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### ***Crisis in the Hungarian judicial administration?***

There have been several articles and interviews in the public and political news lately on the conflict between the President of the National Office for the Judiciary (OBH) and the National Judicial Council (OBT). Obviously, misstatements and occasionally misrepresentations were released, partly with the contribution of the actors concerned and partly through misinterpretations that have led lawyers and non-lawyers astray. The time has come to put this topic back where it belongs: in the domain of public law and international public law. In all probability, there is consensus that bringing a public law debate concerning the judicial apparatus and the administration of courts to the stage of politics and the tabloids is detrimental to the image of the judiciary overall; however, it is also important to speak clearly and to present explicit arguments on issues of public interest, pertaining also to the everyday life of citizens.

Judges should refrain from manifestations of a political type. On the other hand, however, it is the duty of every judge to enhance the enforcement of and respect for the independence of the judiciary. In this paper I examine the supra-political, public law aspect of the topical issues of the administration of courts based on the known facts, by presenting legal arguments, from the point of view of legal science.

#### **1. President of the National Office for the Judiciary (OBH) and the National Judicial Council (OBT)**

After the systems change and the initial period of ministerial administration, Hungary adapted a corporative management model in which the operation and administration of the judicial organisation was assigned to the competence of the National Council of Justice (OIT) composed mainly of judges. In this model, the operative part of the activity was not performed by the judges in the council who retained also their judicial tasks, but by the Office organised under OIT and by its leader.<sup>1</sup> The lessons of the corporative system were drawn by the legislator in 2011, and the central administration of courts was put into the hands of a single person, the President of the National Office of the Judiciary. This change essentially meant that Act CLXI of 2011 on the organisation and administration of courts in Hungary (Bsz.) put one person at the head of the organisation, endowed with broad powers regarding the most important issues of the administration of justice: the distribution of judicial positions and the measurement of the workload, the appointment of judges and court executives, the training of judges, the court budgets, fixed assets and technical infrastructure and, moreover, the planning and execution of major property investments and organisational developments.<sup>2</sup>

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<sup>1</sup> Act LXVI of 1997, Chapter IV

<sup>2</sup> For a detailed list of the functions of the President of OBH, see Bsz. § 76

The President of OBH is assisted in executing her tasks by the Office having a bloated staff of 300 already.<sup>3</sup> After 2012, not the Council had an Office and the Office its own leader, but the President of OBH acquired a personalised apparatus, whereas OBT established to supervise the President of OBH has been functioning without own infrastructure and, what is more, its status has been settled in such a far-from-satisfactory way that, in the absence of independent legal personality, it cannot execute even the most essential procurements necessary for its operation, not to speak of maintaining an office or hiring employees. OBT does have a budget of its own, but in the absence of legal personality it is unable to manage its own resources, that is, although it had been given some “pocket money”, its wallet was put by the legislator in the hands of no other but the President of OBH.<sup>4</sup>

To return to the President of OBH, his/her position differs from the legal status of previous OIT Office heads in several essential respects: she had not been appointed by the Council embodying judicial self-governance, but was elected by the Parliament embodying the legislative power branch, by two-third majority vote. Although OBT have to express their opinion on his/her person, in the case specifically of Ms Tünde Handó this was not feasible since OBT had not existed yet in December 2011, and OIT was about to be terminated.<sup>5</sup>

In some countries of Europe the Minister of Justice has a considerable say in the administration of courts, but I am convinced that if they knew the Hungarian regulations, they would envy the status and powers of the President of OBH. For, unlike a member of the government, she can only be removed by two-third majority decision; she may execute her plans in a cycle not of four, but of nine years, and putting on the robe of independent judge, she may even oppose the will of the government.<sup>6</sup> In the past six years it has already been experienced also in everyday practice that no segment of judicial operation is immune to the decisive direct or indirect influence or interference of the President of OBH. Neither can we claim that Hungarian courts suffered shortages in terms of budgetary resources because our Chief Justice is not a member of the government because – as pointed out by the President of OBH very many times in her reports, communications and interviews – budgetary support to justice had fortunately increased substantially over the past six years, providing cover or long-owed developments and investments.<sup>7</sup>

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<sup>3</sup> The authorised headcount of the Office was 169 in early 2012; this rose to 218 at end-2014 and to 298 at end-2016. The 2016 yearly report of the President of OBH mentioned also that another 219 persons from the judicial organisation were assigned central administration tasks, and 103 members of 15 workgroups assisted the activity of the Office.

