

Budapest, 29 July 2020

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

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**Subject: Communication by Amnesty International Hungary and the Hungarian Helsinki Committee under Rule 9(2) of the Rules of the Committee of Ministers for the supervision of the execution of judgments, in the case of *Baka v. Hungary* (Application no. 20261/12)**

**Dear Madams and Sirs,**

Amnesty International Hungary and the Hungarian Helsinki Committee hereby respectfully submit our observations and recommendations under Rule 9(2) of the “Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements” regarding the execution of the judgment of the European Court of Human Rights in the *Baka v. Hungary* case (Application no. 20261/12, Judgment of 23 June 2016), in advance of the 1383<sup>rd</sup> meeting (September 2020) (DH) of the Ministers’ Deputies on the execution of judgments.

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

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

This communication concerns the execution of the judgment in particular in what concerns the implementation of the general measures indicated by the Committee of Ministers in its decision adopted in September 2019,<sup>2</sup> and the Hungarian Government’s Group Action Report of 25 June 2020 (hereafter: Action Report).<sup>3</sup>

The case of *Baka v. Hungary* concerns the **undue and premature termination of the applicant’s mandate as President of the former Hungarian Supreme Court** through legislative acts of constitutional rank and therefore beyond judicial control, **prompted by views and criticisms he expressed on reforms affecting the judiciary and exerting a “chilling effect”** also on other judges

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

<sup>2</sup> CM/Del/Dec(2019)1355/H46-11, 25 September 2019, [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2019\)1355/H46-11E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2019)1355/H46-11E)

<sup>3</sup> DH-DD(2020)563, 25 June 2020, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)563E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)563E)

and court presidents, **in violation of Articles 6 and 10** of the European Convention on Human Rights. The signatories also recall that in its September 2019 decision, the Committee of Ministers “noted with grave concern the reports suggesting that the ‘chilling effect’ of the violation found by the Court under Article 10 and affecting the freedom of expression of judges and court presidents in general has not only not been addressed but rather aggravated”; and “urged the authorities to provide information on the measures envisaged to counter this ‘chilling effect’ in order to fully guarantee and safeguard judges’ independence and freedom of expression [...]”.<sup>4</sup>

Amnesty International and the Hungarian Helsinki Committee are of the view that **the Government of Hungary has failed to comply with the decision of the Committee of Ministers:**

- The Government has **failed to take any measures to counter the “chilling effect”** of the violation of Article 10 of the European Convention on Human Rights in the underlying *Baka v. Hungary* case, and has **failed to adopt any guarantees to avoid any retaliation against judges publicly voicing criticism** in relation to the independence of the judiciary in Hungary.
- The governing majority has **systematically undermined the independence of the Hungarian judiciary** since 2011. The **legislative and organisational steps** taken by the Hungarian executive and legislative authorities, and the ensuing **legal and institutional changes have heavily contributed to the chilling effect** amongst Hungarian judges. Due to the prevailing legal and institutional structures, the **chilling effect is encoded in the current court system**.
- In addition to organisational developments regarding the judiciary, vaguely formulated internal policies coupled with attacks on individual judges in the media has contributed to a **palpable chilling effect amongst judges**, which materializes e.g. in a fear that prevents judges from speaking up or protesting administrative decisions and laws affecting the judiciary.
- The legislation **fails to guarantee that judges** who are unlawfully dismissed **are to be reinstated into their previous judicial leading administrative position** if the court orders their reinstatement as judges.

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## 1. REGULATORY CONTEXT AND THE SYSTEMATIC UNDERMINING OF JUDICIAL INDEPENDENCE IN HUNGARY

### 1.1. OVERVIEW OF LEGISLATIVE STEPS UNDERMINING JUDICIAL INDEPENDENCE SINCE 2011

The unfair and premature termination of Mr. András Baka’s mandate as President of the Supreme Court was an **integral part of the governing majority’s and the Government’s attempts to systematically undermine the independence of the Hungarian judiciary in the past decade**. The **legislative and organisational steps** taken by the governing majority and the Government, and the ensuing **legal and institutional changes, serve as a backdrop for, and have heavily contributed to, the chilling effect amongst Hungarian judges**. Therefore, the signatories are of the view that it is necessary to briefly outline the most relevant legislative steps and organisational changes, as follows:<sup>5</sup>

<sup>4</sup> CM/Del/Dec(2019)1355/H46-11, 25 September 2019, [http://hudoc.exec.coe.int/eng?i=CM/Del/Dec\(2019\)1355/H46-11E](http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2019)1355/H46-11E), para. 7-8.

<sup>5</sup> For detailed accounts of the steps undermining the independence of the judiciary in Hungary, see e.g.: *Stating the Obvious – Rebutting the Hungarian Government’s response to the Reasoned Proposal in the Article 7 procedure against Hungary* (A reaction paper by NGOs), 18 October 2019, [https://www.helsinki.hu/wp-content/uploads/NGO\\_rebuttal\\_of\\_Article\\_7\\_Hun\\_gov\\_info\\_note\\_18102019.pdf](https://www.helsinki.hu/wp-content/uploads/NGO_rebuttal_of_Article_7_Hun_gov_info_note_18102019.pdf), pp. 8-10; *Contributions of Hungarian NGOs to the European Commission’s Rule of Law Report*, May 2020, [https://www.helsinki.hu/wp-content/uploads/HUN\\_NGO\\_contribution\\_EC\\_RoL\\_Report\\_2020.pdf](https://www.helsinki.hu/wp-content/uploads/HUN_NGO_contribution_EC_RoL_Report_2020.pdf), pp. 4-21.

