



## Report on the fact-finding mission of the EAJ to Hungary

### 1. Request, Constitution of the Task Force, Performance

On request of the Association of Hungarian Judges (Magyar Bírói Egyesület – MABIE) and of the National Judicial Council of the Hungarian Judiciary (Országos Bírósági Tanács -OBT)<sup>1</sup> the *EAJ Working Group on the Situation of Member Associations* was commissioned by the EAJ Assembly in Marrakech in 2018, to carry out a “fact finding mission” with the Hungarian Judiciary in Budapest. A committee was appointed. The EAJ- committee (hereinafter referred to as “the Committee”) consisted of

- the President of the EAJ-Working Group *On the Situation of Member Associations*, Judge Stephan Gass,
- the Member of the EAJ-WG and Honorary President of the IAJ, Judge Gerhard Reissner
- and the Honorary President of the IAJ, Judge Günter Woratsch.

The mission to Budapest was accomplished from April 17<sup>th</sup> to 19<sup>th</sup> 2019.

### 2. Mandate of the Mission

The Association of Hungarian Judges asked the EAJ to conduct an investigation into the following points:

1. The ineffectiveness and consequences of the interim election of missing members of the **National Judicial Council (NJC)**, lacks in collaboration between the **National Office for the Judiciary (NOJ)** and the **National Judicial Council (NJC)**.
2. The **practice of appointing judges and court leaders** under the authority of the President of the National Judicial Office.
3. Observance and safeguarding of **rights of participation** in regard to groups of representatives, the **Association of Hungarian Judges (MABIE)** in particular.<sup>2</sup>

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<sup>1</sup> See the letters of the President of the National Judicial Council of the Hungarian Judiciary (NJC/OBT), Sándor Szabó, of 12-11-2018, and of the Association of Hungarian Judges (Magyar Bírói Egyesület – MABIE), Ms Judit Zso'fia Oltai, of 9-2-2019 (Appendix I.)

<sup>2</sup> **National Office for the Judiciary (NOJ)**, in Hungarian: *Országos Bírósági Hivatal Elnöke (OBH)*; **National Judicial Council (NJC)**; in Hungarian: *Országos Bírói Tanács (OBT)*. In 2012 a new **self-government system** was established which divided the powers formerly belonging to NCJ between two newly established judicial organs: the NOJ and the (new) NJC (see appendix II).

### 3. Meetings-Interviews

The EAJ- Mission had meetings with the following persons/institutions:

- The organs of judicial self- government: The *National Judicial Council (NJC)* and the *National Office for the Judiciary (NOJ)*<sup>3</sup>
- The President of the Curia of Hungary (the Supreme Court)
- The Ministry of Justice,
- The Hungarian Bar Association
- The Association of Hungarian Judges (MABIE)
- Various judges of different regions of the country

The meetings were impeccably arranged and logistically supported by MABIE, i.e. by Judge Etelka Halász, Delegate of the Hungarian Association of Judges to the EAJ, as well as by Judge Günter Woratsch.

### 4. Detailed Visiting Programme

#### Wednesday, 24-04-2019

- Dr. Csaba Ujkéry (former President of the Tribunal of Kapuvár, associate professor)
- Dr. Oltaí Judit (President MABIE) , Dr. Bálint Attila, Vajda Edit (Presidency Hungarian Association of Judges - Magyar Bírói Egyesület -MABIE)
- Dr. Bánáti János President of the Hungarian Bar Association

#### Thursday, 25.04.2019

- Dr. Tünde Handó (President of the National Judicial Office - Országos Bírósági Hivatal Elnöke - OBH)
- Dr. János Bóka (Secretary of State at the Ministry of Justice)
- Dr. Péter Darák (President of the Curia of Hungary (Supreme Court of Hungary)

#### Friday, 26.04.2019

- Dr. Hilbert Edit (Judge Budapest, former President of OBI and member of MABIE)
- Dr. Bucsi Ágnes, Judge, District Court of Dunaújváros
- Dr. Pócsa Róbert, District Court Budapest
- Dr. Léhmann Zoltán District Court Vác
- Dr. Fatalin Judit (Judge, President of OBT) Dr. Rochlicz Zoltán (Judge, Vice-President of OBT)
- Dr. Lajos Makai (Judge, Former President of MABIE)

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<sup>3</sup> See invitation letter of the president of the Hungarian National Office for the Judiciary (OBH), Ms Tünde Handó, of April 2019.

