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Judicial reform – why and how?

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Judicial reform – why and how?

In search of answers to actual questions of constitutional law – like judicial reform –, opinions and other texts of the Venice Commission (VC) is an obvious starting point. Although these texts are not legally binding, but the Commission as an advisory body of the Council of Europe (CoE) in constitutional issues has a certain prestige and a wide horizon. This prestige and horizon follows from its large membership– among the members of the CoE we find not only member states of the Caucasus but also Morocco, Tunisia, Brazil, Chile, Mexico, Peru, Israel, South Korea and the United States of America. There are also observer members as Argentina, Canada, the Holy See, Japan and Uruguay[1].

The main focus of the VC is on rule of law in general, but among the sub-topics, the Judiciary, judicial reforms, independence of the judiciary and of judges, role of constitutional courts, role and structure of judicial councils, administration of courts, relations among the judiciary, legislation and the executive are the most frequent issues. This is shown not only by series of individual opinions but also by the Report on Independence of the Judicial System and a number of related compilations[2]. The cause of this distinguished attention is without doubts the role and stability of the judiciary in a democratic society governed by law.

Stability of the judiciary can be interpreted both in institutional and personal aspect. On personal dimension the carrier system, appointment of judges for indefinite time (to ordinary courts) or at least for a longer period (to constitutional courts) gives itself much more constancy to the judiciary compared to the two other branches influenced regularly by the frequent elections. On institutional dimension stability is confirmed by the historical experience that system of courts changes very rarely. It usually happens when major transformations of the society occur, as a consequence of wars, political transitions, profound constitutional reforms or adherence to supranational structures like the EU. All these aspects of judicial stability are crowned by and included within the principle of judicial independence as an untouchable value of a society ruled by law. Thus judicial independence became the most important counter-value of the democratic will of a nation. Law may be amended or redrafted if it is required by the political will but courts in general and judges in particular must not be removed only because their judgments based on constitutional laws are not in line with the political expectations.

This privilege of judges compared to any other state authority or official needs of course strong reason. The reason of judicial independence and functional immunity is given by their role. The role of judges is even more stable: judges have to decide among individual parties or an individual and the state on application and interpretation of laws and on rights. Their decision is final, indisputable and binding. Judges are guardians of law, of constitution, of rights, of freedom. This role requires their independence in decision-making what presupposes their

[1] http://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN, 30.10.2017.

[2] Report on the Independence of the Judicial System Part I: the Independence of Judges, CDL-AD(2010)004; Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, CDL-PI(2015)001; Compilation of the Venice Commission opinions, reports and studies on constitutional justice, CDL-PI(2017)008; Compilation of Venice Commission opinions and reports concerning prosecutors, CDL-PI(2018)001; Report on freedom of expression of judges, CDL-AD(2015)018.

independence in interpretation of laws. But this independence also has an unbreakable limit: judges may not decide arbitrary, may not change laws – including reasonable content of laws.

Based on these introductory considerations now we can understand the causes of the special interest of the VC to the judiciary. If we look on the opinions of the Commission, we face that almost all of them gives answer to the question of how a judicial reform should be performed. But there is no answer to the question of why a need for judicial reform occurs from time to time if stability is so important. There is hardly such a reform in Western Europe, but it is more frequent in Central Europe and quite usual in the Balkans and in Eastern states. Two main motives can be identified:

a) First, it is a historical experience that political transitions at the end of the 20th Century did not affect judges, courts and the judicial system. The missed lustration lead in the later decades to the frustration of the political branches. Political institutions responsible to their voters saw in courts obstructive factors: parliaments could adopt new laws or even constitutions, but courts could prevent their prevail. Just for example that happened in Hungary. The Constitutional Court declared that its practice is influenced by the so called 'invisible constitution', set of rights, principles not included in the constitution but melted by the Court.

b) On institutional dimension Western Europe invented the judicial councils composed by elected judges and other – elected or ex officio – members, as a new form of administration of courts that reduced or even abrogated the role of the executive, of ministries of justice. However, many of the important legal families did not go along the road. In France, Germany, Austria ministries of justice still have role in administration of courts. The VC does not criticise this, but in the same time in the case of Central European, Balkan and Eastern European states deliverance of administrative power over the judiciary from the ministries of justice to the judicial councils is definitely expected. The official explication of the double standard is originated from the different assessment of the so called 'old' and 'new' democracies:

> "In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time.
>
> New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges"[3].

Although the double standard isn't well founded, but the treaties before accession to the EU are strong instruments to enforce the introduction of the proposed model. However, the reality is that the EU and the VC expects implementation of a judiciary model that is not even realized in Western states. And it is not realized for good reasons: the permanent reforms in states that built up judicial councils proves that this experiment is not definitely successful[4].

