



STATUS OF THE HUNGARIAN JUDICIARY

LEGAL CHANGES HAVE TO GUARANTEE THE INDEPENDENCE OF THE
JUDICIARY IN HUNGARY

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GLOSSARY

WORD	DESCRIPTION
AOAC	Act CLXI of 2011 on the Organisation and Administration of Courts
CHAMBER	Either a single judge or a group of judges adjudicates in the name of the court, depending on procedural rules. In case of a group of judges it is called a chamber.
COLLEGE	Special groups of judges based on their field (e.g. civil law, criminal law, administrative law) at regional courts, regional courts of appeal and at the Kúria that professionally monitor the adjudicating practise of courts
DISTRICT COURT	Lowest level of ordinary courts
HCC	Hungarian Constitutional Court. Its members in this report are called “HCC justices.”
JUDGES’ PLENARY MEETING	The general assembly for judges working at the Kúria, at a regional court of appeal or in a county either at the regional court or at the district courts in the county. The judges’ plenary meeting is convened a few times per year and comprises of all judges, where they may discuss various topics, give opinions (for example, about leadership candidates), and elect the local judiciary councils and the electors for the NJC electoral meeting.
KÚRIA	The Supreme Court of Hungary, the highest-level ordinary court
NJC	The National Judicial Council (in Hungarian: Országos Bírói Tanács) supervises the operations of the NJO and in some cases its approval is needed for an NJO decision.
NJC ELECTORAL MEETING	Judges’ plenary meetings elect representatives (electors) from themselves who elect the members of the NJC on the NJC electoral meeting.
NJO	National Judiciary Office (in Hungarian: Országos Bírósági Hivatal) is the central administrative organ for courts that is led by the NJO President. When mentioning the “NJO President” in this report, Amnesty International refers to Mr. György Barna Senyei, the current NJO President, unless otherwise specified.
REGIONAL COURT	Ordinary courts one level higher than the district courts. There are 20 regional courts.
REGIONAL COURT OF APPEAL	Ordinary courts one level higher than the regional courts. There are 5 regional courts of appeal.

1. EXECUTIVE SUMMARY

The right to a fair trial is protected by Article 6 of the European Convention on Human Rights and it is also instrumental to the judicial protection of all other rights enshrined in the European Convention. It requires that cases are heard by an independent and impartial tribunal established by law. The guarantees of an “independent” and “impartial” tribunal are closely interrelated. If a tribunal is not independent of the executive power, it is likely to be breaching the requirement of impartiality also in cases to which the executive is a party. The European Court of Human Rights commonly considers the two requirements together.¹ Therefore upholding the independence and the impartiality of the judiciary is crucial for guaranteeing the right to a fair trial and other human rights. Without independent judges, it is questionable whether one’s legal dispute can be settled in a fair way and whether individuals can enjoy the judicial protection of their human rights.

The Government of Hungary has initiated and implemented several steps that have adversely impacted the independence and impartiality of judicial institutions in Hungary. Between 2010 and 2020 several steps were taken that combined to amount to a systemic attack against the independence of these institutions. These developments are underlined by the first European Commission Rule of Law report of 2020, that found that over the past years, EU institutions have identified several developments of concern in relation to judicial independence in Hungary, but most of their related recommendations have not been addressed.

The present Briefing provides an insight on the current state of the judiciary and its level of independence at the beginning of 2021. Amnesty International’s research included desk research and a non-representative online questionnaire filled out by 18 Hungarian judges in June and July 2020.²

This report’s main findings are the following:

- The National Judiciary Office (NJO) President’s unbalanced powers in court administration continues to undermine the independence of the judiciary. Although the European Commission, the Council of Europe’s Venice Commission³ and Council of Europe’s Commissioner for Human Rights⁴ repeatedly called upon the Hungarian Government to counter-balance the powers of the NJO President’s to appoint court leaders and other competences, this has not happened yet.
- The previous NJO President had been criticized heavily for abusing her power to appoint court presidents and other court leaders. From 10 December 2019, the NJO has a new President, György Barna Senyei. Based on Amnesty International’s research, the NJO President has conducted court leader appointments legally in 2020. Nevertheless, Amnesty International is of the opinion that the relevant regulations do not provide appropriate systemic guarantees against abuse of power by the NJO President.
- The National Judiciary Council (NJC) is the judges’ self-governing body, consisting of judges, who are elected by the judiciary. It is the main institution to balance the management powers of the NJO. The competences of the NJC remain weak and should be strengthened as was recommended by the Venice Commission and the Council of the European Union⁵. Consequently, without any amendment to the laws, the NJC cannot fulfill its constitutional role.

¹ See cases *Cooper v. United Kingdom*, no. 48843/99, ECHR 2003-XII and *Volkov v. Ukraine*, no. 21722/11, ECHR 2013

² See the methodology at Section 2 of this report.

³ Para. 32 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)

⁴ Para. 128 <https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d>

⁵ Para 17. <https://op.europa.eu/hu/publication-detail/-/publication/421552eb-cffd-11e9-b4bf-01aa75ed71a1/language-en>

- During 2018-2019 a constitutional crisis emerged as the NJO President questioned the legitimacy of the NJC. In 2020 the communication between the actors and the overall situation has improved. The new NJO President accepted the legitimacy of the NJC and additional NJC members were elected in July 2020 to replace members of the NJC who had previously resigned. However, the relationship remains problematic: for example, court secretaries for NJC members are still not guaranteed, the NJC office lacks an office secretary, therefore it is lacking resources to effectively undertake its work. The NJC is still not given access to be portrayed on the official website of courts.
- The Parliament of Hungary has adopted two legal changes in 2019 and 2020 that combined have allowed to widen the pool for potential candidates as president of the Kúria and have strengthened the powers of the President of Hungary over the judiciary to nominate a candidate. In October 2020 the Hungarian Parliament elected Zsolt András Varga as president of the Hungarian Supreme Court ("Kúria"). In its opinion, the NJC did not support Mr. Varga, mainly because he did not have any experience at ordinary Hungarian courts and because his election was made possible by the two recent pieces of legislation that had been claimed by the NJC to be *ad hominem*.
- Political and media attacks on the Hungarian judiciary continued in 2020, which negatively affected judicial independence. The NJO President and other court leaders have overwhelmingly remained silent during these attacks, and thus have contributed to the chilling effect of such attacks on the judiciary: ordinary judges have been afraid of freely expressing their opinion and stating their positions in matters related to the judiciary because of fear of retaliation at their workplace or in public.
- The atmosphere at courts and the chilling effect continues to be problematic despite a few positive developments. The NJO President has not supported judges to express their opinion on any issues publicly. Related to the execution of an ECtHR judgement, the Council of Europe Committee of Ministers stated that "*in the light of the concerns expressed by the Court regarding the "chilling effect" on the freedom of expression of judges caused by the violations in these cases*", and called upon the Hungarian Government to present an action plan and take measures in this field including of the guarantees and safeguards protecting judges from undue interferences.

2. METHODOLOGY

This Briefing paper is based on Amnesty International's research.

Amnesty International's research analysed publicly available pieces of legislation, draft legislation, documents of the NJO (available at birosag.hu) and the NJC (available at orszagosbiroitanacs.hu) as well as publicly available reports of the European Union and the Council of Europe.

Amnesty International's research also touched upon on how Hungarian judges themselves think about selected elements of organizational and individual judicial independence. To gather their opinions, Amnesty International invited judges to fill out an online questionnaire available from 29 June 2020 until 17 July 2020. These were the following topics:

- appointment of court leaders,
- relationship between the NJO President and the NJC,
- the NJO President's communication,
- personnel decisions and resolutions of the NJO President,
- atmosphere at the courts,
- the NJO President's approach regarding the right to freedom of expression of judges.

Questions asked in the online questionnaire are listed below.

The questionnaire provides a qualitative *and therefore not representative* insight to the opinions of judges. It was filled in by:

- 18 judges,
- from all levels of courts: from district courts (5), from regional courts (9), from regional courts of appeal (2), from the Kúria (2),
- from Budapest or Pest County (9), from Eastern Hungary (6) and from Western Hungary (3).

Their period of tenure as a judge was as follows: two judges had worked as judges for 1-10 years, ten judges for 11-20 years and six judges for 21 or more years.

The criteria for filling out the online questionnaire was to be an active judge at a Hungarian court for at least one year. The anonymous nature of the online questionnaire did not allow Amnesty International to verify the fulfilment of such criteria.

To reach the judges, Amnesty International used existing contacts and completed it with the snowball method. Hence the sample is limited to judges who have been open to share their thoughts with Amnesty International and intended to write about the abovementioned topics. Results from this questionnaire shall not be interpreted to represent the opinion of the whole Hungarian judiciary.

