



Hungarian Helsinki Committee

## THE NEW PRESIDENT OF THE KÚRIA

### A POTENTIAL TRANSMISSION BELT OF THE EXECUTIVE WITHIN THE HUNGARIAN JUDICIARY

22 OCTOBER 2020

#### EXECUTIVE SUMMARY

The election of the new President of the Kúria (the Supreme Court of Hungary) exacerbates the constitutional crisis of the Hungarian judiciary, endangering the internal independence of judges and posing a clear threat to the distribution of powers and the protection of fundamental rights in Hungary. Zsolt András Varga, the nominee of the governing majority was elected by the Parliament against concerns raised by international stakeholders and amidst manifest opposition of the judicial self-governing body, the National Judicial Council (NJC). The NJC rejected the nomination of Varga by an overwhelming majority expressing concerns of independence from the executive. As a matter of fact, Varga has never served as a judge. In turn, he served as Deputy General Prosecutor for 10 years in direct hierarchical link with the current General Prosecutor. His mandate as the president of the Kúria was enabled by a series of recent amendments of different laws, which was criticised by numerous domestic and international actors, most recently by the European Commission's Rule of Law Report. Assessing his work at nearly half of his term as member of the Constitutional Court foreshadows Varga's full loyalty towards the Government even if protection of fundamental rights or the rule of law are at stake. With the election of Varga as President of the Kúria for the next nine-year term, a potential transmission belt of the executive is built into the engine of the Hungarian judicial system. Attacks against the judiciary as the last standing line of defence of democracy, the rule of law and fundamental rights in Hungary will now continue at an increased yet more hidden level.

#### INTRODUCTION

Judicial independence has been under constant threat since the Fidesz-led governing majority took power in 2010. Steps undermining judicial independence included the centralisation of the administration of courts, the lowering of the mandatory retirement age of judges, prematurely terminating the mandate of the Supreme Court's President, attempting -- but eventually failing -- to set up a heavily government-controlled administrative court system and exerting pressure on critical judges.<sup>1</sup> Parachuting Varga as a political appointee to the top of the Hungarian judicial system is a new stage in the series of these attacks. The present paper intends to explain the constitutional controversies of mandating Varga as President of the Kúria and the threat it poses to the independence of the judiciary and the protection of human rights in Hungary.

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<sup>1</sup> [https://www.helsinki.hu/wp-content/uploads/Hungary\\_judiciary\\_timeline\\_AI-HHC\\_2012-2019.pdf](https://www.helsinki.hu/wp-content/uploads/Hungary_judiciary_timeline_AI-HHC_2012-2019.pdf)

## FACTS

**On 5 October 2020**, the President of the Republic of Hungary nominated<sup>2</sup> András Zsolt Varga - current member of the Constitutional Court - as future president of the Kúria.<sup>3</sup>

**On 8 October 2020**, the judicial self-governing body, the National Judicial Council (NJC) held a personal hearing and adopted a preliminary opinion which by overwhelming 13-1 majority rejected the nomination of Varga.

**On 19 October 2020**, despite the well-pronounced opposition of the NJC, the Parliament elected Varga as President of the Kúria with effect of 1 January 2021, for nine years.

## CONSTITUTIONAL CONTROVERSIES REGARDING THE NOMINATION AND ELECTION

The election of Varga involves a number of serious constitutional concerns.

(1) Varga became President of the Kúria as a result of recent modifications of the underlying legislation. The modifications removed a number of constitutional safeguards of judicial independence quietly preparing the appointment of Varga as President of the Kúria. Without these modifications Varga would not have been eligible for the position.