- Between 2011 and 2012, **the administration of courts was centralised**: the former judicial body in charge (i.e. the former National Council for the Judiciary, in Hungarian: Országos Igazságszolgáltatási Tanács) was replaced by a one-person decision-making mechanism, the **President of the newly established National Judicial Office (NJO)**, elected by the Parliament without any judicial involvement. As a result, significant decisions affecting judges, such as recruitment and promotion, or management of budget, are now made by an actor who “cannot be regarded as an organ of judicial self-government”, as noted by the Venice Commission.<sup>6</sup> This body concluded that the **powers** of the NJO’s President are “**very extensive** to be wielded by a single person and their effective supervision remains difficult”.<sup>7</sup> This means for example that the NJO President “can basically exert administrative influence on almost all levels of court presidents”.<sup>8</sup> As opposed to that, the powers of the National Judicial Council (NJC, a judicial self-governing body comprised of judges elected by their peers and vested with the task of controlling how the President of the NJO exercises their rights) remain very limited.
- The governing majority **lowered the mandatory retirement age for judges** in 2012, which affected a significant number of judges in leading positions, resulting in their dismissal.<sup>9</sup> The Court of Justice of the European Union concluded<sup>10</sup> that the new retirement scheme contravened Council Directive 2000/78/EC. The step was also found unconstitutional by the Hungarian Constitutional Court.<sup>11</sup> In response, the legislature passed Act XX of 2013, which allowed “prematurely pensioned judges [to] obtain reinstatement or compensation”, as stated by the Action Report. However, the remedy system **did not guarantee reinstatement into leading administrative positions**, since these leadership positions could be reclaimed only if the position had not been filled in the meantime. This led to the **replacement of a significant part of the leadership of the judiciary** within a short timeframe: **close to 90% of the most experienced judicial administrative leaders over the age of 62 were removed** from the system.<sup>12</sup>
- In May 2018, the **NJC found that the NJO President violated the law with the practice of repeatedly annulling** – often without any proper justification – **calls for applications for judicial leadership positions** where the result of the judicial vote on candidates was not in line with her preferences. This was possible because under the respective legal provisions, **the NJO President has the power to annul any call for appointments for court presidents and render the procedure unsuccessful without the consent of any judicial body**. In this case, he/she **may appoint an interim court president** for up to one year. Court presidents have broad authority over judges, and, importantly, the allocation of cases at their courts.

<sup>6</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary*, CDL-AD(2012)001, 19 March 2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e), § 51.

<sup>7</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020-e, 15 October 2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e), § 88.

<sup>8</sup> Amnesty International, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, 2020, [https://www.amnesty.hu/data/file/4871-final\\_fearing-the-unknown\\_report\\_amnesty-hungary\\_e1.pdf?version=1415642342](https://www.amnesty.hu/data/file/4871-final_fearing-the-unknown_report_amnesty-hungary_e1.pdf?version=1415642342), p. 8.

<sup>9</sup> As it was also mentioned by the Government’s June 2020 Action Report (Section II. A); DH-DD(2020)563, 25 June 2020, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)563E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)563E).

<sup>10</sup> *European Commission v Hungary*, Case C-286/12, Judgment of the Court (First Chamber), 6 November 2012, ECLI identifier: ECLI:EU:C:2012:687

<sup>11</sup> Decision 33/2012. (VII. 17.) AB, [http://public.mkab.hu/dev/dontesek.nsf/o/odoc4a0c9bf49cc4c1257ada00524f96/\\$FILE/EN\\_0033\\_2012.pdf](http://public.mkab.hu/dev/dontesek.nsf/o/odoc4a0c9bf49cc4c1257ada00524f96/$FILE/EN_0033_2012.pdf)

<sup>12</sup> Sources: National Judicial Office, 8 May 2013, <https://web.archive.org/web/20130728050053/http://birosag.hu/media/aktualis/nyilatkozatot-tettek-2012-ben-felmentett-birak>; response nr. 14.026-/2013.OBH of the National Judicial Office of 5 December 2013 to the HHC’s FOI request.

A prolonged conflict between the NJC and the NJO President ensued, in which the **President of the NJO declared the NJC illegitimate**, and refused to cooperate with the NJC.<sup>13</sup> In parallel to that, NJC members critical towards the President of the NJO faced retaliatory measures by the NJO President and were consistently targeted by government-affiliated media; and judges have been illegally blacklisted for being members in a judges' association critical towards the NJO. (See more on that in Section 2 below.) As a last resort, in May 2019, the NJC requested the Parliament to remove the President of the NJO, but to no avail. The situation escalated into a kind of **constitutional crisis**,<sup>14</sup> jeopardizing the effective control over the administration of the judiciary, and the crisis somewhat eased only when the acting NJO President was replaced in December 2019.