## 5. Collaboration National Office for the Judiciary (NOJ)-National Judicial Council (NJC)

### 5.1 General Organisation of Judicial Self-Government in Hungary

The new rules concerning judicial self-government coming into effect on January 1st, 2012, introduced a **new self-government system** and **divided the powers** formerly belonging to NCJ between **two newly established judicial organs**. The tasks of central administration of courts are performed by the **President of the National Office for the Judiciary (NOJ)** supported by deputies and the Office. The president of the NOJ has **extensive competences** and responsibilities. The President of NOJ shall keep the competences of the president of the former National Judicial Council, and further rights are also vested on the president of NOJ in order to secure operability. To mention some of the latter, the right to issue regulations, resolutions and recommendations is a right usually exercised by the heads of the institutions with a national scope of competence. The president of NOJ shall bear a serious personal responsibility for the central administration and for its effective operation, i.e. to perform the president's duties – as enshrined in the Act of Parliament – with due regard to the constitutional principle of judicial independence.

The president shall provide for the publicity of the administration of the courts and the related decision-making. The president is under an obligation of publication and notification in respect of decisions of the president of NOJ, regulations, recommendations and reports (for more see appendices II and II).

The president of NOJ shall perform the work under control. Therefore, the administrative work of the NOJ's President is supervised **by the National Judicial Council (NJC)**.

Between the rules of termination of the mandate also prevails the corporative control. **The deprivation of office** of the president of NOJ may be **initiated at the Parliament by NJC** with its resolution adopted by two-third majority vote (see also appendices II and III).

### 5.1 Confirmed facts

The following sequence of events which was fully confirmed by all of our interlocutors, except the Head of the NOJ, shows quite clearly the problematic situation in the Hungarian self-governing body and its consequences on judicial independence:<sup>4</sup>

However, a preliminary remark has to be made here. Unfortunately, it was not possible to get any concrete answer from the President of NOJ concerning the events that happened in the previous year (and up to April of this year). During the meeting with the President the committee got an impressive presentation of activities of the National Office of the Judiciary. The Office is well equipped and employs almost 300 persons. The committee, which was met in the Budapest National Academy for Judges by Ms Tünde Handó, learnt about the services of

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<sup>4</sup> See also the **Report of the National Judicial Council (Országos Bírói Tanács (OBT): A 101/2018. (X.03.) OBT határozattal megalakított, az OBH elnökének az egyes bírói és bírósági vezetői pályázatok elbírálása során folytatott gyakorlatát és az OBT irányában fennálló kötelezettségeinek teljesítését vizsgáló bizottság JELENTÉSE** (2019. január 28). Report by the Committee established by NJC Decision 101/2018 (X.03.) to review the practice adopted by the President of the NOJ during the evaluation of applications for single judge and court management positions and the President's performance of its obligations in respect of the NJC. Budapest, 28-01-2019. Approved and disclosed by the NJC pm 6 February 2019.

the office from a point of view of statistics, about IT-use, restauration of court building, social welfare of judges and court clerks, about initial and continuous training etc. However, questions concerning the controversy with the NJC or the appointment / secondment of judges were plainly and simply rejected on the ground that she would like to continue her – prepared - speech. Other questions could not be asked because the President had set a time limit of one hour and the time had run out.

The sequence of events can be resumed as follows:

- After the previous NJC - members' six-years mandate expired, **new NJC members were elected in January 2018**. Unlike the previous members of NJC the majority of the newly elected judges were not holding high administrative positions in the judiciary. The new composition of the Council projected more efficient control over the central judicial administration (i.e. the President of the NOJ).
- At the beginning of 2018 two judicial assemblies (Metropolitan Court of Budapest and Győr Regional Court of Appeal) requested from the **NJC to investigate decisions of the NOJ President on judicial applications and appointment** of court presidents. NOJ put together a Committee in February to prepare an inquiry- report.
- In April 2018 – when the NOJ President was already familiar with the content of the mentioned report – all of a sudden and completely unexpected 5 members and 12 substitute members of the NJC did resign. This means that the number of members in the NJC (totalling 15) was reduced to 10. Among them there was no judge from an administrative and labour court, as the law directs. In the background **unlawful interference** was foreshadowed that came from the **President of the NOJ** or regional **court presidents** selected and appointed by her. NJC was officially reported that some members were **even threatened by court presidents**.
- As the headcount of the NJC declined from **15 to 10**, the **NOJ- President** declared the **Council illegitimate**, and since May she **refuses to cooperate and provide data** on request; nevertheless, the President of the Cúria (Hungarian Supreme Court) and NJC confirmed that the Council operates in a legitimate way, and that her interpretation of law is simply false. The NOJ President didn't participate at meetings of NJC since May and refused to cooperate.
- On May 2<sup>nd</sup> 2018, based on the inquiry of the NJC Committee, the **NJC** stated that the **NOJ-President** unlawfully **declared** several **judicial applications** and several proceedings to **appoint court leaders “unsuccessful”** and nullified these without proper justification (or with no justification at all).
- A extraordinary electoral assembly was summoned to **elect additional NJC-council** members, however regional court presidents, vice-presidents and collegium leaders which were **directly appointed by the President** of the **NOJ** along with lower court presidents and vice-president directed by them – as electors – obstructed the electoral assembly to elect the new members on October 10<sup>th</sup> 2018. The **nominated court executives refused to accept candidature**; meanwhile, the majority prevented ordinary-judge electors to apply for membership. The electoral assembly were held without a secret ballot, and several other **breaches of procedural rules** were reported afterwards.
- The electoral assembly and (one day later) the regional court presidents appointed by the NOJ- President, published a statement in which they ask remaining **NJC- members**

