

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 44/8.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the election of Mr. András Zsolt Varga as the President of the Kúria.

It is alleged that the election of Mr. Varga has only been made possible as a result of a series of legal amendments to the Hungarian legislation aimed at facilitating his election, and despite the manifest objection of the National Judicial Council, Hungary's judicial self-governing body.

According to the information received:

The election of Justice Varga as President of the Kúria

On 1st January 2021, Justice András Zsolt Varga took his seat as the President of the Kúria, Hungary's Supreme Court, for a period of nine years. Allegedly, Justice Varga would not have been eligible as candidate for the Kúria if it was not for two legal amendments that paved the way for his election by widening the pool of eligible candidates and introducing exceptions to the ordinary application procedure.

These two legal amendments were the following:

- In April 2019, the rules governing the eligibility criteria for becoming President of the Kúria (which required a minimum of five years of judicial practice as ordinary judge to qualify as a candidate to the Kúria's Presidency) were amended, allowing experience as member of the Constitutional Court to be considered as time served as judge.¹
- In December 2019, the legislature adopted an omnibus act allowing members of the Constitutional Court to be appointed as ordinary judges upon their request and without an application procedure, as was established in the previous rules.² According to the new rules, once the judicial appointment is activated, former members of the Constitutional Court automatically become justices at the Kúria.³

¹ Article 1 of Act XXIV of 2019 on Further Safeguards Guaranteeing the Independence of Administrative Courts, subsequently modified by Article 114 (1) of Act CLXI of 2011. The new eligibility criteria entered into force on 1 January 2020.

² Act CXXVII of 2019 on Amendment of Certain Laws with regard to Introducing a One-level Procedure by Local Government Offices.
Article 119 (2) of Act CXXVII of 2019 on Amendment of Certain Laws with regard to Introducing a One-level Procedure by Local Government Offices.

In a statement issued in November 2019, the Commissioner for Human Rights of the Council of Europe expressed concerns that in its current form, the then omnibus bill “may have a negative effect on the internal independence of courts and judges and fair trial guarantees for individuals.”⁴ 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.”

Hungarian civil society organisations raised similar concerns. Amnesty International drew attention to the fact that “the Bill opens the way for Constitutional Court 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.”⁵ Similarly, the Hungarian Helsinki Committee noted that since the legislature is at present dominated by one party, the channelling of Constitutional Court members to the Kúria would have the effect of parachuting political appointees elected by the governing majority without the involvement of the opposition into the highest judicial positions.⁶

In September 2020, as part of its 2020 Rule of Law Report, the European Commission warned that the legislative changes introduced with the omnibus act “have de facto increased the role of Parliament in judicial appointments to the Kúria”, allowing for the appointment to the Supreme Court “of members of the Hungarian Constitutional Court, elected by Parliament, outside the normal procedure”. The European Commission also observed that the widening of the eligibility criteria has had the effect of increasing the pool of candidates that could potentially be elected as Kúria President, thereby increasing the discretion of the President of the Republic in this regard.

On 5 October 2020, the President of the Republic of Hungary nominated Justice Varga, a member of the Constitutional Court, as future President of the Kúria.

On 9 October 2020, the National Judicial Council (NJC) provided its consultative, non-binding opinion on the candidate nominated by the President of the Republic. An overwhelming 13-1 majority rejected the nomination of Justice Varga as President of the Kúria, because “the candidate [had] never performed any judicial activity and [had] no courtroom experience, nor practical experience of litigation or court administration”. The NJC noted that his candidature was made possible by legislative amendments referred to above, “which 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.”⁷

On 19 October 2020, the Hungarian Parliament elected Mr. András Zsolt Varga as the new President of the Kúria. The qualified majority held by the governing party allegedly enabled the election of Mr. Varga despite the objection of the opposition parties.

⁴ <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>

⁵ <https://www.amnesty.hu/wp-content/uploads/2020/10/ANALYSIS.pdf>

⁶ https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf

⁷ <https://orszagosbiroitanacs.hu/english/>

As President of the Kúria, Justice Varga has become the one and only member of the NJC that although not elected by judicial peers, is involved in the decision-making processes of the self-governing judicial body.

On 1 January 2021, Justice Varga took his seat as the President of the Kúria. Simultaneously, an omnibus act widening the powers of the President of the Kúria within the judiciary also entered into force (see below).

Legal amendments strengthening the powers of the Kúria President

The President of the Kúria has extensive administrative and managerial powers in relation to all aspects of the judicial career of Kúria justices (e.g. appointment, evaluation, promotion and discipline of justices). S/he also determines the case allocation scheme of the Kúria and allows derogations from it. The extensive powers referred to above have been further increased by the Parliament:

- (i) As of 1st July 2020, an additional level of judicial review was introduced in the ordinary court system, affecting all court proceedings. According to the new rules, the Kúria shall have exclusive competence to conduct a new procedure, called “complaint for the unification of jurisprudence”, which was introduced with the aim of guaranteeing uniform interpretation of the law by national courts. The new rules governing the unification process grant the President of the Kúria an exclusive right to select members of the unification panels. Consequently, Justice Varga gained a privileged role both in the adjudication of individual cases at the final instance and in shaping the mandatory interpretation of the law.
- (ii) On 15 December 2020, the Parliament adopted the omnibus act that further widened the powers of the President of the Kúria within the judiciary.⁸ As of 1st January 2021, the President of the Kúria is empowered to select Vice-Presidents for the full term of his/her mandate and 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 by a grand panel consisting of five justices instead of three.

