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**Council of Europe**  
**DGI – Directorate General of Human Rights and Rule of Law**  
**Department for the Execution of Judgments of the European Court of Human Rights**

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**Subject:** NGO communication under Rule 9(2) of the Rules of the Committee of Ministers concerning the execution of the judgment of the European Court of Human Rights in the case of *Baka v. Hungary* (Application no. 20261/12)

Dear Madams and Sirs,

Amnesty International Hungary and the Hungarian Helsinki Committee hereby respectfully submit their joint **observations and recommendations under Rule 9(2)** of the “Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements” regarding the execution of the judgment of the European Court of Human Rights in the *Baka v. Hungary* case (Application no. 20261/12, Judgment of 23 June 2016), in advance of the 1411<sup>th</sup> meeting (September 2021) (DH) of the Ministers’ Deputies on the execution of judgments.

**Amnesty International Hungary (AIHU)** is a membership-based, independent Hungarian civil society organization founded in 1990. AIHU is a member of the globe’s largest human rights organization, Amnesty International, which has seven million supporters in more than 70 countries. AIHU carries out research, campaigns, advocacy, human rights education, and empowers and mobilizes local communities with a special focus on gender equality, rule of law and right to privacy to ensure that human rights are enjoyed by everyone in Hungary.

**The Hungarian Helsinki Committee (HHC)** is an independent human rights watchdog organisation, working towards defending the rule of law in Hungary. The HHC submitted (together with other Hungarian NGOs) a third-party intervention in the *Baka v. Hungary* case, and submitted a communication to the Committee of Ministers in relation to the non-execution of the judgment in the *Baka v. Hungary* case in August 2019<sup>1</sup> and in July 2020,<sup>2</sup> the latter jointly with AIHU.

This communication concerns the execution of the judgment in particular concerning the implementation of the general measures indicated by the Committee of Ministers (**CM**) in its decision adopted in October 2020 (hereafter: **2020 CM Decision**,<sup>3</sup> delivered as a consequence of non-execution of its decision adopted in September 2019<sup>4</sup>), and the Hungarian Government’s Action Report of 24 June 2021 (hereafter: **2021 Action Report**).<sup>5</sup>

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<sup>1</sup> DH-DD(2019)877, 2 August 2019, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf)

<sup>2</sup> DH-DD(2020)686, 29 July 2020, [https://helsinki.hu/wp-content/uploads/AIHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf)

<sup>3</sup> CM/Del/Dec(2020)1383/H46-8

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

<sup>4</sup> CM/Del/Dec(2019)1355/H46-11, 25 September 2019, [http://hudoc.exec.coe.int/eng/?i=CM/Del/Dec\(2019\)1355/H46-11E](http://hudoc.exec.coe.int/eng/?i=CM/Del/Dec(2019)1355/H46-11E)

<sup>5</sup> DH-DD(2021)656, 24 June 2021,

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680a314e7>

## 1. THE CURRENT SCOPE OF SUPERVISION

### 1.1. THE MERIT OF THE CASE

The case of *Baka v. Hungary* concerned the **undue and premature termination of the applicant's mandate as President of the former Hungarian Supreme Court** through legislative acts of constitutional rank and therefore beyond judicial control, **prompted by views and criticisms he expressed on reforms affecting the judiciary and exerting a "chilling effect"** also on other judges and court presidents, **in violation of Articles 6 and 10** of the European Convention on Human Rights.

### 1.2. THE 2020 CM DECISION

In its decision delivered in October 2020, the Committee of Ministers urged several general measures to be taken:

(1) with respect to the established violation of Article 6 of the Convention the CM noted with concern "the continuing absence of safeguards in connection with *ad hominem* constitutional-level measures terminating a judicial mandate" and Parliament's competence "to **impeach the President of the Kúria without judicial review**" [section 3. of the CM Decision] and urged the authorities to submit information on "**further measures adopted or planned with a view to guaranteeing that judicial mandates will not be terminated by ad hominem constitutional-level measures devoid of effective and adequate safeguards against abuse**" [section 4. of the CM Decision].

(2) with respect to the established violation of Article 10 of the Convention the CM encouraged the authorities to **evaluate the domestic legislation on the status of judges and the administration of courts** and invited them to "*present the conclusions of their evaluation, including of the **guarantees and safeguards protecting judges from undue interferences***" [section 6. of the CM Decision].

### 1.3. OVERALL ASSESSMENT OF THE STATUS OF EXECUTION

The Hungarian authorities not only failed to take any measures at all to implement the judgment, but further deepened the chilling effect on the freedom of expression of judges and continued to undermine the independence of the judiciary in general. The purpose of this communication is to outline the most important steps taken by the Hungarian executive and legislative authorities to uphold the chilling effect of the underlying *Baka case*.

- The Hungarian authorities have **failed to introduce safeguards against *ad hominem* legislation aimed at terminating a judicial mandate** and take measures to amend the legislation in order to ensure that the impeachment of the President of the Kúria is subject to effective oversight by an independent judicial body.
- The Hungarian authorities have **failed to take measures to guarantee that judicial mandates will not be terminated without effective safeguards against abuse.**
- The Hungarian authorities have **failed to take any measures to counter the "chilling effect"** of the violation of Article 10 of the Convention in the underlying *Baka v. Hungary* case, and have **failed to adopt any guarantees to avoid any retaliation against judges publicly voicing criticism** in relation to the independence of the judiciary in Hungary.

## 2. EVALUATION OF THE 2021 ACTION REPORT OF THE GOVERNMENT

The 2021 Action Report of the government clearly demonstrates that **no action has been taken** by the Hungarian authorities to implement the judgment since the 2020 CM decision. Instead of implementing the measures required by the 2020 CM Decision, the government:

- (1) **argues against the necessity of any measures** with respect to the violation of Article 6, going upfront against the judgment itself [see below under section 2.1.];
- (2) **seeks to avoid taking measures** with respect to the violation of Article 10 by **denying the existence of the climate of threat and self-censorship** created and consciously upheld since the removal of Justice Baka by referring to a survey conducted in 2019 with contestable relevance and questionable results, which shows an unrealistic and overly optimistic picture of the independence of judges in Hungary [see below under section 2.2.].

### 2.1. NON-IMPLEMENTATION OF THE GENERAL MEASURES REQUIRED WITH RESPECT TO THE BREACH OF ARTICLE 6

Although the Committee of Ministers raised concerns regarding the possibility to remove the President of the Kúria without judicial review, no legislation has been passed to make amends to such concern. The lack of any judicial review may pave the way to abuse of power and removing the President of the Kúria based on groundless claims, or for political reasons.