At this point, it is important to consider that, in Section II. D) of the Action Report, the Government notes that "the tensions within the judiciary seem to have eased by the election of a new President of the [NJO]". This may be indeed true on the surface, however, this statement disregards two important aspects. Firstly, the damage already done to the independence of the courts and the chilling effect that spread amongst Hungarian judges is not repaired simply by electing another person as NJO President. Secondly, **all of the structural issues that had led to the crisis above still prevail, and in particular all of the legislative provisions that allowed the abuse of power by the then President of the NJO are still in force**. Most notably, the **NJO President continues to have the same overly broad and excessive powers regarding the appointment of court presidents** as described above and which have been in the forefront of the conflict between the NJO President and the NJC, and so these powers can be abused by any NJO President in the future. Accordingly, related concerns originate not only "in disputes within the judiciary, of actions by the President of the [NJO]", as claimed by the Action Report in Section II. C). Instead, these concerns ultimately originate from the legislative framework allowing for abuse of power and for the undermining of judicial independence.

In the Action Report, the Government also states that it "**will continue to evaluate the domestic legislation** governing the status of judges and the administration of courts". This would in principle be welcomed by the signatories of this communication. However, the Action Report states that the Government will do so "in cooperation" with the President of the NJO (an actor elected by the Parliament without the involvement of any judicial body), but fails to mention any other stakeholders such as the NJC, judicial associations, the legal profession, the academia, or civil society. Moreover, **recent legislative steps cast doubt as to whether any such "evaluation" by the Government would enhance the independence of Hungarian judges**:

- In late 2019, the Government submitted and the Parliament adopted a Bill (**Act CXXVII of 2019**) that **extends political influence over the judiciary** and "**guarantee[s] judicial decisions favourable to the government in politically sensitive cases** even without setting up a separate administrative court system",<sup>15</sup> by making it possible "to channel [these] cases out of the ordinary

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<sup>13</sup> For more on this, see: Amnesty International – Hungarian Helsinki Committee, *A Constitutional Crisis in the Hungarian Judiciary*, 9 July 2019, <https://www.amnesty.hu/data/file/4586-a-constitutional-crisis-in-the-hungarian-judiciary-09072019.pdf?version=1415642342>

<sup>14</sup> European Association of Judges, *Report on the fact-finding mission of the EAJ to Hungary*, 2019, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>

<sup>15</sup> Amnesty International, *Nothing ever disappears, it only changes*, November 2019, [https://www.amnesty.hu/data/file/4721-nothingeverdisappearsitonlychanges\\_independenceofjudiciary\\_amnesty\\_hungary\\_20191119.pdf?version=1415642342](https://www.amnesty.hu/data/file/4721-nothingeverdisappearsitonlychanges_independenceofjudiciary_amnesty_hungary_20191119.pdf?version=1415642342). In 2018, the Government took legislative steps to set up a heavily government-controlled administrative court system that would have been separate from the ordinary courts. This would have blurred the line between the executive power and the judiciary, and would have provided for a wider risk of political interference e.g. in taxation, public procurement and election cases. (See e.g.: Renáta Uitz, *An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts*, 2 January 2019, <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>.) The respective law was criticized by several international stakeholders, such as the Venice Commission

court system and put them into the hands of Constitutional Court judges nominated and elected by the ruling majority”.<sup>16</sup> The Bill was submitted to the Parliament without any consultation with key stakeholders and the general public, and was **adopted against the opinion of the Commissioner for Human Rights of the Council of Europe**, who expressed the view that the Bill “may have a negative effect on the internal independence of courts and judges and fair trial guarantees for individuals”.<sup>17</sup> Moreover, while it introduces overarching changes, Act CXXVII of 2019 **does not address or remedy any of the structural and systemic deficiencies threatening judicial independence in Hungary**. This means that the structural deficiencies that led to the “constitutional crisis” within the system of judicial administration and the conflict between the NJO President and the NJC continue. Act CXXVII of 2019 clearly **shows that the Government and the ruling majority are disinterested in empowering the NJC** and in enabling it to exercise meaningful oversight over the NJO President, **or to address the issue of chilling effect** as raised by the Court in the *Baka v. Hungary* case.

## 1.2. LACK OF GUARANTEE TO BE REINSTATED INTO A JUDICIAL LEADING POSITION AFTER DISMISSAL

In its September 2019 decision, the Committee of Ministers explicitly invited the Hungarian authorities to provide information on the “safeguards to ensure, to the extent possible, that a President of the Kúria [*the successor of the Supreme Court*], or any other judge, removed from office for reasons he or she claims to be in violation of the Convention, has a right to reinstatement if the removal is found contrary to the Convention or other domestic law”.

In Section II. B) of the Action Report, it is stated in this regard that the judges’ right to reinstatement in case of their unlawful removal is guaranteed. The Action Report also acknowledges that **reinstatement into executive positions “is ensured to the extent possible, i.e. when the position is vacant”**. Thus, **if a judicial leader (e.g. court president or vice president) is dismissed unlawfully, and their reinstatement is subsequently ordered by the court deciding on the unlawfulness of the dismissal, they can only be reinstated into their leadership position if that has not been filled by someone else in the meantime**.<sup>18</sup> This means that the dismissed person can continue to serve as a judge, but may not be able to continue their work as a court president or vice president. If a dismissed judge starts a procedure to establish whether the dismissal was unlawful and wins the case, he/she may be reinstated as judge and receive financial compensation up to the amount of the leadership benefit that he/she would receive until the expiration of their original leadership mandate. This regulation means that there is a financial cost for replacing court leaders, however this expenditure does not prevent the arbitrary replacing of judicial leaders before their mandate expires. Due to the above, **the right to reviewing the removal and the right to reinstatement of judges cannot be considered complete and effective** in the view of the signatories of this communication.

