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SYSTEMIC **PROBLEMS**
SYSTEMIC **INFRINGEMENTS:**

the case of Hungary

THE**GREENS/EFA**
in the **European Parliament**

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EXECUTIVE SUMMARY

SCOPE, THESIS AND STRUCTURE OF THE PAPER

In this paper we analyse the independence of the Hungarian judiciary, and argue that Hungary is not a rule of law state, the judiciary does not operate according to the principles of constitutional democracy. We also show how judicial capture affects all segments of the public sphere, illustrated by the examples of academic freedom, media freedom and freedom of information. Due to the violations of EU law on judicial independence, we will argue, legal procedures should be initiated by the Commission, whether in the form of traditional infringement, or in the form of systemic infringement procedures, showing the interconnectedness of orchestrated governmental steps against judicial autonomy. In our view it would be suboptimal, but in case the Commission remains silent, Member States could also start infringement procedures for violations of judicial independence against the Hungarian government. All issues on attacks of judicial independence in Hungary are also relevant for a future process conduced in line with the Rule of Law Conditionality Regulation.

After an introductory Chapter I explaining the importance of national judicial independence for the European project, in Chapter II we list the European standards against which in Chapter III the individual governmental steps of dismantling judicial independence in Hungary are assessed. All the steps discussed could be tackled either in the form of infringement or systemic infringement procedures.

TABLE 1: HUNGARIAN MEASURES VIOLATING JUDICIAL INDEPENDENCE THAT COULD BE TACKLED IN THE FORM OF INFRINGEMENT OR SYSTEMIC INFRINGEMENT PROCEDURES (OVERVIEW)

Hungarian measures violating judicial independence	to be tackled through infringement / systemic infringement procedures
CONSTITUTIONAL COURT	
changing the nomination procedure - eliminating the consensual elements (parity, opposition nominees)	
court packing - enlarging the court, from 11 to 15 judges with **change of mandate length** - mandate extended from nine to 12 years and-retirement rule changed, upper age limit (70 years of age) abolished	
changing the way the court president is elected - instead of-members of CC, now the Parliament elects the president directly	
limiting the right to initiate proceedings (actio popularis abolished, limited circle who can initiate in abstracto reviews) allowing **government bodies to initiate** reviews **legislative rule against precedents** - legal annulment of earlier (pre-2012) Constitutional Court case law	
limiting court competences - the power to invalidate was restricted in case of public finances	
codification of restrictions on review of constitutional amendments, only the procedure of enactment can be subject to re-view, not the substance	
increased competences in **reviewing court judgments** used to-overturn judgments of the ordinary judiciary that go against government interests	
ORDINARY JUDICIARY	
changing central administration of the judiciary - a politically elected president of NOJ with strong powers	
removing the incumbent president of the Supreme Court - the president had his mandate prematurely ended by ad hominem-legislation	
conflict between the politically elected and the self-governing leadership - NOJ not cooperating with the judicial self-government body (NJC)	

nomination practice of the Kúria President, **court presidents**, head of the judiciary declaring application processes invalid, nominating pro tempore and moving own nominees to positions	
appointment of the current head of judiciary **against** the rejection of **the nominee by the judicial self-governing body** (NJC)	
forced retirement (eliminating the earlier 70-year mandatory-retirement age rule, not allowing judges to work after the general retirement age, forcing around 10 per cent of judges into retirement)	
special rules introduced for some judicial appointments allowing-nominees to come from the **executive**	
seconding: head of the judiciary **transferring judges** to higher courts without going through the normal application process	
transferring: head of Kúria appointing judges to the central-administration then **moving** them around **at will**	
opening judicial positions for former Constitutional Court judg-es, becoming a judge at Kúria upon their request, **circumventing-application** procedures	
uniformity procedure, introduction of the limited precedent system where Kúria decision (by panels put together by the president) had to be followed by lower courts, sanctioned by Kúria review	
changing **case allocation** rules, interference with the allocation of cases through arbitrary decisions of judicial leadership	
retribution for preliminary references - threats and actions against judges raising questions deemed to be sensitive in preliminary ruling requests	
"**integrity** regulations" and president practice limiting speech and criticism	
disciplinary proceedings, or threats thereof, misused to counter judicial decisions that go counter to government interests, including requests for preliminary rulings	
climate of fear, harassment, instilling fear for judges dealing with politically sensitive cases	
silencing critical voices through nomination practice, blocked-promotions and expressed views of some judicial leaders	

assessable **both** under **individual** and **systemic** infringement proceedings	
only systemic infringement is likely to capture the underlying violation	

Source: Authors

We give a detailed overview of the above in the form of a more comprehensive table at the beginning of Chapter III. In the vertical columns we list European standards developed by the Court of Justice of the EU, and to some extent the European Court of Human Rights (see Chapter II in detail), whereas in the horizontal rows we list the main steps of Hungarian rule of law backsliding which affected both the Constitutional Court and the ordinary judiciary (see Chapter III in detail). We suggest Readers with limited time to start with the tables to have an overall idea of governmental attacks contradicting EU law, against the Constitutional Court, and the ordinary judiciary. All governmental steps mentioned are discussed in detail in the body of Chapter III. In Chapter IV autonomies such as academic and university freedom, media pluralism, and freedom of information are singled out for discussion, to illustrate the interconnectedness of judicial capture with other values enshrined in Article 2 TEU, and to make the broader point that deterioration of judicial independence automatically and necessarily leads to democratic decline, human right violations and infringements of other related values as well.

GENERAL RULE OF LAW DECLINE IN HUNGARY

After more than a decade of system-building (system-hacking), it can be firmly established that the rule of law was destroyed not by regulatory mistakes or ad hoc flawed institutional practices, but by conscious political intent. All public institutions that would be intended to defend rights are now at the service of the ruling party. The party state has been restored through the instrument of law, with a two-thirds parliamentary, constituent majority. Our analysis does not address all segments of the subversion of the system of separation of powers, the abolition of parliamentarism, the generalisation of governing by decree, the attacks on civil society and the truncation of all autonomies. But it is in this context of total attack that judicial independence got dismantled. The abolition of judicial independence – together with terminating media freedom (including freedom of information) – have made it difficult or impossible to defend against the imposition of government and/or political will in all areas of culture, economy, education and civil society.

Due to the pre-existing vulnerabilities of the Hungarian constitutional structure and a disguised form of abuse of laws, the regime managed to get the same outcome as its Polish counterpart without some of the most blatant violations of formal legality present there. Our overview demonstrates that the results, however, are essentially the same: the breakdown of the crucial elements of constitutional checks on power and, ultimately, of the rule of law.

Denial of the rule of law and European values was institutionalised by legislation, and 'abusive or autocratic legalism' took hold of legislation and constitution-making. The disregard or cynical circumvention of European laws, judgments and standards became everyday practice. While the government propaganda trumpets the denial

of European values, the Hungarian government consolidates its autocratic and kleptocratic regime with European financial support. The re-shaping of the institutions of the rule of law for autocratic purposes also seriously affects the social support for democracy.

THE CAPTURE OF THE HUNGARIAN JUDICIARY

The systemic violation and dismantling of the rule of law and democracy can best be illustrated by governmental attacks on judicial independence. It hardly needs to be explained that without an independent judiciary, all fundamental rights, freedoms and autonomy of citizens are under serious threat. Similarly, high levels of political corruption are a natural consequence of unchecked power, when among others the judiciary does not fulfil its role We will show the individual and inter-re lated steps of dismantling judicial independence in Hungary, in regard to both the Constitutional Court and the ordinary judiciary, proving that these steps are all contrary to European standards. Our points of reference are the Lisbon Treaty, the Charter of Fundamental Rights, and the jurisprudence of European apex courts, with particular attention to the established case-law on the conditions of judicial autonomy.

All of the aspects of judicial independence (external and internal, individual and organizational) that we discuss in this paper have been seriously compromised, and there is no level of the judiciary at which the will of the central political power does not prevail. The Constitutional Court was the first institution to be captured once the Fidesz party got into government in 2010, the highest tier of the ordinary judiciary, the Kúria (Supreme Court of Hungary) is currently being tailored to the government's image by a new president who could only be brought into office by circumventing the rules of appointment and clear-cut personalisation. The overtly political nature of the Prosecutor General's Office, the Constitutional Court, and part of the Kúria results is a complete institutional capture, where not even the facade of institutions or the semblance of their independence is needed anymore.

This is not contradicted by the fact that some judgments are still unfavourable to the government. Quite to the contrary, these decisions, typically in non-system relevant cases, contribute to upholding the semblance of independence, while not harming the building blocks of illiberalism. The decisions of the captured courts confer legal and political legitimacy on decisions taken outside and in clear disregard for the rule of law.

As to the Constitutional Court, using the stick and carrot method, the government was quick to cut back its powers after the 2010 elections, and at the same time it was packed at very fast pace with 'trustworthy' government loyalists. Not only did the new Constitutional Court deliver overtly Fidesz-friendly decisions, rubber-stamping various other rule of law and fundamental rights violations, but via opening channels

between the Constitutional Court and the Kúria, the government paved the way for the capture of the Kúria as well. (E.g., altering rules of nomination and moving government loyal Constitutional Court justices with no ordinary judicial practice whatsoever to the benches to the Kúria; or ad hominem rules which opened the door for the current president of the Kúria, an ex-Constitutional Court judge to take the steering wheel of the Hungarian judiciary, who would not have qualified for the position under the old rules).

As to the attacks on the ordinary judiciary, governmental steps eroded not just internal, but also external aspects of independence. The Fidesz-dominated Parliament (Országgyűlés) – relying on abusive legalism and constitutionalism – adopted rules which introduced new models of judicial leadership and applied ad hominem rules to remove the incumbent chief justice in 2011 who dared to speak up against the planned 'reforms'.

Self-representation and self-governance were deliberately weakened which showed its consequences during the duel between the government loyal head of the central administration of the judiciary (National Office for the Judiciary, NOJ) and the self-governing body of the judiciary (National Judiciary Council, NJC). Members of the NJC who were elected from the ranks of the judges by judges, remained without competences and resources to provide an effective check on the excessive powers of the president of the NOJ and could only flag the scandalous appointment, promotion and integrity practice of the Fidesz-appointee head of NOJ.

During the last decade, selective judicial appointments proved to be crucial in several cases: from filling in the voids after the unlawful forced retirement of senior court leaders (who – despite the win in front of CJEU – were not allowed to return to their former executive positions within the judiciary) to the praxis of the president of the NOJ who appointed interim court presidents circumventing ordinary appointment procedures. Furthermore, the dubious arrival of some new persons from the executive to the judiciary (via tailor-made laws) – despite objection from the judges – is another element which allows the government to shape the judiciary to its own taste. Impartial and objective judicial decision-making is threatened by several institutional factors in Hungary: the case-allocation system is far from being automatised and the methodology provides for several loopholes enabling tampering with the system, the newly introduced uniformity procedure creates leeway for the Kúria-president to annul undesired judgements (even those delivered by other judicial panels of the Kúria) and judges who turn to the Court of Justice of the EU via a preliminary reference have to count with retributions including, but not limited to disciplinary proceedings. (Court leaders have various tools to silence judges, via integrity regulations, personal recommendations or the lack of it, or even harassment, beyond disciplinary procedures). The ordinary judiciary is characterised by a climate of fear and developments that have an increased chilling on judges who speak up against violations of judicial independence or who thematise this issue in the form of preliminary references.

THE EFFECT OF JUDICIAL CAPTURE AND EUROPEAN RESPONSES

The independence of the judiciary is crucial for all spheres of autonomy and indeed in Chapter IV we will show the devastating effects of judicial capture and flawed judgments on the public sphere. But the independence of the national judiciary is also crucial for the European legal and political space, as it is Member States' courts that are ultimately applying EU law, and together with the Court of Justice of the EU they provide for the unified and autonomous interpretation of EU law. Outside the EU, in the Council of Europe setting it is again domestic courts that take the interpretation of the European Court of Human Rights into account when adjudicating.

Despite the existential importance of judicial independence for the European project, the past decade has shown that European norms and procedures safeguarding judicial autonomy are not deployed properly, in a comprehensive and timely manner, to counter deliberate autocratic backsliding. To illustrate this, we refer to the Baka-case and the fake compliance, which followed a judgement of the Strasbourg court, and to the case of early retirement of judges, which led to a de facto beheading of the senior judiciary and remained without adequate remedy. We argue that these actions of the EU proved to be ineffective remedies since in-depth monitoring of the implementation of the judgments of the apex courts are still missing from the European legal toolkit. All cases would have equally benefitted from interim measures to prevent further harm being done until a case is pending.

The time factor, interim measures, and a thorough follow-up make up the gist of effective procedures to enforce EU values, and a heavier emphasis should be placed on them in the future. But most importantly, the vast majority of laws and practices presented in this paper that the Hungarian government employed to cut back judicial independence, and even more, to capture the judiciary, have not been tackled in any form whatsoever by European institutions. Given the existential importance of the independence of national judiciaries, including the Hungarian one, for the European project, we will argue that the Commission as Guardian of the Treaties is compelled to start infringement procedures against Hungary for these violations.

Some issues can stand per se as the basis of an infringement procedures, the devastating effect of others are only visible, if scrutinised in conjunction with the institutional surrounding and other governmental steps. In these latter cases, systemic infringement procedures should be started, as it has been advocated for a long time by Professor Kim Lane Scheppele[1].
In order to grasp the harm of governmental steps on the overall structure of judicial autonomy, it is advised to start systemic infringement cases also in relation to topics that could serve the basis of traditional infringements. At the same time, as Professors

1 Scheppele, K. L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in.: Closa, C., Kochenov, D., (eds), Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, Cambridge, 2016, pp. 105-132. Authors are grateful to Professor Scheppele for her remarks on the draft version of the present paper, based on her theory.

Scheppele, Kelemen, and Morijn have proven[2], the Rule of Law Conditionality Regulation 2020/2092 should also have been immediately employed against Hungary. However, after a long delay and hesitation, which even resulted in the European Parliament suing the Commission over its inaction, in April 2022 the Commission finally decided to trigger the mechanism, but only with regards to public procurement, the high-level corruption, and the non-cooperation with the European Anti-Fraud Office – meaning the issue of judicial independence was not tackled. Given the crucial importance of judicial review for the proper distribution of EU funds, and given that the Rule of Law Conditionality Regulation expressly authorises the suspension of EU funding where rule of law breaches affect or potentially affect in a sufficiently direct way the sound management of the EU budget or the protection of the EU financial interests, every step in dismantling judicial independence we discuss in this paper is of direct relevance and be tackled directly in the frame of the Regulation.

The willingness to compromise, to negotiate and to engage in dialogue on the side of European institutions are the tools of an alien culture, which are ridiculed, and more importantly hacked by the Hungarian government and the captured media in the face of cynical power practices. The EU must walk the walk and live up to its promises to have a rule of law culture. It must start the relevant mechanisms, including (systemic) infringement and conditionality procedures and at the very minimum stop financing such regimes from EU taxpayers' money. The tools are available, EU institutions should not shy away from using them, or else rule of law decline and its consequences spilling over to the supranational entity will eat up the European project from within.

2 For further analysis, see Scheppele, K.L., Kelemen, R.D., Morijn, J., The EU Commission has to cut funding to Hungary: The Legal Case, Appendix 1 (An analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context), p. 44: https://www.greens-efa.eu/en/article/document/the-eu-commission-has-to-cut-funding-to-hungary-the-legal-case.

KEY MESSAGES:

- The rule of law in Hungary has been dismantled by the conscious political intent to break down constitutional checks and balances and place all public institutions at the service of the ruling party. At the centre of Hungarian rule of law backsliding is the deliberate and systematic destruction of judicial independence.

- While the restoration of the independence of the judiciary alone cannot undo the systemic destruction of the rule of law, it is still of crucial importance, not only to safeguard fundamental rights and freedoms at national level, but also for the European project. Member States' courts are ultimately the ones applying EU law. They share responsibility with the Court of Justice of the EU for the unified and autonomous interpretation of the EU acquis. Rule of law decline and its consequences spilling over to the supranational entity will eat up the European project from within.

- Interference with judicial independence is a blatant violation of Article 2 TEU on the founding values of the EU and Article 4(3) TEU on the principle of sincere cooperation. The common rule of law standards regarding judicial independence have a triple European footing, stemming from Articles 6 and 13 ECHR; Article 47 of the EU Charter of Fundamental Rights; and Article 19(1) TEU. This makes violations of judicial independence in a Member State a particularly strong case for intervention by the European Commission.

- Judicial capture is a particularly salient deficiency that automatically and unavoidably leads to democratic decline and human rights violations. When judicial independence - the cornerstone of the rule of law - is compromised, this negatively affects all segments of the public sphere and paves the way for numerous other value deficiencies, such as infringements of academic freedom, media freedom and freedom of information.

- The Hungarian government has taken numerous individual and inter-related steps to dismantle judicial independence, from court packing, forced retirement and limiting court competences, to changing court structures, retributions, disciplinary proceedings and creating a climate of fear. All of these steps, both with regard to the Constitutional Court and the ordinary judiciary, gravely violate one or multiple European standards and principles regarding judicial independence recognized by the CJEU and the ECtHR.

- Despite the existential importance of judicial independence for the European project, the EU has not deployed the tools at its disposal in a proper, comprehensive and timely manner to counter judicial capture in Hungary. The few isolated infringement actions the EU has taken proved to be ineffective and insufficient remedies.

- The vast majority of laws and practices that compromise judicial independence or even fully capture the judiciary in Hungary have not been tackled in any form whatsoever by the EU institutions.

- Effective procedures to enforce EU values require a heavier emphasis on the time factor, the deployment of interim measures to prevent further harm, and a thorough follow-up on the implementation of judgments. A government hiding behind a veneer of legality will engage in fake compliance. Enforcement of guarantees should therefore also be closely monitored and followed up. Setting up new national agencies and making promises of legal change are deceptive as long as the resulting decisions can be undone, for instance via the captured judiciary.

- As the Guardian of the Treaties, the Commission should initiate legal procedures against Hungary, either in the form of traditional or systemic infringement cases. While some issues can stand per se as the basis of an infringement procedure, the devastating effects of others are only visible, if scrutinised in conjunction with the institutional surrounding and other governmental steps. These latter cases may carry a veneer of legality when assessed in isolation and should instead be dealt with through systemic infringement procedures. Still, it is advisable to also bundle infringement cases that could stand on their own, as this helps point to the systemic nature of seemingly diverse issues.

- Individual European responses to individual laws and practices violating the rule of law have so far failed and they are doomed to fail in the future too. The systemic features of rule of law decline require systemic responses. Systemic infringement actions are an excellent tool to do so.

- The dismantling of judicial independence should also be addressed via the Rule of Law Conditionality Regulation 2020/2092. The conditionality mechanism was triggered only with regard to corruption, despite the fact that judicial independence is of crucial importance for the proper distribution of EU funds, and despite the express authorisation of the Rule of Law Conditionality Regulation to address issues related to the judiciary. The uncontrolled inflow of EU funding combined with the elimination of internal checks – including the control an independent judiciary would mean – make democratic pluralism and the prospect of political alternation illusory, undermining all non-systemic attempts for remedy.

I. INTRODUCTION

1.1. The need for a systemic approach

The peculiarity of Hungarian rule of law decline – as opposed to those in Poland or elsewhere outside the EU[3] – is that the authoritarian turn took place in steps that, assessed in isolation, look perfectly legal. In fact, all governmental steps deconstructing constitutionalism, democracy and human rights have a veneer of legality – but instead of limiting or taming government,[4] these constitutional and other legal norms are adopted with the opposite objective, to entrench governmental powers and undermine constitutionalism as a result. The abuse of formal legal means or autocratic legalism is supported by the traditional formalistic legal culture, which remained dominant even three decades after the democratic transition. In-built mechanisms such as captured institutions' confrontation with the government in minor or non-system-relevant cases ensure the semblance of rule of law compliance.

Due to the pre-existing vulnerabilities of the Hungarian constitutional structure and the aforementioned forms of disguised abuse of laws, the regime managed to get the same outcome as its Polish counterpart without some of the most blatant violations of formal legality being present. Our overview demonstrates that the results, however, are essentially the same: the breakdown of the crucial elements of constitutional checks on power and, ultimately, of the rule of law and constitutionalism. Attacks on judicial independence should be considered in this light – their full scope and legal relevance cannot be understood without taking this aspect into account.

Violations on judicial independence have a special role in the systemic features of Hungarian rule of law backsliding[5]. Albeit the EU has already dealt with one aspect of judicial capture – however unsatisfactorily[6] – one cannot ignore the multiple challenges which the members of the judiciary had to face during the last 11 years. In a constitutional democracy, the constitutional court should respond to rule of law violations, but since that apex court was captured, it failed to act to uphold rule of law standards. The curtailment of the autonomies was scrutinised (to some extent) by international and supranational monitoring bodies, which led to corresponding adjustments. All this cannot hide the fact, however, that the resulting conditions fail to comply with standards a judiciary has to satisfy in order to qualify as a court.

3 Sajó, A., Ruling by cheating: Governance in Illiberal Democracy, Cambridge University Press, Cambridge, 2021.

4 Krygier, M., 'The Rule of Law and 'the Three Integrations'', Hague Journal on the Rule of Law, Volume I, Issue 1, 2009, pp. 21-27.

5 Fleck, Z., 'Changes of the Judicial Structure in Hungary – Understanding the New Authoritarianism' Osteuropa Recht, Volume 64, Issue 4, 2018, pp. 583-599. Fleck, Z. 'Changes of the Political and Legal Systems: Judicial Autonomy' German Law Journal, Volume 22, Issue 7, 2021, pp. 1298–1315.

6 For a comparative analysis of the Hungarian and Polish age discrimination cases see Bárd, P., Sledzinska-Simon, A., 'On the principle of irremovability of judges beyond age discrimination: Commission v. Poland', Common Market Law Review, Volume 57, Issue 5, 2020, pp. 1555-1584.

Despite the existential importance of judicial independence for the European project, the past decade or more has shown that European norms and procedures safeguarding judicial autonomy are not deployed properly, in a comprehensive and timely manner, to counter deliberate autocratic backsliding. We argue that actions of the EU proved to be ineffective remedies since in-depth monitoring of the implementation of the judgments of the apex courts is still missing from the European legal toolkit. All cases would have equally benefitted from interim measures to prevent further harm being done until a case is pending.

The time factor, interim measures, and a thorough follow-up are the basis of effective procedures to enforce EU values, and a heavier emphasis should be placed on them in the future. But most importantly, the vast majority of laws and practices presented in this paper that the Hungarian government employed to cut back judicial independence, and even more, to capture the judiciary, have not been tackled in any form whatsoever by European institutions.

We argue – as suggested by Kim Lane Scheppele – that the Guardian of the Treaties should bundle cases and point to the systemic nature of the seemingly diverse problems[7]. Piecemeal responses so far have failed and are doomed to fail. Meanwhile, new changes in national law result in more findings of illegality, but only ex-post and never fully remedying the root problem. This is very visible in the cases of the forced retirement of Hungarian judges and that of the data protection ombudsman; Lex CEU and Lex NGO, where the government, albeit technically loosing CJEU cases, ultimately achieved its goals: replaced judges and the ombudsman, chased a university out of the country and stigmatised civil society organizations. Even in areas with clear EU competencies, the focus on selected aspects of what amounts to the elimination of basic asylum guarantees led to suboptimal results: the transit zones at the Southern borders of Hungary that were found to operate in violation of EU law completely closed down in response to ECJ judgment finding violations, further restricting as opposed to remedying access to asylum.

The backsliding features described below could give rise to systemic infringement actions against the Hungarian government since this instrument provides for an adequate framework for addressing tendencies that might escape the control of isolated actions. This paper will also provide a few illustrations emerging from various fields of liberties (autonomies) where the captured jurisprudence of the courts can be detrimental not only for the court system but also for further checks on power, since it exacerbates the already severe rule of law backsliding. In the absence of adequate, decisive answers, autocratic solutions are normalised, and successive generations of lawyers are socialised in an environment with less and less elements of the rule of law. This further exacerbates the already high degree of counter-selection due to the imposition of political loyalties.

7 Scheppele, K. L., 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', in.: Closa, C., Kochenov, D., (eds), Reinforcing Rule of Law Oversight in the European Union, Cambridge University Press, Cambridge, 2016, pp. 105-132.

The systemic nature of judicial capture affects many other fields beyond the autonomies we list as illustrations, including the EU's financial interest and the sound management of the EU budget, therefore the issues we raise also give rise to future procedures under the Rule of Law Conditionality Regulation, as explained in the next chapter.

1.2. The paper's relevance for the Rule of Law Conditionality Regulation

After a decade of autocratisation in Hungary, and other Member States folowing suit, EU institutions decided to put an end to the absurdity of financing illiberal regimes in violation of EU values from EU money. But we could trace many compromises made in favour of hybrid regimes along the drafting procedure and beyond. During the German presidency of the Council of the EU, the text of the Conditionality Regulation has been significantly weakened[8]. Instead of a supermajority to block the Commission's decision to trigger the conditionality mechanism, the adopted version of the Regulation allows for a minority to block the decision. Also, the focus was shifted from the rule of law to the importance of the protection of the Union´s financial interests, so that rule of law issues may only be discussed in this narrower context. As a further political compromise, the final text of the Rule of Law Conditionality Regulation[9] was agreed to be accompanied by guidelines on how the Commission should apply the Regulation. Despite all the concessions made, Hungary and Poland, the most likely candidates to be affected by the new rules, attacked the Regulation in front of the CJEU. And here, yet again, another decision was made, which benefitted illiberal governments: the Commission promised not to trigger the mechanism until the CJEU delivers its judgment.

Both the guidelines and the decision to wait were criticised by scholars as contrary to the law[10] and the rule of law, and the European Parliament even sued the Commission over its failure to act and trigger the mechanism promptly after its entry came into force in January 2021[11]. Finally on 16 February 2022, the CJEU dismissed the Hungarian and Polish claims on all accounts,[12] and on 2 March the guidelines had been adopted[13]. Nevertheless the Commission presented two novel arguments explaining why the

8 European Council Conclusions, 11 December 2021, EUCO 22/20, https://www.consilium.europa.eu/media/47296/1011-12-20-euco-conclusions-en.pdf.

9 Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget.

10 P. Bárd, D.V. Kochenov, 'War as a pretext to wave the rule of law goodbye? The case for an EU constitutional awakening' (2022) European Law Journal 1-11.; A. Alemanno, M. Chamon, 'To Save the Rule of Law you Must Apparently Break It' (11 December 2020) VerfBlog, https://verfassungsblog.de/to-save-the-rule-of-law-you-must-apparently-break-it/. See also K.L. Scheppele, L. Pech, and S. Platon, 'Compromising the Rule of Law while Compromising on the Rule of Law', (13 December 2020) VerfBlog, https://verfassungsblog.de/compromising-the-rule-of-law-while-compromising-on-the-rule-of-law/.

11 European Parliament resolution of 10 June 2021 on the rule of law situation in the European Union and the application of the Conditionality Regulation (EU, Euratom) 2020/2092 (2021/2711(RSP)); European Parliament resolution of 8 July 2021 on the creation of guidelines for the application of the general regime of conditionality for the protection of the Union budget (2021/2071(INI)); European Parliament, "Parliament prepares legal proceedings against Commission over rule of law mechanism", 20 Oct. 2021, https://the-president.europarl.europa.eu/en/newsroom/parliament-prepares-legal-proceedings-against-commission-over-rule-of-law-mechanism; Letter of the President of the European Parliament to the Parliament's legal service dated 20 October 2021, https://the-president.europarl.europa.eu/files/live/sites/president/files/pdf/Letter%20Conditionality%20Regulation%2020-20-21/Letter%20Sassoli-Drexler_Conditionality%20Regulation.pdf.

12 Case C-156/21, Hungary v Parliament and Council, EU:C:2022:97 and Case C-157/21, Poland v Parliament and Council, EU:C:2022:98.

13 Communication from the Commission, Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, Brussels, 2.3.2022 C(2022) 1382 final.

mechanism still could not be employed. With regards to Poland, the Commission did not even consider starting the procedure in face of Polish citizens taking up many Ukrainian refugees fleeing from Putin's war,[14] whereas in relation to Hungary, the Commission did not intend to give the semblance of interfering with the 3 April 2022 Hungarian elections.

Finally, once Fidesz won for the fourth time in a row, the Commission triggered the conditionality mechanism against Hungary,[15] but only with regards to public procurement, high-level corruption, and non-cooperation with the European Anti-Fraud Office – meaning the issue of judicial independence was not tackled. This occurred despite the fact that judicial independence is of crucial importance for the proper distribution of EU funds, and regardless that the Rule of Law Conditionality Regulation provides for appropriate measures to be adopted where it is established that "breaches of the principles of the rule of law *affect* or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way".[16]

We argue that everything discussed in this paper with regards to the judiciary is of direct relevance for rule of law conditionality, and could be tackled directly in the frame of the Regulation. Therefore, this paper should preferably be read together with one composed by Professors Scheppele, Kelemen, and Morijn,[17] proving that the Rule of Law Conditionality Regulation 2020/2092 should also have been employed against Hungary as of its entry into force, with regards to various issues including the independence of the judiciary.

The Rule of Law Conditionality Regulation lists the following sources to be taken into account when employing the mechanism: judgments of the Court of Justice of the European Union; reports of the Court of Auditors; the Commission's annual Rule of Law Report, the EU Justice Scoreboard, reports of the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO); conclusions and recommendations of relevant international organisations and networks; Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, in particular its rule-of-law checklist; European networks of supreme courts and councils for the judiciary, and the European Union Agency for Fundamental Rights.[18] In this paper we used many of these sources with a special emphasis on court judgments, and at the same time we provide a much deeper analysis than any of these European mechanisms are designed to offer.

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14 Krukowska, S. Bodoni, 'Ukraine War Adds to EU Doubts Over Pursuing Poland, Hungary' (14 March 2022) Bloomberg, https://www.bloomberg.com/news/articles/2022-03-14/eu-to-hold-back-on-rule-of-law-budget-fight-amid-war-in-ukraine?srnd=premium-europe&fbclid=IwAR1vQd4jFflThgZHJw2lY3fNz_BW6aizOgOqo7IlwlqeAgiFVdL6CNvp42Q

15 On 5 April 2022. V. Makszimov, 'Commission to trigger mechanism that could see Hungary lose EU funds', (5 April 2022), Euractiv, https://www.euractiv.com/section/politics/news/commission-to-trigger-mechanism-that-could-see-hungary-lose-eu-funds/ On 27 April 2022 the mechanism was officially triggered. https://twitter.com/VeraJourova/status/1519259040672534530?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1519259040672534530%7Ctwgr%5E%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.dw.com%2Fen%2Feu-triggers-rule-of-law-procedure-against-hungary%2Fa-61607618.

16 Article 4(1) of the Rule of Law Conditionality Regulation 2020/2092.

17 For further analysis, see Scheppele, K.L., Kelemen, R.D., Morijn, J., The EU Commission has to cut funding to Hungary: The Legal Case, Appendix 1 (An analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context), p. 44: https://www.greens-efa.eu/en/article/document/the-eu-commission-has-to-cut-funding-to-hungary-the-legal-case

18 Regulation 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L 433I 1, recital 16.

1.3. Judicial independence in the national setting is an EU matter

Interference with judicial independence is a blatant violation of the rule of law, and thus violates Article 2 TEU on the founding values of the EU, and Article 4(3) TEU on the principle of sincere cooperation. The triple European footing of the common rule of law standards regarding judicial independence specifically stems from Articles 6 and 13 ECHR; Article 47 of the EU Charter of Fundamental Rights; and Article 19(1) TEU. These make violations of judicial independence in a Member State a particularly strong case for intervention by the Commission. Thus far the Court of Justice placed emphasis on the concept of effective judicial remedies enshrined in Article 19(1)(2) TEU, but there is room for improvement also for solid Article 2 TEU infringement cases.

1.4. Interconnected attacks against judicial independence in Hungary

There was a clear intent, from the outset, going back to the first years of the Orbán regime, to diminish all the autonomies necessary for a balanced constitutional system of separation of powers and working checks on the executive. This upended the structure established during the democratic transition and included steps like the wholesale modification of the Constitutional Court and the early termination of the mandate of the President of the Supreme Court (renamed for these purposes as *Kúria*) and reached its peak with the packing of the *Kúria* with tried loyalists. The fate of the two highest judicial organizations shows the strengths of the executive and pushes all judges towards loyalty. Similarly, the forcing of a large number of senior judges into early retirement was a clear message for the judiciary: the classical guarantees of independence do not work.

The self-governing Judicial Council cannot control the activities of the President of the National Office for the Judiciary elected by the Parliament. The first President (Ms. Tünde Handó) fulfilled the political expectations by selecting court leaders through legally questionable moves and created an aura of hierarchical opportunism. The tensions and malfunctions of central administration are structural in nature, the change of head (György Barna Senyei taking over the role from Handó) in 2020 could do little to mitigate the climate of fear. The highly questionable manner of selecting and nominating court leaders, which is a constant source of tension between the Judicial Office and the Council of the Judiciary, did not change. Senyei also used the option of annulling application procedures on numerous occasions.

In 2020, this happened for a total of 20 applications. [19]The political selection of leaders prevails in the appointment of county presidents. By now all the presidents have been replaced. Traditionally, court leaders have enormous influence on the organizational culture, in enforcing judicial adaptation patterns by administering the ordinary framework of judicial activity. Judicial self-government and self-representation (the Council for the Judiciary) has a weak position in the eyes of the judges, in this system self-governance does not seem effective in any sense. The two purest signs of neglecting the opinions and actions of the Council were the non-action of the Parliament after the motion of the Council, which initiated the removal of the President Handó in 2019 and the election of András Zs. Varga as President of the *Kúria* despite the almost unanimous rejection by the Council for the Judiciary. The only positive vote after his hearing, characteristically came from the former President of the *Kúria.*

The famous Baka verdict did not lead to full reinstatement: it did not change the positions of the newly nominated leaders, while retired judges have lost their positions. The only spectacular reversal of power was postponement of the establishment of the special administrative court system. But the political aims were reached differently by the wholly politicised procedure of nomination and persons to the *Kúria* (András Patyi,[20] the President András Zs. Varga[21] and Barnabás Hajas[22]) along with the newly introduced special procedures where the newcomer court executives have strong – unbalanced – competences.

1.5. The importance of judicial independence for various Article 2 TEU values

As the cornerstone of the rule of law, judicial independence could have protected highly relevant autonomies such as academic and university autonomy, civil society, media pluralism and political rights. As regards the latter, severe and unjustified restrictions occurred under the pretext of defending against the COVID-19 epidemic. The state of danger perpetuated the regulatory legislation, and the executive used the special legal situation for strengthening its political and economic power. As to the former aspects, such as academic and media freedoms, and the space for NGOs, they have long been seriously jeopardised on the way of dismantling rule of law and democracy.

We will provide an overview of the unconstitutional restrictions of the academic, cultural and university spheres (i.e., resorts of public scrutiny) by which dissenting voices essential for democracy are oppressed. As a result of government attacks and

19 Eötvös Károly Public Policy Institute, Fighting for Autonomies, EKINT, Budapest, 2021. Available at: https://drive.google.com/file/d/1UjPT0TyqG6hGNiQymowCnEi1L9f5vFat/view?fbclid=IwAR0q7d5QBJHj-Dkhf5tpHyOv3Ee76prD0tn4eIF0X7LYj79vXARCT8EzgTk.

20 Hungarian Helsinki Committee, 'New Hungarian Chief Administrative Judge May Come from outside the Judiciary', 17 May 2019. Available at: https://helsinki.hu/en/new-hungarian-chief-administrative-judge-may-come-from-outside-the-judiciary/; Hungarian Helsinki Committee, 'Yet another government-friendly judicial leader at the Supreme Court of Hungary', 1 June 2021. Available at: https://helsinki.hu/en/yet-another-government-friendly-judicial-leader-at-the-supreme-court-of-hungary/.

21 Hungarian Helsinki Committee, 'The appointment of András Zs. Varga: not even the UN was provided with an explanation by the government', 16 June 2021. Available at: https://helsinki.hu/en/the-appointment-of-andras-zs-varga-not-even-the-un-was-provided-with-an-explanation-by-the-government/.

22 NewsBeezer, 'Index - Domestic - Former Foreign Minister', 2 June 2021. Available at: https://newsbeezer.com/hungaryeng/index-domestic-former-foreign-minister/.

the incapability of constitutional and judicial review to provide remedy, we will show how academic institutions have lost their democratic, autonomous character; how courts cannot restore media freedom and pluralism; and how freedom of information, a basis of any meaningful and rational democratic discourse (and scrutiny), is jeopardised. Means and fora of public discussion are of key importance for the access to public data on public spending, therefore curbing the aforementioned liberties entails strong corruption risks as well. Public control and ways of expressing dissent have proven to be an effective check on the executive, thus these areas should enjoy proper (independent and impartial) judicial protection, while their deterioration should be noted in the course of (Article 2) value-driven debates.

1.6. Roadmap and disclaimers

In the following chapter (Chapter II) the concept of judicial independence as interpreted by Europe's two apex courts, the Court of Justice of the EU and the European Court of Human Rights will be explored. The main part (Chapter III) of the paper is devoted to the deconstruction of judicial independence and judicial capture in Hungary. The saga of the Hungarian Constitutional Court and that of the ordinary judiciary are discussed separately, since the former is not part of the Hungarian judicial hierarchy. Finally, a separate chapter (Chapter IV) is devoted to autonomies such as academic and university autonomy, media pluralism, and freedom of information, to show the interconnectedness of judicial capture with other values enshrined in Article 2 TEU. All values are dependent on an efficient application and enforcement mechanism, the main guardian of which are the courts. Deterioration of judicial independence therefore automatically and necessarily leads to democratic decline, human right violations and infringements of other related values as well.

This overview in parts builds on research and scholarly papers prepared for the purposes of a rule of law project of the Netherlands Helsinki Committee, with the participation of the co-authors of the present report.[23] With regard to the sub-chapter on academic freedom, let us state that we are university professors, lecturers and researchers, who are at times directly caught up in the changes discussed in that part of the paper.

The facts and law discussed in this paper cover events up to 15 March 2022. The URLs were also last checked by this cut-off date.

23 Fleck, Z., Chronowski, N., Bárd, P., The Crisis of the Rule of Law, Democracy and Fundamental Rights in Hungary, MTA Law Working Papers 2022/4, available at: https://jog.tk.hu/mtalwp/the-crisis-of-the-rule-of-law-democracy-and-fundamental-rights-in-hungary; Bárd, P., Koncsik, A., Körtvélyesi, Zs., Tactics Against Criticism of Autocratization - The Hungarian Government and the EU's Prolonged Toleration, MTA Law Working Papers 2022/5, available at: https://jog.tk.hu/mtalwp/tactics-against-criticism-of-autocratization-the-hungarian-government-and-the-eus-prolonged-toleration; Bárd, P., Chronowski, N., Fleck, Z., Inventing constitutional identity in Hungary, MTA Law Working Papers 2022/6, available at: https://jog.tk.hu/mtalwp/inventing-constitutional-identity-in-hungary; Chronowski, N., Kovács, Á., Körtvélyesi, Zs., Mészáros, G., The Hungarian Constitutional Court and the Abusive Constitutionalism, MTA Law Working Papers 2022/7, available at: https://jog.tk.hu/mtalwp/the-hungarian-constitutional-court-and-the-abusive-constitutionalism; Bárd, P, Chronowski N, Fleck, Z., Kovács, Á., Körtvélyesi, Zs., Mészáros, G., Is the EU toothless? An assessment of the EU Rule of Law enforcement toolkit, MTA Law Working Papers 2022/8, available at: https://jog.tk.hu/mtalwp/is-the-eu-toothless-an-assessment-of-the-eu-rule-of-law-enforcement-toolkit; Fleck, Z., Kovács, Á., Körtvélyesi, Zs., Mészáros, G., Polyák, G., Sólyom, P., The Changes Undermining the Functioning of a Constitutional Democracy, MTA Law Working Papers, 2022/9, available at: https://jog.tk.hu/mtalwp/the-changes-undermining-the-functioning-of-a-constitutional-democracy.