(i) **Less than one year ago, Varga could not have been appointed as judge.** With effect of 20 December 2019, an omnibus act<sup>4</sup> allowed members of the Constitutional Court to be appointed as judges upon their request without an application procedure which is otherwise a precondition of the acquisition of judicial status. The Constitutional Court in Hungary is not part of the ordinary court system, its members are elected by the Parliament and the requirements to become a member of the Constitutional Court are different from the criteria of becoming a judge. Varga became a member of the Constitutional Court as a one-party nominee in 2014. He has not served half of his term when using the newly introduced possibility he requested to be appointed as judge under the Omnibus Act. With effect of 1 July 2020 - that is three months before his election as Kúria President - Varga was appointed as judge based on the new rules of appointment.<sup>5</sup> This did not mean that he actually served as a judge, since in terms of the law, the judicial appointment of Constitutional Court members is only activated when their mandate as constitutional judges comes to an end (through expiry or resignation).

(ii) **Less than one year ago, Varga could not have started his judicial career at the Kúria.** Being a judge at the Kúria has always been the summit of a judicial career, reached by judges after several years of exemplary work and after getting to know the various levels of the court system in practice.<sup>6</sup> With the entry into force of the Omnibus Act, members of the Constitutional Court appointed as judges do not only become judges, they automatically become judges of the Kúria after their mandate as members of the Constitutional Court terminates. This modification allows Varga to start his judicial service at the top tier of the judiciary, circumventing several grades of checks by judicial peers built into the legislation.<sup>7</sup>

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<sup>2</sup> According to the laws of Hungary, there is no call for applications for the position of President of the Curia. The process is initiated by the President of the Republic who nominates a candidate. Following a personal interview, the National Judicial Council issues a non-binding opinion of the nominee. The final decision is taken by the Parliament with votes of two-thirds majority.

<sup>3</sup> <https://www.parlament.hu/irom41/13175/13175.pdf>

<sup>4</sup> Act CXXVII of 2019 on Amendment of Certain Laws with regard to Introducing a One-level Procedure by Local Government Offices (hereinafter: Omnibus Act), adopted on 17 December 2019. The Omnibus Act was adopted without any prior consultation with the public, in violation of the law.

<sup>5</sup> Resolution no. 308/2020 (VII.3.) of the President of the Republic published on 3 July 2020.

<sup>6</sup> According to the Consultative Council of European Judges (CCJE) opinion no. 19 (2016) on the Role of Court Presidents: "The minimum qualification to become a court president is that the candidate should have all the necessary qualifications and experience for appointment to judicial office in that court." <https://rm.coe.int/opinion-no-19-on-the-role-of-court-presidents/16806dc2c4>

<sup>7</sup> Article 14 (3) a) and 15 (1) c) of Act CLXII of 2011 on the Status and Remuneration of Judges (hereinafter: Bjt.).

(iii) **Less than one year ago, Varga would not have qualified for becoming the President of the Kúria.** With effect of 1 January 2020, the rules governing the eligibility criteria for this position (which requires candidates to have at least five years of judicial practice) were amended<sup>8</sup> allowing experience as member of the Constitutional Court to be considered as time served as judge. Hence, at the moment of nominating Varga for the post, his total lack of judicial experience (see below) was not an obstacle to his nomination any more.

(2) **Varga became President of the Kúria without spending a single day in judicial service.** Varga has never served as a judge within the ordinary court system, he has never presided over a trial. His position as member of the Constitutional Court cannot substitute experience gained at ordinary courts. The Constitutional Court in Hungary is not part of the ordinary judicial system and has specific rules of procedure alien to ordinary court proceedings. Its members are elected by the legislature (dominated by one party since 2010), therefore political considerations may easily override professional qualities in their appointment. In order to become a member of the Constitutional Court it is not required to have any practical experience, the position can also be fulfilled by academics or scholars.

(3) **Varga was elected despite concerns raised by domestic and international stakeholders regarding the legislation applied.**

(i) Hungarian human rights NGO's raised concerns regarding the channelling of Constitutional Court members to the Kúria reminding that *"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."*<sup>9</sup>

(ii) The Commissioner for Human Rights of the Council of Europe issued a statement<sup>10</sup> claiming that the Omnibus Act *"in its current form may have a negative effect on the internal independence of courts and judges and fair trial guarantees for individuals"*, and urged the Hungarian Parliament to modify the Act.

