Note to the reader
Please support our work by the symbolic adoption of one or more of our analyses.
Thank you for your support!

For bank transfers in HUF: 11600006-00000000-78417407 (IBAN: HU56 1160 0006 0000 0000 7841 7407)
For bank transfers in EUR: 11600006-00000000-78416231 (IBAN: HU89 1160 0006 0000 0000 7841 6231)
For bank transfers in USD: 11600006-00000000-78416303 (IBAN: HU85 1160 0006 0000 0000 7841 6303)

Judicial Independence and the Possibility of Judicial Resistance in Hungary

1. Introduction

The present study examines the state of judicial independence in Hungary at the end of 2020. Judicial independence has two traditional dimensions: it includes, on the one hand, the independence of the judicial organisation as a whole vis-à-vis powers external to courts (*external independence*), and on the other hand, it also requires the personal independence of judges within the organisation (*internal independence*).[1] When we generally wish to make any claim concerning the state of Hungarian courts, we must examine these two dimensions together, at the same time.

Although the study primarily analyses the latest developments, it seeks to assess the situation of the judiciary in a broader historical context. This broader focus can also be justified because the resilience of independent institutions does not depend solely on how and to what extent those in power intend to destroy the conditions of autonomy. The situation of independent institutions is also affected by their previous state: in other words, an organisation with less autonomy is more exposed to pressures from politics and power than a well-established institution with an organizational culture embodying independence and professional values. All of this means, therefore, that the consequences of developments after 2010 do not only reflect the results of the post-2010 period. They also show, in fact, the early condition of the Hungarian judicial organisation, which has been systematically weakened by the Fidesz-KDNP government coming into power in 2010, sometimes with clearly visible and sometimes with less conspicuous tools.

---

[1] See for instance: Russell, P.H., 2001. Toward a general theory of judicial independence. In: Russel, P. H., O´Brien, D. M. (eds.) *Judicial independence in the age of democracy: Critical perspectives from around the world*, *1*(5). University Press of Virginia, Charlottesville, London, pp. 11-12; or Sillen, J., 2019. The concept of 'internal judicial independence 'in the case law of the European Court of Human Rights. *European constitutional law review*, *15*(1), pp. 104-133

The rule of law report published by the European Commission in the autumn of 2020 describes in detail the current problems relating to the independence of the Hungarian judiciary.[2] The Commission's report mentions a number of critical areas, but it is also clear that the pressure in recent years has primarily weakened the internal independence of the courts. Open political intervention, such as the early termination of the mandate of the President of the Supreme Court, the forcing of a large number of judges into retirement, or the introduction of a centralised model of court administration linked to political power and operating without adequate institutional guarantees, already took place in the early 2010s, so in more recent years some softer, less spectacular forms of restraining independence have dominated in the judicial organisation. It is no coincidence that currently there is no pending infringement procedure against Hungary for violating the rules of judicial independence. The only exception could have been the planned reform of setting up separate administrative courts, but the government eventually withdrew from this blatant attempt to intervene in the functioning of the ordinary judiciary. However, the weakening of the external independence of the judicial organisation has come to the foreground again in 2020, largely due to open political attacks by government officials and partly by the completely politicised selection process of the new President of the Supreme Court (*Kúria*)[3].

The purpose of this study is twofold. On the one hand, it intends to provide an overview of the state of judicial independence in Hungary at the end of 2020. On the other hand, it also sets out to answer the questions concerning the level of resilience the Hungarian judicial organisation has, and where those points within the organisation are that can play a prominent role in the struggle for autonomy. Answering the second question may foreshadow where further attacks could be expected from the political power, as well as at which points the organisation should be reinforced in case of a political transition toward the rule of law.

2. Does judicial independence still exist?

2.1. The independence of decision-making

The independence of the judicial organisation can be tested at many points in the functioning of the courts. The independence of decision-making, i.e. ensuring that the judge acting in an individual case can deliver the judgment without any external influence, is the essence of judicial independence. A judge cannot be instructed to render a specific decision, and likewise cannot suffer any retaliation in view of the content of the individual decision either. Although Michal Bobek still argued in 2008 that the requirement of independence for decision-making has consolidated in Central European countries as well,[4] this claim can no longer be maintained in connection with present-day Hungary. Since 2010, the political power has tried to put pressure on judges acting in specific cases, using a variety of ways, to ensure that a judgment corresponding to the interests of the government is delivered. An example for such pressure is

[2] European Commission, 2020 Rule of Law Report Country Chapter on the rule of law situation in Hungary, Brussels, 30.9.2020 SWD(2020) 316 final, pp. 2-9, available at: https://eur-lex.europa.eu/legal-content/HU/TXT/PDF/?uri=CELEX:52020SC0316&from=EN.

[3] Kúria is a name of the Hungarian Supreme Court since 2012.

[4] Bobek, M., 2008. The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries. *European Public Law*, *14*(1) pp. 99 – 123

when members of the government or senior politicians comment on pending cases, conveying the expectations of power to the judicial organisation. But there has also been an example of a judge being subjected to disciplinary proceedings for his decision taken in a case: Péter Tatár-Kis, the acting president of the Budapest-Capital Regional Court (*Fővárosi Törvényszék*) initiated disciplinary proceedings against Csaba Vasvári for referring questions to the Court of Justice of the European Union (CJEU), including questions relating to the independence of the judicial organisation.[5] Although the initiation of disciplinary proceedings was subsequently withdrawn by the president of the regional court with reference to "the interest of the judicial organisation",[6] his reaction had sent a clear message to the judges working in the organisation: in the event of decisions that are unpleasant for the government, they can expect retaliation.

In 2020, we saw a number of examples for the ability of courts to take decisions that meet the rule of law requirements and protect fundamental rights also under strong political pressure. In May, for example, the Supreme Court maintained the pecuniary damages awarded to Roma students illegally segregated and provided with lower-quality education for many years by "Nekcsei Demeter" Primary School in Gyöngyöspata, despite the enormous political pressure on the court.[7] The Supreme Court also delivered its judgment in the case in which the applicants asserted the discriminatory practices of the maternity department of a hospital in Miskolc. In this case, while maintaining the decision of lower-level courts, the Supreme Court confirmed that the hospital directly discriminated against pregnant women and indirectly against those belonging to the Roma nationality by charging them for the protective clothing of the persons accompanying them.[8] Indirect discrimination consisted of the fact that the practice of the hospital disproportionately affected Roma people who were overrepresented among those living in extreme poverty.

