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ARTICLE

Special Issue: Informal Judicial Institutions—Invisible Determinants of Democratic Decay

Schrödinger's Judiciary—Formality at the Service of Informality in Hungary

Attila Vincze[1]

Masaryk University, Brno, Czech Republic
Email: attila.vincze@law.muni.cz

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Abstract

There are two contrasting claims regarding the Hungarian judiciary. The Government asserts that it is in the best shape, while many other voices label it as captured or dependent. This article shows how both of these claims can be true, depending on the interplay between formality and informality and shows how a few small loopholes allow some actors to rig the judicial system. Therefore, the Hungarian judiciary is similar to Schrödinger's cat, which is claimed to be dead and alive at the same time.

The synergy between formality and informality requires a network of a handful of trusted people in managerial positions to administer case allocation, promotion, and disciplinary systems, which seem to be very effective tools. Few small technical loopholes and some special remedies suffice to micromanage important cases precisely because key positions are captured which work as gatekeepers or emergency brakes. Most of these tools are legal in a very formal technical sense of the word because they rely on acts of Parliament. A formal legalism, a very thin understanding of the Rule of law, and a majoritarian mindset serve as a legitimizing ideology for the whole legal system.

Keywords: Hungary; judiciary; abusive constitutionalism; court packing; judicial independence

A. Introduction

Schrödinger's cat has an amazing capacity to be alive and dead at the same time. This may also be true for the Hungarian legal system and its backbone, the judiciary. On the one hand, it is claimed to be in its best shape, and any allegations to the contrary are asserted to be purely political criticism, entirely neglecting legal methodology.[1] On the other hand, it is also alleged that judicial independence in authoritarian or hybrid systems[2] is nothing more than a façade, and that going on behind the scenes is a complex and subtle system of personal networks, loyalties, favors, deterrents, and intimidation capable of influencing judicial decision-making in politically sensitive

[1]András Zs Varga, From Ideal to Idol?: The Concept of the Rule of Law 17–18 (2019).

[2]Alexander Schmotz, *Hybrid Regimes*, *in* The Handbook of Political, Social, and Economic Transformation 521–25 (Wolfgang Merkel, Raj Kollmorgen, & Hans-Jürgen Wagener eds., 2019). The European Parliament classified Hungary as an electoral autocracy: See the Non-Legislative Enactment Nr. 2018/0902R(NLE).

cases.[3] Taking into account the fact that mere membership of the European Union is an obvious constraint requiring at least some kind of appearance of judicial independence to be maintained,[4] both claims may be true at the same time, and the judiciary—like the famous cat—may simultaneously be dead and alive. The institutional arrangement as envisaged "on paper" may comply more or less with the requirements of the Rule of Law and the independence of the judiciary, while it may also contain gaps and loopholes which may be abused in the "particular legal and institutional context of a Member State,"[5] allowing the system to be rigged or hacked if necessary.[6]

At this point, some clarifications are needed. First, as earlier research has also shown, the judiciary in an autocratic system has the different and slightly incompatible functions of social control and strengthening "legal" legitimacy.[7] In order to achieve both of them, there is no need to influence or interest in influencing each and every pending case, but only the relatively few which are important for political or economic reasons. These are often interwoven in hybrid regimes like Hungary. Routine, unimportant cases can be dealt with by an independent judiciary without any political meddling. The cases requiring special attention concern either political power—elections, referenda, niceties of lawmaking—civil control over politics—civil society,[8] freedom of information, transparency, and media—the economic foundations of political power —public procurement, state aids, misappropriation of funds, bid rigging, and a few other high-profile economic criminal cases—or are closely connected with rent-seeking—monopolies, dominant positions, concessions, or infrastructure. Interestingly, most of these cases are concentrated in the Metropolitan area because the central governmental institutions are there. In other cases, the judiciary may work without any external influence and the government may even be interested to keep up the façade of independence. So, it seems that impressions of the judiciary may very well depend on the very court or the very case being scrutinized. As with the famous cat, we do not know if she is dead or alive until we open the box.

