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Crisis in judicial administration?

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Crisis in judicial administration?

There have been several articles and interviews in the public and political news lately on the conflict between the President of the National Office for the Judiciary and the National Judicial Council. Obviously, misstatements and occasionally misrepresentations were released, partly with the contribution of the actors concerned and partly through misinterpretations that have led lawyers and non-lawyers astray. The time has come to put this topic back where it belongs: in the domain of public law and international public law. In all probability, there is consensus that bringing a public law debate concerning the judicial apparatus and the administration of courts to the stage of politics and the tabloids is detrimental to the image of the judiciary overall; however, it is also important to speak clearly and to present explicit arguments on issues of public interest, pertaining also to the everyday life of citizens.

Judges should refrain from manifestations of a political type. On the other hand, however, it is the duty of every judge to enhance the enforcement of and respect for the independence of the judiciary. In this paper I examine the supra-political, public law aspect of the topical issues of the administration of courts based on the known facts, by presenting legal arguments, from the point of view of legal science.

1. President of the National Office for the Judiciary (NOJ) and the National Judicial Council (NJC)

After the systems change and the initial period of ministerial administration, Hungary adapted a corporative management model in which the operation and administration of the judicial organisation was assigned to the competence of the National Council of Justice (NCJ) composed mainly of judges. In this model, the operative part of the activity was not performed by the judges in the council who retained also their judicial tasks, but by the Office organised under NCJ and by its leader.[1] The lessons of the corporative system were drawn by the legislator in 2011, and the central administration of courts was put into the hands of a single person, the President of the National Office of the Judiciary. This change essentially meant that Act CLXI of 2011 on the organisation and administration of courts in Hungary (Bszi.) put one person at the head of the organisation, endowed with broad powers regarding the most important issues of the administration of justice: the distribution

[1] Act LXVI of 1997, Chapter IV

of judicial positions and the measurement of the workload, the appointment of judges and court executives, the training of judges, the court budgets, fixed assets and technical infrastructure and, moreover, the planning and execution of major property investments and organisational developments.[2]

The President of NOJ is assisted in executing his/her tasks by the National Office of the Judiciary having a bloated staff of 300 already.[3] After 2012, not only the Council had an Office and the Office its own leader, but the President of NOJ also acquired a personalised apparatus, whereas the National Judicial Council established to supervise the President of NOJ has been functioning without own infrastructure and, what is more, its status has been settled in such a far-from-satisfactory way that, in the absence of independent legal personality, it cannot execute even the most essential procurements necessary for its operation, not to speak of maintaining an office or hiring employees. NJC does have a budget of its own, but in the absence of legal personality it is unable to manage its own resources, that is, although it had been given some "pocket money", its wallet was put by the legislator in the hands of no other but the President of NOJ. [4]

To return to the President of NOJ, her position differs from the legal status of previous NCJ Office heads in several essential respects: she had not been appointed by the council embodying judicial self-governance, but was elected by the National Assembly embodying the legislative power branch, by two-third majority vote. Although NJC have to express their opinion on her person, in the case specifically of Dr Tünde Handó this was not feasible since NJC had not existed yet in December 2011, and NCJ was about to be terminated.[5]

In some countries of Europe the Minister of Justice has a considerable say in the administration of courts, but I am convinced that if they knew the Hungarian regulations, they would envy the status and powers of the President of NOJ. For, unlike a member of the government, she can only be removed by two-third majority decision; she may execute her plans in a cycle not of four, but of nine years, and putting on the robe of independent judge, although she cannot administer justice in the nine years of her mandate, she may even oppose the will of the government.[6] In the past six years it has already been experienced also in everyday practice that no segment of judicial operation is immune to the decisive direct or indirect influence or interference of the President of NOJ. Neither can we claim that Hungarian courts suffered shortages in terms of budgetary resources because our No1 justice leader is not a member of the government because, as pointed out by the President of NOJ very many times in her reports, communications and

[2] For a detailed list of the functions of the President of NOJ, see Bszi.§76

[3] The authorised headcount of the Office was 169 in early 2012; this rose to 218 at end-2014 and to 298 at end-2016. The 2016 report of the President of NOJ mentioned also that another 219 persons from the judicial organisation were assigned central administration tasks, and 103 members of 15 workgroups assisted the activity of the Office.

