



Hungarian Helsinki Committee

HUNGARIAN HELSINKI COMMITTEE

H-1074 Budapest, Dohány utca 20. II/9.

P.O. Box: H-1242 Budapest, Pf. 317.

Tel/fax: + 36 1 321 4323, 321 4141, 321 4327

helsinki@helsinki.hu

www.helsinki.hu

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Mr. Diego García-Sayán

UN Special Rapporteur on the Independence of Judges and Lawyers

Office of the United Nations High Commissioner for Human Rights

8-14 Avenue de la Paix, 1211 Geneve 10, Switzerland

SRindependenceJL@ohchr.org

Subject: Submission regarding the election of the Chief Justice in Hungary

Dear Mr. García-Sayán,

Please find below the **submission of the Hungarian Helsinki Committee (HHC) requesting a communication regarding the election of the new Chief Justice of Hungary** as the latest development in the series of systematic attacks against judicial independence in Hungary.

The HHC is an independent human rights watchdog organisation, working towards defending human rights and the rule of law in Hungary. As a leading Hungarian human rights organisation with a globally recognised reputation, the HHC also focuses on the developments concerning the independence of the judiciary and monitors Hungary's compliance with relevant UN, EU, Council of Europe, and OSCE rule of law standards, cooperating with international human rights fora and mechanisms.

EXECUTIVE SUMMARY

On 1 January 2021, Justice András Zsolt Varga took his seat as the **President of the Kúria** (the Supreme Court of Hungary) for a period of nine years. The election process of Justice Varga contained several elements indicating that his position as Chief Justice might have been a power grab of the governing majority within the judiciary and an attack against the independence of the judiciary in Hungary. By this submission, the Hungarian Helsinki Committee aims to highlight the most problematic elements of the election of Justice Varga, drawing attention to the facts that:

- (i) a series of **recent modifications of the Hungarian legislation paved the way for the election** of Justice Varga; [see section 1 below];
- (ii) Justice Varga was elected **against the manifest objection of the judicial self-governing body** [see section 2 below];
- (iii) Justice Varga became President of the Kúria without spending a single day in judicial service, **starting an active judicial career practically simultaneously with gaining the highest position** within the ordinary court system [see section 3 below];
- (iv) further modifications of the Hungarian **legislation around his election increased the powers of the President of the Kúria**, also granting him a privileged position in shaping the mandatory interpretation of the law [see section 4 below].

1. MODIFICATIONS PAVING THE WAY TO THE ELECTION OF JUSTICE VARGA

Within a little more than one year before the expiry of the mandate of Justice Péter Darák, the previous President of the Kúria, the Hungarian Parliament adopted a series of amendments to the legislation governing the terms of appointment and the powers of the President of the Kúria. The modifications were introduced step-by-step, removing a number of constitutional safeguards of judicial independence to the detriment of judicial self-governance.

LIST OF EVENTS IN A CHRONOLOGICAL ORDER	
<p>20 DECEMBER 2019</p> <p>~ 10 months before the election of Justice Varga as President of the Kúria</p>	<p>The legislature adopted an omnibus act¹ allowing members of the Constitutional Court to be appointed as judges upon their request without an application procedure, which is otherwise a precondition for the acquisition of judicial status.² According to the new rules, once the judicial appointment is activated, former members of the Constitutional Court shall automatically become justices at the Kúria and may even be appointed as Heads of Panel without an ordinary application procedure.</p> <p>Since Constitutional Court members are political appointees, elected by Parliament, Hungarian human rights NGO's raised concerns regarding the channelling of Constitutional Court members to the Kúria reminding that <i>"the legislature is dominated by one party, so this way persons nominated and elected by one political party (without any involvement by the opposition in the Parliament) can be parachuted into the highest judicial positions."</i>³</p>
<p>1 JANUARY 2020</p> <p>~ 9 months before the election of Justice Varga as President of the Kúria</p>	<p>The rules governing the eligibility criteria for becoming President of the Kúria (which required five years of judicial practice) were amended,⁴ allowing experience as member of the Constitutional Court to be considered as time served as judge.</p>
<p>JUNE 2020</p> <p>~ 4 months before the election of Justice Varga as President of the Kúria</p>	<p>As part of his academic work, Justice Varga published an article entitled: <i>'Is it Really the Least Dangerous Power? Is there a Natural Limit to Judicial Independence?'</i>⁵ concluding that the judiciary is <i>"the most dangerous branch [of power] without any doubt"</i>⁶. Justice Varga also outlined the "natural limits" of judicial independence, suggesting amongst others that <i>"[i]t is worth reconsidering the domestic legislation in order to eliminate the weird misunderstanding of the role of judicial councils, the delusion of judicial self-governance."</i>⁷</p>
<p>1 JULY 2020</p>	<p>Justice Varga was appointed as judge⁸ based on his own request, circumventing the ordinary application procedure</p>

¹ Act CXXVII of 2019 on Amendment of Certain Laws with regard to Introducing a One-level Procedure by Local Government Offices (hereinafter: **Lex Varga I.**), adopted on 17 December 2019. The Lex Varga I. was adopted without any prior consultation with the public, in violation of the law.