**to resign.** According to the Act on structures and administration of courts elected members of the NJC cannot be dismissed or recalled. Moreover, presidents used the phrase “in the name of the Hungarian Judiciary”, which caused a storm of indignation among judges. **The Hungarian Association of Judges (MABIE) and** several judges from all over the country made **open statements and wrote petitions** objecting the appeal of the assembly and court presidents. These were published on <http://www.mabie.hu>.

- The remaining NJC - members **are subject of continuous persecution, annoyance and retaliatory actions** from court presidents and personally from NOJ President (e.g. disciplinary proceedings, ban from certain professional activities).
- The **Minister of Justice abstains from interference** on any side; however, a representative of the Minister of Justice participates – alongside with the representative of the Bar Association - continuously in the meetings of NJC. Neither the Ministry of Justice, nor the Government questioned the legitimacy of the NJC.
- The NOJ President and court presidents failed to indicate any misconduct or breach of law regarding the operation of the NJC so far. Despite this tense situation the NJC is still committed to fulfil its constitutional duties. A **new committee** has started to **examine whether the NOJ- President made any changes in the practice of appointing** judges and court presidents since the last report.
- Moreover, the NJC finds it worrisome that (up to this time) there are several courts where **presidents, vice-presidents or collegium leaders** are **not appointed** for six years, but the NOJ- president commissions acting presidents for **only one year after nullifying application procedures**. A lot of positions are vacant at the moment with acting presidents (vice-presidents, collegium leaders), some of them for more than one year.<sup>5</sup>

## **5.2 Lack in collaboration between the National Office for the Judiciary (NOJ) and the National Judicial Council (NJC) /Ineffectiveness and consequences of the interim election of missing members of the National Judicial Council (NJC) - Evaluation**

The EAJ Committee complies with the depiction and interpretation of the NJC -Report. All judges who were interviewed confirmed the facts and the analysis of the report. In general, one can say that the Hungarian Judiciary is facing a kind of “constitutional crisis” since May 2018 due to the activity of the President of the NOJ who denies any collaboration with the National Judicial Council. Thus, the three bodies of judicial self-government (the President of the Supreme Court, the NOJ and the NJC) cannot work together any longer which leads to a blockade, and thus to the impossibility of the NJC to perceive its supervisory tasks.

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<sup>5</sup> According to NJC the following positions are vacant with acting presidents (vice-presidents, collegium leaders), some of them for more than one year: • President of Pécs Regional Court of Appeal • Vice-president of Pécs Regional Court of Appeal • President of Szeged Regional Court of Appeal • Vice-president of Szeged Regional Court of Appeal • Vice-president of Győr Regional Court of Appeal • Leader of Civil Collegium at Győr Regional Court of Appeal • Leader of Civil Collegium at Metropolitan Court of Appeal • President of Metropolitan Court • Leader of Criminal Collegium at Metropolitan Court • Vice-president of Budapest Environs Court • Leader of Criminal Collegium at Budapest Environs Court • Leader of Civil Collegium at Budapest Environs Court • Leader of Economic Law Collegium at Budapest Environs Court • President of Balassagyarmat Regional Court • Vice-president of Pécs Regional Court • Vice-president of Zalaegerszeg Regional Court.

Therefore, it is evident:

