

and thus to its mandate to ensure that “the law is observed” [Article 19(1) TEU]. Seen in this way, our proposal is in fact nothing new to European law: As early as *Van Gend en Loos* the CJEU enabled individual legal actions based on directly effective Treaty provisions to complement the centralized infringement procedure.⁷⁷ This has become an accepted feature of the EU law *acquis* ever since.

With regard to the former challenge our vision is to take European constitutional pluralism to the next step: EU and national systems of fundamental rights protection would coexist symbiotically like good friends: respectful of each other’s specificities, but mutually vigilant and helpful in order to preserve shared foundational principles. Media freedom, “one of the fundamental pillars of a democratic society”, is worth a try. To implement this, what is needed above all are judges with a mindset and ethos of László Sólyom. The authors of this contribution wish him to live this example for many years to come.

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EUROPEAN STANDARDS FOR AN INDEPENDENT JUDICIARY IN A DEMOCRATIC STATE – CONTRIBUTION OF THE VENICE COMMISSION³

Contribution to the Mélanges
for Prof. LÁSZLÓ SÓLYOM, former President of Hungary

1. Introduction

Until he was elected President of Hungary, Prof. László Sólyom was one of the most eminent members of the Venice Commission of the Council of Europe (6 October 1998 to 2 August 2005) and was known worldwide as the first President of the Constitutional Court of Hungary forging leading case-law in the field of human rights. The ground-breaking decision abolishing the death penalty in Hungary inspired other Constitutional Courts in South Africa, Albania, Ukraine and Lithuania to follow lead.

Unfortunately, his new position as Hungary’s Head of State and his membership in the Venice Commission were incompatible, but he very much regretted having to leave the Commission, which he found intellectually stimulating. However, even after his membership in the Venice Commission, he continued to follow the Commission’s work and we had both the honour and the pleasure of being received by him as the newly elected President of Hungary on the occasion of the 5th meeting of the Venice Commission’s Joint Council on Constitutional Justice in 2005 in Budapest and of hosting him as the keynote speaker at the celebration of the 20th anniversary of the Commission in Venice in 2010.

During his time as member of the Venice Commission, László Sólyom was particularly active in the constitutional justice field and held the position of President of the Sub-Commission on Constitutional Justice and the Joint Council on Constitutional Justice. As a member of the Commission,

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³ This article reflects the views of the authors only and does in no way engage the Council of Europe or the Venice Commission.

⁷⁷ CJEU, *Van Gend en Loos*, *supra* note 9; see further STEIN: Lawyers, Judges, and the Making of a Transnational Constitution. 75 AJIL (1981), 1, 4.

e worked on opinions relating to Albania⁴, Georgia⁵, Moldova⁶ and Latvia⁷ and as a member of the working group on the execution of decisions of Constitutional Courts.

László Sólyom's interest was not limited to specialised constitutional justice. His previous legal work related to the protection of the environment and to personal data. These collective and individual rights cannot be ensured without independent courts. Therefore, we would like to present the present article on a topic, which is relevant for old and new democracies alike: the development of European standards in the field of judicial independence and the Venice Commission's participation in this process.

The Venice Commission, its real name being the European Commission for Democracy through Law, is an advisory body of the Council of Europe, composed of "independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science"⁸. László Sólyom undoubtedly is endowed with such eminence.

Being the result of an Italian initiative within the Council of Europe, the Commission has its seat in Venice, Italy, which explains why it is usually referred to as the Venice Commission. It advises its 57 member States in Europe and beyond⁹ in matters of constitutional and international law. Upon request by the states and the organs of the Council of Europe, it adopts opinions relating to individual states and reports of a general nature.

2. A doctrine developed on country-related opinions

The Venice Commission built the key elements of its doctrine on the judiciary through opinions on draft constitutions¹⁰, constitutional amendments and later in opinions on laws on the judiciary.

In addition to principles expressed in Recommendation 94(12) of the Committee of Ministers of the Council of Europe, the Commission was able

⁴ CDL(1999)055 and CDL(2004)012, CDL-AD(2004)009.