² The Constitutional Court is not part of the ordinary court system in Hungary. Members of the Constitutional Court are elected by the Parliament and the requirements to become member of the Constitutional Court are different than the criteria of becoming a judge.

³ See: https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf and <https://www.amnesty.hu/wp-content/uploads/2020/10/ANALYSIS.pdf>

⁴ Article 1 of Act XXIV of 2019 on Further Safeguards Guaranteeing the Independence of Administrative Courts.

⁵ András Zs. Varga: 'Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?' in: 'A jog többrétegűsége', Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf

⁶ Ibid, p. 92.

⁷ Ibid, p. 94.

⁸ Resolution no. 308/2020 (VII.3.) of the President of the Republic published on 3 July 2020.

~ 3 months before the election of Justice Varga as President of the Kúria	and the otherwise necessary consent of the judicial self-governing body, the National Judicial Council. Mr. Varga did not actually start his service as an ordinary judge at the Kúria, since under the new rules, judicial appointment of Constitutional Court members is only activated when their mandate as constitutional justices comes to an end.
1 JULY 2020	On the same date, an additional level of judicial review was introduced into ordinary court proceedings (also applicable in ongoing court cases). According to the new rules, the Kúria shall have exclusive competence to conduct this new procedure, called "complaint for the unification of jurisprudence", which was introduced with the aim of unifying the jurisdiction of courts. The new rules governing the unification process grant the President of the Kúria a privileged role both in the adjudication of individual cases at the final instance and in shaping the mandatory interpretation of the law. ⁹
30 SEPTEMBER 2020 ~ 3 weeks before the election of Justice Varga as President of the Kúria	The European Commission's Rule of Law Report warned that the <i>"legislative changes have de facto increased the role of Parliament in judicial appointments to the Kúria. [...] [The] widening of the eligibility criteria increases the pool of candidates that could potentially be elected as Kúria President, increasing the discretion of the President of the Republic in this regard."</i> ¹⁰
5 OCTOBER 2020 ~ 2 weeks before the election of Justice Varga as President of the Kúria	The President of the Republic of Hungary nominated Justice Varga as future President of the Kúria. At this time, Justice Varga was still a member of the Constitutional Court and remained passive as an ordinary judge even after his nomination until the last moment before his election.
8 OCTOBER 2020 ~ 11 days before the election of Justice Varga as President of the Kúria	The judicial self-governing body, the National Judicial Council (NJC) held a personal hearing and adopted a preliminary opinion which by an overwhelming 13-1 majority rejected the nomination of Justice Varga as President of the Kúria (see the reasoning of the NJC below) .
16 OCTOBER 2020 ~ 3 days before the election of Justice Varga as President of the Kúria	Justice Varga resigned from his position at the Constitutional Court. His resignation activated his status as judge and he automatically became a justice and Head of Panel at the Kúria circumventing (by the force of the law) all ordinarily applicable application procedures.
19 OCTOBER 2020	Justice Varga was elected as President of the Kúria by the Parliament.
15 DECEMBER 2020 ~ 15 days before commencement of Justice Varga's term as President of the Kúria	The Parliament adopted an omnibus act ¹¹ further widening the powers of the President of the Kúria within the judiciary, amongst others by empowering him/her to select Vice-Presidents for the full term of his/her mandate and also vesting him with the right to order the application of grand panels (consisting of five justices instead of three) any time in the future.
1 JANUARY 2021	Justice Varga took his seat as the President of the Kúria. Simultaneously, the omnibus act widening the powers of the President of the Kúria within the judiciary also entered into force.

⁹ See more: https://www.helsinki.hu/wp-content/uploads/HHC_Illiberal_Highlights_of_2020.pdf p. 6-7.

¹⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN>

¹¹ Act CLXV of 2020 on the amendment of certain acts regarding the judiciary (hereinafter: **Lex Varga II.**) adopted on 15 December 2020. The Lex Varga II. was adopted without any prior consultation with the public, in violation of the law.

Without the above listed modifications, Justice Varga would not have been eligible for the position that he now holds. As a result of the recent amendments of the law, Justice Varga has become President of the Kúria practically without having served as a judge within the ordinary court system or having presided over a court trial. The modifications adopted within a little less than one year before the election of Justice Varga created a situation that the President of the Kúria is practically a political appointee elected by the governing majority, **circumventing** several – otherwise necessary – **application procedures and the obligatory consent of judicial self-governing bodies.**¹²

2. OBJECTION OF THE JUDICIAL SELF-GOVERNING BODY

Justice Varga was elected in complete disregard for the NJC's objection. As already indicated above, 13 out of 14 members of the NJC opposed his nomination holding that it *"The candidacy of Dr. Zsolt András Varga was made possible by two recent legislative amendments, which is at odds with the constitutional requirement that requires the head of the judicial system be a person who is independent of the other branches of power and who appears impartial to an outside observer."*¹³ The NJC added: *"the fact that the candidate has never performed any judicial activity and has no courtroom experience, nor practical experience of litigation or court administration, cannot be overlooked. Since the transition (1989), all presidents of the Supreme Court (Kúria) served as judges previously at some point of time."*¹⁴ As President of the Kúria, Justice Varga became the one and only member of the NJC **not elected by judicial peers, yet involved in the decision-making of the self-governing judicial body.** His election as President of the Kúria against the non-binding objection is a clear message to the NJC (which is constitutionally assigned to safeguard the independence of courts and judges) that the ruling majority is not willing to respect judicial independence by taking into due account the judiciary's stance when selecting the head of the highest court in Hungary.