The judges gave their opinions and thoughts on the operation of the judiciary administration system under the NJO presidency of Mr. Senyei who has been the NJO President from 10 December 2019.

Judges could express their views in the questionnaire anonymously, thus they could speak their mind freely, without fear of any retribution, exercising their right to freedom of expression.

On 30 June 2020, Amnesty International sent a letter to the NJO President asking to share his views on the topics of the online questionnaire but has not received a reply from him.

Moreover, the draft of this Briefing paper has been shared with the National Judiciary Office of Hungary, the National Judicial Council, the Kúria and the Hungarian Ministry of Justice on 9 February 2021. Amnesty International has not received any comments from them as to the merits of this Briefing paper.

All judges featured in this Briefing paper are referred to anonymously, all with their informed consent.

Amnesty International would like to thank all the individuals who cooperated in the course of the research for this Briefing paper, and special thanks to the judges filling out our online questionnaire.

QUESTIONS ASKED IN THE ONLINE QUESTIONNAIRE

1. What is your opinion about the practice of the NJO President (György Barna Senyei) regarding the appointment and assignment of court leaders? (For your information, for example, the NJO President directly appointed several persons on a temporary basis to perform managerial duties pursuant to Article 133 (3) of the AOAC: Attila Hámori as the Szeged Regional Court of Appeal president, Tamás Túri as the Pécs Regional Court of Appeal president, Judit Kissné Szabó as the Szolnok Regional Court, Babett Tárkány-Szűcs as the Szeged Regional Court.) Do you see a change in the appointing practice of the NJO President as compared to the previous period, and if so, what is this change? If there was no change, what do you think is the reason?
2. What is your opinion about the NJO President's practise on judicial personnel matters (judicial appointments, secondments, transfers, appointments to the NJO, declaring applications invalid)?
3. What is your opinion about the relationship of the NJO President with the NJC? Has this relationship improved or deteriorated, and what do you think indicates this?
4. What is your opinion about the NJO President's communication within the judicial organization towards the judges and the NJO President's public communication in relation with the judges and the judiciary?
5. What is your opinion of the NJO President's practice towards judges expressing their opinions so far? For example, to what extent formally (at the level of regulations) or informally does he support or not support judges to express their views on non-political issues (e.g. regarding courts or judicial independence)?
6. How do you think the courts' atmosphere has changed (if any) since the election of the new NJO President? How do you assess the role of the NJO President in relation to this potential change?
7. In the last six months, there have been several external attacks on judges and judgments (for example, in connection with the judgment on school segregation in Gyöngyöspata or judgments on prison damages). What is your opinion about the NJO President's attitude and activity in relation to these and similar attacks?
8. What is your opinion on the normative resolutions and recommendations of the NJO President so far? How does the NJO President involve judges or judicial organizations (NJC, judiciary councils, Hungarian Association of Judges) in the decision-making process?
9. What positive changes have taken place in the operation of the NJO since the appointment of György Barna Senyei as president? What specific example (s) can you give?
10. What negative changes have taken place in the operation of the NJO since the appointment of György Barna Senyei as president? What specific example (s) can you give?
11. Anything else you would like to say about the activities so far of NJO President György Barna Senyei?

3. INTRODUCTION

From 2012, under the Hungarian judicial reform, the administration of Hungarian courts became centralized under the President of the newly established National Judiciary Office (NJO). The NJO President is elected by the Hungarian Parliament and is considered a political appointee. The new laws granted extensive powers to the NJO President over the court administration (e.g. recruitment and promotion of judges, management of the court system's budget, etc.). The NJO President is the leader of judicial administration with overwhelming powers, thus a key actor in providing the institutional guarantees of the right to a fair trial and other human rights. The previous NJO President had been criticized heavily for abusing her power to appoint court presidents and other court leaders. From 10 December 2019, the NJO has a new President, György Barna Senyei.

Although the European Commission⁶, the Council of Europe's Venice Commission⁷ and Council of Europe's Commissioner for Human Rights⁸ repeatedly called upon the Hungarian Government to counter-balance the powers of the NJO President to appoint court leaders and other competences, this has not happened yet. In its 2019 recommendation to Hungary within the European Semester Framework, the Council of the European Union stated that “[c]hecks and balances, which are crucial to ensuring judicial independence, are seen to be under further pressure within the ordinary courts system. The [NJC] faces increasing difficulties in counter-balancing the powers of the [NJO President]. Questions have been raised regarding the consequences of this for judicial independence.”⁹ According to the Venice Commission¹⁰ “the powers of the President of the NJO still clearly prevail over those of the NJC, also because the current Council, composed exclusively of judges, cannot enjoy a true autonomy and independence from the NJO.” The Council of Europe Commissioner for Human Rights, in her statement issued in November 2019,¹¹ reiterated “earlier recommendations on the need to strengthen collective judicial self-governance in Hungary, including the position and functions of the National Judicial Council.” The NJO President's unbalanced powers in court administration, however, have not been amended in 2020 and continue to undermine the independence of the judiciary.

The right of access to an independent and impartial tribunal is specifically guaranteed by Article 6.1 of the European Convention on Human Rights (“Convention”). This right is also enshrined in Article 47 of the Charter of Fundamental Rights of the European Union (“right to an effective remedy and to a fair trial”). In determining whether a body can be considered to be “independent”, the European Court of Human Rights (ECtHR) considers the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question of whether the body presents an appearance of independence.¹² The ECtHR has delivered several judgments in which it concluded that there had been violations of Article 6.1 of the Convention because of the dismissal of judges.¹³ Recently, the

⁶ European Commission Recommendation for a Council Recommendation, COM(2019) 517 final, Para. 17 and Recommendation 4. <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-517-F1-EN-MAIN-PART-1.PDF>

⁷ Para. 32 [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)

⁸ Para. 128 <https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d>

⁹ Para 17. <http://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf>

¹⁰ Para. 32 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e)

¹¹ <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>

¹² Para. 2.2.11 Judges in Poland and in the Republic of Moldova must remain independent

<https://pace.coe.int/pdf/8d097631084855c4b264c95247fa9ae8fe5658d43326667a8259ffe25682ae848428feba12/doc.%2015204.pdf>

¹³ Para. 2.2.12 Judges in Poland and in the Republic of Moldova must remain independent

<https://pace.coe.int/pdf/8d097631084855c4b264c95247fa9ae8fe5658d43326667a8259ffe25682ae848428feba12/doc.%2015204.pdf>

ECtHR held that a breach of domestic law when appointing four judges to the new Court of Appeal of Iceland had resulted in a violation of Article 6.1 of the Convention.¹⁴

The new laws in 2012 also established the National Judicial Council (NJC) to provide checks and balances over the NJO as the main institution to balance management powers of the NJO. The NJC is the main organ for judges' self-governance, consisting of 14 judges elected by their judge peers and the president of the Kúria. They represent Hungary's judiciary, and the 3200 Hungarian judges. The NJC does not have disciplinary power.

During 2018-2019 a constitutional crisis emerged as the NJO President questioned the legitimacy of the NJC. In 2020, although the relationship between the NJO President and the NJC together with the overall situation has improved, no legal changes have been made to strengthen the competences of the NJC. Consequently, the competences of the NJC remain weak and should be strengthened as was recommended by the Council of the European Union¹⁵ and the Venice Commission.¹⁶ Without any amendment to the laws, the NJC cannot effectively, efficiently and satisfactorily fulfill its constitutional role.

¹⁴ Application No. 26374/18, judgment of 12 March 2019 (not final)

¹⁵ Para 17. <https://op.europa.eu/hu/publication-detail/-/publication/421552eb-cffd-11e9-b4bf-01aa75ed71a1/language-en>

¹⁶ Para. 32 [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)020-e)

4. APPOINTMENT OF COURT LEADERS

In the present judiciary system, the NJO President has vast powers in court administration,¹⁷ that significantly impact the right to a fair trial and its elements. Namely, the NJO President appoints and supervises the regional court and regional court of appeal presidents, deputy presidents, college leaders.¹⁸ Court leaders and among them especially court presidents have influence on the selection¹⁹ and career of judges and their evaluation.²⁰ They also have significant powers in case allocation,²¹ allowing them to impact how the right to a fair trial is upheld.