[4] Pursuant to Bszi. §104, the NJC budget is indicated within the NOJ budget separately, and it has to conclude a an agreement about it annually with the President of NOJ who ensures the technical conditions of its operation and, pursuant to Bszi. §86(3)(a) manages executive tasks relating to the functioning of NJC.

[5] Dr. Tünde Handó was appointed on 14 December 2011 by National Assembly Decree 92/2011. (XII.14.) OGY, and NJC held its inaugural meeting on 23 March 2012.

[6] For example, the administrative judicial reform that the Government intended to introduce in 2016, broken inter alia by the strong resistance of the President of NOJ (supported by the then-NJC and also the National Association of Labour Court Judges).

interviews, budgetary support to justice had fortunately increased substantially over the past six years, providing cover or long-owed developments and investments.[7]

In any case it must be pointed out that in the new model introduced in 2012 the appointment of the President of NOJ is decided upon outside the judicial organisation; his/her person is of necessity the outcome of political consensus or, under appropriate government majority, of party will. The political nature of the appointment is not altered substantially by the provision that, pursuant to the legislation, the President of NOJ must be a judge, in particular since he/she shall not conduct judicial activity after his/her appointment during the nine years of his/her mandate, and his/her judicial rights, as those of any judge assigned to the Office, are fully suspended. Plainly speaking, any judge appointed president of NOJ preserves his/her judicial status, but actually temporarily loses his/her "judicial quality" as he/she is not allowed to act as judge afterwards.[8]

The examination of the ministerial justification of Bszi. reveals that the legislator deliberately, of necessity, put the agency embodying judicial self-governance in a pure form above the one-man leader endowed with excessively broad powers in order to fulfil a control function. The 14 members of the National Judicial Council are elected by the judges by secret ballot, democratically, for a cycle of 6 years. The President of the Curia is a member ex officio. The main duty of the Council is to supervise the Fundamental Law and, pursuant to Bszi., the central administration.[9]

Due exactly to its constitutional "checks and balances" function, the National Judicial Council cannot be interpreted either as an interest representation agency acting in favour of the judiciary[10] or as some kind of advisory body[11] and especially not as a "revolutionary council" acting against, or in opposition to, something or someone, as apostrophised in certain newspapers. In the sense of public law, in the current system of Hungarian state power, NJC and judicial self-governance guarantee the rule of law and embody the independence of the judicial branch of power, since judicial self-governance must of necessity exercise supervision over

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[7] The budget appropriation under the chapter on the courts was HUF69.3 billion 2011, HUF79.4 billion already in, HUF87.2 billion in 2014, HUF87.5 billion in 2015, HUF92.8 billion in 2016 and HUF118.4 billion in 2017. By the year 2018, the chapter budget reached HUF120.3 billion, corresponding to 73.6% growth relative to 2011, against a total (cumulated) inflation rate of 14.5% in the period 2011-2017.

[8] Pursuant to Bszi. §66(1), "The President of NJO shall be elected by Parliament from among judges appointed for an indefinite period of time and having at least 5 years of service. According to §57(1) of Act CLXII of 2011 on the legal status and remuneration of judges in Hungary (Bjt.), "Judges posted at the NJO shall retain their judicial title but may not administer justice."

[9] *"In case of one-man leadership, there is an enhanced need also for creating a counterweight. However, the body representing the counterweight needs to be created and assigned such tasks as do not result in a rival body with parallel tasks, but one that represents a real power check for one-man leadership. The Act therefore establishes NJC, with inspection, proposal, commenting rights, to supervise central administration, that may also ultimately initiate the removal of the President of NOJ from his/her office at the National Assembly.* "

[10] The open letter of 29 May 2018 of the presidents of regional courts of appeal and tribunals appointed by the President of NOJ reads -- without any specific statement of facts -- as follows: "The activity so far of the members of NJC does not serve the interest of the Hungarian judiciary."