⁵ CDL(1999)023.

⁶ CDL(2002)102, CDL(2004)012.

⁷ CDL(1999)071.

⁸ Resolution(2002)3, Revised Statute of the European Commission for Democracy through Law adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies).

⁹ Belarus is associate member, while Argentina, Canada, the Holy See, Japan, Kazakhstan, the United States and Uruguay are observers. South Africa and Palestinian National Authority have a special co-operation status similar to that of the observers.

¹⁰ For example CDL(1995)044, Opinion on the provisions concerning the organisation of the judiciary contained in the Transitional Constitution of the Republic of Albania and on related provisions (J. Malinverni).

to base itself on the common European constitutional heritage and the standards set out in Article 6 of the European Convention on Human Rights, as interpreted by the Strasbourg Court.

As a consequence of moving from the constitutional to the legislative level, the Commission was called upon to comment not only on constitutional aspects of judicial independence, but, in addition, it had to provide advice on more practical issues. To name only a few of the major topics which the Commission covered in opinions on individual countries, we refer to the status of prosecutors and especially their relations with courts¹¹, judicial councils¹², the status of judges¹³, their disciplinary liability¹⁴ and even criminal procedure¹⁵. In 2008, the Commission gave an opinion on the Constitutional Law of Court Juries of Kyrgyzstan.¹⁶

In its series of opinions on the judiciary of Bulgaria¹⁷, the Venice Commission regretted the complete replacement of the "parliamentary component" of the Supreme Judicial Council (11 out of the 25 members) after each change of parliamentary majority by simple majority vote. The Commission consequently called for an election of the parliamentary component of the judicial council by a qualified majority. The composition of judicial councils became

¹¹ CDL-AD(2008)019, Opinion on the draft Law on the Public Prosecutors' service of Moldova adopted by the Venice Commission at its 75th Plenary Session (Venice, 13-14 June 2008); CDL-AD(2008)005, Opinion on the Draft Amendments to the Law on the State Prosecutor of Montenegro adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

¹² CDL-AD(2008)006, Opinion on the Draft Law on the High Judicial Council of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008).

¹³ CDL-AD(2008)007, Opinion on the Draft laws on Judges and the Organisation of Courts of the Republic of Serbia adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2007)003, Opinion on the Draft Law on the Judiciary and the Draft Law on the Status of Judges of Ukraine adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

¹⁴ CDL-AD(2007)009, Opinion on the Law on Disciplinary Responsibility and Disciplinary Prosecution of Judges of Common Courts of Georgia adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

¹⁵ CDL(2000)013, Revised comments on the amendments to the Bulgarian Penal Procedure Code (J. Hamilton).

¹⁶ CDL-AD(2008)038, Opinion on the Constitutional Law on Court Juries of Kyrgyzstan adopted by the Venice Commission at its 77th Plenary Session (Venice, 12-13 December 2008).

¹⁷ CDL-INF(1999)005, Opinion on the Reform of the Judiciary in Bulgaria; CDL-AD(2002)015, Opinion on the Draft Law on Amendments to the Judicial System Act of Bulgaria, adopted by the Commission at its 51st Plenary Session (Venice, 5-6 July 2002); CDL-AD(2003)016, Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria adopted by the Venice Commission at its 56th Plenary Session (Venice, 17-18 October 2003); CDL-AD(2008)009 Opinion on the Constitution of Bulgaria adopted by the Venice Commission at its 74th Plenary Session (Venice, 14-15 March 2008); CDL-AD(2009)011, Opinion on the Draft Law amending and supplementing the Law on Judicial Power of Bulgaria, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009); CDL-AD(2010)041, Opinion on the Draft Law amending the Law on Judicial Power and the Draft Law amending the Criminal Procedure Code of Bulgaria, adopted by the Venice Commission at its 85th Plenary Session, Venice (17-18 December 2010).

one of the Commission's recurrent topics in the field of judicial independence (see further below).

