



Judicial reform under scrutiny

Through its reform of the judicial system, the government has enacted changes that may potentially significantly impact judicial independence. Apart from personnel changes that have led to the retirement of over 200 judges and to the ouster of the highest judicial official, András Baka, the new cardinal law on the judiciary has concentrated vast powers in the hands of the chief administrator of the judicial system, Tünde Handó, whom critics consider too close to the governing party. The Venice Commission has compiled a detailed critique of the reform, raising many of the issues domestic critics have also mentioned. While none of the changes impugned allows for direct influence over judicial outcomes, the head of the judicial administration has considerable means of indirect influence at her disposal, which provide far more possibilities for abuse than the previous arrangement allowed for. Considering that the judiciary was the only independent oversight institution that Fidesz had not taken control of, this new development is cause for concern.

Many critics of the Fidesz government consider the ordinary judiciary (i.e. the non-constitutional arm of the judicial branch) one of the last vestiges of independent oversight in the constitutional order as established by Fidesz through both legal reforms and personal appointments. This impression – along with Fidesz’ assurance that it has no designs on the judiciary – suffered its first blow when Fidesz insisted that all judges who had reached the pensions age of 62 would have to leave the bench even if they would like to stay on. For a variety of reasons, this decision appeared to have an air of political cleansing.

Judicial reform

Then came the comprehensive judicial reform and other dubious personal appointments, and the initial suspicions were given considerable additional fodder. Most importantly, the opposition criticised the fact that once again an institutional reform was used as a pretext for ousting a leading independent official – in this case András Baka, president of the Supreme Court and the National Council of Justice. Baka makes for an ill-fitting example of left-wing sympathies. He was once an MDF candidate – at a time when the party was more solidly entrenched on the right –, is generally considered conservative and had been nominated to his position by László Sólyom, Fidesz’ own candidate for the national presidency in 2005.

Nevertheless, Baka was clearly unsuitable for reasons that had nothing to do with his professional qualifications. He was thus replaced by Tünde Handó, who now heads the National Judicial Office (NJO), and Péter Darák, who is president of the Curia, the new name of the Supreme Court (Baka’s former position was split into two, an administrative and a judicial office, but his administrative successor wields vastly more power than Baka did). Handó also happens to be the wife of Fidesz MEP József Szájer – though apparently they have not actually lived together in a long time – and allegedly has strong ties to Fidesz.

The government rejected the criticisms and requested that the Venice Commission analyse the judicial reform and offer its own views. Though the Venice Commission could not opine on the personnel selection, it nevertheless advanced a stinging critique of various aspects of the law. We will focus primarily on the most critical issue, the powers of the president of the newly created NJO.

Weak constitutional protection

The Venice Commission criticises that the new constitution, the Fundamental Law, provides too few guarantees for the independence of the judiciary, mandating only respect for the separation of powers and failing to make a clear commitment to judicial independence. Seeing as how in parliamentary democracies the separation of powers is more or less an empty phrase in the context of legislative-executive relations – this is especially true in Hungary –, the failure to constitutionally buttress an independent judiciary is cause for legitimate concerns. The cardinal law on the judiciary in turn regulates too many details pertaining to the administration of justice, making it potentially difficult for subsequent Parliaments to change minute details that require frequent adjustments.

Vast powers

The most contentious point is the huge increase in the competencies of the judicial administrator-in-chief, Tünde Handó. The following are a few of her many powers (a concise bullet-point summary of which takes up three pages in the Venice Commission's 30 page report):

- she may transfer cases between courts;
- subject to some limitations, she may transfer judges;
- she may expedite proceedings with special significance to the public;
- she has significant influence on the process of appointing and relieving judges and can overrule professional committees that select candidates;
- posts judges to the Curia and the NJO;
- decides whether judges who have reached the age of retirement may stay on;
- she appoints the chairs and vice-chairs of courts of appeal and tribunals, the division heads of courts of appeal and tribunals and the heads and deputy heads of the regional administrative and labour divisions, etc.

There does not appear to be a reasonable explanation why a single person who has a very long mandate (nine years) and is virtually irremovable should have such vast control over the judiciary. Moreover, she is virtually unaccountable, since in the Venice Commission's view the pro forma supervisory organ, the National Council of Judges, "has scarcely any significant powers and its role in the administration of the judiciary can be regarded as negligible". If you add the reasonable suspicion that the current president of NJO is beholden to the ruling parliamentary majority, then an explanation suggests itself: this is meant to give Fidesz substantial leverage over the judiciary, a power that would remain intact even if it were to lose the next election. In fact, as long as Fidesz retains at least a third of seats in Parliament, Handó will remain irremovable even once her term expires: her successor has to be elected by a two-thirds majority, and in the absence of a candidate that has Fidesz' support Handó would stay in office indefinitely.

While the president of the Judicial Office clearly has no powers to order any type of judgment – nor does anyone else - a combination of the powers to assign cases to specific



courts, to transfer judges and to expedite cases can either separately or in combination with one another strongly influence verdicts in the few cases in which Fidesz has a vested interest.

Retirement

The Venice Commission has also addressed the contentious issue of forced retirement, raising various concerns that have already been pointed out domestically. It went so far as to note that the whole issue is especially disconcerting because of the impression that it is connected to judicial independence rather than the ostensible issue of age discrimination. It also noted that the sudden retirement of some 220-270 judges out of a mere 2900 would impose a significant burden on the system – which is far too overburdened as it is, we might add. Fidesz’ reasoning on this issue – this is our point, not the Commission’s – also appears disingenuous because the government argues that young judges can shoulder greater burdens than their older colleagues. For one, this runs counter to Fidesz’ general policy of trying to steer even elderly early retirees back into public service, arguing that the state cannot forego their vast experience – this appears to hold for all areas except for the administration of justice. Second, it is difficult to imagine how young judges, who are being en masse promoted prematurely and with relaxed criteria to their new positions, would be capable of outperforming judges with decades of experience.

The Venice Commission also objects to the rule that judges near the age of retirement may be relieved of their duties already six months before the actual retirement. Responding to the government’s justification, the Venice Commission rejects the notion that this is motivated by making life easier for judges: “[I]t is difficult to find any justification for why especially judges need a ‘smooth and gradual retirement’ by exempting them from office”. Furthermore, the Venice Commission also notes that the law halted recruitment for a few months to ensure that new president of the NJO, Tünde Handó, would be in charge of subsequent appointments.

Compromise?

With all the problems raised by the Venice Commission and the resulting requests for changes, the ball is now in the government’s court. It is probably none to pleased with the response it received from the Venice Commission in response to its query. Nevertheless, the odds are that Fidesz will split the difference, that is it will make a few adjustments that mitigate some of the grossest violation of accepted standards of judicial independence, while retaining the substance of the new powers it has accumulated. That is at least what previous experience suggests, but we would not mind being wrong with this prediction.