

Judiciary in distress - Hungary

First of all I would like to thank for invitation being very honourable for me.

In my speech I will describe the legal situation in my country in context with the given subject as well as the practical handling. First I give a short review on the administration of the Hungarian judicial system, the rules of appointment of judges and court leaders as well as the practice of appointments. Then I will report on some points being a menace of judicial independence. To it belongs the competence of the President of the National Judicial Office (NJO) to transfer pending cases, the inappropriate situation of judges' salaries and the retirement of judges under compulsion.

Since 2010 the Hungarian judicial system has got some essential changes influencing the judicial independence by several reasons. The Law on Organization and Administration of Courts (BSZI CLXI) and the Constitutional Amendment – enabled by a 2/3 majority of the party in power in Parliament – provided a clutch of measures enabling influence in the independence of judiciary and judges. Because of the strong international criticism by reason of violation of the Rule of Law and a strong pressure – EU Commission, Council of Europe, Venice Commission but also European Association of Judges (EAJ-AEM), Regional Group of the International Association of Judges (IAJ-UIM) several modifications and mitigations by Hungarian Parliament took part. About that I will report later on.

Despite of several adaptations a number of elements remained causing troubles in process flow, discontent of judges and undesirable impacts.

The biggest storm of protest after the change of government in 2010 was triggered by the mandatory reduction judges' retirement age from 70 to 62 years. A similar scandal was

the dismissal of the President of the Curia, the former Supreme Court, and the transfer of a lot of rights and competencies to the President of NJO.

Now a short overview of the administration of Hungarian judicial system, the appointment of judges and court leaders as well as realising in practice.

As already mentioned a grave change in the organisation occurred in July 2014. Previously the National Council of Judges (NCJ) had extensive competencies also in international comparison with High judicial Councils in other countries. Now a lot of important duties were deprived and transferred to a single person the President of the new created NJO. This President is the former chairwoman of Metropolitan Labour Court Tünde Handó. The Parliament elected her with a majority of 2/3 for a nine-year period. Practically all competencies concerning the operation of courts belong to the President of NJO. Among that are counted all duties in relation with budgets including award of benefits, fixing number of judges and staff. The duties in context with judges encompass

- announcement of positions
- distribution of judges
- dislocation of judges
- appointment and dismissal of court leaders.

The President of NJO is the highest function in management and control, conducts the administrative activities of court presidents, can initialize disciplinary procedures and has also all competencies concerning education and training of judges as well as issue in information. He is supported by the NJO being subordinated to him and composed of 200 persons.

Besides the NJO operates the already mentioned NJC with central duties of regulation and control. The NJC is composed of 15 members. 14 of them are elected by the Conference of Judges' Delegates composed of judges who are delegated by the particular courts proportionally. It elects the members out of peers by secret ballot. The further

member is the President of the Curia. The chair within NJC changes rotationally twice a year among members.

As mentioned, the competencies of the NJC were restricted extremely by the judicial reform. Lastly the NJC had only in one case a veto right. Apart from that the council had only consultative capacity without binding effect for the President of NJO.

Due to the scorching international criticism and numerous protests the duties other NJC were enlarged mainly on the base of proposals made by the Venice Commission. In appointing on judicial positions the President of NJO may not (more) differ from NJC proposal. If he wants to go of from the taken ranking he needs the agreement of NJC. The same applies to the appointment of court leaders. Now the NJC also is entitled to comment and review measures taken by the President of NJO. It also accepts the Code of Ethics for judges. An important power of NJC is the appointment of the chairman and the members of the disciplinary court.

Now something about the most important regulations for the appointment of judges:

Judicial positions are filled attendant on applications. The handed applications are deliberated by local judicial councils – comparable to a "Personalsenat" perhaps – at the Curia, the High Courts and the Regional Courts. The councils award points following criteria determined in a ministerial order. On that base a ranking is compiled. As already mentioned the President of NJO can go off the ranking only with agreement of NJC.

For the appointment of court leaders the President of NJO is in charge as well. It is about the presidents, vice-presidents and leaders of colleges at the five High Courts, the 20 Regional Courts and the five Administration – and Labour Courts. Judges working in a certain field (criminal, civil etc.) form a specific college. The appointment of a leader is only possible twice for a period of six years. An opinion on the applications is given by the plenary meeting of judges composed of all judges appointed at the concerned court. For leaders of a college an opinion of the members of the concerned college also is given.

The President of NJO has two options: appointment of the candidate or revocation of the application.

In case that the decision of the President of NJO differs the NJC must be informed in written form about reasons. But that does not prevent the appointment of the candidate presupposed the candidate was supported in the gremium by 50% + one vote at least. The regulation follows a proposal of Venice Commission.

By the way, the situation in Hungarian judiciary not only was analysed by Venice Commission but by some other international institutions as well. As an example I would like to mention the International Bar Association, which in 2012 and 2015 has made investigations and given written reports. The report of 2015 appreciated some improvements indeed in comparison with the former situation, for example the enlargement of the competencies of NJC, its right of agreement concerning the Code of Ethics and rules of order of courts. But was also stated that the amendments cannot be seen as an effective counterbalance vis a vis the extensive powers of the President of NJO. Expressively is stated that the NJC in no way has sufficient authority compared to President of NJO.