The Miskolc Regional Court also had to endure significant political pressure while hearing the case in which the claimants challenged the amendment of the law banning people from legally changing gender in an administrative lawsuit by claiming that the new provision resulted in a disproportionate restriction of human dignity and the right to privacy, and therefore was contrary to the Fundamental Law and international treaties.[9] As the amendment of the law ordered the application of the ban also to pending cases, the Miskolc Regional Court referred the case to the Constitutional Court on grounds of violation of the rule of law and the right to a fair trial.[10] The content of the judicial initiative clearly indicates the state of judicial independence: the judges in Miskolc avoided dignity-based argumentation, or reference to other

[5] The case is currently pending before the CJEU under no. C-564/19.

[6] https://mabie.hu/attachments/article/1501/F%C5%91v.Tsz%C3%A9k.mb.eln%C3%B6k%C3%A9nek.k%C3%B6zlem%C3%A9nye2.pdf

[7] Judgment no. Pfv. IV.21.556/2019/22 of the Supreme Court

[8] Judgment no. Pfv. IV.20.677/2019/8 of the Supreme Court. Available at http://www.errc.org/uploads/upload_en/file/5261_file1_ku%CC%81ria-i%CC%81te%CC%81let-edited.pdf.

[9] https://hatter.hu/hirek/miskolci-torvenyszek-alaptorveny-ellenes-a-transz-emberek-nemenek-jogi-elismereset-tilto.

[10] The application is available here: http://public.mkab.hu/dev/dontesek.nsf/0/cb4ca4e8f72d33dfc125863a00604976/$FILE/III_2030_0_2020_Inditvany_anonim.pdf.

substantive fundamental rights, which would have essentially call into doubt any restriction of the provisions on gender change, as this would have been the most apparent form of confrontation with political power. Nevertheless, the step taken by these judges shows significant courage and commitment to the rule of law, as the application, even in this form, can also constitute a criticism of government action and an impediment to the enforcement of this serious human rights violation.

The list of independent judicial actions in politically sensitive cases can be further continued: the ruling of the CJEU that directly resulted in the closing of transit zones was the result of a preliminary ruling procedure, since there were some brave judges at the Administrative and Labour Court of Szeged who brought the serious problems with the Hungarian legislation on asylum before the EU court. These references were issued at the end of 2019,[11] after a criminal panel of the Supreme Court, on the motion of the chief prosecutor and in violation of both Hungarian and EU rules, declared the above-mentioned request of Judge Vasvári for a preliminary ruling, which also contained politically sensitive issues, as unlawful.[12] The former, unprecedented form of political pressure, however, did not seem to have deterred the judges of Szeged from acting in accordance with the ethos of judicial independence. A similar approach is also manifested in the court rulings that declared the strike by the staff of the University of Theatre and Film Arts (*SZFE*) as lawful.[13]

Within the confines of this study, it is not possible to systematically analyse the judicial practice of the past period, nor to provide a comprehensive analysis of the decisions of the courts in politically sensitive cases. However, the cases mentioned above can clearly be taken as an indication of the fact that the political power has not been able to completely undermine the professional integrity of the courts. This insight is not necessarily a novelty, of course, since even in case of courts operating in authoritarian systems, individual decisions contrary to the ideology of the system are not unprecedented.

The importance and political sensitivities of the above-mentioned cases are illustrated by the fact that in 2020 the government launched a campaign against the Roma community that was even tougher than in previous years, while the other priority target group of the government's hate campaign was the LGBTQ community, including transgender people. The anti-refugee campaign has been ongoing since 2015, and the adoption of rules to make asylum applications completely impossible took place in 2020, suggesting that the government does not want to withdraw from the plan for completely dismantling the asylum system.[14] As regards the hostile

[11] See the applications at
http://curia.europa.eu/juris/showPdf.jsf?text=&docid=225890&pageIndex=0&doclang=HU&mode=req&dir=&occ=first&part=1&cid=22564365, and
http://curia.europa.eu/juris/showPdf.jsf?text=&docid=225875&pageIndex=0&doclang=hu&mode=req&dir=&occ=first&part=1&cid=22563860.
[12] Judgment no. Bt.III.838/2019/11. of the Supreme Court of Hungary
[13] https://24.hu/kultura/2020/12/04/jogeros-a-fovarosi-itelotabla-dontese-arrol-hogy-az-szfe-oktatok-es-diakok-sztrajkja-jogszeru/
[14] In November 2020, the European Commission has launched an infringement procedure against Hungary concerning the new asylum legislation, adopted after transit zones were closed in May. See https://ec.europa.eu/commission/presscorner/detail/et/IP_15_6228. The UN High Commissioner for Refugees

government attitude towards SZFE, it is evidenced by a series of unconstitutional actions spanning many months, which are reflected partly in decisions by the government and partly in the actions of the new university leadership appointed by it.[15] Against this background, the above-mentioned decisions indicate that even the overt political attacks did not break the professional integrity of certain judges.

It can be concluded, then, that it is worth using ordinary courts and litigation, whether as a citizen, a lawyer or a human rights organisation, for challenging arbitrary measures of political power and for pointing to the rule of law standards of the exercise of power. The judiciary, in fact, proves to be the last political institution that seeks to maintain the rule of law in thinking and language, thus representing normative principles that may guide the process of restoring the rule of law and constitutionalism in Hungary.