<sup>4</sup> Pursuant to Bszi. § 104, the OBT budget is indicated within the OBH budget separately, and it has to conclude an agreement about it annually with the President of OBH who ensures the technical conditions of its operation and, pursuant to Bszi. § 86 (3)(a) she manages executive tasks relating to the functioning of OBT.

<sup>5</sup> Ms. Tünde Handó was appointed on 14 December 2011 by National Assembly Decree 92/2011. (XII.14.) OGY, and OBT held its inaugural meeting on 23 March 2012.

<sup>6</sup> For example, the administrative judicial reform that the Government intended to introduce in 2016, broken inter alia by the strong resistance of the President of OBH (supported by the previous OBT and also the National Association of Labour Court Judges).

<sup>7</sup> The budget appropriation under the chapter on the courts was HUF 69.3 billion 2011, HUF 79.4 billion already in, HUF 87.2 billion in 2014, HUF 87.5 billion in 2015, HUF 92.8 billion in 2016 and HUF 118.4 billion in 2017. By the year 2018, the chapter budget reached HUF 120.3 billion, corresponding to 73.6% growth relative to 2011, against a total (cumulated) inflation rate of 14.5% in the period 2011-2017.

In any case it must be pointed out that in the new model introduced in 2012 the appointment of the President of OBH is decided upon outside the judicial organisation; his/her person is of necessity the outcome of political consensus or, under appropriate government majority, of party will. The political nature of the appointment is not altered substantially by the provision that, pursuant to the legislation, the President of OBH must be a judge, in particular since he/she shall not conduct judicial activity during the nine years of his/her mandate, and his/her judicial rights – as those of any judge assigned to the Office – are fully suspended. Plainly speaking, any judge appointed president of OBH preserves his/her judicial status, but actually temporarily loses his/her “judicial quality” as he/she is not allowed to act as judge afterwards.<sup>8</sup>

The examination of the ministerial justification of Bszi. reveals that the legislator deliberately, of necessity, put the agency embodying judicial self-governance in a pure form above the one-man leader endowed with excessively broad powers in order to fulfil a control function. The 14 members of the National Judicial Council (OBT) are elected by the judges by secret ballot, democratically, for a cycle of 6 years. The President of the Kúria (Supreme Court of Hungary) is a member *ex officio*. The main duty of the Council is to supervise central judicial administration.<sup>9</sup>

Due exactly to its constitutional “checks and balances” function, the OBT cannot be interpreted either as an interest representation agency acting in favour of the judiciary<sup>10</sup> or as some kind of advisory body<sup>11</sup> and especially not as a “revolutionary council” acting against, or in opposition to, something or someone, as apostrophised in certain newspapers. In the sense of public law, in the current system of Hungarian state power, OBT and judicial self-governance guarantee the rule of law and embody the independence of the judicial branch of power, since judicial self-governance must of necessity exercise supervision over the political appointee President of OBH concerning the most important status issues.

## **2. Independence, accountability and efficiency**

Now that we are on the threshold of another judicial reform, it should be stated at the outset that the choice and restructuring of the judicial administration system and the

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<sup>8</sup> Pursuant to Bszi. § 66(1) “the President of OBH shall be elected by the Parliament from among judges appointed for an indefinite period of time and having at least 5 years of service. According to §57 (1) of Act CLXII of 2011 on the legal status and remuneration of judges in Hungary (Bjt.), “judges posted at the OBH shall retain their judicial title but may not administer justice.”

<sup>9</sup> “In case of one-man leadership, there is an enhanced need also for creating a counterweight. However, the body representing the counterweight needs to be created and assigned such tasks as do not result in a rival body with parallel tasks, but one that represents a real power check for one-man leadership. The Act therefore establishes OBT, with inspection, proposal, commenting rights, to supervise central administration, that may also ultimately initiate the removal of the President of OBH from his/her office at the Parliament.”

<sup>10</sup> The open letter of 29 May 2018 of the presidents of regional courts of appeal and tribunals appointed by the President of OBH reads – without any specific statement of facts – as follows: “the activity of the members of OBT so far does not serve the interest of the Hungarian judiciary.”