II. JUDICIAL INDEPENDENCE UNDER EUROPEAN LAW IN LIGHT OF CJEU AND ECTHR CASE LAW

2.1. Captured courts and non-courts

In great part as a response to systemic rule of law violations, the CJEU has started to develop a targeted case law of what the rule of law requirements, cast in somewhat abstract terms, mandate in practice. Paradoxically, this has been working against defenders of these violations who have continued to claim that the rule of law is a vague concept that is being misused in a politically biased way. As a result of the case law, we not only have clear standards to assess deviations that fall outside of what is permissible under EU law, but also clear venues to enforce these.[24] The challenges pushed the Court to make explicit (and enforceable) some fundamental assumptions that had remained implicit, putting, in effect, the principle of the rule of law – the EU's 'DNA', in the words of Frans Timmermans[25] – to actual work.

Under the logic of EU law enforcement, national courts should be the primary actors of enforcing rule of law standards, as articulated in CJEU case law. Yet, that is exactly what is in jeopardy with the changes under scrutiny. This structural feature of the challenges also underlines the importance of devising a systemic response. It was through concrete questions raised in the context of mutual recognition that the Court had to face the structural nature of the problem, e.g. whether the execution of a European Arrest Warrant can be refused on the grounds that it was issued in a country

24 An invaluable overview and analysis of the related case law that we are also relying on here: Pech, L., Kochenov, D., Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case, SIEPS, Stockholm, 2021:3., p. 74.

25 F. Timmermans, 'The European Union and the Rule of Law', Keynote speech at Conference on the Rule of Law, Tilburg University, 1 September 2015, quoted in Pech, L., Kochenov, D., Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case, SIEPS, Stockholm, 2021:3., p. 208.

with systemic deficiencies of the rule of law.[26] In addition, where judicial capture has not been completed, articulating and enforcing rule of law guarantees also empower national courts that can rely on these as they are using EU law to counter national violations of the rule of law. The two most important provisions that the Court has been relying on are the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union.

The first crucial step in the CJEU's case law was the case known as the *Portuguese Judges* case where the Court articulated judicial independence as a legal requirement obliging Member States[27] and elaborated on substantive elements of the independence of the judiciary[28]. In later cases, the Court followed up on these standards and connected possible legal sanctions, including interim relief, to them.[29] This shows not just the realisation that judicial independence is fundamental to sustain the functioning of EU law, but also the crucial recognition that without swift, resolute and effective action, bad faith actors can get away with, and benefit from, most of the results that they wanted to achieve in the first place.[30] This is the risk of measures having 'irreversible effects' or 'likely to cause serious and irreparable damage to the EU legal order'.[31] It is easier, by orders of magnitude, to stop violations as they are unfolding than to undo the damage once the results fully materialised (as discussions around 'constitutional restoration' already and amply show[32]).

26 CJEU, Case C-216/18 PPU, LM, Judgment of the Court (Grand Chamber), 25 July 2018, ECLI:EU:C:2018:586.

27 CJEU, Case C-64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, esp. paras 34 and 37.

28 Ibid., paras 44–45.

29 CJEU, Case C-619/18 R, Commission v Poland (Independence of the Supreme Court), Order of the Court (Grand Chamber), 17 December 2018, ECLI:EU:C:2018:1021; CJEU, Case C-791/19 R, Commission v Poland (Régime disciplinaire des juges), Order of the Court (Grand Chamber), 8 April 2020, ECLI:EU:C:2020:277 ; CJEU, Case C-204/21 R, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878.

30 The emblematic case here is: CJEU, Case C-286/12 Commission v Hungary (The early retirement of judges), 6 November 2012, ECLI:EU:C:2012:687.

31 See, e.g., CJEU, Case C-619/18 R, Commission v Poland (Independence of the Supreme Court), Order of the Court (Grand Chamber), 17 December 2018, ECLI:EU:C:2018:1021, paras 68, 71 and 78.

32 See the Debate: Restoring Constitutionalism, VerfBlog, https://verfassungsblog.de/category/debates/restoring-constitutionalism/.

The Court identified the following areas where EU law requires the assessment of Member State measures through the lens of judicial independence. These are the cases on which we are also building in our analysis:

- forced retirement
    - CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, *A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court),* 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings);
    - CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924;
    - CJEU, Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*, 24 June 2019, ECLI:EU:C:2019:531;
    - CJEU, Case C-286/12, *Commission v Hungary,* 6 November 2012, ECLI:EU:C:2012:687.
- interference by the executive through secondments
    - CJEU, Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others,* 16 November 2021, ECLI:EU:C:2021:931.
- disciplinary proceedings
    - CJEU, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al*, 26 March 2020, ECLI:EU:C:2020:234;
    - CJEU, Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, 15 July 2021, ECLI:EU:C:2021:596;
    - CJEU, Case C-204/21, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593; CJEU, Case C-204/21, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878;;
    - CJEU, Case C564/19, *IS*, 23 November 2021, ECLI:EU:C:2021:949.
- reduction of remuneration
    - CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges),* 27 February 2018, ECLI:EU:C:2018:117..
- appointment and promotion
    - CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153;
    - CJEU, Case C-487/19, W. Ż. *() and des affaires publiques de la Cour suprême nomination)*, 6 October 2021, ECLI:EU:C:2021:798.

Ultimately, the requirements allow the CJEU to conclude that certain bodies that appear to be judicial in nature or call themselves courts or tribunals are not a 'court or tribunal' under EU law. Furthermore, in the *Repubblika* judgment, the CJEU adopted a novel principle, non-regression, that 'preclud[es] national provisions […] which […] constitute a reduction […] in the protection of the value of the rule of law, in particular the guarantees of judicial independence'.[33] This principle has wide-ranging consequences.[34]

In a number of cases, the CJEU reflected directly on aspects of mutual recognition in the context of judicial independence, e.g., in the context of European arrest warrants. Under these judgments, judges need to conduct a specific and precise analysis of whether there is "a real risk of breach of the fundamental right to a fair trial" (Art. 47 para. 2, Charter of Fundamental Rights of the European Union) as a result of "systemic or generalised deficiencies" regarding the independence of the judiciary.[35]

We are also relying on some relevant decisions of the European Court of Human Rights (cf. Article 6 TEU, Articles 52(3) and 53 CFR):

- judicial self-government and irremovability
    - ECtHR, *Oleksandr Volkov v. Ukraine,* Application no. 21722/11, 9 January 2013;
    - ECtHR, *Baka v. Hungary,* Application no. 20261/12, 23 June 2016;
    - ECtHR, *Erményi v. Hungary,* Application no. 22254/14, 22 February 2017;
    - ECtHR, *Paluda v. Slovakia,* Application no. 33392/12, 23 May 2017;
    - ECtHR, *Denisov v. Ukraine,* Application no. 76639/11, 25 September 2018;
    - ECtHR, *Broda and Bojara v. Poland,* Application nos. 26691/18 and 27367/18, 29 June 2021;
    - ECtHR, *Grzęda v. Poland,* Application no. 43572/18, 15 March 2022.

- appointment and political interference
    - ECtHR, *Miracle Europe Kft. v. Hungary,* Application no. 57774/13, 12 January 2016;
    - ECtHR, *Camelia Bogdan v. Romania,* Application no. 36889/18, 20 October 2020;
    - ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/181, 1 December 2020.
    - ECtHR, *Reczkowicz v. Poland,* Application no. 43447/19, 22 July 2021;
    - ECtHR, *Dolińska-Ficek and Ozimek v. Poland,* Application nos. 49868/19 and 57511/19, 8 November 2021;
    - ECtHR, *Advance Pharma sp. z o.o. v. Poland*, Application no. 1469/20, 3 February 2022.

The principles established by the above case law allow a conclusion that a body called a court or a tribunal under national law does not in fact qualify as such, lacking basic guarantees of independence – a less than independent 'court' is by definition not a court.

33 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311, para 65.

34 Leloup, M., Kochenov, D., Dimitrovs, A., 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Repubblika v Il-Prim Ministru', European Law Review, Volume 46, Issue 5, 2021, p. 687.

35 CJEU, Case C216/18 PPU, LM, 25 July 2018, ECLI:EU:C:2018:586; CJEU, Joined Cases C354/20 PPU and C412/20 PPU, L and P, 17 December 2020, ECLI:EU:C:2020:1033; CJEU, Joined Cases C562/21 PPU and C563/21 PPU, X and Y, 22 February 2022, ECLI:EU:C:2022:100.

After an overview of the developments in Poland that affected judicial independence, the European Court of Human Rights concluded: "These irregularities in the appointment process compromised the legitimacy of the formation of the Civil Chamber of the Supreme Court which examined the applicant company's case to the extent that, following an inherently deficient procedure for judicial appointments, i did lack the attributes of a 'tribunal' which is 'lawful' for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected."[36]

Finally, the standards applied by the European courts to the judiciary can also be applied more broadly, acknowledging the need to look at the interplay of different institutions that is necessary to uphold the rule of law, in other words, to adopt a systemic view. This has been, e.g., the case with the prosecution, with judgments from both CJEU and ECtHR. [37]There are also a number of cases partly pending that regard the independence of the constitutional courts of Romania[38] and Poland.[39]

2.2. External and internal aspects of judicial independence

CJEU, Joined cases C-585/18, C-624/18 and C-625/*18, A. K. e.a. (Independence of the disciplinary chamber of the Supreme Court),* **19 November 2019**[40]

In *A. K.*, requests for a preliminary ruling concerned not just the interpretation of Article 2 and once again the second subparagraph of Article 19(1) TEU but also the third paragraph of Article 267 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 9(1) of Council Directive 2000/78/EC on equal treatment in employment and occupation.

A. K. was a judge of the Polish Supreme Administrative Court *(Naczelny Sąd Administracyjny)* and reached the age of 65 before the entry into force of the New Law on the Supreme Court. A.K. submitted, in line with the new law, a declaration about his willingness to continue his position. On 27 July 2018, the Polish National Council of the Judiciary *(Krajowa Rada Sądownictwa, KRS)* issued an unfavourable opinion to that request. Consequently, A. K. brought an action before the Supreme Court *(Sąd Najwyższy)* claiming inter alia, that retiring him at the age of 65 infringed the second subparagraph of Article 19(1) TEU, Article 47 of the Charter and Directive 2000/78, in particular, Article 9(1) thereof.

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36 ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022, para. 349.

37 CJEU, Joined Cases C83/19, C127/19, C195/19, C291/19, C355/19 and C397/19, Asocia ia Forumul Judecătorilor Din România, 18 May 2021, ECLI:EU:C:2021:393; ECtHR, Kövesi v. Romania, Application no. 3594/19, 5 May 2020.

38 CJEU, Joined Cases C357/19, C379/19, C547/19, C811/19 and C840/19, Euro Box Promotion and Others, 21 December 2021, ECLI:EU:C:2021:1034; Opinion of Advocate General Bobek, Joined Cases C-811/19, FQ and Others, 4 March 2021, ECLI:EU:C:2021:175; and cases pending under C-547/19, C-840/19, C-859/19, C-926/19, C-929/19, and C-709/21.

39 ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021; ECtHR, M.L. v. Poland, Application no. 40119/21 (pending); ECtHR, A.L. and Others v. Poland, Application no. 3801/21 (pending).

40 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982.

The other two cases C624/18 and C625/18 are related to two Supreme Court *(Sąd Najwyższy)* judges, who also reached the age of 65 before the date of the entry into force of the New Law on the Supreme Court, but they did not submit any declarations on the basis of Article 37(1) and of Article 111(1) of that law. Consequently, the Polish President declared that they had been retired as of 4 July 2018, and the judges, namely CP and DO brought actions before the Supreme Court *(Sąd Najwyższy)* against the President of the Republic for a declaration that their employment relationship of judge in active service in the referring court had not been transformed, as of that date, into an employment relationship of retired judge of that court. In support of their actions, they rely, inter alia, on an infringement of Article 2(1) of Directive 2000/78 prohibiting discrimination on the ground of age.[41]

The Labour and Social Insurance Chamber *(Izba Pracy i Ubezpieczeń Społecznych)* of the Supreme Court *(Sąd Najwyższy)* as referring court considered that serious doubts arose because

the New Law on the Supreme Court granted the exclusive jurisdiction in the cases to the newly created Disciplinary Chamber and serious doubts existed about its independence and impartiality.[42]

In his Opinion delivered on 27 June 2019, AG Tanchev essentially agreed with the Commission's evaluation that the DC did not meet the requirements of independence under EU law. He also expressed his concerns related to the Polish judicial system: "I note that, according to the 2019 EU Justice Scoreboard, of the 20 Member States surveyed, Poland is the only Member State where appointment of the judicial members of the judicial council is proposed not exclusively by judges and appointed by the Parliament."[43]

In its judgement, primarily, the European Court of Justice declared that both the Article 47 of the Charter and the second paragraph of Article 19(1) TEU were applicable, however, considering its findings on the basis of Article 47 of the Charter, the CJEU decided not to conduct an additional analysis based on the second subparagraph of Article 19(1) TEU. And furthermore, the CJEU stated that any further assessment on this basis would reinforce its analysis previously adopted as to the imperviousness of the Disciplinary Chamber to external factors.[44]

The Court of Justice reaffirmed that independence and impartiality are essential elements of the right to effective judicial protection and every national court applying EU law must meet these requirements. It also clarified the Disciplinary Chamber will

41 Ibid., para 38.

42 Ibid., para 131. "In the present cases, the doubts expressed by the referring court concern, in essence, the question whether, in the light of the rules of national law relating to the creation of a specific court, such as the Disciplinary Chamber, and, in particular, pertaining to the jurisdiction granted to it, its composition and the circumstances and conditions surrounding the appointment of the judges called to sit on that court, the context of its creation and those appointments, such a court and the members sitting on it satisfy the requirements of independence and impartiality which must be met by a court under Article 47 of the Charter where that court has jurisdiction to rule on a case in which subjects of the law rely, as in the present cases, on an infringement of EU law that is to their detriment."

43 Opinion of Advocate General Tanchev in Cases C-585/18, C-624/18 and C-625/18 A. K., ECLI:EU:C:2019:551, fn. 96.

44 Pech, L., Kochenov, D., ibid., p. 105.

have to be capable of having no legitimate doubts, in the minds of subjects of the law, to its imperviousness to external factors, and, in particular, to the direct or indirect influence of the legislature and the executive.[45] However, the final decision whether the Disciplinary Chamber was in fact independent and impartial was left to the Polish Supreme Court.[46] "Nonetheless, the Court of Justice concurred that certain characteristics of the Chamber, such as the scope of its jurisdiction, composition and circumstances surrounding its creation, when evaluated in a holistic manner, could give rise to concerns."[47] Supreme Court of Poland[48] ruled in line with the Court of Justice decision.

In a series of judgments to be reviewed below, the European Court of Human Rights found that certain bodies cannot be considered to be tribunals established in a lawful manner as a result of government interference. In its judgment in 2016, the ECtHR has openly questioned that the Disciplinary Chamber is sufficiently independent to be considered a court in the first place, describing it as "a body which no longer offered sufficient guarantees of independence from the legislative or executive powers", hence "it did lack and continues to lack the attributes of a 'tribunal' which is 'lawful' for the purposes of Article 6 § 1. The very essence of the right at issue has therefore been affected."[49] This conclusion was confirmed in later case law.[50]

ECtHR, ***Miracle Europe Kft. v. Hungary,* 12 January 2016**[51]

Looking at a specific aspect of institutional guarantees, the ECtHR reviewed the Hungarian rule of assigning cases to different courts. It found that the regulation that allowed the President of the National Judicial Office, who was elected by the legislature, wide discretion but did not specify clear criteria for the selection of cases violates Article 6-1 ECHR.[52] In the concrete case, this meant that the applicant's case was not heard by a "tribunal established by law", for "the appearance of lack of independence and impartiality" and the lack of "foreseeability and certainty".[53]

45 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, para 153.

46 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, para 153.

47 Zelazna, E., 'The Rule of Law Crisis Deepens in Poland after A.K. v. Krajowa Rada Sadownictwa and CP, DO v. Sad Najwyzszy', European Papers, Volume 4, Issue 3, 2019, pp. 907-912. Available at: https://www.europeanpapers.eu/en/system/files/pdf_version/EP_EF_2020_I_001_Ewa_Zelazna_00329.pdf.

48 Supreme Court of Poland, judgment of 5 December 2019, A.K., PO 7/18.

49 ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021, para. 280.

50 ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021.

51 ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016.

52 Ibid., para. 61.

53 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

2.3. Separation of powers, courts' independence from the executive

CJEU, Joined Cases C-748/19 to C-754/19, *Criminal proceedings against WB and Others,* 16 November 2021[54]

Many cases examined infra are related to the independence of the judiciary from the executive power, but this is a specific case which was not included into any of the other Sub-chapters.

The Regional Court of Warsaw *(Sąd Okręgowy w Warszawie)* in connection with seven criminal procedures pending in front of it, turned to the CJEU with questions regarding whether the composition of the adjudicating panels in these criminal cases were compliant with EU rules, especially taking into consideration that some members of these panels are judges seconded by the Minister of Justice to higher courts. The referring court mentions a number of factors[55] which raise serious doubts as to the independence of the seconded judges. According to the Polish regulation, the Minister of Justice has the capacity to send judges to secondment to higher courts. Consequently, the Minister of Justice can significantly influence the composition of a criminal court (an adjudicating panel).

Further problems arose as the Minister makes the decision based on officially unknown criteria, without the possibility of a judicial review against the decision, and they may terminate the secondment at any time without such termination being subject to predefined criteria and/or being accompanied by a statement of reasons. Furthermore, it is unclear from the legislation whether there was an opportunity to challenge such a decision on termination. Obviously, these uncertainties in the regulation and unclearly defined set of criteria include the potential threat on judicial independence and impartiality and also carry the danger that the seconded judges would comply with perceived or real expectations of the Minister of Justice.

In its judgment,[56] the CJEU stated that the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Directive 2016/343 preclude provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.[57]

54 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

55 Ibid., para. 77.

56 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

57 In connection with this judgement see for example, (DW), 'EU's top court says Polish rules on appointing judges violate EU law', dw.com, 16 November 2021, available at: https://www.dw.com/en/eus-top-court-says-polish-rules-on-appointing-judges-violate-eu-law/a-59833245.

2.4. Judicial self-government

ECtHR, *Dolińska-Ficek and Ozimek v. Poland,* 8 November 2021[58]

The ECtHR, upon the application from two Polish judges, assessed the compliance of the establishment of a new Supreme Court chamber ("Chamber of Extraordinary Review and Public Affairs"). The members of the Chamber were appointed by the President of the Republic based on recommendation from the National Council of the Judiciary, a body whose judicial members were, under a 2017 amendment, elected exclusively by the legislature. The ECtHR, relying, among others, on the determination of the CJEU, [59]found the appointment procedure to be incompatible with the requirement of an "independent and impartial tribunal" under Article 6-1 ECHR, considering the "unfettered power" of the executive and the legislative powers.[60]

2.5. Appointment and promotion of judges

ECtHR, *Guðmundur Andri Ástráðsson v. Iceland,* 1 December 2020[61]

The applicant, Guðmundur Andri Ástráðsson, was convicted on the charges of driving without a valid driving licence and driving under the influence of drugs at first instance. He appealed against this judgment in an attempt to have his sentence reduced, which was heard by the new Icelandic Court of Appeal *(Landsréttur)* - a body which had been established in January 2018. The applicant proposed the withdrawal of one of the three judges, Judge A.E. assigned to his case alleging that her appointment procedure was suffering from irregularities. The Icelandic Court of Appeal rejected the applicant's motion for A.E. to withdraw from the case. The applicant challenged this decision, and the appeal was dismissed by the Supreme Court, so the case continued before the Court of Appeal with the participation of A.E. The Court of Appeal upheld the first instance decision.

Finally, Mr. Ástráðsson turned to the Supreme Court, arguing again that Judge A.E.'s appointment had not been in accordance with the law (also alleging that there were political motives behind Judge A.E.'s appointment) and as a consequence, he was deprived of his rights of a fair trial before an independent and impartial tribunal established by law.[62] In May 2018, the Icelandic Supreme Court rejected the applicant's claims and upheld the judgment of the Court of Appeal, stating that Judge A.E.'s

58 ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021.

59 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153.

60 ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021, paras. 329–330.

61 ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Grand Chamber, Application no. 26374/181, 1 December 2020.

62 Judge A.E. had been appointed after a selection procedure, although she was not amongst the best recommended 15 candidates (out of 33) listed by an Evaluation Committee. The Minister of Justice chose 11 of the Committee's 15 suggested candidates, adding four other judges, including A.E., who had ranked lower on the Committee's list of the best candidates. In June 2017 Parliament voted by a majority, to approve the Minister's list and the President of Iceland signed the appointment letters for the new judges, including A.E. The Icelandic Supreme Court, in two judgments rendered on 19 December 2017 stated that the Minister of Justice had failed to carry out an independent evaluation of the facts and had not provided adequate reasons for departing from the Evaluation Committee's proposal, and the Icelandic Parliament had failed to comply with the special voting procedure (Parliament had approved the amended list en bloc without voting on each candidate separately, as required by law.)

appointment had been valid, consequently there is no doubt that Mr. Ástráðsson was given a fair trial before independent and impartial judges.

Mr. Ástráðsson turned to the ECtHR on account of the appointment irregularities of one of the judges who heard his case, alleging the violation of Article 6 § 1 ECHR.
The ECtHR formulated a three-step test to be followed when determining whether the judicial appointment procedure suffered from irregularities of such a gravity that they entailed a violation of the right to "a tribunal established by law". The scrutiny thus extends to (i) whether there has been a manifest breach of domestic law, (ii) whether breaches of domestic law pertained to any fundamental rule of the judicial appointment procedure, (iii) whether the allegations concerning the right to a "tribunal established by law" were effectively reviewed and remedied by the domestic courts.

After a detailed examination of judiciary appointments, the ECtHR held that Mr. Ástráðsson had been denied his right to a "tribunal established by law" on account of the participation in his trial of a judge whose appointment had been undermined by grave irregularities which had impaired the very essence of that right. As the ECtHR found the legal framework had been breached, particularly by the Minister of Justice, when four of the new Court of Appeal judges had been appointed. Although, under certain special circumstances, the Minister had been authorised by law to depart from the Evaluation Committee's proposal, the Minister herself had disregarded a fundamental procedural rule that obliged her to base her decision on sufficient investigation and assessment. The parliamentary procedure and the judicial review before domestic courts had proved ineffective as well, and the discretion used by the Minister to depart from the Evaluation Committee's assessment had remained unfettered.

The ECtHR unanimously ruled that Iceland violated Article 6 § 1 (right to a tribunal established by law) of the ECHR.

ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, 7 May 2021[63]

The ECtHR engaged with aspects of the rule of law backsliding in Poland and found that the packing of the Constitutional Court violated Article 6-1 ECHR. The Court applied the three-prong test from the *Guðmundur Andri Ástráðsson* case and concluded that there was (i) a manifest breach of domestic law that (ii) pertained to a fundamental rule of the procedure of appointing judges and that was (iii) not remedied under national law.[64] The judgment makes it clear that the Constitutional Court, provided its power to decide the civil rights of the applicant, has to fulfil the requirements under the Convention,[65] but because of the election of three judges in an unconstitutional manner (to seats that had already been filled) undermined the applicant's right to a "tribunal established by law".

63 ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021.

64 Ibid., paras. 255–291.

65 Ibid., paras. 192–209 and 252.

ECtHR, *Advance Pharma sp. z.o.o. v. Poland,* 3 February 2022[66]

Following the approach in the *Guðmundur Andri Ástráðsson*[67] case and the findings of the Court in *Xero Flor*[68] and *Reczkowicz,*[69] the ECtHR reviewed an application from a civil party to a case where the applicant's case was reviewed by a chamber of the Supreme Court of Poland composed of judges appointed by the National Council of the Judiciary. This body, under the procedure amended in 2017, was composed of judicial members elected by the legislature. Considering this direct influence, the Court found that this violated the very essence of the right to a "tribunal established by law", following a standard under Article 6-1 ECHR: *"A procedure for appointing judges which […] discloses undue influence of the legislative and executive powers on the appointment of judges is per se incompatible with Article 6 § 1 of the Convention and, as such, amounts to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of the judges so appointed."*[70] The effect of the ECtHR judgment is that the way the Chamber under review was established compromises all its decisions, and its continued existence and functioning leads to continued and repeated violations of the Convention. This determination has far-reaching consequences, touching at the heart of the 2017 amendments and related measures, amounting to a systemic take on a structural problem.

2.6. Irremovability of judges

The principle of irremovability of judges is an essential aspect of judicial independence. While the organisation and administration of justice is national competence, Member States must evidently respect obligations under EU law when exercising their powers[71]. An early Hungarian case on irremovability from 2012, unfortunately framed as an age discrimination case, did not address irremovability from a rule of law perspective and failed to bind the case to crucial Treaty provisions, such as Articles 2 and 19 TEU. But according to the more recent and consequently followed case-law of the CJEU, by adopting measures which undermine the principle of judicial independence in a Member State, the country concerned is in breach of its obligation to provide effective judicial protection in the areas covered by EU law under Article 19(1)(2) TEU.[72] The ECtHR also found, in related cases concerning Ukraine, the dismissal of a court president to amount to a violation of the Article 6(1) ECHR.[73] The dismissal of two

66 ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

67 ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Grand Chamber, Application no. 26374/181, 1 December 2020.

68 ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021.

69 ECtHR, Reczkowicz v. Poland, no. 43447/19, 22 July 2021, see below for a summary..

70 ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022, para. 345.

71 European Commission Communication, 'Strengthening the rule of law within the Union, A blueprint for action', COM(2019)343 final at p. 4.

72 CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531.

73 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018.

court vice-presidents in Poland yielded the same conclusion.[74] (See both summaries below.)

CJEU, C-286/12, *Commission v Hungary (The early retirement of judges)*, 6 November 2012[75]

Immediately after the parliamentary elections victory, the governing parties initiated a legislative package, which created a judicial "reform". As part of this, the government lowered the mandatory retirement age for judges, prosecutors and public notaries from 70 to 62 years to the general retirement age as of 1 January 2012, without any meaningful transitional period.[76] In effect, Hungarian judges were required to retire eight years earlier than expected with immediate effect, and – unlike in other professions – without discretion of the employer to continue their employment. As a direct result of the new regulation, almost 10% of the judiciary was forced to retire within one year. This saw a large number of court executives and justices of the Supreme Court with decades of judicial and leadership experience forced into early retirement. Furthermore, this situation created the opportunity for significantly altering the composition of the judiciary and also appointing new leaders to the courts by the newly established central court administration.

As a first step, on the basis of constitutional complaints in 2012 the Hungarian Constitutional Court found the law unconstitutional.[77] As in this case either the European Commission has not found any objective justification for the drastic lowering of the age limit for judges, prosecutors and public notaries, nevertheless taking into consideration the very short transitional periods for a reform of that extent (reduction of the mandatory retirement age by eight years within a period of one year) and the contradiction of first drastically lowering the age limit before raising it again as of 2014, the Commission considered the measure to be incoherent and disproportionate, and therefore not in compliance with Directive 2000/78/EC[78]. So, the Commission launched an infringement procedure against Hungary and referred the case before the CJEU.

When the Commission initiated an infringement action against Hungary,[79] it played it safe in terms of legal grounds – or worse: it believed that Article 19(1) TEU was not a justiciable ground. The case was therefore presented solely as a breach of the

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74 ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021.

75 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

76 For detailed analysis see for example: Bárd, P., Śledzińska-Simon, A., Rule of law infringement procedures A proposal to extend the EU's rule of law toolbox, CEPS Paper, No. 2019-09, May 2019. Available at: https://www.ceps.eu/ceps-publications/rule-of-law-infringement-procedures/; Halmai, G., 'The Early Retirement Age of the Hungarian Judges', in.: Nicola, F., Davies, B., (eds.) EU Law Stories. Contextual and Critical Histories of European Jurisprudence, Cambridge University Press, 2017, pp. 471-488.; Vincze, A., 'The ECJ as the Guardian of the Hungarian Constitution: Case C-286/12 Commission v. Hungary', European Public Law, Volume 19, Issue 3, 2013, pp. 489-500.

77 Hungarian Constitutional Court (Alkotmánybíróság), 33/2012. (VII. 17.) AB decision.

78 European Commission, 'Hungary - infringements: European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary', Press release, IP/12/395, 25 April 2012. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_12_395.
Cf. 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, 16-17 March 2012, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e.

79 European Commission, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary', Press release IP/12/24, 17 January 2012. Available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_12_24.

prohibition of age discrimination. At that time, it seemed less controversial to base an infringement action against a Member State on an act of secondary EU law, Framework Equality Directive 2000/78/EC.[80] The Commission has not found any objective justification for treating judges and prosecutors differently than other groups, especially when the general retirement ages across Europe were being increased and not lowered. As the Hungarian government communicated to the Commission that it wants to raise the general retirement age to 65,[81] this measure became even more unjustifiable and questionable.

On the request of the European Commission, the Court of Justice of the European Union also ruled in 2012 that the abrupt and radical lowering of the retirement age for judges, prosecutors and notaries in Hungary violates EU equal treatment rules (Directive 2000/78/EC).The Court found Hungary in breach of EU law as the impugned measure constituted age discrimination at the workplace, thereby violating the above-mentioned Directive.[82]

The case went much deeper to the core of judicial independence and the rule of law. But the mischaracterisation of the central problem had severe consequences for the outcome of the case, and compensation of the victims, that is a typical remedy in discrimination cases, was seen as an appropriate answer to a gross violation of judicial independence, which goes way beyond the individual judges' employment concerns.

158 judges also turned to the ECtHR on the ground that their forced early retirement adversely affected their professional career and private life. However, the ECtHR found these applications inadmissible on all grounds, inter alia, by referring to Act XX of 2013 which provided different remedial measures (reinstatement, stand-by post or compensation) for those judges who were affected by the early retirement[83] From the perspective of judicial independence stemming from Article 19(1) TEU, forcing judges into early retirement without any compelling and legitimate ground constituted a political intervention into the functioning of the courts and violated the principle of the irremovability of judges. Later case-law of the CJEU established in a series of rulings the importance of judicial independence for the European project, underpinned by Article 2 TEU on the founding values the EU, Article 4(3) TEU on the principle of sincere cooperation, and importantly Article 19(1) on the obligation

The adopted measures affecting the judiciary have been interpreted as rules against Directive 2000/78/EC which prohibits discrimination at the workplace on grounds of age. Therefore, in this case, both the Commission and the Court missed the opportunity to address the relevant problem as a rule of law issue.

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80 Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal L 303, 02/12/2000 P. 0016-0022.

81 European Commission, 'European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary', Press release IP/12/24, 17 January 2012, available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_24.

82 For a detailed analysis, see: Halmai, G., 'The Early Retirement Age of the Hungarian Judges', in.: Nicola, F., Davies, B., (eds.) EU Law Stories. Contextual and Critical Histories of European Jurisprudence, Cambridge University Press, 2017, pp. 471-488.

83 ECtHR, J.B. and Others v. Hungary, Application nos. 45434/12, 45438/12 and 375/13, 27 November 2018 [Section IV]. For a critical analysis of the ECtHR's deferential approach, see Uitz, R., 'The perils of defending the rule of law through dialogue', European Constitutional Law Review 15.1 (2019), pp. 1-16.

By presenting the legal problem solely as age discrimination, the Commission[84] – and consequently the CJEU, which had to follow the Commission's framing –, failed to invoke the principle of judicial independence and assess the impact of the national measure on the Hungarian judicial. Since the case was (mis)construed as a discrimination case, the logical remedy was individual compensation – and this is what eventually happened. Although, formally, Hungary lost the case, the 10 months that had elapsed between the lodging of the complaint and the ruling gave the government sufficient time to pursue its planned policies, such as the removal of the most senior, most experienced and independent judges, persuading them to retire with financial advantages, and then proceeding to pack the courts with those who displayed loyalty to Fidesz.

ECtHR, *J.B. and Others v. Hungary (inadmissible),* 27 November 2018[85]

In J.B. and Others v. Hungary the ECtHR found the applications lodged by the Hungarian judges and prosecutors who were forcefully retired in 2012 inadmissible on the ground that they failed to convincingly establish the link between the impugned measures and the interference in their private lives under Article 8 ECHR.[86] The ECtHR also disagreed that their removal from office amounted to a "serious attack against the independence of the Hungarian judiciary as a whole".[87] The ECtHR's approach is an example of a process-based review, which is focused on the formal and procedural aspects related to the adoption of the disputed measure rather than its substantive assessment.[88]

CJEU, C-619/18, *Commission v Poland (Independence of the Supreme Court),* 11 July 2019[89] and CJEU, C-192/18, *Commission v Poland (Independence of ordinary courts),* 5 November 2019[90]

The Commission launched a series of infringement actions against Poland related to the principle of judicial independence during the last couple of years. The legal basis is Article 2 TEU on values and more specifically the second subparagraph of Article 19(1) TEU to defend the independence and irremovability of judges. This led to the judgements in the Case C-619/18, *Commission v Poland (Independence of the Supreme Court)*[91] and in the Case C-192/18, *Commission v Poland (Independence of the ordinary courts).*[92]

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84 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

85 ECtHR, J.B. and Others v. Hungary, Application nos. 45434/12, 45438/12 and 375/13, 27 November 2018.

86 Bárd, P., Sledzinska-Simon, A., ibid., p. 1571.

87 J.B. and Others v. Hungary, para 113.

88 Spano, R., 'The future of the European Court of Human Rights: Subsidiarity, process-based review and the rule of law', Human Rights Law Review, Volume 18, Issue 3, 2018, pp. 473–494.

89 CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 11 July 2019, ECLI:EU:C:2019:615.

90 CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924.

91 CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531.

92 CJEU, Case C-192/18, Commission v Poland (Independence of the ordinary courts), 5 November 2019, ECLI:EU:C:2019:924.

In its first decision, the European Court of Justice ruled that in those fields which are covered by EU law, the independence of national courts is protected. In the Case C-619/18 Commission v Poland *(Independence of the Supreme Court)* on the forced early retirement of judges, the CJEU held that the effective judicial protection of individuals provided by Article 19(1) TEU is a general principle of EU law. The CJEU ruled that Poland failed to fulfil its obligations under that provision by adopting a measure lowering the retirement age of Poland's Supreme Court judges, and by granting the President of the Republic the discretion to extend the period of judicial service beyond the newly fixed retirement age.[93]

The Court also made it clear that judicial independence requires that national rules must be designed in such a way that judges are protected from temptations to give in to external intervention or pressure, whether this pressure was direct or indirect. Therefore, "a »court« is always to be understood as meaning an »independent court«" in the EU legal order.[94] In its judgment the CJEU also recognised that the principle of irremovability of judges is not absolute, however at the same time it also stated that exceptions to this principle (i) must be justified by legitimate and compelling objectives; (ii) must be proportionate to these objectives, and (iii) ought to ensure the appearance of judicial independence in the eyes of individuals.[95]

The case was rendered after the ground-breaking Portuguese judges' case[96]discussed *infra,* where the CJEU did not find a violation of the Treaties, but laid down important principles it later followed with regard to the concept of judicial independence. It suffices to state here that the issue in the Portuguese case was the reduction and freezing of remuneration of judges, not their dismissal. Another difference was that while the Portuguese measure was limited both in scope and duration, and was applicable to all judges, the Polish measure led to the premature and definitive termination of judges' careers and targeted only a particular category of Supreme Court judges. These differences were sufficient to conclude distinguish the case from the Portuguese judges' case and show that the Polish measures amounted to limitations on the principle of judicial independence as understood under EU law.[97]

93 Bárd, P., Pech, L., The Commission's Rule of Law Report and the EU Monitoring and Enforcement of Article 2 TEU Values, Policy Department for Citizens' Rights and Constitutional Affairs, Directorate-General for Internal Policies, PE 727.551, 2022, p.51. Available at:

94 Lenaerts, K., 'The Court of Justice and national courts: A Dialogue based on mutual trust and judicial independence', speech delivered at the Supreme Administrative Court in Poland, Warsaw, 19 March 2018.

95 CJEU, C-619/18, Commission v Poland (Independence of the Supreme Court), 11 July 2019, para 79. For a detailed analysis, also see Bárd, P., Sledzinska-Simon, A., 'On the principle of irremovability of judges beyond age discrimination: Commission v. Poland', Common Market Law Review, Volume 57, Issue 5, 2020, pp. 1555–1584.

96 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas (Potuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

97 Bárd, P., Sledzinska-Simon, A., ibid., p. 1567.

CJEU, C-192/18, *Commission v Poland (Independence of the ordinary courts),* 5 November 2019

"With this ruling, Poland became the first EU Member State to be found to have failed to fulfil its Treaty obligations under the second subparagraph of Article 19(1) TEU twice in a row."[98]

According to this second CJEU judgment related to the Polish "judicial reform", the CJEU declared that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU, and the country also violated the Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The first problematic element of the "reform" undermining the principle of irremovability of judges was the lowering of the retirement age applicable to judges of the ordinary Polish courts and granting the Polish Minister for Justice the right to decide whether to authorise extension of the period of judicial service.

Second, by setting different retirement ages for men and women who are judges in the ordinary Polish courts and the Supreme Court of Poland *(Sąd Najwyższy)* or are public prosecutors in Poland, the country has failed to fulfil its obligations under Article 157 TFEU and Articles 5(a) and 9(1)(f) of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

As Professors Pech and Kochenov emphasised, the CJEU confirmed once again that the freedom from all external intervention or pressure is a necessary element of judicial independence, and requires certain guarantees for protecting the individuals who have the task of adjudicating in a dispute, such as guarantees against removal from office. Although the principle of irremovability of judges is not an absolute right, an exception is acceptable only if it is justified by a legitimate objective, it is proportionate in the light of that objective and inasmuch as it is not such as to raise reasonable doubt in the minds of individuals as to the imperviousness of the courts concerned to external factors and their neutrality with respect to the interests before them. "This means that under EU law, the independence of national courts is an essential condition for effective judicial protection and the fundamental right to a fair trial. In this way, the Court reasoned that only an independent national court is a guarantee of the values enshrined in Article 2 TEU and in particular, the rule of law."[99]

98 Pech, L., Kochenov, D., Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case, SIEPS, Stockholm, 2021:3., p. 74.

99 Bárd, P., Sledzinska-Simon, A., ibid., p. 1565.

The Polish rule's criteria were excessively 'vague' and 'unverifiable', so the principle of irremovability has been violated.[100] As opposed to systemic changes, individual instances of violation of judges' irremovability and independence must be dealt with under Article 47 of the Charter, and only if Member States are implementing EU law as dictated by Article 51(1) of the Charter. Should a "structural infirmity" also include "implementation of EU law by a Member State", the case "will fall to be determined by both provisions".[101]

ECtHR, *Baka v. Hungary,* 23 June 2016[102]

The ECtHR found a violation of Article 6-1 as the chief justice in Hungary was removed without recourse to judicial remedies, by way of a legislation that changed the name of the supreme court and foresaw the election of a new chief justice. The Court specifically noted that the ad hominem character of the underlying law made its "compatibility with the requirements of the rule of law […] doubtful".[103] Another important and related aspect of the case is the consideration of chilling effects. The Court also found the violation of freedom of expression (Article 10-1) as he was removed from office for making statements critical of legislative measures regarding the judiciary. (This case will be discussed further in Chapter III below.)