- The President of the NOJ failed to secure the statutory right to inspect documents to the members of the Committee. Accordingly, **the NJC could not exercise full oversight of the practice of the President of the NOJ concerning the declaration of applications unsuccessful**, and it was not possible to establish whether or not the President of the NOJ exercised her power due to legitimate reasons and by keeping the affected persons and bodies appropriately informed.
- The President of the NOJ simultaneously contravened the law **by denying the members of the NJC the right to review conferred upon them in a cardinal act**. Regardless of the position the President of the NOJ expressed about the operability of the Council, **the right to inspect documents inures to each member of the NJC** individually, and denying it limits the right to oversight.
- Any contraventions of law committed by the President of the NOJ relating to applications for judicial and court managerial positions **amounts to a material breach of the principle of legal certainty enshrined in Section 1) of Article B) of the Fundamental Law**. The gravity of the consequences **is not mitigated in any way whatsoever by the actual percentage of the total number of judicial applications affected by illegitimate decisions**. Effective oversight by NJC over this activity of the President of the NOJ, the NJC publishing its opinion of the President's practice relating to the determination of applications and the ongoing control over appointments as practised by the President of the NOJ **are obvious constitutional interests**.
- There are managerial positions, which are **subject to the President of the NOJ's power to appoint, remain unfilled on 1 January 2019** partly **due to** the high number of **applications for court managerial positions declared unsuccessful** recently despite the support expressed by advisory bodies and in part owing to applications invited for court management positions with delay or by not observing procedural time-limits (p. 15 of the NJC report).<sup>6</sup>
- Forward to Sections 6 and 15 of **NOJ Order 10/2016. (X.26.) issued by the President of the National Office for the Judiciary, the NJC should express its opinion in retrospective of promulgated policies** which are already in effect and even applied in practice, which renders this activity of the NJC absolutely weightless. The NJC is in no position to attend to its duties effectively, it plays no role of any significance in the process of drafting regulations since **it is only informed about the outcome of the regulatory process after promulgation** has occurred.
- By adopting policies and practices, **the President of the NOJ deprived the NJC of the powers granted to it in the cardinal act**, reduced the performance of its duties to a mere formality and vacated the supervisory power vested in the NJC by the Fundamental law in this regard.
- The **President of the NOJ failed to perform her duties** relating to the report on **implementing the budget for 2017**, the determination of the detailed conditions for and the level of other benefits and partially as regards the proposal for the Chapter on the Courts in the 2019 Budget as laid down in the cardinal act.
- The President of the **NOJ failed altogether to send to the NJC the financial report** and the submission concerning other benefits thereby **rendering the expression of an**

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<sup>6</sup> As to the positions unfilled see Footnote 5.



**opinion impossible.** In an objectionable manner, she provided access to the proposed budget only after submitting it to the Government. Despite the brevity of time, the President of the NOJ could have proposed voting in written form to avoid forcing the NJC to express an opinion about a proposal which was already submitted.

- **It is the duty of the NOJ to ensure the technical conditions for NJC operations and the NOJ holds no right of control over the National Judicial Council.** The President of the NOJ has the duty to facilitate the operation of the NJC from the budget allocated to the NJC rather than from the budget allocated to the courts where NJC members are employed to serve. By refusing to sign the agreement and to disburse payments directly, the President of the **NOJ contravened the provisions of the cardinal act and prevented the NJC from attending to its constitutional duties.**
- The President of the **NOJ used the central intranet on 16 October 2018** to notify judges that **the operation of the NJC was not legitimate**, and in order to ensure the operation of the judicial organisation in accordance with the Fundamental Law, it is necessary to have an eligible body decide a question relating to the interpretation of law emanating from the position of the NJC, which suggests that the Council continues to have the quorum, and therefore there is nothing that prevents it from operating.<sup>7</sup>
- The communication of the President of the NOJ, **her actions** and the measures she deliberately ignored to take offer **sufficient ground for drawing the conclusion** that the **President of the NOJ** spares no effort to prevent returning the membership of the NJC to 15 once again, **as that would not allow her to argue** that her **supervisory authority** is inoperable (see p.35 of the report

### **5.3 The practice of appointing judges and court leaders under the authority of the President of the National Judicial Office – Evaluation**

- The **drastic reduction of the headcount of the service courts** is the natural consequence of the simultaneous termination of the mandate of judges appointed earlier on **and the failure to reappoint them or to appoint new disciplinary judges to replace the outgoing judges.** The latter reason, namely **the failure** to make new appointments, **is attributable to how the President of the NOJ proceeded in this case.** The courts made their decisions about the persons nominated to act as disciplinary judges in due course and sent their decisions to the President of the NOJ, **who failed to forward the nominations to the NJC despite being explicitly warned to do so.** **Unaware of the actual nominees**, except for those communicated to the NJC directly by the President of the Curia, the **NJC is in no position to make a decision** on the appointment of disciplinary judges.
- The **President of the NOJ acted without legislative authorisation** and surpassed her powers by issuing NOJ Decision 25/2012. (XII.21.), since **in addition to regulating the remuneration of disciplinary judges, she also laid down detailed rules concerning their appointment**, whereby she vindicated powers, particularly powers of submission to herself. All of that runs contrary to the provisions of the cardinal act

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<sup>7</sup> The Act on the Constitutional Court provides a narrow definition of the persons eligible for bringing matters relating to the interpretation of the Fundamental Law before the Constitutional Court and none of the members of the judicial organisation are eligible, which is why the **President of the NOJ contacted the Commissioner of Fundamental Rights to start proceedings with the Constitutional Court** to have the body authorised under public law to **interpret the Fundamental Law** take up a position on the legitimacy of the operation of the NJC.