Furthermore, the legislation<sup>6</sup> **fails to guarantee that judges** who are unlawfully dismissed **are to be reinstated into their previous judicial leading administrative position** if the court orders their reinstatement as judges.<sup>7</sup>

### 2.2. NON-IMPLEMENTATION OF THE GENERAL MEASURES REQUIRED WITH RESPECT TO THE BREACH OF ARTICLE 10

As reflected by section 6 of the CM Decision, at the 1383<sup>rd</sup> CM-DH meeting, **the Hungarian government undertook** *"to evaluate the domestic legislation on the status of judges and the administration of courts,"* and the CM invited the government to *"present the conclusions of their evaluation, including of the guarantees and safeguards protecting judges from undue interferences."*

**The aim of the measure requested was clearly to get a thorough *de iure* analysis of the Hungarian legislation identifying provisions capable of exerting a negative influence on judges "pre-emptively dissuading them from exercising their rights or fulfilling their professional obligations for fear of being subject to formal state proceedings, which could lead to sanctions or informal consequences such as threats, attacks or smear campaigns."**<sup>8</sup>

However, instead of carrying out the task it had committed to undertake, in its 2021 Action Report, the government simply referred back to a survey (already presented at the 1383<sup>rd</sup> CM-DH meeting) on the perception of judges of the threats to their independence and integrity.<sup>9</sup> Besides the fact that this survey has already proved to be insufficient for the execution of the judgment in 2020, its results can be contested for a number of reasons.

<sup>6</sup> Mainly the Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereafter: LSRA) and the Act CLXI of 2011 on the Organisation and Administration of Courts (hereafter: OAC)

<sup>7</sup> In more detail, see: DH-DD(2020)686, 29 July 2020, [https://helsinki.hu/wp-content/uploads/AIHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf), section 1.2. on pp. 5–6.

<sup>8</sup> Laurent Pech, 'The Concept of Chilling Effect, Its Untapped Potential to Better Protect Democracy, the Rule of Law and Fundamental Rights in the EU' (2021) p. 4., see: <https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect>

<sup>9</sup> See Annex II. of the Action Report.

(i) **The survey was conducted in 2019**, during the term of the former President of the National Office for the Judiciary (**NOJ President**), Ms. Tünde Handó, **exactly in the same period when retaliatory measures against judges (members of the National Judicial Council, the judicial self-governing body) expressing criticism and attempts to undermine their professional reputation were common**, with the National Office for the Judiciary and government-affiliated media systematically targeting judges critical towards the NOJ President.<sup>10</sup> Exactly the same period covered by the survey served in 2019 as the basis of the decision of the CM in 2019 when it *"noted with grave concern the reports suggesting that the 'chilling effect' of the violation found by the Court under Article 10 and affecting the freedom of expression of judges and court presidents in general has not only not been addressed but rather aggravated."* It seems highly controversial from the Hungarian government to seek the closure of the execution of the judgment by referring to data of a survey conducted **during the period when the chilling effect on the freedom of expression of judges was palpable amongst judges voicing criticism according to the CM as well.**

(ii) Besides the above, **none of the questions of the survey refer to the freedom of expression of judges** and the chilling effect of the underlying *Baka* case.

(iii) The online anonymous surveys prepared by the NOJ and referenced by the Hungarian Government seriously lack transparency. In large parts, the methodology is unclear, the questionnaires or the method through which the judges were reached have not been made public, and it cannot be verified whether extracts that the Government highlighted present a comprehensive picture based on the results. The data collection method was through the official central intranet system of the courts and responses were collected on a voluntary basis. As the data collector was the employer of the respondents, the aforementioned method can easily hinder the formulation of critical opinions or dissuade respondents holding views that are more critical from participating; as from official publications it is not clear how the anonymity of respondents was ensured. The results of the survey are only partly public and are retracted, so the general public is not able to get to know, let alone to fully evaluate their results. Amnesty International submitted a Freedom of Information request to the NOJ President to obtain the full documentation of these surveys, but the request was declined, claiming that these surveys do not constitute data of public interest (see the request and the answer provided by the NOJ President attached under [Annex 1 and 2](#)); a court case is pending in this matter. Based on the above, the results can hardly be taken into consideration when assessing the independence of the Hungarian judiciary.

(iv) The positive image presented by the government can also be called into question based on two reports by **Amnesty International Hungary**.

Firstly, Amnesty International Hungary carried out a research regarding the Hungarian judiciary between November 2019 and January 2020, the results of which were published in the report titled *"Fearing the Unknown – How rising control is undermining judicial independence in Hungary"*.<sup>11</sup> The report was based on in-depth interviews with 14 judges and **covered the period between 2012 and late 2019**, i.e. the period under the previous NOJ President, Ms. Handó. The *"Fearing the Unknown"* report concluded that institutional changes in the judiciary resulted in a chilling effect at the courts and that judges are scared of speaking up in defence of their opinion, which results in weak solidarity within the judiciary and between judges and other legal professions. Also, it concluded that over recent years judges and their judgments had experienced an increase in the number and severity of attacks from political figures and the government-aligned media.

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<sup>10</sup> See the Rule 9 communication of the Hungarian Helsinki Committee of 2 August 2019: DH-DD(2019)877, [https://helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf)

<sup>11</sup> <https://www.amnesty.hu/fraudulent-fear-rules-among-hungarian-judges/>

As a follow-up to the above report, Amnesty International Hungary conducted a survey among judges for the report "*Still at risk: The status of the Hungarian judiciary*" that was **published in February 2021, covering the time period after Ms Handó was replaced as NOJ President by Mr. György Barna Senyei.**<sup>12</sup> The report contradicts the government's survey results as presented on several levels.

- A relative majority<sup>13</sup> of the 18 respondents to the survey reported that **a bad atmosphere still prevails at the courts.** "*The previous tension turned into apathy*" – one judge told Amnesty International Hungary. Another one said that the "*judges are still afraid*", as shown by the fact that there is often only one applicant for a court leader's position and judges do not dare to apply for such positions, "*fearing revenge*". Yet another judge wrote that the "*initial enthusiasm [after the new NOJ President took office] 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 NOJ President lingers on: "*many judges have become uninterested and self-censorship has become automatic*".
- The majority of judges participating in the survey reported **no changes with regard to the previous practices or negative developments threatening the independence of the judges.** Five judges reported that they do not feel or know anything about the new NOJ President's attitude or practice with respect to the expression of opinions. 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 NOJ 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 NOJ President may prefer to avoid any clash with the government, and he would like that judges communicate only via their judgments and nothing else.