In the Action Report, the Government argues that a “different approach would result in an uncertain situation due to the fact that any court executive could only be appointed for a transitional period pending the final resolution of the dispute”, and that it is “necessary to avoid such uncertain situations [...] in order to maintain the effective operating of the judiciary and its stability”.<sup>19</sup> The signatories are

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([https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)). Subsequently, the setting up of the administrative courts was “indefinitely postponed”, and then abandoned by the Government (see e.g.: [https://index.hu/english/2019/11/04/administrative\\_courts\\_scrapped/](https://index.hu/english/2019/11/04/administrative_courts_scrapped/)).

<sup>16</sup> Hungarian Helsinki Committee, *New law threatens judicial independence in Hungary – again*, January 2020, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Act\\_CXXVII\\_of\\_2019\\_on\\_judiciary\\_analysis\\_2020Jan.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf)

<sup>17</sup> See: <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>.

<sup>18</sup> Article 145(4) of Act CLXII of 2011 on the Status and Remuneration of Judges

<sup>19</sup> Government’s June 2020 Action Report (Section II. B); DH-DD(2020)563, 25 June 2020, [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)563E](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)563E)

of the view that the **Government failed to provide adequate explanation** as to why appointing an interim/acting executive (which is a fairly common solution for similar situations both in the public and private sphere) would lead to “uncertainty”, and why the need for evading “uncertainty” should supersede the right to reinstatement in case of an unlawful removal. The argument put forward by the Government here contradicts its position in relation to the issue of interim court presidents, where it supports the NJO President’s right to appoint an interim court president for up to one year after he/she annuls a call for appointments for a court president and renders the procedure unsuccessful.

## 2. TESTIMONIES OF HUNGARIAN JUDGES ON THE “CHILLING EFFECT”

### 2.1. RETALIATORY MEASURES AND MEDIA ATTACKS AGAINST NJC MEMBERS

In its communication<sup>20</sup> submitted to the Committee of Ministers in August 2019, the Hungarian Helsinki Committee presented in detail the experiences of **NJC-member judges who had been critical of the NJO President’s steps, and subsequently faced retaliatory measures** by the NJO President, aimed at hindering their professional advancement. The measures they reported included bonus cuts, exclusion from judicial working groups or training opportunities, and harsher working conditions. The judges had also been **consistently targeted by government-affiliated media** which aimed to discredit them. It was also presented that judges have been illegally blacklisted for being members of a judges’ association critical towards the NJO, and how all of these steps contributed to the chilling effect among Hungarian judges. The Action Report raises in Section II. C) in this regard that “no complaints have been brought before the Court by judges concerning the allegations submitted by the reports feeding the concerns of the Committee of Ministers”. The signatories wish to stress in this regard that the lack of formal applications to the Court does not in any way undermine the relevance and seriousness of the retaliatory measures and media attacks suffered by individual judges, in violation of their right to freedom of expression. Furthermore, at least three judges launched domestic civil law procedures against various newspapers, and it was established in final domestic court judgments that certain newspaper articles published had violated the judges’ inherent personality rights.<sup>21</sup>

After the election of the new NJO President in December 2019, these clear and visible attacks against NJC-members (or other individual judges)<sup>22</sup> ceased. However, this does not mean that the above series of attacks has not had serious and long-term consequences that go beyond the individual professional situation of the affected judges. The above instances, just as in the case of *Baka v. Hungary* itself, **concerned high-ranking, prominent judges in prestigious positions, and the attacks against them have been in the public**. Consequently, the attacks have **contributed to the “chilling effect” among other judges** that the case of Mr. Baka already had initiated. These events have contributed to creating a system and an environment where judges and the court president are “discouraged [...] in future from participating in public debate [...] on issues concerning the independence of the judiciary”.<sup>23</sup> When the Action Report states that “is difficult to see how any judge would be prevented from expressing their opinion by their fear that the mandate of the President of the Kúria might be terminated without judicial review when such judicial review is available to them

<sup>20</sup> DH-DD(2019)877, 2 August 2019, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf)

<sup>21</sup> See e.g.: <https://www.mabie.hu/index.php/1472-a-magyar-idok-napilap-dr-matusik-tamas-dr-vadasz-viktor-es-dr-vasvari-csaba-birok-serelmer-szemelyisegi-jogsertest-kovetett-el>, <https://444.hu/2019/09/26/egy-harmadik-bironak-is-800-ezer-forintot-kell-fizessen-a-magyar-idok-kiadoja>. Civil law procedures are domestic remedies to exhaust in cases before turning to the Court.

<sup>22</sup> See Section 1.2. of Hungarian Helsinki Committee’s August 2019 communication; DH-DD(2019)877, 2 August 2019, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_201908.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Baka_v_Hungary_201908.pdf).