[11] Sometimes even judges call to account those concerned for the required tight cooperation of NJC with the President of NOJ, although cooperation is basically interpreted in the context of the supervised body and the supervising person. As opposed to its supervisory powers, NJC's contribution to central administration is indicated specifically under the powers described in Bszi in a few cases only (e.g. adopting the code of ethics of judges)

the political appointee President of NOJ concerning the most important status issues.

2. Independence, accountability and efficiency

Now that we are on the threshold of another judicial reform, it should be stated at the outset that the choice and restructuring of the judicial administration system and the judicial organisation is the exclusive right and duty of the constituent power. Nevertheless, this does not mean that the legislator is not subject to certain limitations due either to the democratic constitutional arrangement of the country, or its EU membership or international contractual obligations.[12]

The Basic Principles on the Independence of the Judiciary drafted by the UN Human Rights Committee in 1985 required the inclusion of protection guarantees in the selection of judges to prevent any discrimination or even "improper" motives in connection with it. The promotion of judges should be based on objective factors, in particular ability, integrity and experience criteria.[13]

Recommendation No. R (94) 12 of the Council of Europe issued in 1994 lays down that all decisions concerning the professional career of judges should be based objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity and efficiency. It is an express limitations that the authority taking the decision on the selection and career of judges should be fully independent of government and administration and, in order to safeguard its independence, rules should ensure that its members are selected by the judiciary and its procedural rules are decided by itself.[14]

The Magna Charta of the Consultative Council of European Judges (CCJE) issued in Strasbourg in 2010 mentions among the fundamental principles of the rule of law and justice that judicial independence shall cover in particular the nomination and career of judges based on objective criteria, their irremovability, training, judicial immunity, discipline, remuneration and financing. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law. The Charta expressly requires that, in order to ensure the independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers and composed either of judges exclusively or of a substantial majority of judges elected by their peers.[15]

ENCJ, the organisation gathering the European Networks of Councils for the Judiciary, also set out in its documents that, while respecting the different historical

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[12] Pursuant to Section 10 of the Universal Declaration of Human Rights, *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* Section 6 of the European Convention on Human Rights similarly declares that *"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".*

[13] https://www.ohchr.org/EN/ProfessionalInterest/Pages/lndependenceJudiciary.aspx

[14] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000l6804c84e2

[15] https://rm.coe.int/16807482c6

traditions of the Member States, it has become a fundamental requirement for the accession countries or in connection with judicial reforms introduced in any Member State to ensure autonomous judicial self-governance, that is, to set up councils composed mainly of judges and elected by their peers. It is expected that judicial councils exercise decisive rights in the nomination and career of judges, their training and further training, their disciplinary and ethical responsibility, complaints against the judicial organisation, efficiency management, central administration of courts, the budgets of the courts and, furthermore, the initiation of legislation related to courts. Member States shall ensure continuous compliance with these democratic standards, since these are the main guarantees of the independence, accountability and efficient operation of justice. Judges shall be selected in every case based exclusively on merits and abilities, and the will of a self-governance body that is independent of the executive and the legislative powers shall be asserted.[16]

Political discourse often puts the independence of the judiciary into a context where judges, locking themselves in an ivory tower, draping themselves in the cloak of independence, place themselves above society. The Lisbon Declaration of ENCJ published on 1 June 2018 states with foresight that *"A judiciary that resists change and is perceived to be backward looking will ultimately lose the trust of the people and become vulnerable to external attacks in particular from the other state powers and the media"* It is therefore important that the councils representing judicial self-governance "*should initiate and lead a process of positive change with a view to promoting an independent, accountable and high quality judiciary, so enabling judiciaries to optimize the timely, impartial and effective delivery of justice for the benefit of all".*[17]

Therefore, correctly interpreted, the independence of the judiciary is not about the privilege of judges, but it is the cornerstone of the right of citizens to a fair trial. This is the only way for a democratic state to ensure that the cases of citizens be judged by persons selected on a professional basis, free from any influence and bound only by law. What the state guarantees thereby is not the infallibility of specific judges or specific court rulings, but the principle of operation of an independent system that is free from any influence. Two important components of the right to fair trial and to a lawful judge are that the appointment of judges should take place without partiality and autocratic influence and case distribution should be driven by objective principles fixed in advance.