For the external constraints on the political system, a very delicate mix of instruments is needed. Some tools are necessary which on the blueprint look harmless—mainly dull technicalities also serving legitimate aims which also allow the plausible denial of any wrongdoing—but can be turned inside out in order to influence some cases. Moreover, it is also necessary to have a trusted network of persons to use those tools, which requires the capturing of the most important managerial positions—presidents of the courts and the Head of the NJO—and appointment of reliable judges to some key positions who then can abuse the formal rules.[9] This again makes it much more

[3]Edit Zgut, *Informal Exercise of Power: Undermining Democracy Under the EU's Radar in Hungary and Poland*, 14 Hague J. Rule L. 287 (2022); Mátyás Bencze, *Judicial Populism and the Weberian Judge—The Strength of Judicial Resistance Against Governmental Influence in Hungary*, 22 German L.J. 1283 (2021); Beáta Bakó, *Judges Sitting on the Warsaw-Budapest Express Train: The Independence of Polish and Hungarian Judges Before the CJEU*, 26 Eur. Pub. L. 587, 598–601 (2020); Flóra Garamvölgyi & Hennifer Rankin, *Viktor Orbán's Grip on Hungary's Courts Threatens Rule of Law, Warns Judge*, The Observer (Aug. 14, 2022), https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge.

[4]András Bozóki & Dániel Hegedűs, *An Externally Constrained Hybrid Regime: Hungary in the European Union*, 25 Democratization 1173 (2018).

[5]AG Bobek in Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 & C-397/19, Asociația 'Forumul Judecătorilor din România, ECLI:EU:C:2021:393, (May 18, 2021) paras. 241–44 https://curia.europa.eu/juris/document/document.jsf?text=&docid=241381&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2134115.

[6]Viktor Vadász & András György Kovács, *A Game Hacked by the Dealer,* VerfBlog (Nov. 10, 2020) https://verfassungsblog.de/a-game-hacked-by-the-dealer/.

[7]Tom Ginsburg & Tamir Moustafa, *Introduction: The Functions of Courts in Authoritarian Politics, in* Rule by Law: The Politics of Courts in Authoritarian Regimes 1–22 (Tom Ginsburg & Tamir Moustafa eds., 2008); Zoltán Fleck: Jogszolgáltató mechanizmusok az államszocializmusban (2001).

[8]Antonia-Evangelia Christopoulou, *Civil Society and Rule of Law Backsliding in the EU*, 28 Eur. Pub. L. 245 (2022).

[9]Hollowing out institutional relations and replacing them with personal ones based on trust and loyalty is generally an attribute of the Orbán Regime, and there is no reason to think that the judiciary would be an exception. *See* András Körösényi, Gábor Illés, & Attila Gyulai, The Orbán Regime: Plebiscitary Leader Democracy in the Making (2020)

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complicated to answer the question whether the cat is dead or alive because all the techniques to be discussed in this article are legal in some sense and—taken out of context—even serve a reasonable purpose. Therefore, a very thin, classical, positivist understanding of the rule of law is the bulwark of the whole system[10] because judges cannot be independent of the law itself. The legal toolkit cannot be separated from those who operate it, and, therefore, it is convenient to start with them, B, later introduce the most important instruments, C, and eventually hopefully answer the question whether the cat is dead or alive, D.

B. The Key Actors

As will be shown, the tools are in the hands of a few key actors: The Head of the National Judicial Office (NJO), the President of the Supreme Court, and the members of the Constitutional Court. The appointments to these key positions become heavily politicized,[11] and are based on personal trust and loyalty, which need to be proven before and during their tenure. The clientelist selection mechanism, overlapping responsibilities, and the ongoing testing of loyalty are the basic characteristics of the political system.[12] Power and influence ebb and flow as reward or penalty.[13]

The window of opportunity for packing the courts was opened by the Hungarian Civic Alliance's (FIDESZ) landslide victory in 2010, enabling the amendment of the constitution, the passing of the Act on the Judiciary and that on Judges, and the forcing of the retirement of a large proportion of judges.[14] Most senior and managerial positions were made vacant and ready for grabbing by the application of the newly adopted rules.[15] This maneuver was also facilitated and legitimized[16] by the former corporatist tendencies of judicial self-government between 1997 and 2010,[17] making the judiciary fit for a redesign anyway and even helping to bring on board judges disappointed with those malfunctions.