(iii) Most recently, the European Commission's Rule of Law Report warned that the *"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."*<sup>11</sup>

(4) **Varga was elected in complete disregard for the NJC's objection.** 13 out of 14 members of the NJC opposed his nomination holding that it *"does not respond to the constitutional requirement according to which the person sitting at the top of the court system shall be independent from other branches and shall appear as impartial to an external observer as well."*<sup>12</sup> As President of the Kúria, Varga will be 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.

(5) **The election of Varga as President of the Kúria undermines the appearance of independence of the justice in Hungary.** Varga has never served as a judge and was appointed to be one only a couple of weeks before his election under new legislation circumventing the general application procedure. Before mandated as member of the Constitutional Court in 2014, Varga served

<sup>8</sup> Article 1 of Act XXIV of 2019 on Further Safeguards Guaranteeing the Independence of Administrative Courts.

<sup>9</sup> See: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Act\\_CXXVII\\_of\\_2019\\_on\\_judiciary\\_analysis\\_2020Jan.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf) and <https://www.amnesty.hu/wp-content/uploads/2020/10/ANALYSIS.pdf>

<sup>10</sup> <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>

<sup>11</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN>

<sup>12</sup> <https://orszagosbiroitanacs.hu/az-obt-velemenyezte-a-kuriaj-elnokenek-javasolt-szemelyt/>

for over 10 years as Deputy General Prosecutor **subordinate in rank to the current General Prosecutor**. His election as President of the Kúria not only risks public confidence in the judiciary in general, but can also raise objectively justified doubts in individual cases due to a possible overlap in criminal proceedings where charges were brought under his office as deputy prosecutor and the final ruling is delivered after he became President of the Kúria.

## VARGA AS A POTENTIAL TRANSMISSION BELT OF THE EXECUTIVE

Not without reason has the governing majority made every effort to achieve that a politically loyal appointee would take the seat of the chief-judge. Taking into consideration the powers attached to this position it becomes clear that **electing someone with loyalty to the executive as President of the Kúria creates a possibility for exercising political pressure in cases sensitive for the government and taming the judiciary in an almost invisible manner**.

(1) **The President of the Kúria has excessive powers over judicial careers within the Kúria.** He can influence the ranking of candidates to the Kúria,<sup>13</sup> is entitled to take part in evaluating applications,<sup>14</sup> has a decisive role in the promotion,<sup>15</sup> relocation<sup>16</sup> and secondment<sup>17</sup> of Kúria justices and can initiate the termination of the judge's appointment at the Kúria.<sup>18</sup> **The powers of the President open a way to packing the highest court of Hungary with politically loyal judges.**

(2) **The President of the Kúria is also capable of indirectly influencing the outcome of a case through his administrative powers.** As a court president he has the power to establish (and modify) the case allocation scheme of the Kúria.<sup>19</sup> As the case-allocation scheme also regulates the composition of panels,<sup>20</sup> the President of the Kúria can practically assign a concrete case to a certain panel exploiting the loopholes within the case-assignment regulation (e.g. using the possibility of applying exceptional rules<sup>21</sup> or to reassign the case to another judge or panel for non-transparent reasons<sup>22</sup>). The President of the Kúria is also entitled to designate judges adjudicating administrative matters,<sup>23</sup> and therefore has the right to determine the composition of chambers in cases where a state body is involved. Reshuffling the case-assignment scheme and the composition of panels can actually influence the outcome of a case or at least make one outcome more likely than another (e.g. based on the previous interpretations and approaches of the individual judges).