<sup>11</sup> Sometimes even judges call to account those concerned for the required tight cooperation of OBT with the President of OBH, although cooperation is basically interpreted in the context of the supervised body and the supervising person. As opposed to its supervisory powers, OBT’s contribution to central administration is indicated specifically under the powers described in Bszi. in a few cases only (e.g. adopting the code of ethics of judges)

judicial organisation is the exclusive right and duty of the constituent power. Nevertheless, this does not mean that the legislator is not subject to certain limitations due either to the democratic constitutional arrangement of the country, or its EU membership or international contractual obligations.<sup>12</sup>

The Basic Principles on the Independence of the Judiciary drafted by the UN Human Rights Committee in 1985 required the inclusion of protection guarantees in the selection of judges to prevent any discrimination or even “improper” motives in connection with it. The promotion of judges should be based on objective factors, in particular ability, integrity and experience criteria.<sup>13</sup>

Recommendation No. R (94) 12 of the Council of Europe issued in 1994 lays down that all decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity and efficiency. It is an express limitation that the authority taking the decision on the selection and promotion of judges should be fully independent of government and administration and, in order to safeguard its independence, rules should ensure that its members are selected by the judiciary and its procedural rules are decided by itself.<sup>14</sup>

The Magna Charta of the Consultative Council of European Judges (CCJE) issued in Strasbourg in 2010 mentions among the fundamental principles of the rule of law and justice that judicial independence shall cover in particular the nomination and career of judges based on objective criteria, their irremovability, training, judicial immunity, discipline, remuneration and financing. In the exercise of their function to administer justice, judges shall not be subject to any order or instruction, or to any hierarchical pressure, and shall be bound only by law. The Charta expressly requires that, in order to ensure the independence of judges, each State shall create a Council for the Judiciary or another specific body, itself independent from legislative and executive powers and composed either of judges exclusively or of a substantial majority of judges elected by their peers.<sup>15</sup>

ENCJ, the organisation gathering the European Networks of Councils for the Judiciary, also set out in its documents that, while respecting the different historical traditions of the Member States, it has become a fundamental requirement for the accession countries or in connection with judicial reforms introduced in any Member State to ensure autonomous judicial self-governance, that is, to set up councils composed mainly of judges and elected by their peers. It is expected that judicial councils exercise decisive rights in the nomination and career of judges, their training and further training, their disciplinary and

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<sup>12</sup>Pursuant to Section 10 of the Universal Declaration of Human Rights, “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Section 6 of the European Convention on Human Rights similarly declares that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

<sup>13</sup><https://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

<sup>14</sup><https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804c84e2>

<sup>15</sup><https://rm.coe.int/16807482c6>

ethical responsibility, complaints against the judicial organisation, efficiency management, central administration of courts, the budgets of the courts and, furthermore, the initiation of legislation related to courts. Member States shall ensure continuous compliance with these democratic standards, since these are the main guarantees of the independence, accountability and efficient operation of justice. Judges shall be selected in every case based exclusively on merits and abilities, and the will of a self-governance body that is independent of the executive and the legislative powers shall be asserted.<sup>16</sup>

Political discourse often puts the independence of the judiciary into a context where judges, locking themselves in an ivory tower, draping themselves in the cloak of independence, place themselves above society. The Lisbon Declaration of ENCJ published on 1 June 2018 states with foresight that *“a judiciary that resists change and is perceived to be backward looking will ultimately lose the trust of the people and become vulnerable to external attacks in particular from the other state powers and the media”* It is therefore important that the councils representing judicial self-governance *“should initiate and lead a process of positive change with a view to promoting an independent, accountable and high quality judiciary, so enabling judiciaries to optimize the timely, impartial and effective delivery of justice for the benefit of all”*.<sup>17</sup>

Therefore, correctly interpreted, the independence of the judiciary is not about the privilege of judges, but it is the cornerstone of the right of citizens to a fair trial. This is the only way for a democratic state to ensure that the cases of citizens be judged by persons selected on a professional basis, free from any influence and bound only by law. What the state guarantees thereby is not the infallibility of specific judges or specific judgements, but the principle of operation of an independent system that is free from any influence. Two important components of the right to fair trial and to a lawful judge are that the appointment of judges should take place without partiality and autocratic influence and case distribution should be driven by objective principles fixed in advance.