2.1. Appointment of judges:

According to the appointment system adopted in Hungary in 2011, judges are selected via application, in a transparent way, whether this concerns a first appointment or any further promotion, or transfer to a higher-level court or one with a different competence area. After the invitation of applications for the judicial position is published, applications submitted to the open call are evaluated by scores by the judicial councils of the tribunals and regional courts of appeal based on a set of criteria defined by justice decree. The majority are so-called objective points given to the candidates without any special consideration – based on service time, competencies and qualifications -, whereas others (subjective points) are

[16] https://www.encj.eu/images/stories/pdf/workinggroups/encj_distillation_report_2004_2017.pdf
[17] https://www.encj.eu/node/478

determined by the judicial council or the professional division after the personal hearing of the candidates, by voting.[18]

Judicial council members are elected by the judges working at the given regional court of appeal/tribunal from among themselves, by secret ballot, whereas those of a division by the professional community of tribunal or regional court of appeal judges active in the given division. There is a civil and a criminal division at each regional court of appeal and each tribunal, and there are also economic divisions at larger tribunals and usually there are regional administrative and labour divisions with jurisdiction over several tribunals. Similarly to the National Judicial Council, these bodies embody judicial self-governance at local level since in the sense of public law they represent, directly or indirectly, the corporate will of judges.[19]

In the event that the President of NOJ wants to appoint the applicant ranking first based on the scores of the judicial council, he/she may decide on that without any further restriction, individually. This is correct also in the sense of public law for, apart from the fact that a major part of appointments of judges can proceed quickly and smoothly in these cases, the ranking is based on the decision of the judicial council embodying judicial self-governance. Therefore, according to the logic of public law, no legitimacy problem arises if the final decision-maker is a political appointee from outside the scope of judicial self-governance. It may happen, however, that based on the scores alone, one candidate ranks higher than another, more suitable, one, and is considered more fit for the job maybe also by the judicial council or the division. For example, a judge with a longer service period applies for a job in another part of the country for family or other personal reasons, but a judge or assistant judge with a shorter service period with higher objective scores finishes ahead of him in the contest. In such cases it may be justified to appoint not the person ranking first, but the one occupying second or third position; therefore, the law provides the President of NOJ the right to depart from the ranking ex officio or on the motion of the president of the court concerned, with the agreement of NJC. In such cases NJC ensures the legitimacy of the decision.[20]

The regulation pertaining to the case where NJC does not agree with the proposal to rank a candidate higher, but the President of NOJ does not appoint the candidate who is first in rank order is not coherent and therefore does not comply fully even with the minimum standards in practice. For, in such cases, according to the Bjt., the President of NOJ may make a further proposal to NJC or even – as several examples have shown in practice – declare the candidacy proceedings unsuccessful, and then invite new proceedings. By exploiting this legal lacuna, the President of NOJ can bypass judicial self-governance, i.e. overwrite the will of NJC and the judicial councils of the tribunals. It should be noted that the law provides a taxative list of the options to declare the proceedings unsuccessful and, therefore, we may draw the conclusion that it was definitely not the intent of the legislator to provide such broad rights to the head of office for bypassing judicial self-governance.[21]

[18] 18/201 1. (III. 4.) KIM rendelet a bírói álláspályázatok elbírálásának részletes szabályairól és a pályázati rangsor kialakítása során adható pontszámokról

[19] Bszi., Chapter IX

[20] Bjt., Chapter II

[21] Declaring the proceedings unsuccessful is regulated under Bjt. §20

2.2. Appointment of court executives:

Another important right of the President of NOJ is the appointment of the most important court executives. Bszi. allocates here the right to appoint tribunal and regional court of appeal presidents and vice-presidents exercising disciplinary right over judges, and that of the division heads who have great influence on the justice administering practice of the courts by managing their professional work. Ultimately, the case distribution schedules are designed by these executives, so they have decisive influence also on which judge would proceed in which cases.