Another issue, which the Commission had to address in its series of Bulgarian opinions, was judicial immunity. The Bulgarian Judiciary was rattled by allegations of corruption in the three branches of its magistracy: judges, prosecutors and investigators. Their immunity, similar to that of the members of Parliament, was deemed to be too wide. The Commission affirmed its position that judges should benefit only from functional immunity for acts performed in their judicial activity. Immunity should not shield them against intentional crimes such as taking bribes for handing down a favourable judgment.

3. General report – judicial appointments

These positions were always based on a coherent view of the role of the independence of the judges as the central element of the rule of law in a democratic state. However, opinions on individual countries did not provide the Commission with an opportunity to express its views in an abstract and comprehensive manner. This changed in 2007, when the Committee of Ministers of the Council of Europe gave a mandate to the Consultative Council of European Judges (CCJE) to prepare an opinion on judicial appointments and to consult the Venice Commission on this issue. As opposed to expert committees composed of government representatives from the respective ministries, which usually prepare draft recommendations and conventions for the Committee of (foreign) Ministers of the Council of Europe, the consultative Council of European Judges is an advisory body to the Council of Europe, composed exclusively of judges.¹⁸

The CCJE invited the Venice Commission to its meetings¹⁹ dedicated to the preparation of what later would become "Opinion No. 10 of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the service of society".²⁰

The co-operation with the CCJE was the welcome occasion for the Commission to prepare its own Report on Judicial Appointments²¹, which

¹⁸ Terms of reference of the Consultative Council of European Judges (CCJE) for 2010 and 2011, Decisions adopted at the 1075th meeting of the Ministers' Deputies, 20 January 2010, Appendix 3 (Item 10.1).

¹⁹ Meetings of the Working Party of the CCJE (CCJE-GT) in Rome (28–29 March 2007) and in Graz (25–26 June 2007).

²⁰ Adopted by the CCJE at its 8th meeting (Strasbourg, 21–23 November 2007).

²¹ CDL-AD(2008)028, adopted by the Commission at its 70th Plenary Session (Venice, 16–17 March 2007).

took up ideas and principles already expressed in previous country opinions. However, the more abstract approach allowed the Commission to prepare a coherent text on an essential part of judicial independence, that is judicial appointments.

3.1. Appointment system

The Commission distinguished two major types of appointments – elective systems and direct appointment systems and warned against the dangers of the former. In particular, the Venice Commission was of the opinion that ordinary judges should not be elected by Parliament, because there was a great danger that "political consideration prevail over objective merits of a candidate".²²

The Commission preferred that the appointment of judges be made by an independent judicial council.²³ Appointments by the Head of State were however found to be acceptable, as long as he or she was bound by the decisions of an independent judicial council.²⁴ Such a Council should have a "decisive influence on the appointment and promotion of a judge and [...] on disciplinary measures brought against them".²⁵

3.2. Judicial councils

A central point of the Report dealt with the composition of judicial councils. While accepting that there is no standard model for such councils, the Commission recommended that they should have a mixed composition, with a "substantial element or a majority" of judges and other "members elected by Parliament among persons with appropriate legal qualification taking into account conflicts of interest".²⁶ With this formula, the Commission tried to combine two conflicting principles. Judicial independence might be best served by a judicial council composed only of judges, but experience had shown that such councils tended to be lenient, especially in the field of judicial discipline, and when only judges appointed judges there was a danger of corporatism within a judicial caste, unaccountable to the public.

The other principle pursued was that of the uninterrupted chain of democratic legitimacy, developed in the German constitutional doctrine. According

²² CDL-AD(2007)028, paragraphs 9–12.

²³ However, the Commission was of the opinion that such a council should not be burdened with administrative organisation of the judiciary.

²⁴ CDL-AD(2007)028, paragraph 14.

²⁵ CDL-AD(2007)028, paragraph 25.