2.2. Administration of the judicial organisation

2.2.1. Central administration

Of course, the resilience of a judicial organisation can be tested not only through individual judgments. Other features of the organisation's operation may also indicate the degree of autonomy and independence. In recent years, the "scandals" of the central court administration have been making news both in Hungary and internationally. The current model of court administration – which is based on a strong, single-person, managerial-type of leadership, combined with the relatively weak controlling function of judicial self-governance – was created in 2012, precisely as a response to the dysfunctional operation of the earlier administrative model. The problems of the former central administration, based on the full self-governance of the judiciary, are well known: low operational efficiency, a complete lack of transparency and accountability, strong corporatism and nepotism.[16] The new model, therefore, was apparently intended to remedy these problems; at the same time, however, the political selection of the single-person head of the central administration having extremely strong administrative powers and a long mandate – since the President of the National Office of the Judiciary ("NOJ") is elected by the National Assembly for a term of nine years – indicated that the new model is perfectly suited for the political control of the judicial organisation. It is not an accident that the Hungarian administrative model, which has been in use since 2012, is unprecedented in political systems based on the rule of law.[17] Although the role of the government, and thus the role of the political power in the administration of the judicial

---

also voiced serious concerns about the new rules for asylum procedure. https://www.refworld.org/docid/5ef5c0614.html

[15] Eötvös Károly Policy Institute. 2021. *Fight for university autonomy: what is the message of the resistance of SZFE citizens? A constitutional analysis of the fight for autonomy of the University for Theatre and Film Arts Budapest (SZFE)*, available at: http://ekint.org/lib/documents/1612167588-EKINT_University_autonomy_Analysis___EN.pdf

[16] Fleck, Z., 2012. Judicial independence in Hungary. In Anja Seibert-Fohr (ed.) *Judicial independence in transition*. Springer, Berlin, Heidelberg. pp. 796-801.

[17] According to David Kosař's classification, the current model of court administration in Hungary constitutes a hybrid type that is significantly distinct from other European models. See Kosař D., 2016. *Perils of judicial self-government in transitional societies*. Cambridge University Press. p. 132

organisation is also a standard solution in consolidated democracies, the appointment of an actor linked with political power to lead the courts, whose political responsibility, however, is completely lacking, could not possibly occur in states based on the rule of law. The political responsibility of the President of the NOJ exists on paper only. An example for this was the procedure in 2019 in which the National Assembly did not deal in substance with the motion of the self-governing body, the National Judicial Council ("NJC"), which initiated the removal of the President of the NOJ, with reference to a series of irregularities.[18]

The administrative model set up in 2012, therefore, is inherent with the potential for political influence. The activities of the former president of the NOJ, Tünde Handó, provided many examples of this. It is a question, however, if the problem of court administration will be solved by the fact that there has been a new President of the NOJ since 2020. The EU's rule of law report, published in September 2020, seems to be optimistic about the operation of the new President of NOJ: *"the election of a new President of the National Office for the Judiciary may open the way for reinforced cooperation."*[19] The one year that has elapsed allows only cautious predictions, but the steps taken and the public statements made by György Senyei, the new president may reveal some information on his perception of the role and autonomy of the President of the NOJ, which also affects the autonomy of the judicial organisation as a whole.

It is obvious that Senyei has set the objective of consolidating the relationship between the NOJ and the NJC and restoring the lawful operation of the NOJ. However, there are still problems with the appointment of court leaders (court presidents and other senior court officials), which was the most criticised aspect of the earlier president's work. Like his predecessor, Senyei also used the option of annulling application procedures on numerous occasions. In 2020, this happened for a total of 20 applications. These also included cases where the plenary session of the judges or the relevant judicial college (department) otherwise supported the application, and yet the President of the NOJ decided to annul the procedure. In contrast with the previous practice of Tünde Handó, reasons were also provided in such situations, but the relevance of those reasons was questionable.[20] It is a sign of continuing distrust toward leadership positions that some calls for applications had to be declared unsuccessful due to the lack of applicants.[21] This means that the (person of the) new president could not resolve these problems. The public statements of György Senyei, on the other hand, indicate that, similarly to his predecessor, he does not wish to get into confrontations with the government, even when the judicial organisation is under open political attack – as it happened on several occasions in 2020 in public statements by Viktor Orbán.[22] Furthermore, Senyei found that the highly controversial law, adopted in late 2019 as part of an omnibus legislation that made possible for justices of the Constitutional Court to be appointed as judges in the ordinary court system without participating in the normal application process, did not raise any concern in terms of judicial

[18] See European Commission, 2020, p. 9.
[19] See European Commission, 2020, p. 2.
[20] Decision no. 373.E/2020. (X. 1.) OBHE; Decision no. 443.E/2020. (XI. 30.) OBHE; Decision no. 444.E/2020. (XI. 30.) OBHE.
[21] Decision no. 463.E/2020. (XII. 10.) OBHE.
[22] http://ekint.org/alkotmanyossag/2020-02-21/csend-vagy-kialtas-hallgathatnak-e-a-birak-ha-megtamadjak-a-biroi-fuggetlenseget.

independence. As a result, he has so far failed to initiate any change to the relevant law even though the NJC, by a 10-4 vote, expressed a critical opinion about the 2019 amendment and called on Senyei to propose changes to it to the National Assembly.[23]

The new President of the NOJ is clearly an embodiment of consolidation, but his activities so far indicate that the problems inherent in the central administration of the judicial organisation – e.g. too broad powers with insufficient institutional guarantees, weak interest protection function – cannot be solved by a simple replacement of the President of the NOJ, and therefore, the improvement of the conditions of autonomy can only be achieved through a significant transformation of the entire model which should, first of all, detach central administration from political power.