### *2.1. Appointment of judges:*

According to the appointment system adopted in 2011 in Hungary, judges are selected via application, in a transparent way, whether this concerns a first appointment or any further promotion, or transfer to a court with a different competence area. After the call for applications for the judicial position is published, applications are evaluated by scores given by the judicial councils of the regional courts and regional courts of appeal based on a set of criteria defined by justice decree. The majority are so-called objective points given to the candidates without any special consideration – based on service time, competencies and qualifications –, whereas others (subjective points) are determined by the judicial council or the professional division after the personal hearing of the candidates, by voting.<sup>18</sup>

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<sup>16</sup>[https://www.encj.eu/images/stories/pdf/workinggroups/encj\\_distillation\\_report\\_2004\\_2017.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/encj_distillation_report_2004_2017.pdf)

<sup>17</sup><https://www.encj.eu/node/478>

<sup>18</sup>7/2011 (III.4.) Decree of the Minister of Justice on the detailed rules and application ranking scores of judicial appointment proceedings

Judicial council members are elected by the judges working at the given district court and regional court or regional court of appeal from among themselves, by secret ballot. Divisions are professional assemblies of regional court or regional court of appeal judges working in the given division. There is a civil and a criminal division at each regional court and regional court of appeal, there are also economic divisions at larger tribunals and there are regional administrative and labour divisions with jurisdiction over several tribunals. Similarly to OBT, these bodies embody judicial self-governance at local level since in the sense of public law they represent, directly or indirectly, the corporate will of judges.<sup>19</sup>

In the event that the President of OBH wants to appoint the applicant ranking first based on the scores of the judicial council, she may decide on that individually without any further restrictions. This is applicable also in the sense of public law for, apart from the fact that a major part of appointments of judges can proceed quickly and smoothly in these cases. The ranking is based on the decision of the judicial council embodying judicial self-governance. Therefore, according to the logic of public law, no legitimacy problem arises if the final decision-maker is a political appointee from outside the scope of judicial self-governance. It may happen, however, that – based on the scores alone – one candidate ranks higher than another, more suitable, one, and is considered better for the job maybe also by the judicial council or the division. For example, a judge with a longer service period applies for a job in another part of the country for family or other personal reasons, but an other applicant with shorter service period has higher objective scores and finishes ahead of him in the contest. In such cases it may be justified to appoint not the person ranking first, but the one occupying second or third position; therefore, the law provides the President of OBH the right to depart from the ranking *ex officio* or on the motion of the president of the court concerned. However she may do so only with the agreement of OBT. In such cases OBT ensures the legitimacy of the decision.<sup>20</sup>

The regulation pertaining to the case where OBT does not agree with the proposal to rank a candidate higher, despite of that the President of OBH does not appoint the candidate who is first in rank order is not coherent and therefore does not comply fully even with the minimum standards in practice. For, in such cases, according to the Bjt., the President of OBH may make a further proposal to OBT or even – as several examples have shown in practice – declare the application proceedings unsuccessful, and then initiate new application. By exploiting this legal lacuna, the President of OBH can bypass judicial self-governance, i.e. overwrite the will of OBT and the judicial councils of the courts. It should be noted that the law provides a taxative list of the options to declare the proceedings unsuccessful and, therefore, we may draw the conclusion that it was definitely not the intent of the legislator to provide such broad rights to Chief Justice for bypassing judicial self-governance.<sup>21</sup>

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<sup>19</sup>Bszi., Chapter IX

<sup>20</sup>Bjt., Chapter II

<sup>21</sup>Declaring the proceedings unsuccessful is regulated under Bjt. § 20

## 2.2. *Appointment of court executives:*

Another important right of the President of OBH is the appointment of the most important court executives. Bszi. allocates here the right to appoint regional court and regional court of appeal presidents and vice-presidents exercising disciplinary right over judges, and heads of divisions who have great influence on the judicial practice of the courts by managing their professional work. Ultimately, the case allocation rules are also designed by these executives, so they have decisive influence on which judge would proceed in which case.