The correctness of these statements I would like to substantiate by some examples based on my personal experiences. They also were mentioned in some newspaper articles.

A concrete and recently happened example is the appointment of the chairwoman (president) of the High Court of Budapest. She started as judge of the Central District Court of Budapest and became president there in 2012. In 2015 she became deputy of Tünde Hando, the current President of NJO. In relation with the necessary replacement of the position of the High Court President of Budapest within the procedure of application three candidates were proposed. Nevertheless, the President of NJO annulled the procedure without giving an explanation for that and authorized some time later her deputy with the provisory management of the concerned position. Then the position was

announced newly in 2016, the manager being the only applicant was appointed for six years. It is to mention that she always worked in the surround of Ms.Hando took part for her in some working groups and operated – as it was reported in medias as well – in working out the so-called „Rules of Integrity” triggering a storm of protest and giving reason for some judges to file complaints to the Constitutional Court and the European Court of Human Rights as well. I will deal with that later on.

The described approach is not to be seen as a single case, by the way. In fact the practice to revoke applications of undesirable candidates and to wait for presentation of desired persons has become more or less unexceptional. In divers cases persons were appointed court presidents or got other leading positions in a similar manner. Worth mentioning, in particular, is the appointment of a court president in Komitat Békés. A judge aged 34 with short practice of three years became the youngest court president in the country. Moreover, short time before as a judge appointed on a subordinated court he has been assigned for service (not appointed!) to the court where now he is president. Similar happened with the position of a college leader in the High Court of Budapest. Only after three revoked procedures the current leader was appointed.

Statistical materials are available in Hungary only in insufficient extent. Due to a report in the weekly journal HVG last year only 16 of 25 applications concerning leading positions were successful. The President of NJO revoked all others. Official information about reasons was not given. Newspapers report on explanations like „the applicant does not identify with aims of NJO” or „it is not secured that the applicant is able to fulfil the duties requested by NJO”.

In context with the invalidations of application procedures the Constitutional Court has stated with decision Nr.13/2013 (VI.17.) that Parliament has failed to regulate in the Law on Legal Status of Judges whether an by what reasons as well as in what cases the President of NJO has the right to revoke applications. That provoked a constitutional disturbance. It is to assume that several valid and ranked by the competent gremium

have arrived timely. The Constitutional Court did not deal with the question of unsuccessful application for leading positions.

In 2014 was regulated by law ion what cases an application is unsuccessful. One of the reasons is that after announcement of a position changes in work organisation, workload or budget have arise making the staffing of the judicial position under administrative aspect unsubstantial.

To this an example which happened recently: The application of a judge for a position on High Court of Budapest was revoked the judge already twice was ranked in the proposal on leading position. The revocation was reasoned with the statutory provision quoted above. The interesting background of the story is that during the running procedure of application suddenly two judges from other courts were attached to the High Court by the President of NJO. The concerned judge has filed a suit against President of NJO at the Labour Court substantiating that the President of NJO abuses her power and decides arbitrarily on appointment of judges. He requests to get the position.

Some words concerning judges' salary situation.

It must not be stressed that an adequate of a judges is in close relation with independence. There in principle is to be mentioned positively that in the years 2016 and 2017 a 5% increase of salaries in each case took place. For 2018 such an increase is provided as well. That makes 15% together. However, the increase does not effect a harmonisation to the level of other EU member states – also in Central Europe. It remains under the national level as well, for example in the field of administration. Due to that fact candidates for a judicial office and young judges as well abandon the judicial area. Moreover, incentive for young and capable lawyers to strive for a judicial career is not strong marked. I have to underline that my last remarks are based on personal perceptions and assessments. Statistical material is – as usual – not available.

About the Constitutional Complaint of Judges.

Since the amendments of 2014 there is a possibility for judges to file a constitutional complaint against orders of the President of NJO. Several judges filed such a complaint at the Constitutional Court and the ECHR in Strasbourg as well in context with the already mentioned „rules of integrity” It is about a compendium of rules which was passed by the President of NJO and represents a kind of code of conduct for judges. Therein are included a lot of quite commendable principles being in accordance with international conventions and recommendations and can be found in in code of ethics existing in some countries. But in addition the rules contain orders of reporting and disclosure commitments being an invasion of privacy in highest degree. Non-compliance is under the threat of disciplinary measures. Selected persons shall scrutinize the compliance of the rules.

The complaints are reasoned essentially that judges according to constitution are independent and liable to law only. Rights and duties of judges can be determined by law merely. The President of NJO is not entitled to that. By the concerned rules a wide range of powers would be created for her endangering the independence of the judiciary and the confidence in Rule of Law. Up to now decisions are not rendered.

Another positive remark.