Judicial reforms in Hungary

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[3] CDL-PI(2015)001, Compilation of Venice Commission Opinions and Reports Concerning Courts and Judges, section 2.2.3.1., based on CDL-AD(2007)028, Report on Judicial Appointments by the Venice Commission, §§2-3, 59 and 12-17

[4] "48. Although public trust over the past 20 years in the efficiency of this approach has not been unequivocal in some countries, no other more efficient form of guarantee has been developed and accepted since. (…) 49. On the other hand, the establishment of a judicial council, even if it is endowed with sufficient constitutional guarantees, is no guarantee for ensuring judicial independence in itself." CDL-AD(2018)003

After the transition the structure of courts and their administration was changed for the first time in 1998, when the National Judicial Council (NJC) chaired by the President of the Supreme Court was set up. The reform did not succeed. The new administration led to a decrease of internal independence of the judiciary hence the role of presidents of county courts was almost uncontrolled, thus just the same actors decided on promotion of judges and nomination of new leaders of the courts who had the role of revision of their judgments[5]. On the other hand administration by the NJC caused the politicization of the courts, exactly contrary to their goal. The NJC prepared the budget of courts that was compulsory for the Ministry of Finances, and could be amended (changed) only during the parliamentary debates on formal motions for amendment. Consequently the governing parties – irrelevant of their political shape – were posed in a conflict position against courts, while opposition parties – also irrelevant of their political shape – became friends of the courts. The NJC, this formally non political body had to take part in the arisen political conflict. This undesired effect could not happen when administration of courts was fulfilled by the Ministry of Justice – then the political debates were arranged by politicians. Exactly because of this experience the new Constitution of Hungary, the Basic Law transformed the administration of justice, and the president of the new National Judicial Office (NJO) controlled by the new National Council of Judges (NCJ) became the main actor. The new model reduced the intrinsic danger of politicization of the Council even if personal willingness of their members to take part in public debates could not be excluded.

In 1998 the former three-level structure of courts was also transformed to a four-level model by setting up of the historical regional appeal courts called (Ítélőtábla). But another need for change of structure of courts remained unresolved. It was the problem of administrative courts. The Royal Administrative Court abolished in 1949 was particularly prestigious. Due to case law of the Constitutional Court set up after the transition judicial control became formally complete in Hungary, but until 2018 the lack of a special code of procedure was caustic and administrative justice bestowed on ordinary courts was criticised by majority of public law scholars. The new rule of the Basic Law of Hungary that prescribes a separate administrative court system with special administration cannot be disputed by well-grounded arguments.

If we step back to the VC, this last statement is confirmed, there are definitely no institutional standards for the structure of administrative courts in Europe. The VC observed that

> "There are of course arguments in favour of establishing separate administrative courts and the Commission does not wish to take a definite position on this point. [...] [T]he establishment or non-establishment of an administrative judiciary is a solution of such importance that it should be made at constitutional level.[6]"

Or:

> "...it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts, and this is likely to contribute to the efficiency of judicial handling of administrative law cases...[7]",

There is only a soft-spoken remark that

> "A system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) may however be the most democratic structure for the judicial power, and judges preferably should be generalists rather than specialists in the fields of substantive law.[8]"

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5 Pokol Béla: A bírói hatalom [=Judicial Power], Budapest, Századvég, 2003.

6 CDL-INF(2001)017, Report on the Revised Constitution of the Republic of Armenia, §59

7 CDL-AD(2002)026, Opinion on the Draft Law on Judicial Power and Corresponding Constitutional Amendments of Latvia, §6,

8 Ibid.

As a consequence, the new administrative courts can be set up without doubts. This does not mean that there are no ambiguities around it, or there are no important questions to be answered. Let me mention some of them.

In the current structure in Hungary there are ordinary courts with civil, criminal and administrative law jurisdiction, and there is the Constitutional Court. If the separate administrative courts are set up, three types of courts will function: the ordinary courts, the administrative courts and the Constitutional Court. Relationship among the three types of courts should be determined. We have to note, that in Hungary there are debates around the Constitutional Court whether it belongs to the judiciary or not. This question does not exist in European context. The VC consequently enlists the constitutional courts within the judiciary even if this type of courts has special structure and constitutional justices are appointed by special procedures:

> "The separation between Constitutional Court and the ordinary judiciary probably represents the most widespread model in Europe. On the other hand, a court exercising a power of constitutional review might be considered a part of the judiciary even though it may have a power of review over other courts. However, this seems to be primarily a dogmatic question of classification rather than having a practical effect provided that the Constitutional Court receives the fundamental guarantees for its independence and respect for its authority which should be afforded to the highest judicial organ.[9]"

The Constitutional Court has special jurisdiction, special procedure, but it belongs without any doubt to the judiciary. It is a court.