As Amnesty International demonstrated in the Fearing the Unknown report,²² the previous NJO President (Tünde Handó) had had a practice of invalidating judges' and court leaders' applications in a non-transparent way and without giving clear justification for her decisions, misusing her power to appoint judges and court leaders. For example, the previous NJO President disregarded judges' plenary meeting opinions before deciding on court leadership without a clear justification, in violation of the law.²³ Also, in several cases the previous NJO President regularly filled leadership positions not through regular application procedures, but through temporarily, directly appointed interim leaders, thus abusing this legal possibility.²⁴ Another issue that the Fearing the Unknown report demonstrated is that in these temporary direct appointments the leadership positions were filled in a manner contrary to the law, as was established by the NJC.²⁵ The direct appointment of court leaders may affect guarantees of the right to a fair trial, for instance through case allocation and other means that impact the right to an independent and impartial tribunal. As regards case allocation, court presidents are the ones who draft the case allocation policies at each court outlining the case allocation rules and appoint the persons who allocate the cases.²⁶ Eventually the system allows the case allocator wide discretion to decide to whom to allocate a case. It is a serious hindrance to the right of fair trial if a client's case is allocated or re-allocated to a judge based on political or other inappropriate motivation.²⁷ International standards²⁸ stress that "*adequate structures within the judiciary and the courts be established to prevent improper interference from within the judiciary*". According to the Implementation Measures of the UN's Bangalore Principles of Judicial Conduct,²⁹ "*the division of work among the judges of a court, including the distribution of cases, should ordinarily be performed under a*

¹⁷ Article 76 of the AOAC

¹⁸ The Venice Commission in its latest related report from October 2012 stated that "the powers of the President of the NJO remain very extensive to be wielded by a single person and their effective supervision remains difficult."
[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)

¹⁹ Articles 11-13 of the ALSRJ

²⁰ Article 70 of the ALSRJ

²¹ Article 9 of the AOAC

²² Fearing the Unknown, p. 19-20.

²³ Article 132 (4) of the AOAC

²⁴ According to Article 133 (2) of the AOAC, the NJO President may appoint interim court presidents for up to one year time if the regular application procedure is invalid because the NJO President does not accept any candidate for the presidency position.

²⁵ Article 133 (1) of the AOAC. See para. 2.1.4 of NJC Resolution No. 34/2019. (V.08.) available at <https://orszagosbiroitanacs.hu/2018-05-02/>

²⁶ Article 9-10 of the AOAC

²⁷ Fearing the Unknown, p. 24.25.

²⁸ Para. 103 of the Report of the Special Rapporteur on the Independence of Judges and Lawyers, Leandro Despouy (A/HRC/11/41) ("2009 IJL Special Rapporteur Report") https://www2.ohchr.org/english/bodies/hrcouncil/docs/11session/A.HRC.11.41_en.pdf

²⁹ Para. 3. of the Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct https://www.unodc.org/res/ji/import/international_standards/measures_implementation/measures_implementation.pdf

predetermined arrangement provided by law or agreed by all the judges of the relevant court. Such arrangements may be changed in clearly defined circumstances such as the need to have regard to a judge's special knowledge or experience."

Hence in the present research Amnesty International examined publicly available resolutions of the current NJO President, the NJO President's appointing court leaders, the NJO President's statements and interviewed judges to analyse his practice.

Before his election, the NJO President told³⁰ NJC members that as a general rule he would aim to respect the judges' plenary meetings' opinions on court leaders' applications.

The NJO President also said that the professional and administrative work at courts must be separated. He expressly told that college leaders should not deal with administrative tasks and instead concentrate on professional guidance.³¹ Amnesty International welcomes such an approach from the NJO President.

ILLUSTRATIVE EXAMPLES: TAKING INTO CONSIDERATION THE OPINION OF JUDGES



As regards the issue of court leader positions filled in through direct appointment and not through regular applications, in December 2019, the NJO President told NJC members that he would examine this issue and deal with it, but "not immediately". He considered it important to place the application bid for the position of the Metropolitan Regional Court's president³², which he issued on 7 January 2020.

Dated 7 January 2020, the NJO President issued a call for applications for the position of the Metropolitan Regional Court's president. After the judges' plenary meeting supported Mr. Péter Tatár-Kis on 8 June 2020, the NJO President appointed Mr. Tatár-Kis as new president of the court. The NJO President also appointed³³ Ms. Judit Szabó college leader at the Metropolitan Regional Court after she had received a majority of the votes from her colleagues.

There were other cases³⁴ where the NJO President invalidated the application procedure because the applicant had *not* received the support of their colleagues.

Based on the above cases, the NJO President so far has taken the opinion of judges' plenary meetings and peers into consideration when deciding about appointing a court leader.

There were cases where the NJO President directly appointed interim court presidents to courts: Ms. Babett Tárkány-Szűcs to be the interim president of the Szeged Regional Court,³⁵ Ms. Judit Kissné Dr. Szabó to be the interim president of the Szolnok Regional Court,³⁶ Mr. Tamás Túri to be the interim president of the Pécs Regional Court of Appeal,³⁷ Mr. Attila Hámori to be the interim president of the Szeged Regional Court of Appeal.³⁸ However, later, he did issue calls for regular application for these positions and eventually he did fill these court president positions by way of regular applications. Some of the abovementioned persons (Ms. Judit Kissné Dr. Szabó, Mr. Attila Hámori, Mr. Tamás Túri) were appointed later by way of regular applications.

In the online questionnaire Amnesty International collected information specifically on these interim direct appointments. The fact that many (7 from those who had an opinion on this topic) judges told Amnesty International that the reasons for these appointments of interim presidents have not been problematic confirms the judges' perception that the situation has improved under the new NJO President. Based on the available public information,³⁹ Amnesty International agrees that the situation has improved as compared to the era of the previous NJO President regarding direct appointments of interim presidents. One judge stated that "*in my opinion, this is also due to the inherited situation, applications were pending when the new NJO President took office, i.e. there was a forced trajectory resulting from the transition*" and "*it is a positive tendency that as per my knowledge there was no direct appointment (as opposed to the former NJO President) where an 'external' person not belonging to the given court would have been appointed*". One

³⁰ NJC minutes of 4 December 2019 available at <https://orszagosbiroitanacs.hu/2019-12-04/>, p. 11

³¹ NJC minutes of 4 December 2019, p. 11

³² NJC minutes of 4 December 2019, p. 22

³³ NJO President Resolution No. 37/E/2020

³⁴ NJO President Resolution No. 132/E/2020, NJO President Resolution No. 133/E/2020, NJO President Resolution 338/E/2020, NJO President Resolution No. 394/E/2020, NJO President Resolution No. 396E/2020

³⁵ NJO President Resolution No. 666/E/2019

³⁶ NJO President Resolution No. 137/E/2020

³⁷ NJO President Resolution No. 162/E/2020

³⁸ NJO President Resolution No. 163/E/2020 and NJO President Resolution No. 370/E/2020

³⁹ birosag.hu

judge mentioned that the judges became too passive to apply for a leadership position, plus due to the pandemic there could not have been judges' plenary meetings held where judges would have given their opinion about the candidates. Yet another judge said that many leaders had already been appointed and many leadership applications were already underway.

Amnesty International concludes that appointment of court leaders has not raised serious concerns yet, but stresses that the NJO President should continue to fill court leadership positions by regular application procedures and fair processes instead of direct appointments.

5. PERCEIVED IMPARTIALITY OF THE COURTS

Public perceptions of impartiality of courts are important for maintaining judicial independence, and the NJO President as the main player in the field of court administration plays a great role in this regard. According to the law,⁴⁰ the NJO President may initiate investigations – potentially ending in disciplinary proceedings – into the operation of court leaders appointed by the NJO President, to make sure that rules on court administration, on legal deadlines or internal court rules are upheld at the court in question. It is a powerful legal measure and the abusive or inconsistent use thereof by the NJO President may hinder the perceived impartiality and independence of the judicial administration.

That is why it has been concerning that there have been inconsistencies in initiating investigations against court presidents by the NJO President: a case at the Szeged Regional Court (where investigation was commenced) and one at the Metropolitan Regional Court (where investigation was not commenced). In this chapter these two cases are presented, plus a personnel choice of the NJO President appointing the mother-in-law of the Minister of Justice to be his vice-president, which also harmed the perceived independence of the court administration.

First, there was the controversial case related to the Szeged Regional Court. From December 2019, government-aligned media attacked⁴¹ a few judges at that court, alleging that the judges adjudicating in the so-called Szeviép case were impartial and corrupt.⁴²

After the news broke, the NJO President started an external investigation and the court president Ms. Tárkány-Szűcs herself started an internal investigation into the Szeviép case at the court in late December 2019.⁴³ The NJO President then invalidated⁴⁴ the application procedure for the president of the Szeged Regional Court where the incumbent president, Ms. Tárkány-Szűcs, was the only applicant. The NJO President's reasoning for such invalidation was the aforementioned internal investigation. At an NJC meeting,⁴⁵ NJC members Mr. Csaba Vasvári and Mr. Viktor Vadász confronted this reasoning because they thought that with the same reasoning, in the future the NJO President could launch an investigation with the intention to declare an application procedure unsuccessful.