I. The Head of the NJO and the Regional Court Presidents

The presidents of the 20 regional courts (*törvényszék*) and of the five Higher Courts of Appeal (*ítélőtábla*) play a crucial role in the judiciary:[18] They decide on and influence the working conditions of the judges at a court, serve as transmission mechanisms between the regional and central levels,[19] communicate and execute the wishes of the central authorities at the regional level, and inform central authorities about the workings of the regional ones.[20] Moreover, they influence not only the given regional court but also the first instance county courts (*járásbíróság*) and have a decisive influence over their everyday lives.

[10]András Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, 68 AM. J. COMP. L. 760, 785–89 (2020).

[11]Some appointments probably even circumvented the legal requirements. Helsinki Figyelő, *Törvénybe ütköző bírói kinevezések a Kúrián*, (Sept. 3, 2022), https://helsinkifigyelo.444.hu/2022/09/03/torvenybe-utkozo-biroi-kinevezesek-a-kurian.

[12]*See* KÖRÖSÉNYI et al., *supra* note 9, at 92–113.

[13]*Id.* at 71–92.

[14]David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 208–11 (2013).

[15]Miklós Ligeti, *Korrupció* [Corruption], *in* A MAGYAR JOGRENDSZER ÁLLAPOTA [The Status of the Hungarian Legal System] 745 (András Jakab & György Gajduschek eds., 2016).

[16]Amnesty Int'l, *Hungary: Fearing the Unknown*, AI Index AFR 27/2051/2020 (Apr. 6, 2020).

[17]Zoltán Fleck, *A Comparative Analysis of Judicial Power, Organisational Issues in Judicature and the Administration of Courts*, *in* FAIR TRIAL AND JUDICIAL INDEPENDENCE 3–25 (Attila Badó ed., 2013).

[18]Adam Blisa & David Kosař, *Court Presidents: The Missing Piece in the Puzzle of Judicial Governance*, 19 GERMAN L.J. 2031 (2018).

[19]Similarly to the organizational patterns in socialism, see FLECK, *supra* note 7.

[20]Several judges complained of being spied on. *See* Amnesty Int'l, *supra* note 16, at 39.

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The Head of the NJO had a decisive influence on the appointment of the court presidents, enabling her to fill those positions with loyalists.[21] This personal bond has been strengthened also by the fact that the regional court presidents are basically accountable only to the Head of the NJO.[22] They enjoy disproportionately higher salaries and much better working conditions than rank-and-file judges, and often receive targeted bonuses also thanks to the Head of the NJO, which further supports their good relations.[23] The Head of the NJO is hence a crucial player but was for a long time basically unaccountable to anybody.[24] This unusual institutional blueprint must have been created in anticipation of handpicking trusted allies.[25] In order to unlock EU money, the NJC was granted more stringent oversight and access to the NJO's files in 2023. At the moment of writing, this needs to be implemented, and, therefore, its impact is hard to assess.

II. The Supreme Court President

Although there were no written rules to require it, a conventional rule has been established that the President of the Supreme Court is elected from among the sitting judges of the Supreme Court.[26] On the one hand, this was observed even under the communist regime and had a clear rationale: Effective leadership requires reputation, which is ensured by a successful judicial career. On the other hand, this unwritten rule supports incumbents, insider interests, and the maintaining of the status quo. The first breach occurred in 2008 when the then President Sólyom, who had a clear interest in changing the corporativist structures of the Supreme Court, nominated President Mr. Baka[27] who, although he had been a judge of the European Court of Human Rights (ECtHR) for 16 years, lacked experience within the Hungarian judiciary. This circumstance was heavily criticized, and the nominee was declined twice and elected only at the third attempt under the pretext that he had in the meantime gained relevant experience between the first and the third nominations he served at the Supreme Court.

In 2011, the former conventional rule was formalized, and five years of experience on national benches was required by law—a fact which ruled Mr. Baka out, and a new Chief Justice, Mr. Darák, was elected.[28] Nonetheless, he also proved himself to be driven more by professional ethics than by political expectations, and, therefore, the law was amended again to pave the way for Mr. Varga, who had earlier been a prosecutor and a constitutional justice but had never served on the bench.[29] The National Judicial Council (*Országos Bírói Tanács*) (NJC) criticized the

[21]András Sajó, Ruling by Cheating 78 (2021); Mátyás Bencze & Attila Badó, *A magyar bírósági rendszer* [Hungarian Judicary] *in* A magyar jogrendszer állapota [The Status of the Hungarian Legal System] 438 (András Jakab & György Gajduschek eds., 2016).