2.2.2. Court presidents: loyalty and reliability

In recent years, one of the main bastions of resistance within the judiciary has been the Budapest-Capital Regional Court. With a view to the fact that the Budapest-Capital Regional Court is the largest court in the country, with nearly a quarter of the entire judiciary working here[24], one may conclude that the size of the judicial organisation affects the degree of autonomy and thus the resilience of the organisation. The Polish judicial organisation is much larger than its Hungarian counterpart: there are nearly ten thousand judges in Poland, and the "rule of law revolution" unfolding within Polish courts also seems to suggest that there is a correlation between the size of the organisation and its resistance potential.[25] However, the year 2020 shows a halt in the struggle for autonomy of the Budapest-Capital Regional Court. In June 2020, the President of the NOJ appointed a new president to the Budapest-Capital Regional Court, and as part of the appointment procedure, the plenary session of the judges also gave an opinion on the candidates. According to Act CLXI of 2011 on the Organisation and Administration of Courts, the President of the NOJ can only appoint an applicant if he or she was supported by the majority of the judicial body entitled to express its opinion on candidates. In the absence of such majority support, a candidate may be appointed only with the consent of the NJC. In 2020, there were two applicants for the office of the president of the Budapest-Capital Regional Court: one of them was Péter Tatár-Kis, who became known as someone loyal to and enjoying the trust of Tünde Handó, while the other candidate, Sándor Fazekas, former president of the court, came to the focus of public attention in recent years as someone in confrontation with Handó's system. In previous years, Tünde Handó failed to appoint Fazekas for a second term by declaring the application procedure unsuccessful on two occasions, even though the plenary session of the judges supported his applications with a large majority (75.15% on the first occasion, and an even higher 78.75% the second time around). In 2020,

[23] See the Decision no. 107/2020. (IX.21.) OBT.

[24] In 2020, the number of the authorized judicial staff in the Budapest-Capital Regional Court was 785 [Decision no. 79.SZ/2020. (V. 15.) OBHE] while at the end of 2019, 2926 judges were in the judicial organization.

[25] Remaining on the topic of autonomy, this conclusion seems to be contradicted by the autonomy struggle of the University of Theatre and Film Arts (SZFE), which is a very small organisation in comparison with other universities. Experience thus indicates that it is not primarily the size of an organisation that affects the possibility of independence. It is influenced by the characteristics and traditions of organizational culture, which can be understood in relation to the function of the organisation only.

however, even if with a small margin only, the plenary session of the judges already supported the application of Tatár-Kis.[26]

Court presidents play an important role in the management and administration of the judiciary. This layer of leadership has historically gained a strong position within the Hungarian judicial organisation.[27] In the period following the democratic transformation when the judicial organisation was formally still under ministerial governance, and later also under the judicial council model between 1997 and 2011, court presidents (actually presidents of county courts) had the strongest influence on the operation of courts. They also retained the majority of their powers after 2011, but their position became politically controlled by the establishment of the NOJ. Even today, court presidents continue to play a decisive role in the process of appointing judges, in shaping the personal and material conditions of judges' work, in determining the system of case allocation, and they can also initiate disciplinary proceedings and decide on the distribution of rewards. As holders of wide administrative power, court presidents may also be used to discipline the judiciary and operate as "transmission belts" of the political power.[28] The political dependence of court presidents derives from the current model of court administration itself, as they are appointed by the President of the NOJ, against whose decisions there is still no adequate institutional safeguard or legal remedy. Thus, as long as there is a model of one-person leadership linked to the National Assembly, it is difficult to reduce political exposure in the case of court leaders. At the same time, the possibility of autonomy is also weakened by the persons of the current court presidents holding office,[29] since they were appointed after the establishment of the new model in 2012. Leadership appointments in the Handó period were mostly dominated by the criteria of loyalty and reliability.[30] It is no coincidence that this practice caused the greatest tension between the President of the NOJ and the NJC. Although Tünde Handó was appointed to the Constitutional Court, court presidents appointed by her remained in position, i.e. some important actors of the system were not replaced. The power of senior court officials can be used by the current political administration for controlling the judiciary, and the highly hierarchical judicial organisation based on the model of career judges is of assistance in this. It is only a stronger judicial council and the strengthening of the autonomy of individual judges that can balance the power of court presidents.

2.2.3. Judicial self-government

An important measure of the autonomy struggle of the judicial organisation was the reaction of the NJC to the nomination of Zsolt András Varga as President of the Supreme Court. There is no application procedure for this position: the NJC expresses its opinion, but the decision is in

---

[26]https://birosag.hu/hirek/kategoria/birosagokrol/fovarosi-torvenyszek-velemenynyilvanito-osszbiroi-ertekezlet.

[27] Fleck, Z., 2019. Changes of the Judicial Structure in Hungary–Understanding the New Authoritarianism. *OER Osteuropa Recht*, *64*(4), pp. 597-598

[28] See also Kosař, D., 2017. Politics of judicial independence and judicial accountability in Czechia: bargaining in the shadow of the law between court presidents and the ministry of justice. *European Constitutional Law Review*, *13*, p. 121-122

[29] Blisa, A., Kosař, D. 2018. Court Presidents: The Missing Piece in the Puzzle of Judicial Governance. *German Law Journal, 19(7), pp.*2069-2070.

[30] Kovács, Á. 2019. Új modell a bírósági igazgatásban: bírák központi nyomás alatt. *Buksz*, 3-4, pp. 239-258.

the hands of the National Assembly. It is well known that János Áder, the President of the Republic, nominated a person as the new President of the Supreme Court who had never worked in the ordinary court system and thus had no judicial and administrative experience either. The candidate held the position of deputy prosecutor general, before elected to the Constitutional Court in 2014, with the support of the current governing parties only. By way of his activities as a constitutional court judge and his other declarations, generally made in his academic capacity, he proved that he is absolutely loyal to the current power, and he also gladly undertakes the role of one of the main ideologists of the government – his statements on the rule of law and on judicial independence are clear examples supporting the latter claim. In addition, on the basis of previous rules, Varga did not satisfy the requirements for the position of President of the Supreme Court, and therefore the government amended the relevant legislation twice in 2019, making it obvious who they were planning to put in the respective position. It was under such circumstances that the NJC had to provide its opinion on the candidate for the office, and with an overwhelming majority, in a 13-1 vote, they decided not to support the appointment of Varga as President of the Supreme Court. From the members of the NJC, only the then President of the Supreme Court, Péter Darák, voted in favour of the candidate. Incidentally, the President of the Supreme Court is an *ex officio* member of the judicial self-governing body. The other members of the NJC, who are elected by members of the judiciary, voted against the candidate. This step is undoubtedly seen as a strong form of resistance to authoritarian tendencies.