²⁶ CDL-AD(2007)028, paragraph 29.

to this doctrine, all state bodies should have a direct or indirect link to the will of the sovereign people. By recommending to have part of the judicial council elected by Parliament, the Venice Commission sought to achieve a compromise between full judicial independence and democratic legitimacy of judicial appointments. The Commission limited the scope of Parliament's influence right away by insisting that active members of Parliament not be eligible. Moreover, a qualified majority vote should oblige the parliamentary majority to seek a compromise with opposition. Ideally, they could settle on neutral candidates but – political life often is intricate – at least they would have to accept a balanced composition of the parliamentary component of the judicial council, which would include members close to the majority and others close to the opposition. On this point, ideas that were developed over the years in country opinions found their way into the general report on judicial appointments.

Another issue that had come up in previous opinions was the participation of the minister of justice in the judicial council and whether he or she should preside it *ex officio*. Not least because of the responsibility of the minister towards parliament, the Commission did not exclude the minister's participation in the council. Often, as a member he or she might be an instigator of reform, which would have to be implemented by the judicial council. However, because of his or her political mandate, the minister of justice should not participate in certain decisions, especially on judicial discipline. The Commission, however, preferred the chair of the council to be elected by the council from among the non-judicial members. In expressing this view, the Commission explicitly referred to the need to avoid “corporatist tendencies within the council”.²⁷

3.3. Probationary periods

Finally, the report on judicial appointments takes a clear stance against probationary periods for judges, because the Commission found that probation can “undermine the independence of judges”. In its country related opinions, the Commission often had been confronted with constitutional provisions providing for such probationary periods. The last such opinion relates to Ukraine and was adopted in October 2011, just at the moment when the former Prime Minister of Ukraine, Ms Tymoshenko, was condemned to a seven year prison sentence by a judge under probationary period. The Commission was of the opinion that “it should be ensured that judges in these temporary

²⁷ CDL-AD(2007)028, paragraph 35.

positions cannot be appointed to deal with major cases with strong political implications”²⁸.

In order to overcome the problem that the laws, which the Commission assessed, could not contradict the constitution, the report recommended to quasi assimilate the non-confirmation of a judge in a probationary period to dismissal and called for the same guarantees as those against dismissal: citing its opinion on Macedonia, the report states that a “refusal to confirm a judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is removed from office”.²⁹

3.4. Answer to the CCJE's draft opinion

Right after its adoption, the Report on Judicial Appointments was transmitted to the Consultative Council of European Judges (CCJE) and the Commission presented its contents at CCJE-GT meetings in Rome, Graz and Strasbourg. In most points, the Venice Commission and the CCJE fully agreed on standards required to guarantee judicial independence. However, already in October 2007 and before the adoption of Opinion no. 10, it became clear that the CCJE was likely to disagree on a few points with the Report of the Venice Commission. In order to identify these points and to assist the CCJE in making an informed decision, the Venice Commission adopted Ms Suchocka's Comments on the Draft Opinion of the Consultative Council of European Judges on Judicial Councils.³⁰

In her comments, Ms Suchocka raised the following points, which distinguished the CCJE from the Venice Commission: the Venice Commission had opted for the formula of “a substantial element or a majority” of judges as members of a judicial council. The substantial element clause was intended to accept even slightly less than half of the members as judges. The CCJE however envisaged 75 per cent of judges as a minimum and admitted even judicial councils composed only of judges. In her comments pointing out this difference, Ms Suchocka explicitly referred to democratic legitimacy as the argument supporting a lower number of judges.

²⁸ CDL-AD(2011)033, Joint Opinion on the Draft Law amending the Law on the Judiciary and the Status of Judges and other Legislative Acts of Ukraine by the Venice Commission and the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe adopted by the Venice Commission at its 88th Plenary Session (Venice, 14–15 October 2011), paragraph 49. See also ECtHR, case of Mirosław Garlicki v. Poland (application no. 36921/07).

²⁹ CDL-AD(2007)028, paragraph 41, referring to CDL-AD(2005)038, Opinion on Draft Constitutional Amendments concerning the reform of the Judicial System in ‘the Former Yugoslav Republic of Macedonia’, paragraph 23.

³⁰ CDL-AD(2007)032.