[22]*See* Bencze & Badó, *supra* note 21, at 438; Amnesty Int'l, *supra* note 16, at 19.

[23]As Ms. Tünde Handó left the NJO for the Constitutional Court the regional court presidents expressed their utmost gratitude to her, which most probably reflected their relationship also during her tenure. *Elolvastam, ahogy hálálkodnak, és szégyelltem magam magyar bíróként*, 444.hu (Dec. 2, 2019), https://444.hu/2019/12/02/elolvastam-ahogy-halalkodnak-es-szegyelltem-magam-magyar-birokent.

[24]The bodies of judicial self-governance like the National Judicial Council are either ignored or even sabotaged. *See* Bakó, *supra* note 3, at 593–95.

[25]Family ties and friendships do not necessarily mean undue influence. Nonetheless Ms. Tünde Handó, the former Head of the NJO, was a confidant of the PM, a good friend of his wife, and the wife of a high-ranking FIDESZ politician. Árpad Répássy, who is a relative of Róbert Répássy, State Secretary of the Ministry of Justice and a leading politician of Fidesz, was appointed as deputy head in 2019.

[26]The position was actually chronically underregulated: Nóra Chronowski &Tímea Drinóczi, *Alulszabályozott közjogi méltóság: a Legfelsőbb Bíróság elnöke*, 52 Magyar Közigazgatás 460 (2002).

[27]Gábor Miklósi, *A főbírójelölés története—Messziről jött*, Magyar Narancs, https://magyarnarancs.hu/belpol/a_fobirojeloles_tortenete_-_messzirol_jott-68769.

[28]David Kosař & Katarína Šipulová, *The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law*, 10 Hague J. Rule L. 83 (2018).

[29]According to the omnibus legislation of 2019, 2019. évi XXIV. törvény a közigazgatási bíróságok függetlenségét biztosító további garanciákról (Act XXIV of 2019 on Further Guarantees of Administrative Justice) (Hung.), judicial experience can be

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nominee for his lack of judicial experience and expressed the view that all former Presidents had had that necessary professional background, showing that the conventional rule was considered to be binding irrespective of parliamentary enactments. The controversial appointment of the new Chief Justice seemed also to undermine his legitimacy[30] and resulted in ongoing conflicts within the Kúria itself and between it and the NJC.[31] In 2023, the rules were amended, and the NJC must now confirm the candidate's independence and integrity—a requirement which it is hoped will depoliticize the nomination process.

III. Constitutional Court Judges

The appointment of constitutional court justices has been subject to political memoranda, practices, and usages since the court was established in 1989 in order to keep the balance between the opposition and the ruling parties, so five were elected before the first free elections on a parity basis and another five after those elections. Candidates were nominated by a parliamentary *ad hoc* committee composed of all parliamentary parties on an equal footing and elected by a two-thirds majority of the Parliament. This two-step process required a wide consensus among the parliamentary parties. This resulted in a *modus operandi* whereby the opposition and the government could nominate an equal number of justices, but it was unfortunately not always observed[32] and opposition candidates were sometimes not elected. This, logically, deepened the distrust between the parties and prompted a further conventional usage, namely, that the opposition nominees are the first to be voted on to avoid governmental cheating. After 2010, the ad hoc nomination committee has not been composed of equal numbers from the various parties. This made it possible to select justices without the consent of the opposition, which is an atrophy of the former conventional rules.[33] Furthermore, the President of the Constitutional Court is no longer elected by the members of the court but by the Parliament directly, enabling a trusted person to be selected for the influential tasks of agenda-setting and case allocation.

Although nomination demanded a hearing before the Parliamentary Committee for Justice, its standards were not laid down, fostering an arcane process of endorsement of the candidates.[34] The secretive hearings supported the impression that the whole procedure was political horse-trading. The lack of conventional rules on how to vet candidates also made it easier after 2010 to establish a lopsided selection process which preferred governmental candidates irrespective of their merits.

