



FEARING THE UNKNOWN

HOW RISING CONTROL IS UNDERMINING JUDICIAL
INDEPENDENCE IN HUNGARY

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EXECUTIVE SUMMARY

**What are judges afraid of when not speaking up?
“I have no idea – and I think those who dare not to speak don't know either.”**

A judge from a district court

Since 2010 the governing majority in Hungary has been systematically weakening checks of the executive power and undermining the rule of law. The governing majority has either restricted established powers of independent institutions that exercise control over the executive or have appointed political loyalists to key positions. As a part of this process, since 2012, an ongoing institutional reform has centralized court administration.

The Venice Commission has warned against such centralization and the concentration of significant powers in the hands of the President of the National Judiciary Office (NJO) in 2012. As the European Association of Judges and the European Commission have found in 2019, *“the Hungarian judiciary is facing a kind of ‘constitutional crisis’ since May 2018”* while *“checks and balances, which are crucial to ensuring judicial independence, have been further weakened within the ordinary court system.”*

Members of the judiciary interviewed during this research¹ believed that their decisional independence remained largely intact, though in danger. However, they believed that the institutional independence of the judiciary was being severely undermined and that the judiciary as a separate branch of power was under attack from the courts’ central administration (NJO) and from other branches of power (executive, legislative). Those interviewed have also felt that attacks on the judiciary by the government-aligned media² had also intensified recently.

In 2018–2019, an ever-escalating conflict evolved between the President of the National Judiciary Office (“NJO President”) and the National Judicial Council (“NJC”), the judicial self-administration body that should oversee the NJO President’s work. With an unexpected move on 4 November 2019, the governing majority in Parliament elected the NJO President as a member of the Constitutional Court and, consequently, elected a new NJO President. In contrast to their predecessor, the newly elected NJO President does not question the legitimacy of the NJC that unanimously supported the NJO President’s appointment. Since January 2020, there has not been any signs of conflict between the two institutions in the mainstream media. However, this present research uncovers systemic problems caused by the ineffective supervisory powers of the NJC and other weaknesses in the institutions of judicial self-governance which will not be solved simply by a change of NJO President.

¹ Interviews were conducted between November 2019 and January 2020.

² Amnesty International refers to „government-aligned media” when speaking about those media outlets that are directly or indirectly controlled by the Hungarian government and/or the ruling party. According to [atlatszo.hu](https://english.atlatszo.hu/2019/06/30/data-visualization-this-is-what-the-pro-government-news-media-looks-like/), an investigative journalism website, *“112 newspapers, online media outlets, outdoor advertising companies, radio and TV stations belong to the media empire serving the Hungarian government.”* <https://english.atlatszo.hu/2019/06/30/data-visualization-this-is-what-the-pro-government-news-media-looks-like/>

Amnesty International's analysis found that the concentration of power in the hands of one single NJO President causes systemic problems. The institutions of judicial self-governance (including the NJC, local judiciary councils or judges' plenary meetings) remain weak. As a consequence of the institutional set-up established in 2012, Mrs. Tünde Handó NJO President from 2012 to November 2019, has formed a system in which all court presidents are obliged to the NJO President and any incumbent NJO President has the power to do the same. Through this mechanism, the NJO President can basically exert administrative influence on almost all levels of court presidents. Court presidents have influence on the selection and career of judges and their evaluation. They also have significant powers in case allocation, allowing them to impact how the right to a fair trial is upheld. The newly elected NJO President has not yet made any alterations to this system.

Amnesty International believes that the case allocation system also seriously threatens the right to a fair trial in Hungary. This is because the system operates in a way that a client, or even a judge, does not know why a case has been allocated or re-allocated to a specific judge. Such a system gives the case allocator the opportunity to interfere and allocate a case to a judge that he/she thinks will decide the case with a desirable outcome and exclude or withdraw certain judges from adjudicating sensitive cases.

Even if case allocation is not tampered with, the severe limitations of organizational independence and the endangered individual independence of a judge mean that respect for fair trial rights depends almost exclusively on the integrity and moral compass of the individual judge.

The research found that external factors, including attacks through mass media and newly introduced institutional and legal developments³ have increased external pressure on the judiciary. The government is trying to introduce new tools to curb judicial independence: earlier, with the idea of the administrative courts, now with the adoption of the so-called omnibus bill. This new law adopted in December 2019 has opened ways for Constitutional Court justices to easily transfer to the Kúria (Supreme Court) as chamber presidents. This is problematic because, as earlier research⁴ has shown, the Constitutional Court is an institution that has previously been packed with loyalists to the governing majority and has failed to resist direct or indirect political pressure in significant human rights related cases.