As it is well known, the NJC has confronted with the former President of the NOJ, who is close to the government, on several occasions in recent years, so the result of the vote is not necessarily surprising. Rather, it indicates that the self-governing body is an actor – perhaps the most important one – in the struggle for autonomy. A further sign of this fight is that the NJC criticized the governmental move allowing judges of the Constitutional Court to request their appointment to the ordinary court system without application process, and in November 2020, the NJC directly addressed the Minister of Justice with a motion to give the judicial self-governing body the opportunity to comment on the bills concerning the judicial organisation.[31]

Conflicts and operational anomalies in court administration once again highlighted the question of what administrative model could be the most ideal in countries with weak democratic traditions, where the independence of the judicial organisation could only be institutionalised and become part of the legal, political and organisational culture to a limited extent. The criticism is well known that the model based on judicial self-government, the original home of which is Italy – and which many Central and Eastern European countries have institutionalised after the regime change, primarily due to international "pressure," in preparation for accession to the EU – cannot be successfully adapted in young, less consolidated democracies. This criticism was reinforced by several problems of the Hungarian model, which existed between 1997 and 2011. According to critics of the judicial councils, although the possibility of depoliticization was inherent with the self-government model, it overly isolated judicial power

[31] See the minutes of the NJC meeting of November 4, 2020, available at https://orszagosbiroitanacs.hu/2020-11-04/

from political processes and the public.[32] Judicial power reflected an image of "untouchability," and this situation has been used by political leaders sympathetic to authoritarianism to underline the lack of the democratic legitimacy of the judiciary and the need for administrative reform. A good example is the fate of the Hungarian and Polish judicial councils following the authoritarian turns in these two countries: the powers of the Hungarian judicial council were severely curtailed by the Orbán government, and the PiS-led Polish government changed the selection and composition of the judicial council to subject the judiciary to increased political control.[33]

The Hungarian model change in 2012, which resulted in the central administration being led by an actor elected by politics (the National Assembly), also underlined at the same time that central administration linked to political power poses far more risks to judicial independence than the model of judicial self-government. This is because the state of judicial independence has deteriorated significantly in the period since 2012. Thus, based on recent experience concerning judicial independence and the steps taken by the incumbent NJC to protect and maintain the professional integrity of the judiciary, judicial self-government seems to have more potential for self-defence in a political system having little democratic experience and being at risk of authoritarian tendencies than the ministerial model of administration or one based on the division of responsibilities between the ministry and the courts. Judicial self-government in itself conveys an image of autonomy, of an institution that is isolated from politics, and in which professional values prevail, since the people making the decisions on judges' career paths and other organisational issues are those who are themselves involved and have adequate information on the organisation's operational characteristics. While the mentality of judges who are socialised in bureaucratic organisations is strongly determined by alignment and adaptation, all political influences pose an increased threat to autonomy. By contrast, political isolation, as well as the image of the apolitical and expert judge, which is an important part of the socialisation of Hungarian judges, make it difficult for these political influences to prevail, and in this respect, they can be factors strengthening autonomy. Consequently, in case of all future administrative reforms, there is a need to strengthen judicial self-government.

3. Judicial free speech and the self-image of the apolitical judge

In countries experiencing authoritarian tendencies, the judicial organisation is forced to defend itself. An important tool for this self-defence is the public, which can be used by judges against measures and manifestations of power trying to undermine their independence. Courts communicate to the public primarily by way of their judgments, but judges are not excluded from the possibility of exercising their freedom of speech either. The boundaries of judicial free speech have long been surrounded by many misunderstandings in Hungary. The uncertainty can partly be explained by the bad experiences of the authoritarian past, but it cannot in itself justify the maintenance of the misinterpretation, which can be identified both in the external

[32] Kosař, D., Baroš, J. and Dufek, P., 2019. The twin challenges to separation of powers in Central Europe: technocratic governance and populism. *European Constitutional Law Review*, *15*(3), pp.427-461., 447.

[33] ibid pp. 452-454.

expectations and in judges' perception of their own roles. Judicial free speech in Hungary is extremely limited by reference to the danger of the politicisation of the judiciary. The Fundamental Law[34] and the Act CLXII of 2011 on the Legal Status and Remuneration of Judges ("Status Act")[35] both set forth that judges are not allowed to engage in political activities. Judicial free speech is also narrowed by the provisions of the abovementioned "Status Act". Therefore, judges may not make public statements extrajudicially on cases currently or previously pending before courts and may not give information to the media about the cases handled by them either.[36] These rules already raise serious constitutional concerns, as the judge's freedom of speech is curtailed to an unjustified (disproportionate) extent. Why should not a judge be able to talk about a closed case or comment on other judges' decisions? What about texts in academic publications or in commentaries that are authored by judges? It is clear that the rule itself is a source of considerable confusion concerning the constitutional boundaries of the judicial freedom of speech. Moreover, the position of free speech is also weakened by the apolitical self-image of Hungarian judges, based on keeping a strict distance from politics, which has become, as a result of historical processes, an important part of their professional socialisation.[37] Moreover, current authoritarian tendencies also steer judges further towards silence, as statements that displease those in power may lead to retaliation. The case of András Baka, former President of the Supreme Court who was removed from his position because of voicing his critical opinion on judicial reforms, highlights the risks of speaking up against the measures of the incumbent government.[38] The Committee of Ministers of the Council of Europe is still monitoring the execution of the 2016 Baka judgment and reiterated in 2020 that Hungary should provide adequate safeguards against any abuse in relation to the restriction of judges' freedom of speech.[39]

The prohibition of engaging in political activities is of key importance for judicial independence and impartiality and maintaining the appearance of these values, ensuring that clients and potential stakeholders in court proceedings, i.e. members of the political community, do not think that the judge is influenced by political considerations when deciding a legal dispute. However, the ban on engaging in political activity is not the same as the total prohibition of speaking publicly. Judicial work itself is an inherently political activity, as judges adopt decisions on the basic rules of social cooperation and coexistence in the name of the political community. Consequently, delivering judgments is by its very nature political, and therefore the prohibition of politicisation clearly cannot be interpreted as a ban of judicial work. Consequently, the expectation that judges should not engage in political activities must be interpreted narrowly. There is no doubt that judges cannot support parties and partisan standpoints of political parties, they cannot be involved in battles of partisan politics, nor can

[34] Article 26 of the Fundamental Law: "[...] Judges may not be members of political parties and may not engage in political activities."
[35] Section 39 (1) of the Status Act.
[36] Section 43-44 of the Status Act
[37] Zoltán, F., 2002. A bírói függetlenség állapota. *Fundamentum*, *1*, p. 37
[38] *Baka v. Hungary,* no. 20261/12, [GC] 23 June 2016.
[39] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016809fa8be

they serve power interests. These restrictions are necessary to ensure that judicial independence and impartiality is not violated.