Thanks to these changes, a gradual courtpacking became possible.[35] Unlike in 2010–2014, which was hallmarked by open conflicts and drastic cuts in the powers and influence of the

substituted by experience gained at international judicial fora or at the Constitutional Court. It cannot be ignored that nominations to these positions are politically highly sensitive, so the experience means that the given person has already been thoroughly vetted. Grotesquely, according to the newly enacted rules Mr. Baka could have been nominated, while he had earlier been turned down because he had gained his experience at the ECtHR and not at the national bench.

[30]His election was also criticized by the European Commission. *Rule of Law Report Country Chapter on the Rule of Law Situation in Hungary*, COM (2021) 714 final (July 20, 2021).

[31]There are several fronts: The judicial code of ethics, which the Chief Justice did not support but requested a constitutional review of, the promotion of his wife, the appointment of some new judges to the Kúria, or the visit of some NJC members to the US Embassy.

[32]*Alkotmánybíró-választás: Nulla megoldás*, Magyar Narancs (May 8, 1997), https://magyarnarancs.hu/belpol/alkotmanybiro-valasztas_nulla_megoldas-61548.

[33]Adrian Vermeule, *The Atrophy of Constitutional Powers*, 32 Oxford J. Legal Stud. 421 (2012); Attila Vincze, *Szokás, szokásjog és konvenció az alkotmányjogban,* 14 Közjogi Szemle 1, 7 (2021).

[34]Attila Vincze, *Az alkotmánybíróság*, *in* Az alkotmány kommentárja 1168 (András Jakab ed., 2009).

[35]David Kosař & Katarína Šipulová, *How to Fight Court-Packing*, 6 Const. Stud. 133; Vincze Attila, *Wrestling with Constitutionalism: the Supermajority and the Hungarian Constitutional Court*; 8 Vienna J. of Int'l Const. L. 86 (2014). Illiberal regimes defy constitutional adjudication only up to the point of capturing the constitutional courts. *See* Mirosław Wyrzykowski & Michal Ziółkowski, *Illiberal Constitutionalism and the Judiciary*, *in* Routledge Handbook of Illiberalism 519 (András Sajó, Renáta Uitz, & Stephen Holmes eds. 2021). Similarly Pablo Castillo-Ortiz, *The Illiberal Abuse of Constitutional Courts in Europe*, 15 Eur. Const. L. Rev. 48 (2019).

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Constitutional Court,[36] the government has relied more and more on the Constitutional Court since 2015. Abstract interpretations of the Basic Law were requested in politically very sensitive questions, and the government has always received the answer it hoped for.[37] In tandem with that, the Constitutional Court received some new powers—for example, constitutional complaint of governmental bodies.[38] These circumstances reinforce that members of the Constitutional Court were elected primarily on the basis of their political orientation,[39] and show that the institutional and personal changes went hand in hand, and formal changes followed and backed up the informal relations. The lower courts are aware of this fact and do not expect decisions from the Constitutional Court that are contrary to governmental interests, which also makes them reluctant to turn to the Constitutional Court.

C. The Tools

Meddling with judges and the judiciary is difficult: They are trained to be independent, work in chambers of different sizes, their decisions are subject to review nationally and internationally, and, hence, it seems to be hard to grasp the whole organization. The Hungarian example shows, however, that full control is not necessary: The politically sensitive cases are few in number and can nonetheless be managed. The easiest and most convenient way is to prevent them from reaching the judiciary at all—I. Gatekeeping.[40] If that is not possible, they need to be channeled to trustworthy or conforming judges who know how to handle them—II. Channeling. A further alternative is to enhance pressure on judges—III. Sticks and Carrots—and, if nothing helps, some emergency mechanisms are necessary to avoid mishaps occurring—IV. Emergency Brakes. Last but not least, judicial appointments and promotions help to recruit the right chap for the right job and gradually shape the judiciary—V. Appointments and Selection.