Executives are appointed by open call, under which the candidates describe their planned measures and concepts for the six-year period concerned in a detailed career plan published on the central website of the courts.[22] The legitimising function of judicial self-governance appears also in the appointment of court executives: for the presidents and vice-presidents of tribunals and regional courts of appeal the all-judges conference, i.e. all judges of the given court, and for division heads the division and then also the all-judges conference express their opinion on the application by secret ballot. If the President of NOJ does not wish to see the candidate enjoying most support in the position or wants to appoint a person who did not win the support of the reviewing board (50% + 1 vote) , he/she may appoint that court executive exclusively with the agreement of NJC. Obviously, the legislator tried to integrate guarantees also in the appointment process of court executives, since no court executive shall be appointed as a general rule without legitimisation by judicial self-governance.[23]

No system is perfect, and the President of NOJ has found the right loophole also in this case. We have seen several examples over the past six years when she declared an executive application unsuccessful because, although one of the candidates enjoyed the support of the majority of judges, she did not want to appoint that person. The law, by the way, provides the "right of no decision" to the President of NOJ, but at system level, the high number of persons not supported by the judges who are nevertheless fulfilling important executive positions projects an alarming democracy deficit. It has become regular for persons who had not even submitted an application and were consequently not evaluated by the judges to be appointed executives. The relevant method, quite widespread already, is that after declaring the second round of applications for an executive position unsuccessful, the President of NOJ assigns someone for twelve months – any judge, often not even from the court concerned – to fill the position, and when new proceedings are invited one year later, that person is usually the only candidate, and the judges voting at the all-judges conference know well whom the President of NOJ wishes to see in the Chief Justice's seat. The judges have two options: to protest and refuse supporting the candidate of the President of NOJ, or accept the fact that, if they want to support central administration and especially want peace at their workplace, they vote yes. Although the legitimising effect of judicial self-governance prevails formally, assigning an executive function to a person who had not even submitted an application – against a candidate supported by the judges – is completely contrary to the goal of the legislator and to the international minimum standards.

To guarantee that the cases of citizens be judged by independent persons whose

[22] https://birosag.hu/szakmai/palyazatok-obh_eln-jogkore
[23] Bszi**. §§**127-134

selection was not subject to any personal, arbitrary criteria incompatible with the rule of law or even to the indirect influence of legislative and executive power, it is imperative to have democratic legitimisation provided by judicial self-governance and transparent and strictly objective appointment criteria of judicial executives in combination. This is the reason why the system-level breach of the appointment rules and the misuse of the right of appointment by a political appointee chosen by legislature can by no means be taken lightly.

3. The practice of the President of NOJ to declare proceedings unsuccessful

Not unexpectedly, after the National Judicial Council of new composition started operation in early 2018, judges from two tribunals addressed questions to it. The all-judges conferences of the Metropolitan Tribunal and the Regional Court of Appeal of Győr requested NJC simultaneously to investigate the lawfulness of the practice of the President of NOJ to declare candidacy proceedings of judges and executives unsuccessful.

The investigation was ordered by the NJC session of 22 February 2018, where NJC set up a five-strong committee consisting of its members to conduct an investigation. [24] The committee partly asked the President of NOJ to provide data and partly looked into the presidential documents of the application proceedings and drew up a summary report based on its findings. The report was received by NJC's members and the consultative participants of the sessions, including the President of NOJ, eight days before the session.[25] The president of NJC did not comment on the report to NJC then and has not done so to this date.