⁴⁰ Article 76 (6) b)-c) of the AOAC

⁴¹ <https://pestisracok.hu/tag/szeviep-ugy/>

⁴² This Szeviép case was about a few local businessmen of Szeviép Limited, a construction company who lent huge amounts to various persons, and thus allegedly bankrupting their company (Szeviép) and damaging the interests of the company's creditors. After the first instance court found them guilty, the second instance Szeged Regional Court acquitted the defendants due to lack of evidence. Ms. Ágnes Nové, a judge at the second instance court adjudicating in this case was attacked by the media alleging that she has a family business in the construction industry, and her business also has had municipal assignments, just like Szeviép.

⁴³ According to a government-aligned news agency, Ms. Tárkány-Szűcs initiated this internal investigation against Ms. Andrea Nagy, deputy college leader at the court. <https://pestisracok.hu/feyelmi-eljaras-jogkormegvonas-ervenytelenített-elnoki-palyazat-lepelt-az-obh-a-szeviép-vezereket-felmento-botkaekkel-pacsizo-birok-ugyeben/> We could not verify such information.

⁴⁴ NJO President Resolution No. 664/E/2019

⁴⁵ NJC minutes of 6 May 2020, p. 11

In the same case, the NJO President himself also initiated an external investigation⁴⁶ on 13 January 2020 into the court administration of the criminal bench of the Szeged Regional Court, “*taking into consideration the fact findings concerning the operation of the criminal bench of the Szeged Court and made available to the investigators*”, according to the reasoning of the NJO President’s resolution.⁴⁷ This external investigation has been led by judges appointed by the NJO President. Four judges filling out the questionnaire considered the initiation of this external investigation as potentially politically motivated because they thought that the NJO President initiated the investigation only based on news reports.

Although the report of the external investigation has been prepared⁴⁸, it was not public at the time of finalizing this briefing paper. The NJO also asked for the results of this investigation, which has not been granted.⁴⁹ The only information known is that beforehand there had been two persons under disciplinary investigation, and as a result of the investigation report, disciplinary proceedings have been initiated against a third person.

Second, in late November 2019, a letter praising the previous NJO President Ms. Handó appeared on the courts’ central website.⁵⁰ This letter bore the signature of Mr. Tatár-Kis, then-appointed interim president of the Metropolitan Regional Court.⁵¹ At a judges’ plenary meeting hearing the presidential candidates to the Metropolitan Regional Court in June 2020, presidential candidate Mr. Tatár-Kis denied that he had signed the abovementioned letter, implying forgery of his signature. He said that: “[t]his letter was not signed by [me], either in [my] own name or representing the judges at the Metropolitan Regional Court. [I] was at a European Union meeting in Stockholm at the time of writing this letter. [I] did not see this letter, [I] did not know its contents.”⁵²

When hearing him for the president’s position⁵³, the NJO President also asked Mr. Tatár-Kis about the above-mentioned forged signature: “*why did you just inform the public about this peculiar situation only now?*” Mr. Tatár-Kis replied that he did not want to cause any public debate because of this. Despite the fact that the NJO President knew about a potential crime (forging a document) involving the president of the biggest court in Hungary, he has not initiated any internal or external investigation in that case.

Amnesty International is of the opinion that indeed the NJO President may have started the external investigation against the Szeged Regional Court president purely in response to news reports, because Amnesty International does not have any information on any other available legal basis (for example about the outcome of the internal investigation at the Szeged Regional Court that had started in December 2019). Also, Amnesty International deems concerning that after government-aligned media had attacked one court⁵⁴ (i.e. the Szeged Regional Court), the NJO President reacted promptly, started investigations and commented in the media in the case, whereas he did not take any measures in the abovementioned case of Mr. Tatár-Kiss.⁵⁵ The fact that the NJO President did start an investigation in the Szeged case, but did not start one in the Budapest case raises concerns as to whether the NJO President might use investigations as a way of exerting pressure on court leaders and thus putting into question the perceived independence and impartiality of Hungarian courts and court management.

Third, the perceived independence and impartiality of Hungarian courts and court management was further undermined by a personnel choice for the position of NJO vice-president. According to the law⁵⁶, the NJO President makes recommendations on the candidate for the position of vice president to the President of the Republic. The vice president may substitute the NJO President if the latter cannot perform their duties. The NJO President had recommended Ms. Mónika Eröss to be vice president of the NJO, who was appointed by the President of the Republic on 7 April 2020.⁵⁷ Ms. Eröss is the mother-in-law of the Hungarian Minister of Justice, Ms. Judit Varga, but according to the law, this does not constitute a conflict of interest. In Amnesty International’s online questionnaire, seven judges pointed out that Ms. Eröss’s recommendation to be vice president was bad optics and questioned the impartiality of the NJO President because of this

⁴⁶ Done by persons appointed at the NJO, based on Article 76 (6) b) of the AOAC

⁴⁷ NJO President Resolution No. 9/E/2020

⁴⁸ According to the NJO’s public statement available at <https://birosag.hu/hirek/kategoria/birosagokrol/sajtokozlemenyszzeviép-ugyben>

⁴⁹ Section V. of the previous NJO President’s activity report on first half of 2020. Available at <https://orszagosbiroitanacs.hu/2020-09-09/>

⁵⁰ https://index.hu/belfold/2019/11/29/hando_tunde_birak_birosagok_bucsztatasa/

⁵¹ <https://birosag.hu/sites/default/files/users/Szakirodalmi%20aj%C3%A1nl%C3%B3%202020/k%C3%B6sz%C3%B6net%20EANak%20nevekkelllevel.jpg>

⁵² https://index.hu/belfold/2020/06/08/tatar_kis_peter_fovarosi_torvenyszek/

⁵³ https://birosag.hu/sites/default/files/2020-06/meghallgatasi_jegyzokonyv_-_dr_tatar-kis_peter.pdf

⁵⁴ <https://pestisracok.hu/tag/szeviép-ugy/>

⁵⁵ As one judge put it: “[h]e ordered an investigation based on a press release in Szeged, but not in a more serious case in the capital where he appointed the president without any concerns.”

⁵⁶ Article 76 (2) c) of the AOAC

⁵⁷ <https://birosag.hu/en/news/category/about-courts/president-republic-has-appointed-new-vice-presidents-national-office>

recommendation. One said that “*having the mother-in-law of the minister of justice as vice president of the NJO is unacceptable in Europe*”.

These examples, more than providing conclusive evidence show how the actions of the NJO and of its president can contribute to undermining the perception of the impartiality of the judiciary and put pressure on single judges, who might face arbitrary investigations and procedures. The impartiality of courts is further undermined if appointments to high level positions appear to be dictated by personal connections rather than by objective criteria based on merits and qualifications.

6. SITUATION OF THE NATIONAL JUDICIARY COUNCIL

“...Our standpoint is long known in this question. I immediately signalled the positive developments in the cooperation [between the NJO and the NJC], so to the European Commission I signalled that the date and time of the NJC electoral meeting is set, the NJC office is provided, the NJC’s appearance on the courts’ central administration website is under preparation.”⁵⁸

Mr. Viktor VADÁSZ, NJC member at an NJC meeting

As Amnesty International concluded in its *Fearing the Unknown* report, the NJC’s powers are much weaker than those of the NJO and the system allows for the NJO to disregard the NJC’s supervision.⁵⁹ This systematic problem was visible during the NJO-NJC conflict in 2018-2019 when the NJO President claimed that the NJC was illegitimate and stopped cooperating with the very institution vested with supervising the NJO.⁶⁰ Consequently, the NJC could not effectively supervise the operation of the NJO according to the law. The NJO President, elected by the legislative, is widely considered a political appointee who has the upper hand against the NJC, which is elected by judges, in disputes between the two organs. Such a legal imbalance of power has the potential to undermine judicial independence, as the constitutional task of the NJC is to supervise the legality of the NJO President’s operations.

The right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights requires that cases are heard by an independent and impartial tribunal established by law. The guarantees of an “independent” and “impartial” tribunal are closely interrelated. If a tribunal is not independent of the executive power, it is likely to be breaching the requirement of impartiality also in cases to which the executive is a party. The European Court of Human Rights commonly considers the two requirements

⁵⁸ NJC minutes of 1 July 2020, p. 19.

⁵⁹ *Fearing the Unknown*, p. 19.