[LSRJ Section 102(4)], **which authorises the President of the NOJ to do nothing more but regulate remuneration.** Using her newly vindicated power and the opportunities presented by reporting lines, **the President of the NOJ held back the nominations of the organs of judicial self-governance and thereby prevented the NJC from exercising the right conferred upon it in a cardinal act** [Section 103(3) g) of the OACH]. In addition **to depriving the NJC of its power, the inaction of the President of the NOJ also threatens the uninterrupted operation of the service courts.**

- Section (1) of **Article 26 of the Fundamental Law** enshrines the **legal guarantees of judicial independence**, and judges are only **subordinated to law, they shall not be given instructions as to their adjudication activities and may only be removed from office for the reasons and in a procedure specified in a cardinal act.** The **operation of appropriately staffed courts** of judicial discipline with competence over any disciplinary and compensation cases involving judges and the legal disputes arising from the professional evaluation of court managers is one of the **significant guarantees of judicial independence** (p. 19 of the report).

## **6 The Association of Hungarian Judges (MABIE) and the NOJ**

1400 out of 2791 judges are members of the Hungarian Judges Association (Magyar Bírói Egyesület (MABIE), which is member of IAJ since 1991. At the election of the board in 2018 Dr. Judit OLTAI was elected new President of the association. Dr.Sandor SZABO remained secretary general, who at this time was also member of the new composed Council, which started its work in January 2018, and became president of the Council from July 2018 onwards. Before 2018 there were no serious conflicts between the office and the association. At the time when mysteriously several members and substitute members resigned from their mandate in the Council Sandor SZABO was called by the President of the Notional Judicial Office (NJO) Hando Tünde twice and demanded to step down from his mandate in the Council otherwise a disciplinary procedure might be initiated against him.

When after the assembly to elect new members and substitute members of the Council , which took place in October 2018 the association protested against the termination of the election process, which it considers as illegal, and published a resolution on its website, which was signed by hundreds of colleagues, within a month, the attacks against the association intensified. The President of the National Office closed the headquarter of the association, which was in a building belonging to the NJO. With the help of the bar association, who provided an intermediate seat it could be avoided that this loss of the headquarter caused the illegality of the association, because according to Hungarian law an association without a seat is classified as illegal. The possibilities to hold meetings in court buildings were reduced. No support was provided. In 2018 the association did not get any contribution out of the 5 Mio Forint, which were foreseen for associations, which work in connection with the judiciary, The application of this year was answered with the proposal to get 700000 Forint under conditions, which were not acceptable for the association, namely that the President of the Office could participate in and speak at certain meetings of the association and would be provided with certain information.



In one district the president of the second instance court, assembled all presidents of the first instance courts in his district, explained that he considers the role of a president not compatible with the membership in the Association, and invited the other presidents to consider this not only for themselves but also to speak with the members of the Association at their respective courts about the membership. In order to facilitate this, he distributed lists of members, which obviously were compiled from data, which were collected in the financial department of the court. Members previously had agreed to directly deduct the monthly membership fee from their salaries,

The Association was not invited to participate in any projects, even if the goal of the project deals with the situation and work of judges, like elaborating a new scheme of salaries, and it cannot use the official website of the courts to provide its information.

On the opposite to such lack of mutual inclusion there are frequent exchange, mutual participation in activities and co-operation of the association with the Bar Association, with the Ministry of Justice and with the National Judicial Council. The president of the Association is regularly invited to the meeting of the NJC.

## **7. Excursus: The new Administrative Court System**

In June 2018 the Hungarian Constitution was amended and a separate administrative courts system was introduced. Administrative jurisdiction so far was integrated in the system of ordinary courts with the Supreme Court (Curia) as highest instance. The constitutional amendments established a Supreme Administrative Court, with a president appointed by the Parliament with 2/3 majority for a period of nine years. The Minister of Justices is entrusted with all the tasks, which in the system of civil and criminal courts are within the jurisdiction of the President of the National Judicial Office. The jurisdiction of the two branches of jurisdiction is very vaguely formulated and leaves some space of interpretation for legislation. The new system is scheduled start to operate on January 1<sup>st</sup> 2020.

Following these constitutional amendments of December 12<sup>th</sup> 2018, the parliament adopted a Law on Administrative Courts which establishes a two-level court system composed of the Supreme Administrative Court and first instance Administrative Courts in the regions, and a law, which contains transitional provisions among others regarding the selection and appointment of the first judges of the new courts. Judges who already work in the field of administrative law will be transferred, if they apply for it, others would have to have the same requirements of experiences as all future judges. The law also establishes a National Administrative Judicial Council which has a purely advisory role. The few possibilities, in which in the ordinary courts system the National Judicial Council has the right to veto the decision of the President of the NOJ or in which the latter needs the consent of the NJC do not apply on the relation between the minister and the National Administrative Council. This is especially relevant in appointment procedures, when the minister deviates from the ranking of candidates. The legal regulations, when the minister can declare an appointment procedure as unsuccessful are even more un-precise than the corresponding regulations which apply for the President of the NJO.

The Venice Commission was asked by the Minister of Justice to deliver an opinion on the draft law, nevertheless the law passed the parliament before the Venice Commission forwarded its opinion. The Opinion criticized several points of the meanwhile adopted laws. A central point are the powers of the minister in the appointment but also in the transfer of judges and court presidents without effective counterbalance of control or remedy.