The reasoning of the President of NOJ displayed on the central courts website, namely that she declared unsuccessful only 15 of 274 application proceedings for judges – in four cases admittedly due to lack of candidates – is not a satisfactory explanation legally in any sense. It is like an employer defending himself at the labour court by saying that of the 274 dismissals implemented over one year, he acted illegally only in the case of 10 persons – the plaintiffs -, whereas all others were subject to fair proceedings.[26] A similar argumentation is presented in the summary of the President of NOJ released in connection with the applications for judges and court executives dated 9 February 2018, but as for the anomalies of the practice of appointment of court executives, it is a tell-tale sign that according to the statistics of 2017, every other application for executives was declared unsuccessful.[27]

It is maybe not too far-fetched to assume that it was no coincidence that the President of NOJ adopted her individual legal interpretation that the resignation of its administrative and labour judge member made NJC unable to act right before the session of 2 May 2018. For this was the day when, as she well knew, NJC was to discuss the committee report. Had the President of NOJ attended the meeting, she could have been asked questions, although the report gave ground for no other conclusion than that the practice of the President of NOJ was in part non-compliant with the provisions of the law. The establishment of a certain degree of irregularity necessarily followed, without the need for discretionary assessment, from the

[24] https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/obt_osszefoglalo_2018.02.22.pdf
[25] https://birosag.hu/sites/default/fiIes/allomanyok/obt_dokumentumok/szakbizottsagi_jelentes.pdf
[26] https://birosag.hu/sites/default/files/allomanyok/stat-tart-file /6_obt_tajekoztato_biroi_palyazatok_2017_l.pdf
[27] https://birosag.hu/sites/defaultlfiles/allomanyok/stat-tart-file/osszefoglalo.pdf

findings of the report.[28]

The most serious of the identified errors was the total lack of justification for declaring the proceedings unsuccessful, all the more so since the Constitutional Court had already called the attention of the President of NOJ to such practice infringing on the Fundamental Law in 2013.[29] There were also contradictory explanations, two different ones for the same application, and it has also occurred that the documents made it practically impossible to trace in what way the President of NOJ informed the applicant and the reviewing board of the reasons of her decision. The committee has also found a reasoning that was obviously completely contrary to the data in the documents and the known facts. For, if the President of NOJ declared an application for judges unsuccessful for example on the ground that, based on case turnover data, the call was not necessary after all, it is incomprehensible why she invited new proceedings for the same position right away. [30]

It is important to note, however, that it is a natural concomitant of proper operation, in compliance with the rule of law, that NJC notifies the President of NOJ supervised by it in case of the detection of irregularity, and expounds what is considered unlawful and why in the practice under study. Apart from establishing certain facts, however, the NJC resolution did not/cannot have any public law consequences: it serves only as a guideline for the future. As for the "response" of the President of NJC, that is inconceivable and incomprehensible in a constitutional framework: when she declared NJC supervising her activity illegitimate – a declaration in effect to this day -- based on her own individual legal interpretation, it was not the Council that she put outside the domain of public law, but herself.

4. Operability of NJC

The argument of the President of NOJ that a council of 15, including 14 members elected by delegates at court level, becomes inoperable if the representation of one level fails due to the loss of a member or alternate member is incorrect. [31] For, the quota defined by level refers expressly to the election of members and sets an upper limit, not a minimum headcount required for operation. Moreover, the Act expressly states when new elections for alternate members are to be held. This has conjunctive conditions: on the one hand, the number of alternate members should drop below 5 and, on the other, the representation of a level should not be guaranteed or the operation of the council be threatened.[32] The Act does not define a certain headcount required for operability, but it defines quorum as attendance by

[28] https://birosag.hu/sites/default/fiIes/allomanyok/obt_dokumentumok/osszefoglalo_2018.05.02.pdf

[29] *The Constitutional Court ex officio establishes in regard to the application of the second sentence of Section 77(2) of Act CLXI of 2011 on the organisation and administration of courts that: it is a constitutional requirement deriving from the basic constitutional value of the rule of law under Article B(1) for the President of NOJ to reasonably justify her decisions, including measures of a personnel nature open to judicial review , considering also the right of the party concerned for legal remedy* " Constitutional Court Decision 13/2013. (Vl.11.) AB

[30] https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/szakbizottsagijelentes.pdf

[31] Pursuant to Para (1) of Bszi. §91, "The meeting of delegates entitled to elect the members of the NJC shall elect – from among the delegates – one judge from the regional court of appeal, five judges from the tribunal, seven judges from the district courts and one judge from the administrative and labour court to be judge members of the NJC."