Executives are appointed by open call, under which the candidates describe their planned measures and concepts for the six-year period concerned in a detailed career plan published on the central website of the courts.<sup>22</sup> The legitimising function of judicial self-governance appears also in the appointment of court executives: for the presidents and vice-presidents the general conference (i.e. all judges of the given court), and for heads of division the division and then also the all-judges conference express their opinion on the application by secret ballot. If the President of OBH does not wish to appoint the candidate enjoying most support or wants to appoint a person who did not win the major support of the reviewing board (50% plus 1 vote), he/she may appoint that candidate exclusively with the agreement of OBH. Obviously, the legislator tried to integrate guarantees also in the appointment process of court executives, since – as a general principle – no court executive shall be appointed without legitimisation by judicial self-governance.<sup>23</sup>

No system is perfect, and the President of OBH has found the right loophole also in this case. We have seen several examples over the past six years when she declared an executive application unsuccessful although one of the candidates enjoyed the support of the majority of judges, because she just did not want to appoint that person. The law, by the way, provides the “right of no decision” to the President of OBH, but at system level, the high number of persons not supported by the judges who are nevertheless fulfilling important executive positions projects an alarming democracy deficit. It has become regular for persons to be appointed executives who had not even submitted an application and were consequently not evaluated by the judges. The relevant method, quite widespread already, is that after declaring the second round of applications for an executive position unsuccessful, the President of OBH assigns someone for one year – any judge, often not even from the court concerned – to fill the position, and when new application proceedings are initiated one year later, that person is usually the only candidate, and before the ballot judges already know well whom the President of OBH wishes to see in the executive seat. The judges have two options: to protest and refuse supporting the candidate of the President of OBH, or accept the fact that, if they want the support of the central administration and especially if they want peace at their workplace, they vote yes. Although the legitimising effect of judicial self-governance prevails formally, assigning an executive function to a person who had not even submitted an application against a candidate supported by the judges is completely contrary to the aim of the legislator and to the international minimum standards.

<sup>22</sup>[https://birosag.hu/szakmai/palyazatok-obh\\_eln-jogkore](https://birosag.hu/szakmai/palyazatok-obh_eln-jogkore)

<sup>23</sup>Bszi. §§ 127-134

To guarantee that all cases will be decided by independent persons whose selection was not subject to any personal, arbitrary criteria incompatible with the rule of law or even to the indirect influence of legislative and executive power, it is imperative to have democratic legitimisation provided by judicial self-governance and transparent and strictly objective appointment criteria of judicial executives in combination. This is the reason why a system-level breach of the appointment rules and the misuse of the right of appointment by Chief Justice appointed by legislature can by no means be taken lightly.

### **3. The practice of the President of OBH to declare proceedings unsuccessful**

Not unexpectedly, after the OBT of new composition started operation in early 2018, judges from two courts addressed questions to it. The general conferences of the Metropolitan Court and the Regional Court of Appeal of Győr requested OBT simultaneously to investigate the lawfulness of the practice of the President of OBH to declare candidacy proceedings of judges and executives unsuccessful.

The inquiry was ordered by the OBT session of 22 February 2018, where the Council set up a committee consisting of 5 members to conduct an investigation.<sup>24</sup> The committee partly asked the President of OBH to provide data and partly looked into the documents of the application proceedings and drew up a summary report based on its findings. The report was received by members of the Council and the consultative participants of the sessions (including the President of OBH) eight days before the session.<sup>25</sup> The president of OBH did not comment on the report to OBT then and has not done so to this date.

The argument of the President of OBH displayed on the central courts website, namely that she only declared 15 judicial applications unsuccessful out of 274 – in four cases admittedly due to lack of candidates – is not a satisfactory explanation legally in any sense. It is like an employer defending himself at the labour court by saying that of 274 dismissals implemented over one year, he acted unlawfully only in the case of 10 persons – the plaintiffs –, whereas all others were subject to fair proceedings.<sup>26</sup> A similar argumentation is presented in the summary of the President of OBH released in connection with the applications for judges and court executives dated 9 February 2018, but as for the anomalies of the practice of appointment of court executives, it is a tell-tale sign that according to the statistics of 2017, every other application for executives was declared unsuccessful.<sup>27</sup>

It is maybe not too far-fetched to assume that it was no coincidence that the President of OBH adopted her individual legal interpretation that the resignation of some members made OBT unable to act right before the session of 2 May 2018. For this was the day when, as she well knew, OBT was to discuss the committee report. Had the President of