(3) **The President of the Kúria may exert undue pressure on judges through his managerial powers.** As the person entitled to exercise employer's rights vis-à-vis Kúria judges<sup>24</sup> the President can affect the everyday life of judges by creating their work schedules, determining their workload and holding rights to decide in what chamber a judge will sit. The President controls parts of their salaries and is entitled to initiate disciplinary proceedings,<sup>25</sup> decides on complaints on whether members of the disciplinary court are biased,<sup>26</sup> and in case he/she finds the bias-complaint grounded, appoints different members of the disciplinary panel.<sup>27</sup> All these powers can be used to exercise inappropriate pressure on individual judges. Even in the absence of direct pressure, judges who seek favourable treatment or promotion may be tempted to adjust their decision-making to the presumed

<sup>13</sup> The President of the Kúria has power to influence the ranking candidates of the Kúria by holding right to evaluate the candidate's work in unification panels [Article 14 (1) ab) of Bjt.].

<sup>14</sup> Article 17 of Bjt.

<sup>15</sup> Article 27 (2) of the Bjt.

<sup>16</sup> Article 34 (2) of the Bjt.

<sup>17</sup> Article 31 of the Bjt.

<sup>18</sup> Article 64 (1) b) of the Bjt.

<sup>19</sup> Article 9 of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter: Bszi.).

<sup>20</sup> Article 10 (1) of the Bszi.

<sup>21</sup> Article 11 (2) of the Bszi. According to the current case-assignment schedule, the President of the Kúria and one Deputy President of the Kúria shall be entitled to derogate from the rules of case-assignment. [See Article III.4.3.] [https://kuria-kozadatok.birosag.hu/sites/default/files/field\\_attachment/ugyelosztasi\\_rend\\_2020\\_10\\_01.pdf](https://kuria-kozadatok.birosag.hu/sites/default/files/field_attachment/ugyelosztasi_rend_2020_10_01.pdf)

<sup>22</sup> Article 32 (1) of decree no. 14/2002 (VIII. 1.) of the Minister of Justice on Judicial Administration.

<sup>23</sup> Article 30 (5) of the Bjt.

<sup>24</sup> Article 99 (1) b) of the Bjt.

<sup>25</sup> Article 130 of the Bjt.

<sup>26</sup> Article 115 (3) of the Bjt.

<sup>27</sup> Article 116 (2) of the Bjt.

expectations of the President of the Kúria, and vice versa, judges who are reluctant to meet expectations may easily face harsh working conditions.

(4) **The President of the Kúria has a leading role in the unification of the jurisprudence and can shape the interpretation of the law.** The Kúria shall guarantee the uniform application of the law and is entitled to issue binding interpretations.<sup>28</sup> The President of the Kúria can initiate a unification procedure,<sup>29</sup> become head of the unification panel and select the members of it.<sup>30</sup> Binding interpretations issued by the unification panel have great importance in shaping the mandatory interpretation of the law as no derogation thereof is allowed for lower tier courts.<sup>31</sup> The President of the Kúria also determines the tasks and composition of working groups analysing the jurisprudence.<sup>32</sup> These powers enable the President of the Kúria to shape the interpretation of laws and determine the jurisprudence of lower tier courts.

Each of these powers have a strong impact on the internal independence of the judiciary, and their effect is multiplied by the fact that they are unified in one hand. **Taking into account the above functions it is evident that, if he does not keep his distance from the executive branch, Varga may act as a transmission belt of the executive within the judiciary.** Strong, and durable, as his mandate lasts for nine years. For the next nine years, undermining judicial independence in Hungary may continue in a new, more hidden manner.

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<sup>28</sup> Article 25 (3) of the Fundamental Law.

<sup>29</sup> Article 33 (1) a) of the Bszi.

<sup>30</sup> Article 34 (1) of the Bszi.

<sup>31</sup> In addition to that, the jurisprudence of the Kúria became of even larger significance since the Omnibus Act introduced a limited precedent system with effect of July 2020. In the 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. See more: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Act\\_CXXVII\\_of\\_2019\\_on\\_judiciary\\_analysis\\_2020Jan.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf)

<sup>32</sup> Article 29 (1) and (2) of the Bszi.