<sup>23</sup> *Baka v. Hungary* (Application no. 20261/12, Judgment of 23 June 2016), § 173.

as judges”, it misrepresents the problem. It is not the lack of judicial review in the case of President of the Kúria that prevents judges to speak out, but **the message that the case of Mr. Baka and the cases of the targeted NJC-members sends out, namely that retaliation and media attacks can reach a judge if that judge dares to speak out, no matter how high their status as a judge is.** This situation clearly sends a strong message to other judges. Furthermore, the institutional and organisational changes introduced by the governing majority since 2011 and 2012 (as partly outlined in Section 1) have created an environment that exacerbates the chilling effect.

All this is demonstrated by the testimonies of individual judges provided to Amnesty International as summarized below.

## 2.2. AMNESTY INTERNATIONAL’S REPORT ON JUDICIAL INDEPENDENCE AND CHILLING EFFECT

Amnesty International carried out research regarding the Hungarian judiciary between November 2019 and January 2020 published in the report titled *“Fearing the Unknown – How rising control is undermining judicial independence in Hungary”*, 6 April 2020.<sup>24</sup> The report “Fearing the Unknown” was based on in-depth interviews with 14 judges from different levels of the Hungarian court system and related to the period between 2012 and late 2019 under the previous NJO President, Tünde HANDÓ.

The “Fearing the Unknown” report concluded that **institutional changes in the judiciary resulted in a chilling effect at the courts** and that judges are scared of speaking up in defence of their opinion, which results in weak solidarity within the judiciary and between judges and other legal professions. Also, it concluded that over recent years judges and their judgments have experienced an increase in the number and severity of attacks from political figures and the government-aligned media.

### 2.2.1. Palpable chilling effect felt by Hungarian judges

Judges reported a chilling effect and very bad atmosphere at various courts where **most judges do not dare to speak openly and freely** and this has led to distrust among the judges. The interviewees mentioned that the chilling effect materializes in a fear amongst judges that **prevents them from speaking up or protesting administrative decisions and pieces of legislation affecting the judiciary.** The judges said that they are **afraid of potential threats of disciplinary proceedings, disadvantageous case allocation, bad evaluation results, financial consequences, consequences related to family members also working in judicial capacities, and repercussions on professional training and development.**

One judge interviewed said that while nobody would get harmed, most of the people had decided not to express their opinion publicly because that is the “100% safe option”.

The **rules on freedom of expression and cooperation with external professional organisations that judges are required to comply with remain unclear**, and this uncertainty also leads to a chilling effect in the judiciary. Sometimes judges could not precisely identify what they are afraid of: they are fearing an abstract potential future consequence.<sup>25</sup>

Judges might talk about issues of judicial independence and share critical thoughts face-to-face to each other, but not in a bigger fora. There is a general attitude to avoid “trouble”. At events organised

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<sup>24</sup> Amnesty International, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, 6 April 2020. Available at: <https://www.amnesty.org/en/documents/eur27/2051/2020/en/>.

<sup>25</sup> Fearing the Unknown, p. 9.

by the court administration, judges feel that they need some courage to speak up, they fear speaking up, and this is a problem. The chilling effect impacts them informally and gets under the judges' skin.<sup>26</sup>

### 2.2.2. A climate of distrust

**Uncertainty combined with the dysfunctions of court administration has led to increasing distrust among judges which may undermine solidarity.** As promotions are not always based on experience or acumen in adjudication, nobody knows who will soon be promoted or seconded. As one interviewee put it, colleagues have become distrustful towards each other as they are afraid about whom they befriend, or whether a colleague is marked out as "renitent" (i.e. someone who is on bad terms with the central administration).<sup>27</sup>

When judges meet at sports or other events or stop to talk in the court's corridor, they check who is nearby, who can hear them talking. There is a paranoia amongst some. Instead of talking, some judges only keep in touch online.<sup>28</sup>

To illustrate this distrust, multiple judges said they think there are so-called "spies" at their court. A judge reported that "*there was an actual case where the regional court president asked a person to report if he/she hears something about this or that*" – that person declined this request and eventually left the court. In another case judges claimed that a court leader loyal to the leadership was placed to a certain court building so that the leadership could have an eye there.<sup>29</sup>

There is a perception that if judges sign a petition or an open letter, the name of these judges "*are remembered*" by their peers and by the court leadership and this atmosphere also has a chilling effect. It seems that some courts' leaderships are trying to exacerbate the poisoned atmosphere. A judge reported an incident when some judges signed a declaration of protest against their leaders and the two youngest judges were summoned afterwards by the court president in order to convince them to withdraw their signatures. All non-judge court workers were also summoned and were told by the court's leadership to stand in line and not to do anything.<sup>30</sup>

### 2.2.3. Examples of the chilling effect

Concrete examples of the chilling effect that the judges interviewed by Amnesty International include the following:

- The case of criminal judge Csaba VASVÁRI, a district court judge working at the Central District Court of Pest who was also an NJC member. A disciplinary proceeding was initiated against him<sup>31</sup> which the judges interviewed believed was in retaliation for a preliminary ruling request he filed at the Court of Justice of the European Union. In this request Mr. Vasvári raised questions regarding compliance with the principle of judicial independence under the Treaty of the European Union, particularly the appointment procedures for court presidents, the remuneration for judges, as well as questions regarding the right to interpretation in court.<sup>32,33</sup>

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<sup>26</sup> Fearing the Unknown, p. 38.

<sup>27</sup> Fearing the Unknown, p. 39.

<sup>28</sup> Fearing the Unknown, p. 39.