<sup>24</sup>[https://birosag.hu/sites/default/files/allomanyok/obt\\_dokumentumok/obt\\_osszefoglalo\\_2018.02.22.pdf](https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/obt_osszefoglalo_2018.02.22.pdf)

<sup>25</sup>[https://birosag.hu/sites/default/files/allomanyok/obt\\_dokumentumok/szabizottsagi\\_jelentes.pdf](https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/szabizottsagi_jelentes.pdf)

<sup>26</sup>[https://birosag.hu/sites/default/files/allomanyok/stat-tart-file/6\\_obt\\_tajekoztato\\_biroi\\_palyazatok\\_2017\\_1.pdf](https://birosag.hu/sites/default/files/allomanyok/stat-tart-file/6_obt_tajekoztato_biroi_palyazatok_2017_1.pdf)

<sup>27</sup><https://birosag.hu/sites/default/files/allomanyok/stat-tart-file/osszefoglalo.pdf>



OBH attended the meeting, she could have been asked questions, although the report gave ground for no other conclusion than that the practice of the President of OBH was in part non-compliant with the provisions of the law. The establishment of a certain degree of irregularity necessarily followed from the findings of the report without the need for discretionary assessment.<sup>28</sup>

The most serious of the identified errors was the total lack of justification for declaring the proceedings unsuccessful, all the more so since the Constitutional Court had already called the attention of the President of OBH to such practice infringing on the Fundamental Law in 2013.<sup>29</sup> There were also contradictory explanations, two different ones for the same application, and it has also occurred that the documents made it practically impossible to trace in what way the President of OBH informed the applicant and the reviewing board of the reasons of her decision. The committee has also found a reasoning that was obviously completely contrary to the data in the documents and the known facts. For, if the President of OBH declared an application for judges unsuccessful for example on the ground that, based on statistical data, the application was not necessary after all, it is incomprehensible why she initiated new proceedings for the same position right away.<sup>30</sup>

It is important to note, however, that it is a natural concomitant of proper operation, in compliance with the rule of law, that OBT notifies the President of OBH in case of the detection of irregularity and expounds what is considered unlawful and why in the practice. Apart from establishing certain facts, however, the OBT resolution cannot have any consequences in public law, it serves only as a guideline for the future. As for the “response” of the President of OBT, it is inconceivable and incomprehensible in a constitutional framework the President of OBH to declare OBT illegitimate. This declaration – in effect to this day – is solely based on her own individual legal interpretation. It was not the Council that she put outside the domain of public law, but herself.

#### 4. Operability of OBT

The argument of the President of OBH that a council of 15, including 14 members elected by delegates at court level, becomes inoperable if the representation of any of the court levels fail due to the loss of a member or alternate member is incorrect.<sup>31</sup> For, the quota defined by level refers expressly to the election of members and sets an upper limit, not a minimum headcount required for operation. Moreover, the Act expressly states when new

<sup>28</sup> [https://birosag.hu/sites/default/files/allomanyok/obt\\_dokumentumok/osszefoglalo\\_2018.05.02.pdf](https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/osszefoglalo_2018.05.02.pdf)

<sup>29</sup> *The Constitutional Court ex officio establishes in regard to the application of the second sentence of Section 77(2) of Act CLXI of 2011 on the organisation and administration of courts that: it is a constitutional requirement deriving from the basic constitutional value of the rule of law under Article B(1) for the President of OBH to reasonably justify her decisions, including measures of a personnel nature open to judicial review, considering also the right of the party concerned for legal remedy* " Constitutional Court Decision 13/2013. (VI.11.) AB

<sup>30</sup> [https://birosag.hu/sites/default/files/allomanyok/obt\\_dokumentumok/szabizottsagi\\_jelentes.pdf](https://birosag.hu/sites/default/files/allomanyok/obt_dokumentumok/szabizottsagi_jelentes.pdf)

<sup>31</sup> Pursuant to Bszi. § 91(1), “The meeting of delegates entitled to elect the members of the OBT shall elect – from among the delegates – one judge from the regional court of appeal, five judges from the tribunal, seven judges from the district courts and one judge from the administrative and labour court to be judge members of the OBT.”