Beyond the above issues surrounding the content and results of the government survey, it has to be emphasized that **no survey can replace the holistic evaluation** of the domestic legislation on the status of judges and the administration of courts, and, in particular, **of the "guarantees and safeguards protecting judges from undue interferences"**, as required by the 2020 CM Decision. **The completion of the general measure requested by the 2020 CM Decision** (a thorough analysis of the legislation identifying the safeguards) **is essential and therefore cannot possibly be waived.**

While Justice András Baka was removed from office for criticizing the "*unrestricted, non-transparent and uncontrollable power*" of the NOJ President,<sup>14</sup> **the legislation that prompted his criticism still prevails and actively serves as a tool to uphold the chilling effect of the issues addressed in the Baka case amongst judges** [see in more detail below in section 4.]. As explained by András Baka in

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<sup>12</sup> <https://www.amnesty.hu/still-at-risk-the-status-of-the-hungarian-judiciary/>

<sup>13</sup> Amnesty International's research touched upon 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, and 18 of them participated anonymously. Judges constitute a difficult-to-reach respondent group especially because of the contentious manner of this research project. Thus this research provides a qualitative insight to the opinions of judges thus contributing to the problem mapping related to judicial independence in Hungary. The criteria to qualify as a respondent was a minimum of one year long experience as an active judge at a Hungarian court. Amnesty International used a snowball method to recruit respondents, which started with approaching existing contacts.

<sup>14</sup> In the words of Justice Baka "*This unrestricted, non-transparent and uncontrollable power is unparalleled in contemporary Europe ... The extent and uncontrollability of such centralised authority is without precedent, even in countries where the administration of the judiciary lies with the ministry of justice and even if we think of the socialist dictatorship [...]*." See § 23. of the judgment delivered in the *Baka v. Hungary* case.

an interview published in December 2020: "*I consider the second phase of attacks [against the judiciary] to be the period when the President of the National Judicial Office tried to enforce those unrestricted and uncontrollable powers I already criticised at the adoption of the act on the organisation of courts.*"<sup>15</sup>

The enforcement of these powers by the NOJ President contributed to deepening the chilling effect of the *Baka* case amongst Hungarian judges. The government must take legislative and organisational steps to eliminate all those provisions that enable arbitrary application of the law by the NOJ President (and/or the President of the Kúria, respectively) to lift and countervail the chilling effect created. Unless the government amends the legislation serving as a tool to uphold the chilling effect, the *Baka* judgment cannot be deemed as executed. For this purpose, the **evaluation and full assessment of the legislation on the status of judges and the administration of courts as prescribed by the 2020 CM Decision remains essential.**

### 3. ALL PRIOR CONCERNS REGARDING STRUCTURAL DEFICIENCIES THAT CONTRIBUTE TO A CHILLING EFFECT REMAIN RELEVANT

As a direct consequence of the fact that the Hungarian authorities openly argue against the necessity of taking any measures and expect the closure of the case without any meaningful action taken, **all prior concerns raised by the Hungarian Helsinki Committee and Amnesty International Hungary in their previous communication of July 2020<sup>16</sup> remain relevant.**

In the 2020 Action Report, the government argued that "*tensions within the judiciary seem to have eased by the election, on 10 December 2019 of a new [NOJ President], unanimously supported by the members of the National Judicial Council (NJC).*" Although the election of Mr. György Barna Senyei as NOJ President may have contributed to the normalisation of the communication between the NJC and the NOJ President, it has **not solved any of the structural problems that had led to the prolonged conflict between the NJC and the NOJ President in 2018–2019, which escalated into a constitutional crisis.**<sup>17</sup> The legislative provisions that allowed the abuse of power by Ms. Handó – against which former Chief Justice Baka raised concerns – are still in force and continue to be applied by the new NOJ President. In the following we provide **three examples for legal measures that formerly – during the term of Ms. Handó – already proved to serve as a tool to exert pressure on judges and continue to be in force and applied by Mr. Senyei.**

#### 3.1. THE INTEGRITY POLICY: SUSTAINING THE CLIMATE OF SELF-CENSORSHIP

The so-called **Integrity Policy**, which was issued by the previous NOJ President in 2016, continues to be in effect and adversely impacts judges' freedom of expression. The "*Integrity Policy*"<sup>18</sup> prescribes how a judge may conduct any activities outside of their task of adjudication. The provisions on judges' potential involvement in "political activities" are unclear and therefore these provisions open up the space for arbitrary interpretation. **The Integrity Policy is used as a tool to silence judges who would want to speak up in defence of their judicial independence,**<sup>19</sup> by saying that this topic is political and/or an activity that infringes their integrity. Furthermore, the Integrity Policy, for example,

<sup>15</sup> See: András Baka, 'Serious forces came into play' an interview by Szilárd Teczár, Magyar Narancs, 3 December 2020, <https://magyarnarancs.hu/belpol/komoly-erok-mozdultak-meg-134602>

<sup>16</sup> DH-DD(2020)686, 29 July 2020, [https://helsinki.hu/wp-content/uploads/AIHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf)

<sup>17</sup> European Association of Judges, *Report on the fact-finding mission of the EAJ to Hungary*, 2019, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>

<sup>18</sup> The Integrity Policy is available in Hungarian at: <https://birosag.hu/obh/szabalyzat/62016-v31-obh-utasitas-az-integritasi-szabalyzatrol-0>.

<sup>19</sup> Amnesty International Hungary, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, April 2020, <https://www.amnesty.hu/fraudulent-fear-rules-among-hungarian-judges/> p. 41.



contains a catch-all provision saying that "*other activities [...] endangering the judicial independence or impartiality of a judge*"<sup>20</sup> may also infringe integrity, which provision is open to interpretation by the NOJ President.

**Up until the submission of this communication, the Integrity Policy has remained in force, including the above mentioned problematic provisions.**

### **3.2. ONGOING PRACTICE: INVALIDATION OF CALLS FOR APPLICATION FOR LEADERSHIP POSITIONS**

Due to the lack of relevant modifications in the law, the NOJ President continues to have the same **overly broad and excessive powers regarding the appointment of court presidents** (which have earlier been in the forefront of the conflict between the NOJ President and the NJC), including that **the NOJ President has the power to annul any call for applications<sup>21</sup> for court leadership positions and render the procedure unsuccessful without the consent of any judicial body (e.g. the NJC or local judicial councils).**

In addition, the potential reasons for invalidating a call for applications are not determined by the law, providing the NOJ President with complete discretion in this regard. Article 133 of the OAC simply provides that the application may be declared invalid if the person with the power to appoint the judicial leader "*does not accept any of the applications*".