The CCJE also had ruled out the participation of the Minister of Justice in the Council, admitted by the Venice Commission. For the CCJE, the president of the judicial council should be elected by its members from among the judicial members, whereas the Commission had preferred a non-judicial member as the council's president.³¹

Finally, the CCJE had opted for disciplinary measures to be adopted by a judicial council in its membership reduced to judges only. Here, the Venice Commission had a different approach. Because of the perceived leniency of 'judges-only' disciplinary boards, the Commission was of the opinion that disciplinary measures should be adopted in a mixed composition. The idea was that non-judicial members were more likely to hold a judge accountable than his or her peers. However, the judge sanctioned should have a possibility to appeal against these measures to a court.³²

From this highly interesting dialogue between two independent bodies of the Council of Europe, we may conclude that for the CCJE, the main concern seems to have been the protection of judicial independence at its highest possible level. The Venice Commission however favoured an approach based on judicial independence, but also placed significant emphasis on the accountability of judges.

4. The Venice Commission's Report on Judicial Independence and Recommendation CM/Rec(2010)12 of the Committee of Ministers

In 2008, it was the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe which triggered a further development of the Commission's judiciary doctrine. Its President requested an opinion on "European standards as regards the independence of the judicial system". The most challenging aspect of this request was to present not only the existing *acquis*, but also proposals for future development.

Within the framework of its Sub-Commission on the Judiciary, the Commission prepared two partial reports, the first on the independence of judges³³ and the second on the prosecution service³⁴. In the present article, we cannot deal with the second report on the prosecution service, although it contains many interesting aspects (the variety of models of organisation of the pro-

³¹ CDL-AD(2007)032, paragraphs 11 and 13.

³² CDL-AD(2008)028, paragraph 14.

³³ CDL-AD(2010)004, adopted by the Venice Commission at its 82nd plenary session (Venice, 12-13 March 2010).

³⁴ CDL-AD(2010)040, adopted by the Venice Commission at its 85th plenary session (Venice, 17-18 December 2010).

secution service, the incidence of mandatory or discretionary prosecution, appointments, discipline, external and internal independence, including the possibility for an effective appeal against illegal instructions, public accountability and finally a warning against excessive powers of the prosecutor outside the criminal law field).³⁵

The Commission started by systematising all its previous opinions in the draft *Vademecum* on the Judiciary.³⁶ This *Vademecum*³⁷ provides an overview of the opinions adopted in the field of the ordinary justice (as opposed to constitutional justice) by presenting citations from the opinions in a systematic manner. On the basis of the *Vademecum*, the Commission examined various topics linked to judicial independence, following the structure of Opinion no. 1 of the CCJE.³⁸

The Report was prepared, taking into account Recommendation (94)12 of the Committee of Ministers, then still in force. In addition to providing an overview of European Standards to the Parliamentary Assembly, the Venice Commission's Report was also designed to provide input to the work of the Committee of Ministers of the Council of Europe in revising its recommendation, which resulted in the adoption of the excellent Recommendation CM/Rec(2010)12.³⁹ Below, we will therefore present a comparison between the Venice Commission's report and the new recommendation, where this is of special interest, without trying to be exhaustive.

4.1. Scope – constitutional justice

The first question is whether constitutional justice should be covered by the standards on the judiciary in general. Recommendation (2010)12 says so in its paragraph 1. The Venice Commission says the opposite in paragraph 11 of its Report: "it should be noted that some principles are applicable only to the ordinary judiciary at the national level but not to constitutional courts or international judges, which are outside the scope of the present report." What

³⁵ We also cannot refer here to the OSCE/ODIHR's Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, which were a point of reference for the Venice Commission in its Joint Opinion with ODIHR on the Constitutional Law on the Judicial System and Status of Judges of Kazakhstan adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011, CDL-AD(2011)012).

³⁶ CDL-JD(2008)001.

³⁷ Since 2011, the Venice Commission calls its overviews of opinions and reports "Compilations" (e.g. on Constitutional Justice – CDL(2011)048 or on Minorities – CDL(2011)018).