Individual or decisional independence is in better shape compared to institutional (organizational) independence. The research found that, in general, an individual judge can still adjudicate without direct outside influence. However, it is in danger, due to several reasons.

Judges are afraid that the negative trends regarding institutional (organizational) independence will eventually have a negative impact on individual independence. The lack of institutional (organizational) independence makes many judges "adapt and bend" to the expectations of leaders of court administration, and this mentality might transpire to the judge's decisional (individual) independence, too. The NJO together with court presidents have already put severe administrative pressure on a judge during or following a procedure or judgement in which expectations were not met. Furthermore, due to legislative changes passed on 17 December 2019, there is a higher risk that the Kúria will hinder a judge's professional autonomy at lower level courts e.g. new regulations require judges to provide reasons for departing from non-binding jurisprudence made or published previously by the Kúria.

Over recent years, judges have experienced an increase in the number and severity of attacks from political figures and the media against individual judges and judgements. Due to the chilling effect of the institutional changes described above, judges are scared away from speaking up in defence of their opinion, which results in only weak signs of solidarity within the judiciary and between judges and other legal professions. Moreover, members of the judiciary Amnesty International talked to had the impression that there are an increasing number of judges with a bureaucratic mentality (several judges called them "bureaucrat judges"), especially among newly appointed judges. This is partly the result of the changes in the selection criteria of newly appointed judges; of socialization at the NJO; of an application system that does not necessarily favour strong skills in legal argumentation or experience in adjudication. It also stems from the fact that career advancement requires loyalty towards court leadership appointed by the NJO President. Based on the interviews, Amnesty International's understanding was that bureaucrat judges are less resilient against attacks on individual judicial independence and can be more open to outside pressures that influence judgements.

Amnesty International concludes 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. The judges that

³ Legal developments contained in the so-called omnibus bill allowing HCC justices to transfer to the Kúria or requiring judges to provide reasons for a decision in case of departing from the non-binding jurisprudence published by the Kúria.

⁴ https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf

Amnesty International interviewed said that judges are afraid of potential threats of disciplinary proceedings, disadvantageous case allocation, bad evaluation results, financial consequences, consequences related to family members, and repercussions on professional training and development. A good illustration of the chilling effect is that sometimes judges do not even know what they are afraid of: they are fearing an abstract potential future consequence, or they are fearing the unknown. Yet, this indirect and subtle consequence of the chilling effect may influence their thinking and decision making.

RECOMMENDATIONS

TO THE GOVERNMENT OF HUNGARY

KÚRIA'S POWERS AND COMPOSITION

1. The provisions of the omnibus bill⁵ analysed in Amnesty International's previous briefing⁶ that may result in curbing judicial independence and violating the right to fair trial and other human rights should be immediately withdrawn, especially the following:
 - 1.1. that allow HCC justices to become chamber presidents at the Kúria;⁷
 - 1.2. that impose the obligation on the individual judges to provide reasons for a decision that departs from the non-binding jurisprudence published by the Kúria;⁸
 - 1.3. that entitle public authorities to file a constitutional complaint with the HCC on the ground that their competences have been unconstitutionally constrained.⁹

CASE ALLOCATION

2. The government should reform the case allocation system and introduce new and effective measures to ensure that courts have case allocation policies for allocating and re-allocating cases in a way that is transparent for both judges and clients.

JUDGE APPLICATION SCORING SYSTEM

3. The government should reform the rules on judge application scoring system in a way that gives more advantage to applicants having more adjudicating practice.

FUNCTIONS AND STATUS OF THE NJC

As has been suggested earlier by the Venice Commission¹⁰ and the Council of Europe Commissioner for Human Rights¹¹, the role of the NJC should be strengthened in order to balance the powers of the NJO President effectively. Amnesty International suggests the following means, some of which were included in the Bill proposal¹² of the NJC published in 2018:

4. The NJC should be provided legal personality and greater budgetary autonomy in order to effectively carry out its tasks determined by the Fundamental Law of Hungary.
5. The NJC should have broader powers and tools to take the necessary measures if the NJO President fails to carry out his/her statutory obligations and follows an unlawful practice despite the notice made by the NJC about the irregularities.
6. A new rule of conflict of interest should be introduced to prevent court leaders directly appointed by the NJO President and their relatives becoming members of the NJC.