elections for alternate members are to be held. This has conjunctive conditions: on the one hand, the number of reserve members should drop below 5 and, on the other, the representation of a level should not be guaranteed or the operation of the council be threatened.<sup>32</sup> The Act does not define a certain headcount required for operability, but it defines quorum as attendance by two-thirds of the members.<sup>33</sup>

We could quote many public law examples of why the legal interpretation of the President of OBH is erroneous. Considering the widespread dissemination of her wrong legal interpretation concerning operability of OBT, on 16 May 2018 OBT addressed an open letter to the judiciary.<sup>34</sup> There it expounded in detail *inter alia* that, under the rule of law, a person exercising public power may not exercise a right to declare the public body supervising her illegitimate. Of course, the President of OBH is not barred from contesting any decision of OBT or from initiating legal action against it, but so far she has not taken any measure to do so. On the other hand, irrespective of the outcome of the legal interpretation debate, it is beyond any doubt that a public body shall be considered operational until declared inoperative by a body or person entitled to do so. One thing we know for certain is that it is not the President of OBH who is entitled to do so.

With her misleading reasoning concerning the inoperability of the Council, the President of OBH – over and beyond the point that she tried to drive attention away from the arbitrary practice of judicial appointments – has caused serious damage to the entire judicial organisation: by refusing to make the necessary proposals, the President of OBH not only bars the constitutional powers of a public body, but unduly brings the whole judiciary organisation and many judges into an unfair situation also directly. For example, regarding a district court, the President of OBH revoked the proposal to give consent to the re-appointment of the court leader, as a result of which the district court concerned was left without appointed executive. Without a proposal OBT cannot decide to depart from the ranking in judicial applications; it would be impossible to appoint court executives who are not supported by the reviewing body; appoint the members of service courts; grant exemption in case of conflict of interest between executive and family member. In such case, OBT could not consent to authorising a notice period of less than 3 months, it could not exempt a judge from the obligation to work during the notice period, nor decide on the exemption from work of retiring judges, the same as, it could not check the asset declarations of judges without proposal.<sup>35</sup>

After the session on 16 May 2018, the OBT called the attention of the non-attending President of OBH to the consequence of omission under the effective public law: by failing to fulfil her statutory obligation – to make the proposals to OBT required by law – the President of OBH breaches her constitutional obligation, and that can have no other

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<sup>32</sup>According to Bszi. §92, “if the number of alternate members has fallen under five and the undisturbed operation of the OBT or the observance of the upper limits defined in Sections 91 (1) cannot be guaranteed, new elections shall be held to increase the number of reserve members to 14 persons.”

<sup>33</sup>Bszi. § 105(3)

<sup>34</sup><http://mabie.hu/index.php/981-kozlemennyel-fordult-magyarorszag-biraihoz-az-orszagos-biroi-tanacs>

<sup>35</sup>Bszi. § 103(3)

consequence after certain time than the initiation of her removal from office. Therefore, the President of OBH is mistaken when she complains that OBT as “court-martial” threatened her with removal due to her practice of declaring proceedings unsuccessful, since this warning related not to her appointment practice, but to the unlawful declaration of the operation of OBT illegitimate. By visibly sticking with stubborn insistence to her erroneous legal position – albeit she has been left completely alone with it in the field of public law – the President of OBH commits such unlawful omission the consequences of which leave OBT no other option but to ask the Parliament to remedy the situation. Of course, it would be appropriate to avoid this procedure if possible, since that would transfer a public law issue to the political sector, something that is absolutely not useful for the judicial organisation.<sup>36</sup>

## 5. Crisis in the European aspect – Solutions

The already tenuous situation is further strained by the fact that foreign and domestic public opinion – judicial decision-makers and political and professional international agencies in the first place – assesses the conduct of the President of OBH vis-à-vis OBT and also its individual members in the shadow of a very delicate international situation. European judicial stakeholders rated the recent judicial reform introduced in Poland as a major step backwards in terms of judicial self-governance. EU is following with growing alarm how the Romanian prosecutors and judges struggle with political corruption. Neither can be deemed as pleasing development the statements of some Italian politicians about justice system. Disciplinary action initiated by the President of OBH or through presidents appointed by her against four members of OBT is watched with anxiety both in Hungary and in Europe.<sup>37</sup> Presumably, calling certain OBT members “traitors of the homeland” – and that on completely mistaken factual and legal grounds – will not help dispel the dark clouds, and it will certainly not bring the desired peace.<sup>38</sup>

As lawyers we cannot doubt that European stakeholders will not consider the fact that the President of OBH was a judge when she was appointed by the Parliament satisfactory guarantee of judicial self-governance, since it does not mean that she embodies nor is she entitled to represent the independent judicial power branch as her appointment had not been legitimised by judiciary bodies.