³⁸ Opinion No. 1 of the Consultative Council of European Judges on Standards concerning the Independence of the Judiciary and the Irremovability of Judges.

³⁹ Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Minister's Deputies.

the Venice Commission wanted to avoid by not referring to constitutional courts was a recommendation calling for the process of selection of constitutional judges to be identical to that of ordinary judges. Constitutional courts do not have a judicial “career” and most European constitutions establish those courts as separate bodies outside the judiciary. In view of their special powers as “negative legislator” conceived by Hans Kelsen, they are appointed in a special manner, different from the ordinary judiciary (typically either all elected by Parliament with a qualified majority or one third of the members is designated by each of the three branches of power – Parliament, Government and the Judiciary⁴⁰).

The Recommendation of the Committee of Ministers focuses on other elements, which are of course also applicable to constitutional judges (e.g. external and internal⁴¹ independence, removability) and does not refer to special types of appointment. It admits that judges are appointed by Parliament, but insists that an “independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice”⁴². Such an input in the procedure of appointing judges of the constitutional court is not common practice and many European states would have to amend their constitution to introduce it.

4.2. Level of regulation

In most other areas there is convergence between the Recommendation and the Report: like the Recommendation⁴³, the Venice Commission’s Report insists that the basic principles ensuring the independence of the judiciary should be set out in the Constitution or equivalent texts⁴⁴. The Recommendation⁴⁵ and the Report set out that “all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law”⁴⁶.

⁴⁰ For an overview on this topic see the Commission’s Report on the Composition of Constitutional Courts – Science and Technique of Democracy, no. 20 (1997), CDL-STD(1997)020.

⁴¹ Both the Recommendation and the Report insist on internal independence of the judge: “In their decision making judge should be independent and impartial and able to act without any restriction, improper influence, pressure threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary”. Recommendation CM/Rec(2010)12, paragraph 22 (emphasis added) and “the independence of each individual judge is incompatible with a relationship of subordination in their judicial decision making-activity”, CDL-AD(2010)004, paragraph 72.

⁴² Recommendation CM/Rec(2010)12, paragraph 47.

⁴³ Recommendation CM/Rec(2010)12, paragraph 7.

⁴⁴ CDL-AD(2010)004, paragraph 22.

⁴⁵ CM/Rec(2010)12, paragraph 44.

⁴⁶ CDL-AD(2010)004, paragraph 27.

4.3. Judicial councils

Referring only to the ordinary judiciary, the Venice Commission is of the opinion that an independent judicial council should have a “decisive influence on decisions on the appointment and the career of judges”⁴⁷. As set out above, the Recommendation accepts that decisions are taken by the head of state, the government or the legislative power, but calls for input from an independent and competent authority.

The Commission goes further than that by recommending that “states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers.”⁴⁸ The Commission wants these judicial councils to take the final decision in judicial appointments, not limit them to making recommendations.

4.4. Probationary periods

The Committee of Ministers Recommendation demands that decisions on probationary periods for judges “be based on objective criteria pre-established by law or by the competent authorities”⁴⁹. The Venice Commission has an even stronger view on this point and recommends that judges be appointed permanently because probationary periods are “problematic from the view of independence”⁵⁰.

4.5. Accountability

Following its line developed in country opinions, the Commission held that judges “should enjoy functional – but only functional – immunity (immunity from prosecution for acts performed in the exercise of their functions, with the exception of intentional crimes, e.g. taking bribes)”⁵¹. Without referring to immunity as such, the Committee of Ministers comes to a similar result when it states that the “interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not

⁴⁷ CDL-AD(2010)004, paragraph 32.

⁴⁸ *idem*.

⁴⁹ CM/Rec(2010)12, paragraphs 51 and 44.

⁵⁰ CDL-AD(2010)004, paragraph 38.

⁵¹ CDL-AD(2010)004, paragraph 61.

give rise to criminal liability, except in cases of malice”⁵², read together with paragraph 71 of the Recommendation, which reads: “[w]hen not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen”.