⁶⁰ *Fearing the Unknown*, p. 21. Also see the joint report by Amnesty International and the Hungarian Helsinki Committee on this conflict: <https://www.amnesty.hu/data/file/4586-a-constitutional-crisis-in-the-hungarian-judiciary-09072019.pdf?version=1415642342>

together.⁶¹ Therefore upholding the independence and the impartiality of the judiciary is crucial for guaranteeing the right to a fair trial. In the case of Hungary, the right to be heard by an independent and impartial tribunal established by law is impacted adversely through the unchecked powers of the NJO President.

The European Commission prepared a Rule of Law Report the first time in 2020, covering all EU Member States. The report examines four pillars in each of the Member States: the justice system, the anti-corruption framework, media pluralism, and other institutional issues related to checks and balances. The Commission's country report⁶² on Hungary identifies severe deficiencies threatening the rule of law under all four pillars including the independence of the judiciary. Besides acknowledging the efficiency of the justice system and the high level of digitalisation in Hungary, the report highlights as a problem the fact that the most important body of judicial self-administration, the NJC, faces challenges in counter-balancing the extensive powers of the NJO President relating to the administration of the court system. Balancing of powers can be achieved with legal certainty only through a legislative reinforcement of the NJC's powers.

The latest Group of States against Corruption (GRECO) compliance report⁶³ of the Council of Europe published on 17 November 2020 found that the Hungarian Government has not implemented the three following recommendations to prevent corruption in respect of judges:

- GRECO recommended that the powers of the NJO President to intervene in the process of appointing and promoting candidates for judicial positions be reviewed in favour of a procedure where the NJC is given a stronger role.
- GRECO recommended that the power of the NJO President to re-assign ordinary judges without their consent be reduced to a minimum in time and only for precise and particular reasons of a temporary character.
- GRECO recommended that the immunity of ordinary judges be limited to activities relating to their participation in the administration of justice ("functional immunity").

The Hungarian Government or Parliament has made no progress regarding implementing the above-mentioned GRECO recommendations since the publication of the 2020 compliance report.

During the 2018-2019 constitutional crises within the judiciary, the NJO President questioned the legitimacy of the NJC over several member's resignation and a quorum criterion not being met. Amnesty International welcomes the fact that during 2020, the NJO President took steps to resolve this issue and fill the positions that had been vacant for more than one year (from October 2018 until December 2019). The NJC held an electoral meeting in July 2020 and four new NJC members were elected⁶⁴. Amnesty International is not aware of any irregularities or controversies regarding this NJC electoral meeting, as opposed to the infamous October 2018 NJC electoral meeting.⁶⁵

During 2020 several improvements were observed by Amnesty International. The NJC heard and eventually unanimously supported Mr. Senyei as a candidate to the position.⁶⁶ In contrast to his predecessor, the newly elected NJO President has not questioned the legitimacy of the NJC publicly. This was acknowledged by the judges that responded to Amnesty International's questionnaire and was also visible in the public communication of the NJO President. Furthermore, according to NJC meeting minutes, the NJO President has personally attended most NJC meetings held in 2020.

These developments have contributed to improving relations between the NJO and NJC, which positively affected the perceived independence and impartiality of the courts and thus helped strengthening the right to a fair trial, as shown by judges' testimonies in Amnesty International's online questionnaire.

The NJC also plays a consultative role since it can give opinions on the resolutions and recommendations of the NJO President.⁶⁷ This role has been acknowledged by the NJO President and the NJC mostly supported the NJO President's resolutions. Amnesty International has studied the Official Gazette of the Judiciary,⁶⁸ which demonstrated that the NJC has given its opinions on the draft resolutions of the NJO

⁶¹ See cases *Cooper v. United Kingdom*, no. 48843/99, ECHR 2003-XII and *Volkov v. Ukraine*, no. 21722/11, ECHR 2013

⁶² https://ec.europa.eu/info/sites/info/files/hu_rol_country_chapter.pdf

⁶³ GrecoRC4(2020)10 <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a062e9> p. 5-7.

⁶⁴ <https://orszagosbiroitanacs.hu/tagok/>

⁶⁵ Fearing the Unknown, fn. 91 That previous NJC electoral meeting was convened to elect the missing members of the NJC, but court leaders and other judges effectively blocked the election of new NJC members, and some participants claim that several procedural laws were violated on the meeting.

⁶⁶ NJC Resolution 54/2019. (XII. 04.)

⁶⁷ Article 103 (1) c) of the AOAC

⁶⁸ <https://birosag.hu/birosagi-kozlonyok>

President. Judges that were in contact with Amnesty International confirmed that the NJO President has officially requested such opinions and one judge estimated that “approximately 80%” of recommendations of the NJC were taken into account.⁶⁹ .

Despite the above-mentioned positive developments, Amnesty International remains concerned that several issues remain unsolved. Until steps are taken with regards to these matters, the unchecked nature of the NJO President’s powers continues to pose a risk to the independence of the judiciary and accordingly to the right to be heard by an independent and impartial tribunal established by law. Amnesty International’s concerns are validated by the interviewed judges. Four judges told Amnesty International that the cooperation between the two organs is only superficial. In addition, according to NJC minutes, NJC members also raised issues that show that the NJO President is not fully cooperating with the NJC. Support for the NJC judges has also been an issue of concern: NJC judges are still under-resourced, most NJC members are not assisted by court secretaries,⁷⁰ the NJC is not assisted by an administrative secretary,⁷¹ they can’t access the courts’ official website and present their views,⁷² or they are excluded from planning judicial training.⁷³

Based on the above, Amnesty International concludes that although there has been a positive development in the relationship between the NJO President and the NJC, still, there are areas where the NJO President could enhance the cooperation with the NJC. Also, to make this cooperation more sustainable, the competences of the NJC should be strengthened as recommended by the Venice Commission and the Council of the European Union.

⁶⁹ Amnesty International counted twenty-eight NJC Resolutions in which the NJC overall supported the resolution of the new NJO President (there were some where the NJC made some recommendations to the NJO), while only one (NJC Resolution No. 86/2020 (VII. 1.) giving opinion about the NJO resolution on documents management) which the NJC did not support at all. According to one NJC member (NJC minutes of 1 July 2020, available at <https://orszagosbiroitanacs.hu/2020-07-01/>, p. 13.), the NJC backed 95% of the NJO President’s initiatives during the pandemic. According to the previous NJC President’s activity report (available at <https://orszagosbiroitanacs.hu/2020-09-09/>) on the first half of 2020, “*in most cases the NJC supported the draft NJO President resolutions, but in several cases the Council made critical remarks. Some of these were taken into consideration, [...] but in several cases they were entirely disregarded. For example, he has not amended the NJO President regulation about judges’ car allowance that had been considered unacceptable by the NJC or the new rules on courts’ document management heavily criticized for prescribing excessive formalities.*”

⁷⁰ NJC minutes of 1 July 2020, p. 6.

⁷¹ Available at <https://orszagosbiroitanacs.hu/2020-09-09/>

⁷² Article 103 (1) d) of the AOAC

⁷³ The vice president of the NJO requested that the NJC give its opinion on the 2021 annual training and professional skill development plan for the courts. The NJC delivered its opinion on 1 July 2020 (NJC Resolution No. 91/2020 (VII.1.)), however one judge told Amnesty International that the 2021 Central Education Plan was approved by the NJO one day earlier, on 30 June 2020 – meaning the NJO President did not take into consideration the NJC’s opinion on the topic.

7. ATTACKS IN MEDIA UNDERMINE THE INDEPENDENCE OF THE JUDICIARY

“...I have been missing a determined action against these statements grossly attacking the judges. The judiciary remained almost unprotected.”

A judge from a regional court

MEDIA AND POLITICAL ATTACKS ON THE JUDICIARY CONTINUE IN 2020

Media attacks and attacks from politicians (government officials, governing-party and opposition-party politicians) on the judiciary and against judges continued in 2020, undermining public trust in the judiciary as the third branch of power.

In this regard, the NJO President has a main role in defending the integrity and independence of the judiciary by refuting such attacks. This stems firstly from the main obligation that the NJO President “*represents the courts*”.⁷⁴ It is also underlined by the practise of the NJO President himself: the NJO President has issued a few public statements in the defence of the judiciary (see below). Judges who filled out the online questionnaire also indicated that the NJO President must stand up against such attacks against the judiciary.

During 2020, Amnesty International has observed several external media or political statements criticizing, and in some cases personally attacking, judges and judgements.