These powers may allow the President of the Kúria to create new judicial positions within the supreme court, and hence to increase the number of judges loyal to the Kúria President and to the governing majority (e.g. by appointing constitutional justices who served as justices at the Constitutional Court).

In 2020, several Constitutional Court justices elected with the votes of the governing parties in the Parliament were appointed at their request as ordinary judges.⁹ As ordinary judges, these politically-appointed judges may operate in the future as Heads of Panel at the Kúria circumventing the otherwise obligatory application procedure. This cast serious doubts as to the

⁸ Act CLXV of 2020 on the amendment of certain acts regarding the judiciary.

⁹ Amnesty International, Status of the Hungarian Judiciary - Legal Changes Have to Guarantee the Independence of the Judiciary in Hungary, 2021, p. 26.

independence and impartiality of these judges, who may feel pressured to adjudicate cases in which the State is a party in favour of the State authorities in order to minimize the risk of being dismissed. Similarly, other justices of the Kúria may be inclined to uphold the Government's position in similar cases in order to improve their chance of becoming Heads of Panel in the future. In both cases, the independence and impartiality of the judge are under threat, and the perception of his/her independence and impartiality is irremediably compromised.

Without prejudging the accuracy of the information received, concern 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. His appointment may be regarded as an attack to the independence of the judiciary and as an attempt to submit the judiciary to the will of the legislative branch, in violation of the principle of separation of powers.

The fact that Justice Varga was elected in spite of the manifest objection of the NJC, the judicial self-governing body, is of particular concern. The decision to ignore the negative opinion expressed by the NJC may be interpreted as a political statement by the ruling majority that does not consider itself bound to respect judicial independence by abiding to, or at least taking into account, the views expressed by the body constitutionally assigned to safeguard the independence of courts and judges.

These concerns are further exacerbated by the far-reaching reform of the judicial system, initiated by the governing majority in 2010. Considered in their entirety, it appears that the main effect — if not the main goal — of these measures has been to hamper the constitutionally protected principle of judicial independence and to enable the legislative and executive branches to interfere with the administration of justice. As a result, the independence of justice and institutional checks and balances are now under threat in Hungary, as noted by several international and regional bodies, such as the Human Rights Committee, the Venice Commission, the CoE Commissioner for Human Rights and the European Commission.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain the rationale behind the legislative amendments introduced in April and December 2019 to the procedure for the appointment of justices of the Kúria, and indicate how they can be regarded as in line with the principle of independence of the judiciary and the separation of powers.

3. Please comment on the allegation that the two legal amendments have only been introduced to facilitate the appointment of the candidate chosen by the ruling majority to the Kúria.
4. Please explain why the Parliament decided to appoint Justice Varga as President of the Kúria despite the negative opinion of the NJC on the candidate nominated by the President of the Republic. How can the disregard of the opinion of the self-governing judicial body be regarded as compatible with the principle of judicial independence?
5. Please provide further information on the strengthening of the powers of the President of the Kúria vis-à-vis other justices in the Kúria, and explain to what extent these powers may be deemed compatible with the principle of individual (or personal) independence, according to which judges “shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason” (Principle 2 of the Basic Principles on the Independence of the Judiciary).

I would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency’s Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is prescribed in article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Hungary on 17 January 1974, which establishes the right a fair and public hearing by a competent, independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which Your Excellency's Government ratified on 5 November 1992, includes similar provisions. According to article 6, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As a Member State of the European Union, Hungary is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (article 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is legally binding on Hungary, reflects fair trial requirements relating to an independent and impartial tribunal previously established by law.

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, inter alia, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

The general functions, composition and core competencies of judicial councils are dealt with in a number of principles, guidelines and recommendations adopted under the aegis of the Council of Europe. These instruments include opinion No. 10 (2007) of the Consultative Council of European Judges on "the council for the judiciary at the service of society", and the Magna Carta of Judges (Fundamental Principles), adopted at the 11th plenary meeting of the Consultative Council of European Judges, held in Strasbourg, France, from 17 to 19 November 2010.

In a report on national judicial councils (A/HRC/38/38), the Special Rapporteur on the independence of judges and lawyers highlighted the essential role that judicial councils play in guaranteeing the independence and the autonomy of the judiciary, and included a number of recommendations relating to the establishment, composition and functions of judicial councils aimed at ensuring the independence of such bodies and their effectiveness in the discharge of their functions as guarantors of judicial independence.

The Special Rapporteur considers that in order to guarantee their independence from the executive and legislative branches and ensure effective self-governance for the judiciary, judicial councils should be established under the Constitution in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument in other countries. The Constitution or the equivalent basic law should include detailed provisions regarding the setting-up of such a body and its composition and functions, and guarantee the autonomy of the council vis-à-vis the executive and legislative branches of power (para. 92).

With regard to the duties and responsibilities of judicial councils, the Special Rapporteur considered that these bodies should be endowed with the widest powers in the field of selection, promotion, training, professional evaluation and discipline of judges. They should have general responsibilities with regard to the administration of the court system and/or the allocation of budgetary resources to the various courts (para. 94).

In relation to the selection and appointment of judges, the Special Rapporteur recommended that decisions on the appointment and promotion of judges should be taken through a transparent process by a judicial council or an equivalent body independent of the legislative and executive branches of powers (para. 97), and warned against the involvement of the legislative or executive branches of power in judicial appointments, which may lead to the politicization of judicial appointments (para. 99). In cases in which judges are formally appointed by the Government, the appointment should be made on the basis of the recommendation of the judicial council that the relevant appointing authorities follow in practice.