I. Gatekeeping

A criminal trial takes place basically if governmental bodies want it to: The police investigate and, with a few exceptions, the state attorney has an exclusive right to charge somebody; to qualify the wrongdoing and, in doing so, the upper limit of the punishment; or to drop the case entirely.[41] There is no need to tussle with criminal judges if one can keep the charges at bay. And the hierarchically organized prosecution service is an ideal gatekeeper of criminal investigation.[42] It would, however, be a misperception to think that this necessarily means full immunity: One may fry only the little fish, pick less serious charges, offer an advantageous plea bargain, sabotage the investigation, or commit procedural failures leading to much more lenient punishments than would otherwise be imaginable.

In administrative cases, the most widespread strategies are legalization and prevention. "Legalization" is autocratic legalism[43] in everyday situations: Exempting something from the

[36]*See* Vincze, *supra* note 34.

[37]Attila Vincze, *Unsere Gedanken sind Sprengstoff—Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts*, 49 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 13.

[38]Nóra Chronowski & Attila Vincze, *Az Alkotmánybíróság határozata a Magyar Nemzeti Bank kiadmányozási joga ügyében*, 10 JOGESETEK MAGYARÁZATA 3 (2019); Ágnes Kovács, *Tájkép sötét kerettel: az Alkotmánybíróság "MNB-határozata"—szkeptikus olvasat*, 23 FUNDAMENTUM 109 (2019). This was dismantled in 2023 for unlocking some EU money.

[39]Zoltán Szente, *The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014.* 1:1 CONST. STUD. 123 (2016).

[40]This can also be called access to justice. *See* Ginsburg & Moustafa, *supra* note 7, at 18–20.

[41]This is also labeled as clientelist forbearance. Alisha C. Holland, *Forbearance*, 110 Am. Pol. Sci. Rev. 232 (2016).

[42]Péter Hack, *Az ügyészség* [Public Prosecution], *in* A MAGYAR JOGRENDSZER ÁLLAPOTA [The Status of the Hungarian Legal System] 745 (András Jakab & György Gajduschek eds., 2016); András Becker, *Utánajártunk: így szabotálta el a nyomozóhatóság és az ügyészség az Elios-ügy felderítését*, ATLATSZO.HU (May 6, 2019), https://atlatszo.hu/kozpenz/2019/05/06/tobb-mint-hiba/.

[43]Kim Lane Scheppele, *Autocratic Legalism,* 85 U. Chi. L. Rev. 545 (2018).

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generally applicable legal requirements mainly by declaring it to be of major national interest, which not only streamlines the procedures but also makes litigation futile. The legalization of non-compliance[44] ties the hands of the Weberian judges[45] and makes court proceedings futile. The second strategy, prevention, aims to limit access to justice by setting short time limits or exorbitantly high fees or reducing the number of causes of illegality—for example public procurements—which has a chilling effect, especially if the governmental bodies win in more than 90% of the cases.

II. Channeling the Cases—A Semi-Automatic Case Allocation with Loopholes

Automatic or randomized case allocation is basically not traditional in Hungary, and that lack of awareness may explain why non-compliance does not often make waves. During the communist regime cases were manually allocated by the court presidents, underlining their crucial administrative position.[46] Although the political micromanagement of the judiciary has been considerably reduced since the 1970s, there have been loyal judges at every courthouse ready to do the party's bidding if it was asked for, and sensitive cases have been allocated to them.[47] The rest could be handled by others, reinforcing some sense of socialist legality.[48]

Albeit the randomized case allocation was widely acknowledged as a procedural safeguard,[49] it was introduced into Hungary only belatedly, sporadically, and half-heartedly, and the case allocation regime could be different not only between courts but also within different parts of a given court.[50] The fact that manual allocation still lingered was often justified by the devilish combination of ever-changing legal provisions and the lack of professional experience, so that only very few judges were allegedly capable of handling some particular types of cases.[51] This worked perfectly as a pretext for retaining the influence of court presidents.