ECtHR, *Erményi v. Hungary,* 22 November 2016[104]

In a related case, the Court also found the removal of the Vice-President of the Supreme Court on grounds of the "restructuring of the judiciary system" and removal from judicial office altogether following an amendment on the maximum age for judges (forced retirement) to similarly be in violation of the Convention (this time Article 8). Furthermore, the Court made this determination based on the lack of a legitimate aim for these measures, indicating a more blatant form of violation. (This case will be discussed further in Chapter III below.)

ECtHR, *Broda and Bojara v. Poland,* 29 June 2021[105]

The ECtHR found the violation of Article 6-1 ECHR in a case involving vice-presidents removed under a new law granting temporary powers to the Minister of Justice to make such decisions.[106] The law provided for no meaningful limits (substantive or procedural conditions) or an obligation to provide reasons and it foresaw no venue for challenging the decision. The Court found that the Government's arguments about the adopted law allowing the Minister to circumvent existing legal procedures was

100 Pech, L., Kochenov, D., ibid., pp. 78-80.

101 Pech, L., Kochenov D., ibid., p. 80.

102 ECtHR, Baka v. Hungary, Grand Chamber, Application no. 20261/12, 23 June 2016.

103 Ibid., paras. 117 and 121.

104 ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 November 2016.

105 ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021.

106 Ibid., paras. 141, 144 and 146.

exactly the move that led to the finding that the required guarantees were lacking;[107] and that, against the argument that the government adopted the measures in the public interest, that disregard for the rule of law, in the form of full ministerial discretion without stated reasons and legal constraints cannot be in the interest of the state. [108]The judgment underlines the importance of an independent judiciary that can be undermined by the almost unconstrained power in the hands of a sole representative of the executive, and it is precisely against such decisions that guarantees against arbitrariness should be put in place to secure the rights of career judges under the Court's case law.[109]

ECtHR, *Grzęda v. Poland,* 15 March 2022[110]

The applicant in the *Grzęda* case is a former member of the National Council of the Judiciary in Poland, a body that used to include judicial members elected by a self-governing body of the judges. In 2017, this rule was changed to the direct election of judicial members by the legislature, together with the ex lege termination of the mandate of the former judicial members, before these expired. This is how the applicant lost his membership and this is the measure that he challenged, arguing that there was no legal remedy available, which amounts to a violation of Article 6-1 ECHR. The Court could rely on a long list of documents adopted by various European institutions, including the relevant judgments of the CJEU as well as the ECtHR itself, regarding the Polish rule of law backsliding.[111]

The novelty in the case compared to earlier litigation was that here membership in a judicial self-governing body was at stake, which prompted the Court to refine its test applied in previous cases. It connected official judicial positions outside the adjudicating role to the integrity of the judicial appointment process and, ultimately, to judicial independence and Article 6-1 ECHR. The Court emphasised that the Convention does not prescribe a definite model for judicial administration or does not directly constrain judicial reforms, but that States should ensure judicial independence throughout. Using this standard, the Court took what can be interpreted as a systemic view of judicial independence, connecting judicial autonomy and judicial appointments and emphasising the importance of shielding the judiciary "from encroachment by the legislative and executive powers".[112] The Court took into account the context in which measures by the Polish Government "have resulted in the weakening of judicial independence and adherence to rule-of-law standards".[113] The systemic approach was most apparent in the argument in para. 348 of the judgment (with references omitted):

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107 Ibid., para. 148.

108 Ibid., para. 146.

109 Ibid., paras. 146–147.

110 ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

111 See the following cases, also discussed in the present overview: ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021, ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021, see also, e.g., CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982.

112 ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022, para. 346.

113 Ibid.

"The Court notes that the whole sequence of events in Poland vividly demonstrates that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015, then, in particular, remodelling the NCJ and setting up new chambers in the Supreme Court, while extending the Minister of Justice's control over the courts and increasing his role in matters of judicial discipline. At this juncture, the Court finds it important to refer to its judgments related to the reorganisation of the Polish judicial system, as well as the cases decided by the CJEU and the respective rulings of the Supreme Court and Supreme Administrative Court. As a result of the successive reforms, the judiciary – an autonomous branch of State power – has been exposed to interference by the executive and legislative powers and thus substantially weakened. The applicant's case is one exemplification of this general trend."

The Court found, in conclusion, that the fact that judicial review was not available to the applicant amounts to a violation of Article 6-1 (access to a court).

2.7. Remuneration of judges

Both European courts have considered guarantees related to judicial salaries to be an essential part of judicial independence. E.g., in the Bogdan case, the ECtHR considered this question together with the decision on suspending a judge and found the violation of Art. 6-1 ECHR.[114] For demonstrative purposes in this paper, we are reviewing the *Portuguese Judges* case where the CJEU elaborated on principles of judicial independence in this area, and the *Camelia Bogdan* case where the ECtHR found a violation regarding the suspension of a judge and the stoppage of her salary.

CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges),* 27 February 2018[115]

In 2018, for the first time the CJEU provided an indirect answer to the worsening process of rule of law backsliding in a Member State, with its judgment in a case informally referred as the case of the Portuguese Judges,[116] a decision which one can view "as belonging to the Pantheon of the European Court of Justice's rulings, on a par with Van Gend en Loos and Costa".[117]

In 2014, in Portugal the legislature temporarily reduced the remuneration paid to the persons working in the Portuguese public administration, including judges. The Associação Sindical dos Juízes Portugueses (ASJP), acting on behalf of members

114 ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020.

115 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Potuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

116 Ibid.

117 Pech, L., Kochenov D., ibid., p. 8.

of the Court of Auditors (Tribunal de Contas), decided to initiate a court procedure challenging the salary-reduction measures alleging that these introduced measures violate the principle of judicial independence enshrined, in the Portuguese Constitution and also in the EU law, notably the second subparagraph of Article 19 (1) TEU[118] and Article 47 of the EU Charter of Fundamental Rights Right on the right to an effective remedy and to a fair trial. This issue was then subsequently referred by the Portuguese Supreme Administrative Court to the CJEU for a preliminary ruling.

The legal issue has thus been whether the reduction of judges' salaries violated the principle of judicial independence. The CJEU considered that the impugned measure did not breach this principle because of certain specificities of the case. First, it was justified by the mandatory plan to reduce the excessive budget deficit in Portugal; second, the reduction was limited to a certain percentage of the salary; third, the reduction was temporary; and finally, it applied to public servants in all branches of government. At the same time, the CJEU made clear that a measure applicable only to judges and not justified by such compelling reasons as the reduction of the budgetary deficit may be in breach of EU law.

Certain criteria on the level of judicial remuneration can be deduced from the Portuguese Judges case.[119] Accordingly, the level of judicial salaries must be (i) proportionate to the importance of the functions judges carry out,[120] (ii) high enough to guarantee independent judgments,[121] and (iii) the socioeconomic context and average salaries of civil servants need to be taken into account when determining whether the above criteria are met.[122]

The CJEU emphasised that the EU law element in the case was not the reduction of public debt, which would have been an easy way out of the uncomfortable debate on the rule of law, but this time Luxembourg took the chance and made the important point that all national courts are to apply EU law, and this is the element that matters and brings the case under the umbrella of EU law. In other words, the CJEU held that every Member State must ensure that national courts meet the requirements of effective judicial protection, which is only possible if judicial independence is maintained. While the organisational structure of justice in an EU Member State definitely falls within the competence of the specific Member State concerned, this competence cannot be exercised in a way which violates EU law and in particular the obligation to ensure that their national courts meet the requirements to provide effective judicial protection.

The judgement established a strong connection between the autonomy of the EU legal order and the independence of domestic courts. Any national court may potentially

118 "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

119 See also the Vindel case, CJEU, Case C-49/18, Escribano Vindel, 7 February 2019, ECLI:EU:C:2019:106.

120 ASJP, para. 45, Vindel, para. 66.

121 ASJP, para. 45, Vindel, para. 72.

122 Vindel, para. 70-71.

be called upon to interpret and apply EU law, so virtually all national court must be independent to comply with their obligations stemming from Article 19(1) TEU. "This step can be called a Les Verts moment, where the Court of Justice ruled that neither EU institutions nor the Member States are above the law."[123]

ECtHR, *Camelia Bogdan v. Romania,* 20 October 2020[124]

In the *Camelia Bogdan* judgment, the ECtHR found the suspension of a judge from duty that included the stoppage of her salary despite her appeal of the decision in violation of Article 6-1. The Court confirmed that the right to access to court applied to this claim and the lack thereof violated the Convention, even though her appeal was later granted partly, she received back payment and could eventually continue working as a judge.

Note that the question of judicial salary has come up in other cases as well, also connected to the decision on suspension, and the Court found, similarly, a violation of Article 6-1 in the *Paluda* case (to be discussed below), where half of the judicial salary was withheld for the time of the suspension.[125]

2.8. Disciplinary proceedings against judges

CJEU, Joined Cases C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny,* 26 March 2020[126]

In a nutshell, while the first case (Case C-558/18) concerned a litigation between the town of Łowicz and the Polish State Treasury and was related to public expenditures, the second case (Case C-563/18) was a criminal proceeding under Polish criminal law against three persons for offences which involved kidnapping committed for financial gains. In both cases the state was a party, and the judges feared to be subjected to disciplinary proceedings. The referring courts, the Łódz Regional Court *(Sąd Okręgowy w Łodzi)* and the Warsaw Regional Court *(Sąd Okręgowy w Warszawie)* asked the CJEU whether the Polish national rules on the disciplinary regime for judges undermine the independence of those judges by depriving the litigants concerned of their right to an effective judicial remedy guaranteed by the second subparagraph of Article 19(1) TEU. That provision, read in conjunction with Article 2 and Article 4(3) TEU, requires Member States to ensure that bodies, like the referring courts, which are empowered to rule on questions relating to the application or interpretation of EU law, satisfy the requirements inherent in the right to effective judicial protection; and that they are independent.[127]

123 Vindel, para. 70-71.

124 ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017.

125 ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017.

126 CJEU, Joined Cases C-558/18 and C-563/18, Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, 26 March 2020, ECLI:EU:C:2020:234.

127 Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, para. 15.

The Court ruled on the admissibility of both requests for a preliminary ruling alleging that the disputes in the main proceedings are not connected with EU law, in particular with the second subparagraph of Article 19(1) TEU to which the questions referred for a preliminary ruling relate. The Court held that "it was not apparent from the orders for reference that there is a connecting factor between the provision of EU law to which the questions referred for a preliminary ruling relate and the disputes in the main proceedings".[128] However, the Court made it clear once again that the Member States are required to comply with their obligations deriving from EU law and, in particular, from the second subparagraph of Article 19(1) TEU, which applies to any national body which can rule, as a court or tribunal, on questions concerning the application or interpretation of EU law.[129]

CJEU, C-791/19, *Commission v Poland (Régime disciplinaire des juges),* 15 July 2021[130]

The CJEU pointed out yet again that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU. In this judgment, the CJEU ordered the immediate suspension of the activities of the Disciplinary Chamber of the Supreme Court as regards disciplinary cases concerning judges. It also determined a violation of Article 267 TFEU on preliminary references due to the new possibility given to Polish authorities to trigger disciplinary proceedings against judges submitting requests for a preliminary ruling to the CJEU.

The CJEU stated that Poland failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU

(i) by failing to guarantee the independence and impartiality of the Disciplinary Chamber of the Supreme Court;

(ii) by allowing the content of judicial decisions to be classified as a disciplinary offence;

(iii) by conferring on the President of Disciplinary Chamber the discretionary power to designate the disciplinary tribunal with jurisdiction at first instance in cases concerning judges of the ordinary courts; and

(iv) by failing to guarantee that disciplinary cases against judges of the ordinary courts are examined within a reasonable time, and by providing that actions relating to the appointment of defence counsel and the taking up of the defence by that counsel do not have a suspensory effect and that the disciplinary tribunal is to conduct the proceedings despite the justified absence of the notified accused judge or his or her defence counsel.[131]

128 Court of Justice of the European Union, 'The Court declares that the requests for a preliminary ruling concerning Polish measures from 2017 establishing a disciplinary procedure regime for judges are inadmissible', Press Release No 35/20., Luxembourg, 26 March 2020. Available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-03/cp200035en.pdf.

129 Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, para. 34.

130 CJEU, Case C-791/19, Commission v Poland (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596.

131 Bárd, P., Pech, L., ibid., p. 51.

CJEU, Case C-204/21 *(Muzzle Law)* - No judgment yet but see Case C-204/21 R[132]

In this ongoing case the European Commission is alleging that multiple provisions of Poland's so-called "muzzle law" of 20 December 2019 violate the second subparagraph of Article 19(1) TEU as well as Article 267 TFEU, furthermore the principle of the primacy of EU law and Regulation 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.[133] According to the Commission, since the content of judicial decisions can be qualified as a disciplinary offence, the disciplinary regime can be used as a system of political control of the content of judicial decisions. This regulation clearly violates Article 19(1) TEU read in connection with Article 47 of the Charter of Fundamental Rights of the European Union and is incompatible with the requirements of judicial independence as established by the CJEU. The "muzzle law" also blocks Polish courts from fulfilling their obligation to apply EU law or request preliminary rulings from the CJEU, consequently is incompatible with the principle of primacy of EU law, the functioning of the preliminary ruling mechanism, as well as with requirements of judicial independence. The new law also prevents Polish courts from assessing, in the context of cases pending before them, the power to adjudicate cases by other judges. This impairs the effective application of EU law and is incompatible with the principle of primacy of EU law, the functioning of the preliminary ruling mechanism and requirements of judicial independence. And the law also violates the GDPR Regulation as some of its provisions requires the judges to disclose specific information about their non-professional activities.

On 14 July 2021, the Vice-President of the Court of Justice ordered the immediate suspension of the application of certain provisions of the law of 20 December 2019 on the judiciary (the so-called Polish "muzzle law"), including the functioning and operation of the Disciplinary Chamber for the second time. Within the meaning of the order Poland must immediately suspend the operation of the Chamber. The CJEU expected to find the "muzzle law" incompatible with the EU law, including judicial independence, primacy of EU law and the preliminary reference mechanism. On 21 October 2021, the CJEU ruled that Poland must pay the European Commission a periodic penalty payment of EUR 1 000 000 daily until the order of the Vice-President of the Court of 14 July 2021, is complied with, or it fails to do so, until the date of delivery of the judgment closing the main proceedings.[134]

132 CJEU, Case C-204/21 R, Commission v Poland, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593.

133 European Commission, 'Rule of Law: European Commission launches infringement procedure to safeguard the independence of judges in Poland', Press release IP/20/772, 29 April 2020, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_772.

134 CJEU, Case C-204/21 R, Commission v Poland, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878.

CJEU, Case C-564/19, IS *(Illégalité de l'ordonnance de renvoi)*, 23 November 2021[135]

IS resulted from criminal proceeding suspended by a Judge Vasvári of the Pest Central District Court in a case where a Swedish national was charged with criminal offences. The judge initially submitted three questions to the Court of Justice.
First, he asked whether the accused was denied the use of his first language, Swedish, during the proceedings, in violation of Directive 2010/64/EU.

Second, the judge asked whether certain elements of court capture, like the practice of the then President of the National Office for the Judiciary of sidestepping the rules for applying for court leadership positions, disregarding the opinion of the judges, and filling positions through temporary mandates, was in line with the Rule of Law and judicial independence as guaranteed by the Treaties.

Third, the court asked whether the facts that judges' salaries have not changed in the last 15 years; that they earn less then prosecutors of equivalent rank; and that court presidents have the discretionary power to give bonuses, was in line with judicial independence.[136]

The Prosecutor General exercised his right to initiate a review of the order for the preliminary reference in front of the Hungarian Supreme Court, the *Kúria.*[137] He argued that the questions are irrelevant, since the quality of translation did not come up in the case at hand, while the second and third questions are not about the interpretation of EU law, furthermore they are too remote from the case, and do not influence its outcome. The *Kúria* in its judgement agreed with the Prosecutor General without reservations,[138] and held that the harmony between Hungarian and EU law must not be subject to preliminary references. This decision preventing judges from filing preliminary references with the CJEU is binding on every single ordinary judge in Hungary. When assessing judges, court presidents must check whether judges comply with such judicial precedent.

The Acting President of the Metropolitan Court, expressly because the reference for a preliminary ruling had been rendered illegal by the *Kúria,* initiated a disciplinary proceeding against the judge referring the case to the CJEU.[139] It is interesting to see that the Acting President was an interim court president appointed by the President of the National Office for the Judiciary in a procedure criticised in the original preliminary

135 CJEU, Case C-564/19, IS (Illégalité de l'ordonnance de renvoi), 23 November 2021, ECLI:EU:C:2021:949.

136 For detailed analyses see Szabó, G. D., 'A Hungarian Judge Seeks Protection from the CJEU – Part I', VerfBlog, 28 July 2019, available at: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/; Vadász V., 'A Hungarian Judge Seeks Protection from the CJEU – Part II', VerfBlog, 7 August 2019, available at: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/ and Bárd, P., 'Luxemburg as the Last Resort', VerfBlog, 23 September 2019, available at: https://verfassungsblog.de/luxemburg-as-the-last-resort/; Bárd, P., 'The Sanctity of Preliminary References: An analysis of the CJEU decision C-564/19 IS', VerfBlog, 26 November 2021, available at: https://verfassungsblog.de/the-sanctity-of-preliminary-references/.

137 Articles 666-669, Act XC of 2017 on Criminal Procedures.

138 Judgment No. Bt.838/2019. Kúria, 'A büntetőeljárás menetének megakasztása a jogszerű és alapos érdemi döntés meghozatalának előmozdítása érdekében történhet', Press release, 11 September 2019, available at: https://kuria-birosag.hu/hu/sajto/buntetoeljaras-menetenek-megakasztasa-jogszeru-es-alapos-erdemi-dontes-meghozatalanak?fbclid=IwAR1DEoefrVZ-p2vgufIZ-AB_I2p9AKcUW_h2cHGRHeShkmv6t010mMWafIBM (in Hungarian).

139 File number: 2019.II.IV.K.15/2.

questions.[140] The disciplinary procedure was later withdrawn with reference to the "interest of the judicial organisation".

Two more questions were added to the request in light of the above circumstances, Judge Vasvári asking whether the declaration of illegality of the original preliminary reference and the disciplinary proceeding were in line with EU law, and whether he would have to withdraw the reference, or simply disregard whatever the CJEU has to say on the matter in light of the *Kúria's* declaration of illegality.

On 23 November 2021, the Grand Chamber of the CJEU delivered its judgment.[141] The CJEU made some important statements regarding the first question on criminal procedural law, but the statements on judicial independence are important for our purposes.

In the CJEU's view, the *Kúria's* reasoning that the questions were not relevant and necessary for the resolution of the dispute in the original criminal proceedings, came very close to the determination of inadmissibility, which is an issue to be decided by the CJEU exclusively. The CJEU also found it problematic that the declaratory judgment by the *Kúria* on illegality might have a chilling effect, which again restricts the effective judicial protection of the rights which individuals enjoy as per EU law. Consequently, the referring judge must disregard the illegality decision by the *Kúria*, without waiting for any authority to withdraw or invalidate that decision.

With regard to the disciplinary proceeding against Judge Vasvári, the CJEU distinguished the IS case from C-558/18 and C-563/18, *Miasto Łowicz and Prokurator Generalny* discussed supra. Unlike in Miasto Łowicz, in IS the referring judge was faced with a procedural obstacle, arising from the application of a national piece of law against him, which he must first address before he could decide as to whether to go on with the main proceedings or not. Therefore, the question was declared to be admissible. Then, the CJEU repeated its earlier case-law, according to which launching disciplinary proceedings against a national judge for making a reference for a preliminary ruling contradicts EU law. The disciplinary procedure does not need to come to an end to produce chilling effects.[142]

The referring court's original questions in relation to the overall health status of the Hungarian judiciary were declared inadmissible by the CJEU, on the ground that there was not a strong enough connecting factor between the case pending before it and the interpretation of EU law it asked for.[143]

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140 Euractive citing the Hungarian Helsinki Committee, Makszimov, V., 'MEPs shut out of Hungary Council hearing as rule of law situation worsens', 22 November 2019, EURACTIV, available at: https://www.euractiv.com/section/justice-home-affairs/news/meps-shut-out-of-hungary-council-hearing-as-rule-of-law-situation-worsens/1403494/.

141 CJEU, Case C-564/19, IS (Illégalité de l'ordonnance de renvoi), 23 November 2021, ECLI:EU:C:2021:949.

142 Ibid., para. 90.

143 For a thorough assessment of the case see Bárd, P., 'In courts we trust, or should we? Preliminary rulings and judicial independence', European Law Journal, 2022, forthcoming.

For further reference of the IS case see Subchapter III.2.10.

The issue of guarantees of judicial independence concerning disciplinary proceedings have been also taken up by the ECtHR, finding violations of Article 6-1 in a series of cases.[144]

ECtHR, *Oleksandr Volkov v. Ukraine*, 9 January 2013[145]

In the Volkov case, the ECtHR found multiple violations regarding the dismissal of a judge of the Supreme Court of Ukraine. The different judicial and legislative bodies involved in the decision and its review lacked the independence and impartiality required by Article 6-1 of the Convention. Importantly, this finding was based, regarding the Higher Administrative Court reviewing the removal, on the fact that this court was composed of judges who could also be subject to the same disciplinary proceeding that lacked adequate rule of law guarantees.[146] This in effect made it a violation that radiated out in the judicial structure, or a systemic violation.

ECtHR, *Denisov v. Ukraine*, 25 September 2018[147]

Relying on this determination, the Court found a violation of Article 6-1 ECHR in case of an application filed by the President of the Kyiv Administrative Court of Appeal who was dismissed following the same disciplinary proceeding.[148]

ECtHR, *Paluda v. Slovakia*, 23 May 2017[149]

In the *Paluda* judgment, the ECtHR found that the suspension of a judge after he criticised and filed a criminal complaint against the President of the Supreme Court was in violation of Article 6-1 ECHR. The Judicial Council that suspended the judge was found to be in violation of the institutional and procedural guaranteed required by Article 6-1. Half of the members were appointed by the legislative and executive power and was not a body of a judicial character.[150] Furthermore, the Council was headed by the President of the Supreme Court, against whom the judge raised criticism in the first place.[151]

ECtHR, *Reczkowicz v. Poland*, 22 July 2021[152]

In its judgment in the *Reczkowicz* case, the ECtHR reviewed the functioning of the

144 ECtHR, Reczkowicz v. Poland, no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021.

145 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013.

146 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013, para. 130.

147 ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018.

148 Ibid., para. 139.

149 ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017.

150 Ibid., para. 38.

151 Ibid., para. 48.

152 ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021.

Disciplinary Chamber of the Supreme Court of Poland and concluded that it was not a "tribunal established by law". Under a 2017 amendment, members of the Chamber ceased to be elected by judges and this power was moved to the legislature. The judgment referenced the CJEU's earlier determination[153] that the Disciplinary Chamber failed to meet the requirement of an independent body. The Court declared that interference with the appointment of judges "calls for strict scrutiny".[154] It then established that the National Council of the Judiciary (recommending candidates who can then be appointed by the President of the Republic to the Disciplinary Chamber) "lacked sufficient guarantees of independence from the legislature and the executive" and that this undue influence on judicial appointments is "per se incompatible" with Article 6-1 ECHR.[155] The Court identified what can be seen a systemic violation as the incompatibility, in its reading, "amounts to a fundamental irregularity adversely affecting the whole process and compromising the legitimacy of a court composed of judges so appointed".[156] The Court subsequently found that the Disciplinary Chamber of the Supreme Court of Poland was not a "tribunal established by law".[157]

Reviewing domestic procedures, the Court reiterated its findings, in Xero Flor,[158] that the composition of the Constitutional Court, a body that reviewed the case and found no violation, raised doubts about its lawfulness, and pointed to "the apparent absence of a comprehensive, balanced and objective analysis of the circumstances". The ECtHR concluded that "the Constitutional Court's evaluation must be regarded as arbitrary, and as such cannot carry any weight".[159]

2.9. The principle of non-regression

As the chapter already showed, CJEU came a long way in its jurisprudence to unfold the very nature of rule of law which cannot be considered only as a vague and solemn political pledge, but a core value of the EU which belongs to the realm of the law,[160] therefore requires adequate, direct and comprehensive enforcement. Furthermore, as Pech and Kochenov argue, this change could lead the Union to transform into a true constitutional system where the rule of law is an enforceable part of EU law.[161]

153 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982. See paras. 164 and 249.

154 ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021, para. 267.

155 Ibid., para. 276.

156 Ibid.

157 Ibid., para. 281.

158 ECtHR, Xero Flor w Polsce sp. z o.o. v. Poland, Application no. 4907/18, 7 May 2021.

159 ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021, para. 262.

160 About the acquis-value dichotomy see: Scheppele, K.L., Kochenov, D. and Grabowska-Moroz, B. 'EU Values Are Law, after All: Enforcing EU Values through Systemic Infringement Actions by the European Commission and the Member States of the European Union', Yearbook of European Law, Vol. 00, No. 0, 2021, referring to Mader, O., 'Enforcement of EU Values as a Political Endeavour: Constitutional Pluralism and Value Homogeneity in Times of Persistent Challenges to the Rule of Law', 11 Hague Journal on the Rule of Law, 2019. pp. 136–8.

161 Pech, L., Kochenov, D., Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case, SIEPS, Stockholm, 2021:3., pp. 12. and 207-208.

After becoming part of the EU, the Member States enjoyed (latent) presumptions about developing and maintaining the very constitutional structures which enabled them to join the European community at the first place. These presumptions held even more after ratifying the Treaties where these constitutional structures are declared to be part of the common constitutional denominators of the members which rest on shared values.[162] The jurisprudence of CJEU proved to be crucial in the fight against ex post rule of law backsliding which became a gruesome practical challenge after Hungary and Poland's U-turn.

The much needed, albeit pioneer approach of CJEU required inter alia a more detailed, substantive understanding of rule of law and the principle of judicial independence including the explicit consecration of a principle of non-regression prohibiting rule of law backsliding.[163] It is important to see that the principle of non-regression has broader implications than the independence of the judiciary. Furthermore, the recently crystallised principle could provide a strong safeguard for maintaining and enforcing values enshrined in art2 of TEU, the normative content of which has been challenged for a long time.[164] As various experts have been articulating, the bottleneck of the problem was the so-called 'Copenhagen dilemma': the EU's inability to reshape the legal-political developments in the Member States outside the material scope of EU law at a post accession date which led to the lacuna undermining the EU legal order.[165]

In other words, the question emerged how the European community could or should tackle members going rogue and putting the common legal order into jeopardy after their accession. Various stakeholders advocated for solutions within the exercise of transferred competences for already existing institutional actors,[166] while these solutions offered different ways to counter extrapolated sovereigntist or fake comparative arguments of backsliders and defend rule of law in a more efficient way. In the pool of proposed actions, one cannot avoid putting the relevant decisions of the CJEU under the loop which aimed at providing a legal way to tackle systemic backsliding of rule of law.

In the following jurisprudence of CJEU discussed, it can be interpreted as the harbinger foretelling of the later non-regression jurisprudence of the Luxembourg court.

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162 Scheppele, K.L., Kochenov, D. and Grabowska-Moroz, B., ibid., pp. 11-12.; Williams, A., The Ethos of Europe, Cambridge University Press, Cambridge, 2009; Williams, A., 'Taking Values Seriously: Towards a Philosophy of EU Law' 29 OJLS, 2009, p. 549.

163 Pech, L., Kochenov, D. ibid., p. 16.

164 Brief overview by Scheppele, K.L., Kochenov, D., Grabowska-Moroz, B., ibid., pp. 22, 31-33. who pointed it out that compliance with the values of Article 2 TEU by both the Member States and the EU institutions alike is not merely a matter of enforcing an impractical ideal anymore.

165 See for instance D. Kochenov, Dimitrovs, A., 'Solving the Copenhagen Dilemma: The Repubblika Decision of the European Court of Justice', VerfBlog, 28 April 2021, available at: https://verfassungsblog.de/solvingthe-copenhagen-dilemma; Leloup, M., Kochenov, D., Dimitrovs, A., 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All Eyes on Case C-896/19 Repubblika v Il-Prim Ministru', 46 European Law Review, 2021. pp. 692-703.

166 Regarding the Council, for a brief overview, see Closa, C., Kochenov, D., Weiler, J.H.H., Reinforcing the Rule of Law Oversight in the European Union, RSCAS Working Paper no. 25, EUI Florence, 2014. Regarding the European Commission, see European Commission, Strengthening the Rule of Law within the Union. A Blueprint for Action, COM/2019/343 final, 17 July 2019. Regarding the EPPO, see e.g. Diez, C., Herlin-Karnell, E., 'Prosecuting EU Financial Crimes: The European Public Prosecutor's Office in Comparison to the US Federal Regime' German Law Journal, Volume 19 Issue 5, 2018 pp. 1191-1220; Damaskou, A., 'The European Public Prosecutor's Office. Ground-Breaking New Institution of the EU Legal Order' New Journal of European Criminal Law, Volume 6, Issue 1, 2015. pp. 126-153. Regarding the Conditionality Regulation, see Halmai, G. 'The Possibility and Desirability of Rule of Law Conditionality', Hague Journal on the Rule of Law, Volume 11, Number 1, 2019. pp. 171-188.

Judgement in the Portuguese judges[167] case (see detailed assessment supra in Subchapter II.7.), provided a progressive interpretation of the second subparagraph of Article 19(1) TEU.[168] According to CJEU, the provision creates a justiciable – direct – obligation for every Member State to "ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection".[169]
This direct obligation includes not merely a duty to respect but also an obligation to maintain[170] the independence of national courts or tribunals.[171] The preliminary ruling stated that Article 19(1) TEU gives concrete expression to the principle of the rule of law[172] and it implied that it could be a base for initiating infringement procedures against Member States which threaten the independence of the national courts via national regulations. The judgement therefore brought all legislation affecting those national judges who may be asked to apply EU law under the purview of the Court of Justice.[173]

Decisions about the Polish disciplinary chamber (see for instance joined cases of AK and others[174] and our assessment supra in Subchapter II.2.) pointed it out that CJEU has found a violation of the principle of non-regression in relation to the disciplinary chamber (DC) while it stressed that the organ constitutes a reduction in the protection of the value of the rule of law.[175] EFTA Surveillance Authority intervened in the case rather progressively and stated that 'this principle of non-regression of judicial independence can be derived from Articles 2, 7 and 49 TEU, Article 53 CFR and the Council of Europe's European Charter on the statute of judges[176] which was fortunately not acknowledged by CJEU, but the point of reference is still significant.

These judgments of the CJEU were first recalling that independence of the judiciary is an EU (rule of law) matter, then highlighted that the principle of non-regression is also applicable in this particular expression to the rule of law (which means that non-regression was only linked to judicial independence - and only via judicial independence to rule of law).

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167 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Potuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

168 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

169 ASJP, para. 37.

170 To this regard, CJEU was invoking the second subparagraph of Article 47 of the Charter of Fundamental Rights, which refers to the access to an 'independent' tribunal as one of the requirements linked to the fundamental right to an effective remedy. See ASJP, para 41.

171 Pech, L., Kochenov, D. ibid., p.28.

172 CJEU also it reiterated that the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law. ASJP para. 32

173 Bonelli, M., Claes, M., 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary
ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses', European Constitutional Law Review, Volume 14, Issue 3, 2018, pp. 622-643.

174 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982.

175 Ibid., paras 112-113.

176 Opinion of Advocate General Tanchev in Cases C-585/18, C-624/18 and C-625/18 A. K., ECLI:EU:C:2019:551 quoted by Pech, L., Kochenov, D. ibid., p 110.

CJEU, Case C-896/19, *Repubblika v Il-Prim Ministru* (The Maltese Judges case), 20 April 2021[177]

European community witnessed the broadening of the scope of the non-regression principle in the Judgment of 20 April 2021, when the CJEU boldly declared that EU Member States are subject to a non-regression obligation when it comes to the rule of law - a value which is given concrete expression by, inter alia, Article 19 TEU[178]. In a nutshell, the Repubblika-case was about the constitutional appointment procedures of the Maltese judiciary and whether it was compatible with the principle of judicial independence, as enshrined in Article 19(1), second subparagraph TEU and Article 47 of the Charter of Fundamental Rights.[179]

The Court held that the Maltese legislative framework, in its entirety, was not in violation of the aforementioned provisions of the Treaties, however, it declared that compliance with the values enshrined in Article 2 TEU, the rule of law among them, is a condition for the enjoyment of all rights deriving from the Treaties and that a State cannot amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law.[180]

Given that the Maltese case was revolving around the Maltese judicial appointments, the Court emphasised that every Member State is required to ensure that any regression of their laws on the organisation of justice is prevented, by refraining from adopting rules which would undermine the independence of the judiciary.[181]

Nonetheless, it is worth noting that the core rationale underlying it is not Article 19(1) TEU per se. Non-regression builds on the provision mandating that any Member State joining the EU is bound to safeguard fully the values of the Union as expressed in Article 2 TEU. Non-regression may then be understood as the obligation not to fall below the Article 49 TEU threshold post-EU accession[182] which could be a strong response to Member States going rogue after their accession. Experts share unanimity in enthusiasm when stating that not connecting non-regression exclusively with Article 19(1) is the crucial added value of *Repubblika*: 'what has been done by the CJEU under the banner of Article 19(1) TEU is but a micro-share of the potential of Article 49 TEU, since Article 49 is not issue-specific and demands only one thing: full adherence to the values of Article 2 TEU at the moment of accession.[183]

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177 CJEU, Case C-896/19, Repubblika v Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

178 Ibid., para 63.

179 The Association Repubblika essentially argued that the judicial appointment system in Malta was in violation of the principle of judicial independence, as enshrined in Article 19(1), second subparagraph TEU and Article 47 of the Charter. They found support for this belief in a 2018 opinion by the Venice Commission, which argued that the 2016 amendments and the establishment of the judicial appointments committee were a step in the right direction, but fell short of ensuring judicial independence.

180 Ibid., para 63.

181 Ibid., para 64.

182 Leloup, M., Kochenov, D., Dimitrovs, A., ibid. p. 687.

183 Pech, L., Kochenov, D. ibid., p. 217.

In the light of the foregoing, the most important implications of the judgement are that:

- it broadens the EU rule of law obligations beyond the Portuguese Judges judgment
- it provides a seminal new approach to tackling the so-called 'Copenhagen dilemma.[184]
- It can help countering rule of law and democracy backsliding in EU Member States through legal means[185] since not only the judiciary, but other constitutional checks suffered heavy blows from abusive legalists (in Hungary: abusive constitutionalists) of the backsliding countries, therefore a comprehensive non-regression obligation could help reviving the immune system of captured states.
- it can successfully counter Frankenstate-arguments and extrapolated relativism which hijack dialogue and monitoring[186]
- the new non-regression approach could cover not only rule of law, but further values laid down in Article 2 TEU.
- non-regression could also be the last promising chapter in the ongoing construction of a revamped values-based EU constitutional system[187]

Strengthening the imprint: Joint case of Romanian Judges[188]

Later in 2021, the preliminary ruling of CJEU strongly reiterated that national authorities are under both a positive obligation and a negative obligation to respect EU requirements relating to judicial independence[189] and not to regress in the area. This means inter alia that member states have to refrain from adopting legislative changes which undermine the rule of law, which is the case when, for instance, a new special prosecution section – in charge of disciplinary investigation of judges - is established and is used as an instrument of pressure and intimidation with regard to judges.[190] The ruling also dealt with the CVM Decision (and the benchmarks of its Annex),[191] which was declared to fall within the scope of the Treaty of Accession and being binding in its entirety. The Court held that the 'benchmarks were defined […] on the basis of the deficiencies established by the Commission before Romania's accession to the European Union in the areas of, inter alia, judicial reforms and the

184 Leloup, M., Kochenov, D., Dimitrovs, A., ibid.

185 Pech, L., Kochenov, D. ibid., p. 207.

186 See Scheppele, K.L. 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', Governance: An International Journal of Policy, Administration, and Institutions, Volume 26, No. 4, 2013, pp. 559-562.

187 Pech, L., Kochenov, D. ibid., p. 217.

188 CJEU, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, Asocia ia 'Forumul Judecătorilor din România' et al., 18 May 2021, ECLI:EU:C:2021:393. paras 234-35. For further analysis, see Dimitrovs, A., Kochenov, D., 'Of Jupiters and Bulls: CVM as a Redundant Special Regime of the Rule of Law – Romanian Judges', EU Law Live, No. 61, 5 June 2021, pp. 1-8.

189 Pech, L., Kochenov, D. ibid., p. 96.

190 AFJR and others paras. 216. and 253. 2-4.

191 Commission Decision 2006/928/EC of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption. OJ L 354, 14 December 2006, p. 56–57.

fight against corruption, and that they seek to ensure that Member State comply with the value of the rule of law set out in Article 2 TEU.[192] Romania therefore is required to refrain from implementing any measure which could jeopardise those benchmarks being met.[193] To this, the Court referred to the judgement of Repubblika and the non-regression principle,[194] implying that the CVM benchmarks – along with Article 2 and Article 19(1) constituted the standard of non-regression established by Article 49 of TEU. By doing so, anti-corruption might be considered another area where non-regression is applicable, but given the core questions of the preliminary reference, the judgement also revolved around judicial independence.

192 AFJR and others para 169.

193 AFJR and others para 172.

194 AFJR and others paras 162 and 169.

III. ATTACKS ON THE HUNGARIAN JUDICIARY

TABLE 2: HUNGARIAN MEASURES VIOLATING JUDICIAL INDEPENDENCE THAT COULD BE TACKLED IN THE FORM OF INFRINGEMENT OR SYSTEMIC INFRINGEMENT PROCEDURES (DETAILED OVERVIEW)

The below table shows that all governmental steps discussed in this Chapter violate two or more principles of judicial independence as discussed by the CJEU and the ECtHR. As a consequence, they all interfere or limit the right to a fair trial, the principles of tribunal established by law (courts vs. non-courts) lawful judge, effective review, and in general impartiality and non-interference by political branches. Therefore, legal procedures should be initiated by the Commission, whether in the form of traditional infringement, or in the form of systemic infringement procedures, showing the interconnectedness of orchestrated governmental steps against judicial autonomy. All issues on attacks of judicial independence in Hungary are also relevant for a future process constructed in line with the Rule of Law Conditionality Regulation.