5 Act CXXVII of 2019

6 Nothing ever disappears, it only changes https://www.amnesty.hu/data/file/4721-nothingeverdisappearsitonlychanges_independenceofjudiciary_amnesty_hungary_20191119.pdf?version=1415642342

7 Articles 88 (3) and 3 (4a) together with Article 58 (3) of the ALSRJ

8 Effective from 1 April 2020, Article 346 (5) of Act CXXX of 2016 on the Code on Civil Procedure and Article 561 (3) g) of Act XC of 2017 on the Code of Criminal Procedure

9 Article 27 (1) a) of Act CLI of 2011 on the HCC

10 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)

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

12 <https://orszagosbiroitanacs.hu/wp-content/uploads/2018/10/2018-10-03-Az-OBT-javaslat-a-b%C3%ADr%C3%B3s%C3%A1gokat-%C3%A9rint%C5%91-jogszab%C3%A1lyok-m%C3%B3dos%C3%ADt%C3%A1s%C3%A1ra-PDF-mell%C3%A9klet.pdf>

7. Members of the NJC should be protected more effectively against procedures targeting their immunity or initiated on the ground of incompetence such as: disciplinary proceeding, extraordinary evaluation procedure, examination procedure relating to incompetence. These should only be initiated against an NJC member upon NJC's prior consent. These measures would be aimed to guarantee that NJC members can exercise their statutory rights and obligations of safeguarding judicial independence and integrity through, among others, formulating and disseminating critical opinions on the administration and independence of the judiciary without any undue interference.
8. NJC members should be provided more effective protection against intimidation, attacks on their reputation, as well as retaliatory administrative and other measures.

RELATIONSHIP BETWEEN THE NJO PRESIDENT AND THE NJC

The co-decision-making powers between the NJC and the NJO President should be regulated in a way that strengthens the position of the NJC and requires consensus from both parties upon disagreement:

9. The consent of the NJC should be required for a judge's application procedure to be declared unsuccessful, and strict deadlines should be set for these purposes. If the NJO President declares a judge's application procedure unsuccessful, the law shall prescribe a deadline for the NJO President to publish a new call so that selection procedures are not unnecessarily delayed.
10. The following legal measures should be taken in order to challenge the NJO President's potential unlawful practices in declaring a court leadership appointment procedure unsuccessful:
 - 10.1. if the majority of the judges' plenary meeting or the majority of college judges supported the candidate for court leadership position, the NJC should be given a right to consent to the NJO President declaring the appointment procedure unsuccessful; and
 - 10.2. if the NJO President declares a court leadership application procedure unsuccessful, the law shall prescribe a deadline for the NJO President to publish a new call so that court leadership selection procedures are not unnecessarily delayed.

GENERAL RECOMMENDATIONS REGARDING THE JUDICIARY

11. Before passing any new piece of legislation affecting the judiciary, the government must have a meaningful and substantial consultation with all parties affected. The Hungarian Association of Judges (MABIE), the NJC, and civil society shall be included in all consultation.
12. The government should immediately condemn any public harassment, intimidation, or retaliation against judges, 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.

TO THE NJO

The NJO President

13. should ensure that he/she respects the NJC's prerogatives including but not limited to the NJC members' right to supervise the operation of the NJO President,¹³ the NJC's right to consent with regard to judges' and court leaders' applications¹⁴, and complies with the NJC's resolutions and requests;
14. should build a relationship with NJC members based on transparency, accountability, mutual respect and trust;
15. should review the NJO President's orders and repeal any regulations that unnecessarily restricts judges' right to freedom of expression;
16. should make clear that the NJO President's so-called integrity policy respects the judges' right to freedom of expression, and judges may freely discuss topics and questions related to judicial independence;
17. should ensure that the missing members of the NJC are elected without further delay, according to the law and without any outside interference;

¹³ Section 103 (1) a) of the AOAC

¹⁴ Section 103 (3) c) and d) of the AOAC

18. should immediately condemn any public harassment, intimidation, or retaliation against judges, 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.

TO THE EUROPEAN COMMISSION

19. Make full use of infringement proceedings and other applicable tools to continue holding the government of Hungary accountable for breaches of EU law, in particular:
 - 19.1. the values of respect for human dignity, freedom, equality, the rule of law and respect for human rights enshrined in Article 2 TEU;
 - 19.2. the obligation to ensure effective legal protection in the fields covered by EU law as required by Article 19 TEU in conjunction with Article 47 of the Charter of Fundamental Rights.