In consequence of the national and international criticism the Parliament by the 5. Amendment of Constitution (valid 5 August 2013) terminated the power of the President of NJO to allocate cases. According to that the President of NJO was authorized to take off a pending case from a court and to transfer to another court. Reasons for that were „contemporary decision” and a proportional assignment of cases. It is evident that thereby the possibility of a subjective intervention was given to select for trial and decision a „suitable” judge or bench. Beside of all dogmatic concerns the also the

appearance of impartiality is excluded. After the amendment by Parliament also the Constitutional Court has nullified the allocations retroactively.

Mandatory retirement of judges.

This legislative measure without doubt has been one of the most severe attacks against independence and has brought even treaty violation procedures against Hungary within the European Union. In June 2012 Parliament has passed a law whereby – retroactively – the retirement age of judges was reduced from 70 to 62 years. It is to imagine that by such a measure a huge amount of judges is confronted with difficulties in context with retirement provisions. Retirement pension of judges in Hungary averages out 30 – 40 % of remunerations. All professional organisations within justice, even the Association of Hungarian Judges acting in other respects – benevolently worded – rather restrainedly have protested immediately against the law. The European Commission and the Venice Commission passed harsh criticism, and the International Association of Judges (IAJ-UIM) forwarded letters of protest to responsible persons in Government and Parliament emphasizing contradictions with international conventions and recommendations as well as discrimination.

The Constitutional Court annulled the law on retirement of judges in form and content as well with retroactive effect by 1st January 2012. That meant that retirements effectuated before this date were invalid as well. The reduction of age limit affected the upper courts and court leaders in particular. Two thirds of court presidents, two of five High Court presidents, several leaders of colleges and two thirds of 70 judges of the Curia were involved.

Under strong international pressure and due to the decision of the Constitutional Court the Parliament has passed a new law on age limit of judges. The limit was fixed with 65 years. The pension age shall be reduced step by step until December 2012, that means

within 10 years from 70 to 65 years. For judges already retired by the amended law three possibilities were created

- 1 re-installment in the former or a similar position.
- 2 preparedness for special activities (lectures, assistance for seminars etc.) for a special period
- 3 payments of twelve monthly salaries brut, that is without deduction of taxes and fees.

No wonder that the first option only could be used very restrictedly. In the most cases the former position was restocked already. The preparedness to accept an equally ranked position in a place of employment maybe far away from domicile was low understandably. Also the second possibility was not used frequently being very vague and uncertain. Out of 229 concerned judges 173 choose the third option. Only 56 judges decided to return in former position. Four of 17 court presidents retrieved their former position.

60 judges choosing the third option (financial compensation) filed also complaints at ECHR.

It can be summarized that government achieved practically the goal to get rid of a whole generation of judges to high extent. For achievement a lot of money must be spent. That is mitigating financial damages for the concerned judges. Taken in the whole the dubiousness of the proceeding remains.

Now I have reported about incidents, activities and occurrences. Maybe the question rises whether there is nobody who is defending resolutely the interests of judiciary and judges. Is there no representation for instance an active association? The appearance of the Hungarian Association of Judges was already mentioned in context wit the mandatory retirement of judges. There the association participated in the general protest wave. Apart from that the outside visible activities of the association are restricted to organisation of sporting events and sometimes-smaller presentations with harmless topics. Customization

an avoiding of conflicts seems to be the dominating behaviour patterns obviously. In numerous countries the described practices concerning appointment immediately would provoke harsh reactions of judicial representatives. In the framework of my activities within the International Association of Judges, the European Group in particular, I was confronted repeatedly with complaints of national associations concerning similar or other incidents also leading to reactions and measures. The complaints were not only coming from Central- and Eastern European countries.

The Hungarian Association of Judges – by the way, the first national association coming from a country of the former Eastern Block, which became member of IAJ-UIM – never did something like that. Also the mentioned protests of IAJ-UIM against the ‘reform acts’ were not initiated by the Hungarian association but came direct from IAJ-UIM in the framework of general criticism.

Of course, I am aware that Hungarian judges themselves only can resolve the problem at long sight. We only can hope.

Prior to my final remark some words about prosecution service. It is bound by instructions, of course, but not subordinated to NJO. In contrary to other countries there are also no communities with the bench, f.e. common association, common activities etc. A change over only happens on rare occasions. The problem of the decision whether, when and in which investigations are to be carried out and whether an action is to bring in and by that to hand over the final decision to an independent court is known from other countries as well. But distressing in my country is the lack of any transparency. In fact the sphere is in a legal limbo without judicial control.

Summary

The described circumstances, the legal situation and handling in practice are suitable without doubt to jeopardize the independence of judiciary in Hungary. Nevertheless, based on my own cognition and experience I have to stress that judges in exercising judicial duties in jurisdiction and decision-making are independent. Attempts of direct influences did not emerge up to now. But it does not change that current circumstances definitely afford opportunities for it and enable to apply a certain pressure. Thus concerns in regard Rule of Law Principle must arise undoubtedly.

Not least by international support we succeeded to avoid the worst legislative intentions against judicial independence. For the necessary elimination of the remaining „dragon teeth” we will need such a support further on.

Thank you for your attention. I am prepared to answer questions.