TABLE 2

TOPIC	HUNGARIAN DEVELOPMENTS			EUROPEAN STANDARDS									
	area/actual measures	effect	section in paper	judicial self-governance (autonomous leadership)	appointment	promotion	irremovability (incl. forced retirement)	remuneration	disciplinary proceedings	secondment and case allocation	competences and non-interference in deciding cases	non-regression regarding the rule of law	INDEPENDENCE OVERALL
CONSTITUTIONAL COURT													
NOMINATION	**changing the nomination procedure** - eliminating the consensual elements (parity, opposition nominees)	regime loyalists get elected, with one-party judges quickly forming a majority	III.1.1		X							X	
NOMINATION	**court packing** - enlarging the court, from 11 to 15 judges with **change of mandate length** - mandate extended from nine to 12 years and retirement rule changed, upper age limit (70 years of age) abolished	increased political influence on the functioning of the Court	**III.1.1**		X							X	
LEADERSHIP	**changing the way the court president is elected** - instead of members of CC, now the Parliament elects the president directly	judges and actions crucial for protecting the rule of law are sanctioned with radiating effects	III.1.1	X	X							X	
PROCEDURE	**limiting the right to initiate** proceedings (actio popularis abolished, limited circle who can initiate in abstracto reviews)	increased political control over what cases go to the Court	III.1.1								X	X	
PROCEDURE	allowing **government bodies to initiate** reviews	review can be abused to counter judicial decisions that go against government interests	**III.1.1**								X	X	
DECISION-MAKING	**legislative rule against precedents** - legal annulment of earlier (pre-2012) Constitutional Court case law	elimination of constitutional constraints and rule of law guarantees by established case law	III.1.1								X	X	
DECISION-MAKING	**limiting court competences** - the power to invalidate was restricted in case of public finances	undermining the rule of law by creating legal black holes in non-review areas	**III.1.1**								X	X	
DECISION-MAKING	codification of **restrictions on review** of constitutional amendments, only the procedure of enactment can be subject to review, not the substance	entrenchment of limitations on possible judicial responses to anti-constitutionalist amendments	III.1.1								X	X	
DECISION-MAKING	increased competences in **reviewing court judgments** used to overturn judgments of the ordinary judiciary that go against government interests	increased control over ordinary court judgments with political motivations	**III.1.2**								X	X	

TABLE 2

TOPIC	HUNGARIAN DEVELOPMENTS			EUROPEAN STANDARDS									
	area/actual measures	effect	section in paper	judicial self-governance (autonomous leadership)	appointment	promotion	irremovability (incl. forced retirement)	remuneration	disciplinary proceedings	secondment and case allocation	competences and non-interference in deciding cases	non-regression regarding the rule of law	INDEPENDENCE OVERALL
REGULAR JUDICIARY													
LEADERSHIP	**changing central administration of the judiciary** - a politically elected president of NOJ with strong powers	weakened judicial self-governance and increased political control	III.2	X	X	X	X	X	X	X	XX	XX	
	removing the incumbent president of the Supreme Court - the president had his mandate prematurely ended by ad hominem legislation	a new president supported by the government could be elected, increasing government control	III.2.2.b and III.2.6	XX			XX					XX	
	conflict between the politically elected and the self-governing leadership - NOJ not cooperating with the judicial self-government body (NJC)	undermining judicial self-governance	III.2.2.b	X	X							XX	
	nomination practice for **court presidents**, head of the judiciary declaring application processes invalid, nominating pro tempore and moving own nominees to positions in a second round	circumventing the powers of the judicial self-governing body in selecting court leaderships	III.2.2.b, III.2.3 and III.2.4	X	X							XX	
	appointment of the current head of judiciary **against** the rejection of the nominee by **the judicial self-governing body (NJC)**	increased government influence through a political nominee elected against the rejection of the judicial self-government body	III.2.2.b and III.2.7	X	X							XX	
	nomination rule change for head of judiciary, allowing nominee, through *ad hominem* legislation, to have zero experience in the judiciary	allowing the government to move forward with a loyalist nominee lacking judicial experience	III.2.3 and III.2.7	X	X							XX	
APPOINTMEN	**forced retirement** (eliminating the earlier 70-year mandatory retirement age rule, not allowing judges to work after the general retirement age, forcing around 10 per cent of judges into retirement)	mass removal of senior judges, disproportionately in leadership positions	III.2.1.b	XX			XX					XX	
	special rules introduced for some judicial appointments allowing **nominees** to come **from the executive**	scaling back guarantees against executive interference	III.2.3	XX	X							XX	
	seconding: head of the judiciary **transferring judges** to higher courts without going through the normal application process	circumventing the powers of the judicial self-governing body, further strengthening central powers that weigh on individual judgesW	III.2.3	XX	XX					XX	XX	XX	
	transferring: head of Kúria appointing judges to the central administration then moving them around at will	circumventing the powers of the judicial self-governing body, further strengthening central powers that weigh on individual judges	III.2.3, III.2.4 and III.2.5	XX	X	X						XX	
	opening judicial positions for former Constitutional Court judges, becoming a judge at Kúria upon their request, **circumventing application procedures**	increasing legislative influence over the composition of the judiciary	III.2.7, III.2.13 and III.1.1,	XX	XX							XX	

TABLE 2

TOPIC	HUNGARIAN DEVELOPMENTS			EUROPEAN STANDARDS									
	area/actual measures	effect	section in paper	judicial self-governance (autonomous leadership)	appointment	promotion	irremovability (incl. forced retirement)	remuneration	disciplinary proceedings	secondment and case allocation	competences and non-interference in deciding cases	non-regression regarding the rule of law	INDEPENDENCE OVERALL
REGULAR JUDICIARY													
DECISION-MAKING	uniformity procedure, introduction of the limited precedent system where Kúria decision (by panels put together by the president) had to be followed by lower courts, sanctioned by Kúria review	increased central control over judicial decision-making	III.2.3 and III.2.12			X					X	X	
	changing case allocation rules, interference with the allocation of cases through arbitrary decisions of judicial leadership	undermining the right to a lawful judge by tinkering with case allocation	III.2.8	XX						XX	XX	XX	
	retribution for preliminary references - threats and actions against judges raising questions deemed to be sensitive in preliminary ruling requests	interference with judicial decision-making along political lines with noticeable effects	III.2.10	XX		XX			XX		XX	XX	
CLIMATE OF FEAR	"integrity regulations" and president practice limiting speech and criticism	judges and actions crucial for protecting the rule of law are sanctioned with radiating effects	III.2.9	X		X	X	X	X			X	
	disciplinary proceedings, or threats thereof, misused to counter judicial decisions that counter government interests, including requests for preliminary rulings	interference with judicial decision-making along political lines with radiating effects	III.2.10	XX	XX	XX	XX		XX		XX	XX	
	climate of fear, harassment, instilling fear for judges dealing with politically sensitive cases	chilling effect on judicial action that dares to step up against dominant political interests	III.2.11	X	X	X	X	X	X		X	X	
	silencing critical voices through nomination practice, blocked promotions and expressed views of some judicial leaders}}	judges and actions crucial for protecting the rule of law are sanctioned with radiating effects, a clear message that bravery does not pay off	III.2.11, III.2.14 and III.2.6	X	XX	X	XX	X	X		X	XX	

	very serious violation of the respective principle	XX
	violation of the respective principle	X
	assessable both under individual and systemic infringement proceedings	
	only systemic infringement is likely to capture the underlying violation	

Source: Authors

3.1. Hungarian Constitutional Court

3.1.1. Crisis of Hungarian constitutionalism and capture of the Hungarian Constitutional Court

Shortly after the 2010 election, Fidesz with the constituent power (2/3rd majority of the seats in Parliament) modified the constitutional structure of Hungary and in 2012 January the new Fundamental law entered into force. As is well known, no professional, political or social consultation preceded the adoption of a new constitution.[195] Before the elections, the party publicly denied the need for a new constitution. Since the beginning of Fidesz rule, the constitution-making process has served the long-term stabilisation of the power structure. The supermajority in the Parliament made it easy for the ruling party to eliminate all the limits to the amendment of the Fundamental law without any constraint. This constituent power was systematically used for getting rid of all the constitutional control of the executive.

The Constitutional Court has been the strongest guarantee of the rule of law in the post-change constitutional system. This institution, following the German model, contributed to the consolidation of post-communist Hungarian democracy through its strong legal powers and interpretation of the Constitution.

Even before the adoption of the new Fundamental Law, the political and ideological weakening of the "old" constitution and the parallel change of the public status of some constitutional institutions started.[196] The Constitutional Court was the most urgent in terms of the exercise of power: the parliamentary supermajority rewrote the nomination process for constitutional judges and limited the powers of the body by amending the Constitution. From 1990 until June 2010, the parliamentary committee nominating constitutional judges operated on a parity basis, which ensured the political consensus. This consensual element was eliminated and the nomination was made on a majority basis as of 2010.[197] This has made it possible that today only judges loyal to the ruling party sit on the Constitutional Court.

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195 Tóth, G. A., (ed.), Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law, Central European University Press, Budapest, 2012; Bárd, P., 'The Hungarian Fundamental law and related constitutional changes 2010-2013', Revue des Affaires Européennes: Law and European Affairs, Volume 20, Issue 3, 2013, pp. 457-472.

196 Act CLI of 2011 on the Constitutional Court.

197 For a short overview, see: Halmai, G., 'Dismantling Constitutional Review in Hungary', available at: https://me.eui.eu/gabor-halmai/wp-content/uploads/sites/385/2018/11/Bocconi_HCC_Halmai.pdf.

In 2019, the rule of the incompatibility of the position of member of the Constitutional Court with the status of ordinary judge was abolished, allowing the President of the National Office for the Judiciary, Ms. Handó, close friend of Orbán to be elected as a constitutional judge. One of the most relevant regulations which served the one-party occupation of the constitutional judiciary was the abolition of the age limit for constitutional judges in 2013. Under the old law, the tenure of constitutional judges ceased to exist upon reaching the age of seventy, but the new regulation does not set this limit. As of 1 September 2011, the number of judges was increased from 11 to 15 and the majority elected five new judges. From 1 January 2012, the term of office of constitutional judges was increased from nine to 12 years. As a result of all these changes, the composition of the body was radically changed from the beginning and became monolithic politically. Recently there are five judges over 70.

Another Act limited the Constitutional Court's competence on reviewing the acts concerning public finances.[198] The narrowing of authority by amending the Constitution was a response to a decision of the Constitutional Court in October.[199] This decision annulled the provisions on the politically motivated extreme 98% special tax.

The method of electing the President of the Constitutional Court has also changed. According to the Fundamental Law, Parliament elects the members and the President of the Constitutional Court by 2/3 majority. Previously, the judges of the Constitutional Court chose the President from among themselves.[200] This is not merely a reduction in the autonomy of the body, but a significant political tool: the Constitutional Court President has considerable powers to set the direction of the Constitutional Court. Such powers include scheduling the cases on the agenda, appointing the judge-rapporteur, and, in the event of a tie, having a golden vote.

The Fundamental Law and the amendment of the Law on the Constitutional Court abolished the possibility of *actio popularis* but extended the competence of the Constitutional Court to review the constitutionality of judicial decisions (constitutional complaint procedure). This, combined with the capture of the Constitutional Court and other measures, allows for the "correction" of the decisions of the ordinary judiciary, not aligning with the interests of the government.

The Fourth Amendment to the Fundamental Law of March 2013 further limited the Constitutional Court's powers: since this date, it is only able to examine amendments to the Fundamental Law from a procedural point of view. (The Constitutional Court was never brave enough to review any amendment of the constitution.) Consequently, any provision, even if it contradicts fundamental constitutional principles, can be included in the Fundamental Law. Moreover, the same amendment formally repealed the previous decisions of the Constitutional Court. In other words, it cut off the continuity

198 Act CXIX of 2010 on the Amendment of Act XX of 1949 on the Constitution of the Republic of Hungary.

199 Hungarian Constitutional Court (Alkotmánybíróság), 184/2010. (X. 28.) AB decision.

200 The Venice Commission in its Opinion no. 665/2012 seriously objected the new regulation. See: Venice Commission, 'Opinion on Act CLI of 2011 on the Constitutional Court of Hungary', (15-16 June 2012), CDL-AD(2012)009, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2012)009-e.

of constitutional interpretation. This constitutional amendment also narrowed the scope for interpretation by tying constitutional review more closely to the petition.

The Venice Commission expressed its serious concerns about the systematic protection of ordinary law from constitutional review. The reduction in budgetary matters and in some cases complete removal of the competence of the Court to review ordinary legislation on the one hand undermines the rule of law, while on the other hand it infringes the democratic system of checks and balances.[201]

In a so called omnibus act, the Parliament amended the Act on the Constitutional Court by the following rule: "The persons and organisation concerned in an individual case may also lodge a constitutional complaint with the Constitutional Court against a judicial decision that is contrary to the Fundamental Law, if the decision on the merits of the case violates its rights guaranteed by the Fundamental Law."[202] This means that even public authorities can initiate complaints procedures if they deem their rights to be violated. (Earlier practice restricted this right in line with the idea of human rights protecting individuals against the state and not *vice versa*.)

The same Act gave the opportunity for constitutional judges to become judges without any formal application procedure compulsory for judges. "A member of the Constitutional Court may apply to the President of the Republic, through the President of the Constitutional Court, for appointment as a judge. The President of the Constitutional Court shall, at the same time as forwarding the request to the President of the Republic, inform the President of the National Office for the Judiciary of the application."[203] (See also *infra* in Subchapters III.2.3., III.2.13. and III.2.14.) As the members of the Constitutional Court are elected by a majority in Parliament and by then only lawyers loyal to the government are appointed, this rule seriously compromises the independence of the courts. The eligibility criteria for the President of the *Kúria* was modified by this same Act: for the counting of the compulsory five years of judicial experience, the years spent as Constitutional Court judge or senior adviser must be considered. In the next year, eight Constitutional Court judges were decided to request judicial appointment, in October 2020, one of them was elected by the Parliament to the President of the *Kúria* from January 2021 without the non-binding consent of the Hungarian Judicial Council.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[204]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including non-interference by the executive,[205]

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201 Venice Commission, 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary', Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e.

202 Article 55(3), Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

203 Article 55(2), Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

204 See Article 6 TEU, Articles 52(3) and 53 CFR.

205 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982,

appointment and promotion,[206] judicial self-government,[207] and non-regression.[208] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.1.2. Changed course of Hungarian Constitutional Court jurisprudence

Due to the strong authority of the Constitutional Court and its activist jurisprudence in the 1990's this body became the main institution to protect constitutionalism. In the Hungarian constitutional system, there are no eternity clauses or any other hierarchy among constitutional norms. The Fundamental Law declared that the Constitutional Court is the guarantor of the Constitution.[209]

Institutional changes following an extensive and conscious political strategy have had a clear consequence: the practice of the Constitutional Court has changed fundamentally. It lost its function of constitutional control over the executive.[210] The political goal of putting people on the board who do not go against the political will of the majority in power has been achieved. Within a short time, this logic became the majority (from April 2013) and then almost exclusive. Already in a 2014 analysis, it was found that judges elected as single-party candidates supported decisions in the government's supposed interest, with few exceptions.[211] The Fourth Amendment of the Fundamental Law elevated to constitutional level elements of content that had previously been declared unconstitutional by the Constitutional Court. From that moment there is no constitutional review in Hungary. Some Constitutional Court decisions supporting the Government in politically relevant issues:

10/2013 (IV. 25.) Only parties that have stood in the elections have the right to form a political group. This decision has adversely affected opposition political forces.

12/2013 (V. 24.) According to the decision, the Constitutional Court has no power to review constitutional amendments, the power of the parliamentary majority to amend the constitution is unlimited.

CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

206 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

207 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

208 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

209 Article 24, Fundamental Law of Hungary.

210 Szente, Z., 'The Political Orientation of Members of the Hungarian Constitutional Court between 2010 and 2014', Constitutional Studies, Volume 1, Issue 1, 2016, pp. 123-149.

211 Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Eötvös Károly Public Policy Institute, Egypárti alkotmánybírák a kétharmad szolgálatában. Az egypárti alkotmánybírák 2011-2014 között hozott egyes döntéseinek elemzése, Hungarian Helsinki Committee, Budapest, 2015, available at: https://helsinki.hu/wp-content/uploads/EKINT_TASZ_MHB_Egypar-ti_alkotmanybirok_2015.pdf.

24/2013 (X. 4.) Parliament has annulled final court rulings in connection with the riots in the autumn of 2006. The decision said that this did not violate the rule of law, the separation of powers and the independence of the judiciary.

3206/2013 (XI. 18.) Restrictions on the right of the members of the parliament to express their views are not unconstitutional because the Parliament has the right to take restrictive measures to ensure the dignity and smooth functioning of the body. Nor is the absence of a legal remedy unconstitutional.

22/2016 (XII. 5.) After almost one year of silence, the Constitutional Court formed an opinion on the question posed by the Commissioner of the Fundamental Rights (Ombudsman) in an issue related to asylum-seekers. After a failed anti-migrant referendum in October 2016, the Constitutional Court helped the Government out. The decision said: "upon a relevant motion and in the course of exercising its competences it may review whether the joint exercise of powers with other EU member states or by way of the EU institutions violates human dignity, or another fundamental right, the sovereignty of Hungary or its constitutional identity based on the country's historical constitution." The phrase constitutional identity implies the sovereignty of decisions concerning the living conditions of Hungarian society, the preservation of linguistic and cultural identity. It cannot be limited by international treaties.

3/2019 (III. 7.) The Constitutional Court declared constitutional the criminalisation of the "facilitation and support of illegal immigration" ("Stop Soros law") despite the European Commission taking Hungary to the CJEU for criminalising activities in support of asylum seekers.[212]

19/2019 (VI. 18.) The Constitutional Court declared constitutional the criminalisation and imprisonment of homeless people saying: "(…) nobody has the right to poverty and homelessness, this condition is not part of the right to human dignity," thus homeless people living on the streets have no right to human dignity. This decision clearly broke with the constitutional interpretation of human dignity of the first Constitutional Court of the 1990's.

15/2020 (VII. 8.) The Constitutional Court did not find unconstitutional the following amendment to the Criminal code: "Any person who, during the state of emergency, states or publishes in a public place an untrue fact or a false statement of fact in such a manner as tohinder or frustrate the effectiveness of the defence shall be punished for the offence by imprisonment for a term of one to five years." This new crime can be abused to stifle legitimate criticism of the government and help to cover up inconvenient truths under a state of emergency.

212 European Commission, 'Asylum: Commission takes next step in infringement procedure against Hungary for criminalising activities in support of asylum applicants', Press Release IP/19/469, 24 January 2019, available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_19_469.

16/2020 (VII. 8.) Pro-government businessmen offered their media companies to KESMA (Central European Press and Media Foundation) on the same day - 28 November 2018. The Hungarian Competition Authority *(Gazdasági Versenyhivatal)* then gave the go-ahead for the acquisition of the foundation. In the Constitutional Court's view, the merger of media companies is not unconstitutional and does not constitute a violation of the diversity of the press. It did not review what the government considers to be in the public interest in terms of national strategy. According to the decision, in the present case, the concentration of the media companies concerned can be considered to be in the public interest.

21/2021 (VI. 22.) This decision rejected the initiative by judges in the issue of university authority. The Decision said, that according to the regulations, the University Senate has the right to give an opinion or to give its consent. The Constitutional Court concluded from this that the challenged provision is not unconstitutional because the regulation now gives the Senate substantive influence, and therefore rejected the judicial initiative to annul the relevant provision of the Higher Education Act.

IV/665/2022 The Constitutional Court has annulled the *Kúria* decision that the Government had violated the Electoral Act by directly criticising the opposition's alleged position in a government information letter to citizens. This took place in the run-up to the elections. According to the constitutional judges, this political communication was in the public interest. This is part of a larger trend where the Constitutional Court is acting to overturn *Kúria* decisions that still dare to go against government interests. The Constitutional Court echoed the government's argument that the information was in the public interest. With the decision, the Constitutional Court contributes to the undermining of the integrity of the electoral process and, as a result, democracy, is criticised, among other subjects, by the OSCE in its evaluation of the 2018 elections: "the ability of contestants to compete on an equal basis was significantly compromised by the government's excessive spending on public information advertisements that amplified the ruling coalition's campaign message." And: "The government's information campaigns that directly reinforced the ruling coalition's message did not figure in any campaign finance calculations, which may serve to circumvent campaign expenditure limits. The estimate of these expenses dwarfs the campaign limits for even the largest parties."[213]

The court's practice reveals a single principle that works coherently: support for the government. No other constitutional considerations can be identified. Such an interpretative practice in no way implies that the Constitutional Court is fulfilling its constitutional duty, on the contrary. It supports the executive power with all its means and has ceased to function as a court and a check on power.

The developments presented above constitute a violation of standards established by

213 OSCE, Hungary – Parliamentary Elections 8 April 2018, ODIHR Limited Election Observation Mission Final Report, 27 June 2018, pp. 2 and 17, available at: https://www.osce.org/files/f/documents/0/9/385959.pdf.

European (CJEU and ECtHR)[214] case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including forced retirement,[215] interference by the executive,[216] and non-regression.[217] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.2. Attacks on the ordinary judiciary

3.2.1. Institutional changes allowing the violation of the independence of the judiciary

a. Institutional changes allowing the violation of the independence of the judiciary

The administrative model of the judiciary, introduced in 2012, is based on the centralised and strong powers of the President of the National Office for the Judiciary (NOJ, in Hungarian: OBH) elected by parliament for nine years. This fact establishes the strong political links to the ruling majority and possibilities for influencing the judiciary. Judicial self-governance formally remains in existence, but the National Judicial Council (NJC, in Hungarian: OBT), despite the fact, that as an elected body, this organ is the only legitimate representation of the judiciary, is weak legally and administratively, it has only supervisory power over the National Office for the Judiciary.

The last decade has repeatedly shown that political expectations reach the courts. This was displayed by the manipulation of the appointment procedure of Ms. Handó, a close friend of the Prime Minister, to President of the National Office for the Judiciary. Once appointed to this post, she was able to change all the administrative leaders

214 See Article 6 TEU, Articles 52(3) and 53 CFR.

215 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

216 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

217 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

according to her taste. A large number of court executives and justices of the Supreme Court were forced into early retirement in 2011, which opened the way for significantly rearranging the composition of the judiciary and appointing new court leaders by the newly established central court administration.

The law was later found unconstitutional by the Constitutional Court (by the golden vote of the President Péter Paczolay), and the European Commission launched an infringement procedure against Hungary and referred the case before the CJEU which found Hungary in breach of EU law as the impugned measure constituted age discrimination at workplace, thereby violating Council Directive 2000/78/EC.[218] 158 prematurely retired judges also turned to the ECtHR on the ground that their forced early retirement adversely affected their professional career and private life. However, the ECtHR found these applications inadmissible on all grounds, inter alia, by referring to Act XX of 2013 which provided different remedial measures (reinstatement, stand-by post or compensation) for those judges who were affected by the early retirement. From the perspective of judicial independence stemming from Article 19(1) TEU, forcing judges into early retirement without any compelling and legitimate ground constituted a political intervention into the functioning of the courts and violated the principle of the irremovability of judges.

In 2018, the Government was forced to withdraw the plan for a Special Administrative Tribunal.[219] This special court would have ruled on politically sensitive cases. The Venice Commission, seeing this danger, did not find the plan acceptable.[220] Critics at home and in Europe saw the setting up of the special court as an institutionalisation of political influence, in particular over the selection of judges and the head of the organisation.[221]

In December 2021, an omnibus law significantly overhauled the organisation of the administrative judiciary.[222] In doing so, the Government achieved the political objective, shortly before the elections, it had previously sought by setting up the Special Administrative Court. A separate administrative court (the Administrative Chamber of the Metropolitan Court of Appeal) will be established from 1 March 2022. Judges have had 10 days (from 1 January 2022) to request their transfer to this court, while other posts are free to be filled.

In 2018, judges elected a new Judicial Council with strongly critical attitudes and vigilant against interferences with judicial independence. The new Judicial Council started to seriously scrutinise the practice of the President of the National Office for the Judiciary.

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218 Hungarian Constitutional Court (Alkotmánybíróság), 33/2012. (VII. 17.) AB decision.

219 Act LXI of 2019 postponing the entry into force of the Act on administrative courts.

220 Venice Commission, 'Opinion on the Law on Administrative Courts and on the Law on the entry into force of the Law on Administrative Courts and Certain Transitional Rule' (15-16 March 2019), CDL-AD(2019)004, available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e.

221 See: Mandate of the Special Rapporteur on the independence of judges and lawyers, 21 December 2018, AL HUN 8/2018, available at: https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=24283.

222 Act CXXXIV of 2021.

b. Court packing

The modification of the retirement age of judges retroactively in 2012 forced 10% of judges out of office, mostly holding leadership positions. They have since been unable to regain their lost positions, despite the serious criticism and ECR verdict.[223] The weak legal basis of the European verdict (age discrimination instead of judicial independence) gave possibility for the Hungarian government to change the highly important positions in the administration of judiciary. In these circumstances courts were easy targets of the ruling party with the intent of monopolisation of power. Recently all the presidents of the county and regional courts were elected on a basis of personal trust to the former President of the NOJ elected by the Parliament majority.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[224]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including judicial self-government and irremovability,[225] including forced retirement,[226] and non-regression.[227] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they

3.2.2. The lopsided duel between the National Judicial Council and the National Office for the Judiciary

could also form the basis of an ordinary infringement procedure.

The systemic capture of the Hungarian judiciary could only be revealed if one connects the dots in a sequence of events, putting layers of autocratisation on top of each other. This autocratisation relied on abusive legalism – in many cases abusive constitutionalism – since one party decisions were coated and displayed as constitutional reforms serving de facto power centralisation and abolishing of – already weak – autonomies of democratic checks. The David-Goliath duel between the National Judicial Council and the National Office for the Judiciary is therefore only one, but a very telling milestone in the aforementioned capture.[228]

223 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, EU:C:2012:687.

224 See Article 6 TEU, Articles 52(3) and 53 CFR.

225 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

226 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

227 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

228 The capture contains the complete overhaul of the Constitutional Court, the early termination of the mandate of the President of the Supreme Court (Curia), the forced retirement of hundreds of senior judges, the introduction of a new, centralized model of court administration and the capture of the strengthened Supreme Court in order to capture the minds of regular judges via Gleichschaltung of the jurisprudence.

In order to see the broader implications of the clash between NJO and the NJC, we must enumerate the most important legal developments in the field of judicial administration and self-governance which led to a constitutional crisis in 2019 and which remained unresolved to this very day.

a. 2012: fruit of a poisonous reform: an unbalanced dual system of increased government control

Based on the rather unfortunate experiences of the non-transparent and oligarchic justice council model (National Justice Council, in Hungarian: OIT) which was established in the middle of the 1990's, there was a well-substantiated need for reforming judicial administration and judicial self-governance.[229] Under the guise of a reform, however, the Orbán-regime shifted judicial self-determination towards a dual system of a strongly hierarchical, one-person central administration (exercised by the National Office for the Judiciary, NOJ) and anaemic self-governance (represented by the new, weakened National Judicial Council, NJC).

The Office and its President (Ms. Tünde Handó[230]) had excessive powers over court administration, including the recruitment and promotion of judges, management of the judiciary's budget and IT infrastructure.[231] The NOJ President was elected by the National Assembly (Parliament) for a nine-year term in 2012.

The Council is supposed to be an oversight body over the NOJ (and its President). It was composed of the President of the Supreme Court (ex officio member) and fourteen judges, who were elected by their peers by secret ballot for a six-year term, with 14 additional substitute members who would become full members in case of a vacancy.[232] The NJC had only the power to scrutinise the actions of the NJO President and – as ultima ratio – if the President of NOJ breached her duties for more than 90 days or becomes "unworthy" of the office, the NJC can request Parliament to vote on removing the NOJ President from office.[233]

b. 2012-2018: revving up the engines

The adopted legislative reform raised both the concerns of prominent figures of the domestic judiciary and of international monitoring bodies (see the assessment infra in Subchapter III.2.15. b). András Baka (incumbent president of the Supreme Court in 2011) voiced his concerns about the planned cardinal acts that were the cornerstone

229 The ruling majority justified the reform by referring to the deficiencies of the "judicial council model" that existed between 1997 and 2011: lack of transparency and accountability, low level of efficiency, and strong corporatism – see Fleck, Z., 'Judicial independence in Hungary', in. Seibert-Fohr, A., (ed.), Judicial Independence in Transition. Springer, Berlin, Heidelberg, 2012, pp. 796-801.

230 Godmother of PM Orbán's daughter and wife of a formerly prominent Fidesz MEP, who co-founded the party and drafted the Hungarian Fundamental law.

231 Venice Commission, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary' 12-13 October 2012, CDL-AD(2012)020, paras. 88, 93/6,7,8. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e.

232 Articles 88(3) and 91(2) of Act CLXI of 2011 on the Organization and Administration of Courts.

233 It is important to see that the Council is only entitled to initiate the voting, but not removing the President.

of introducing the new change.[234] During the parliamentary debate of the bills,[235] Baka shared a detailed analysis to the National Assembly, taking account of the comments received from judges throughout the country. He raised his concerns about the fact that the draft legislation did not address the structural problems of the judiciary, but left them to the discretion of the chief executive of an external administration (i.e., the president of the new NOJ), to whom excessive and, in Europe, unprecedented powers were being conferred without adequate accountability.[236]

As a 'reward', Baka's mandate as president of the Supreme Court was prematurely terminated by the National Assembly. The former chief justice turned to the ECtHR where he won the case in 2016[237] and the Grand Chamber established that he was removed via ad hominem constitutional legislation for exercising his right to freedom of expression (see our assessment about the judgement infra in Subchapter III.2.6.). He, however, has never been reinstated to his former position which created a chilling effect that still holds within the judiciary.[238] During the first six years, the members of the NJC were holding high administrative positions in the judiciary, therefore the composition of the Council brought less efficient control over the central judicial administration (i.e. the President of the NOJ) based on both the chilling effect of the Baka-case and the practical implications of the forced retirement of senior judges.[239]

c. 2018: the war starts

The conflict of the two organs started when the mandate of the previously elected, members of the NJC (rather lenient towards Ms. Handó) was fulfilled and the newly elected members started an inquiry investigation requested by 2 lower instance courts (noting irregularities around the appointments of judges and court leaders[240]). The inquiry started at the beginning of 2018 and shortly before the adoption of the report on the conclusions,[241] 5 members and almost every substitute member of the Council suddenly resigned. According to the Council – confirmed by the report of European Association of Judges (EAJ)[242] –, the whole phenomenon was the result of obstruction and pressure on the members of the NJC by the Handó Office which not only 'convinced' certain members to resign, but successfully blocked the by-election procedure of the new (substitute) members of the NJC. The Office put court leaders under further pressure and withheld necessary funds for the operation of the NJC (which had no budgetary autonomy), while Ms. Handó personally claimed that NJC

234 Act on the Organisation and Administration of the Courts Bill (no. T/4743) and Act on the Legal Status and Remuneration of Judges Bill (no. T/4744).

235 Debate took place during October 2011.

236 ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016.

237 Ibid.

238 Council of Europe, Committee of Ministers, 1411th meeting, 14-16 September 2021, (DH) H46-16 Baka v. Hungary (Application no. 20261/12), Supervision of the execution of the European Court's judgments, CM/Del/Dec(2021)1411/H46-16, 16 September 2021, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

239 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

240 These questions were asked by the Metropolitan Court of Budapest and Győr Regional Court of Appeal. For the illicit appointment practice see Subchapter III.2.4. of this study.

241 Decision nos. 59/2018. of 2 May 2018 and 60/2018. of 2 May 2018 of the National Judicial Council provided a response to the questions posed by the judges of the Metropolitan Court and Regional Court of Appeal of Győr.

242 European Association of Judges, Report on the fact-finding mission of the EAJ to Hungary, EAJ, 2019, [further: EAJ-report (2019)], available at: https://www.njb.nl/umbraco/uploads/2019/5/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf

operates illegitimately [243]and broke almost every official communication with the organ.During the quick escalation of the conflict, the most important developments were the following:[244]

- **27 April 2018:** five members along with the substitute members of NJC had resigned.

- **27 April 2018:** Ms. Handó immediately declared her supervisory body (the NCJ) as inoperable.

- **2 May 2018**: NJC adopted its first report which stated that Handó applied the unlawful practice of annulling calls for application for leadership positions[245] in order to circumvent the opinion of the judicial staff or the NJC and appoint interim court executives without the control of any judicial body.[246]

- **8 June 2018:** Ms. Handó called the NJC an "illegitimate body" in the media.[247]

- **17 June 2018:** Ms. Handó practically accused some members of the NJC of "treason".[248]

- **9 October 2018:** extraordinary electoral assembly was summoned to elect additional NJC-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. Violation of secret ballot was also reported.

- **10 October 2018:** the regional court presidents appointed by the NOJ-Presid ent published a statement in which they ask remaining NJC-members to resign.[249]

- **6 February 2019:** the NJC adopted the second report on the maintained practice of the President of the NOJ as well as on the President's performance of its co-operational obligations.[250] The report emphasised the refusal of

243 Letter of 27 April 2018 of the NJO President, 2018.OBH.III.D.4/139, available at: https://www.dropbox.com/s/dlzc4vmcph3h3je/2.%20sz%C3%A1m%C3%BA%20mell%C3%A9klet.pdf?dl=0. (in Hungarian). Referred to the lack of quorum and proportionate representation in the NJC.

244 See milestones in EAJ-report, 2019, supra fn. 215. Also Hungarian Helsinki Committee, 'Attacking the Last Line of Defence – Judicial Independence in Hungary in Jeopardy', 15 June 2018, available at: https://helsinki.hu/wp-content/uploads/Attacking-the-Last-Line-of-Defense-June2018.pdf.

245 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 January 2019. Approved and disclosed by the NJC on 6 February 2019, [further: 2nd inquiry report], available at: OBT Report 06.02.2019.pdf (dropbox.com)

246 About the excavated tactics, see: Kovacs, A: 'Új Modell a Bírósági Igazgatásban: Bírák Központi Nyomás Alatt', BUKSZ, 2019/3-4, pp. 239-258. In a nutshell: annulling the appointment procedure, Handó gave mandate regularly to those judges who were rejected by their peers or those who did not participate in the application procedure, or did not even work in the court where the vacant leadership position must have been filled in. This practice was capable of circumventing the NJC and mandating (then later appointing) court leaders loyal to the President of the NOJ.

247 Ibid.

248 Ibid.

249 The statement was reported about in the pro-government propaganda media, however it was removed from the website of the court system.

250 NJC, 2nd inquiry report. available at: https://www.dropbox.com/s/w3gv9qjonr3b76r/OBT%20Report%2006.02.2019.pdf?dl=0.

cooperation and stated that the President of NOJ continued to exercise certain functions without the rule of law, contrary to their purpose, and by some of her measures infringed the rights of citizens to a lawful judge.[251]

- **18 March 2019:** The Ombudsperson, at the motion of the NOJ President,[252] referred a question to the Constitutional Court and requested a decision on the functionality of the Council arguing that an unclear provision in the Constitution shall be clarified. The Council argued that the Constitutional Court should reject the question or rule that the Council is fully functional. Three years later the case is still pending.

- **8 May 2019:** the NJC adopted a resolution calling on the Hungarian to deprive Handó of her office. According to Hungarian law, this was the strongest step the NJC could take.[253]

- **7 June 2019:** the Fidesz-dominated Justice Committee of the Hungarian Parliament voted to reject the National Judicial Council's call. The committee gave no meaningful response to the very straightforward points raised by the NJC. The discussion leading to the rejection only lasted 30 minutes.

- **11 June 2019:** The Plenary of the Hungarian Parliament voted down the motion of the NJC[254]. At the very same day, Ms. Handó was decorated by the "Pro Cooperatione" (For Cooperation) medallion by the Chief Prosecutor.[255]

As confirmed by the fact-finding mission of the European Association of Judges,[256] the remaining NJC – members were subject of continuous persecution and retaliatory actions from court presidents and personally from NOJ President (e.g., disciplinary proceedings, ban from certain professional activities were reported on a regular base[257]). Meanwhile, an empiric survey of European Networks of Councils for the Judiciary (ENCJ) found that "Hungary … face[s] issues across a range of aspects of independence".[258] This survey showed that respondents in Hungary gave worrying

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251 The report was amended on the 6th of March 2019 when the NJC completed the 2nd inquiry report by Decisions no. 13/2019. of 6 March and no. 14/2019. of 6 March. The President of NOJ didn't comment on the 2nd inquiry report neither until the deadline provided by the NJC (22 February 2019), neither until the deadline she asked for (20 March 2019).

252 X/453-0/2019, Letter of the Commissioner for Fundamental Rights (Ombudsperson), AJB-1418/2019, available at: http://public.mkab.hu/dev/dontesek.nsf/0/e40059ca0811c-088c12583c200614e99/$FILE/X_453_0_2019_ind%C3%ADtv%C3%A1ny_anonim.pdf (in Hungarian).

253 The bottom line of the reasoning was that Handó repeatedly failed to correct unlawful behaviour and illicit appointing practice as the head of the central judicial administration in Hungary and therefore is not fit to serve in that capacity. NJC, decision no. 34/2019 of 18 May 2019, available at: https://www.dropbox.com/s/9w8gkq8u8zm3ixs/34_2019%252520OB-T%252520(Impeachment%252520of%252520Tunde%252520Hando).pdf?dl=0.

254 Proposal S/6247 in relation to the mandate of the President of the National Office for the Judiciary, available at: https://www.parlament.hu/irom41/06247/06247.pdf (in Hungarian).

255 National Office for the Judiciary, 'NOJ President dr. Tünde Handó Was Awarded with Pro Cooperatione Memorial Award', Press Communication, 11 June 2019, available at: https://birosag.hu/hirek/kategoria/magazin/pro-cooperatione-emlekermet-vehetett-dr-hando-tunde-az-obh-elnoke (in Hungarian). According to a 24 June 2019 decision of the NJC, the NJO President should have requested the consent of the NJC before accepting the award, but failed to do so. - see Article 103(3)(j) of Act CLXI of 2011 on the Organization and Administration of Courts.

256 European Association of Judges, Report on the fact-finding mission of the EAJ to Hungary, EAJ, 2019, available at: https://www.njb.nl/umbraco/uploads/2019/5/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf, p.5.

257 Members of NJC were prohibited by Handó from teaching at the Justice Academy and from attending professional conferences. They admittedly had no chance of promotion either. When one of the Council-members was elected as President of the Budapest Metropolitan Court with 64% of the votes, - just like during the previous two rounds of voting - Handó did annul the procedure without providing any argument (which was again contrary to the law) and appointed an interim president of her liking.