Selecting court presidents is a strong power of the NOJ President, because court presidents have broad authority over judges and cases of their courts: court presidents evaluate the work of judges, which determines the progress of their career; they are entitled to launch disciplinary proceedings; and court presidents influence the everyday working conditions of individual judges, including permitting or denying the right to work from home or determining the number of assistants. Court presidents can also influence the fate of individual cases as they issue the case allocation scheme of the court, without any meaningful control by judicial self-governing bodies.

The practice of invalidating applications for leadership positions has not come to a complete halt under the new NOJ President either.<sup>22</sup> **In 2020, altogether 20 applications for leadership positions were invalidated by the new NOJ President Mr. Senyei**, in 2021, so far two applications have been deemed unsuccessful.<sup>23</sup> Although it is an improvement that these decisions contain reasons for the invalidation, it is a **warning sign** that at its session of 5 May 2021, the NJC made the following observations regarding the new NOJ President's practice:

*"The NJC discussed the report of the President of the National Office for the Judiciary (NOJ) on the appointment of judges and judicial leaders (court presidents, vice-presidents etc.) in 2020 and formed the following opinion:*

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<sup>20</sup> Article 7 (2) of the Integrity Policy

<sup>21</sup> According to Article 130 (1) and (2) of the OAC, court leadership positions must be filled based on a public call for application (unless otherwise provided by law). The call for application shall be issued by the person holding the power to appoint the court leader (e.g. the NOJ President, the President of the Kúria or court presidents respectively).

<sup>22</sup> According to Article 128 (2) of the OAC, leadership positions granted by the NOJ President comprise the presidents and vice-presidents of regional courts and regional appeal courts, and college leaders of the regional courts and the regional appeal courts.

<sup>23</sup> For example, reasons for invalidating court leadership applications by the NOJ President have included the following: (i) increasing number of cases pending over 2 years (Resolution No. 388.E./2020. (X.19.) of the NOJ President) which constituted the 3% of all cases dealt with by the court concerned; or (ii) deficiencies with archiving case files (Resolution No. 27.E/2021. (II. 8.) of the NOJ President) where the reasoning admits that these deficiencies may not be substantial, but merely constitute a result of undue administration of the archiving activities; or (iii) high backlog of cases at the district court presided by the candidate (Resolution No. 444.E/2020. (XI. 30.) of the NOJ President). In all abovementioned cases, the competent judicial council voted for the appointment of the applicant.

- In the case of court leadership applications where the President of the NOJ did not accept any of the candidates (invalidated applications), **the NJC raises concerns about the lack of unified criteria.**
- The system of criteria as stipulated by the NOJ Regulation on Court Administration was not adequately applied.
- The NJC finds it worrisome that some of [the] justifications of **the invalidating resolutions referred to facts which the candidate had no opportunity to comment on or challenge during the procedure** and were based on data that was accessed [by the NOJ President] without the prior approval of the candidate.
- The NJC also notes that the President of the NOJ failed to respect deadlines in some of the procedures.
- There were no other objections regarding the appointment practice of court leaders and no negative comments on the appointment of judges.<sup>24</sup>

As outlined by the European Commission's 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary (hereinafter the **2021 EC RoL Report**) "*The NOJ President has continued the practice of cancelling – in a growing number of cases and often without sufficient explanations – selection procedures for court presidents and other court managers, even where there were suitable applicants supported by their peers.*"<sup>25</sup>

The full discretion of the NOJ President to invalidate calls for applications for leadership positions at courts is a glaring example for **effective provisions that are consciously kept in the legislation and are capable to contribute to the chilling effect on the freedom of expression of judges.** Knowing that the NOJ President routinely exercises the right to invalidate calls can dissuade judges from voicing criticism or applying for the position for fear of falling foul of these measures.

### 3.3. FULL DISCRETION IN THE DISTRIBUTION OF BONUSES

According to the Venice Commission's relevant opinion,<sup>26</sup> "[t]he remuneration should be based on a general standard and rely on objective and transparent criteria, not on an assessment of the individual performance of a judge. Bonuses which include an element of discretion should be excluded. [...] Bonuses and non-financial benefits, the distribution of which involves a discretionary element, should be phased out."

The legislation<sup>27</sup> provides a wide discretion to the NOJ President and judicial leaders in determining the bonuses of their employees, therefore self-censorship goals can easily be reached by cutting (or rewarding) bonuses. As also highlighted in the Hungarian Helsinki Committee's Rule 9(2) communication submitted regarding the *Baka* case in 2019,<sup>28</sup> it is highly problematic that **the legislative basis of some of the payment supplements is very vague, leaving much room for arbitrariness.** There is no statutory list or definition of the types and forms of support that the NOJ President and other judicial leaders can distribute among judges, nor are there clear criteria as to what can serve as the basis of such decisions.<sup>29</sup> For instance, Article 20 of Annex 2 of NOJ Instruction 5/2013. (VI. 25.) lists premiums and bonuses that can be granted in the framework of the labour force

<sup>24</sup> Summary on the session of the National Judicial Council held via Skype videoconference on 5th May 2021 between 09:00 and 16:30, available at: <https://orszagosbiroitanacs.hu/english/>

<sup>25</sup> The European Commission's 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf) p. 6.

<sup>26</sup> European Commission for Democracy through Law (Venice Commission), Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, 6 March 2010, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)004-e)

<sup>27</sup> Articles 179–196 of the LSRA

<sup>28</sup> See: DH-DD(2019)877, 2 August 2019, [https://helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf), p. 6.

<sup>29</sup> Article 189 of the LSRA stipulates that besides cafeteria-type of allowances, "other types of payments" may be provided to judges, and this provision is followed by an open list of allowances, supplements and bonuses, which means that there is no statutory list or definition of the types and forms of support that the NOJ President and other judicial leaders can distribute among judges, nor are there clear criteria as to what can serve as the basis of such decisions.



preservation program of the court system. These include the "*acknowledgment of outstanding achievements*", the "*acknowledgment of exceptional work*", premiums granted on the occasion of state or church holidays, or vacation support.