As concerns disciplinary proceedings, the Report confirms the position of the Venice Commission that decisions should be made by an appeal to a court against decisions of disciplinary bodies.⁵³ Without explicitly referring to court, the Committee of Ministers also recommends to “provide the judge with the right to challenge the decision and sanction”⁵⁴. The Committee of Ministers also insists that such proceedings be conducted with all the guarantees of a fair trial and that sanctions be proportionate.

4.6. Budget and remuneration

While the Committee of Ministers calls upon member states to allocate adequate resources, facilities and equipment to the courts⁵⁵, the Commission goes a step further by recommending that “the judiciary should have an opportunity to express its views about the proposed budget to parliament, possibly through the judicial council”.⁵⁶

A major point of the Report deals with bonuses for judges. Based on the experience in some Eastern European countries, the Venice Commission stated that bonuses and the allocation of housing could be abused in order to influence a judge. Therefore, the Commission recommends that bonuses and non-financial benefits, which involve a discretionary element, be phased out.⁵⁷ The Committee of Ministers recommends that “[s]ystems making judges’ core remuneration dependent on performance should be avoided as they could create difficulties for the independence of the judges”.⁵⁸ The reference to “core remuneration” seems to allow some performance based bonuses as long as they do not constitute a major part of the revenue.

⁵² CM/Rec(2010)12, paragraph 68.

⁵³ CDL-AD(2010)004, paragraph 43.

⁵⁴ CM/Rec(2010)12, paragraph 69.

⁵⁵ CM/Rec(2010)12, paragraph 33.

⁵⁶ CDL-AD(2010)004, paragraph 55.

⁵⁷ CDL-AD(2010)004, paragraph 51.
⁵⁸ CM/Rec(2010)12, paragraph 55.

4.7. Case allocation

On the basis of Article 6 of the European Convention on Human Rights and the right to a lawful judge found in many constitutions, the Commission came to the conclusion that possible abuse of the allocation of sensitive cases to compliant judges by court presidents, which had been observed in some countries, should be avoided by introducing automatic case-allocation systems. The Commission discussed in detail whether such systems should be recommended to all states, how such systems could be established and under which conditions exceptions were permissible. As a result of these discussions, the Commission “strongly recommends that the allocation of cases to individual judges should be based to the maximum extent possible 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.”⁵⁹ While the term “to the maximum extent possible” admittedly weakens the recommendation, the Commission strengthened it by adding that: “Exceptions should be motivated”. In a similar vein, the Recommendation sets out that 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.”⁶⁰

5. Conclusion

The Venice Commission found that in the new democracies which it assists, the establishment of an independent judiciary often proved to be more difficult than setting up other democratic institutions such as a pluralistic parliament or a functioning electoral system. The reasons for these problems are manifold, starting with a low esteem of the profession of judges in some countries, underfunding of the judicial system and problems of corruption as a consequence and the continued attempt of the executive to control judges in politically sensitive cases.

In its opinions, the Commission had to try to provide answers to these problems, based on European standards. The doctrine of the Venice Commission in the field of judicial independence evolved from country-related opinions on specific topics, to a general approach, first on judicial appointments only and then covering a wider range of issues. This evolution was both gradual and coherent as from the outset it was based on the European constitutional heritage and applicable international standards. In all cases, the Commission always tried to find a reasonable balance between judicial in-

⁵⁹ CDL-AD(2010)004, paragraph 81.

⁶⁰ CM/Rec(2010)12, paragraph 24.

dependence and the accountability of judges. As set out in the present article, in a number of areas, the Commission made recommendations which went further than existing international texts or provided an interpretation which extended the scope of existing legislation.

While the Venice Commission did not cover all aspects of the life of the judiciary, its recommendations were always geared towards assisting its member states – old and new democracies alike – in establishing a judiciary that is independent and provides an impartial service to all individuals and which is a centrepiece of any democracy.

We are grateful to László Sólyom for his contribution to the work of the Venice Commission in promoting democracy, the protection of human rights and the rule of law throughout Europe and beyond.