<sup>29</sup> Fearing the Unknown, p. 39.

<sup>30</sup> Fearing the Unknown, p. 39.

<sup>31</sup> See e.g.: <https://www.icj.org/hungary-disciplinary-action-against-judge-for-recourse-to-eu-court-must-cease/>.

<sup>32</sup> C-564/19, request for a preliminary ruling by Pesti Központi Kerületi Bíróság (Central District Court, Pest, Hungary) <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=220134&pageIndex=o&doclang=EN&mode=req&dir=&occ=first&part=1&cid=275818>

<sup>33</sup> Fearing the Unknown, p. 42.

- On a personal “rapport” in front of the whole regional court leadership, one interviewee was told that “*a mistake can be found in everybody's work*”. They hinted at the possibility of a disciplinary proceeding (that eventually did not happen). This interviewee said the rapport was about his/her activities in the judiciary council.<sup>34</sup>
- Judge Gabriella FICSÓR has been working at the Debrecen Regional Court of Appeal and in 2012, she also wrote open letters to the whole judiciary on the topic of compulsory retirement of elderly judges – after that her court’s president told her on three separate occasions that she may face a disciplinary proceeding (though that has not happened).<sup>35</sup>
- Another interviewee recalled that he/she was put under pressure by the court leadership to resign from the membership of the judiciary council because of his/her activities there. The regional court president sat down with him/her and said it would be better to take another position at the court instead, for extra money. He/she did not accept “the offer”. After that, car and fuel allowances stopped being granted so he/she pays for the trips himself/herself to attend the judiciary council meetings. Also – in the presence of the regional court's president and deputy president, all the district court presidents and deputy presidents and all the college leaders – he/she was questioned about how he/she votes in the judiciary council, why he/she does not report to them on that, what are the judiciary council’s press relations like, etc. They also wanted to change his/her opinion in a question regarding the NJO-NJC conflict. “*It was like a rapport*”– he/she described to Amnesty International.<sup>36</sup>

(The above are only a few examples of the many that judges recounted to Amnesty International. For more details, see Section 3 of Amnesty International’s “Fearing the Unknown” report, dedicated to the chilling effect, with more details explaining the atmosphere at Hungarian courts.)

#### **2.2.4. Positive effects of appointing a new NJO President – but the overly broad powers remain in place**

As mentioned above, the Hungarian Parliament elected a new NJO President, György Barna SENYEI on 10 December 2019.<sup>37</sup> Although the NJO President has changed, the Hungarian laws, regulations and the legal structure of the judiciary have not been reformed. The over-reaching mandate and powers that the NJO President has remain a serious concern, as highlighted and evidenced previously in this communication. The overly-broad powers this role has cause fundamental problems even when they are not used, because the potential and threat that they may be applied is there so long as they are a possibility enshrined in the legal framework.<sup>38</sup> Additionally, these powers have already been applied in previous years, with negative consequences documented in the “Fearing the Unknown” report. The signatories of this communication are of the view that there are indications the harm caused by the overly broad and vague powers are still being felt by members of the judiciary, despite the change in NJO President.

Since the NJO President plays a central role in the Hungarian judicial system, it holds influence over the atmosphere at the courts. In July 2020, Amnesty International conducted an online survey among judges as a follow-up to its “Fearing the Unknown” report to assess whether the appointment of the new NJO President with no accompanying reform to the governing framework has had an impact on the atmosphere in the judiciary. The survey was filled out by 18 Hungarian judges.<sup>39</sup>

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<sup>34</sup> Fearing the Unknown, p. 43.

<sup>35</sup> Fearing the Unknown, p. 43.

<sup>36</sup> Fearing the Unknown, p. 46.

<sup>37</sup> <https://birosag.hu/en/news/category/about-courts/dr-gyorgy-barna-senyei-new-president-national-office-judiciary>

<sup>38</sup> See also Sections 1 and 2 of the Amnesty International’s “Fearing the Unknown” report.

<sup>39</sup> With a snowball method, Amnesty International has reached approximately 30 active judges, out of which 18 have filled out the survey.

In the survey, Amnesty International asked the following questions, amongst others: *"How do you think the courts' atmosphere has changed (if any) since the election of the new NJO President? How do you assess the role of the NJO President in relation to this potential change?"*

The answers to these questions varied. 11 judges reported positive developments due to the change of the NJO President. Some attributed this change to the new appointment. Three judges said that the removal of the previous NJO President brought a relief to the judges, and some pointed out that the removal contributed to a more peaceful and open atmosphere at the courts.

Five of the 18 judges who answered the survey reported that bad atmosphere still prevails at the courts. *"The previous tension turned into apathy"* – one told Amnesty International Hungary. Another one said that the *"judges are still afraid"*, as shown by the fact that there is only one applicant for a court leader's position and judges do not dare to apply for a court leader position, *"fearing revenge"*. Yet another judge wrote that the *"initial enthusiasm has been replaced by a disappointment"* because of the *"weak"* personality of the new NJO President. Some reported that the judges are *"lonely"*, they do not feel the support of the community and *"everybody is laying low in their courtroom or office in silence, and happy not being bothered"*. A judge wrote that the era of the previous NJO President lingers on: *"many judges have become uninterested and self-censorship has become an automatism"*.