258 European Networks of Councils for the Judiciary (ENCJ), Independence, Accountability and Quality of the Judiciary, 7 June 2019. Available at: https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/2019-06/ENCJ%20IAQ%20report%202018-2019%20adopted%207%20June%202019%20final.pdf, p 5.

responses on pressure experienced by judges from court leaders, recruitment of judges and promotion to leadership positions, and on the NJC's ability to defend the independence of judges.[259] One has to conclude that judicial self-government has a weak position in the eyes of a Hungarian judge, because of the weakness of the NJC vis-à-vis the President of the NOJ, and also due to the lack of effective tools available to the NJC to hold the President of the NOJ accountable,[260] which prevents effective self-determination in Hungary.

d. Shell-game with the international community

The controversial justice reform had not escaped international attention: various monitoring and opinion-giving bodies articulated concerns about the excessive powers of the chief executive of judicial administration[261] and the lack of truly autonomous judicial self-governance.[262] The Orbán-regime, however, used its infamous peacock-dance in half-way implementing or dodging those recommendations (see also our findings infra in Subchapter III.2.15 about fake compliance).

This shell-game is part of an evergreen arsenal of the Hungarian government which ensures that shortcomings in the judicial administration remain without proper remedy. The Orbán regime had presented notorious non-compliance with international recommendations about judicial self-representation and self-governance, while the unresolved (constitutional) issues add up, and provide a foothold for the next layer of curbing further autonomies within the judiciary. For instance, the weakened judicial self-representation (analysed in this Subchapter) could not block the arrival of members of the CC or high-ranking governmental officials (without former judicial background) to the benches of the judiciary.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[263]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive,[264] disciplinary

259 Ibid., pp. 56, 39-41, 42, 56.

260 The President of the NOJ cannot be subject to any ethical and disciplinary procedure. Acting within its supervisory power, the NJC can notify the President of the NOJ of irregularities in central court administration, and as a last resort, can initiate the removal of the President of the NOJ to the Parliament. The latter tools, however, have so far proved ineffective. These problems concerning the accountability of the head of central court administration have been highlighted in the request for a preliminary ruling made by a Hungarian judge in case C-564/19.

261 Venice Commission, 'Opinion no. 663/2012 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, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e.
Venice Commission, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary' 12-13 October 2012, CDL-AD(2012)020. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e.
See also Group of States against Corruption (GRECO) reports in fn. 366. The reports acknowledged that since 2012, Hungary has taken positive steps to transfer certain functions from the president of the NJO to the NJC in order to create a better balance between these two organs. However, further progress is still required.

262 Ibid actors emphasised the need to enhance the role of the collective body, the National Judicial Council, as an oversight instance, because the president of the NOJ, who is elected by the Hungarian Parliament, cannot be considered an organ of judicial self-government. See also: European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [further: EP resolution on Sargentini-report] paras (12)-(13).

263 See Article 6 TEU, Articles 52(3) and 53 CFR.

264 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

proceedings,[265] reduction of remuneration,[266] appointment and promotion,[267] judicial self-government and irremovability,[268] forced retirement,[269] and non-regression.[270] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.3. Nominees not fulfilling statutory requirements

Seizing the *Kúria*

After capturing the Constitutional Court, the other apex court, the Supreme Court of Hungary, later renamed as the Kúria, could not have been left out from the party-political influencing. The notorious Baka (See Subchapter III.2.2.b.) case showed that the governing majority does not hesitate to restructure the institution for the sake of personal change. Sadly, the ECtHR has not realised the clear sign of breaking with the judicial independence in Hungary and the decision interpreted the removal of the Chief Justice of the *Kúria* as a violation of freedom of speech instead of a violation of the judicial independence.[271] Just as the arbitrary lowering of the retirement age of judges from 70 to 62 was a mere violation of equal treatment in the eyes of European judges.[272] With this act the Orbán government could clean the scene for their new judges in key positions, since the older judges removed were typically in high and middle administrative leading positions. The President of the NOJ took advantage of the situation to fill these unlawful vacancies with loyalists.

In recent years, the Fidesz government has incorporated special rules into the cardinal laws on the judiciary in order to "parachute" loyalists into the courts by evading the normal application process. A highly important and consequential example is the late 2019 amendment of the Act on status of judges, which made it possible for members of the Constitutional Court to be appointed to the ordinary judiciary on

265 CJEU, Joined Cases C-558/18 and C-563/18, Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, 26 March 2020, ECLI:EU:C:2020:234; CJEU, Case C-791/19, Commission v Poland (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596; CJEU, Case C-204/21, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593; CJEU, Case C-204/21, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878; CJEU, Case C564/19, IS, 23 November 2021, ECLI:EU:C:2021:949.

266 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

267 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

268 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

269 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

270 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

271 ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016.

272 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

their own request without participating in any application procedure.[273] In July 2020, eight serving justices of the Constitutional Court were appointed as judges by the President of the Republic, out of which only two had any previous judicial experience within the ordinary court system. These judges can decide at any point to leave the Constitutional Court and start working in the *Kúria*. This happened with András Zsolt Varga, who became the new Chief Justice of the *Kúria* in 2021 (elected for nine years!) after resigning from the bench of the Constitutional Court. The whole amendment was tailor-made for Mr. András Zs. Varga[274] who is an eminent legal ideologist and tried professional of the executive.[275]

This rule is highly problematic as members of the Constitutional Court are elected by the Parliament, and since 2010 this has taken place exclusively by the votes of the governing parties having a two-third majority in the legislation. As a result, the legislative branch (currently dominated by a party coalition) can exert significant influence on the composition of the top court of Hungary. These concerns were raised by the NJC which requested the withdrawal of the provision without any effect. Circumventing the application process has characterised the practice of appointing court executives. The President of the NOJ used her power extensively to annul application processes and appoint temporary court leaders who then became permanent leaders for a fixed six-year term by winning the next application procedure. Judicial secondment is also a tool for disguised promotion without application process. For instance, the President of the NOJ can second judges to higher courts which can last even for years without filling the respective judicial offices by application process. Or the President can transfer judges to the NOJ for doing service in the central organ of judicial administration, and then appoint the judges concerned to any office within the organisation, again without any application procedure. Both practices have been used regularly by the former President of the NOJ.

The political importance of seizing the *Kúria* is clear: the two apex courts have decisive, formal and informal guiding role for judicial interpretation. In 2020, an omnibus Act introduced a "limited precedent system": lower tier courts are mandated to follow the interpretation of judgments of the *Kúria* or provide express reasons for any derogation thereof. If the lower tier court deviates from published judgments of the *Kúria*, its decision could be subject to review.[276]

Thus, after the first years of diminishing the role of the Kúria vis a vis the Constitutional Court, the political rational reversed and with a strong restaffing policy the *Kúria* became the second most important veto player mainly against the judiciary which

273 Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

274 Kazai, V. Z., Kovács, Á., 'The Last Days of the Independent Supreme Court of Hungary?', VerfBlog, 13 October 2020, available at: https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/

275 Hungarian Helsinki Committee, 'The new President of the Kúria. A potential transmission belt of the executive within the Hungarian judiciary, 22 October 2020, available at: https://helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf.

276 Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

cannot be completely captured.[277]

But there are some closer rational too: the President of the Kúria has strong decisive role over careers within the top court: evaluating application, the decisions on promotion, relocation. He has also such administrative authorities as stating the scheme of case allocation, composition of panels, reassigning the cases. The managerial authority is wide to influence sitting judges, as the county court presidents at lower levels: initiating disciplinary proceeding, decision on complaints, controlling a part of salary. There is no normative basis of distribution of rewards. According to the Fundamental Law, the Kúria shall guarantee the uniform application of the law and is entitled to issue binding interpretations and the President of the *Kúria* can initiate a unification procedure and select the members of the unification panel.

After the enforced abandonment of the plan to establish a special administrative court in Autumn 2019, the government started to find another solution of putting its hand on final administrative issues as tax cases, budgetary issues, election cases. The new President of the *Kúria* with his wide administrative power could reach the political aim. After some months of his election, some new members have also appeared, with one of them coming directly from the Justice Ministry.[278]

At its meeting on 5 January 2022, the National Council of Judges did not support Varga Zs. András, President of the Curia, who proposed that the NJC should issue a statement "in defence of the Fundamental Law and the constitutional order of Hungary", condemning the opposition's plans for constitutional changes. The President of the Constitutional Court asked the Prime Minister in an open letter to shield justices from an opposition pledge to remove constitutional judges from office after the next election, if the opposition were to win. According to Tamás Sulyok, President of the CC, the plan of some opposition experts and politicians is tantamount to a “subversion of the constitutional order” which is a crime. The letter asked for appropriate and effective measures to prevent this. Varga Zs. András the President of the *Kúria* and Péter Polt Procurator General joined to the letter by signatures.[279]

The statutory requirements for constitutional judges both before and after 2011 included the following qualification conditions: either “legal thinkers with outstanding knowledge”, specifying the highest academic qualifications (university professors or doctors of the Hungarian Academy of Sciences), or “lawyers with at least twenty years of practice”, adding that this means work in a position that requires a law degree.[280] István Stumpf, Mihály Bihari and István Balsai were all judges elected after the change of the rule of nomination in the Parliament, as part of the one-party appointments. Mihály Bihari held academic positions, but not in the field of law. István Stumpf, an

277 CEELI Institute, ‘Central & Eastern European Judicial Exchange Network Webinar Spotlight Series: Judiciaries in Peril in Central and Eastern Europe’, July 2021, available at: http://ceeli-institute.org/wp-content/uploads/2021/07/Hungary-Spotlight-Transcript-final.docx.pdf.

278 President of the Republic (Köztársasági elnök) 274/2021 KE. határozat.

279 Cseresnyés, P., ‘Supreme Court, Prosecutor’s Office Promise to Protect Hungary’s Constitutional Order’, Hungary Today, 16 December 2021, available at: https://hungarytoday.hu/supreme-court-prosecutors-office-hungarys-constitutional-order/.

280 Art. 5, Act XXXII of 1989 on the Constitutional Court (in force until 31 December 2011) and Art. 6, Act CLI of 2011 on the Constitutional Court (entered into force on 1 January 2012).

earlier member of the first Fidesz government, did not have the twenty-year legal practice or the academic qualifications. István Balsai, who transferred directly from parliamentarian and Fidesz politician to the Constitutional Court, was not working in academia and did not have twenty years of legal practice.[281]

András Zs. Varga fulfilled these statutory requirements when elected to the Constitutional Court, but in October 2020 was appointed to head the *Kúria*, even though he had never worked in the judiciary. The amendment of two laws allowed the nomination of Varga to happen: the five-year judicial experience requirement was changed so that that experience as a constitutional judge or senior advisor also suffices;[282] and constitutional judges can address the President of the Republic and request to be moved to ordinary courts, circumventing the normal application process.[283] Subchapters III.2.6. and III.2.7. will address ad hominem rules designed for removing and appointing judges in greater detail.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[284]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive in general[285] and through secondments,[286] appointment and promotion,[287] judicial self-government and irremovability,[288] and non-regression.[289] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

281 Halmai, G., 'In memoriam magyar alkotmánybíráskodás – A pártos alkotmánybíróság első éve' [In memoriam Hungarian constitutional adjudication – The first year of the one-party constitutional court], Fundamentum, Volume 18, Issue 1-2, pp. 36-64.

282 Art. 1, Act XXIV of 2019 on further guarantees ensuring the independence of administrative courts.

283 Art. 55, Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.

284 See Article 6 TEU, Articles 52(3) and 53 CFR.

285 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

286 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

287 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

288 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

289 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

3.2.4 Nominating practices of the President of the Judicial Office and their radiating effects

The President of the Judicial Office, elected by the Parliament, has wide but not unconstrained powers when it comes to nominating judicial leaders. Importantly, presidential decisions require consent with various judicial bodies: the central self-governing body of the judiciary, the National Judicial Council and the body composed of all judges at a particular court (the judicial conference). The details of the process and the relationship between the President and the Council have been subject to sustained scrutiny and criticism from various bodies including the Venice Commission that dealt with the issue on three occasions.[290] As we will see, the related provisions, partly amended as a result of the said criticisms, allow, to this day, for the President of the Judicial Office to disregard and effectively override the decision of the said judicial bodies.

Nomination rules became especially important after the Parliament decided to lower the mandatory retirement age for judges[291] – that the CJEU later found to be in violation of EU law[292] – that forced around 10% of the active judges into retirement.[293](See Subchapter III.2.1.) Many (59) of these senior judges were in leading positions.[294] Their removal opened the way to new nominations, leading to an overhaul of judicial administration.

Former President of the Judicial Office, Tünde Handó, used her powers to make sure that her nominees be appointed, using a combination of tactics like annulling calls for appointment and short-term (temporary) nominations followed by calls favouring these temporary leaders. Her successor, György Barna Senyei has also been relying on this technique that circumvents not only the powers of the NJC but also show that the checks by the judicial self-government over the power of the political appointees are ineffective.

In 2020 alone, President Senyei annulled 20 calls, even in cases where judicial bodies voting on the matter supported the applicant.[295] The procedure includes a vote in the judicial self-government bodies, e.g., in the case of a court president, all judges

290 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 Court' (19 March 2012) CDL-AD(2012)001, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e.; Venice Commission, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary', (12-13 October 2012) CDL-AD(2012)020-e, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e; Venice Commission, 'Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020', (15-16 October 2021) CDL-AD(2021)036-e, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e.

291 See Art. 26-2 of the Fundamental Law of Hungary.

292 CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

293 194 plus 37 judges lost their position under decrees of the President of the Republic [96/2012 (V. 2.) KE határozat and 155/2012. (VII. 6.) KE határozat, respectively]; further judges asked for their retirement.

294 Kovács, Á., 'Új modell a bírósági igazgatásban: bírák központi nyomás alatt' [New model in judicial administration: judges under central pressure], BUKSZ, Issue 3–4, 2019, pp. 239-258., available at: http://buksz.c3.hu/190304/06.2_probkovacs.pdf.

295 Eötvös Károly Public Policy Institute, Judicial Independence and the Possibility of Judicial Resistance in Hungary, EKINT, Budapest, 2021, available at: http://ekint.org/lib/documents/1612860445-EKINT_Judicial_Independence_and_the_Possibility_of_Judicial_Resistance_in_Hungary.pdf.

under the nominee's prospective leadership (the so-called judicial conference) can vote. The President of the National Office for the Judiciary still has the power to reject this nominee, with two outcomes: either appointing a candidate not supported by the majority of judicial votes, subject to the consent of the NJC, or can move to annul the call.[296] The latter decision is a unilateral power that is, under the described strategy, followed by a temporary appointment of the favoured candidate, a possibility provided for by law.[297] The result is a clear message to aspiring judges: those not falling in line risk never making it to leadership positions, as the President of the National Office for the Judiciary is able to block all such nominations. This takes place with complete disregard for the votes of the judicial self-governing bodies.[298]

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[299]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including appointment and promotion,[300] judicial self-government,[301] and non-regression.[302] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.5. Nominating practices of the President of the Kúria

Concerning the *Kúria*, human rights watchdog organizations noted that "The number of posts at the *Kúria* was raised in 2020 by 23% opening 21 new vacant positions. As the selection and appointment of judges of the *Kúria* mostly lies in the hands of the President of the *Kúria*, this may lead to a court packing process".[303] In retrospect, looking at the nominating practices of the current President of the *Kúria* – himself appointed in a dubious procedure, see Subchapter III.2.7 – the NGOs' fears have been confirmed. The nominating practices came to light after the Hungarian Helsinki Committee filed a freedom of information request and obtained a summary of the

296 Arts. 132–133, Act CLXI of 2011 on judicial organization and administration.

297 Art. 133-2, Act CLXI of 2011 on judicial organization and administration.

298 For an overview and analysis of the practice, with detailed statistics, see, e.g., Kovács, Á., Új modell a bírósági igazgatásban: bírák központi nyomás alatt. BUKSZ, Issue 3–4, 2019, pp. 239-258., available at: http://buksz.c3.hu/190304/06.2_probkovacs.pdf.

299 See Article 6 TEU, Articles 52(3) and 53 CFR.

300 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

301 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

302 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

303 Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, K-Monitor, Mertek Media Monitor, Political Capital, Transparency International Hungary, Contributions of Hungarian NGOs to the European Commission's Rule of Law Report, March 2021, available at: https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf; citing Resolution no. 41. sz./2020. (III.24.) of the President of the National Office for the Judiciary, available at: https://birosag.hu/sites/default/files/2020-04/41.sz_2020.pdf.

application procedures.[304]

Application to Kúria positions have to be submitted to the President of the Kúria, who according to the law, mainly has an administrative role during the process.[305] He can order the applicant to amend the application and can reject the application only if the applicant fails to do so. In all other cases a panel of judges convenes within 15 days from the application deadline to interview the applicants, who are then ranked according to a set of objective criteria laid down by law. The President either agrees with the ranking and appoints the candidate who received the highest points to the vacnt position or recommends the second or th third candidate. In the latter case, the National Judicial Council takes a decision on the Kúria President's recommendation. The NJC has the final say: if it agrees, the second/third candidate will be appointed, if it disagrees, the highest ranked applicant will get the position.

In 2021, 11 vacancies have been announced. In 5 cases the Kúria President did not initiate the appointment of the first-ranked judge, but neither did he request the opinion of the National Judicial Council on the second or third candidates. In the case of one position, he appointed the fourth-ranked candidate, even though the law does not foresee such an option. The Kúria President waited for several positions to become vacant, published a call in a package for various positions for which the same qualifications were needed. Judges applied to various positions at the same time, which is permitted by law. But when someone got one of the positions, the Kúria President failed to inform the judge whether the other applications must be withdrawn Also, the judges were not told which positions they got, so even if they wanted to, they did not know which applications to withdraw. This gave considerable leeway for the President of the Kúria for playing around with the rankings, the order of deciding on the various positions (which is not determined by law) and thus select the candidates of his choice. In several cases, the President of the Kúria arbitrarily set certain criteria beyond the ones foreseen by the law (e.g. a deep knowledge of freedom of assembly).

The appointment of former state secretary Barnabás Hajas as a Kúria judge stands out even among the many dubious appointment procedures. First, unlike his fellow judges, he did not start his career as a district court judge, but was immediately appointed to the top court of the country. What is more, he did not have any judicial experience whatsoever. (Just like the Kúria President, who did not have an experience at the ordinary judiciary before either. Varga Zs at least used to be a Constitutional Court judge, Hajas had no experience in any judicial role.) Hajas not only did he not serve as a judge, but was a high ranking official of the executive. Among others he was a state secretary until March 2021, under the direct supervision of the Justice Minister.

304 Hungarian Helsinki Committee, Tribunal Established by Sleight of Hand, 4 September 2022, https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/

305 Act CLXII of 2011 on the legal status and remuneration of judges.

Second, one of the calls, requiring deep knowledge in freedom of assembly, but not requiring any previous expertise in adjudicating, seems to have been tailor-made for Barnabás Hajas, who co-drafted the Act on the Right of Assembly of 2018,[306] and wrote the commentary to the new law. Because of the special requirement only 7 candidates applied, as opposed to similar positions with similar ranks, for which 15 judges submitted their applications. Because there was no need for judicial expertise, Hajas qualified and had to compete with less Candidates. So the call favoured him in every possible way.

Third, Hajas' appointment shows how the order of deciding on different judicial positions matters. Hajas was ranked second in a dead heat with another Candidate. The position he applied for was the first in terms of its serial number among a series of judicial positions advertised.[307] Had the President of the Kúria appointed judges for the positions in the order they had been advertised, he would have been obliged to appoint the first candidate, or recommend Barnabás Hajas as a second ranked candidate, but it the NJC might not have approved this choice. Since Hajas failed to apply to any other position, he would have lost the opportunity to become a judge. So, the President of the Kúria started the appointment with other positions, and appointed both the first ranked judge and the other second ranked candidate to other judicial positions. By the time the Kúria President decided on the position foreseen for Hajas, there was no other candidate ahead of him. As a consequence, András Varga Zs appointed Barnabás Hajas, as the "first candidate", without consulting the NJC. (Please note the double standards: since the candidates did not withdraw their applications, Hajas was still to be considered a second ranked candidate, and the NJC should have been consulted.)

Fourth, once appointed, unlike other judges, who have to serve a three-year fix-term-period before they get a position indefinitely, Barnabás Hajas was appointed immediately for an indefinite period, upon the recommendation of the President of the Kúria.

This means that the Kúria President appointed a number of judges to the bench in violation of Hungarian law,[308] and in contravension of EU legislation at the same time. As the Hungarian Helsinki Committee put it, "[t]he Kúria President's practice of appointing judges and judicial leaders raises serious concerns that he may be willing to circumvent even legal provisions in order to appoint individuals to key judicial posts who are close to the very same political power that had put him into his current position."[309]

The developments presented above constitute a violation of standards established by

306 Act VL of 2018 on the Right to Assembly

307 Order of the Persident of the National Judicial Office no. 48.E/2021. (III.2.)

308 See the minutes of the NJC meeting on 6 July 2022, 2022.OBT.XI.11/21.

309 Hungarian Helsinki Committee, Tribunal Established by Sleight of Hand, 4 September 2022, https://helsinki.hu/en/tribunal-established-by-sleight-of-hand/

European (CJEU and ECtHR[310]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including appointment and promotion,[311] judicial self-government,[312] and non-regression.[313] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.6. *Ad hominem* legislation to fire the President of the Supreme Court

Tailor made legislation was used in order to remove the President of the highest judicial authority, the Supreme Court of Hungary. This so-called ad hominem legislation was also used in relation to this judicial authority in 2020 to appoint the new President who is said to be loyal to Fidesz.

András Baka served as the Hungarian Judge to the European Court of Human Rights between 1991 and 2008,[314] then he was appointed to the Budapest-Capital Regional Court of Appeal as a judge and was elected to President of the Supreme Court by the Hungarian Parliament in June 2009, for a six-year term, which was to expire on 22 June 2015. At that time, in accordance with the constitutional regulation, the President of the Supreme Court was also *qualitate* qua President of the NJC.

After the electoral victory of Fidesz in 2010-11, the governing party initiated a 'judicial reform" as part of the constitutional process and Mr. András Baka as President of the Supreme Court and judicial administration expressed his opinion on parliamentary bills that affected the judiciary.

As part of these "reforms" the Fundamental Law of 25 April 2011 established that the *Kúria* will once more be established as the highest judicial body (the historical Hungarian name for the Supreme Court before World War 2).

Additionally, new acts on the judiciary established new eligibility criteria for the candidates of the President of the *Kúria*. One of these regulations stated that the President could be elected by Parliament from those judges who are appointed for an

310 See Article 6 TEU, Articles 52(3) and 53 CFR.

311 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

312 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

313 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

314 European Court of Human Rights, 'Judges of the Court since 1959', available at: https://www.echr.coe.int/Documents/List_judges_since_1959_BIL.pdf.

indeterminate term and who had served for at least five years as a judge. Although Mr. Baka had 17 years of experience as a judge on the ECtHR, he was ineligible for the post of President of the *Kúria* as he had not previously served a five-year term as a judge in Hungary. Serving as member of an international court did not satisfy this condition.

In compliance with the Bill on the Transitional Provisions of the Fundamental Law of Hungary, and in order to ensure a smooth transition and continuity in the fulfilment of the tasks of the *Kúria*, the new President was to be elected until 31 December 2011 and was to take office on 1 January 2012. In parallel, Mr. Baka's mandate as President of the Supreme Court terminated on 1 January 2012, three and a half years before its expected date of expiry.[315] The mandate of the Vice-President of the Supreme Court – who was appointed by the President of the Republic upon the recommendation of the President of the Supreme Court in 2009 – was also ex lege terminated. Organisational and administrative changes in the judicial system served as official argumentation.

The former Vice-President initiated a Constitutional Court case, claiming that the termination of his position violated the rule of law, the prohibition on retrospective legislation and his right to a remedy. The Hungarian Constitutional Court with its decision[316] adopted with only one vote (eight to seven) majority dismissed the constitutional complaint. The Constitutional Court stated that "the premature termination of the claimant's term of office as Vice-President of the Supreme Court had not violated the Fundamental Law, since it was sufficiently justified by the full-scale reorganisation of the judicial system and the important changes in the tasks and competences of the President of the *Kúria*. It noted that the *Kúria's* tasks and competences had been broadened, in particular with regard to the supervision of the legality of municipal council regulations." According to those Constitutional Court judges who attached a dissenting opinion, infringement of the Rule of Law principle and violation of the right to remedies of the petitioner should have been established.

As no national level remedy was provided to Mr. Baka, he turned directly to the ECtHR. In the judgement[317] the premature termination, via ad hominem legislative measures of the applicant's term of office was considered to be a violation of the applicant's right of access to a court by the ECtHR, which right is guaranteed by Article 6 para. 1 of the European Convention on Human Rights because of the absence of judicial review.

In its judgment the Chamber also considered that the facts of the case and the sequence of events showed that the early termination of the applicant's mandate as President of the Supreme Court was not the result of restructuring of the supreme judicial authority, as the Government had contended, but a consequence of the views and criticisms Mr. Baka had publicly expressed in his professional capacity and

315 Point 14(2) of the Closing and miscellaneous provisions of the Fundamental Law: The mandate of the President of the Supreme Court and of the President and members of the National Council of Justice shall terminate upon the entry into force of the Fundamental Law.

316 Hungarian Constitutional Court (Alkotmánybíróság), 3076/2013. (III. 27.) AB decision.

317 ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016.

thus violated Article 10 ECHR. Hungary had not pursued any legitimate aim linked to the claimed judicial reform, nor had the measures been necessary in a democratic society. The Court reiterated that Mr. Baka not only had a right, but also a duty to speak out on matters concerning the administration of justice, in order to defend judicial independence and the rule of law.

He expressed his views on issues related to the legislative reforms affecting the judiciary, notably the Nullification Bill, the retirement age of judges, the amendments to the Code of Criminal Procedure, and the new Organisation and Administration of the Courts Bill, which are all questions of public interest, calling for a high degree of protection of the freedom of expression.

The premature termination therefore defeated, rather than served the independence of the judiciary. The Court warned that the premature termination of the applicant's mandate had a "chilling effect" in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary.

In 2016, the Strasbourg court also ruled in the case of Mr. Lajos Erményi, the former Vice-President of the Supreme Court, whose constitutional complaint was previously refused by the Constitutional Court of Hungary. The judgement[318] found, referring to its rulings in the Baka case, a violation of Article 8 ECHR[319] as the ad hominem legislation similar to that at issue in the Baka case, but remaining at a legislative rank, had also not pursued any legitimate aim linked to the so-called judicial reform. The Court concluded that the termination of the applicant's mandate as Vice-President of the Supreme Court did not meet the requirements of Article 8 para. 2 of the Convention therefore been a violation of Article 8 of the Convention.

Although there are some similarities between this case and the premature termination of the mandate of the Data Protection Commissioner which was found as a violation of the EU law this case was not an EU law conflict.[320]. However, it has important consequences for the independence of the judiciary – which also effects the EU legal system in the multi-level constitutional landscape. The case itself was formulated as a European human rights law conflict and was based on the premature termination of the mandate of the President of Hungarian Supreme Court in 2012. But the case has relevance for the EU project as well, where judicial independence and the irremovability of judges also occupies a central role.

318 ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 November 2016.

319 The ECtHR stated the following in the Erményi-judgment, paras 30-31.: "30. The notion of "private life" within the meaning of Article 8 of the Convention encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature. Article 8 thus protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world and does not exclude in principle activities of a professional or business nature because it is in the course of their working lives that the majority of people have a significant opportunity to develop relationships with the outside world."
31. In the present case, it was not in dispute between the parties that the termination of the applicant's mandate as Vice-President constituted an interference with his right to respect for his private life. The Court finds no reason to hold otherwise. It remains to be examined whether that interference was justified under Article 8 § 2."

320 CJEU, Case C-288/12, Commission v Hungary, 8 April 2014, ECLI:EU:C:2014:237.

In the words of Laurent Pech, the non-implementation of Strasbourg judgments regarding judicial independence such as the judgment of Baka v. Hungary could directly trigger an infringement proceeding in the EU, as "the sustained, long period of non-implementation by Hungarian authorities of Baka is enough evidence to show that Hungary is (deliberately) seeking to dissuade judges from speaking up to defend judicial independence and as such, is therefore failing to fulfil its (positive) obligation to protect judicial independence under Article 19(1) TEU."[321]

For the most recent developments related to the judgment of Baka v. Hungary, see Subchapter III.2.15. on the fake compliance with international recommendations.

Ad hominem laws that are tailored to certain individuals are in clear breach of the rule of law as it was also stressed by the ECtHR in the above-mentioned infamous Baka case. The legislative steps also go against the principle of non-regression principle as formulated by the CJEU in the Repubblika judgment and the decision on the joint case of Romanian Judges.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[322]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive,[323] judicial self-government and irremovability,[324] forced retirement,[325] and non-regression. [326]Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

321 Pech, L., The Concept of Chilling Effect. Its untapped potential to better protect democracy, the rule of law, and fundamental rights in the EU, Open Society Foundations, March 2021, p. 31.

322 See Article 6 TEU, Articles 52(3) and 53 CFR.

323 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

324 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

325 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

326 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

3.2.7. *Ad hominem* legislation to appoint a new President of the *Kúria* (formerly called the Supreme Court)

In October 2020, the Hungarian Parliament elected Mr. András Zs. Varga, a former Deputy Prosecutor General and Justice of the Constitutional Court of Hungary (between September 2014 and October 2020) as the new President of the *Kúria* for a nine-year-stint. Varga was nominated by the President of the Republic and was supported only by the governing parties, Fidesz-KDNP having a two-third majority in the legislature.

The NJC, the judicial self-governing body overwhelmingly rejected the nomination of Mr. Varga in a non-binding 13:1 vote[327] on account of his lack of any professional experience either as a judge or as a court executive in the ordinary court system. His candidacy was made possible through just again two ad hominem legislative changes in 2019. These tailor-made legislative acts raised concerns[328] about his independence from the political branches and the appearance of impartiality in the eyes of the public.

In order to be eligible for the post of the President of the *Kúria*, the government amended two laws in 2019 to pave the way for Mr. Varga to the top court:

(1) the requirement of five-year judicial experience was extended to experience gained as a justice or a senior adviser in the Constitutional Court or international tribunal[329], and

(2) justices of the Hungarian Constitutional Court, upon their request, can now be appointed to judges in the ordinary judiciary without participating in any ordinary application procedure.[330]

In a nutshell, these new rules were specifically designed to enable one specific member of the Constitutional Court with no ordinary judicial practice experience to become the new President of the *Kúria*, endowed with additional powers, regardless of a negative opinion from the NJC. Otherwise, Mr. Varga would not have qualified for being the President of the *Kúria* under the laws in force before his nomination, but the Parliament made it possible for him with these solutions.

327 Decision no. 120/2020 of 9 October 2020 of the National Judicial Council on the preliminary opinion on the candidate for the office of President of the Kúria (Hungarian Supreme Court), available at: https://orszagosbiroitanacs.hu/?mdocs-file=1519.

328 On the ad hominem laws which paved the way to the election of Zsolt András Varga as Supreme Court President, see Amnesty International, Status of the Hungarian judiciary: Legal changes have to guarantee the independence of the judiciary in Hungary, Amnesty International Hungary, 2021, available at: https://www.amnesty.org/en/wp-content/uploads/2021/05/EUR2736232021ENGLISH.pdf.

329 Act XXIV of 2019 on additional guarantees of the independence of administrative courts.

330 Act CXXVII of 2019 on the amendment of certain Acts in relation to the single-instance administrative procedures of district offices.
Mr. Varga was appointed as a judge 1 July, 2020.

These moves were heavily criticised by the Executive Board of the European Network of Councils for the Judiciary (ENCJ),[331] and by the 2020 Annual Role of Law Report of the European Commission. The Commission's 2020 Annual Rule of Law Report has emphasised the serious concerns about these changes: as justices of the Constitutional Court, elected by the Parliament, can assume a judicial position in the ordinary court system without any call for application, the legislative branch can exert unjustified influence over judicial appointments and over the composition of the judiciary, in particular that of the *Kúria*. This rule, therefore, poses risk to the external independence of the judiciary, all the more so in light of the selection procedure of Constitutional Court justices, which has been dominated by the governing majority since 2010, lacking any consensual element among the political parties.[332] One year later, the Commission evaluated this situation as follows:

"In Hungary, the direction of change continues to be towards lowering previously existing safeguards. The justice system has been subject to new developments, for example the nomination of the new President of the *Kúria*. This adds to existing concerns on judicial independence, which have been expressed also in the context of the Article 7(1) TEU procedure initiated by the European Parliament."[333]

Additionally, Mr. Varga is the Hungarian member of the Venice Commission where despite all the criticism, he was re-elected as a Vice-Chair of the Sub-Commission for Constitutional Justice in December 2021.[334]

As the election of Mr. Varga was determined by purely political considerations, and the President has very broad managerial powers within the *Kúria*, there is a clear risk that his term of office will undermine the institutional independence of the entire judiciary, and jeopardise the independence of individual judges in the top court since their judicial career is highly dependent on him.[335]

Ad hominem laws that are tailored to certain individuals are in clear breach of the rule of law as it was also stressed by the ECtHR in the above-mentioned infamous Baka case. The legislative steps also go against the principle of non-regression as formulated by the CJEU in the Repubblika judgment and the decision on the joint case of Romanian Judges.

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331 See ENCJ letter to the European Commission about rule of law concerns in Hungary dated 27 October 2020: "the ENCJ Board would like to point out that the most recent changes to the law that have made the appointment of the new President possible, have to be qualified as ad hominem legislation […] There is, in the view of the Board, an increasing risk of state capture of the entire judiciary in Hungary. The President of the Kuria has far reaching powers to control the functioning of the Kuria as he is in charge of the case allocation plan, composition of the chambers and the panels […] The recent appointment of the President of the Kuria, in the view of the Board, calls for immediate action from the European Commission to protect the Rule of Law and Judicial Independence in Hungary".
European Network of Councils for the Judiciary, Letter to the European Commission about rule of law concerns in Hungary, 27 October 2020, available at: https://www.encj.eu/node/577.

332 European Commission, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, pp. 5-6.

333 European Commission, 2021 Rule of Law Report, Country Chapter on the rule of law situation in Hungary, p. 8.

334 129th plenary session of the Venice Commission of the Council of Europe, 10-11 December 2021.

335 Kazai, V. Z., Kovács, Á., 'The Last Days of the Independent Supreme Court of Hungary?', VerfBlog, 13 October 2020, available at: https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[336]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by appointment and promotion,[337] judicial self-government,[338] and non-regression.[339] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.8. The system of case allocation – high risk of arbitrary assignment of cases

Case allocation is an aspect of the Hungarian judicial system that has been recurringly criticised by the Venice Commission.[340] The regime of case allocation is, under the law, based on the decision of the court presidents.[341] This is partly why the political capture of the nomination process (see above) was important for the government and why this is detrimental for judicial independence. Similarly, to the system of nominations, judicial self-governing bodies can only express their opinions but have no meaningful check on this power.[342] The statutory rules have been amended after findings of violations of rule of law requirements by the Constitutional Court,[343] the European Court of Human Rights,[344] and the Venice Commission. Yet, the practice still exists and criticism has most recently been raised regarding case allocation rules in the *Kúria*, the highest ordinary court in the country.[345]

Case allocation rules continue to be non-transparent and subject to constant changes. As an example, the case allocation rules of the *Kúria* saw 14 amendments

336 See Article 6 TEU, Articles 52(3) and 53 CFR.

337 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

338 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

339 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

340 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-e, 16-17 March 2012, 23–25, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e; 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, 12-13 October 2012, 12–15, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e; Venice Commission, 'Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020', CDL-AD(2021)036-e, 15-16 October 2021, 7–10, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e.

341 Art. 9-1, Act CLXI of 2011 on judicial organization and administration.

342 Art. 9-1, Act CLXI of 2011 on judicial organization and administration.

343 Hungarian Constitutional Court (Alkotmánybíróság), 36/2013. (XII.5.) AB decision.

344 ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016. According to the European Court of Human Rights while the Constitutional Court of Hungary found the case allocation rule to be unconstitutional, it did not remedy the violation in the case, leading to a violation of the European Convention on Human Rights.

345 Venice Commission, 'Opinion on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020', CDL-AD(2021)036-e, 15-16 October 2021, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e.

in 2020[346] and 13 in 2021. [347]The various factors undermine the logic of the rule of law requirement, i.e., that one can verify if one's case is considered by a court "established by law", and not arbitrarily selected to influence the outcome. As two Hungarian judges noted: "Neither the parties nor the judge can follow whether the case was allocated in accordance with the rules or if there was a justifiable or malicious deviation from it."[348] One of them, a judge at the *Kúria*, noted that the post-September 2020 case allocation rules at that court fail to comply with rule of law requirements.[349] An Amnesty International report based on interviews with judges stated that judges delivering critical decisions can become stigmatised and never get politically sensitive cases again. This is possible because the system of case allocation allows for decisions where sensitive cases fall "into the hands of the 'appropriate judge'."[350]

As an example for politically salient cases, the fate of the recent questions put to referendum by the government shows how direct political influence can appear in *Kúria* decisions. Mr. Hajas had been a high government officer (state secretary in 2021) in the Ministry of Justice for years and was appointed to the *Kúria* in June 2021. While he was not member of any of the judicial councils that could consider applications on the referendum initiatives under the rules for case allocation, he suddenly appeared on one of these bodies and could participate in the decision. This meant that Mr. Hajas, who was a prominent government official a couple of months before the judgment, a subordinate to the minister of justice, could judge the legality of a government initiative.[351] (The case came out in favour of the government.)

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[352]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive,[353] among others through secondments,[354] judicial self-government,[355] and non-regression.[356] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic

346 Amnesty International Hungary, Eötvös Károly Institute, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, K-Monitor, Mertek Media Monitor, Political Capital, Transparency International Hungary, Contributions of Hungarian NGOs to the European Commission's Rule of Law Report, March 2021, available at: https://helsinki.hu/wp-content/uploads/2021/03/HUN_NGO_contribution_EC_RoL_Report_2021.pdf.

347 See the list of archived case allocation rules (ügyelosztási rend): Kúria, Information of Public Interest, available at: https://kuria-kozadatok.birosag.hu/kozerdeku-adatok/tevekenyseg-re-mukodesre-vonatkozo-adatok/a-szerv-alaptevekenysege-feladat-es-hataskore

348 Vadász, V., Kovács, A. Gy., 'A game hacked by the dealer', VerfBlog, 10 November 2020, https://verfassungsblog.de/a-game-hacked-by-the-dealer/.

349 Kovács, A., 'Adalékok a Kúria első elnöke jogállamhoz való viszonyának megértéséhez', Fundamentum, Issue 4, 2020, available at: http://fundamentum.hu/sites/default/files/fundamentum-2020-4-02.pdf.

350 Amnesty International, Fearing the Unknown – How Rising Control Is Undermining Judicial Independence in Hungary, 2020, available at: https://www.amnesty.eu/wp-content/uploads/2020/04/FINAL_Fearing-the-Unknown_report_Amnesty-Hungary_E1.pdf.