[32] According to Bszi. §92, "If the number of alternate members has fallen under five and the undisturbed operation of the NJC or the observance of the upper limits defined in Sections 91 (1) cannot be guaranteed, new elections shall be held to increase the number of alternate members to 14 persons"

two-thirds of the members.[33]

We could quote many public law examples of why the legal interpretation of the President of NOJ is erroneous and, considering the widespread dissemination of the erroneous legal interpretation concerning operability, on 16 may 2018, NJC addressed an open letter to the judiciary.[34] There it expounded in detail inter alia that, under the rule of law, a person exercising public power may not exercise a right whereby she might declare the public body supervising her illegitimate. Of course, the President of NOJ is not barred from contesting any decision of NJC or from initiating legal action against it, but so far she has not taken any measure to do that. On the other hand, irrespective of the outcome of the legal interpretation debate, it is beyond any doubt that a public law body shall be considered operational until declared inoperative by a body or person entitled to do so. One thing we know for certain is that it is not the President of NOJ who is entitled to do so.

With her misleading reasoning concerning the inoperability of the Council, the President of NOJ – over and beyond the point that she tried to drive attention away from the arbitrary practice of appointments – has caused serious damage to the entire judicial organisation: by refusing to make the necessary proposals, the President of NOJ not only bars the constitutional powers of a public body, but unduly brings the whole judiciary organisation and many judges into an unfair situation also directly. For example, in a district court, the President of NOJ revoked the proposal to give consent to the re-appointment of the executive, as a result of which the district court concerned was left without appointed president. Without proposal, NJC cannot decide to depart from the ranking in calls for applications to the positions of judges; it would be impossible to appoint court executives who are not supported by the reviewing body; appoint the members of service courts; grant exemption in case of conflict of interest between executive and family member. In such case, NJC could not consent to authorising a notice period of less than 3 months, it could not exempt a judge from the obligation to work during the notice period, nor decide on the exemption from work of retiring judges, the same as, without proposal, it could not check the asset declarations of judges.[35]

After its session on 16 May 2018, the National Judicial Council called the attention of the non-attending President of NOJ to the consequence of omission under the effective public law: by failing to fulfil her statutory obligation to make the proposals required by law to NJC, the President of NOJ breaches her constitutional obligation, and that can have no other consequence after some time than the initiation of her removal from office. Therefore, the President of NOJ is mistaken when she complains that NJC as "court-martial" threatened her with removal due to her practice of declaring proceedings unsuccessful, since this warning related not to her appointment practice, but to the unlawful declaration of the operation of NJC illegitimate. By visibly sticking with stubborn insistence to her erroneous legal position -- albeit she has been left completely alone with it in the field of public law -- the President of NOJ commits such unlawful omission the consequences of which leave NJC no other option but to ask the National Assembly to remedy the situation. Of course, it would be appropriate to avoid the removal procedure if possible, since

[33] Bszi. §105(3).
[34] http://mabie.hu/index.php/981-kozlemennye1-fordult-magyarorszag-biraihoz-az-orszagos-biroi-tanacs
[35] Bszi. §103(3)

that would transfer a public law issue to the political sector, something that is absolutely not useful for the judicial organisation.[36]

5. Crisis in the light of the international situation - solutions

The already tenuous situation is further strained by the fact that foreign and domestic public opinion – judicial decision-makers and political and professional international agencies in the first place – assesses the conduct of the President of NOJ vis-à-vis NJC and also its individual members in the shadow of a very delicate international situation. International public opinion rated the recent judicial reform introduced in Poland as a major step backwards in terms of judicial self-governance, since the members of the Polish judicial council are currently not elected by judges, but by the judges in the lower house of Parliament, Sejm. In Poland, judges and judicial associations (e.g. Iustitia[37]) raising their voice against the reforms suffered serious retaliation: disciplinary and then criminal proceedings were brought against several judges expressing critique, and their professional and human prestige was destroyed by media campaigns. Understandably, disciplinary action initiated by the President of NOJ or through presidents appointed by her against several (four) members of NJC is watched with anxiety both in Hungary and in Europe.[38] Presumably, calling certain NJC members "traitors of the country" – and that on completely mistaken factual and legal grounds – will not help dispel the dark clouds, and it will certainly not bring the desired peace.[39]

As lawyers we cannot doubt that European public opinion will not consider the fact that the National Assembly chose the President of NOJ from among the judges satisfactory guarantee of judicial self-governance, since it does not mean that she embodies nor is she entitled to represent the independent judicial power branch as her appointment had not been legitimised by judiciary bodies.