- For example, there was a case about Roma children being segregated in a public school in Gyöngyöspata between 2004-2017, where Hungarian Prime Minister Viktor Orbán and the ruling

⁷⁴ Article 76 (1) c) of the AOAC

party together with government-aligned media attacked the court's judgement of awarding HUF 99 million in damages to the affected students to be paid by the state.⁷⁵

- Another example was that the Hungarian government has suspended the pay-outs for prisoners that were ordered by Hungarian courts as compensation for the poor conditions in which they were detained.⁷⁶ This was done as part of a smear campaign started by Government officials including the Prime Minister and governing-party politicians attacking judges and lawyers, implying that the judges adjudicating in these cases and lawyers representing their clients defend criminals.
- In the trial of Mr. Gábor Kaleta, former Hungarian ambassador to Peru, Mr. Máté Kocsis, a FIDESZ politician and parliamentary group leader said that the "*judgement is outrageous and unacceptable*".⁷⁷
- In September 2020, in a pending case against a Hungarian politician, Mr. Tamás Deutsch MEP posted on his Facebook page that "*let's be clear: the non-final verdict of the court in the case is net treason*".⁷⁸
- In December 2019 Mr. Péter Márky-Zay (opposition mayor of Hódmezővásárhely) publicly said that "*today, in this court system, what judgment you get largely depends on which court the case is heard*". He also said that "*then we will start the vérbíró.hu [„blood judges” website] and sooner or later they will be ashamed of themselves*".⁷⁹
- On 1 December 2020 Mr. Márky-Zay also said⁸⁰ after his first-instance judgement that the judgement was passed after a "show trial".

In the EC Rule of Law Report of 2020⁸¹, the European Commission also established that the Government's and pro-government media outlets' criticising certain judicial decisions could undermine public trust and confidence in the justice system.

In the Fearing the Unknown report, judges told Amnesty International that public attacks on the judiciary and special media attention can put tremendous pressure on a judge, and judges mostly agreed that the organization did not provide enough support for judges in these cases.⁸² Similar cases have also been documented by Amnesty International in its report on the judiciary in Poland.⁸³

NJO PRESIDENT'S OR OTHER COURT LEADERS' GENERAL LACK OF REACTING TO THESE ATTACKS

Amnesty International found that the NJO President mostly remained silent and has not responded to political or media attacks on judges and judgements in 2020.

Out of the eighteen judges filling out the questionnaire, fourteen judges had a negative view on the NJO President's performance in this regard, namely that he has not or not sufficiently defended the judiciary against the above attacks. Several judges mentioned that the only case when the NJO President stood up and defended judicial independence was Mr. Márky-Zay's aforementioned "blood judges" remark.

Other than that, there were two public statements of the NJO President defending the judiciary against political attacks:

- In the aforementioned commentary by Mr. Deutsch MEP, the NJO President in his reply⁸⁴ refuted such a statement by saying that "*I hereby reject the finding that the independence of the judiciary has been called into question and that the judgment in this case has been classified as treason*."

⁷⁵ <https://insighthungary.444.hu/2020/01/09/orban-says-fidesz-must-take-a-new-direction-if-epp-is-unable-to-change>

⁷⁶ <https://hungarytoday.hu/govt-prison-business-suspend-compensation-poor-conditions/>

⁷⁷ <https://infostart.hu/belfold/2020/07/08/kocsis-mate-kaleta-gabor-tette-undorito-a-birosag-itelete-felaborito-es-elfogadhatatlan>

⁷⁸ https://www.facebook.com/permalink.php?story_fbid=3621973201169122&id=100000694338124

⁷⁹ <https://index.hu/belfold/2019/12/09/transparency-international-evzaro-korrpcio-ezaminimum/>

⁸⁰ <https://magyararancs.hu/belpol/marki-zay-peter-ez-az-itelet-koncepcios-fellebbezni-fogok-234041>

⁸¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0316&from=EN>

⁸² Fearing the Unknown, p. 30.

⁸³ Poland: Free Courts, Free People,

<https://www.amnesty.org/download/Documents/EUR3704182019ENGLISH.PDF>, p. 18

⁸⁴ https://birosag.hu/sites/default/files/2020-09/OBH_eln%C3%B6ke_lev%C3%A9%202020.09.25..pdf

- In the aforementioned case of Mr. Márky-Zay in December 2020, the NJO President in a public statement⁸⁵ said that “*he refutes the implication of any political influence at the court*”.

The judges commented that in other cases, when the judiciary was attacked by government politicians or by government-aligned media outlets, the NJO President did not speak up, however he spoke up when attacks came from members of the opposition. One of the interviewed judges commented that this circumstance questions the political independence of the NJO President. Another judge noted that “*regarding external communication, the press and politicians have unprofessionally criticized the courts in many cases in recent months, stigmatizing them ('the courts are on the side of the criminals'), and I have been missing a determined action against these statements grossly attacking the judges. The judiciary remained almost unprotected.*” Another judge commented that “*in December 2019, he remained silent after personal, unprofessional attacks against some judges of the Szeged Regional Court, which I consider a mistake.*”

On the NJC meeting held on 5 February 2020, the NJC members, the NJO President and other legal professionals (including the president of the Kúria and the Hungarian Bar Association, representatives of the Ministry of Justice and the General Attorney’s office) discussed the matter of political and media attacks on the judiciary. The NJO President had the opinion that the judgements need to speak for themselves.⁸⁶ He also said that courts should not say publicly that “*we have passed good judgements*”. Instead, he proposed to communicate to the public in the future by making anonymized judgements public to explain the individual cases.

In the questionnaire, a few other judges had a more positive view on the NJO President’s external communication. One judge said that it should be the Kúria’s president who defends judicial independence publicly. Another judge said that The NJO President’s approach is not necessarily bad in this regard. Yet another judge wrote that “*this [i.e. not speaking up in defense of the judicial independence] is the result of a systemic failure: the NJO president, who has been appointed politically, will never oppose politics. Would it be his job to protect the courts? Maybe, but his position is unsuitable for that.*”

Amnesty International concludes that in 2020 political attacks and attacks from the media continue and that negatively affects judicial independence. Except for the case of Mr. Deutsch EP, the NJO President and other court leaders have not defended the judiciary against the attacks of Hungarian government officials and governing party leaders. The NJO President and other court leaders (e.g. the Kúria’s president), with some notable exceptions, have not defended the judiciary against these attacks, which is regarded negatively by the judges.

⁸⁵

<https://www.mabie.hu/attachments/article/1555/Ny%C3%ADt%20lev%C3%A9%20az%20OBH%20EIn%C3%B6k%C3%A9t%C5%91.pdf>

⁸⁶ NJC minutes of 5 February 2020, <https://orszagosbiroitanacs.hu/2020-02-05/>, p. 13-14.

8. CHILLING EFFECT AND JUDGES' RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression of judges is an integral part of the concept of judicial independence. According to international standards, judges also have the right to freedom of expression. Thus, “[m]embers of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”⁸⁷ Actual investigations and disciplinary proceedings commenced against Polish judges for exercising their freedom of expression created a chilling effect in the Polish judiciary, as was shown by Amnesty International’s report.⁸⁸

The actors of the executive or key figures in judicial administration oftentimes send chilling messages in the judiciary to discourage judges to exercise their right to free expression. As regards the chilling effect amongst Hungarian judges, on 1 October 2020 the Committee of Ministers of the Council of Europe decided not to close the supervision of the *Baka v. Hungary* case, meaning that it does not deem the judgement adequately executed. The decision shows that the Hungarian Government has not been able to dispel the concerns in relation to the freedom of expression of Hungarian judges and chilling effect affecting Hungarian judges. The Committee of Ministers stated that there are still “concerns expressed by the Court regarding the “chilling effect” on the freedom of expression of judges caused by the violations in these cases”.⁸⁹

Amnesty International’s *Fearing the Unknown* report found that “attacks on judicial independence have resulted in a palpable chilling effect amongst judges. Judges reported a very bad atmosphere at various courts, where most judges do not dare to speak openly and freely; cliques have formed and there is mistrust among judges. The interviewees mentioned that the chilling effect materializes in a fear amongst judges that prevents them from speaking up or protesting administrative decisions and pieces of legislation affecting the judiciary”. This climate is not supportive to an environment in which the right to freedom of expression of judges could be respected, protected, promoted, and supported.

Some judges that contacted Amnesty International have assessed some recent developments as positive. A few of these judges attribute the changes to the appointment of a new NJO President. Three judges said that the removal of the previous NJO President brought relief to the judges, and some pointed out that the removal contributed to a more peaceful and open atmosphere at the courts. Nevertheless, a significant portion of judges, five out of 18, reported that a bad atmosphere still prevails at the courts. “*The previous tension turned into apathy*” – one told Amnesty International Hungary. Another one said that the “*judges are*

⁸⁷ Para. 8 of the UN OHCHR Basic Principles on the Independence of the Judiciary

⁸⁸ <https://www.amnesty.org/download/Documents/EUR3704182019ENGLISH.PDF>

⁸⁹ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016809fa8be>

still afraid", as shown by the fact that there is only one applicant for a court leader's position and judges do not dare to apply for a court leader position, "*fearing revenge*". Yet another judge wrote that the "*initial enthusiasm has been replaced by disappointment*" with regard to the atmosphere. Some reported that the judges are "lonely", they do not feel the support of the community and "*everybody is laying low in their courtroom or office in silence, and happy not being bothered*". A judge wrote that the era of the previous NJO President lingers on: "*many judges have become uninterested and self-censorship has become automatic*".

