President of the NJO changes the ranking and the other appointtees does not gain the consent of the NJC, in case the NJC does not agree with the sugestion of the President of the NJO to appoint the 2 or the 3 applicant in the ranking, no appointment is possible. This guarantee – according to the Constitutional Court – is satisfactory. The unsuccessful applicant has the right to claim the unlawfulness of the decision if the final appointee did not enjoy the consent of the NJC.

In sum, although great and important amendments were already made to the original text of the acts ont he judiciary of 2011, there still are certain parts regarding the appointment process that give unlimited power to the President of the NJO. In spite of the important changes that point into the direction of the protection of the independence of the judiciary, the President of the NJO

[50] Opinion 683/2012 of the Venice Commission of October 2012. 10. point 44.

can still bloque, veto the appointment of a candidate ranked to the first place by the JC and supported by regional judges. Although it certainly not frequent that the President of the NJO does not agree with the appointees ranked to the first place in some cases, then personal or professional conlict occurs between the appointee or the appointing body and the President of the NJO, the President can bloque the appointment procedure. Under the new regulation the NJC obtained a better posision, because after the amendment it can also bloque the procedure if it does not agree with the change in ranking.

The constitutional problem that remained in the system is twofold. One case is that there is no appointment if the two constitutional institutions responsible for the central administration of courts cannot agree. The other case is that there is also no appointee if the President of the NJO argues that under art. 20. bd) of the act on the legal status of judges there were relevant changes in circumstances that makes it unnecessary to appoint a candidate to that position.

Although a stable constitutional democracy could be well functioning also without detailed rules on procedures, procedural guarantees safeguard constitutional values if necessary against the will of individuals or collective bodies in state institutions. It is good to trust constitutional culture, the free will to respect constitutional values, but it is even better to welcome legislative intents trying to incorporate all possible guarantees againts arbitrary decision. Constitutional intent, culture and legal safeguards must go hand in hand in order to operate a successful, professionally acknowledged and independent judiciary that is the main purpose of the 2011 reforms in general and especially on the appointment of judges.

VII.

It was a widely discussed problem of the judicial system before the 2011 reform that judges who were or became professionally unacceptable in their position, could not be easily removed from the judiciary with an inaptitude procedure The rules of the disciplinary proceedings were also not clear cut.

It was a constitutional requirement that the judiciary as such (service courts) investigate on all cases that emerge regarding all suspicion and that

the service court must be independent and the decisions must be reasoned, furthermore disciplinary procedures must meet the requirements of fair trial. However, the related statutory provisions on these issues were not satisfactory complex. Besides the ethical codex there must have been rules e.g. on the whistlebloers as a guarantee that all motions against a judge reach the service court in due order.

The service court of first instance (attached to the court of appeal in the territory of Budapest) and the service court of second instance (attached to the Curia) proceeds in disciplinary cases under the provisions of the new act of 2011 on the legal status and remuneration of judges. Disciplinary proceedings and related compensation cases and further in legal disputes arise usually from the professional evaluation of the activities and of the managerial duties of judges[51]. The chair and the members of the service court are appointed by the NJC from among the judges of the Curia, the courts of appeal and tribunals[52]. The service court of first instance is comprised of maximum 75 persons. The service court of second instance consists of maximum 15 persons[53].

Under the new provisions, all judges are evaluated in each three years. In case of an ineligible evaluation grade, the chair of the court and the chair of the evaluating board simultaneously call upon the judge to resign within 30 days. If the judge rejects to resign, the chair of the court notify the service court of first instance. The service court proceeds with an inaptitude proceedings subject to the due application of the rules of disciplinary proceedings. The service courts of first instance decides on the aptitude[54].

The judicial service relationship has to be suspended if a judge wishes to run in an election for becoming an MP, local municipality board representative or mayor. The judge must report this intention in advance[55].

The judicial service relationship terminates upon the judge's death, in the case if a judge does not request his appointment as a judge for an indefinite term or is found, as a result of the investigation on the three year's practice as

[51] Ibidem, § 101.
[52] Ibidem, § 102. (1).
[53] Ibidem, § 103. (1).
[54] Ibidem, § 81.
[55] Ibidem, § 88. (1).

unsuitable for appointment or through exemption[56]. Under art. 90. of the act on the legal status of judges, the judge's office is terminated if if he resigned his office as a judge, if the judge is ineligible for the fulfillment of the judicial office for health reasons or was declared ineligible in the course of the inaptitude proceedings. Exemption is necessary if a prison sentence or a sentence of community service was imposed on the judge or the judge was subjected to forced medical treatment. The judge may fail to take the judicial oath within the time limit determined and therefore she/he cannot start his work as a judge. If the conditions with respect to the appointment of the judge no longer exist regarding the conflict of interests, or if the judge, in agreement with the President of the NJO, enters into a legal relationship based on an application with an international organization or any of the agencies of the European Union aimed at the administration of justice or any other work related to the administration of justice, the exemption becomes necessary. If the judge reaches the applicable old-age retirement age, not including the President of the Curia (where the upper age limit stayed 70) the office of the judge terminates.