TO THE MEMBER STATES OF THE EU

20. Use the dialogue with Hungary under the Article 7.1 TEU procedure effectively, including through the adoption of concrete recommendations within the framework of the procedure and commit to assessing the implementation of the recommendations in a timely manner in order to reach a final determination under the procedure.
21. Urge the government of Hungary to address the problems highlighted in this report.
22. Demand that the government of Hungary amends the legislation on the judiciary to bring it in line with the EU's founding principles under Article 2 TEU.

TO THE EUROPEAN PARLIAMENT

23. Continue to closely monitor the situation of rule of law and human rights in Hungary.
24. Continue holding the EC and the Council accountable for their actions taken with regard to violations of the EU's founding principles in Hungary.

METHODOLOGY

This report is based on Amnesty International's research carried out continuously from November 2019 until January 2020.

Amnesty International's research concentrated mainly on how Hungarian judges themselves think about selected elements of organizational and individual judicial independence.

Individual cases presented in this report are based on interviews with judges. Before conducting the interviews, Amnesty International consulted with academics and other judge expert on issues affecting judicial independence in Hungary to map the topics and the main issues to be covered in interviews. These were the following topics: conditions of service and tenure, qualifications, selection and training, evaluations and discipline, the rights to freedom of association and freedom of expression, atmosphere at the workplace, independence of the judiciary, adjudication, and case allocation.

Amnesty International has conducted a qualitative research based on semi structured interviews with:

- 14 judges (including two ex-judges),
- 8 male and 6 female judges,
- from all levels of courts: from district courts (4), from regional courts (7), from regional courts of appeal (2), from the Kúria (1),
- from civil law (6), criminal law (7), and administrative law (1) departments,
- from both Budapest (4) and the countryside (10).

The criteria for interviewees was to work or to have worked at a Hungarian court as a judge for at least one year in the new judiciary system effective from 2012. Their period of tenure as a judge was as follows: two had worked as judges for 1-5 years, nine for 6-20 years and 3 for 21-40 years.

To reach the interviewees, Amnesty International used existing contacts and completed with the snowball method. Hence the sample is limited to judges who are open to speak with Amnesty International and intended to speak about judicial independence.

The interviewed judges gave their opinions and thoughts on the operation of the judiciary administration system under the NJO presidency of Mrs. Tünde Handó who had been the NJO President until 30 November 2019.¹⁵ As a consequence, Amnesty International stresses that it cannot and does not make any conclusions regarding the activities of the new NJO President, Mr. György Senyei in this report.

Conclusions of this report has been shared with the Hungarian Ministry of Justice, the National Judicial Council and the National Judiciary Office of Hungary. We have not received any comments from them.

Some judges featured in this report are referred to by their full names and some anonymously, all with their informed consent. Interviewees Szilvia DARVASI, Gabriella FICSÓR and István KEVICZKI agreed to publish their names in the report.

Amnesty International would like to thank all the individuals in Hungary who cooperated in the course of the research for this report, and special thanks to the interviewees.

15 https://www.parlament.hu/egy-kepviselo-adatai?p_p_id=hu_parlament cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8&p_p_lifecycle=1&p_p_state=normal&_hu_parlament cms_pair_portlet_PairProxy_INSTANCE_9xd2Wc9jP4z8_pairAction=/internet/cplsqli/ogy_kpv.kepv_adat?p_azon=h069

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The present research found that Hungarian judges think institutional judicial independence is being severely undermined in Hungary. Although on paper the judiciary is a separate branch of power, this principle has come under attacks from the courts' central administration and other branches of power.

The concentration of power in the hands of the National Judiciary Office's President causes systemic problems. The NJO President and court leaders under his/her influence can exert administrative pressure directly and indirectly on the judiciary.

The overall view of the judges interviewed was that an individual judge can generally still adjudicate freely, without direct outside influence. However, this freedom is in danger. Right now, it is up to the integrity and moral compass of an individual judge whether someone's case will be tried by an impartial and independent judge.

Attacks on judicial independence have resulted in a palpable chilling effect amongst judges. Judges reported a poisonous atmosphere at various courts, where most judges do not dare to speak openly and freely and there is mistrust among judges. Due to this chilling effect, judges are scared away from speaking up in defence of their opinion. This results in only weak signs of solidarity within the judiciary and among judges and other legal professions.

The case allocation system lacks transparency and allows a court's case allocator wide discretion over which judge to allocate a case. The judges interviewed described an allocation system that seriously threatens the right to a fair trial in Hungary.

The report proposes solutions on how to strengthen judicial independence and protect the right to a fair trial.