And, the moment when NJC would cease to be operational, the accountability of the President of NOJ – the most important guarantee of the rule of law – would be eliminated totally, that is, in its absence, the central administration of courts could not function legitimately, not even temporarily. As lawyer and judge, I sincerely hope that the President of NOJ will appreciate the gravity of her situation in time, acknowledge the legitimacy of NJC also by her attendance, and do everything to ensure that the current members of NJC exercise the constitutional rights due to judicial self-governance without hindrances and intimidation.

From another perspective, such a crisis may – in the long term at least – be even useful for the legal system by providing an excellent opportunity to draw conclusions concerning the most serious drawbacks and anomalies of the operation of the system. As announced by the Prime Minister and also the Minister of Justice, the time has come to draw the lessons of the experience of the past six years upon which – in my opinion – the unfortunate events of the past few months will certainly

[36] According to Bszi. §74 (1), "The President shall be removed from office if he/she is not able to perform his/her duties for longer than 90 days for reasons falling under his/her control, furthermore, if due to some action, conduct or omission he/she has become unworthy of his/her position."
[37] https://www.iustitia.pl/
[38] https://444.hu/2018/06/14/fegyelmi-eljarasokat-kezdemenyeznek-ellenzekinek-gondolt-birak-ellen
[39] http://hvg.hu/itthon/20180617_hando_tunde_orszagos_biroi_tanacs_hazaarulok

leave a marked impression.

Some have already expressed their concerns in advance in connection with the transformation of the administrative courts and the possible reintroduction of ministerial administration. Since the draft legislation containing the relevant details has not been published yet, and it is therefore impossible to express a sound lawyer's opinion on the matter, we may nevertheless state that the main question is not what signboard – Ministry of Justice or National Office for the Judiciary – will be placed on the wall of the building under Szalay utca 16, but much more whether judicial self-governance will be provided efficient means to fulfil its constitutional role. For, it has become obvious that the main deficiency of the current system is that the body of judicial self-governance that is meant to exercise supervision over a political appointee endowed with strong powers does not have a legal status and adequate powers that would give it equal weight, as meant by the legislators of Bszi., and also by the representatives of the Venice Commission in 2013.

Judicial self-governance should be enhanced in the following fields:

- settlement of the status of NJC regarding the legal personality, competences and legal instruments of NJC;
- strengthening the legal status of the members of NJC to ensure their independence from the President of NOJ;
- in the system of appointment of judges, exclusion of the current options of the President of NOJ to declare proceedings unsuccessful, to stall for time and to circumvent the rules;
- restriction of the powers of the President of NOJ regarding the appointment or assignment of court executives;
- considerable enhancement of the decision-making and controlling role of NJC in the training and further training of judges.

Consolidating the legal status of NJC would promote the more efficient fulfilment of the constitutional role of "checks and balances" and thus secure the independent, accountable and quality administration of justice all at once. For, in vain does Hungary make progress in the justice scoreboard in terms of the efficient and timely administration of justice, if it moves backwards at double speed in the fields of judicial independence or accountability of the executives.

As regards the future, let us call attention to one important thing: in extreme cases, the efficiency of a system may be influenced substantially - pro or contra – by who occupies a given seat. In Poland, what caused the greatest outcry among Polish and foreign lawyers in connection with the introduction of the new model of justice was that legislature removed judges from executive positions and positions occupied in self-governance bodies. I think this is a message also for Hungary: legislative power may remove a political appointee any time, since it had placed that person into his/her position itself, but the integrity of judicial bodies may not must not be attacked either from the interior or form the exterior and, what is more, it should be actively protected also by the other branches of power.

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