Amnesty International also posed the following questions about the right to freedom of expression of judges: *"What is your opinion of the NJO President's practice towards judges expressing their opinions so far? For example, to what extent formally (at the level of regulations) or informally does he support or not support judges to express their views on non-political issues (e.g. regarding courts or judicial independence)?"*

Eight judges surveyed told Amnesty International that they have the impression that the new NJO President may not support judges to express their opinion on any issues or to appear in social media. One judge felt that *"Mr. Senyei apparently wants to avoid any scandal or clash, if it is up to him, we would have to put up with a quiet surrender"*. Two judges speculated that the reason for this is that the NJO President may prefer to avoid any clash with the Government, and he would like that judges communicate only via their judgments and nothing else.

Five judges reported that they do not feel or know anything about Mr. Senyei's attitude or practice with respect to expression of opinion. As one judge explained, *"there is no change and judges themselves are socialized in a way not to express their opinion publicly"*.

Three judges reported a positive change in this respect: one told Amnesty International that they did not feel any pressure from the new NJO President, another one said that they do not know of any direct impediment of judges' right to freedom of expression, and a third one commented that it is positive that at least the new NJO President – in their view – does not regard all expression of opinion as a personal insult.

Overall, the survey results give some indication that although the replacement of the NJO President does appear to have been an improvement on the previous incumbent, **the chilling effect continues to prevail in the judiciary, and will continue to do so unless the framework providing over-reaching powers to the NJO President is addressed.** The NJO President and court leaders under his/her potential influence can exert administrative pressure directly and indirectly on the judiciary. The institutions of judicial self-governance (including the NJC, local judiciary councils or judges' plenary meetings) remain weak.

### 3. RULING PARTY POLITICIANS EXERTING UNDUE PRESSURE ON THE JUDICIARY IN HUNGARY

As a closely related development, the Hungarian judiciary as a whole has also become the target of fierce criticism by the governing party. **Breaching the standards on freedom from undue external influence,<sup>40</sup> the governing majority and the Government has been widely using public statements and the media to interfere** with the competences of the judiciary.<sup>41</sup> These manifestations of criticism erode trust and confidence in the judiciary and the perception of independence, and can indirectly contribute to the chilling effect both among ordinary judges and high-level judicial leaders.

Several public statements by governing party politicians **questioned the requirement itself that the judiciary has to be independent**. Within the context of building an “illiberal democracy”, judicial independence was labelled as a “liberal requirement”.<sup>42</sup> Amidst the attempts to establish a politically controlled administrative court system, the **Speaker of the Parliament** claimed that judges “must decide whether they side with the defenders and builders or the attackers and destroyers of the State”<sup>43</sup> and that “[t]he system of checks and balances is dumb” and “has nothing to do with the rule of law or with democracy”.<sup>44</sup> In addition, high-ranking **government officials**, including the Prime Minister, **repeatedly disregard the requirement of non-interference with pending court procedures** by publicly formulating expectations regarding the judgments to be delivered.<sup>45</sup>

Judges face political pressure especially when dealing with cases concerning the protection of individuals or vulnerable minorities against state actors. Recent examples for this include political pressure for more rigorous penalties,<sup>46</sup> and public political campaigns against compensations for prison overcrowding<sup>47</sup> and a judgment granting Roma pupils damages for segregation, which the Prime Minister called – while the judgment was still pending review – a “provocation” and unjust because the Roma plaintiffs “receive a significant amount of money without performing any work”.<sup>48</sup>

In July 2020, Amnesty International asked judges about recent external attacks on judges and court judgments (for example, in connection with the abovementioned judgment on school segregation in Gyöngyöspata or judgments on compensation for prison overcrowding). Almost all of the 18 respondents agreed that the NJO President did not defend the judiciary in these instances, although

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<sup>40</sup> Recommendation CM/Rec (2010)12 of the Committee of Ministers to member states “*Judges: independence, efficiency and responsibilities*”, Sections 18 and 60; UN Basic Principles on the Independence of the Judiciary, Sections 2 and 4.

<sup>41</sup> For more details and examples, see: Hungarian Helsinki Committee, *Unfettered Freedom to Interfere – Ruling party politicians exerting undue influence on the judiciary in Hungary 2010–2020*, 29 July 2020, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Hun\\_Gov\\_undue\\_influence\\_judiciary\\_29072020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf)

<sup>42</sup> By Szilárd NÉMETH, MP of the Fidesz, on 31 January 2016. See e.g.: <https://444.hu/2016/01/31/nemeth-szilard-elszamoltatna-a-birosagokat>.

<sup>43</sup> The speech was held on the occasion of the 150<sup>th</sup> anniversary of the act guaranteeing the independence of the judiciary. See e.g.: <https://hungarianspectrum.org/2019/04/24/soon-enough-hungarian-judicial-independence-will-exist-only-in-history-books/>.

<sup>44</sup> See: [https://index.hu/english/2019/10/25/laszlo\\_kover\\_checks\\_balances\\_dumb\\_forget\\_it\\_rule\\_of\\_law\\_hungary\\_fidesz](https://index.hu/english/2019/10/25/laszlo_kover_checks_balances_dumb_forget_it_rule_of_law_hungary_fidesz).