However, the protection of the rule of law, including judicial independence, and the enforcement of fundamental rights is not a party political issue. The protection of these values is an obligation for the judiciary, especially in courtrooms, but where appropriate, also outside of courtrooms. The European Court of Human Rights has also explained that issues linked with the functioning of the judicial organisation relate to disputes of public interest, i.e. they are public matters, and in connection with these freedom of opinion enjoys a high level of protection.[40] The fact that matters of public interest have political aspects does not make talking about such matters into political statements, and it does not prevent judges from sharing their opinions on them. Consequently, constitutional protection applies to any speech relating to the functioning of the judiciary and its fundamental, constitutional questions, which does not extend beyond the limits of professional criticism and is not capable of undermining the authority of the judiciary and public trust in courts. This requirement is also reflected in the provision of the Status Act pursuant to which a judge's disciplinary liability may arise only if his or her conduct (including the making of public statements) "infringes on or jeopardises the authority of the judicial profession."[41]

Freedom of speech is a fundamental right, but in the case of the most important leaders of the judicial organisation, speaking is also an obligation when the organisation is under unjustified political attack or other external pressure. Political pressure traditionally comes from those in power or from the press that asserts the ideology of the power. In 2020, the government launched an unprecedented attack on judicial autonomy. In early 2020, the Prime Minister called on Judit Varga, Minister of Justice, to refuse to enforce final court judgments in connection with prison compensation cases. At the same time, he also criticised the decisions made by the courts of first and second instance in the lawsuits for damages due to the school segregation of the Roma in Gyöngyöspata, while the procedure was still pending before the Supreme Court. Criticism from public figures also weakens the authority and social acceptance of the judiciary, which can be used by authoritarian government for legitimising reforms affecting the judiciary.

Although there were voices of indignation in response to the Prime Minister's speech, there was no substantial reaction on the part of the judicial organisation to what he had said. Neither the President of the NOJ nor the President of the Supreme Court found it important to speak up against Orbán's statements, which by conveying the expectations of the political power to the judicial organisation, clearly violated the principle of the separation of powers.

According to György Senyei, the new President of the NOJ, the heightened political interest surrounding the administration of justice shows the importance of judges, but judges must always refrain from formulating political opinions.[42] On the basis of the above, Senyei is

[40] Baka v. Hungary, § 165
[41] Section 105 of the Status Act.
[42] https://index.hu/belfold/2020/02/05/obh_elnok_senyei_gyorgy_bemutatkozas_miniinterju_birosagok_biroi_fuggetlenseg_itelkezesi_gyakorlat/.

mistaken about his own role, and he applies this principle in practice inconsistently. The current President of the NOJ – probably in order to avoid the risk of engaging in political activity – did not consider it important to protect the organisation against the open attack of the Prime Minister, but he did condemn, in two open letters, the statements by an opposition mayor launching attacks against specific judgments and judges.[43]

As President of the Supreme Court, Péter Darák said in connection with the political criticism of courts that *"it is rather for the benefit than to the disadvantage of the judiciary if it is aware of the social impacts of the judgments; the same applies to the public perception of cases. How strong the criticism is, and in what style it is rendered, depends on the political actors, and neither the Supreme Court nor its president have any control over this."*[44] In a later interview, however, still as President of the Supreme Court, he argued that it is the task of senior court officials to *"call the public's attention that it is wrong to influence judges in their work"*[45]. The two statements clearly contradict each other, and the series of cases in which Darák failed to respond to overt political attacks suggest that he identified with the first perception of his role. It was not only in 2020 that he failed to speak up. During the 2018 general elections, the Supreme Court found more than 4000 mail-in votes invalid which was also followed by a violent outburst by the Prime Minister, who accused the apex court of political bias and lack of professionalism. The President of the Supreme Court tried to explain the decision on television, and instead of rejecting the Prime Minister's accusations, he argued that the judicial organisation needed feedback and that it is necessary to get used to increasing criticism, since everyone, even the Prime Minister, has the right to express an opinion on the Supreme Court's activities.

The misunderstandings surrounding the freedom of speech of judges can be clearly identified from the above statements. Activities aiming to protect judicial independence and the fundamental interests of the judiciary cannot constitute political activities, and public statements concerning the operation of the judicial organisation are not in themselves political statements, despite the political sensitivity of the subject matter. However, as long as the unjustifiably narrow interpretation of judicial free speech and the self-image of the apolitical judge prevail in the Hungarian judiciary, the possibility of resistance at both individual and organisational levels is low.

4. Putting the Supreme Court under political control

Since 2010, the Supreme Court has been subjected to constant political attacks. In late 2011, the government prematurely dismissed András Baka, then President of the Supreme Court, who publicly criticised the upcoming judicial reforms. In 2012, as a result of the forced retirement of judges, nearly a third of the Supreme Court judges were retired, which resulted in a significant change in the composition of the apex court of Hungary, and in many cases also in senior positions. Since 2012, as a result of the introduction of the full constitutional complaint,

---

[43] https://birosag.hu/sites/default/files/users/OBH%20nyilatkozat.pdf; https://birosag.hu/sites/default/files/users/2019.OBH_.XI_.D.1-146.pdf
[44] https://www.youtube.com/watch?v=40a-wg11g9k&t=492s.
[45] https://index.hu/belfold/2020/11/02/darak_peter_nem_a_kozhangulatnak_kell_megfelelnie_a_bironak/.

the Constitutional Court has been able to exercise control over the constitutionality of decisions of the Supreme Court – and thus the case law of the entire ordinary judicial organisation. This move also paved the way for increased political control over the judiciary as the Constitutional Court has completely lost its political independence and professional integrity in recent years and has been serving the government's interest by its decisions. Furthermore, by setting up separate administrative courts, the political power sought to transfer administrative cases from the Supreme Court, which plan was eventually abandoned by the government, largely due to international pressure, and thus the unity of the normal judicial system has remained. Meanwhile, the seventh amendment of the Fundamental Law has made changes to the established principles of judicial interpretation by requiring courts to take into consideration the preambles and official reasoning of the law. This new rule of statutory interpretation, entrenched in the Fundamental Law, indicates that the enforcement of the political will of the authoritarian regime expressed in the laws is also an important task for the judges.