In disciplinary proceedings, the removal from the office can be proposed as a final and absolute disciplinary sanction. If the judge does not consent to her/his transfer or if the judge wilfully fails to meet the obligation to make a proper financial disclosure, furthermore if the judge fails to meet his obligation of verification or fails to attend the medical examination ordered by the employer, his office shall be terminated through exemption. In case of conflict of interests, when the judge is appointed as a rector of a state university or head of a state research institute the office is terminated. In case the judge terminated his service relationship unlawfully, she/he must be exempted under the law[57].

Within the framework of this contribution it is impossible to explain all detailed rules on the cessation of the office of a judge, however, I hope that this short summary demonstrated comprehensively that after the 2011 judicial reform one may find detailed rules and guarantees on the inaptitude and disciplinary proceedings as well. As I argue in the next part, that current constitutional controversies originated more in special pieces of legislation,

[56] Ibidem, § 89.

[57] Ibidem, § 90.

in focused provisions rather than in the general concepts and rules of removal, contrary to the case of appointment where he general concept of centralization was the main criticism raised.

VIII.

In its decision 33/2012 (VII. 17.) the Hungarian Constitutional Court ruled in a 7–7 decision based on the constitutional complaint procedure of former judges that the implementing provisions on the new retirement age for judges is unconstitutional[58]. The *ex tunc* striking down decision, however, could not have a retroactive effect in case of the retired judges. They could not get back to their former offices as most of these positions were already filled by new applications.

In its decision, the Constitutional Court examined the importance and basic elements of the independence of judges. The independence of the judge – as I argued above – is the most important guarantee for the independence of the jurisdiction. One element of the independence of judges is certainly the personal independence. According to the Constitutional Court the status of the judge guaranties that the judge may not be ordered to cease his office, renounce his office and may not be removed against her/his will. In other words, the appointment and the removal of a judge must be scheduled for a lifetime. The independence requires guarantees that other branches in the system of separation of powers, such as the administrative branch does not violate this principle.

The Constitutional Court noticed that the Fundamental Law does not include provisions on the mandatory age of retirement for judges. The phrase that the act on the legal status of judges applied, namely the "average age of retirement"[59] could also not be considered as a precise legal definition due to

[58] The Constitutional Court stated that Section 90. ha) and Secion 230 of Act CLXII of 2011 on the legal status and the remuneration of judges are unconstitutional. See the detailed analyses of this decision in Hungarian, L. Csink, *Az alkotmánybíróság határozata a bírói hivatás felső korhatárának szabályairól. Az elmozdíthatatlanság alkotmányjogi fogalma,* "JeMa" 2012, no. 4, pp. 8–18.

[59] Ibidem, § 90., § 94. (3) and § 96. (2) in force at the time of the constitutional court procedure.

the constant transformation of the general rules on retirement. However, as the age of retirement for judges was 70 years since centuries and also when the Fundamental Law of Hungary came into effect in 2012, judges older than 60 were still responsible for many cases at the time when the new provisions came into effect.

The Constitutional court argued that according to this fact as a result of the new regulation cases were in fact taken from the individual judges. This result of the implemented provisions certainly contradicts the general principle of independence that judges cannot be disengaged from cases. Furthermore the regulation results in the violation of the fundamental rights of judges.

The Venice Commission argued in its Opinion of March 2012, that "it is difficult to find any justification for why especially judges need a "smooth and gradual retirement" by exempting them from office"[60]. A group of Hungarian legal scholars submitted an amicus brief to the Venice Commission signaling among other constitutional problems that the "shortening of the mandate of the sitting judges by 8 years violate the independence of the judiciary"[61]. After the decision of the Hungarian Constitutional Court, the Venice Commission in its decision of October 2012 argued that the Hungarian legislator should still adopt provisions for re-instating the dismissed judges in their previous position. Under Hungarian Legislation after the decision of the Hungarian Constitutional Court retired judges could apply for their re – emplacement before ordinary courts of labor law, but they could hardly get back their original positions. The Venice Commission claimed that judges should be enabled to continue their work without requiring them to go through a re-appointment procedure[62].

The European Court of Justice found in the same case a violation of EU law. On the request of the European Commission, the Court of Justice of

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[60] Opinion 663/2012 of the Venice Commission of March 2012 on act CLXII OF 2011 on the legal status and remuneration of judges, pp. 25–26, http://www.venice.coe.int/Ibforms/documents/?pdf=CDL-AD(2012)001-e (30.06.2015).

[61] *Amicus Brief for the Venice Commission* eds. G. Halmai, K.L. Scheppele http://halmaigabor.hu/dok/426_Amicus_Cardinal_Laws_final.pdf (30.06.2015).

[62] http://www.venice.coe.int/Ibforms/documents/?pdf=CDL-AD(2012)020-e17–18. point 89 (30.06.2015).

the European Union ruled that the radical lowering of the retirement age for judges, prosecutors and notaries in Hungary violated EU equal treatment rules[63]. According to the Court's judgment the forced early retirement of hundreds of judges in 2012 constitutes unjustified age discrimination under EU law[64].