Regarding these supplements and bonuses, it must also be pointed out that **it is often the discretionary decision of the employer whether or not to allow the judge to participate in the activities that serve as the basis of granting the bonus**. E.g. a court president can prevent a judge from participating in projects, acting as an instructor for younger judges or being a member in judicial working groups, which automatically deprives them from the possibility of receiving such bonuses.

One example of these bonuses is the normative bonus,<sup>30</sup> the discretionary distribution of which by court presidents lacks any predetermined principles, paving the way to rewarding or punishing judges in a non-transparent way. A further example for rewarding judges is the NOJ President's right to assign judges with "central administrative tasks" for extra allowance.<sup>31</sup> As one judge told Amnesty International, a wide range of tasks may be considered a "central administrative task" and therefore it is possible that judges are assigned with unnecessary tasks (for example, creating three press secretary jobs as central administrative tasks, at a court where only one such job would be enough). Finally, project premiums<sup>32</sup> are special payments, whose beneficiaries are selected at the discretion of the NOJ President, and are also not transparent, cannot be reviewed by any institution outside the NOJ to verify the projects' due performance.

Information on the payment of some of these bonuses are not available even for the NJC that is supposed to exercise oversight over the courts' budgets.<sup>33</sup> On 28 December 2020 the NJC's dedicated committee requested<sup>34</sup> anonymized, individual information about project premiums, purpose-based premiums and other personal premiums paid out in 2018-2019 to i) judges, court secretaries assigned to the NOJ and ii) to court leaders appointed or assigned by the NOJ President, together with these payments' legal basis. The reason for the request was that project premiums, purpose-based premiums and other personal premiums paid out in 2018 amounted to 0.52% of the total personal expenditure at the courts, while 0,66% in 2019. The aim of the request was to learn how much premium each individual received and what were the highest premiums paid out. However, the NOJ President has declined<sup>35</sup> the NJC's request, claiming that the NJC does not have a competence to have access to such data.

As described in HHC's Rule 9 submission submitted in 2019, this type of pressure was also complained about by members of the NJC during their conflict with the previous NOJ President.<sup>36</sup> Similar conclusions can be drawn from Amnesty International Hungary's 2020 research report, which found the following:

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<sup>30</sup> At the end of each year, the part of the courts' financial budget not used in the actual financial year are redistributed by the NOJ equally to the courts, and the court presidents have the discretionary power to award "normative bonuses" to those judges who have at least 6 months' tenure at the court and are not under disciplinary or criminal procedure. Distribution among judges are done by court presidents, taking into account the recommendations of court department leaders.

<sup>31</sup> According to Article 186/A of LSRA, the NOJ President may assign judges with "performing central administrative tasks", in return of which they receive allowance.

<sup>32</sup> According to Article 10 (2) of NOJ Instruction 5/2013. (VI. 25.) on the Financial Management of Courts and the National Office for the Judiciary, this premium may be given to judges who do extra work beyond their adjudicating job, in the framework of an EU project or in a project founded by the NOJ President. For example, a judge based on their experience or special knowledge may be assigned to produce educational materials, train the trainers or directly train other judges in case new procedural laws are being introduced. Judges who are assigned with project tasks are selected at the NOJ.

<sup>33</sup> Article 103 (2) b) of the OAC

<sup>34</sup> <https://www.dropbox.com/s/dxynfp07uvw84qb/5.%20OBT%20bizottsag%20megkereses%202020-12-28.pdf?dl=0>

<sup>35</sup> <https://www.dropbox.com/s/z6x4gml41d6jcp/6.%20OBH%20elnok%20valasza%202021.02.22.pdf?dl=0>

<sup>36</sup> See: DH-DD(2019)877, 2 August 2019, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf), pp. 5-6.

*"There are some financial incentives granted at the discretion of the court leader and not set out in law. A judge told Amnesty International that there was potential for a court president to withdraw a judge's language or other bonus as a tool of retribution. [...] There was a case mentioned where a "renitent" judiciary council president (who was also a college leader) received zero year-end bonus, while the other college leader received a good year-end bonus."<sup>37</sup>*

All above mentioned examples of legislation leaving room for arbitrary application indicate that the failure to resolve the systemic legislative problems continues to create problems and is capable of exerting chilling effect on judges even under a less controversial and confrontational NOJ President. As confirmed by the 2021 EC Rule of Law Report: *"concerns persist as regards the system of bonuses and the power of the authorities managing the courts to award bonuses to judges on a discretionary basis, without objective and transparent criteria."<sup>38</sup>*

#### 4. NEW DEVELOPMENTS CONTRIBUTING TO THE CHILLING EFFECT

Besides the manifest unwillingness of the government to take meaningful measures to execute the judgment, attacks against the independence of the judiciary have continued. Amnesty International Hungary and the Hungarian Helsinki Committee are of the view that **several recent developments which have occurred since the adoption of the 2020 CM Decision have further aggravated the chilling effect on judges' freedom of expression and undermined the independence of judges.**

##### 4.1. ELECTION OF AN EXTERNAL ACTOR AS PRESIDENT OF THE KÚRIA

The election of the current President of the Kúria (the Supreme Court of Hungary), Zsolt András Varga, on 19 October 2020<sup>39</sup> is one further remarkable step in the series of attacks against the independence of the judiciary.<sup>40</sup> As assessed by Justice Baka in December 2020: *"The strategy of the third phase [of attacks against the judiciary] can be achieving a relative calmness within the judicial system, while extraordinary efforts are taken to capture the Kúria forming the peak of the hierarchy."<sup>41</sup>*

**Until his election as President of the Kúria, Mr. Varga was an external actor from the point of view of the judiciary.** He had never served as a judge within the ordinary court system and never presided over a trial before being elected as Chief Justice.

Diego García-Sayán, special rapporteur on the independence of judges and lawyers for the office of the United Nations High Commissioner for Human Rights, has said he is concerned over Hungary's top court president choice: *"[c]oncern is expressed at the election of Justice Varga as the president of the Kúria, which has been made possible by the legislative amendments introduced by the governing majority in April and December 2019."<sup>42</sup>*

**The election of Mr. Varga as President of the Kúria was made possible by three separate *ad hominem* amendments of the pertaining legal regulations.**

<sup>37</sup> Amnesty International Hungary, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, April 2020, <https://www.amnesty.hu/fraudulent-fear-rules-among-hungarian-judges/>, p. 44.

<sup>38</sup> The European Commission's 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, [https://ec.europa.eu/info/sites/default/files/2021\\_rlr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rlr_country_chapter_hungary_en.pdf) p. 6.