Few days before the Venice Commissions Opinion was published on basis of its draft the Hungarian Parliament passed Law 5241, which introduced some amendments, e.g. regarding the composition of the National Administrative Judicial Council. But core points of the problems especially as regards the regulations of appointment, transfer and the selection criteria for the President of the Supreme Administrative Court remained unchanged.

During the mission our exchanges regarding the topic of the new separate system of administrative courts it was confirmed not only by the secretary of state but also by the president of the Supreme Court and others that the plan to establish a separate system of administrative courts is a very old one, which was supported very much from academics and also from within the judiciary. In times of the Austrian Hungarian Empire since 1876 there was an Administrative Court in Austria as well as in Hungary. This court was created as a supreme court which decides upon the lawfulness of administrative acts as final instance. In Hungary this court remained till the communist regime. In literature books were filled which argue for a separate administrative court system. The Venice Commission in its Opinion underlines that it is up to the states to exercise administrative jurisdiction in a common or in a separate court system as long as balance of powers of the state and independence of the judiciary are guaranteed. The secretary of state claimed that praxis will proof that this is the case. Others were doubtful and referred that not even the system in the ordinary court works, where control is foreseen works properly, it is not more likely that it is the case, when there is almost no control foreseen like it is the case in the new system.

The secretary of state also mentioned that two different systems also create the possibility to examine which system proves more effective. But he denied the question if it is possible that in future the ministerial system of running the administrative court system may also substitute the self-government system of running the civil and criminal courts. The possibility of such an option was also shared by the president of the Supreme Court and the representatives of the Judges Association

## 8 Overall Conclusions

- Since May 2018 the Hungarian Judiciary is facing a very grievous situation which in some aspects comes close to a “constitutional crisis” **due to the activity of the President of the NOJ** who denies any collaboration with the National Judicial Council. Thus, the two bodies of **judicial self-government**, the National Office of the Judiciary (NOJ) and the National Judicial Council (NJC) cannot work together any longer which leads **to a blockade**, and thus to the **impossibility of the NJC to perceive its supervisory tasks**.
- The competences of the NOJ, which are vested in one person, the president, are much too large, almost comprehensive (as already the GRECO – Report of 2015 has

ascertained. On the other hand, the jurisdiction of the NJC is too restricted almost non-existent and can easily be neutralised – as *in casu*!

- It is inadmissible that the organ which should be controlled (the NOJ) can declare the controlling organ (the NJC) “illegitimate” and refuses the collaboration, provided by law, with this organ. Thus, neutralising the controlling body.
- It is furthermore problematic when the procedure for bye-elections to the controlling body (the NJC) can only be tackled by the body to be supervised.
- The jurisdiction of the NOJ relating the appointment and promotion of judges and the secondment of judges from one court to another is particularly problematic under the aspect of judicial independence. If the composition of the NCJ indeed needs additional members a bye-election must be organized as quickly as possible and the procedure should be initiated by either the NOJ or the NJC.
- Relating to the appointment and promotion of judges, The GRECO – Report of 2015 (Group of States against Corruption/Councils of Europe Anti-Corruption Body) recommended an amendment of the NOJ’s President widespread powers in order to establish more competences of the NJC on this field (p. 28 of that report). The Committee supports this proposal.
- Judges have the right to form associations (see Recommendation 2010/12 of the Committee of Ministers of the Council of Europe, para 25, UN Basic Principles on the Independence of the Judiciary, point 9). It is highly recommended to involve judges in all projects etc., with regard to their status or their work, be it in legislature or on the executive level.
- The members of the delegation noticed that MABIE obviously regained its strength and willingness to fight for the rule of law in Hungary, that they take important steps in the interest of the judiciary and their colleagues and that this positive development is seen also from representatives of other institutions. They regret that this view is not adopted by the National Office for the Judiciary (NOJ).
- It is a long-lasting idea fostered by academics and many judges to separate the administrative court system from the civil and criminal court system. There should be clear regulations, on the constitutional level which cases should belong to which branch, otherwise there is the danger of arbitrary shift of tasks.
- It is recommended that administration of courts should be in the hands of ministers of Justice only when there is a long and strong tradition and when nevertheless the balance of powers of the state as essential element of the rule of law is guaranteed (Venice Commission et al.),
- Without evaluating if this is the case in Hungary it is in any case obvious, that to guarantee functioning of the balance of powers, additional amendments of the law regarding the appointment of judges and presidents, criteria for the President of the Supreme Administrative Court, and enlargement of the powers of the National Administrative Judicial Council are necessary.

## 9 Recommendations

The Committee recommends to the EAJ at its meeting in Copenhagen

- a) To take note of the report of this mission.
- b) To forward the report to the **Association of Hungarian Judges (MABIE)** at their disposal, and to all national and European authorities which the assembly may propose.
- c) To express full support to MABIE and asking for their update on the situation before the next meeting in Nurajev (Astana) in September 2019.