The political power and the media loyal to it have regularly attacked and continue to attack the Supreme Court for decisions that are unfavourable to it. This worrying phenomenon culminated in 2020, when the Prime Minister formulated concrete expectations for the outcome of the above-mentioned Gyöngyöspata case pending before the Supreme Court. The omnibus act on courts, adopted at the end of 2019, significantly strengthened the position of the Supreme Court within the judicial organisation by requiring ordinary courts, including the judicial panels of the Supreme Court, to follow the legal interpretations of the Supreme Court's published decisions. Of course, this regulation also resulted in restrictions on the discretion of ordinary court judges, including the judges in the Supreme Court. In addition, the leeway of the judicial panels was further reduced by the introduction of the uniformity complaint. Uniformity complaint is a new form of legal remedy against the decisions of the Supreme Court in such cases where the top court intends to deviate in a legal question from its published decision or when the parties "have already referred to a deviation in a legal question, and the Supreme Court has failed to provide remedy in its decisions for the violation of the law caused by the deviation."[46]

It is in this legal-political context that we need to evaluate the election of Zsolt András Varga as the new President of the Supreme Court. The career of his predecessor, Péter Darák started with a serious legitimacy deficit, due to the arbitrary removal of András Baka. During the nine-year term of Darák, the Supreme Court maintained its relative independence, but this was less due to him than to heads of judicial panels (*tanácselnök*) who are in charge of the professional supervision of adjudication and the quality of justice, and to the rank-and-file judges. As discussed above, Darák did not defend the Supreme Court from the increasing criticism of high-ranking government officials and the attacks of the pro-government media against the persons and the professional integrity of certain judges. In addition, Darák also supported the establishment of the separate administrative courts, i.e. the fragmentation of the judicial system, which would have meant limiting the powers of the Supreme Court.[47] Through the institutionalisation of informal "grand panels" in the apex court which involved the dissolution

[46] Section 41/B of the Act CLXI of 2011 on the Organisation and Administration of Courts
[47] https://nepszava.hu/3017680_darak-szerint-indokolt-a-kozigazgatasi-biraskodas-elkulonitese

of the ordinary three-judge panels, he strengthened hierarchy and dependence within the organisation, which also allowed for the manipulation of the allocation of cases, thereby impairing the right to a lawful judge.[48] Darák's personal merit was manifested primarily in the fact that in 2018-2019 he took sides with the judicial self-governing body in the conflict between the President of the NOJ and the NJC, when he continued to participate in the latter's activities, thereby recognising the legality of the NJC. Despite the above, he was also the only NJC member to vote in favour of the appointment of Varga.

Similarly to Darák, the recently elected President of the Supreme Court also started his work with deficient legitimacy. In order for Varga to be eligible for the position of President of the Supreme Court, the National Assembly amended the relevant laws in 2019, the year preceding his election. These amendments prepared the way specifically for the presidency of Varga, so they can be considered *ad hominem* laws, which constitute a serious violation of the rule of law. This problem was also highlighted by the European Network of Councils for the Judiciary (ENCJ) in its letter to the European Commission[49], and as we have already stated above, the NJC overwhelmingly rejected the nomination of Varga as the new President of the Supreme Court.[50] In a well-functioning democracy, the election of a senior court official who does not enjoy the support and the trust of his or her own organisation and placed in a position solely for political reasons, would be inconceivable. In a well-functioning democracy, in a similar situation, the candidate for the presidency would certainly have withdrawn his or her application. It is also dubious how the new president will be able to cooperate with the NJC, of which he is an *ex officio* member. In his study published in 2020, Varga has criticised severely judicial councils, comparing the activities of these self-governing bodies to movements.[51]

Furthermore, the prior activities of Varga as a constitutional justice and an academic also call into question the new president's ability to operate independently from the government, and to represent the judicial organisation in an autonomous way. As a constitutional justice, he wrote a number of "government-friendly" decisions, and occasionally he also did not hesitate to represent the interests of the government by openly violating the rules of competence of the Constitutional Court, i.e. by acting in breach of the law. In his academic work, he has been a consistent critic of idea of the rule of law and the expansion of judicial power.[52]

[48] Vadász, V., Kovács, A. Gy., 2020. *A game hacked by the dealer*. *VerfBlog,* 2020/11/10, https://verfassungsblog.de/a-game-hacked-by-the-dealer/.
[49] The letter is available at https://www.encj.eu/node/577.
[50] https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/.
[51] Varga, Zs. A. 2020. Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek? In: Tóth J. Zoltán (ed.): *A jog többrétegűsége*, a Károli Gáspár Református Egyetem Állam- és Jogtudományi Kara, Budapest, pp. 91, 94. Available at: https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf
[52] See: http://ekint.org/fuggetlen-igazsagszolgaltatas/2020-10-15/varga-zs-andras-kuria-elnokke-jeloleserol-velemeny; https://www.helsinki.hu/wp-content/uploads/Most_lehet_elkezdeni_aggodni_20210107.pdf; Kazai, V. Z., Kovács, Á. 2020. The Last Days of the Independent Supreme Court of Hungary? *VerfBlog,* 2020/10/13, https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/, DOI: 10.17176/20201013-233456-0.