Nevertheless, a so-called Integrity Policy, which had been issued by the previous NJO President, continues to be in effect and adversely impacts judge's right to freedom of expression. The "Integrity Policy"⁹⁰ prescribes how a judge may conduct any activities outside of their task of adjudication. In 2017, some parts of the Integrity Policy were deemed unconstitutional and removed by the HCC⁹¹ partly because of a provision stating that "integrity" shall also mean the complying with the values and principles contained in the recommendation of the NJO President. Other parts of the Integrity Policy, however, remained in force and have not been challenged. The provisions on judges' potential involvement in political activities are unclear and therefore these provisions open up the space for arbitrary interpretation.

Amnesty International understands that the Integrity Policy is used as a tool to silence judges who would want to speak up in defence of their judicial independence, by saying that this topic is political and/or an activity that infringes their integrity. Furthermore, the Integrity Policy, for example, contains a catch-all provision saying that "other activities [...] endangering the judicial independence or impartiality of a judge"⁹² may also infringe integrity, which provision is open to interpretation of the NJO President. The present NJO President has not amended the Integrity Policy's above terms yet. These terms have not been challenged yet.

With regards to recent developments, Amnesty International has observed different opinions relating to the chilling effect and restrictions pertaining to the right to freedom of expression, although there is a clear pattern that judges' freedom of expression continues to be restricted and that the NJO President thinks that judges should only express their opinion through their judgements. Amnesty International can conclude that developments in 2020 had mixed effects regarding the chilling effect at courts, and it seems that passivity of judges is still present in the Hungarian judiciary, thus hindering judicial independence and the rule of law.

Three judges reported a positive change in this respect: one told Amnesty International that they did not feel any pressure from the new NJO President, another one said that they do not know of any direct impediment of judges' right to freedom of expression, and a third one commented that it is positive that at least the new NJO President – in their view – does not regard all expression of opinion as a personal insult.

Nevertheless, the majority of judges participating in the questionnaire reported no changes with regard to the previous practice or negative developments. Five judges reported that they do not feel or know anything about the NJO President's attitude or practice with respect to expression of opinion. As one judge explained, "*there is no change and judges themselves are socialized in a way not to express their opinion publicly*". Furthermore, eight judges told Amnesty International that they have the impression that the new NJO President may not support judges to express their opinion on any issues or to appear in social media. One judge felt that "*Mr. Senyei apparently wants to avoid any scandal or clash, if it is up to him, we would have to put up with a quiet surrender*". Two judges speculated that the reason for this is that the NJO President may prefer to avoid any clash with the Hungarian Government, and he would like that judges communicate only via their judgments and nothing else.

Amnesty International calls on the NJO President to review his resolutions and repeal any resolutions that unnecessarily restrict judges' right to freedom of expression.

⁹⁰ <https://birosag.hu/obh/szabalyzat/62016-v31-obh-utasitas-az-integritasi-szabalyzatrol-0>

⁹¹ [http://public.mkab.hu/dev/dontesek.nsf/0/b8b4a549c5c37b1fc1257ff0005876c0/\\$FILE/33_2017%20AB%20hat%C3%A1rozat.pdf](http://public.mkab.hu/dev/dontesek.nsf/0/b8b4a549c5c37b1fc1257ff0005876c0/$FILE/33_2017%20AB%20hat%C3%A1rozat.pdf)

⁹² Article 7 (2) of the Integrity Policy

9. THE FINAL NAIL IN THE COFFIN: HOW THE ELECTION OF A NEW KÚRIA PRESIDENT AND APPOINTMENT OF JUDGES TO THE KÚRIA AFFECT THE PERCEPTION OF JUDICIAL INDEPENDENCE

The Hungarian Parliament elected⁹³ a new president to the Hungarian Kúria on 19 October 2020. Zsolt András Varga was elected exclusively with the votes of MPs of the governing parties. Mr. Varga's 9-year tenure as Kúria president started on 1 January 2021. Varga would not have been eligible as candidate for the Kúria if it wasn't for two recent legal amendments that paved the way for his election by widening the pool of eligible candidates.

These two legal amendments were the following:

⁹³ <https://hungarytoday.hu/hungary-supreme-court-president-zsolt-andras-varga/>

- First, there is a rule which requires 5 years of legal practice as an ordinary judge from a candidate who applies to the Kúria's presidency. A new amendment passed in April 2019⁹⁴ made it possible that a candidate could also count their legal practise as an HCC justice into this 5-year requirement. Before this new amendment, only experience as an ordinary judge (and not as an HCC justice) could have been counted as legal practise.⁹⁵ Mr. Varga could not have been elected Kúria president without this amendment, because he had not had 5 years of legal practise as an ordinary judge.
- Second, according to the main rule, a candidate who applies to the Kúria's presidency must be a judge.⁹⁶ In December 2019, an "omnibus bill"⁹⁷ made it possible for HCC justices to become judges simply on their request, without an application process.⁹⁸ Mr. Varga, being a HCC justice himself, used this legal opportunity and consequently was appointed judge in July 2020 by the President of Hungary.⁹⁹ Mr. Varga could not have been elected Kúria president without this amendment either, because he had not been a judge before July 2020.

The CoE Commissioner for Human Rights, in her statement issued in November 2019,¹⁰⁰ expressed concerns that the omnibus bill "*in its current form may have a negative effect on the internal independence of courts and judges and fair trial guarantees for individuals.*" The Commissioner also reiterated "*earlier recommendations on the need to strengthen collective judicial self-governance in Hungary, including the position and functions of the National Judicial Council.*"

In its first Rule of Law Report,¹⁰¹ the European Commission warned that the omnibus bill's "*new rules allow for appointment to the Supreme Court of members of the HCC, elected by Parliament, outside the normal procedure, and lower the eligibility criteria for the Supreme Court President.*"

The Commission also found, that as the result of the above-mentioned "omnibus legislation", "*in practice, the election by Parliament to the HCC, which does not entail the involvement of a body drawn in substantial part from the judiciary, can in itself lead to the appointment as a judge of the Kúria if requested by the judge concerned. These legislative changes have de facto increased the role of Parliament in judicial appointments to the Kúria.*" The European Commission also stated that "*this widening of the eligibility criteria increases the pool of candidates that could potentially be elected as Kúria President, increasing the discretion of the President of the Republic in this regard.*"

The European Commission found that the above new rules regarding appointment to the Kúria enhance the role of the legislature in defining the composition of the highest judicial forum and so weakens the separation of powers.

The NJC is required by law to give its consultative, non-binding opinion on the candidate for the Kúria President. Prior to the parliamentary vote, the NJC gave its opinion on the candidate and its members overwhelmingly voted down¹⁰² Mr. Varga's candidature (13 votes against and only one for). The NJC's reasoning was that Mr. Varga had never been practising as a judge and has no experience in judicial administration. Mr. Varga said that being an HCC justice, he had indeed adjudicated cases, since clients regularly file so-called constitutional complaints to the HCC in their individual cases. However, the NJC vote was not taken into consideration.

In 2020 Amnesty International observed the appointment of several HCC justices as ordinary judges, which, given that all justices were elected by the votes of the governing parties in Parliament to the HCC, was widely seen as the political appointment of HCC justices to ordinary court positions. In July 2020, apart from Mr. Varga, HCC justices Mrs. Ágnes Czine, Mr. Imre Juhász, Mrs. Ildikó Hörcherné Marosi, Mr. Tibor Balázs Schanda, Mr. Tamás Sulyok, Mr. Marcel Szabó and Mr. Péter Szalay were also appointed judges – from them, only Mrs. Czine and Mrs. Hörcherné Marosi had been a judge before.

As these justices may operate as chamber presidents at the Kúria in the future, and consequently hear and decide cases in which the state is a party, it is questionable whether these judges will be able to satisfy the

⁹⁴ Act XXIV of 2019

⁹⁵ Article 114 (1) of the AOAC

⁹⁶ Article 114 (1) of the AOAC

⁹⁷ Act CXXVII of 2019

⁹⁸ https://index.hu/english/2019/12/10/changes_to_court_system_omnibus_bill_judicial_independence/

⁹⁹ <http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/MK20160.pdf>

¹⁰⁰ <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>

¹⁰¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0316&from=EN>

¹⁰² orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyi/

criteria of being impartial. Therefore, this step significantly impacts the perceived impartiality of the courts as well as may impact decision making in any future cases where the state will be a party.