CHRISTOPH GRABENWARTER

SEPARATION OF POWERS AND THE INDEPENDENCE OF CONSTITUTIONAL COURTS

1. Introduction

Separation of powers is one of the basic structural principles of democratic societies. It was already discussed by ancient philosophers; deep analysis can be found in medieval political and philosophical scientific work. We base our contemporary discussion on legal theory that has been developed in parallel to the emergence of democratic systems in Northern America and in Europe in the 18th century.

Separation of powers is not an end in itself, nor is it a simple tool for legal theorists or political scientists. It is a basic principle in every democratic society that serves other purposes such as freedom, legality of state acts and independence of certain organs that exercise power delegated to them by a specific constitutional rule.

When we combine the concept of the separation of powers with the independence of constitutional courts, we address two different aspects. The first aspect has just been mentioned. The independence of constitutional courts is an objective of the separation of powers; independence is its result. This is the first aspect and perhaps the aspect which first occurs to most of us.

The second aspect deals with the reverse relationship: independence of constitutional courts as a precondition for the separation of powers. Independence enables constitutional courts to effectively control the respect for the separation of powers.

Against this background I would like to take this opportunity to discuss certain questions on the relationship between the constitutional principle of the separation of powers and the independence of constitutional judges; questions that have to a large extent already been discussed by *László Sólyom* in his scientific work. In particular, I refer to his contributions on to the role of Constitutional Courts in transitional systems.¹

¹ SÓLYOM L.: *The Hungarian Constitutional Court and Social Change*, Yale JIL, 1994, 223–237; SÓLYOM: *The Role of Constitutional Courts in the Transition to Democracy*, International Sociology, 2003, 133–161.

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TANULMÁNYOK SÓLYOM LÁSZLÓ TISZTELETÉRE
70. SZÜLETÉSNAPIJA ALKALMÁBÓL

CSEHI ZOLTÁN – SCHANDA BALÁZS – SONNEVEND PÁL
SZERKESZTÉSÉBEN



SZENT ISTVÁN TÁRSULAT
AZ APOSTOLI SZENTSZÉK KÖNYVKIADÓJA
BUDAPEST 2012



PÁZMÁNY PÉTER
KATOLIKUS EGYETEM
JOG- ÉS
ÁLLAMTUDOMÁNYI KAR

XENIA

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a Pázmány Péter Katolikus Egyetem
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az Eötvös Loránd Tudományegyetem
Állam- és Jogtudományi Kara,
az Alkotmánybíróság,
valamint a Nagy és Trócsányi Ügyvédi Iroda

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• E l ő s z ó •

MESTERÜKET köszöntik tanítványok ebben a kötetben, kollégák szellemi társukat, Európa és magyar hon jeles jogtudósai a tudóst, egyházi és állami vezetőket az államférfit és alkotmánybírókat, a szellem emberei a Szellem nagyszemélyiségét. 70. születésnapján Sólyom Lászlót ünnepeljük, aki jogtudós-ként azt a kéréssel telen igazságosság-kérését szolgálta, amely a szellem-tudományok nagy kihívását jelenti, aki bíróként valós jogot mert alkotni, nem hátrálva meg élet és halál kérdéseit elől sem, aki a politikában megmutatta a tisztességet és a bátor kiállást, és aki Európában megszervezte azt a Magyarországot, aminek létezésében hiszünk, és aminek megerősödését reméljük. Sólyom László életútja jól példázza, hogy az élet kritikus perceiben a tudósi nagyság az emberi kiállással párosulva pótolhatatlan energiákat képes felszabadítani másokban, és meghatározhatja az ország sorsának menetét. Hálásak vagyunk, hogy az Ünnepeket mellett válhattunk azzá, akivé lettünk. Kötetünk megjelentetésével szeretnénk kifejezni köszönetünket és jókívánságainkat. A hivatalos megbízatások megszűnhetnek, mi azonban kívánjuk és reméljük, hogy Sólyom László, a tanító és kolléga marad az, aki: *a törvény élő szava*.

CSEHI ZOLTÁN – SCHANDA BALÁZS – SONNEVEND PÁL