<sup>39</sup> András Zsolt Varga was elected by Parliament Decision No. 30/2020 (X. 20.), <https://magyarkozlony.hu/dokumentumok/5bb8bb4906186489d448ed112adcoe14ea6ae46d/megtekintes>

<sup>40</sup> See more in detail: [https://helsinki.hu/wp-content/uploads/The\\_New\\_President\\_of\\_the\\_Kuria\\_20201022.pdf](https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf)

<sup>41</sup> See: András Baka, 'Serious forces came into play' an interview by Szilárd Teczár, Magyar Narancs, 03 December 2020, <https://magyarnarancs.hu/belpol/komoly-erok-mozdultak-meg-134602>

<sup>42</sup> AL HUN 2/2021, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26371>

- (i) The first amendment<sup>43</sup> allowed for the appointment of Constitutional Court justices as “ordinary” judges if they request so, without the otherwise required application procedure and any involvement of judicial self-governing bodies and judges.
- (ii) The second amendment<sup>44</sup> enabled Constitutional Court justices to be transferred automatically to the Kúria after their mandate as constitutional justices comes to an end. (According to the 2021 EU Justice Scoreboard, due to this amendment currently Hungary is the only European Union Member State where a person who has not been a judge can be appointed as a Supreme Court justice by a special procedure, i.e. not in the same procedure as for judges.<sup>45</sup>) It must be noted that the Constitutional Court in Hungary is not part of the ordinary court system, its main task is to assess the constitutionality of legal norms ranking lower than the Fundamental Law. Constitutional justices are nominated and elected by the legislature without any involvement of the representatives of the judiciary. Due to the fact that the incumbent ruling party has the qualified majority required for the nomination and election of constitutional justices, the justices in practice are appointees of a single political party (some of them are former MP’s or Ministers of the party). The result is that the Constitutional Court has been packed with loyalists to the governing majority and has been failing to resist political pressure.<sup>46</sup>
- (iii) Since Mr. Varga did not have any experience as an ordinary judge (he was a high-ranking prosecutor before he was elected as a constitutional justice), another amendment<sup>47</sup> of the legal framework was needed, as a result of which as of 1 January 2020, the rules governing the eligibility criteria for the position of the President of the Kúria (which require candidates to have at least five years of judicial practice) were amended as well, allowing experience as member of the Constitutional Court to be considered as time served as judge. So while at the time of Mr Baka’s dismissal as Supreme Court President the law was amended in a way making it sure that he could not be considered for the presidency of the newly established Kúria (because he had less than five years of practice as a judge within the ordinary judiciary), now the law was amended to guarantee that any new candidate’s lack of any experience as an ordinary judge would not be an obstacle to their election.

The government failed to provide any reasonable justification for the modifications introduced a short while before the election of Mr. Varga, not even to the direct questions of the UN Special Rapporteur on the independence of judges and lawyers.<sup>48</sup>

**Mr. Varga became President of the Kúria as a one-party political appointee and was transferred to the top tier from outside the judicial system.**

In addition to the above, Mr. Varga was elected in **complete disregard for the manifest objection of the NJC, where 13 out of the 14 members opposed his nomination.** The NJC held that the fact that Mr Varga’s appointment was made possible by two recent legislative amendments *“is at odds with the constitutional requirement that requires the head of the judicial system be a person who is independent of the other branches of power and who appears impartial to an outside observer.”* The NJC also emphasised that *“the facts that the candidate has never performed any judicial activity and has no*

<sup>43</sup> Article 55 of Act CXXVII of 2019.

<sup>44</sup> Article 88 (3) of LSRA was amended by Article 119 (2) of Act CXXVII of 2019.

<sup>45</sup> [https://ec.europa.eu/info/sites/default/files/eu\\_justice\\_scoreboard\\_2021.pdf](https://ec.europa.eu/info/sites/default/files/eu_justice_scoreboard_2021.pdf) p. 45, Figure 53

<sup>46</sup> In more detail, see e.g.: [https://helsinki.hu/wp-content/uploads/2021/03/AIHU\\_EKINT\\_HHC\\_UPR2021\\_Hungary\\_RoL\\_web.pdf](https://helsinki.hu/wp-content/uploads/2021/03/AIHU_EKINT_HHC_UPR2021_Hungary_RoL_web.pdf), paras 7–16 and 40,

<sup>47</sup> Article 114 of the OAC was amended by Article 1 of Act XXIV of 2019 on the Additional Guarantees of the Independence of Administrative Courts.

<sup>48</sup> See: <https://helsinki.hu/en/the-appointment-of-andras-zs-varga-not-even-the-un-was-provided-with-an-explanation-by-the-government/>

*courtroom experience, nor practical experience of litigation or court administration, cannot be overlooked. Since the transition (1989), all presidents of the Supreme Court (Kúria) served as judges previously at some point of time.*"<sup>49</sup>

The Parliament however gave no consideration to the concerns and objections of the representative body of the judiciary, and put Mr. Varga in the position of the Kúria's President. **Undoubtedly, the mere presence of a person who was voted for by one party only at the top tier of the whole Hungarian judicial system in itself is capable of exerting a chilling effect amongst judges (most directly amongst judges of the Kúria).** Nevertheless, the election of Mr. Varga is all the more concerning for several further circumstances as detailed below, being capable of deepening the chilling effect on the right to freedom of expression and having a negative effect on the independence of judges.

(i) As an academic, Mr. Varga proved to be **an advocate for limiting the independence of the judiciary.** In his view *"undoubtedly, the judiciary is the most dangerous branch of power"* and therefore *"it is an urgent task to re-discover and enforce the natural limits of judicial independence."*<sup>50</sup> According to Mr. Varga, *"the concept of judicial self-administration is a consequence of a misunderstanding"* as *"judicial councils pose more risk than the benefits they provide"* and *"[t]heir only 'benefit' is to politicize the judiciary."* He suggested that *"[i]t is worth reconsidering the domestic legislation in order to eliminate the weird misunderstanding of the role of judicial councils, the delusion of judicial self-governance."*<sup>51</sup> With respect to the possibility of judges to criticize the legislation regarding the judiciary, he claimed: *"there is one thing a judge can never do: determine the law, because it is the 'task of politics'."*<sup>52</sup>