*The EAJ Working Group on the Situation in Member Associations  
Sub-Committee "Mission to Hungary"  
Basel, Wien, Budapest, May 3<sup>rd</sup> 2019*

*Stephan Gass, Gerhard Reissner, Günter Woratsch*

## Appendix I



IAJ válaszlévél  
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## Appendix II

### **The National Office for the Judiciary**

Scope of authority of the President of NOJ and the central administrative supervision of the National Judicial Council (NJC)

### **The beginnings of the operation of a self-governing system of the courts**

The justice system created by the reform of 1997, which entrusted the National Council of Justice (NCJ) as a self-governing body with the administration of courts, is a novel and unique formation in Europe. Given its unprecedented functioning in the '90s its formation and method of functioning needed several revisions on the way of improvement.

### **From 1997 to 2011**

Over the years of operation, it turned out that as a natural consequence of the formational setting of (management performed by a body) the decisions of the NCJ have more likely been influenced by particular interests and only low operability could be achieved: problems that had to be addressed swiftly could remain unsolved for months. This is why the new regulations introduced on 1 January 2011 and on 1 March 2011 deprived NCJ as a body of many of its rights and delegated them into the competence of the president of NCJ. By this delegation of competences 16-20 new rights were added to the original 7-10 rights of the president of NCJ.

### **New self-government formations in 2012**

The new rules coming into effect on January 1st, 2012 introduced a new self-government system and divided the powers formerly belonging to NCJ between two newly established judicial organs. From then on the tasks of central administration of courts are performed by the President of the National Office for the Judiciary (NOJ) supported by deputies and the Office.

**The administrative work of the NOJ's President is supervised by the National Judicial Council (NJC).** The President of NOJ shall keep the competences of the president of the National Judicial Council, and further rights are also vested on the president in order to secure operability. To mention some of the latter, the right to issue regulations, resolutions and recommendations is a right usually exercised by the heads of the institutions with a national scope of competence. The president of NOJ shall bear a serious personal responsibility for the central administration and for its effective operation, i.e. to perform the president's duties – as enshrined in the Act of Parliament – with due regard to the constitutional principle of judicial independence. The president of NOJ shall perform the work under serious control:

The president shall provide for the publicity of the administration of the courts and the related decision-making.

The president is under an obligation of publication and notification in respect of decisions of the president of NOJ, regulations, recommendations and reports.

Between the rules of termination of the mandate also prevails the corporative control. **The deprivation of office of the president of NOJ may be initiated at the Parliament by NJC** with its resolution adopted by two-third majority vote.

#### **The customary control over the person responsible for a budgetary heading.**

The president shall ensure the rights of the advocacy organisations only with respect to new cases received by the court, only upon a motion taken within 15 days upon receipt, only upon the motion of the court (or upon the motion of the General Prosecutor in criminal cases), on the basis of specific data on the number of cases, staff number etc., upon requesting the opinion of the concerned court (the General Prosecutor). The decision of the president of the NOJ may be appealed by the concerned parties, what is adjudged by the Curia.

#### **Obligation of providing information**

The **president shall inform the NJC on her activities** on a half year basis. The president shall inform annually the presidents of the Curia, of the high courts and of the tribunals. The president shall report to the Parliament annually on the general situation of the courts and on the administrative activities of the courts and once in between annual reports to the Parliamentary Committee of the Judiciary.

#### **Appointment of court executives**

In the appointment of court executives, the right of the judicial bodies to form an opinion on the appointment remains unchanged. Some of the court executives shall be appointed by the president of NOJ, while a much larger part of executives shall be appointed by the presidents of high courts and of tribunals.

The powers of the bodies forming an opinion remain intact with regard to all executive appointments. Indeed, the rights of the president of NOJ are more limited than the powers of the presidents of high courts and of tribunals. The president of NOJ has to obtain the advance opinion of NJC, if she would like to appoint an executive who had not received the majority of the votes of the body forming an opinion on the appointment. The president of the NOJ shall – at the same time as the appointment – provide a written notification to the NJC and present the reasons of the decision on the next session of NJC, in the case of appointing another person than the one proposed by the body providing an opinion.

The system of applications court executive posts will remain unchanged: The applicants shall refer to his/her long-distance plans and the way of realization concerning the operation of the division in



question. The president of the NOJ may propose to initiate legislation in the interest of legislation affecting the courts.