In September 2020, the NJC in its resolution¹⁰³ called upon the NJO President to initiate a change of this law. The NJC said that HCC justices who have not served as judges before should apply for a judicial position in an ordinary procedure applicable for other candidate judges.



THE CASE OF PREVIOUS SUPREME COURT PRESIDENT MR. BAKA

In 2012, a previous president of the Supreme Court, András Baka, who was critical of the judiciary reforms of the Government, was prevented by the same governing majority to remain Kúria president because he had not had 5 years of practice as a judge (he did have a judge's practice at the European Court of Human Rights [ECtHR], though). Mr. Baka filed an application to the ECtHR that established that the Hungarian Government violated his right to a fair trial and his freedom of expression.¹⁰⁴

Amnesty International was the first organization to analyse¹⁰⁵ the so-called omnibus bill and drew attention that *“the Bill opens the way for HCC justices without any judicial experience in the ordinary court system to be elected by the Parliament as the next President of the Kúria in 2020, when the term of office of the current President, Péter DARÁK, will expire.”* Amnesty International also criticized the new law as a possible threat to judicial independence in its *“Fearing the Unknown”* report,¹⁰⁶ backed by testimonies of Hungarian judges.

On 10 November 2020 the Hungarian Minister of Justice submitted a new bill proposal (*“Proposal”*)¹⁰⁷ to the Hungarian Parliament aimed at amending several laws on the judiciary. The Proposal includes several provisions that are to strengthen the powers of the Kúria president. For example, according to the envisaged new rules, the Kúria president would be able to designate certain types of cases (e.g. second instance judicial review cases, or third-instance judicial review cases) where the legal proceedings must be tried in 5-member chambers instead of 3-member chambers.¹⁰⁸ Or, the Kúria president would be able to appoint not only 8, but more judges also to the so-called *“uniformity procedure”*.¹⁰⁹ It is yet to be seen how these provisions will materialize in the future. The Hungarian Parliament passed the Proposal on 15 December 2020.¹¹⁰

With regard to the Proposal, the Commissioner for Human Rights of the Council of Europe raised her concerns in a statement¹¹¹ saying that *“the proposal to further enhance the powers of the President of the Kúria, Hungary’s Supreme Court, raises particular concerns, especially in view of recent changes to the appointment procedure.”*

¹⁰³ NJC Resolution No. 107/2020

¹⁰⁴ <http://hudoc.echr.coe.int/eng?i=001-163113>

¹⁰⁵ <https://www.amnesty.hu/semmi-sem-vesz-el-csak-atalakul-a-kormany-tovabb-korlatozza-a-birosagok-fuggetlenseget/>

¹⁰⁶ <https://www.amnesty.org/en/documents/eur27/2051/2020/en/>

¹⁰⁷ <https://www.parlament.hu/irom41/13648/13648.pdf>

¹⁰⁸ Article 39 of the Proposal

¹⁰⁹ Article 40 of the Proposal. At the end of 2019, a bill introduced a new procedure called *“uniformity complaint”* which can be submitted if, in questions of law, a chamber of the Kúria deviates from the published decision of the Kúria without initiating a *“uniformity procedure”*, and the deviation does not appear in the lower courts' decisions.

¹¹⁰ https://www.parlament.hu/web/guest/iromanyok-lekerdezese?p_p_id=hu_parlament cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&p_p_mode=view&p_auth=zbre9RZQ&hu_parlament cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=%2Finternet%2Fcpisql%2Ffogy_irom.irom_adat%3Fp_ckl%3D41%26p_izon%3D13648

¹¹¹ <https://www.coe.int/en/web/commissioner/-/commissioner-urges-hungary-s-parliament-to-postpone-the-vote-on-draft-bills-that-if-adopted-will-have-far-reaching-adverse-effects-on-human-rights-in->

10. CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

The present briefing has provided updates and insights as to the status of the judiciary in Hungary and the perceived independence and impartiality of the courts. It needs to be read in the context of the difficult situation facing the Hungarian judiciary and the interference by the executive and legislative power with the judiciary.

Amnesty International concludes that a power imbalance still exists between the NJC and the NJO President in favour of the latter, as no legal changes have been made to strengthen the powers and competences of the NJC. A change in the person of the NJO President and thus reduction in the tensions between the two organs does not solve this legal concern.

Without effective measures taken, the chilling effect is still undermining the Hungarian judiciary: developments in 2020 had eased the tension amongst judges (especially by normalizing the relationship between the NJO President and the NJC), but the passivity of judges and their reluctance to exercise their right to freedom of expression is still present in the Hungarian judiciary, thus hindering judicial independence. The NJO President's regulation (the so-called Integrity Policy) is still unnecessarily restricting judges' right to freedom of expression.

Inconsistency in initiating investigations against court leaders by the NJO President has harmed the perceived independence and impartiality of the judiciary. Such inconsistency also exists when publicly condemning media and political attacks against courts or judges, since the NJO President has chosen to speak up in the defence of the judiciary vis-à-vis some political actors, but declined to do so vis-à-vis others, casting doubt on the impartiality of the office.

With respect to judicial independence, it is concerning that another main actor in the judiciary, the president of the Kúria, was elected by the Hungarian Parliament with the help of ad hominem legislation and without any legal practise as a judge.

RECOMMENDATIONS TO THE GOVERNMENT OF HUNGARY

In light of the above conclusions, Amnesty International is putting forward the following recommendations:

1. Strengthen by law the competences of the NJC as recommended by the Venice Commission and the Council of the European Union.
2. In line with applicable standards, as outlined in this briefing, pass effective measures to reduce the chilling effect amongst Hungarian judges including guarantees and safeguards protecting judges' freedom of expression and other rights from undue interference.
3. Revoke the law¹¹² that allows a candidate for the Kúria's presidency to count their practising years at the HCC as a judge's practice.

¹¹² Article 1 of Act XXIV of 2019

4. Revoke the law¹¹³ that made it possible for HCC justices to become judges simply on their request, outside of a regular application process.

Amnesty International calls on the Government of Hungary to work with the Hungarian Parliament and other institutions, as appropriate, to implement these recommendations.

RECOMMENDATIONS TO THE NJO PRESIDENT

5. In order to uphold the perceived independence and impartiality of the Hungarian judiciary, refrain from using investigations against court leaders and judges as a pressure tool and only start investigations based on facts and the relevant laws.
6. Enhance cooperation with the NJC and settle outstanding issues ensuring that the NJC receives adequate support (e.g. secretary to the NJC, court secretaries for NJC members, NJC presence at the courts' central website).
7. Publicly condemn any harassment, intimidation, or retaliation against judges – whether it comes from the Hungarian government, the governing party or from the opposition –, and communicate clearly that while public criticism of jurisprudence as a part of a debate is necessary in a pluralistic society, personal attacks against judges are unacceptable.
8. Review the NJO President's orders and repeal any provision (especially those in the so-called Integrity Policy) that unnecessarily restricts judges' right to freedom of expression.
9. Continue to fill court leadership positions by regular application procedures and fair processes instead of direct appointments.

¹¹³ Article 55 of Act CXXVII of 2019

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STATUS OF THE HUNGARIAN JUDICIARY

LEGAL CHANGES HAVE TO GUARANTEE THE INDEPENDENCE OF THE JUDICIARY IN HUNGARY

The present research has found that the National Judiciary Office President's unbalanced powers in court administration continue to undermine the independence of the judiciary and the rule of law in the country. Although European institutions repeatedly called upon the Hungarian Government to counter-balance the powers of the NJO President to appoint court leaders and other competences, and to strengthen the weak competences of the National Judiciary Council vested in supervising the NJO President, this still has not happened yet.

The new NJO President elected at the end of 2019 so far has not abused his power regarding court leader appointments and takes into consideration the opinions of judges' plenary meetings as required by law. Nevertheless, Amnesty International is of the opinion that the relevant regulations do not provide appropriate systemic guarantees against abuse. In 2020 the relations between the NJO President and NJC and the overall situation have improved, however, though further improvements are needed.

In October 2020, the Hungarian Parliament elected a new president of the Hungarian Supreme Court (or Kúria), whose election was made possible by two recent pieces of legislation that had been claimed to be *ad hominem*.

Political and media attacks on the Hungarian judiciary continued in 2020, which negatively affected judicial independence and the rule of law. The NJO President and other court leaders have overwhelmingly remained silent during these attacks, thus contributing to the chilling effect of such attacks on the judiciary. The atmosphere and the chilling effect at courts continues to be problematic despite a few positive developments.