351 Hungarian Helsinki Committee, 'Áprilisi népszavazás: matt 13 lépésben a jogállamnak', Helsinki Figyelő, 11 February 2022, available at: https://helsinkifigyelo.444.hu/2022/02/11/aprilisi-nepszavazas-matt-13-lepesben-a-jogallamnak

352 See Article 6 TEU, Articles 52(3) and 53 CFR.

353 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

354 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

355 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

356 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.9. Abuse of the concept of the 'apolitical' judge

The political capture of the judiciary rests also on the capture or distortion of the judicial ethos. The chilling effect within the judiciary can be achieved via many routes: harassment and open retaliation for exercising the right to free speech is one of the blunt methods which we already elaborated supra in Subchapters III.2.5. There are, however, more subtle, but still efficient ways to create the climate of stupor and self-censorship which rely for instance on the abuse of the concept of 'apolitical judge representing a rather cynic approach. The separation of powers along with the independence and impartiality of the judiciary are well-established axioms in a democratic rule of law state. The appointees of Fidesz (e.g., Ms. Handó or the current President of the *Kúria*), however, have turned these axioms to a façade, while applying them as a tool for pre-empting dissent about curbing judicial autonomies. We will explore the phenomenon via two examples: the Integrity Policy issued by the NOJ and the statements of Mr. Varga about the meaning of 'political'.

a. Integrity policy

The Integrity Policy of the Hungarian judiciary[357] was shaped by Ms. Handó who issued a regulation that prescribed how a judge may conduct any activities outside of their task of adjudication. In 2017, some parts of the Integrity Policy (IP) were deemed unconstitutional and removed by the Hungarian Constitutional Court[358] partly because of a provision which stated that "integrity" shall also mean the complying with the values and principles contained by the recommendations of the NOJ (without proper normative content). Other parts of the Integrity Policy, however, remained in force and have not been challenged. Watchdogs – based on a survey carried out in 2020 within the HU judiciary[359] – concluded that the remaining IP could still serve as a tool to silence judges who would want to speak up in defence of their judicial independence, since the provisions on judges' potential involvement in political activities are unclear[360] and open the way for arbitrary interpretation. From there, it is only one step to declare critics about institutional reforms (or academic remarks about the shortcomings of the case allocation system) as political and therefore an infringement of judicial integrity. Regarding the lingering legacy of Ms. Handó, the present NOJ President Mr. Senyei has not amended the Integrity Policy's above terms

357 Order no. 6/2016. (V.31.) of NOJ on intergrity regulation. Available in Hungarian at: https://birosag.hu/obh/szabalyzat/62016-v31-obh-utasitas-az-integritasi-szabalyzatrol.

358 Hungarian Constitutional Court (Alkotmánybíróság), IV/1259/2016. AB decision.

359 Amnesty International, Status of the Hungarian judiciary. AI Hungary, Budapest, 2021. Available at: https://www.amnesty.nl/content/uploads/2021/02/Status-of-the-Hungarian-judiciary_EN_FINAL.pdf?x50292.

360 Furthermore, the umbrella provision of Article 7 (2) of the IP which states that "other activities [...] endangering the judicial independence or impartiality of a judge" may also infringe integrity, which provision is open to interpretation of the NOJ President.

yet, although critics and recommendations were already addressing it.[361]

b. Double standards on the meaning of 'political'

In Hungary, the formalist model of adjudication has been prevailing for a long time, since the modern court system was brought about in the spirit of the so-called Prussian (Weberian) model in which the judge is a neutral official of the state.[362] Based on the findings of Bencze, this model is revolved around a judge who is a well-educated, competent, and responsible bureaucrat, a legal specialist whose primary duty is the unbiased and impersonal application of the law.[363] The ideology behind formalism is legalism which traditionally over-emphasises the value of legal certainty.[364] Even during the socialist times, judges were generally conceived of as technocrats and apolitical civil servants. Later, after the Wende (1989), the new constitutional setting provided guarantees for organizational independence, while the individual independence of judges remained limited to their freedom of decision-making.[365] This 'apolitical attitude' of a bureaucrat, however, gives narrow elbow-room for enforcing values and principles that also belong to the terrain of law and like Hilbink pointed it out, self-understanding of an 'apolitical judge' can be exploited by autocratic regimes as well.[366]

András Zs. Varga, a former Deputy Prosecutor General and member of the Constitutional Court who became president of the *Kúria* via ad hominem legislative amendments (see our assessment supra in part III.2.3. and III.2.6.) hardly misses an opportunity to remind the public how he perceives 'political'. In his public commentary about the CJEU's decision delivered in the case of A.K. et al. (19 November 2019), he highlighted that the judgement of CJEU is detrimental to the judicial independence per se.[367] In his views, judicial independence is neither a privilege nor without limits. He claimed the ruling of CJEU - initiated by the Polish judges - as dangerous while stating that one cannot consider it a violation of judicial independence when the legislator adopts a law which is opposed by the judiciary itself.[368]

In the commentary, the chief justice emphasised that judges are not allowed to conduct direct political activities (i.e. joining movements) and they have to remain independent not only from the other two branches of state power, but from other

361 See Amnesty International, Status of the Hungarian judiciary. AI Hungary, Budapest, 2021. Available at: https://www.amnesty.nl/content/uploads/2021/02/Status-of-the-Hungarian-judiciary_EN_FINAL.pdf?x50292, recommendation 8 on the base of the survey.

362 Bencze, M 'Judicial Populism and the Weberian Judge—The Strength of Judicial Resistance Against Governmental Influence in Hungary', German Law Journal, 22(7), October 2021, pp. 1282-1297.

363 Bencze, M., ibid.

364 Weber, M., (author), Roth G., Wittich, C., (eds.), Economy and Society. Berkeley: University of California Press, 1978, p. 811.

365 Ravasz, L., 'Bírói függetlenség és a tisztességes eljáráshoz való jog', Debreceni Jogi Műhely, Volume 12, Issue 3-4., 2015, available at: http://www.debrecenijogimuhely.hu/archivum/3_4_2015/biroi_fuggetlenseg_es_a_tisztesseges_eljarashoz_valo_jog/.

366 Based on L. Hilbink's research, dominant judicial self-understanding in Chile had been the seemingly "apolitical judge" a long time before the onset of the authoritarian regime, for example, being faithful only to the "text of the law" and not being sensitive to "rights" and "principles" behind the text, which was advantageous to the right-wing conservative politicians. See Hilbink, L. 'Agents of Anti-Politics: Courts in Pinochet's Chile' in: Ginsburg, T., Moustafa, T., (eds.) Rule By Law: The Politics of Courts in Authoritarian Regimes 1, Cambridge University Press, Cambridge, 2008, pp. 102-131.

367 Varga Zs. A., 'Védi vagy kiüresíti a bírói függetlenséget az EU Bírósága?', Mandiner.hu, 10 April 2020, available at: https://precedens.mandiner.hu/cikk/20200410_vedi_vagy_kiuresiti_a_biroi_fuggetlenseget_az_eu_birosaga.

368 Ibid.

states, international bodies and even from protecting judicial self-interest (sic!) as well.[369] These statements made one ponder whether the mouth of the law - in the eye of the former deputy prosecutor general - is allowed to voice concerns if the institutional guarantees of the independent judiciary are curbed by the legislator.

In the autumn of 2021, the European Parliamentary Committee on Civil Liberties, Justice and Home Affairs carried out a fact-finding mission which aimed at following up on the Hungarian rule of law deficiencies established in the EP resolution from 2018.[370] The LIBE delegation visited the *Kúria*, which considered the mission as a courtesy call and based on the press release of the *Kúria*,[371] it expressed its shock about LIBE posing a row of 'political questions' at the highest judicial forum in Hungary. Without entering into details about the renounced 'political questions', the press release highlighted that judges and courts are not allowed to enter into official dialogue with a political body, therefore the delegation of the LIBE Committee was considered as a group of curious guests (including university students) expressing interest in the history and operation of the *Kúria*.[372]

In the light of this seemingly strict approach, it was hardly conceivable why the president of the *Kúria* supported the letter of the incumbent president of the Constitutional Court who asked for 'the cooperation of the President of HU (Mr. Áder), the Prime Minster (Mr. Orbán) and the Speaker of the Parliament (Mr. Kövér) to ensure that the power branches responsible for the undisturbed operation of the Constitutional Court would provide for long term guarantees – via adequate and efficient measures - for the operability of the organ which is the cornerstone of the democratic Rechtsstaat'.[373] The head of the Constitutional Court asked for the help of prominent Fidesz officials on the base of a presumed – but not substantiated future coup d'état and was joined in this quest by the chief justice of Hungary.[374] In view of the foregoing, 'political' actions of the judiciary and 'political' actions of the chief justice might be governed and measured by different standards: while regular judges should refrain from voicing concerns about their independence (see also the decision of the *Kúria* about the preliminary request of judge Vasvári in Subchapter III.2.10.), separation of powers has modest importance when support of Fidesz dignitaries is requested.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[375]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second

369 Ibid.

370 European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (Sargentini-report)

371 Supreme Court (Kúria), 'A Kúria vezetői fogadták az Európai Parlament LIBE Bizottsága delegációját', Press release, 30 September 2021. Available at: https://kuria-birosag.hu/hu/sajto/kuria-vezetoi-fogadtak-az-europai-parlament-libe-bizottsaga-delegaciojat.

372 Ibid.

373 Open letter to the President, the Prime Minister and the Speaker of the Parliament, 14 December 2021. Available at: https://www.alkotmanybirosag.hu/uploads/2021/12/nyilt_lev-el_st.pdf.

374 Supreme Court (Kúria) 'A Kúria elnöke támogatásáról biztosította az Alkotmánybíróság elnökét', Press release, 15 December 2021. Available at: https://kuria-birosag.hu/hu/sajto/kuria-elnoke-tamogatasarol-biztositotta-az-alkotmanybirosag-elnoket.

375 See Article 6 TEU, Articles 52(3) and 53 CFR.

subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by disciplinary proceedings,[376] reduction of remuneration,[377] promotion,[378] judicial self-government and irremovability,[379] forced retirement,[380] and non-regression.[381] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.2.10. The threat of disciplinary proceedings, fit-to-serve tests, promotions

Case of Judge Csaba Vasvári (IS-case)[382]

The IS judgment delivered by the CJEU has been discussed in detail in Subchapter II.8. The CJEU there rejected going into the merits in regards to the referring judge, Judge Vasvári's, questions related to the general health status of the Hungarian judiciary. But the CJEU importantly held that declaring a preliminary reference illegal and subjecting a judge to a disciplinary procedure as a consequence amounts to violations of EU law. The CJEU also underlined that such measures have a chilling effect on any national judge willing to submit a reference in the future.[383]

But the current situation still presents threats to judicial independence. The CJEU decision did not because it could not nullify the *Kúria's* decision holding that preliminary references filed with the CJEU could be potentially illegal. Hungarian courts are therefore still obliged to follow the *Kúria's* ruling on illegality – at least by the *Kúria's* account. Albeit the AG and the CJEU both instructed[384] Hungarian courts to disregard any such illegality decision by the *Kúria*, this is not so straightforwardly simple to comply with in an illiberal regime. The illegality decision will most likely have some severe effects on self-censorship of Hungarian judges, with the reality that even thematising the issue of judicial independence would result in harsh retaliation.

Compliance with the Court judgment is particularly unlikely considering the reaction

376 CJEU, Joined Cases C-558/18 and C-563/18, Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, 26 March 2020, ECLI:EU:C:2020:234; CJEU, Case C-791/19, Commission v Poland (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596; CJEU, Case C-204/21, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593; CJEU, Case C-204/21, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878; CJEU, Case C564/19, IS, 23 November 2021, ECLI:EU:C:2021:949.

377 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

378 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

379 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

380 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

381 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

382 CJEU, Case C-564/19, IS (Illégalité de l'ordonnance de renvoi), 23 November 2021, ECLI:EU:C:2021:949.

383 Cf. Pech, L., The Concept of Chilling Effect: Its Untapped Potential to Better Protect Democracy, the Rule of Law, and Fundamental Rights in the EU, Open Society European Policy Institute, 2021, available at: https://www.opensocietyfoundations.org/publications/the-concept-of-chilling-effect.

384 See especially para. 80 of the IS judgment.

of the *Kúria* to the IS judgment delivered in IS. In a press release[385] issued on the same date the IS judgment was delivered, the *Kúria* emphasised – in violation of EU law – that its initial declaration of illegality is still good law until the *Kúria* decides otherwise. The *Kúria* also foresaw that it would study the IS judgment in light of the Hungarian Constitutional Court decision 2/2019. (III. 5.)[386] – a ruling, which "created a legal basis for not complying with EU legislation (…) by using, actually abusing, the concept of constitutional identity."[387] The assessment has not yet been made, and as of the cut-off date of the present paper, the illegality decision, as the *Kúria's* sees it, is "final, and its interpretation of the law is binding."[388]

Case of Judge Gabriella Szabó[389]

In August 2018, Judge Gabriella Szabó requested a preliminary ruling from the European Court of Justice (ECJ) in order to check the compliance of the 2018 amendments to the Fundamental Law of Hungary and the Law on the Right to Asylum, with Directive 2013/32/EU

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The case of a Syrian migrant was related to his asylum application which earlier had been rejected, referring to a new rule which said that if an asylum-seeker arrives in Hungary via a safe transit country, such as neighbouring Serbia, their application is inadmissible. The Hungarian Helsinki Committee, challenged the Immigration and Asylum Office's decision in court on behalf of the migrant person.[390]

Upon Judge Szabó's request, in Case C-564/18,[391] the ECJ had ruled that EU law was breached and the new Hungarian rules were contrary to EU legislation.

The same judicial leader, Acting President of the Budapest-Capital Regional Court *(Fővárosi Törvényszék)*, Péter Tatár-Kis, who initiated a disciplinary action as a consequence of a preliminary reference against Judge Csaba Vasvári,[392] declared Judge Szabó to be unsuitable for a judicial office, and her appointment as a judge was therefore not finalised. In Hungary, the first judge appointment will be made for a definite period of three years (first judicial appointment). After this kind of a

385 Kúria, 'A Kúria közleménye az Európai Unió Bírósága C-564/19. számú ügyben hozott ítélete vonatkozásában', Press Release, 23 November 2021, available at: https://kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaga-c-56419-szamu-ugyben-hozott-itelete-vonatkozasaban.

386 Hungarian Constitutional Court (Alkotmánybíróság), 2/2019 (III. 5.) AB decision.

387 Kazai, V. Z., Kovács, Á., 'The Last Days of the Independent Supreme Court of Hungary?', VerfBlog, 13 October 2020, available at: https://verfassungsblog.de/the-last-days-of-the-independent-supreme-court-of-hungary/. See also Halmai, G., 'Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law', Review of Central and East European law, Volume 43, Issue 1, 2018, pp. 23-42.

388 Kúria, 'A Kúria közleménye az Európai Unió Bírósága C-564/19. számú ügyben hozott ítélete vonatkozásában', Press Release, 23 November 2021, available at: https://kuria-birosag.hu/hu/sajto/kuria-kozlemenye-az-europai-unio-birosaga-c-56419-szamu-ugyben-hozott-itelete-vonatkozasaban.

389 CJEU, Case C-564/18 Judgment of the Court (First Chamber), LH v Bevándorlási és Menekültügyi Hivatal (Tompa), 19 March 2020, ECLI:EU:C:2020:218.

390 Zalan, E., 'Hungarian judge claims she was pushed out for political reasons', EUObserver, 6 July 2021, available at: https://euobserver.com/democracy/152349.

391 CJEU, Case C-564/18 Judgment of the Court (First Chamber), LH v Bevándorlási és Menekültügyi Hivatal (Tompa), 19 March 2020, ECLI:EU:C:2020:218.

392 Judge Vasvári, a criminal judge at the Central District Court of Pest (Pesti Központi Kerületi Bíróság) and a member of the National Judicial Council referred three sets of questions to the CJEU in July 2019. Two of the questions concerned judicial independence: one raised issues about the appointment of court presidents who have wide powers over judges of their courts and the second asked whether the level of salary given to judges is high enough to maintain independence. See the details: Szabó, G. D., 'A Hungarian Judge Seeks Protection from the CJEU – Part I', VerfBlog, 28 July 2019, available at: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/; Vadász V., 'A Hungarian Judge Seeks Protection from the CJEU – Part II', VerfBlog, 7 August 2019, available at: https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-ii/ and Bárd, P., 'Luxemburg as the Last Resort', VerfBlog, 23 September 2019, available at: https://verfassungsblog.de/luxemburg-as-the-last-resort/ (Finally, the President withdrew his action, which he justified by the protection of the reputation of the judiciary. - See in Hungarian: (Jogászvilág), 'Visszavonják a dr. Vasvári Csaba elleni fegyelmi eljárást', Jogászvilág, 22 November 2019, available at: https://jogaszvilag.hu/napi/visszavonjak-a-dr-vasvari-csaba-elleni-fegyelmi-eljarast/.

probationary period if the judge was found suitable for appointment for an indefinite term, the appointment recommendation shall be presented to the President of the Republic, without the invitation of applications, 30 days prior to the last day of the third year.

This practice was criticised by the Venice Commission in 2012, when it expressed that "The Venice Commission has always been critical of probationary periods, stating that 'ordinary judges should be appointed permanently until retirement. Probationary periods for judges are problematic from the point of view of their independence', since they might feel under pressure to decide cases in a particular way."[393]

The Commission also made it clear that "The problem is not so much that the evaluation during the time as court secretary and the probationary period would objectively exert pressure on the person concerned. However, the court secretary or probationary judge will be in a precarious situation for many years and - wishing to please superior judges who evaluate his or her performance - may behave in a different manner from a judge who has permanent tenure ("pre-emptive obedience")."[394]

Judge Szabó also complained about receiving harassment and discrimination from her colleagues. She said that: "Ordering for a preliminary reference, I was immediately subject of harassments and discrimination in Hungary, also within my court".[395]

Gabriella Szabó turned to the European Court of Human Rights for redress.[396]

Despite these critics the Hungarian government failed to follow the recommendations, and now it takes its toll. All in all, the risks for any Hungarian judge may be too high to follow the IS ruling and use Article 267 TFEU to its full potential.

These cases harassing judges read together with the *Kúria's* defiance against the IS judgment lead to the conclusion that the effects of ad hoc retaliations against Hungarian judges have systemic implications as they are highly likely to have a general chilling effect resulting in self-censorship of the vast majority of the judges. However strongly the CJEU formulates its stance on judicial independence, for CJEU judgments to work, Member States and their apex courts must adhere to some very minimum elements of the rule of law and EU law, such as respect for the CJEU's judgments. The *Kúria's* defiance against CJEU judgments in conjunction with some other forms of retaliations will inevitably lead to Hungarian judges thinking twice before asking any sensitive questions from the CJEU, however important they are from the viewpoint of application of EU law. Even if no direct sanctions are applied for example in the form of disciplinary proceedings, a declaration of illegality and other

393 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-e, 16-17 March 2012, p. 19. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e.

394 Ibid., p. 19.

395 Zalan, ibid.

396 https://twitter.com/hhc_helsinki/status/1569329466832306177

condemnations may still affect the promotion of judges.[397]

The preliminary reference mechanism is key for the European legal system, since it ensures uniform interpretation and application of EU law.[398] Any interference with preliminary ruling procedures is in violation of EU law, as the CJEU made clear in a series of cases referenced in Subchapter II.8.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[399]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by non-interference by the executive,[400]disciplinary proceedings,[401] appointment and promotion,[402] judicial self-government and irremovability,[403] forced retirement,[404] and non-regression.[405] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

3.2.11. Climate of fear

General climate in the courthouses

The current administration of the judiciary does not exclude the possibility of political interference in the courts, mainly because of the excessive powers of the President of the National Office for the Judiciary elected by the Parliament.

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397 See the order adopted by the President of the Office for the Judiciary that regulates the details of the assessment of the work of judges. 8/2015 (XII.12.) OBH utasítás a bíró munkájának értékelési rendjéről és a vizsgálat részletes szempontjairól szóló szabályzatról [Order No. 8/2015 of 12 December 2015 of the President of the Office for the Judiciary on the rules of the order of evaluation of the work of judges and of the details of assessment], available at: https://birosag.hu/sites/default/files/2022-02/8-2015-_-xii-_12-_obh_utasitas_20.pdf.

398 European Court of Justice, 'Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Compatibility of the draft agreement with the EU and FEU Treaties. Case Opinion 2/13', ECLI:EU:C:2014:2454, para. 176; CJEU, Case C-284/16, Slowakische Republik v Achmea BV, 6 March 2018, ECLI:EU:C:2018:158, para. 37.

399 See Article 6 TEU, Articles 52(3) and 53 CFR.

400 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

401 CJEU, Joined Cases C-558/18 and C-563/18, Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, 26 March 2020, ECLI:EU:C:2020:234; CJEU, Case C-791/19, Commission v Poland (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596; CJEU, Case C-204/21, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593; CJEU, Case C-204/21, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878; CJEU, Case C564/19, IS, 23 November 2021, ECLI:EU:C:2021:949.

402 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

403 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

404 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

405 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

This structural weakness has led to serious conflicts between the NCJ and the President of the NOJ. In 2019, Parliament appointed a new person, Barna Senyei to this post, but the situation has hardly improved. The President has broad powers regarding the appointment of court leaders, for example he can annul any call for application without the consent of elected judicial bodies. Invalidating applications is a continuous practice of the President of the NOJ, the NJC expressed its concern on it in May 2021:

> *"In the case of court leadership applications where the President of the NOJ did not accept any of the candidates (invalidated applications), the NJC raises concerns about the lack of unified criteria.*
>
> • *The system of criteria as stipulated by the NOJ Regulation on Court Administration was not adequately applied.*
>
> • *The NJC finds it worrisome that some of [the] justifications of the invalidating resolutions referred to facts which the candidate had no opportunity to comment on or challenge during the procedure and were based on data that was accessed [by the NOJ President] without the prior approval of the candidate.*
>
> • *The NJC also notes that the President of the NOJ failed to respect deadlines in some of the procedures.*
>
> • *There were no other objections regarding the appointment practice of court leaders and no negative comments on the appointment of judges."*[406]

The court leaders in question traditionally have very broad powers over the substantive issues relating to the status of judges: promotion, aptitude tests, working conditions, remuneration, etc. The Pegasus wiretap scandal that broke in January 2022, offers an illustration. On 18 July 2021, the use of the Pegasus spyware was uncovered by a consortium of international investigative journalists. They found that Hungarian citizens – including investigative journalists, opposition politicians and the president of the Hungarian Bar Association – had been wiretapped.[407] While the investigation did not show conclusively who had deployed the spyware, from the documents gathered it was highly likely that the Hungarian government was behind the spying operation, and indeed later a Fidesz MP accidentally admitted that the presumption was right.[408]

In the Pegasus scandal the President of the Municipal Court of Budapest himself

406 Summary on the session of the National Judicial Council held via Skype videoconference on 5th May 2021 between 09:00 and 16:30. Available at: https://orszagosbiroitanacs.hu/2021-05-05/.

407 The first article on the use of Pegasus-spyware was published by the investigative portal Direkt36. Panyi, Sz., Pethő A., 'Lelepleződött egy durva izraeli kémfegyver, az Orbán-kormány kritikusait és magyar újságírókat is célba vettek vele', Direkt36, 18 July 2021, available at: https://telex.hu/direkt36/2021/07/18/leleplezodott-egy-durva-izraeli-kemfegyver-az-orban-kormany-kritikusait-es-magyar-ujsagirokat-is-celba-vettek-vele.

408 Spike, J., 'Hungary's government won't confirm or deny using Pegasus spyware on journalists', insighthungary.444.hu, 22 July 2021, available at: https://insighthungary.444.hu/2021/07/22/hungarys-government-wont-confirm-or-deny-using-pegasus-spyware-on-journalists.

has clearly indicated that he can “make life difficult for subordinate judges."[409] The appointment of this President (Mr. Péter Tatár-Kis) was not supported by the NJC but was nevertheless appointed by the Head of the NOJ. What is more, in this corruption case, according to the official documents leaked from the investigating body, the President of the NOJ mediated between this court president and the person who tried to influence judicial decisions. At the time of closing the manuscript there are no consequences.

Based on interviews with judges, Amnesty International Hungary’s research shows that a climate of fear in the courts is a threat to judicial independence.

"Unfortunately, there has been increasing pressure on the independent judiciary in recent times. It is unfortunate when politicians talk about prison business, or when they envisage listing judges, or when they call some judges blood judges" – said the spokesman of the NCJ, Mr. Csaba Vasvári. In his view, it is also problematic that judges are under pressure from within the system, from the administrative leadership. There have been plenty of examples of this in recent times. These include the resignation of several members of the NCJ, and the recent shocking case of the President of the Chamber of Executors, who has since been arrested. He tried to force a bailiff out of his practice and asked the President of the Court to "discipline" a judge.[410]

As both the EAJ[411] and ENCJ[412] noted the far-reaching harassment of the members of the Council, either by Ms. Handó herself or by the court leaders appointed by her and advised to correct the power imbalance between the Council and Office, the constitutional amendments were not adopted until this very day and the de facto legacy of the former President, Ms. Handó, as of today is untouched. The arrival of the new President Mr. Senyei only petrified the existing structures and practices. György Barna Senyei,[413] the incumbent President of the NOJ has also used the option of annulling application procedures on numerous occasions. For example, in 2020, this happened in 20 cases, including application processes in which the plenary session of the judges or the judicial college supported the applicant.[414] Mr. Senyei is also reluctant to cooperate effectively with the judicial self-governing body,[415] therefore his first years as President of NOJ have demonstrated that the problems of court

409 Cseresnyés, P., ‘444: Key Figure in Völner Case, György Schadl Tried to Get Judge Fired at Highest Level of the Judiciary’, Hungary Today, 24 January 2022, available at: https://hungarytoday.hu/444-key-figure-in-volner-corruption-case-gyorgy-schadl-judge-fired-judiciary-obh/.

410 Komócsin, S., ‘Beismerés a Völner-Schadl ügyben’, napi.hu, 28 January 2022, available at: https://www.napi.hu/magyar-gazdasag/volner-schadl-korrupcios-botrany-tatar-kis-peter.744914.html.

411 European Association of Judges, ‘Report on the fact-finding mission of the EAJ to Hungary’, EAJ, 2019, available at: https://www.njb.nl/umbraco/uploads/2019/5/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf pp. 7-8, 10-11.

412 European Networks of Councils for the Judiciary (ENCJ), ‘Independence, Accountability and Quality of the Judiciary’, ENCJ, 7 June 2019, available at: https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/2019-06/ENCJ%20IAQ%20report%202018-2019%20adopted%207%20June%202019%20final.pdf.

413 N.b. Senyei’s name was also mentioned in the transcript of the criminal investigation about one of the biggest corruption scandal affecting the Hungarian justice system – especially the chamber of bailiffs.

414 Eötvös Károly Public Policy Institute, Judicial Independence and the Possibility of Judicial Resistance in Hungary, 2021. Available at: http://ekint.org/lib/documents/1612860445-EKINT_Judicial_Independence_and_the_Possibility_of_Judicial_Resistance_in_Hungary.pdf.

415 For instance, Senyei failed to act upon the motion of the NJC and initiate legislative amendment to the highly contested law which allows for justices of the Constitutional Court to request judicial appointment without participating in any application procedure. Recently, the NJC issued a warning and called on the President of the NJO to give access to those documents and information that help the council to perform its task of supervision over the President. Furthermore, the President still does not provide the possibility for the NJC to use the central website of the judiciary in order to share the contents about the activity of the council with the judicial organization and the public. The website of the NJC is still financed by the members of the council instead of being financed from the budget allocated to the NJC.

administration are structural and systemic in nature and the current political regime is never mistaken in appointing reliable staff.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[416]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by interference by the executive,[417] disciplinary proceedings,[418] reduction of remuneration,[419] appointment and promotion, [420]judicial self-government and irremovability,[421] forced retirement,[422] and non-regression.[423] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.2.12. Limited precedent system, uniformity complaint, appeal in the in terests of the law – more than a constitutional reform

Parallel to the increased control over central judicial positions, the legislature significantly strengthened the role of the *Kúria* over the judicial work of judges.[424] The resulting "limited precedent system" mandates judges to follow published "legal uniformity" decisions.[425] Such decisions are rendered by bodies composed of *Kúria* judges; the president of the *Kúria* having decisive influence over their composition.[426] Taking recent developments together, including the highly politicised process of the election of the *Kúria* president – appointed against the decision of the NJC –, the packing of the *Kúria*, and the role of deviation from such published decisions in judges' evaluation and promotion, this can have a great disciplining effect on judicial

416 See Article 6 TEU, Articles 52(3) and 53 CFR.

417 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

418 CJEU, Joined Cases C-558/18 and C-563/18, Miasto Łowicz v Skarb Pan´stwa – Wojewoda Łódzki et al, 26 March 2020, ECLI:EU:C:2020:234; CJEU, Case C-791/19, Commission v Poland (Régime disciplinaire des juges), 15 July 2021, ECLI:EU:C:2021:596; CJEU, Case C-204/21, Order of the Vice-President of the Court, 14 July 2021, ECLI:EU:C:2021:593; CJEU, Case C-204/21, Order of the Vice-President of the Court, 27 October 2021, ECLI:EU:C:2021:878; CJEU, Case C564/19, IS, 23 November 2021, ECLI:EU:C:2021:949.

419 CJEU, Case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas (Portuguese Judges), 27 February 2018, ECLI:EU:C:2018:117.

420 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

421 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

422 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others v Sąd Najwyższy (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982 (also discussing interference through disciplinary proceedings); CJEU, Case C-192/18, Commission v Poland (Independence of ordinary courts), 5 November 2019, ECLI:EU:C:2019:924; CJEU, Case C-619/18, Commission v Poland (Independence of the Supreme Court), 24 June 2019, ECLI:EU:C:2019:531; CJEU, Case C-286/12, Commission v Hungary, 6 November 2012, ECLI:EU:C:2012:687.

423 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

424 Wide-ranging amendments were adopted in 2019 and 2020: Arts. 65–74 of Act CXXVII of 2019; Arts. 39–43 of Act CLXV of 2020.

425 Arts. 25–44, Act CLXI of 2011 on judicial organization and administration.

426 Art. 41/A, Act CLXI of 2011 on judicial organization and administration.

decision-making.

A similar uniformity logic is behind the power of the Chief Prosecutor (one of the first captured institutions) to challenge criminal judgments through "legality challenge" ("appeal in the interests of the law").[427] This allows the Chief Prosecutor and the *Kúria* to clamp down on particular decisions, like it happened in in the IS case. There, the Chief Prosecutor challenged a court decision to initiate preliminary proceedings and the *Kúria*, agreeing with the prosecution, invalidated the judicial initiative. The ECJ subsequently found the practice in violation of the Treaties.[428] (For the details see Chapters II.8 and III.2.10)

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[429]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive,[430] appointment and promotion,[431] and non-regression.[432] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.2.13. Constitutional court judges loyal to the government moving to the *Kúria*

Questions related to the structure, composition, competences or even the existence of a constitutional court in a Member State at least at first sight are not EU law questions, consequently the related issues and potential concerns cannot be discussed either under Article 258 TFEU, the Conditionality Regulation, or any other EU procedure. However, the changes related to the constitutional and institutional capacity of the Constitutional Court of Hungary will help to understand and evaluate Rule of Law backsliding in a broader sense, thus they belong to the evaluation of the wider Rule of Law landscape in the country and contribute to the assessment of whether there is an existence of a clear risk of a serious breach of Article 2 TEU values. Additionally, the evolving influence and interrelations of the CC on the judicial branch can be relevant features while evaluating the independence of the ordinary judiciary in Hungary as well.

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427 Arts. 666–669 of Act XC of 2017 on the Code of Criminal Procedure.

428 CJEU, Case C-564/19, IS, 23 November 2021, ECLI:EU:C:2021:949, para. 82.

429 See Article 6 TEU, Articles 52(3) and 53 CFR.

430 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

431 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

432 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

Since 2010, the two-third majority of the governing Fidesz-KDNP coalition in the Parliament provides a comfortable position and total control over the process of the nomination and election of CC judges. [433]Therefore, the composition of the Constitutional Court has changed to a great extent. The acting justices take a modest approach to controlling the legislator, and sometimes postpone or bypass decisions in sensitive questions (e.g., in the cases of the Central European University, or the refugee quota discussed infra under the candidate topics for infringement procedures).

The Act CXXVII of 2019 amended the Act CLI of 2011 on the Constitutional Court (in force from 1 January 2012) which entitled the members of the CC to be appointed as a judge of the *Kúria* without any application procedure. CC judges are elected by the Parliament and are under the control of the ruling majority from the nomination to the election, while ordinary judges of the courts of law are appointed upon application controlled by judicial expert bodies. As expressed above, provisions of the tailor-made legislation for one specific person amended the eligibility criteria for the President of the *Kúria* as well. For the counting of the five years of judicial experience, also the years spent in the CC as a CC judge or senior adviser must be considered.

Although the Constitutional Court is structurally not part of the judiciary, its role is inevitably related to the judicial independence too as:

(1) the CC reviews the constitutionality of the final judgments of the ordinary courts, and

(2) the CC judges can be appointed to the *Kúria* after their term at the CC expires.

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[434]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by appointment,[435] judicial self-government,[436] and non-regression.[437] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

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433 See for example: Liberties, 'Hungary's Government Has Taken Control of the Constitutional Court', 2015, available at: https://www.liberties.eu/en/stories/one-party-constitutional-judges/3613; Eötvös Károly Public Policy Institute, 'CC judges nominated and elected unilaterally by the government majority', 2016, available at: http://ekint.org/lib/documents/1490874872-DRI_EKINT_indicators_2016.pdf.

434 See Article 6 TEU, Articles 52(3) and 53 CFR.

435 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

436 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

437 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

3.2.14. Training and recruitment

Relying on the powers over judicial positions (determining the number of positions at courts, decision on calls for position, proposing appointments to the President of the Republic, designating the court where judges serve etc.),[438] the president of the Judicial Office could greatly shape staffing at the judiciary. This power became even more important with the unlawful forced retirement and the opening of new positions.

Some of the subsequent amendments risk blurring the lines between courts and public administration, undermining institutional guarantees of independent decision-making. The secondment rules mean that the president of the Judicial Office can designate secondment positions to administrative bodies like the State Audit Office, the Public Prosecutor's Office, the Office of the Constitutional Court, the Office of the Human Rights Commissioner, and other state and local government offices. A further problem is that this possibility comes without adequate guarantees that secondment will not interfere with the judicial decisions that can include the judicial control of decisions by these same bodies.[439] Outside the powers of the president of the Judicial Office but also part of how political nominees can end up in the judiciary is the new statutory provision under which judges from the Constitutional Court of Hungary, filled with politically vetted persons, can move to judiciary, without the need or possibility to check if they fulfil the statutory requirements for becoming a judge.[440]

While the creation of a separate system of administrative courts was dropped under pressure from the European Union, an omnibus bill from the end of 2021 created a judicial body dealing with administrative cases both on first and second instance, to be filled by judges appointed by the president of the Judicial Office.[441]

The president of the Judicial Office has wide powers over the training of judges, including the appointment of the head of the Hungarian Justice Academy, decision and control over central training and its execution, the training obligation of judges and clerks.[442] Decisions regarding access to judicial training have not remained untouched by the centralisation and expectations of loyalty. An Amnesty International report based on interviews with judges notes: "Some judges mentioned that they can be removed from the trainee judges' education group, or they can be put into a hat from where people are not selected to go to courses or conferences. One judge said that after he/she strongly supported a 'renitent' judge's application at a judges' plenary meeting in 2019, his/her applications for training started to fail" at the Judicial Office.[443]

438 Art. 76-4 and 5, Act CLXI of 2011 on judicial organization and administration.

439 Amnesty International, Nothing ever disappears, it only changes – The Hungarian Government switches to higher gear to curb judicial independence, AI Hungary, 2010, available at: https://www.amnesty.hu/wp-content/uploads/2020/10/ANALYSIS.pdf.

440 Art. 3-4a, Act CLXI of 2011 on the legal status and remuneration of judges.

441 Art. 232/U, Act CLXI of 2011 on the legal status and remuneration of judges.

442 Art. 76-7, Act CLXI of 2011 on the Organisation and Administration of the Courts.

443 Amnesty International, Fearing the Unknown – How Rising Control Is Undermining Judicial Independence in Hungary, AI Hungary, 2020, available at: https://www.amnesty.eu/wp-content/uploads/2020/04/FINAL_Fearing-the-Unknown_report_Amnesty-Hungary_E1.pdf.

(Showing political compliance, following the government's decision, as part of the political campaign against critical NGOs that included government criticism of judicial trainings by these entities,[444] the trainings held by such NGOs were also terminated, including sensitivity trainings.[445])

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[446]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive through secondments,[447] appointment,[448] and non-regression.[449] Considering the systemic nature of the violations, they could be addressed as part of a systemic infringement procedure.

3.2.15. Fake compliance with international recommendations[450]

a. Deficiencies regarding the implementation of judgments by the European Court of Human Rights

The Hungarian state always pays the compensation established in the Strasbourg judgments, but it often remains in arrears – even for years – with the so-called general measures. The implementation of the judgments is monitored by the Committee of Ministers, the main decision-making body of the EC. There are currently 53 such 'pending' cases where the implementation of the judgments has been found unsatisfactory over the last ten years. This means that 81% of cases have been found to be unsatisfactory in the implementation of judgments.

444 Amnesty International, ibid.

445 Amnesty International, ibid.

446 See Article 6 TEU, Articles 52(3) and 53 CFR.

447 CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931.

448 CJEU, Case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court – Actions), 2 March 2021, ECLI:EU:C:2021:153; CJEU, Case C-487/19, W. Ż. (Supreme Court Chamber of Extraordinary Control and Public Affairs), 6 October 2021, ECLI:EU:C:2021:798; ECtHR, Miracle Europe Kft. v. Hungary, Application no. 57774/13, 12 January 2016; ECtHR, Camelia Bogdan v. Romania, Application no. 36889/18, 20 October 2020; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, Application no. 26374/181, 1 December 2020; ECtHR, Reczkowicz v. Poland, Application no. 43447/19, 22 July 2021; ECtHR, Dolińska-Ficek and Ozimek v. Poland, Application nos. 49868/19 and 57511/19, 8 November 2021; ECtHR, Advance Pharma sp. z o.o. v. Poland, Application no. 1469/20, 3 February 2022.

449 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

450 In general see: Bárd, P., Bárd, K., 'The European Convention on Human Rights and the Hungarian Legal System', in. Cozzi, A., et al. Comparative study on the implementation of the ECHR at the national level, Council of Europe, 2016, pp. 147-166.; Hungarian Helsinki Committee, Non-Execution of Domestic and International Court Judgments in Hungary, Hungarian Helsinki Committee, Budapest, 2021.

Strategies used by the Hungarian state related to the fake-compliance with the judgements ruled by the European Court of Human Rights are as follows:

(1) Disregard of the ECtHR case-law: clear violation of national law[451]

(2) Cherry-picking from the case-law and abusive references to the Strasbourg jurisprudence

(3) References to the ECHR and the related case-law by domestic courts: good practices[452]

As it was presented before in the case of Baka v. Hungary, the ECtHR found that the early termination of the Mr. Baka's mandate as the President of the Supreme Court through ad hominem legislation was a vengeance because of his views and criticisms publicly expressed in his professional capacity about certain legislative steps threatening the independence of the judiciary. As such, according to the ECHR this violated not only his right of access to a court (Article 6) and freedom of expression (Article 10), but also exerted a chilling effect also on other judges. As until today, the Hungarian authorities have not taken any measures to implement the judgment, but furthermore deepened the chilling effect on the freedom of expression of judges, and have continued to undermine the independence of the judiciary in general.[453]

Consequently, the Committee of Ministers of the Council of Europe, in its capacity of supervising the execution of the judgments of the European Court of Human Rights, issued the latest decision regarding the Baka v. Hungary case in September 2021. In its decision the Committee of Ministers:

- expressed its concerns about the absence of safeguards in connection with ad hominem constitutional-level measures terminating a judicial mandate, and Parliament's competence, established in 2012 following the facts of the Baka case, to impeach the President of the *Kúria* without judicial review.