### **The central administrative supervisory rights of National Judicial Council**

The NJC has the central administrative **supervisory rights regarding to the president of the NOJ** as follows:

- Supervising the central administrative activity of the president of NOJ, and making a notification as necessary
- Making a proposal to the president of NOJ on initiating legislation affecting the courts
- Forming an opinion on the regulations and recommendations issued by the president of NOJ
- Approves the rules of procedure of the service court and publish it on the central website.
- Forming an opinion on the proposal on the budget of the heading and on the report on the implementation of the budget
- Forming an opinion on the detailed conditions and the amount of other benefits
- Expresses a preliminary opinion on persons nominated as President of the NJO and President of the Curia on the basis of a personal interview,
- Determines the principles to be applied by the President of the NJO and the President of the Curia when adjudicating the applications in the context of using their power to award a position to the applicant in the second or third position in the rankings,
- Have the right of consent in the adjudication of applications where the President of the NJO or the President of the Curia wishes to award a position to the applicant in the second or third position in the rankings,
- Exercises the right of consent regarding the appointment of court leaders who did not receive the approval of the reviewing board
- Publishing annually its opinion on the relevant practice of the president of NOJ and of the Curia regarding the assessment of the applications for judiciary posts, and court executive positions, may awarding honorary titles etc., on the initiative of the president of NOJ
- Performing checks related to the property declarations of judges
- Deciding on the repeated appointment of certain executives, if the office has already been filled by the applicant two times
- Forming an advance opinion on the application for an executive post, if the president of NOJ or the Curia would like to defer from the majority opinion of the body that has formed an opinion on the appointment
- Forming an opinion on the rules pertaining to the training system of judges and to the performance of the training obligation.
- The member of NJC may observe the documents related to the operation of NOJ and the president of NOJ, and may request data and information from the president of NOJ
- The deprivation of office of the president of NOJ may be initiated by NJC

Courts of Hungary in: <https://birosag.hu/en/national-office-judiciary> [30-04.-2019]

## **Appendix III**

### **The status of the National Office for the Judiciary and the National Judicial Council under public law**

Article 25(5) of the Fundamental Law of Hungary provides that President of the National Office for the Judiciary shall perform the central responsibilities of the administration of the courts whilst the National Judicial Council shall supervise the central administration of ordinary courts. Section 65 of **Act CLXI**

**of 2011 on the Organisation and Administration of Courts** (hereinafter: OACH) asserts that the President of the NOJ shall -while observing the constitutional principle of judicial independence - fulfil the central duties of court administration and the management duties with respect to the chapter on courts in the Act on the State Budget, and shall supervise the administrative activities of the presidents of regional courts of appeal and regional courts. Section 88 of the OACH repeats the section of the Fundamental Law quoted above: the NJC is a supervisory body of the central administration of courts, which also cooperates in the administration of courts over and above its supervisory duties.

When establishing the new system of justice in 2012, the Government of Hungary divided the powers exercised formerly by the National Council for the Administration of Justice (in Hungarian: Országos Igazságszolgáltatási Tanács) among three new public law entities: in its capacity as the head of the highest level court, the President of the Curia of Hungary is responsible for professional guidance and uniformity of law, the President of the NOJ was granted extremely wide powers in respect of central administration to be supervised by the National Judicial Council, a purely self-governing judicial body elected by judges. Forward to the 2012 recommendations of the Venice Commission, the legislator widened the supervisory powers of the National Judicial Council and granted a substantially stronger mandate for exercising control over the appointment of judges and court managers, and over HR matters. Section 76 of the OACH lists the specific duties of the President of the NOJ relating to central administration, the appointment of judges, directing the Office, court budgets, collection of statistics, case distribution, measuring workload, HR matters, court administration, training and information. Section 103(1) a) of the OACH provides in general that in the area of general central administration the NJC shall exercise oversight in respect of the central administrative activity of and shall, if necessary signal any problems to, the President of the NOJ. Thereafter, Section 103 of the OACH contains several subsections laying down the details of specific areas where the NJC has the right to approve (or consent), to express an opinion or the make independent decisions.

The legislator's intent was clear to see even in the original language of the OACH, which in turn was expressed in more powerful terms in the amendments proposed by the Venice Commission. The general explanation of the Act says: „That facilitates the establishment of an operational administrative management function capable of responding to problems immediately; the President of the NOJ vested with powerful competences and the NOJ organisation under direct management. Even the President of the NOJ does not operate without control, as the National Assembly may remove the President from office (upon a motion to that effect by the President of the Republic or the NJC) and is subordinated to the NJC in terms of its powers to express an opinion and to offer matters to the President's attention.”

Although the powers of the National Judicial Council was granted broader powers, its set of legal instruments remained rather limited: it may send a signal to the President of the NOJ upon observing violations of law or may table a motion in Parliament to have the President of the NOJ removed from office „upon a failure to perform presidential duties for longer than 90 days due to reasons attributable to the President, and furthermore, upon being discredited in the presidential position due to an act, conduct or omission.“

Report by the Committee established by NJC Decision 101/2018 (X.03.) to review the practice adopted by the President of the NOJ during the evaluation of applications for single judge and court management positions and the President's performance of its obligations in respect of the NJC. Budapest, 28-01-2019. Approved and disclosed by the NJC pm 6 February 2019. P. 6.7.