(ii) Being the President of the Kúria, **Mr. Varga became an ex officio member of the NJC and is therefore directly involved in the work of the NJC and may put NJC members under pressure in taking their decisions and formulating their opinions also in that capacity.** Not long after being elected, Mr. Varga reprimanded an NJC member for expressing views on the deficiencies of the case Kúria's allocation system in an article published online. The article published by two prestigious Hungarian judges (the reprimanded member of the NJC and a chamber president at the Kúria) claimed that *"there are several occasions when court presidents can misuse their powers regarding case allocation rules to influence the outcome of court cases"* and presented a typical scenario: *"A judge who had several years of experience adjudicating in immigration cases was suddenly getting no more of these cases after officials of the Immigration Authority complained to the President of the Administrative Court about certain judgments. [...] There is no remedy against the allocation of cases by the President of the Administrative Court."*<sup>53</sup> After the article was published, at the 3 February 2021 meeting of the NJC, Mr. Varga reprimanded the NJC member author of the analysis for voicing such a "serious criticism" and called on him to publish another, rectifying article on the same website on the basis that the Kúria's case allocation scheme was about to be changed (which of course was not foreseeable for the author at the time of writing his analysis).<sup>54</sup>

(iii) Mr. Varga as President of the Kúria **holds the same unlimited and uncontrollable powers in relation to the appointment of judges and judicial leaders at the Kúria as the NOJ President with**

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<sup>49</sup> In Hungarian: <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/>, in English: <https://orszagosbiroitanacs.hu/english/>

<sup>50</sup> András Zs. Varga: 'Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?' in: 'A jog többretekűsége', Acta Carolinensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: [https://ajk.kre.hu/images/doc6/kiadvanyok/A\\_jog\\_tobbretegusege.pdf](https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf), p. 91.

<sup>51</sup> See more: [https://helsinkih.hu/wp-content/uploads/Now\\_its\\_time\\_to\\_worry\\_20210107.pdf](https://helsinkih.hu/wp-content/uploads/Now_its_time_to_worry_20210107.pdf), p. 6.

<sup>52</sup> See footnote 29 above.

<sup>53</sup> András György Kovács and Viktor Vadász: *A game hacked by the dealer*, <https://verfassungsblog.de/a-game-hacked-by-the-dealer/>

<sup>54</sup> See: <https://orszagosbiroitanacs.hu/2021-02-03/>

**regard to the lower courts.**<sup>55</sup> He is also entitled to declare any call for application to the Kúria invalid under the same rules as the NOJ President, leaving room for arbitrary application [see above under section 3.2.].

As concluded by the 2021 EC RoL Report "[t]hese developments confirm the concerns already flagged in the 2020 Rule of Law Report, with an appointment to the top judicial post being decided without involvement of a judicial body, and not in line with European standards. [...] In the light of the administrative powers of the Kúria President and the key role of the Kúria in the justice system, these developments raise serious concerns as regards judicial independence."<sup>56</sup>

#### 4.2. JUDGE FORCED OUT FROM THE JUDICIARY FOR POLITICAL REASONS

The most recent development capable of producing a general **negative effect beyond the individual instances and of dissuading judges from acting independently in accordance with the laws was the case of a judge who claimed to be pushed out from the judiciary for political reasons.**<sup>57</sup> The case concerned an administrative judge appointed for a definite period of time in accordance with the law that prescribes the first appointment to create a **probatory tenure of three years.** This legal solution was already criticized by the Venice Commission in 2012, warning that: *"This means that a person who is already acting in a judicial function could remain in a precarious situation for up to nine years (six years as court secretary and three years in probationary period). The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years and – wishing to please superior judges who evaluate his or her performance – may behave in a different manner from a judge who has permanent tenure ("pre-emptive obedience"). Probationary periods are problematic already as such. The additional time as court secretary further aggravates this problem."*<sup>58</sup>

During her term as probatory judge, Justice Gabriella Szabó turned to the Court of Justice of the European Union (CJEU) to request a preliminary ruling on the asylum rules introduced by the Hungarian government in 2018. Based on her request, the CJEU in March 2020 ruled that the new Hungarian rules were indeed contrary to EU legislation. This ruling made the migration policy of the government legally unsustainable. Not much later, the evaluation process of Justice Szabó became due as prescribed by law, ahead of her appointment for an indefinite period. As a result of the evaluation process, she was disqualified in March 2021, and as a consequence her mandate ended with the lapse of the definite term, before her case initiated at the service court (which has the right to review the disqualification) could be adjudicated. The 2021 EC RoL Report also raises concerns regarding the fact that in such cases "the service court cannot grant interim relief to prevent an interruption of the judicial career during the review of the evaluation."<sup>59</sup>

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<sup>55</sup> Exercising his powers to nominate and appoint judicial leaders and justices to the Kúria, Mr. Varga has recommended Mr. Patyi as Vice-President of the Kúria, who was formerly appointed as rector of a university heavily supported by the government and at the same time, fulfilled the position of President of the National Election Office serving with perceived loyalty towards the government (see: <https://helsinki.hu/en/yet-another-government-friendly-judicial-leader-at-the-supreme-court-of-hungary/>). He also appointed as judge Mr. Hajas, a former state secretary at the Ministry of Justice (see: <https://telex.hu/belfold/2021/06/01/hajas-barnabas-biroi-kinevezes-kuria-varga-zs-andras>).

<sup>56</sup> The European Commission's 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf) p. 6.

<sup>57</sup> See: <https://euobserver.com/democracy/152349>

<sup>58</sup> See: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e) section 68.

<sup>59</sup> The European Commission's 2021 Rule of Law Report Country Chapter on the rule of law situation in Hungary, [https://ec.europa.eu/info/sites/default/files/2021\\_rolr\\_country\\_chapter\\_hungary\\_en.pdf](https://ec.europa.eu/info/sites/default/files/2021_rolr_country_chapter_hungary_en.pdf) p. 7.