Varga arrived directly from the Constitutional Court to serve as the new President of the Supreme Court, and – following from the practice of appointments and the decisions it has adopted – the Constitutional Court has become part of the political branch for many years. "Migration" between branches of power is not an exceptional phenomenon for leaders of the judiciary's top bodies, but for historical reasons and due to the characteristics of the current authoritarian regime in Hungary, this tendency is particularly worrying, as it carries the risk of the politicisation of the Supreme Court, and indirectly that of the entire judiciary.[53]

The 2022 parliamentary elections may once again bring the judgments of the Supreme Court to the foreground, and impartial and professional decisions in electoral disputes may be crucial to the outcome of the elections. In 2018, the government did not hesitate to put independent courts under political fire if so required by its interests. The Supreme Court can count on similar attacks in 2022 as well, and just as Darák could not defend the organisation, we can hardly expect a president much less independent than him to speak up in defence of judicial independence when needed.

By electing Varga as President of the Supreme Court, a person was installed as the head of the highest judicial body whose political commitment and loyalty is beyond any doubt. As a result of the strong powers attached to his position, the new president could put the judges of the Supreme Court under heavy pressure. A legislative amendment passed at the end of 2020 further increased the administrative powers of the president in determining the rules of case allocation.[54] The powers of the President of the Supreme Court do not only constitute formal powers, but also translate into real influence over the organisation, which is further strengthened by the president's political relations. It is generally true that the independence of judges is significantly reduced in case of the political capture of the apex court, and rank-and-file judges' room for manoeuvre is further restricted by the newly adopted constraints of legal interpretation. Since 2010, the Fidesz-KDNP government has established a judicial elite whose members often have personal ties to the political branches,[55] which helps the ruling parties keep the judiciary under control in the long run.

5. Conclusions

The Hungarian judiciary has historically been subjected to a series of "top-down" reforms, as a result of which the values of acceptance, adaptation and passivity have been consolidated in the organizational culture. This mentality is still reflected in the organisation today, which is mostly manifested in the absence of organizational-level resistance. The introduction, in 2019, of the practice that was labelled by the government as "limited precedent system", for example, occurred without any meaningful opposition by the organisation, despite the fact that its conditions – whether in the legal culture, judicial reasoning strategies, or the infrastructural

[53] Blisa, Kosař, pp. 2070-2071.
[54] See Section 39-40 of the Act CLXV of 2020 on the Amendment of Certain Justice-related Acts
[55] In 2020, for example, Mónika Erőss, the mother-in-law of the incumbent Minister of Justice was appointed as vice-president of the NOJ, while the largest court, the Budapest-Capital Regional Court, is now presided by the brother-in-law of Zoltán Kovács, State Secretary for International Communications and Relations.

requirements for following precedents – were not in place.[56] It is a good indication of the complete lack of preparation of the reform that the professional debate on the obligation to follow the interpretation of the Supreme Court started only after the adoption of the new law, shortly before its entry into force,[57] and the original text had to be substantially amended less than a year after its introduction.[58] Due to problems of interpretation of the original law, Darák, then President of the Supreme Court, turned to the Constitutional Court.[59]

The mentality of adaptation is accompanied by the self-image of the apolitical judge, stemming partly from a misunderstanding of the boundaries of judicial free speech, which results in an unjustified self-restraint on the part of Hungarian judges. These characteristics of the Hungarian judiciary further weaken the chances of a successful fight for autonomy, as well as the possibility of consolidating the values that could help defend judicial independence.
Judicial independence is historically weak in Hungary. The development of the modern justice system was limited to a few decades, as the communist takeover of power soon ended this process in the middle of the 20th century. The first short period of modernisation was not sufficient for solidifying the conditions of autonomy and professionalism in the functioning of the Hungarian judiciary.[60] During the period of soft dictatorship, professionalism replaced the culture of political loyalty, but the low prestige of the judicial profession, which was also reflected in low salaries, prevented the consolidation of autonomy and independence, which also had a negative impact on organizational culture and individual judicial attitudes, since socialisation did not favour the acquisition of professional values.[61]

In today's organisation, a key player in the struggle for autonomy seems to be the judicial council, which in recent years has performed important roles in representing and defending the interests of the judiciary. It is no coincidence that Zsolt András Varga, the new President of the Supreme Court who started his office as a pro-government figure, discussed the dangers of judicial councils and their assumed political motivations in an essay, and he suggested a reconsideration of the roles of these judicial bodies. Perhaps it is not an exaggeration to interpret this opinion as the government's position, which means there is legitimate fear that the current political power is considering the further weakening of the powers and influence of the NJC. However, in terms of judicial independence, it would be desirable to extend the powers of NJC. A stronger NJC could not only limit the influence of the President of the NOJ in the functioning of the judicial organisation, but could also offset the power of the historically strong court presidents, which would probably result in a weakening of the hierarchy within the organisation. The historical experience of judicial self-government could also help reconsider the ideal composition of the NJC – for instance, by establishing the rule that a member of the

---

[56] Tahin, Sz., 2020. Korlátozott precedensrendszer – alulnézetből. *Magyar Jog* 67 (5), pp. 266-275
[57] ibid
[58] See Act CLXV of 2020 on the Amendment of Certain Justice-related Acts, whose sponsor, in the explanatory memorandum attached to the bill, expressly indicated that the original text resulted in legal uncertainty, due to which the President of the Supreme Court turned to the Constitutional Court. https://www.parlament.hu/irom41/13648/13648.pdf.
[59] The application is available at http://public.mkab.hu/dev/dontesek.nsf/0/8859cd4bc1a7c13cc1258606005b35b8/$FILE/II_1734_0_2020_inditvany.anonim.pdf.
[60] Fleck, 'Changes of the Judicial Structure', p. 596
[61] ibid. p. 597

NJC cannot be a court leader at the same time.[62] The latter reforms could also demonstrate that the problems of court administration in the CEE region lie not in the model of judicial self-government itself. What we suggest is that this model must be maintained but implemented in the light of the legal, political, cultural characteristics as well as the mentalities of the Hungarian judicial organisation.

[62] See also the joint opinion of Hungarian NGOs on this issue: http://ekint.org/lib/documents/1599057276-200831_OBT_jogalkot%C3%A1si_javaslatok_AIHU_ MHB_EKINT.pdf