- urged the authorities to submit information on any measures adopted or planned with a view to guaranteeing that judicial mandates will not be terminated by ad hominem constitutional-level measures devoid of effective and adequate safeguards against abuse.

- regrettably noted that the legislative amendments which are supposed to ensure that a decision by Parliament to impeach the President of the *Kúria* will be subject to effective oversight by an independent judicial body, so far, remained without any results and firmly urged them to introduce the required legislative amendment in

451 ECtHR, Vajnai v. Hungary, Application no. 33629/06, 8 July 2008.

452 ECtHR, Bukta and others v. Hungary, Application no. 25691/04, 17 October 2007; ECtHR, Patyi and others v. Hungary, Application no. 5529/05, 7 October 2008; ECtHR, Vajnai v. Hungary, Application no. 33629/06, 8 July 2008, ECtHR, Fratanoló v. Hungary, Application no. 29459/10, 3 November 2011.

453 Hungarian Helsinki Committee, ibid., p. 47.

close cooperation with the Secretariat; and finally

- recalled the Hungarian authorities "undertaking to evaluate the domestic legislation on the status of judges and the administration of courts, and firmly invited them to present the conclusions of their evaluation, including of the guarantees and safeguards protecting judges from undue interferences, to enable a full assessment to be made by the Committee as to whether the concerns regarding the 'chilling effect' on the freedom of expression of judges caused by the violations in these cases have been dispelled."[454]

b. Deficiencies regarding the implementation of judgments by the Court of Justice of the European Union

The enforcement of judgments and respect for decisions is an essential condition of judicial independence. Beside the open political critics by state functionaries, the non-compliance with the judgments of European courts is discouraging message to Hungarian judges. A vivid example is the political declaration of the Speaker of the Parliament, eminent leader of Fidesz, which harshly questions the meaning of the division of powers.[455]

The controversial justice reform had not escaped international attention, since various monitoring and opinion-giving bodies articulated concerns about the excessive powers of the chief executive of judicial administration[456] and the lack of truly autonomous judicial self-governance.[457] The Orbán-regime, however used its infamous peacock-dance in half-way implementing or dodging those recommendations.

As early as 2012, the Venice Commission inter alia flagged in its report on the introduced reform[458] that the possibility for the NOJ President to declare the appointment procedure of judges unsuccessful without providing appropriate reasoning should be removed (obligatory reasoning for annulments should be incorporated) and that the strengthening of the NJC via by broadening its co-decision-making powers is strongly recommended.[459] The VC maintained these findings also in its recent opinion from 2021 and recalled that "the powers of the [NJO] remain very extensive

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454 Council of Europe, Committee of Ministers, 1411th meeting, 14-16 September 2021, (DH) H46-16 Baka v. Hungary (Application no. 20261/12), Supervision of the execution of the European Court's judgments, CM/Del/Dec(2021)1411/H46-16, 16 September 2021, available at: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3c123.

455 "The system of checks and balances, I don't know what you learned about it, but it is dumb. Forget about it. It has nothing to do with either the rule of law or with democracy. The problem is that some people take seriously the need to rein in a government that is the product of democratic expression. And they think that democracy is democracy if you keep sticking a stick in the spokes." said László Kövér in front of students of National University of Public Service.

456 See supra in fn. 234.

457 Ibid., actors emphasised the need to enhance the role of the collective body, the National Judicial Council (NJC), as an oversight instance, because the president of the NOJ, who is elected by the Hungarian Parliament, cannot be considered an organ of judicial self-government. See also: European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded [further: EP resolution on Sargentini-report] paras (12)-(13).

458 Venice Commission, 'Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary' 12-13 October 2012, CDL-AD(2012)020, paras. 93(6),(8),(14). Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e.

459 Hungarian Helsinki Committee, A Constitutional Crisis in the Hungarian Judiciary, 2019, available at: https://helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf p. 5. highlighting the most important recommendations of Venice Commission Opinion no. 683/2012.

to be wielded by a single person and their effective supervision remains difficult".[460] Regarding the central judicial administration, the HU peacock-dance until this very day includes fake-compliance arguments, over-emphasising the significance of the steps that were indeed taken to enhance the out of balance dual system, however, these did not ensure proper control over the head of the Office or endow the organ of judicial self-governance (NJC) with matching competences of the president of the NOJ.[461] The governmental response[462] to the Sargentini-report,[463] which also touched upon the unresolved competency debate between the Council and the Office, showed that the government – instead of addressing the issues - rather referred to the figures of the EC Justice Scoreboard published on 27 May 2018[464] which in its opinion showed that the Hungarian justice system performs above or well above the EU average,[465] than address the structural concerns. The Fidesz government also stated that 'as far as the independence of the justice system is concerned, the ranking [of the Scoreboard] does not illustrate significant discrepancies in the Hungarian system, especially regarding the guarantees of structural independence which are well-established under Hungarian law'. Then the government quoted some more stats and the details of the justice admin regulation which entered into force after the first opinion of the Venice Commission.

More interestingly, the government used the findings of GRECO in a confusing Münchhausen-style. GRECO established in 2015 that central administration of the judiciary, as it has been developed in Hungary, is a rather unique construction as it vests in one single person (the President of NJO), far-going powers to manage the judiciary.[466] It acknowledged that the status of the president of the NOJ had been altered and its powers became more restricted in order to ensure a better balance between the president and the Council.[467] GRECO, however, still stressed the need for further moves in this direction, in order to minimise potential risks of discretionary decisions; for example, in relation to the appointment and promotion of judges[468] and recalled that the Council is still rather dependent on the President of the Office in many ways.[469] Regarding these competency-arguments, the Fidesz government - in its response to the Sargentini-report - recalled GRECO to counter GRECO, i.e. it

460 Venice Commission, 'Opinion no. 1050/2021 on the amendments to the Act on the organisation and administration of the Courts and the Act on the legal status and remuneration of judges adopted by the Hungarian parliament in December 2020', CDL-AD(2021)036, 15-16 October 2021, para 22. Available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)036-e

461 Hungarian Helsinki Committee, 'Addendum to communication from the Hungarian Helsinki Committee concerning the execution of the judgment of the European Court of Human Rights in the case of Baka v. Hungary (Application no. 20261/12)', Letter to the 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, 24 February 2022. Available at: https://helsinki.hu/en/wp-content/uploads/sites/2/2022/02/HHC_Addendum_Rule_9_Baka_20220224.pdf.

462 Government of Hungary, Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018. PM' Office, 12 November 2018. Available at: https://2015-2019.kormany.hu/download/3/61/81000/The%20official%20legal%20arguments%20of%20the%20Hungarian%20government%20in%20the%20Article%207%20procedure%20in%20the%20European%20Council%20refuting%20the%20accusations%20of%20the%20Sargentini-report.pdf.

463 The report led to European Parliament resolution of 12 September 2018 quoted supra note.

464 European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM(2018) 364 final, Publications Office of the European Union, Luxembourg, 2018. Available at: https://ec.europa.eu/info/sites/default/files/justice_score-board_2018_en.pdf.

465 Ibid., pp. 20-21.

466 Group of States Against Corruption (GRECO), 4th Evaluation Round. Corruption prevention in respect of members of parliament, judges and prosecutors. Evaluation Report – HU, 22 July 2015. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c6b9e para 95.

467 Ibid., para 3.

468 Ibid., para 3.

469 Ibid., para 95.

only referred to the steps which have been taken by HU (and acknowledged by the 4th Evaluation Report).[470] The Fidesz government simply omitted addressing the maintained concerns of GRECO which were repeated in the compliance and interim compliance reports of GRECO in vain,[471] while also remaining silent about the abusive appointment practice of the president of NOJ (excavated by the NJC in 2018)[472] and focused on showcasing full compliance based on solely partial acknowledgement.

The sequence of the aforementioned arguments is painfully long. The Orbán regime had presented notorious non-compliance with international recommendations about judicial self-representation and self-governance, while the unresolved (constitutional) issues not only add up, they also provide a foothold for the next layer of curbing further autonomies within the judiciary.

The Lex NGO and the lex CEU judgments are two typical examples of the failure of European court decisions to bring about substantive change without the national authority's cooperation.

The CJEU ruled in June 2020 that the Hungarian Lex NGO contradicts the Charter of Fundamental Rights. According to the ruling, the legislation also violates the right to the free movement of capital, the right to the protection of personal data and the principle of freedom of association, and thus "undermines the role of civil society as independent actors in democratic societies, undermining their right to freedom of association, creating a climate of mistrust and limiting the privacy of donors."

In February 2021, the European Commission set a deadline of two months to amend the unlawful NGO Act. In April 2021, the Parliament adopted the new NGO Act, which stipulates that the State Audit Office of Hungary (SAO) shall audit NGOs with a balance sheet total of at least HUF 20 million and which have the capacity to influence public life. The State Audit Office drew up its own audit plan, to give it the ability to decide arbitrarily which NGOs to audit and which to spare. Moreover, the law does not specify what the SAO's audits should cover. The title of the bill hints at its political origin: 'on the transparency of civil society organisations engaged in activities likely to influence public life'.

As a result of this plan, NGOs continue to face threats and actual sanctions that the CJEU find to be in violation of EU law. In a case reported upon in independent media, a Pécs-based foundation ('Emberség Erejével Alapítvány', 'Cum Virtute Humanitatis' ['With the Force of Humanity Foundation']) was denied a €72,000 grant because they refused to declare their 'foreign funded' status. The Tempus Public Foundation, which launched the call for proposals, later added the requirement to declare foreign funding

470 Information Note to the General Affairs Council of the European Union by the Hungarian Government on the Resolution on Hungary adopted by the European Parliament on 12th of September 2018. Updated by PM' Office 12 November 2018. pp. 21-22.

471 See GRECO, 4th evaluation round - compliance report HU, 19-23 June 2017, paras 42-44. GRECO, 4th evaluation round - interim compliance report HU, 3-7 December 2018, para. 18. GRECO, 4th evaluation round second interim compliance report HU, 21-25 September 2020, para 22. The compliance reports confirmed the status of recommendation viii which remained not implemented at all.

472 1st and 2nd inquiry reports of NJC, see supra.

to the application criteria - which the CJEU has so far declared to be in breach of EU law.

Lex CEU created a strange rule that was ultimately only applied to Budapest-based Central European University, making the accreditation of its programmes conditional on a governmental decision that never materialised. The CJEU found the law to be in violation of EU law.[473]

Yet, the CEU had to move educational activities to Vienna,[474] the Constitutional Court suspended the procedure with a less than convincing reasoning that is widely seen as a move to win time,[475] and waited until a new law was adopted, finding the complaint to have then become moot. This is against the backdrop that the said law still contains the clause that blocked the CEU's accreditation, on the requirement to have an international agreement adopted (i.e., subject to government discretion).[476]

Undermining the spirit of compliance is also well captured in a clause submitted by Fidesz MPs as part of the Fourth Amendment to the Fundamental Law, struck out from the final version, that foresaw a 'name and shame' type measure: a tax specifically issued and named after judicial decisions creating financial obligations, including the decisions of the Court of Justice of the European Union.[477] Another example is the *Kúria* legal uniformity council decision that declared that ECtHR judgments are only binding on the named parties, and as a result it is not binding on the interpretation of the *Kúria*, more specifically concluding that it is impossible, by definition, that a clause not yet judged by the ECtHR is violating the Convention.[478]

Probably the most straightforward ongoing violation is the response of the Hungarian government to the series of CJEU rulings in the area of asylum law.[479] When the CJEU found various violations related to the functioning of the transit zones,[480] that resulted in an extreme constraint on access to asylum, the closing-down of these entry points altogether, and further restrictions on access to asylum. This means that despite the long list of cases declaring various – often fundamental – aspects of the Hungarian dismantling of the asylum regime to be in violation of EU law, asylum has remained largely inaccessible (with the caveat that recent changes make a partial exception

473 CJEU, Case C-66/18, Commission v Hungary (Enseignement supérieur), 6 October 2020, ECLI:EU:C:2020:792.

474 CEU, 'CEU Forced Out of Budapest: To Launch U.S. Degree Programs in Vienna in September 2019', 3 December 2018, available at: https://www.ceu.edu/article/2018-12-03/ceu-forced-out-budapest-launch-us-degree-programs-vienna-september-2019.

475 The Court suspended its procedure despite the fact that the arguments raised in the complaints are predominantly about violations of domestic law. Hungarian Constitutional Court (Alkotmánybíróság), 3199/2018. (VI. 21.) AB order.

476 See the current Article 76-1 of the Act CCIV of 2011 on National Higher Education as amended by Article 1 of the Act LIV of 2021.

477 "As long as national debt is over half of the gross domestic product, if the Constitutional Court, the Court of Justice of the European Union, or other court or legal body issues a decision prescribing financial obligation to be fulfilled by the state that is not sufficiently covered by the amount dedicated in the law on the central budget, a contribution exclusively and specifically created and named after this obligation and sufficient for covering public needs shall be imposed." Parliament of Hungary, Bill T/9929 on the Fourth Amendment to the Fundamental Law of Hungary, 8 February 2013, Article 17-2, available at: https://www.parlament.hu/irom39/09929/09929.pdf.

478 3/2015. számú BJE határozat Part III.8 and III.10, available at: https://kuria-birosag.hu/hu/joghat/32015-szamu-bje-hatarozat (in Hungarian). For a critique, see Bárd, K., Bárd, P., 'Összhang vagy kollízió? Hol tart Magyarország 25 évvel az EJEE-hez való csatlakozás után a strasbourgi elvárásoknak való megfelelésben?', Állam- és Jogtudomány, Volume 58, Issue 4, 2017, p. 28.

479 See: CJEU, Case C-406/18, PG v Bevándorlási és Menekültügyi Hivatal, 19 March 2020, ECLI:EU:C:2020:216; CJEU, Case C-564/18, LH v Bevándorlási és Menekültügyi Hivatal, 19 March 2020, ECLI:EU:C:2020:218; CJEU, Case C-556/17 (Grand Chamber), Alekszij Torubarov v Bevándorlási és Menekültügyi Hivatal, 29 July 2019, ECLI:EU:C:2019:626; CJEU, Cases C 924/19 PPU and C 925/19 PPU (Grand Chamber), FMS, FNZ (C-924/19 PPU), SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság, 14 May 2020, ECLI:EU:C:2020:367; CJEU, Case C-808/18 (Grand Chamber), Commission v Hungary, 17 December 2020, ECLI:EU:C:2020:1029.

480 CJEU, Case C-808/18 (Grand Chamber), Commission v Hungary, 17 December 2020, ECLI:EU:C:2020:1029.

regarding the war on Ukraine). The resulting situation triggered FRONTEX to suspend joint operations in Hungary.[481]

The developments presented above constitute a violation of standards established by European (CJEU and ECtHR[482]) case law, enforceable in an infringement procedure, with special regard to the principle of judicial independence (see second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union) including interference by the executive,[483] judicial self-government,[484] and non-regression.[485] Considering the systemic nature of the violations, we suggest tackling them in the frame of a systemic infringement procedure, but as a second best solution, given the gravity of EU law violation, they could also form the basis of an ordinary infringement procedure.

481 'By the Decision of the Executive Director of the Agency, Frontex-coordinated joint operations implemented in Hungary have been suspended as of 27 January 2021.' Letter of Matthias Oel, Director, Directorate-General for Migration and Home Affairs, Directorate B: Schengen, Borders, Interoperability and Innovation, European Commission, Written question E-001120/2021–Suspension of Frontex operations in Hungary, 9 August 2021, available at:
https://www.europarl.europa.eu/RegData/questions/reponses_qe/2021/001120/P9_RE(2021)001120(ANN01)_XL.pdf.

482 See Article 6 TEU, Articles 52(3) and 53 CFR.

483 CJEU, Joined Cases, C-585/18, C-624/18 and C-625/18, A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court), 19 November 2019, ECLI:EU:C:2019:982, CJEU, Joined Cases C-748/19 to C-754/19, Criminal proceedings against WB and Others, 16 November 2021, ECLI:EU:C:2021:931; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022,

484 ECtHR, Oleksandr Volkov v. Ukraine, Application no. 21722/11, 9 January 2013; ECtHR, Baka v. Hungary, Application no. 20261/12, 23 June 2016; ECtHR, Erményi v. Hungary, Application no. 22254/14, 22 February 2017; ECtHR, Paluda v. Slovakia, Application no. 33392/12, 23 May 2017; ECtHR, Denisov v. Ukraine, Application no. 76639/11, 25 September 2018; ECtHR, Broda and Bojara v. Poland, Application nos. 26691/18 and 27367/18, 29 June 2021; ECtHR, Grzęda v. Poland, Application no. 43572/18, 15 March 2022.

485 CJEU, Case C-896/19, Repubblika v. Il-Prim Ministru, 20 April 2021, ECLI:EU:C:2021:311.

IV. ILLUSTRATIONS OF THE INTERCONNECTEDNESS OF JUDICIAL CAPTURE WITH OTHER VALUE DEFICIENCIES

4.1. Academic freedom

A number of steps taken by the Hungarian leadership have led to undermining academic freedom contrary to the Charter of Fundamental Rights and its Articles 13 and 14, which guarantee the freedom of arts and sciences as well as the right to education. In one case, the Grand Chamber of the Court of Justice of the European Union found that Hungary violated Articles 13, 14(3) and 16 of the Charter of Fundamental Rights by adopting restrictive measures[486] that led to the ousting of a private academic institution, Central European University.[487] The Court of Justice relied, among others, on the definition of academic freedom in Recommendation 1762 (2006) of the Parliamentary Assembly of the Council of Europe ('Academic freedom and university autonomy', 30 June 2006), Recommendation concerning the status of higher-education teaching personnel (11 November 1997) of the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO). The judgment makes it clear that institutional and organizational autonomy is an essential condition for academic freedom.[488] Similar commitments[489] have been made by virtually all international bodies dealing with academia, see, e.g., Article 15(b) on academic freedom of the UN Social Pact, the UNESCO Global Convention

486 See, above all, Act CXXVII of 2017 modifying Act CCIV of 2011 on National Higher Education and Act XXV of 2017 on modifying Act CCIV of 2011 on National Higher Education.

487 CJEU, Case C-66/18, Commission v Hungary (Enseignement supérieur), 6 October 2020, ECLI:EU:C:2020:792. For an overview of the Hungarian legal background, see: Bárd, P., 'The rule of law and academic freedom or the lack of it in Hungary', European Political Science, 19/1, 2020, pp. 87–96.

488 See esp. para. 227 of the judgment in CJEU, Case C-66/18, Commission v Hungary (Enseignement supérieur). See also an academic call for the adoption of EU-level definition of academic freedom: Karran, T., 'Academic freedom in Europe: time for a Magna Charta?', Higher Education Policy, Volume 22, 2009, pp. 163–189.

489 In addition to intergovernmental documents, international associations have also adopted statements emphasizing the importance of commitment in this area. See, e.g., All European Academies (ALLEA), the European University Association (EUA) and Science Europe, Academic freedom and institutional autonomy: Commitments must be followed by action, April 2019, available at: https://eua.eu/downloads/content/academic%20freedom%20statement%20april%202019.pdf; or the report of the League of European Research Universities: Vrielink, J., Lemmens, P., Parmentier, S., The LERU Working Group on Human Rights, Academic Freedom as a Fundamental Right, League of European Research Universities Advice Paper No. 6, December 2010, available at: https://www.leru.org/files/Academic-Freedom-as-a-Fundamental-Right-Full-paper.pdf.

on the Recognition of Qualifications concerning Higher Education of 25 November 2019, the UNESCO Recommendation on Science and Scientific Researchers of 13 November 2017, the OECD Recommendation of the Council on International Co-operation in Science and Technology of 30 June 2021. In the European setting, a strong confirmation came from the ministers in Annex I (on Academic Freedom) of the Rome Ministerial Communiqué 2020.[490]

Concerns such as those raised in the CEU judgment are applicable in the Hungarian academic sphere generally. A series of measures have secured direct political control over most public universities throughout the country. This includes direct ministerial control,[491] the system of government-appointed chancellors with wide-ranging powers[492] and putting most public universities under the control of bodies filled with political appointees.[493] In a widely publicised case, the leadership of the leading national institution of theatre and film arts (SZFE) was overhauled, installing a leadership with strong connections to the government.[494]

The association FreeSZFE was created to continue education in the original setting, receiving support from European universities outside Hungary, which included awarding diplomas to students caught up in the changes and not wanting to pursue their studies under the new leadership. The European Parliament awarded the European Citizen's Prize in 2021 to this program (titled "Emergency Exit")[495]. The largest and leading network of research institutions were removed from under the auspices of the Hungarian Academy of Sciences and moved under the control of a newly established body, strengthening government influence.[496] The independent system of research funding was brought under ministerial control back in 2014,[497] leading to one publicised case of the minister of innovation and technology directly overruling the decision of the expert jury.[498]

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490 European Higher Education Area, Annex I to the Rome Ministerial Communiqué: Statement on Academic Freedom, available at: http://ehea.info/Upload/Rome_Ministerial_Communique_Annex_I.pdf.

491 According to Chapter II of Act CXXXII of 2011 on the National University of Public Service and the higher education in the fields of public administration, law enforcement and military sciences, one minister has full control over questions ranging from the adoption of the budget to the application procedure of the rector. In other widely publicized cases, the minister of education overrode the university decision regarding the new rector. MTI, 'Az autonómia helyreállítását kérik a rektorok', Nyelv és Tudomány, 14 May 2013, available at: https://www.nyest.hu/hirek/az-autonomia-helyreallitasat-kerik-a-rektorok.

492 Kováts, G., 'Recent Developments in the Autonomy and Governance of Higher Education Institutions in Hungary: the Introduction of the "Chancellor System"', Central European Higher Education Cooperation Conference Proceedings, Corvinus University of Budapest Digital Press, Budapest, 2015, pp. 26–39, available at: http://unipub.lib.uni-corvinus.hu/2212/1/Kovats_CEHEC_2015.pdf.

493 Drinóczi, T., 'Loyalty, Opportunism and Fear – The forced privatisation of Hungarian universities', VerfBlog, 5 February 2021, available at: https://verfassungsblog.de/loyalty-opportunism-and-fear/.

494 Kazai, V. Z., 'Aux armes, comédiens!: The freedom of the arts and sciences under siege', VerfBlog, 7 September 2020, available at: https://verfassungsblog.de/aux-armes-comediens/.

495 Európai Parlament Magyarországi Kapcsolattartó Irodája, 'A Freeszfe Egyesület Emergency Exit programja kapta idén az Európai Polgár díjat Magyarországon', 13 July 2021, available at: https://www.europarl.europa.eu/hungary/hu/aktualis/2021-hirek/2021-julius/a-freeszfe-egyesulet-emergency-exit-program-kapta-iden-az-europai-polgar-dijat-magyarorszagon.HTML.

496 Nature Editorial, 'Worrying changes in Hungary', 26 June 2018, available at: https://www.nature.com/articles/d41586-018-05526-x. See also the series of statements from the ALLEA. European Federation of Academies of Sciences and Humanities, 'ALLEA reinforces its calls to protect the institutional autonomy and academic freedom of the Hungarian Academy of Sciences', 15 February 2019, available at: https://allea.org/wp-content/uploads/2019/02/ALLEA_HungaryStatement15022019b.pdf; European Federation of Academies of Sciences and Humanities, Open letter on the 'Proposed amendment of the Law on the Hungarian Academy of Sciences and the Law on the 2019 state budget of Hungary', 22 June 2018, available at: https://allea.org/wp-content/uploads/2018/06/Letter_Minister_Palkovics_ALLEA_20180622.pdf; European Federation of Academies of Sciences and Humanities, 'ALLEA's reaction to the Parliament's bill concerning the Hungarian Academy of Sciences', 7 July 2019, available at: https://allea.org/alleas-reaction-to-the-parliaments-bill-concerning-the-hungarian-academy-of-sciences/. See also: European University Association, 'Hungary: EUA condemns law tightening control on scientific research bodies', 5 July 2019, available at: https://eua.eu/news/358:hungary-eua-condemns-law-tightening-control-on-scientific-research-bodies.html.

497 Váradi, A., Kertész, J., 'Research agency will lose autonomy', Nature, 516.7531, 2014, pp. 329–329, available at: https://www.nature.com/articles/516329c.

498 See, e.g., the protest letters responding to the ministerial overreach: Letter from the President of the Hungarian Academy of Sciences to Minister László Palkovics, 2 September 2020, available at: https://www.klubradio.hu/data/articles/113/1138/article-113847/Palkovics_Freund.pdf; Resolution of the Department of Mathematical Sciences of the Hungarian Academy of Sciences ("Az MTA Matematikai Tudományok Osztályának állásfoglalása az OTKA pályázatok elbírálásába történt beavatkozásról"), 17 September 2020, available at: https://mta.hu/iii-osztaly/az-mta-matematikai-tudomanyok-osztalyanak-allasfoglalasa-az-otka-palyazatok-elbiralasaba-tortent-beavatkozasrol-110835. "Nyilatkozat" [Declaration by Hungarian ERC grantees and other leading researchers], available at: https://drive.google.com/file/d/1PYdhQFNQdctjP0f2zT4gIloMK0H5evR8/view.

Steps targeting autonomous structures have included not only formal measures like the ban on gender studies,[499] or education suspended under a measure targeting migration-related activities,[500] but also smear campaigns and a general trend of rewarding loyalty and punishing critical voices.[501] (It is in this context that we should understand, e.g., the decision of the University of Debrecen to award an honorary doctoral degree to Russian premier Vladimir Putin.[502])

The above measures have a clear impact on research in Hungary as well as on European academic cooperation, the system of mutual recognitions and European academic and research funding. As a concrete example of the types of dangers this presents, the European Association for Quality Assurance in Higher Education expressed concerns about the independence and funding of the Hungarian Accreditation Committee and once denied renewing its membership.[503] Getting rid of institutional checks on government interference and intimidation practices, leading to a climate of fear that not only undermine academic freedom but in many cases question institutions can still be considered academic: where institutions and researchers lose the autonomy that allows independent research, a key condition of academic work disappears.

The series of Hungarian measures were criticised by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, mentioning Hungary in the company of countries like China, Turkey or Uganda.[504] The measures establishing tight political control have led to a capture where, according to the Academic Freedom Index, Hungary is the only EU Member State with a ranking lower than "A Status", sitting two full tiers lower, receiving a "C Status".[505]

4.2. Media freedom

The interconnectedness of judicial independence with other values, most notably fundamental rights and democracy will be shown by two illustrative examples, where the courts on the one hand entered into freedom of expression restricting interpretations, such as when a journalist formulated government criticism, and on the other, rubber-stamped clearly defamatory statements, which were in line with rights-infringing and homophobic government policies and rhetoric.

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499 European University Association, 'EUA condemns Hungarian government plan to ban gender studies', 24 August 2018, available at: https://eua.eu/news/130:eua-condemns-hungarian-government-plan-to-ban-gender-studies.html.

500 This included CEU's Open Learning Initiative targeting refugees and asylum-seekers in Hungary: "In Hungary, anti-migration legislation in 2018 resulted in CEU leadership choosing to close its refugee education program and a refugee-related research projects." Central European University, OLIve – History, https://olive.ceu.edu/history.

501 For an overview with individual stories illustrating the atmosphere of fear and self-censorship, see: Körtvélyesi, Zs., 'Fear and (Self-)Censorship in Academia', VerfBlog, 16 September 2020, available at: https://verfassungsblog.de/fear-and-self-censorship-in-academia/.

502 University of Debrecen, Press Release, 2017, available at: https://edu.unideb.hu/news.php?id=385.

503 The membership was later reinstated after a report based on international scrutiny.

504 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, United Nations, A/75/261, 28 July 2020, available at: https://www.undocs.org/pdf?symbol=en/A/75/261

505 P. 9 (Figure 1) and p. 24 (Table 2), https://gppi.net/media/KinzelbachEtAl_2021_Free_Universities_AFi-2020_upd.pdf. The index has been developed by the Global Public Policy Institute (GPPI), the Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU), the Scholars at Risk Network, and the V-Dem Institute. For the underlying methodology, see: Spannagel, J., Kinzelbach, K., Saliba, I., The Academic Freedom Index and Other New Indicators Relating to Academic Space: An Introduction, Users Working Paper Series 2020:26, The Varieties of Democracy Institute, March 2020, available at: http://www.v-dem.net/media/publications/users_working_paper_26.pdf.

4.2.1. The Tóta W. / hvg.hu case[506]

The recent decision of the Hungarian *Kúria*[507] could create a dangerous precedent with the broad and nonsensical interpretation of the provision "violating the dignity of the Hungarian nation" enshrined in the Fundamental Law and the Civil Code (discussed in detail infra) and could be widely used against critics of the government.

The dispute concerns a short opinion piece written by columnist Árpád Tóta W. titled "Hungarians don't steal, they go on adventures", first published in the online edition of the Hungarian weekly HVG back in 2018.[508]

The author first described Hungary in the early 2010s, where all procedures and institutions aimed at limiting government power and preventing corruption have failed. Among others, he mentioned the emblematic case where the prosecutor's office halted the criminal procedure against PM Orbán's son-in-law and his company, in a corruption case that OLAF had reported. Tóta W. saw the European Union as the external defender of the rule of law, and contended that the EU would be the only entity able to contain the decline of constitutional democracy in Hungary. The journalist urged EU institutions to step up much more forcefully against autocratising states. He made references to the use of EU money for purposes that are in violation of EU values, he blamed the slouch European procedures which play into the hands of authoritarians, the EPP's struggle to get rid of Fidesz, the soft nature of OLAF findings, and in general regretted the failure to use dissuasive measures by EU institutions against backsliding governments.

Then, the journalist went on to compare the current state with the Hungary 1,100 years ago, when Hungarian armies invaded Europe. And here came the contested parallel: the Hungarian invasions of Europe were not stopped by a Hungarian ruler, suggested Tóta W., but by Western Europe. He stated that when the Hungarians were defeated in the Battle of Lechfeld in 955, who finally put a halt to the violent crimes committed by "stinky Hungarian migrants" *(„büdös magyar migránsok")* and "Hungarian bandits" *(„magyar banditák")*. According to the plaintiffs, two Hungarian citizens – and their legal representative, a former MP of the right-wing radical Jobbik party –, the author went too far with the two expressions in quotation marks. They filed a lawsuit against HVG for having published a piece violating the "dignity of the Hungarian nation".

The first instance court found a violation of the Hungarian Civil Code, however, the

506 In connection with the Case of Tóta W. (hvg), see Bárd, P., 'Tóta W. Árpád és a HVG esete a szólásszabadsággal', Fundamentum, Vol. 25, No. 4., 2021, pp. 41-50., available at: http://fundamentum.hu/sites/default/files/fundamentum-2021-4-03.pdf (in Hungarian); 'The Tóta W. / HVG controversy: The Hungarian Supreme Court's judgment limiting freedom of expression', RECONNECT Blog, 6 April 2021, available at: https://reconnect-europe.eu/blog/the-tota-w-hvg-controversy-the-hungarian-supreme-courts-judgment-limiting-freedom-of-expression/; 'A Nation (Un)Dignified. Árpád Tóta W., Medieval Migrants, the Hungarian Supreme Court, and Freedom of Expression', VerfBlog, 6 April 2021, available at: https://verfassungsblog.de/a-nation-undignified/ (in English).

507 Hungarian Supreme Court (Kúria), Pfv.IV.20.199/2020/7., 24 March 2021, available at: https://drive.google.com/file/d/1djd3H3c-4I7xFc637EhcpOUV2VeFdVE7/view?fbclid=IwAR1Tsraf-ShqOnb_dpvG2cakE873wbEk-Q0vgEB_mFWXyJBId_HWC3duhGpY.

508 Tóta W., Á., 'Magyar ember nem lop, csak kalandozik' [Hungarians don't steal, they go on adventures], hvg online, 8 November 2018, available at: https://hvg.hu/itthon/20181108_Bunuldozes_hianyaban.

second instance court reversed the judgment, and finally the *Kúria* as the court of last instance agreed with the first instance court determining the media outlet's responsibility for publishing the article at dispute. The legal basis for the case is partially constitutionally embedded, partially written into the Civil Code. The heavily criticised Fourth Amendment to the Fundamental Law[509] inserted the provision Article IX (5), in force as of 1 April 2013 into the Fundamental Law saying that "[t]he right to freedom of expression may not be exercised with the aim of violating the dignity of the Hungarian nation...." The Civil Code of 2013 includes a corresponding provision in Article 2:54 (5): "Any member of a community shall be entitled to enforce his or her personality rights in the event of any false and malicious statement made in public at large for being part of the Hungarian nation ..." The two legal provisions were criticised for their potentially chilling effect and for giving extra protection to powerful societal groups. In accordance with these controversial provisions and contrary to the European consensus on freedom of expression, the court did not protect the freedom of expression.

Main concerns of the last instance decision of the *Kúria* are:

- the core elements of the article were related to corruption and the discontinuation of criminal proceedings against government allies, oligarchs and relatives of prominent political figures suspected to be in breach of the law. Consequently, the *Kúria* should have assessed whether the current government's criticism violated the dignity of the Hungarian nation, which could not be the case since the criticism was directed at the government, which cannot be equalled with the Hungarian nation.

- not only is government-criticism not equal to criticism of a whole nation, criticism of Hungarian troops and their impunity 1,100 years ago is not equal to criticism of all Hungarians back then, either.

- the *Kúria* in its judgement sensed it correctly that the word "migrant" had a pejorative connotation in Hungarian language, however, it failed to sufficiently explore the government responsibility behind the changing of this word from a neutral term practically into a swearword.

- exploring the government responsibility into turning the word migrant into a swearword should have made the *Kúria* acknowledge that the use of the word intended to show the thwarting nature of the anti-migrant government policy (once Hungarians were seen as hostile/smelly/uncivilised migrants by the rest of Europe, whereas the current Hungarian government despises of today's migrants) and thus amounted to government criticism.

- the *Kúria* at some point indeed stated that the term had to be interpreted in the context of political criticism, and held that the word "migrant" on its own would have

509 See for example, Venice Commission, 'Opinion on the Fourth Amendment to the Funamnetal Law of Hungary', Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013), available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2013)012-e.

fallen under the scope of protection of free speech, but it also stated that together with the adjective "stinky" and the use of the noun "bandits" it went beyond the scope of protected speech. Although the Kúria noticed the political context of the speech while analysing the word "migrant", it lost its own line of argumentation when it came to an assessment of the words "stinky" and "bandits".

- as of the judgement of the *Kúria*, freedom of expression is not unduly limited, since only two words needed to be deleted. Needless to say, this is a misunderstanding of journalistic work.

The Kúria obliged the defendant to remove the hurtful words from the publication, publish an apology, and awarded the plaintiffs 400.000 HUF (approximately 1.100 EUR) for a violation of their personality rights.

As the defendant's lawyer said,[510] this judgment does not only overturn 30 years of constitutional adjudication in Hungary, but also adheres to the ideological preferences of the President of the *Kúria*, who was elected through an ad hominem legislation, as explained in this paper supra, in Subchapter III.2.7.

As a response to the criticism the *Kúria* President issued a press release[511] in which he "forcefully rejected every attempt questioning or destroying judicial independence". Among others the press release misconstrued the principle of judicial independence, which does not mean that judges are sacrosanct and judicial decisions cannot be subjected to any type of public debate. Quite to the contrary: the independence of the judiciary requires that judges are subjected exclusively to the law. And this goes hand in hand with judicial accountability, which again is there to scrutinise whether judges are indeed only subjected to the rule of law and nothing and nobody but the law. Judicial accountability is meaningless if judgments cannot be debated. The statement blaming critics with violating judicial independence may create an additional chilling effect.

After the judgement, HVG turned to the Hungarian Constitutional Court, which as explained supra in Subchapter IV.2.1. cannot be seen as an independent forum. An additional problem is that the HCC has no biding deadlines related to constitutional complaints, therefore it could last for many years until a decision is rendered, which is a prerequisite to turn to the ECtHR according to its recent jurisprudence.[512]

A pressing question the case triggers is whether the progressive case law of the HCC's first 20 years, which up until recently corresponded to the European Convention on Human Rights and the Strasbourg case-law would be overwritten in the future. The signs are worrying. First, in a significant decision, 22/2012 (V.11.) the HCC stated that

510 Nehéz-Posony, K., 'A Kúria és a szólásszabadság: a politikai elvárásoknak megfeleltek', hvg online, 25 March 2021, available at: https://hvg.hu/itthon/20210325_Magyarsag__Kuria_itelet.

511 Kúria, 'A Kúria elnöke a bírák függetlenségének tiszteletben tartását kéri', Press release, 26 March 2021, available at: https://kuria-birosag.hu/hu/sajto/kuria-elnoke-birak-fuggetlenseget-tiszteletben-tartasat-keri.

512 ECtHR, Szalontay v. Hungary, Application no. 71327/13, 12 March 2019. (Fourth Section Decision).

in cases arising after 2012, arguments of earlier decisions rendered prior to the entry into force of the Fundamental Law may still be used, provided that the content of the provision in the Fundamental Law is identical or similar to that of the previous Constitution. But the Hungarian Parliament saw the matter differently. As if in response to the above finding of the HCC, the Fourth Amendment to the Fundamental Law (the same that introduced the protection of the dignity of the Hungarian nation) repealed the rulings of the HCC rendered prior to the entry into force of the Fundamental Law.

This was interpreted to mean that HCC Decision 22/2012 (V.11.) is overwritten by the constitution-amending power, and the HCC is no longer bound by its earlier rulings and may not even refer to them. As a next step, the Hungarian Constitutional Court addressed the issue once again in Decision 13/2013 (VI.17.), coming to the conclusion that it was still possible to reference reasons, legal principles, and constitutional issues developed by former HCC decisions on a case-by-case basis, if a detailed reasoning is given to why such an exercise was justified. However, the HCC added that due to the Fourth Amendment to the Fundamental Law, it may disregard legal principles elaborated in earlier decisions even if the text of the given provision in the Fundamental Law and the previous Constitution is identical. In its decision 7/2014. (III. 7.) – passed after the constitutional amendment at issue – the HCC held that earlier principles related to freedom of speech and freedom of the press are still valid.

But the constitutional landscape clearly changed with the insertion of Article IX (5) into the Fundamental Law, and it seems that the HCC will accordingly redraw the limits of freedom of expression. So far, Article IX (5) of the Fundamental Law and the corresponding Article 2:54 (5) of the Civil Code had a very scarce case law, but the jurisprudence was quickly evolving in 2021. (See HCC Decisions 6/2021. (II.19.) and 7/2021. (II.19.)). In the second case, criticising the Polish abortion regime, again the dignity of the certain community – in this case the dignity of the largest religious community in Hungary, i.e., Catholics – prevailed. But the HCC stressed also in the former decision – where free speech was ultimately upheld –that this right can be restricted with due regard to Article IX (5) of the Fundamental Law.

