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THE VENICE COMMISSION ON THE NEW HUNGARIAN CONSTITUTIONAL COURT ACT

*Posted on 9 Luglio 2012 by **Katalin Kelemen***

The extensive dialogue between the Venice Commission and the Hungarian government continues. On 19 June the Venice Commission published its opinion on the new Constitutional Court Act of Hungary (its text in English available here), adopted in November 2011 and entered into force together with the new Fundamental Law on January 1, 2012 (already presented on this blog, here). Opinion no. 665/2012 was adopted on request by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, at its 91st plenary session on 15-16 June.

This Opinion is only one a long series of documents issued by the Venice Commission in relation to the new constitutional asset of Hungary (see, for example, the Opinion no. 663/2012 on the cardinal laws concerning the judiciary, delivered in March, and discussed on this blog). At the same plenary session, the Venice Commission adopted also other three opinions concerning Hungary: Joint Opinion no. 662/2012 concerning the Act on parliamentary elections (requested by the Hungarian Foreign Minister), Opinion no. 671/2012 concerning the Act on the rights of nationalities and Opinion no. 668/2012 concerning the Acts on the prosecution service and on the status of the Prosecutor General (requested by the Monitoring Committee).

The Opinion on the new Constitutional Court Act has been issued on the basis of comments by three rapporteurs. Two of them, Christoph Grabenwarter from Austria and Wolfgang Hoffmann-Riem from Germany, participated in the preparation of other opinions concerning Hungary as well. The third member is new: Guido Neppi Modona from Italy. The Venice Commission adopted its final opinion a few days after the submission of remarks by the Hungarian Government on the draft opinion.

The overall opinion of the Venice Commission on the new Constitutional Court Act is rather positive. It states that the Act is well drafted and coherent (par. 53 of the 665/2012 Opinion), and welcomed a number several provisions, among which the abolition of the possibility of re-election of constitutional judges (par. 7) and the introduction of *prorogatio* (par. 15). Regarding the latter, the Opinion observes that it would be however diserable to amend the constitutional provision on the Constitutional Court in order to allow explicitly the extension of the mandate of the incumbent member until the appointment of a new judge, since the Art. 24.4 provides for a term of office of twelve years and currently does not make reference to any exception (par. 16). The Venice Commission also welcomed the granting of the right to initiate *ex post* review to the Ombudsman, as previously expressly recommended in its Opinion no. 614/2011 (see par. 66 and 75), and that proceedings before the Constitutional Court shall be free of charge (par. 44). The latter rule is not new in Hungarian constitutional justice, while a new element is the introduction of mandatory legal representation of the complainants. In relation to this the Venice Commission recommends the introduction of provisions on legal aid, also simply by referring to the code of civil procedure for example (par. 43).

At the same time the Venice Commission criticised some other elements, such as the direct election of the Court's President by the Parliament (par. 9), the vagueness of the term “unworthy” in the provision concerning the exclusion of members of the Constitutional Court (par. 18). However, as to the latter negative remark, the Opinion makes a comparative statement, admitting that “such a wording is not completely unusual from a

comparative perspective" (par. 19), bringing as an example the Austrian Constitutional Court Act (Art. 10.1.c). Therefore the recommendation of the Venice Commission may be regarded as addressed to Austria as well: the vagueness of this term should be compensated by procedural safeguards, e.g. by requiring a qualified majority or even the unanimity of the other judges, and by giving some examples of "unworthiness" (as the Austrian Act does by specifying that a judge may be removed from office if he or she grossly disregarded the obligation of non-disclosure of confidential information).

The Opinion points out some inconsistencies in the text, such as the provision that grants a payment equivalent to a six months salary to former Presidents of the Court when they retire or are dismissed, and only to a three months pay if they resign (Art. 20.2 of the Act). The Commission considers this distinction unjustified (par. 20). The Opinion also points out that the Act deals too specifically with the personal privileges of the President, which can affect his dignity and the public perception of the independence of the Court at a whole (par. 21). In fact, the Act dedicates four entire articles to the President (Art. 17-20), granting him several privileges, among which a presidential residence, the use of two passenger cars, personal protection and entitlement to first class travel on flights and trains. The original proposal, submitted to the Parliament in October 2011, entitled the President to the use of a charter flight in case of necessity, but it was eliminated from the text due to harsh criticism raised by the opposition. (However, the Venice Commission took into consideration only the final text, since the original legislative proposal and the materials of the debate have not been translated to English. For those who can read Hungarian, they are all available on the website of the Hungarian Parliament, here.) According to the Commission the best solution, as regards the privileges of the President, is to entrust the Court itself with defining the scope of such benefits in order to avoid political influence.

As to the changes in the competences of the Constitutional Court, the Venice Commission repeats several recommendations already explained in previous opinions. It states clearly that the the introduction of the full

constitutional complaint is appreciated. However, the Commission points out that in certain parts the wording of the provisions is not completely clear or coherent (par. 26-28).

The most serious concern expressed by the Venice Commission is related to Art. 41.2 of the Act that confirms the exemption of taxation and budgetary laws from constitutional review, already provided by Art. 37.4 of the Fundamental Law (par. 38). Even if the Act contains only a simple reference to Art. 37.4, upholding its content, the Commission does not miss the opportunity to observe that Art. 27 of the Transitional Provisions of the Fundamental Law (adopted just one day before its entering into force, on 31 December 2011) extends the scope of this limitation of jurisdiction. In virtue of the the constitutional provision, the limitation is valid as long as state debt exceeds half of the GDP. The Transitional Provisions specify that taxation and budgetary laws published in the period when state debt exceeded half of the GDP continue to be exempted from constitutional review even when the budget situation has improved beyond that target. As the Venice Commissione notes, this norm is not a transitory provision at all, as it provides for a permanent rule, and seems to run counter the Fundamental Law itself.

In its conclusions the Venice Commission summarises both the positive and the negative comments to the Act. The list, presented in a numbered and concise form, is balanced: 10 positive and 10 negative elements.