And, the moment when OBT would cease to be operational, the accountability of the President of OBH – the most important guarantee of the rule of law – would be eliminated totally, that is, in its absence, the administration of the judiciary could not function legitimately, not even temporarily. As lawyer and judge, I sincerely hope that the President of OBH will appreciate the gravity of her situation in time, acknowledge the legitimacy of OBT also by her attendance at the sessions, and do everything to ensure that

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<sup>36</sup>According to Bszi. § 74(1), “the President shall be removed from office if he/she is not able to perform his/her duties for longer than 90 days for reasons falling under his/her control, furthermore, if due to some action, conduct or omission he/she has become unworthy of his/her position.”

<sup>37</sup><https://444.hu/2018/06/14/fegyelmi-eljarasokat-kezdemeneznek-ellenzeknek-gondolt-birak-ellen>

<sup>38</sup>[http://hvg.hu/itthon/20180617\\_hando\\_tunde\\_orszagos\\_biroi\\_tanacs\\_hazaarulok](http://hvg.hu/itthon/20180617_hando_tunde_orszagos_biroi_tanacs_hazaarulok)

the current members of OBT exercise the constitutional rights due to judicial self-governance without hindrances and intimidation.

From another perspective, such a crisis may – in the long term at least – be even useful for the stakeholders by providing an excellent opportunity to draw conclusions concerning the most serious drawbacks and anomalies of the operation of the system. As announced by the Prime Minister and also the Minister of Justice, the time has come to draw the lessons of the experience of the past six years upon which – in my opinion – the unfortunate events of the past few months will certainly leave a marked impression.

Some have already expressed their concerns in advance in connection with the transformation of the administrative courts and the possible reintroduction of ministerial administration. Since the draft legislation containing the relevant details has not been published yet, and it is therefore impossible to express a sound lawyer's opinion on the matter, we may nevertheless state that the main question is not what signboard – Ministry of Justice or National Office for the Judiciary – will be placed on the wall of the building under Szalay utca 16 (seat of OBH), but much more whether judicial self-governance will be provided efficient means to fulfil its constitutional role. For, it has become obvious that the main deficiency of the current system is that the body of judicial self-governance that is meant to exercise supervision over a political appointee endowed with strong powers does not have a legal status and adequate powers that would give it equal weight, as meant by the legislators of Bszi., and also by the representatives of the Venice Commission in 2013.

Judicial self-governance should be enhanced in the following fields:

- settlement of the status of OBT regarding the legal personality, competences and legal instruments of OBT;
- strengthening the legal status of the members of OBT to ensure their independence from the President of OBH;
- in the system of appointment of judges, exclusion of the current options of the President of OBH to declare proceedings unsuccessful, to stall for time and to circumvent the rules;
- restriction of the powers of the President of OBH regarding the appointment or assignment of court executives;
- considerable enhancement of the decision-making and controlling role of OBT in the initial and continuous training of judges.

Consolidating the legal status of OBT would promote the more efficient fulfilment of the constitutional role of “checks and balances” and thus secure the independent, accountable and quality administration of justice all at once. For, in vain does Hungary make progress in the justice scoreboard in terms of the efficient and timely adjudication, if it moves backwards in the fields of judicial independence or accountability at double speed.

As regards the future, let us call attention to one important issue: in extreme cases, the efficiency of a system may be influenced substantially – pro or contra – by who occupies a given seat. In Poland, what caused the greatest outcry among Polish and foreign lawyers in connection with the introduction of the new model of justice was that legislature removed judges from executive positions and positions occupied in self-governance bodies. I think this is a message also for Hungary: legislative power may remove a political appointee any time, since it had placed that person into his/her position itself, but the integrity of judicial bodies may not be attacked either from the interior or from the exterior and, what is more, it should be actively protected also by the other branches of power.

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*The article can be disclosed in its entirety.*