4.2.2. The personality rights lawsuit by the Labrisz Lesbian Association

On 1 February 2022, the Budapest Metropolitan Court of Appeals as a second instance court passed a ruling holding that an article published in the pro-government daily newspaper Magyar Nemzet, saying that the Labrisz Lesbian Association was a "paedophile organisation"[513] did not damage the reputation of the organisation.[514] The second instance court overturned a ruling passed in November 2021, where the Budapest-Capital Regional Court as a first instance court found the opposite, calling

513 Németh, Gy., 'Meseország: mit mond a tudomány?', Magyar Nemzet, 12 October 2020, available at: https://magyarnemzet.hu/velemeny/2020/10/meseorszag-mit-mond-a-tudomany.

514 Fővárosi Ítélőtábla, 'Döntés a www. magyarnemzet.hu internetes oldalon „Meseország: mit mond a tudomány?" címmel megjelent cikk miatt indult személyiségi jogi perben', Press release, 3 February 2022, available at: https://fovarosiitelotabla.birosag.hu/sajtokozlemeny/20220203/dontes-wwwmagyarnemzethu-internetes-oldalon-meseorszag-mit-mond-tudomany.

the comparison in question a "severely offensive, unjustifiably offensive, devastating, unfounded opinion", which does not have to be tolerated by the Association, and which is capable of causing and actually caused social condemnation of the plaintiff.[515]

The second instance judgment was rendered in a very specific political setting, with the government inciting hatred against members of the LGBT+ community. PM Viktor Orbán and his government are infamous for scapegoating various minorities, whether human rights defenders, migrants, prisoners, refugees, small churches, just to name a few.[516] Recently, the LGBT+ community has been singled out and a series of attacks started against people having a minority sexual orientation or gender identity.[517]

A law banning sexual propaganda and promotion of gender reassignment targeting children fits into these series of attacks. The country was flooded by billboards displaying the question: "Are you afraid your child could be exposed to sexual propaganda?" The government even organised a nation-wide referendum on the issue, to take place on the day of the parliamentary elections, on 3 April 2022. Hungarians were invited to answer questions on whether they support holding sexual orientation workshops in schools without parental consent and whether they believe gender reassignment procedures should be promoted among children. Legally speaking the referendum was unneeded, since the law had already been passed, and is anyway absurd, since there is no single organisation planning to promote gender reassignment among children. But for the government's populistic agenda it is important to create an enemy against whom emotions can rise high, and against whom the government can claim to defend the Hungarian people.

When the CJEU passed a judgment[518] on the Conditionality Regulation 2029/2020[519] dismissing Hungarian and Polish claims that the law was without proper legal basis, the Hungarian Justice Minister gave a bizarrely unrelated speech at a press conference: instead of discussing the judgment about the legality of the Conditionality Regulation as promised, she talked about a war waged by the EU against Hungary because of this "child protection" instrument. Towards the end of her speech, Minister Varga made clear that "our children need to be protected against all sorts of sexual propaganda, (..) the child protection act is the problem (for the EU), not the rule of law."[520]

This is the political setting in which the personality rights claim by Labrisz Lesbian Association started. Not only the outcome of the process is problematic, i.e., the

515 Zalan, E., 'Budapest ruling seen as normalising anti-LGBTI sentiment', EUObserver, 3 February 2022, available at: https://euobserver.com/democracy/154275, Hungarian Helsinki Committee, 'Hazugságot terjesztett a Magyar Nemzet, sérelemdíjat kell fizetnie a Labrisznak', 3 November 2021, available at: https://helsinki.hu/hazug-ragalmat-terjesztett-a-magyar-nemzet-serelemdijat-kell-fizetnie-a-labrisznak/ (in Hungarian on the first instance ruling).

516 Sík, E., Lázár, D., 'A morálispánik-gomb 2.0', Mozgó Világ, 2019/11, available at: https://www.academia.edu/40971554/A_morális_pánikgomb_2.0 Reference Paper V.

517 Abusing the emergency situation induced by the COVID-19 pandemic, the state banned legal gender recognition and later made it practically impossible for same-sex couples to adopt children.

518 CJEU, Cases C-156/21 Hungary v Parliament and Council; C-157/21 Poland v Parliament and Council, 16 February 2022, ECLI:EU:C:2022:97, ECLI:EU:C:2022:98.

519 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

520 After Justice Minister Varga mixed up the rule of law and the alleged protection of children, a topic not even remotely mentioned by the judgment, left the stage, so journalists could not ask her questions at the extraordinary press conference. Nagy, B., 'A kormány állítja, politikai ítélet született, az ellenzék szerint a magyarok fizetik meg Orbán antidemokratikus döntéseit', Telex.hu, 16 February 2022, available at: https://telex.hu/belfold/2022/02/16/a-kormany-szerint-politikai-iteletet-hozott-az-unio-birosaga-az-ellenzek-szerint-egyertelmuve-valt-hogy-az-orban-kormany-antidemokratikus-mukodese-draga-lesz-a-magyaroknak.

court holding that it is legal to say that the entity fighting for minority rights was an organisation of paedophiles, but its reasoning is even more disturbing.

Labrisz was the publisher of a book titled “Fairy-tale Land belongs to everyone” that updated traditional fairy tales with various minority characters, including a prince falling in love with another prince, which prompted an immediate backlash from the government. "Hungary is a patient, tolerant country as regards […] homosexuality. But there is a red line that cannot be crossed, and this is how I would sum up my opinion: Leave our children alone," Orbán said in a radio interview after the book got published.[521]

In the oral reasoning the court cited comments by the Prime Minister connecting homosexuality and paedophilia, and it held that the contested article only provided scientific evidence for this statement. According to the court, the objective of the contested article was not to defame the Labrisz Lesbian Association, but to raise the attention of the audience.[522] The court also stated that both paedophilia and the book in question hurt children, so the parallel drawn cannot be harmful. In other words, the homophobic and false sentences by the Prime Minister proved to be decisive in the outcome of a court case.[523]

4.3. Freedom of information (FOI) in decline – From right to favour?

Access to public data – especially on public spending – means both a vessel and a right in the fight for transparency, accountability and democracy *per se*. Public discussion becomes pale and even misguided if the public is not endowed with the power to ask meaningful questions about the functioning of the state. Freedom of information - although strongly linked to freedom of expression - points beyond it. Lacking access to accurate and comprehensive public data curbs liberties while it entails strong corruption risk, too. Public control above public spending should enjoy proper - independent and impartial - judicial protection, while the deterioration should be noted in the course of (Article 2) value-driven debates as well.

It is important to see that until this very day, the right of access to public information, has a special legal recognition. The European Convention on Human Rights[524] does not contain any specific articles regarding the access to information of public interest, the jurisprudence, however, had evolved to the level to provide protection for it - as part

521 Kossuth Rádió, Reggeli krónika, 3 October 2020.

522 Hungarian Helsinki Committee, ‘A Fővárosi Ítélőtábla közleményben magyarázza ítéletét’, 4 February 2022, available at: https://helsinki.hu/a-fovarosi-itelotabla-kozlemenyben-magyarazza-iteletet/.

523 Hungarian Helsinki Committee, ‘A kormányfő hamis szövege perdöntőnek bizonyult egy mai perben’, 1 February 2022, available at: https://helsinki.hu/a-kormanyfo-hamis-szovege-perdontonek-bizonyult-egy-mai-perben/.

524 Only Article 10 of the European Convention of Human Rights of 1950 which was adopted with the following text: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers”.

of the right to freedom of expression. This is the result of long-lasting legal evolution, in which the case *HCLU v Hungary*[525] was an important milestone. The HCLU-case was the first Hungarian case, where the ECtHR ruled that similarly to the press, civil organizations fulfilling the role of a social watchdog, may also request information from the state, in order to discuss affairs of public interest.[526] A further important step was the *Helsinki v Hungary*[527] case, where the Grand Chamber's ruling among others reinforced that the state is obliged to grant access upon individual requests if, for instance, the information is indispensable to exercising the right to "the freedom to receive and impart information" where the denial of data requested, constitutes an interference with that right.[528] The Grand Chamber added that - similarly to the press and civil society organizations - the Convention protects the rights of bloggers or social media opinion-leaders, therefore it widened the scope of the subjects entitled to protection of the Convention.[529]

Parallel to this slow jurisprudential evolution, a FOI-devolution took place in Hungary. Freedom of information was twisted and turned during the past 12 years in order to resort to a small oasis of public data, which can only be accessed after years long trials, and which is even more endangered by the capture of the Supreme Court and the Constitutional Court of Hungary which used to defend it already with a varying degree of success in the past. First, we must recall how the freedom of information landscape was re-designed under Orbán's system of national cooperation (NER), then second, why and how the capture of the judiciary could be crucial in order to keep public data concealed.

4.3.1. Milestones of the backsliding

2011 - The new beginning

During the '90s, HU had a rather progressive legislation on data protection and freedom of information,[530] which was replaced by a new act in 2011[531] Act CXII of 2011 on Informational Self-determination and Freedom of Information, for further reference: FOI-act. that came into force on the 1st of January 2012. The new FOI-act introduced some new definitions and exceptions from the obligation to disclose public data,[532] but the most important novelty was the ad hominem institutional change, namely the Fidesz-dominated Parliament removing[533] the former independent Data

525 ECtHR, Társaság a Szabadságjogokért v. Hungary, Application no. 37374/05, 14 April, 2009.

526 Ibid., para 26.

527 ECtHR (Grand Chamber) Magyar Helsinki Bizottság v Hungary, Application no. 18030/11, 8 November, 2016.

528 Ibid., paras. 160, 170 and 180.

529 Ibid., paras. 46 and 168.

530 Act LXIII of 1992 on Data Protection and Public Access to Data of Public Interest.

531 Act CXII of 2011 on Informational Self-determination and Freedom of Information, for further reference: FOI-act.

532 Para. 27. Sec. 2 of act CXII of 2011 introduced e.g. the categories of intellectual property or in the interest of the protection of national heritage and natural conservation as possible excuses for non-disclosing public data and left open a somewhat fuzzy relationship between classified info (regulated in a different act) and public data.

533 It was the Fundamental Law of Hungary (FL), transitional provisions of the FL and the new FOI-act that deprived Jóri from his mandate. The Fundamental Law of Hungary entered into

Protection and Freedom of Information Commissioner András Jóri, who was elected by the previous Parliament for six years in 2009. Based on the adopted changes, a new administrative authority (NAIH)[534] was established, which replaced Jóri without fulfilling his mandate.[535] NAIH was headed by the appointee of the president of the republic (on the nomination of the Prime Minister) for a nine-year renewable term, therefore his link to Fidesz was obvious from day one.

In 2011, watchdogs already raised their concerns about the independence of the planned authority,[536] since it would not enjoy the same independent status as the commissioner (as of an ombudsman).[537] They also highlighted that the premature removal by law-making was an unacceptable political influence above the former commissioner and the removal breaches obligations under EU law[538] which was acknowledged by the European Commission then later by the CJEU.[539] In spite of the judgement – which unfortunately failed to emphasise the rule of law angle of the infringement -, Mr. András Jóri was not reinstated as commissioner, and the new Authority could start its lenient operation.

2013 - Diligent legislator and the 'abusive data requests'

By 2013, the Orbán-government had faced many watchdog enquiries[540] pursuing research on the opaque management of public funds by state organizations.[541] Therefore the Parliament enacted an amendment package to the FOI act[542] which intended only to permit central state oversight bodies to audit the management of public organs.[543] According to the underlying reasoning: there was a difference between access to data of public interest and access to controlling data to the extent and depth of supervisory authorities specified by law do.[544] The problem with this reasoning was that it implied the dichotomy of 'regular' and 'abusive of public data requests' - depending on the pursuit of the requester (i.e. if citizens 'dare to ask too much'). Furthermore, it forecasted the gloomy approach of the State: namely

force on 1 January 2012. Under Article VI(3) of the FL, '[e]xercise of the right to the protection of personal data and access to data of public interest shall be supervised by an independent authority established by statute'. Paragraphs 3 and 5 of the final provisions of the FL provided, that the Parliament is to adopt transitional measures separately and that those provisions are to form part of the Fundamental Law. Article 16 of those transitional provisions, stated that 'the term served in office by the incumbent [Supervisor] shall come to an end upon the entry into force of the present Fundamental Law.'

534 Hungarian National Authority for Data Protection and Freedom of Information; Nemzeti Adatvédelmi és Információszabadság Hatóság (further NAIH) (in Hungarian).

535 N.b. the same method was used against the president of the Supreme Court who was removed via the Transitional Provisions of the FL (see our assessment supra in Subchapter III.2.6.)

536 Huttl, T: 'New Law on Freedom of Information in Hungary', Freedominfo.org, 19 September 2011. Available at: https://www.freedominfo.org/2011/09/new-law-on-freedom-of-information-in-hungary/.

537 Ibid.

538 Article 28. (1) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such date requires the following: "Each Member State shall provide that one or more public authorities are responsible for monitoring the application within its territory of the provisions adopted by the Member States pursuant to this Directive".

539 CJEU, Case C-288/12, Commission v Hungary, 8 April 2014, ECLI:EU:C:2014:237.

540 Transparency International, 'Hungary: Government Closing Down Freedom of Information', TI Hungary, 8 May 2013, available at: https://www.transparency.org/en/press/20130508-hungary-government-closing-down-freedom-of-information.

541 Társaság a Szabadságjogokért, 'The Coming Dark age of Democratic Governance in Hungary', tasz.hu, 3 May 2013, available at: https://tasz.hu/cikkek/the-coming-dark-age-of-democratic-governance-in-hungary-4; MTI/index, 'Másodjára is átment a Lex Átlátszó', index.hu, 11 June 2013, available at: https://index.hu/belfold/2013/06/11/masodjara_is_atment_a_lex_atlatszo/.

542 Bill T-10904. Available at: https://www.parlament.hu/irom39/10904/10904.pdf (in Hungarian). Summarized motion available at: https://www.parlament.hu/irom39/10904/10904-0012.pdf (in Hungarian).

543 N.b. the Parliament had to vote on the legislation twice, since the first adopted draft was vetoed by the President of Hungary who sent it back to the Parliament, but this paper only focuses on the adopted and promulgated second bill (which only had minor modifications compared to the original).

544 Bill T-10904 assessed by one of the affected investigative portals.

there is a red line for comprehensive requests about public spending. This approach completely ignores the fact that fulfilling public data requests is part of the efficient public control and not the grace granted by state organisations,[545] therefore it was adopted by Fidesz.

From the summer of 2013, "the requests for data with the purpose of a comprehensive, account-level as well as itemised control of the financial management of the body with public service functions were regulated in specific relevant laws",[546] which meant that theoretically they were exempted from public data requests or access became much more difficult. Based on the close reading of the provisions, only the Government Control Office[547] or the State Audit Office - known to be a very cautious auditor[548] - were entitled to look into the depth of the management of the state, while watchdogs could only hope for a *strictu sensu* interpretation applied by courts, which happened for instance in the case of the Hungarian Treasury which was successfully sued for the campaign spending data of individual MP candidates in 2014.[549]

2014 - Paving the way for the privatisation of TAO (corporate tax benefits)

The Orbán-government introduced a new support system for spectacle team sports in 2011.[550] From that moment on, companies could decide to pay a portion of their corporate tax not into the central state budget but to one of the spectacle team sports clubs. The scale of the benefit system can be illustrated by the fact that sport clubs and federations received a total of HUF 923 billion (EUR 2.49 billion) over the past 10 years from the corporate tax contributions (TAO).[551] Transparency watchdogs and investigative journalists followed the infamous scheme closely[552] which led to one of the flagship corruption scandal of the country.[553] Based on their findings, it was revealed that a clandestine pay-back system might have been established since at the end of 2014, the Parliament adopted an amendment to the act I of 2004 on Sports,[554] which enabled these spectator team sports associations to hide their

545 Transparency International, 'Hungary: Government Closing Down Freedom of Information', TI Hungary, 8 May 2013, available at: https://www.transparency.org/en/press/20130508-hungary-government-closing-down-freedom-of-information; Ligeti, M., Sarkalatos átalakulások – Az adatvédelmi és adatnyilvánossági szabályozás átalakulása, MTA Law Working Papers, 2014/31, available at: https://jog.tk.hu/uploads/files/mtalwp/2014_31_Ligeti.pdf

546 Article 30(7) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information.

547 The Government Control Office (KEHI) was a flagship body to conduct government-ordered investigations about NGOs (see EEA-grant recipient scandal in 2014). After years of litigation, the public could learn that PM Orbán himself ordered the investigations about the blacklisted NGOs, which investigations ended without any substantiation of the smear-campaign carried out against the NGOs.

548 The institution is formally responsible for auditing state spending. The independence of its chairman since 2010, is questionable as László Domokos has been a member of Fidesz since the party's foundation and has also served as an MP of Fidesz. SAO (Állami Számvevőszék) has fined opposition parties on a number of different occasions. For instance, Jobbik was fined €2.08 million (approximately 17 months of state support provided to the party) four months before the 2018 general election, Domokos, however never fined or issued a warning despite the fact that the same practice was applied by Fidesz as well." See Bertelsmann Stiftung, 34–35US About Domokos, see also Department of State, '2020 Investment Climate Statements: Hungary', available at: https://www.state.gov/reports/2020-investment-climate-statements/hungary/.

549 The Hungarian Treasury (Magyar Államkincstár) denied access to the aforementioned campaign spending data on the base of the previously adopted provisions, some courts however did not consider these arguments valid. See Fővárosi Törvényszék, judgment 35.P.23.475/2014/5.

550 The system was originally created for 5 spectator team sports: football (the favorite sports of PM Orbán), basketball, handball, water polo and ice hockey.

551 Bita, D., Pető, P. 'Közelíti az ezermilliárdot a költségvetés helyett sporttámogatásra fizetett összeg, újra szárnyal a Felcsút', 24.hu, 22 November 2021, available at: https://24.hu/belfold/2021/11/22/tao-2020-labdarugas-kezilabda-felcsut/.

552 Transparency International Hungary, Korrupciós Kockázatok a Magyar Sportfinanszírozásban. TI Hungary, 2015. Available at: https://transparency.hu/wp-content/uploads/2015/10/Corruption-Risks-in-Hungarian-Sport-Financing-Study.pdf.

553 Novak, B., 'TI: Corporate donations to sports clubs in Hungary pose high corruption risk', The Budapest Beacon, 22 October 2015, available at: https://budapestbeacon.com/ti-corporate-donations-to-sports-clubs-in-hungary-pose-high-corruption-risk/.

554 Section 22(3) of act I of 2004 on Sports which entered into force on the 1st of January, 2015.

donations received from corporate tax subjects.[555] The sports associations could comply with public data requests without having to publish more than the summary of subsidies. This meant that the Hungarian state had renounced tax[556] income for the sake of the associations of certain favoured spectator sports, while the route and details of the support were intended to be kept away from publicity. The selection of eligible sport associations was the result of an opaque, politically entangled process[557] while active politicians have been heading each and every chosen association.[558] Another problematic feature of the system was that the generous donors could be state-owned enterprises and winners of enormous public tenders who could stay in the shadow.[559] The status of the aforementioned tax benefit[560] was highly debated since according to PM Orbán, it was only a 'communist reflex'[561] to consider these donations (and the tax benefit) as part of public funds. By 2016, some court decisions, countered the statement of PM Orbán,[562] therefore the government again had to initiate legislative amendments to conceal these donations along with the tax benefits.

Fidesz first came up with the idea of extending the concept of tax secrets to these subsidies,[563] then intended to enact a provision which would have enshrined the primacy of tax secrets above fulfilling public data requests.[564] The *Kúria* ended a deep-rooting discussion in 2017,[565] confirming that the TAO-benefits are of public resource character, therefore they can be subject to public data requests,[566] but it could only deliver its judgement on the base of the provisions already in force before the tax secret-amendments. [567]

Furthermore, the favourite sport association of the PM (Felcsút Utánpótlás)[568] which was the defendant in one of the lawsuits), has not complied with the decisions because it relied on various tools of procrastination: namely trying to charge fees for fulfilling the requests,[569] but mostly involving one of the Ministries as complicit

555 Section 22(3) of act I of 2004 on Sports which entered into force on the 1st of January, 2015.

556 The European Commission looked into the planned donation scheme and in its report it stated that "State resources are clearly involved in the scheme since the Hungarian central budget suffers a loss of fiscal revenue as a result of the scheme". European Commission, 'Supporting the Hungarian sport sector via tax benefit scheme', C(2011)7287 final, 9 November 2011, available at: https://ec.europa.eu/competition/state_aid/cases/240466/240466_1271180_52_3.pdf.

557 Transparency International Hungary, Korrupciós Kockázatok a Magyar Sportfinanszírozásban. TI Hungary, 2015. Available at: https://transparency.hu/wp-content/uploads/2015/10/Corruption-Risks-in-Hungarian-Sport-Financing-Study.pdf.

558 See the list of TI about Fidesz-MPs or figures close to the governing parties, where eg. MP Szilárd Németh was president of the HU Birkózó Szövetség.

559 These allegations were confirmed by the investigative portal atlatszo in 2019 which helped TI-HU to create a searchable data base of the TAO-donations (between 2011-2016) which they gained access to after years of litigations in 2018. Erdélyi, K., 'Keresheto adatbázist készítettünk a TI által kiperelt, 2011-2016 közötti TAO-támogatásokról', atlatszo.hu, 19 March 2019, available at: https://atlatszo.hu/kozpenz/2019/03/19/keresheto-adatbazist-keszitettunk-a-ti-altal-kiperelt-2011-2016-kozotti-tao-tamogatasokrol/.

560 Ligeti, M., Mucsi, Gy., 'Opening the door to corruption in Hungary's sport financing', in TI (ed.) Global Corruption Report. Sport. Transparency International, 2016: available at: https://images.transparencycdn.org/images/2016_GCRSport_EN.pdf.

561 Csurgó, D., 'Cáfolta Orbánt a bíróság: közpénz a tao', index.hu, 28 October 2016, available at: https://index.hu/gazdasag/2016/10/28/orban_a_tao_kedvezmeny_nem_kozpenz._birosag_de/.

562 Székesfehérvár Regional Court ((as first instance court) 27.P.20.099/2016/11. judgement of 24 August 2018.

563 Bill T-12450 aimed at amending the Act on Taxation [act XCII of 2003] and the Parliament enacted that the exact, itemized amount of donations and the received tax relief is to be considered tax secret. Bill T-12450 available at: https://www.parlament.hu/irom40/12450/12450.pdf (in Hungarian).

564 At the end of the day, this concept failed, because the Supreme Court stated in 2017 (and 2018) that the publicity of public data manifests bigger public interest than the sustained tax secret (see judgements infra fn. 125-126). These judgements were delivered by the adjudicating panel of the former president Baka who maintained a different ethos within the judiciary after 2012 and who retired during 2020.

565 Supreme Court Pfv. IV.22.334/2017/4. judgement of 30 May 2018, which maintained previous judgement from 2017 in force. Available at: https://transparency.hu/wp-content/uploads/2018/12/20180918_TI-v-sportsz%C3%B6vets%C3%A9gek_K%C3%BAria-%C3%ADt%C3%A9let.pdf.

566 Supreme Court (Kúria) Pfv.21.135/2017/10 judgement of 25 October 2017 and Pfv.IV.21.175/2017/14 of 15 November 2017.

567 It is highly doubtful that the Court would be able to deliver a similar judgement on the base of the new taxation regulation while constitutional norm control is painfully missing.

568 Felcsút Utánpótlás Neveléséért Alapítvány: Foundation for Felcsút Youth Football Development, founded by Viktor Orbán (a.k.a. Puskás Academy).

569 Charging fees for fulfilling the data request itself became a popular instrument for discouraging public data requesters since 2016, regarding the details, see our assessment infra.

in hiding the data.[570] According to the data requester plaintiff, even the Ministry of Human Resources (EMMI) was helping Felcsút Utánpótlás Foundation not to comply with the judgment of the *Kúria*[571] therefore Minister Kásler ordered a 'never-ending' scrutiny of the Foundation withholding the data.[572] The plaintiff filed a criminal report against Min Kásler, who – so far – had not been facing any reported consequences of the allegations. The Felcsút Utánpótlás Foundation until this very day remained the biggest beneficiary of the scheme: Puskás Academy received some HUF 3.9 billion (EUR 10.5 million) in 2020 and a total of HUF 36.3 billion (EUR 98 million) over the past decade[573] from a non-transparent network of donors.

2015 – taking revenge on jurisprudence of the courts

By the summer of 2015, some victories in the field of successfully enforced public data requests led to increased frustration of Fidesz and therefore to a new amendment of the FOI-Act.[574] The proposal[575] put forth by the Minister of Justice transformed the data controllers' previously fruitless arguments during litigation into a new legal framework. The amendment[576] changed the legal basis of future deliverable judicial decisions – practically challenging arguments in precedent-value judgements in the former FOI-cases.[577]

The law made it possible for data controllers to reject public data requests on the grounds that the information serves as the basis of a decision that might be only passed in the distant future (or not at all).[578] Access to expensive studies – ordered in a non-transparent way by the State – was made more difficult based on enacted copyright considerations which aimed at averting the next Századvég fiasco.[579] Furthermore, based on the amendments, non-identified (anonymous) FOI-requests could be denied freely. The most surprising element of the adopted package was, however, that it enabled data controllers to ask for payment for not only copying services and posting, but also for processing the FOI-request itself. It does not require much imagination to identify the purpose of the amendments, namely, to deter people from requesting information, especially since the amount of the planned fee was not

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570 Botos, T., 'Használhatatlan a felcsúti tao-pénzekről szóló minisztériumi jegyzőkönyv', 444.hu, 29 May 2020, available at: https://444.hu/2020/05/29/hasznalhatatlan-a-felcsuti-tao-penzekrol-szolo-miniszteriumi-jegyzokonyv

571 Farkas, Gy., 'Felcsúti taoügy: feljelentik Kásler Miklóst', 24.hu 9 November 2018, available at: https://24.hu/belfold/2018/11/09/felcsuti-tao-ugy-feljelentik-kasler-miklost/.

572 At the end of 2019, two years after the judgement of the Supreme Court, the Ministry had still not closed the scrutiny, therefore did not grant access to the plaintiff to the data, see Botos, T., 'Két éve tartja vissza a minisztérium a jogerősen kiadásra ítélt felcsúti tao-papírokat', 444.hu, 18 November 2019, available at: https://444.hu/2019/11/18/ket-eve-tartja-vissza-a-miniszterium-a-jogerosen-kiadasra-itelt-felcsuti-tao-papirokat

573 Analysis of 24.hu (supra) summarized in English. Vass, Á., 'TAO Money for Sports Totals Nearly HUF 1 Trillion over Past Ten Years', Hungary Today, 23 November 2021, available at: https://hungarytoday.hu/tao-money-public-funds-sports-football-support-fidesz-orban-govt-puskas/.

574 Koncsik, A: 'Azért még ne dőljünk hátra', tasz.hu, 16 November 2017, available at: https://tasz.hu/cikkek/azert-meg-ne-doljunk-hatra (in Hungarian) and 'Let's just not sit back and relax yet', available at: https://hclu.hu/en/articles/lets-just-not-sit-back-and-relax-yet-1 (in English).

575 Bill T-5404/16. Available at: https://www.parlament.hu/irom40/05404/05404-0016.pdf (in Hungarian).

576 Act CXXIX of 2015 on the amendment to the FOI-act and other acts.

577 See Koncsik A., ibid.

578 Article 27 of FOI-act referring to data which "expected to underlie a future possible decision".

579 The Hungarian government ordered some studies from the government-close think tank Századvég in 2011 which studies were purchased for 4 billion HUF and raised the suspicion of corruption. Investigative journalists were keen on learning the content of the studies in to report on them, but the Ministries denied the access. Hajnalka Joó with the help of HCLU litigated for 3 years in order to get access to the studies which are public data since they were purchased from taxpayer's money. The courts rejected the claims of the government referring to copyright issues and the studies being preparatory documents for future decision. See judgement Pfv. IV. 21.535/2015/6. of the Supreme Court. Available at: https://tasz.hu/files/tasz/imce/2015/szazadveg_kuria.pdf

specified for over a year due to the lack of proper implementing regulations.[580]

2016 – sectoral laws and the grandfather of KEKVAs[581]

During the year of the migration-referendum, the Fidesz-government started to experiment with new ways of hiding public funds, namely exempting state-owned enterprises and funds from public scrutiny via sectoral laws which could refer to broadly construed trade secrets, management and business interests. During the debate of the amendment to the law regulating state-owned enterprises,[582] the detailed reasoning precisely stated that freedom of information cannot impede interest of national economy disproportionately.[583] In other words: taxpayers could threaten the prudent management by taking an interest in how and what their money is spent on. The legislator forgot about the fact that these corporations were not traditional operators on the market and first the Postal Service, then the National Bank (MNB) was awarded with a new set of arguments for rejecting public data requests.[584]

All of the adopted regulations were challenged in front of the packed Constitutional Court of Hungary and only the foundations of the MNB failed the constitutionality-test[585] which means that both the general regulation about state-owned enterprises and about the Postal Service were enacted without constitutional concerns about transparency of the State or fundamental rights.[586] Compared to data about the rest of the state owned enterprises, the public learned, that the National Bank of Hungary (MNB) transferred almost HUF 267 billion (approx. € 900 million) in total to a group of foundations it established under the name Pallas Athéné.[587] Watchdogs already warned in 2014, that the establishment of the foundations might be illegal and after two years, when access to public data was granted by the courts, it was proved that the Foundations spent taxpayers' money for peculiar investments without proper legal base.[588]

These foundations could be considered to some extent as the pioneer-predecessors of the KEKVA-s of 2020/2021.[589] The 9th amendment to the Fundamental Law of

580 A year later, Government Decree nr. 301/2016 (IX.30) regulated the fees which still can be considered as unconstitutional and an unnecessary obstacle for fulfillment of FOI-requests.

581 Közfeladatot ellátó közérdekű vagyonkezelő Alapítvány (KEKVA): asset managing public foundations performing public duties, regulated via the Fundamental Law of Hungary, Act IX of 2021 on asset managing public foundations performing public duties (its Annex) and more than 3 dozens of specific cardinal acts.

582 The omnibus bill T-10536 on the Budget of Hungary, available at: https://www.parlament.hu/irom40/10536/10536.pdf contained detailed reasoning of the amendment to act CXXII of 2009 on the parsimonious operation of state-owned enterprises.

583 See section 99 of Bill T-10536.

584 Amendment to act CLIX of 2012 on the postal service [section 53(4)] and act CXXXIX of 2013 on the central bank.

585 Hungarian Constitutional Court (Alkotmánybíróság) 8/2016. (IV. 6.) AB decision.

586 Hungarian Constitutional Court (Alkotmánybíróság) 8/2016. (IV. 6.) AB decision.

587 Kovács, G., '250 milliárdot sikerült kiszervezni a Matolcsy-alapítványokból, a maradékot betették Mészáros Lőrinc bankjába', 24.hu, 12 November 2018, available at: https://24.hu/belfold/2018/11/12/matolcsy-gyorgy-jegybanki-alapitvany-mnb-meszaros-lorinc/

588 Transparency International-Hungary and CIVITAS: Black Book – Corruption in Hungary (2010-2018). Civitas Institute, 2018, pp. 12-13. Available at: https://transparency.hu/wp-content/uploads/2018/03/Black-Book_EN.pdf

589 Közfeladatot ellátó közérdekű vagyonkezelő Alapítvány (KEKVA): asset managing public foundations performing public duties, regulated via the Fundamental Law of Hungary, Act IX of 2021 on asset managing public foundations performing public duties (its Annex) and more than 3 dozens of specific cardinal acts which caused one of the biggest corruption scandal in 2021 in Hungary since Hungarian state wealth was simply outsourced to non-transparent foundations with Fidesz-cronies and government officials in their boards. Regarding the risk of grand corruption and constitutional challenges, see watchdogs: TI-Hungary (2021): amicus curiae in case II/02280/2021, available at: http://public.mkab.hu/dev/dontesek.nsf/0/6a96c3f-521143e12c12587640033dd6c/$FILE/II_2280_2_2021_amicus_curiae_Transparency_International_Magyarorszag_anonim.pdf, K-Monitor (2021): amicus curiae in case II/02280/2021, available at: https://m.blog.hu/k/k/image/kekva_amicus_km.pdf.

Hungary[590] opened not only the door for the aforementioned outsourcing of state wealth to opaque, semi-private foundations, but it narrowed the concept of public funds,[591] which is suitable for curbing freedom of information jurisprudence, too. The Hungarian courts previously granted access to public data on the legal base that "every organization managing public funds shall be obliged to publicly account for its management of public funds".[592]

The new amendment left doubt whether the transfer of state assets to KEKVAs (linked to prominent Fidesz cronies or public officials) still would fall under the scope of transparent and publicly accountable management. Furthermore, the current silence of the Hungarian Constitutional Court is rather revealing (i.e., the CC is not keen on delivering its judgement about the KEKVA-system now), although 50 opposition MPs initiated norm control right after adopting the rules[593]

2020 – never enough shade: FOI during state of danger

Modern emergency regimes - especially under the European continental doctrine-, believe that the constitutional regulation of emergencies help not just to handle the threat effectively, but also to prevent the abuse of exceptional powers.[594] In a working democracy, transparency considerations do not cease to exist during the special legal order, but they might be embedded into a different context. For instance, the Constitutional Court could review the constitutionality of the state of danger and the decrees issued under the special legal order.

However, in 2020, during the first wave of the coronavirus pandemic, the packed HCC was reluctant to review several important decrees issued by the Fidesz-government.[595] The government decree on fulfilling FOI-requests also shared this fate. During the first wave, Fidesz prescribed a 45 plus 45-day deadline for data controllers to grant access to public data,[596] while the FOI-act contained originally only a 15 plus 15-day deadline. After terminating the first state of danger,[597] the decree was also set out of force, then the provisions became reintroduced to the legal system[598] just days around the same time when HCC published its inadmissibility decision on the previous decree.[599] At the end of the day, during April 2021, the HCC did not find decree 521/2020 (XI.25.)

590 Bill T/13647 adopted on the 15th of December 2020.

591 Based on the adopted motion, the newly added Article 39(3) would define public funds as " […]the income, expenditure and receivable of the State."

592 Article 39(2) Fundamental Law.

593 Csengel, K., 'A közvagyon alapítványokba szervezéséről szóló törvény megsemmisítését kéri az Alkotmánybíróságtól az ellenzék' merce.hu, 2 June 2021, available at: https://merce.hu/2021/06/02/a-kozvagyon-alapitvanyokba-szervezeserol-szolo-torveny-megsemmisiteset-keri-az-alkotmanybirosagtol-az-ellenzek/

594 There are at least two main theories on how to handle emergencies: first, there are those, who prefer the crisis management and accept that no legal provisions should constrain the exceptional power; second, there are those who claim that there should be legal, constitutional norms that regulate the emergency. Among the latter "group" there are those who claim that exceptional government – although separated from regular government – has to be regulated by constitutional provisions and those who believe that special laws or executive measures are better able to confront the threat. See: Ferejohn, J., Pasquino P., 'The Law of the Exception: A Typology of Emergency Powers', International Journal of Constitutional Law 2, 2004, pp. 210-239.

595 The Constitutional Court decided on several complaints only when the state of danger was already terminated which resulted in a series of inadmissibility decisions. This was the case, for instance, with the decree on new labour law legislation, see Hungarian Constitutional Court (Alkotmánybíróság) 3326/2020. (VIII. 5.) AB decision.

596 Government Decree nr. 179/2020 (V.4.) was regulating the extension of deadlines during the first wave.

597 Government Decree nr. 282/2020 (VI.17.).

598 Government Decree nr. 521/2020. (XI. 25.) regulated again the extended deadlines during the second wave of the pandemic and it became the subject of the second inquiry of the Constitutional Court.

599 Hungarian Constitutional Court (Alkotmánybíróság) 3413/2020 (XI. 26.) AB decision.

unconstitutional, it only called for providing specific reasons why public duty might be endangered via granting access within the original deadline.[600]

4.4. Conclusions on freedom of information

Based on the steep decline of FOI in Hungary, by 2022, there is an abundance of reasons for rejecting or procrastinating the fulfilment of data requests: (a) data controllers can successfully challenge the quality of public data, (b) in cases of public data, they can refer to exemptions from fulfilment, for instance broadly interpreted trade (tax) secrets or copyright considerations, (c) then lastly, they can charge fees or rely on a significantly extended deadline while anticipating that time or money render the requests moot.

Furthermore, as we could see, Fidesz used its legislative supermajority to overrule FOI-milestones of the judicial praxis which is still a handy tool as long as abusive constitutionalist tactics could prevail on international fora. Finally, one cannot avoid noticing the new competences of the Kúria (see our assessment about the uniformity complaint procedure supra in Subchapter III.2.12.), which endow the special uniformity complaint panel (selected by the new Fidesz-loyalist president with zero judicial background) with the power to set a new course for jurisprudence about FOI. It is highly conceivable that former progressive judgements of the courts (including the Kúria[601]) would be set aside and replaced by the special panel, then the introduced semi-precedent system captures the minds of lower-instance judges, who cannot deviate from the officially 'established' (gleichschalted) jurisprudence in their decisions. The system is diabolically complex which gains extra impetus from the decisions - or deliberate silence – of the packed CC, therefore the undoing of it should also require a complex approach which reflects upon the systemic restoration of fundamental rights and transparent – rule of law conform - operation of the previously captured state.

600 Hungarian Constitutional Court (Alkotmánybíróság) 15/2021 (V.13.) AB decision para 44.

601 See e.g. judgements of the aforementioned Baka-panel at the Supreme Court. supra ibid.

V. CONCLUSION

The destruction of judicial independence was and remains at the centre of Hungarian rule of law backsliding.[602] Standards a judiciary must satisfy in order to qualify as an independent judiciary, i.e., a judiciary in the European sense, are not met. Many features of the institutional constellations and procedures applicable are in direct violation of European standards, whether black letter law, most notably Article 6 ECHR, Articles 2 and 19 TEU, Article 267 TFEU, Article 47 of the Charter of Fundamental Rights, or standards, tests, and case-law developed by European apex courts. Other features are indirectly affecting judicial independence, and their devastating consequences for the rule of law can only be captured in light of a thorough and contextual analysis connecting all the dots.

As shown on the above pages, the problems of the Hungarian judiciary are grave and interconnected, and destroy autonomies by being incapable of rendering justice against government mischiefs or even rubber-stamping them. EU institutions have already acknowledged the importance of an independent judiciary in their Common Provisions Regulation[603] and Rule of Law Conditionality Regulation.[604] But the judiciary is also traditionally entrusted with upholding individual rights including minority rights and is important for other spheres of autonomies as well.

Individual European responses to individual laws and practices violating the rule of law so far have failed and are doomed to continue to fail in the future, too. Instead, the systemic features of rule of law decline need systemic responses, and bundled cases of infringement actions against would provide an excellent opportunity. Acknowledging the importance of an independent judiciary for the EU's financial interest and the sound management of the EU budget, simultaneously with systemic infringement proceedings, judicial capture should also be addressed via the Rule of Law Conditionality Regulation.[605]

602 Fleck, Z. 'Changes of the Political and Legal Systems: Judicial Autonomy' German Law Journal, Volume 22, Issue 7, 2021, pp. 1298–1315.

603 Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L 347, 20.12.2013, p. 320–469.

604 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, pp. 1–10.

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