In order to concretise the problem, the locus standi of state authorities before the Constitutional Court should be rethought. Before an administrative court performing judicial control over administrative and other public law acts, the private party appears always as claimant and the state authority as defendant. In the administrative trial both parties have the same procedural rights, including rights to remedy. But if a case is brought to the Constitutional Court, this equality disappears. Only a constitutional claim by the civil party is accepted, claims by state authorities as former defendants in the administrative (or civil law) trials are rejected on *locus standi* grounds: state has no fundamental right, consequently there is no right to be protected by the Constitutional Court[10]. Different decisions declared the claim admissible appeared only in the case of non-administrative institutions, like state hospitals, local governments or other institutions if fulfil non-administrative role, or courts in labour law trials[11]. This really ambiguous legal phenomenon cannot be kept on.

The main argument for a further legislation is that the Basic Law of Hungary prescribes as role of the Constitutional Court control of constitutionality in general, and not only protection of fundamental rights. Consequently constitutional powers and competences of state authorities is to be protected by the Constitutional Court as well as fundamental right of the individuals. What more, if we accept the principle of separation of powers, and there is no reason not to do it, state bodies in an administrative or civil law trial lose their public law authority, and act as a party with equal rights as any private individual. Consequently, even state bodies are vested with specific rights, at least right for fair trial.

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[9] CDL-AD(2005)005, §14.

[10] Decisions 3307/2012. (XI. 12.) AB, 3317/2012. (XI. 12.) AB, 3105/2014. (IV. 17.) AB, 3032/2017. (III. 7.) AB,3067/2018. (II. 26.) AB, 3164/2018. (V. 16.) AB, 3167/2018. (V. 16.) AB, 3248/2018. (VII. 11.) AB.

[11] Decisions 3091/2016. (V. 12.) AB, 3149/2016. (VII. 22.) AB, 3005/2017. (II. 1.) AB, 3235/2017. (X. 3.) AB, 3365/2017. (XII. 22.) AB, 3332/2017. (XII. 8.) AB, 3109/2018. (IV. 9.) AB.

Particularly in such cases, but also in control of constitutionality of legislative acts, the procedural rights of the executive should be strengthened. The Supreme Public Prosecutor should be heard compulsorily at the Constitutional Court and in important cases at the High Administrative Court. The same right should be granted to the Minister of Justice in the proceedings of the Constitutional Court.

Finally, two other suggestions seem to be reasonable. The first one is related to expectations of the political branches against courts. It should be fixed without any exceptions that courts and judges must proceed without any kind of external pressure. There is no 'but' in this regard. Judges and courts are and must be independent. As a consequence no judicial reform affecting administration of courts can change the relationship between the judiciary and the other branches. If the legislation or the executive is not pleased with the effectiveness of courts, with the uniformity of jurisdiction, with observance of laws by the different judges, an adequate instrument for development that does not affect independence should be found. And there is an adequate instrument. It is called *stare decisis* or rule of precedents. Of course, this instrument is originated in the common law system, but it sneaks step by step into the continental civil law systems. And what more, the VC (and other bodies of the CoE) is of opinion that this instrument is constitutionally acceptable[12].

The last suggestion concerns role of judicial councils in administration of the judiciary. My view is – and I think that the expertise of the VC confirms this –, that the idea of judicial "self-government" is a misunderstanding. The VC had – but rarely – use this notion[13] , but not as a direction to be followed. Just contrarily, it was expressed in a number of cases that judicial corporatism is not preferable[14]. Corporatism is counterbalanced by membership of other legal professions in the highest judicial councils. Membership of the Minister of Justice or of the General Prosecutor fits this, if there are also other professionals (from the Bar Association, Universities, etc.). What more, if it is constructed properly, the highest judicial council may serve as a formal and open space for exchange of views among the different legal professionals interested in the administration of courts. It is more practical and also legitimate than a system, where the communication between the courts and the executive, the courts and the legislation, the courts and the bar, the courts and the prosecution in administrative topics is simplified to ad hoc and closed relations. Consequently, I suggest redrafting the rules on judicial councils in a manner that excludes the strange misunderstandings of judicial self-government.

12 CDL-AD(2018)011, § 28; CEPEJ Opinion No 20 (2017), §10; see also: Michal J. Gerhardt: „The Role of Precedents in Constitutional Decision-making and Theory". College of William & Mary Law School, Faculty Publications, 1991, 75-76.

13 CDL-AD(2010)003, §122

14 CDL-AD(2002)021, § 21; CDL-AD(2002)012, §66; CDL-AD(2002)021, §§21-22, CDL-AD(2005)003, §102