According to Justice Szabó, after making a preliminary reference, *"I was immediately subject of harassments and discrimination in Hungary, also within my court."* She also claimed to have received *"a private warning from a former president of the administrative and labour court - where Szabó worked - that with such decisions she 'won't be prolonged for indefinite time'."*<sup>60</sup> In her words: *"It is presumable that the real motivation of my removal from the judiciary can be linked to my previous order for a preliminary reference that interferes [with] the political interests of the Hungarian government. Although my superiors didn't refer to this directly as the main reason of my disqualification, but the general circumstances and certain overlaps clearly show the malicious intentions of the court management."*<sup>61</sup>

This has not been the first time that a Hungarian judge faced negative consequences after submitting a preliminary ruling request. In 2019, a disciplinary proceeding was initiated against Justice Csaba Vasvári after he raised questions regarding compliance with the principle of judicial independence under the Treaty of the European Union, particularly the appointment procedures for court presidents and the remuneration for judges.<sup>62</sup> Although the disciplinary proceeding was later dropped, judges believed it was a retaliation for a preliminary ruling request he filed at the Court of Justice of the European Union.<sup>63</sup>

Retaliation, or threats of retaliation against Hungarian judges who use their right to address legal questions for clarification of EU laws with the CJEU sends a message to the other Hungarian judges that it is not worthwhile, or it is even risky to turn to the CJEU if there is a possibility that political expectations conflict with the EU acquis. Such threats can paralyze judges and can further erode the independence of the judiciary.

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<sup>60</sup> See: Eszter Zalán: Hungarian judge claims she was pushed out for political reasons, available at: <https://euobserver.com/democracy/152349>

<sup>61</sup> In a similar recent case, with regard to disciplinary proceedings, the ECJ stated that "by allowing the right of courts and tribunals to submit requests for a preliminary ruling to the Court of Justice to be restricted by the possibility of triggering disciplinary proceedings, the Republic of Poland has failed to fulfil its obligations under the second and third paragraphs of Article 267 TFEU" (Judgement of 15 July 2021, C-791/19, EU:C:2021:596, par. 235)

<sup>63</sup> See: <https://helsinki.hu/en/the-kuria-cannot-act-as-an-eu-court-because-it-is-not-one/> and DH-DD(2020)686, 29 July 2020, [https://helsinki.hu/wp-content/uploads/AlHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://helsinki.hu/wp-content/uploads/AlHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf)



## RECOMMENDATIONS

Amnesty International Hungary and the Hungarian Helsinki Committee respectfully recommend the Committee of Ministers to **continue examining under enhanced procedure the execution of the judgment** in the *Baka v. Hungary* case, and to **call on the Government of Hungary to:**

- **Protect the integrity of the NJC's judge members** by taking effective measures to guarantee that they can exercise their statutory rights and obligations of safeguarding judicial independence through, among others, formulating and disseminating critical opinions on the administration and independence of the judiciary **without any undue interference**. Such measures may include that the NJC be provided legal personality and greater budgetary autonomy in order to effectively carry out its tasks determined by the Fundamental Law of Hungary, or that the NJC have broader powers and tools to take the necessary measures if the NOJ President fails to carry out their statutory obligations and follows an unlawful practice despite the notice made by the NJC about the irregularities;
- More effective protection of NJC's judge members should be ensured against intimidation, attacks on their reputation as well as retaliatory administrative and other measures;
- **Amend the legislation providing the NOJ President's with overly broad and excessive powers regarding the appointment of court leaders** in a way that the law prescribes clear criteria for invalidating court leadership applications and requires the consent of the NJC for the invalidation;
- **Provide a thorough *de iure* analysis of the Hungarian legislation** identifying provisions capable of exerting a negative influence on judges, taking into account the concerns raised by international stakeholders;
- **Refrain from and condemn any public harassment, intimidation or retaliation against judges**, and communicate clearly that while criticism of jurisprudence as a part of a public debate is necessary in a pluralistic society, personal attacks against judges are unacceptable;
- **Abstain from** any public critique, recommendation, suggestion or solicitation regarding court decisions **that may constitute direct or indirect influence** on pending court proceedings or otherwise undermine the independence of individual judges in their decision-making;
- Amend the law in order to ensure that the **remuneration of judges is based on a general standard and rely on objective and transparent criteria** and **phase out bonuses which include an element of discretion**;
- Amend the law<sup>64</sup> to ensure that **if a judicial leader challenges their dismissal** by launching a lawsuit, and if the judge concerned is reinstated, legal guarantees ensure that the **judge may be reinstated to their former leadership position**, for example, by making sure that the position could only be filled temporarily;
- **Address the issue of judicial independence holistically and comprehensively**.<sup>65</sup> In order to address the long-standing structural problems and to ensure the independence of the judiciary, **the laws on the judiciary should be amended to ensure compliance with**

<sup>64</sup> Act CLXII of 2011 on the Legal Status and Remuneration of Judges

<sup>65</sup> For a comprehensive list of recommendations in this regard, see: Amnesty International – Hungarian Helsinki Committee, *Recommendations aimed at restoring the independence of the judiciary in Hungary*, December 2019, [https://www.helsinki.hu/wp-content/uploads/Hungary\\_rec\\_judiciary\\_AI-HHC\\_01122019.pdf](https://www.helsinki.hu/wp-content/uploads/Hungary_rec_judiciary_AI-HHC_01122019.pdf), <https://www.amnesty.hu/hu/news/2656/recommendations-aimed-at-restoring-the-independence-of-the-judiciary-in-hungary>; Amnesty International, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, 2020, [https://www.amnesty.hu/data/file/4871-final\\_fearing-the-unknown\\_report\\_amnesty-hungary\\_e1.pdf?version=1415642342](https://www.amnesty.hu/data/file/4871-final_fearing-the-unknown_report_amnesty-hungary_e1.pdf?version=1415642342), pp. 10-12.

international standards<sup>66</sup> and specific recommendations on the situation of the Hungarian judiciary by international bodies including the Venice Commission,<sup>67</sup> the Council of Europe Commissioner for Human Rights,<sup>68</sup> and the Council of Europe Group of States against Corruption.<sup>69</sup>

Sincerely yours,



András Kristóf Kádár  
co-chair  
Hungarian Helsinki Committee



Dávid Vig  
director  
Amnesty International Hungary



Annexes:

Annex 1 – Amnesty International Hungary’s freedom of information request regarding the documentation of judicial integrity surveys conducted in and after 2015 (19 October 2020)

Annex 2 – The NOJ’s refusal to provide the documentation (3 November 2020)

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<sup>66</sup> Inter alia, the United Nation’s Basic Principles on the Independence of the Judiciary, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx> and the Venice Commission’s Report on the Independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004, 6 March 2010

<sup>67</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020-e, 15 October 2012, [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)

<sup>68</sup> Commissioner for Human Rights of the Council of Europe Dunja Mijatović, *Report Following her Visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, 21 May 2019

<sup>69</sup> Group of States against Corruption, *Fourth Evaluation Round – Corruption prevention in respect of members of parliament, judges and prosecutors. Interim Compliance Report – Hungary*, GrecoRC4(2018)16, available at: <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680969483>