3. JUSTICE VARGA STARTED HIS JUDICIAL CAREER AS ELECTED PRESIDENT OF THE KÚRIA

The above detailed modifications enabled Justice Varga to **start his judicial career at the top tier of the judiciary as elected President of the Kúria**, less than three months before the beginning of the term of his mandate. The short biography below highlights the professional experience of Justice Varga revealing that before his **half-served mandate at the Constitutional Court elected as a one-party candidate in 2014** as part of the court packing process of the governing party, Justice Varga **served for over 10 years as Deputy General Prosecutor** subordinate in rank to the current General Prosecutor, Mr. Péter Polt (a former member of the governing Fidesz party). Former positions of Justice Varga at the Ombudsman's Office were also linked to the current General Prosecutor (who served as the Ombudsman's General Deputy during the same period).

PROFESSIONAL EXPERIENCE OF JUSTICE VARGA¹⁵

- 1995 Assistant, Public Prosecutor's Office, Budapest
- 1996 Rapporteur at the Ombudsman's Office
- 1997 - 1998 Deputy Head of Department at the Ombudsman's Office
- 1999 Director of the Ombudsman's Office (Deputy State Secretary)
- 2000 – 2006 Deputy Prosecutor General, **General Prosecutor's Office**
- 2006 – 2010 chief counsellor tit. prosecutor, **General Prosecutor's Office**
- 2010 – 2013 Deputy Prosecutor General, **General Prosecutor's Office**
- 2013 - member of the Venice Commission
- 2014 - 2020 Justice of the Constitutional Court of Hungary
- 2021 – President of the Kúria

¹² Under the normal procedure, judges are appointed to the Kúria by its President, following a call for applications, on the basis of an opinion of the Kúria's competent department and of an assessment and ranking of candidates by the Kúria's judicial council. The Kúria President may not appoint the candidate ranked second or third without the prior consent of the National Judicial Council.

¹³ <https://orszagosbiroitanacs.hu/english/> and <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriai-elnokenek-javasolt-szemelyt/>

¹⁴ Ibid.

¹⁵ Based on the full biography of Justice Varga available at <https://jak.ppke.hu/en/teaching/faculty-members-and-researchers/varga-zsolt-andras-812a1>

In the last few years, Justice Varga has published a book and several articles relativizing the importance of adhering to the rule of law, and justifying the Hungarian government's illiberal understanding of democracy, human rights and the rule of law.¹⁶ A couple of months before his election as President of the Kúria, in an article published as part of his academic work, he suggested that judicial independence should be limited by among others modifying domestic legislation in order to eliminate judicial self-governance and limiting the freedom of judicial interpretation by prescribing uniform application of the law and requiring adherence to former decisions as precedents.¹⁷

4. MODIFICATIONS INCREASING THE POWER OF THE PRESIDENT OF THE KÚRIA

The President of the Kúria in Hungary traditionally holds strong powers within the top tier of the judiciary, having (i) administrative powers that permit him to determine judicial careers within the Kúria (e.g. appointment, evaluation, promotion and relocation of justices); (ii) managerial powers that authorise him amongst others to exercise employer's rights over Kúria justices (e.g. the right to initiate disciplinary proceedings) and (iii) a right to determine the case allocation scheme of the Kúria and allow derogations from it. In case of Justice Varga however, the above powers were further increased, as demonstrated below:

- (i) With effect of **1 July 2020**, an **additional level of judicial review was introduced in the ordinary court system**, affecting all court proceedings. The Kúria has exclusive competence to conduct this new procedure, called "complaint for the unification of jurisprudence", which was introduced with the aim of guaranteeing uniform interpretation of the law. The new rules governing the unification process **grant the President of the Kúria a privileged role both in the adjudication of individual cases at the final instance and in shaping the mandatory interpretation of the law.**¹⁸
- (ii) With effect of 1 January 2020, the President of the Kúria was vested with **the right to raise the number of members of the judicial panels** at the Kúria from three to five, creating more positions at the Kúria and the possibility to increase the number of loyal judges at the Kúria (e.g. by appointing constitutional justices who were granted judicial appointment together with Justice Varga). This may lead to court packing and the capture of the final instance of the judiciary by another branch of power, the legislature.

¹⁶ See more: https://www.helsinki.hu/wp-content/uploads/Now_its_time_to_worry_20210107.pdf

¹⁷ András Zs. Varga: 'Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?' in: 'A jog többretekűsége', Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretekusege.pdf.

¹⁸ See more: https://www.helsinki.hu/wp-content/uploads/HHC_Illiberal_Highlights_of_2020.pdf p. 6-7.