<sup>45</sup> For examples, see: Hungarian Helsinki Committee, *Unfettered Freedom to Interfere – Ruling party politicians exerting undue influence on the judiciary in Hungary 2010–2020*, 29 July 2020, [https://www.helsinki.hu/wp-content/uploads/HHC\\_Hun\\_Gov\\_undue\\_influence\\_judiciary\\_29072020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf), pp. 2-6.

<sup>46</sup> Gergely GULYÁS, the head of the Prime Minister’s Office blamed the Kúria for a tragic family drama that evolved in the end of 2019, claiming that “[t]he Kúria shall be responsible for the delivery of sufficiently rigorous judgments, because today judges hand down extremely lenient verdicts”.

<sup>47</sup> For summaries in English, see: Hungarian Helsinki Committee, *NGO communication with regard to the execution of the judgments of the European Court of Human Rights in the cases Varga and Others v. Hungary and István Gábor Kovács v. Hungary* (Application no. 14097/12 and 15707/10), [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_9\\_Varga\\_and\\_Others\\_v\\_Hungary\\_20200120.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_9_Varga_and_Others_v_Hungary_20200120.pdf), pp. 3–4.

<sup>48</sup> See e.g.: Lilla FARKAS, *The EU, Segregation and Rule of Law Resilience in Hungary*, 8 March 2020, <https://verfassungsblog.de/the-eu-segregation-and-rule-of-law-resilience-in-hungary/>.

it would be his job.<sup>49</sup> A judge was of the opinion that attacks against the judiciary and their tone might be attributed to the lack of refuting comments from the NJO President. Another judge pointed out that there was only one instance when the NJO President refuted an attack on the judiciary, and that in response to a comment made by an opposition mayor. Otherwise, when the attack came from the Government, governing party members, or government-aligned media: the NJO President, the court leaders, the judges' association, the NJC, and the president of the Kúria have remained silent.

## RECOMMENDATIONS

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

- **Protect the integrity of the NJC's judge members** by taking effective measures to guarantee that they can exercise their statutory rights and obligations of safeguarding judicial independence through, among others, formulating and disseminating critical opinions on the administration and independence of the judiciary **without any undue interference**. More effective protection of NJC's judge members should be ensured against intimidation, attacks on their reputation as well as retaliatory administrative and other measures;
- **Refrain from and condemn any public harassment, intimidation or retaliation against judges**, and communicate clearly that while criticism of jurisprudence as a part of a public debate is necessary in a pluralistic society, personal attacks against judges are unacceptable;
- **Abstain from** from any public critique, recommendation, suggestion or solicitation regarding court decisions **that may constitute direct or indirect influence** on pending court proceedings or otherwise undermine the independence of individual judges in their decision-making;
- Amend the law<sup>50</sup> to ensure that **if a judicial leader challenges their dismissal** by launching a lawsuit, and if the judge concerned is reinstated, legal guarantees ensure that the **judge may be reinstated to their former leadership position**, for example, by making sure that the position could only be filled temporarily;
- **Address the issue of judicial independence holistically and comprehensively**.<sup>51</sup> In order to address the long-standing structural problems and to ensure the independence of the judiciary, **the laws on the judiciary should be amended to ensure compliance with international standards and specific recommendations on the situation of the Hungarian judiciary by international bodies** including the Venice Commission,<sup>52</sup> the Council of Europe

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<sup>49</sup> "[I would give] Grade 'F'. The NJO President did not speak up in case of any attack against judges" – one judge participating in Amnesty International's survey commented. "It is very sad that he does not stand up in public to protect his colleagues from attacks" – another judge wrote.

<sup>50</sup> Act CLXII of 2011 on the Legal Status and Remuneration of Judges

<sup>51</sup> For a comprehensive list of recommendations in this regard, see: Amnesty International – Hungarian Helsinki Committee, *Recommendations aimed at restoring the independence of the judiciary in Hungary*, December 2019, [https://www.helsinki.hu/wp-content/uploads/Hungary\\_rec\\_judiciary\\_AI-HHC\\_01122019.pdf](https://www.helsinki.hu/wp-content/uploads/Hungary_rec_judiciary_AI-HHC_01122019.pdf), <https://www.amnesty.hu/hu/news/2656/recommendations-aimed-at-restoring-the-independence-of-the-judiciary-in-hungary>; Amnesty International, *Fearing the Unknown – How rising control is undermining judicial independence in Hungary*, 2020, [https://www.amnesty.hu/data/file/4871-final\\_fearing-the-unknown\\_report\\_amnesty-hungary\\_e1.pdf?version=1415642342](https://www.amnesty.hu/data/file/4871-final_fearing-the-unknown_report_amnesty-hungary_e1.pdf?version=1415642342), pp. 10-12.

<sup>52</sup> European Commission for Democracy through Law (Venice Commission), *Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, CDL-AD(2012)020-e, 15 October 2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)

Commissioner for Human Rights,<sup>53</sup> and the Council of Europe Group of States against Corruption.<sup>54</sup>

Sincerely yours,



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<sup>53</sup> Commissioner for Human Rights of the Council of Europe Dunja Mijatović, *Report Following her Visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, 21 May 2019

<sup>54</sup> Group of States against Corruption, *Fourth Evaluation Round – Corruption prevention in respect of members of parliament, judges and prosecutors. Interim Compliance Report – Hungary*, GrecoRC4(2018)16, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680969483>