Another outstandingly contradictory case related to the judicial reform is worth to be mentioned here in order to explain some contradictory elements of the reform process. András Baka, the former head of the former Supreme Court was removed from his office before the end of his original mandate of 6 years. In December 2011, Transitional Provisions to the new Hungarian Fundamental Law were adopted, ruling that the legal successor to the Supreme Court would be the Curia (Kúria)[65]. It also ruled on the election of the President of the "new institution", the Curia. According to this, the mandate of the President of the Supreme Court terminated upon the entry in force of the new Fundamental Law. András Baka's mandate thus terminated on 1 January 2012 instead of 2015.

The head of the Curia under the new provisions must have had a 5 year judicial practice in Hungary[66]. This was a requirement that the former head, Baka could not meet as he had worked for the European Court of Human Rights for 18 years prior to his election as head of the Supreme Court.

The wise president of the Supreme Court whose mandate terminated equally as of András Baka turned to the Hungarian Constitutional Court and initiated a constitutional complaint procedure[67]. The ise president claimed that the termination of his position violated the rule of law, the prohibition of retroactive legislation and his right to a remedy. In its eight to seven decision no. IV/2309/2012, the Constitutional Court rejected the complaint. It stated that the premature termination of the term of the office did not violate the Fundamental Law, since it was justified by the full-scale reor-

[63] Directive 2000/78/EC.

[64] Case C-286/12. see a detailed analyses of the decision inHungarian A. Vincze, *Az Európai Unió bírósága a bírói nyugdíjazásról. A diszkrimináció tilalma és a bírói függetlenség*, "JeMa" 2012, no. 4, pp. 65–73. M. Kocsis, *Az európai bíróság ítélete a bírák nyugdíjazása ügyében*, "Közjogi sZemle" 2012, no. 5/4, pp. 71–72.

[65] The historical Hungarian name for the Supreme Court.

[66] § 14. (1) of the Act CLXI of 2011 on the organisation and administration of courts.

[67] Constitutional Court's decision no. IV/2309/2012 of 19 March 2013.

ganisation of the judicial system and the important changes in the tasks and competences of the President of the Curia.

András Baka turned to the European Court of Human Rights. In the case Baka v. Hungary[68] the court emphasized that András Baka was elected by the Parliament of Hungary as President of the Supreme Court of Hungary for a six-year term, until June 2015. In his position he was under a legal duty to express his opinion on legislative bills related to the judiciary. András Baka certainly criticized some reforms – including a proposal on the change of the mandatory retirement age for judges. Relying on art. 6 § 1 (right to a fair trial) of the European Convention on Human Rights, András Baka argued that he was denied access to a tribunal to contest his dismissal as the new regulation was implemented on a constitutional level. He further argued for the violation of art. 10 (freedom of expression) of the Convention claiming that his dismissal was the result of the criticism he expressed. The European Court of Human Rights held that there had been a violation of art. 6 § 1 and art. 10 of the Convention.

Constitutional controversies regarding the forced termination of the office or position of judges were always targeted against certain individuals or groups of judges. There was definitely no statistics that proved that older judges did a worse job in adjudication that their younger counterparts, in addition to this, older judges certainly had more work experience that must be useful when working in a leading administrative position[69]. The legislative intent to "pure" the judiciary was certainly not acceptable under rule of law standards. This was – as I explained in the introduction – against the basic consent of the peaceful transition of Hungary.

IX.

One may try to reflect upon the above changes from various directions[70]. In order to provide a comprehensive review on the Hungarian system of judi-

[68] Baka v. Hungary. Application no. 20261/12. p. 99.

[69] Ibidem, p. 3.

[70] See further points of assessment in P. Sólyom, *Az Alkotmánybíróság határozata a bírósági*, op.cit., pp. 13–28.

cial appointment and the cessation of the judicial status, additionally to the relevant legal provisions I explained some related discussions and described the context of the regulation in a nutshell. I concluded that in the selection of judges in Hungary mostly professional requirements prevail and the cases of removal of the judges are also strictly limited by law. The 2011 reform undoubtedly made important steps toward professionalism, however, the two thirds majority applied unconstitutional measures as well in order to reach a politically more comfortable setting. These unconstitutional measures, although already corrected in many regards, are very harmful in the long run, not only because of their immediate results but also because of the uncertainty they caused. Judges presently in office must bear in mind that even if at the moment their status is secured, the constitution and the cardinal laws may be easily amended by the votes of a two thirds majority. Change comes from one day to the other and can unforeseeably threaten the status of the individual judge as well[71]. This definitely does not promote the substantial independence of the judge and cannot be evaluated as a suitable environment for work.

The organic development and the well planned institutional and administrative reform steps might bring, however, good results regarding the quality and independence of the adjudication. But effectiveness must go hand in hand with the respect of the fundamental values in law. This reform will probably be up to be evaluated in the next decade.

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