In 1997, as part of the necessary judicial reforms, new rules were introduced that required the installation in advance of a case allocation scheme for the next year to provide some guarantee against arbitrariness.[52] It was, however, not fully randomized, allowed for exceptions, and enabled the courts to carry on with their existing informal practices.[53] There was no remedy available either against the scheme itself or against any deviations from it. The not fully randomized case allocation also survived the judicial reform of 2011. The allocation scheme can be updated or amended in case of unforeseen circumstances substantially influencing the caseload or for other important reasons. These are not considered as a violation of the right to a lawful judge.[54]

[44]One recent example is the legalization of the formerly illegal rejection of a freedom of information request during ongoing court proceedings. Domány András & Lengyel Tibor, *A HVG bírósági perének közepén írta át a kormány a szabályokat, hogy eltitkolhassa, miről szóltak az operatív törzs ülései*, hvg.hu (Sept. 20, 2022), https://hvg.hu/itthon/20220920_Operativ_torzs_birosagi_per_kormany_szabalyvaltoztatas_titkolozas.

[45]*See* Bencze & Badó, *supra* note 21.

[46]*See* Fleck, *supra* note 7, at 140.

[47]Zoltán Fleck, *A bírói függetlenség állapota*, 6 FUNDAMENTUM 28, 33–34 (2002).

[48]Fruzsina Gárdos-Orosz, *Two Influential Concepts: Socialist Legality and Constitutional Identity and Their Impact on the Independence of the Judiciary*, 22 German L.J. 1327 (2021).

[49]Attila Badó & Kata Szarvas, *As luck would have it . . . Fairness in the Distribution of Cases and Judicial Independence*, *in* FAIR TRIAL AND JUDICIAL INDEPENDENCE 60 (Attila Badó ed., 2013). Zsolt Ilonczai, *Vezetők nélkül automatikusan,* 4 Bírák Lapja 6, 109–18 (1994).

[50]András Kovács, *Adalékok a Kúria első elnöke jogállamhoz való viszonyának megértéséhez,* 24 FUNDAMENTUM 20, 21–22 (2020).

[51]*See* Fleck, *supra* note 47, at 33.

[52]*See* Vadász & Kovács, *supra* note 6, at 24–25.

[53]*Id.*

[54]Alkotmánybíróság (AB) [Constitutional Court], Feb. 2, 2022, 3070/2022 AK 2022, 456 (Hung.); Alkotmánybíróság (AB) [Constitutional Court], Dec. 5, 2013, 36/2013 AK 2013, 1268 (Hung.). For example, the case allocation scheme at the Kúria was modified—completely legally—14 times in 2020. *Magyarországi kórkép a jogállamról*, TASZ (Apr. 28, 2021), https://tasz.hu/cikkek/magyarorszagi-korkep-a-jogallamrol.

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The adjustments and deviations always take place for a formally legal purpose, like illness, caseload management, secondment, or the transfer of judges, with their agreement, to another court to reduce its caseload, factors which necessarily affect the composition of the court.[55] Because career decisions and judges' transfers are managed by the NJO, a quid pro quo obligation can easily be created. Several high-flyer judges agreed to be transferred which makes the allegations plausible that they could expect some reward.[56] So, these blanket exceptions serve as perfect smokescreens, and sensitive cases are claimed to be channeled on the basis of interest or previous behavior—for example, requesting preliminary rulings from the ECJ. [57]Case allocation at the *Kúria*, but not at other courts, has now been fully automatized.

Between 2019 and 2020, the members of the Special Chamber for Law Unification[58] were chosen *ad hoc* by the President of the *Kúria*. He or his Deputy convened these chambers, and there was no rule how judge rapporteurs are selected. This obviously enabled them to hand-pick the panel, which made a mockery of the right to a tribunal established by law.[59] Due to heavy criticism from the Venice Commission,[60] two permanent chambers of 21 members each have been created, composed of Chamber and College Presidents, irrespective of their field of expertise, and chaired by the President or Vice President of the *Kúria*.[61] Case allocation between them is fully randomized. There are two different strategies here: The first is a primitive hand-picking, while the second is a more sophisticated one, which undermines the conditions of a meaningful discussion. The chambers are artificially ballooned up and members are not selected by specialization, which reduces the number of judges capable of meaningful discussion to a handful. This helps the chair to dominate deliberations. Interestingly, this second solution was blessed by the EU in 2023.

Automatic case allocation has never applied to the Constitutional Court. Like many other procedural questions, this one was also left for the Rules of Procedure, which were never enacted,[62] making space for informal practices. Usually, the President allocated cases on the basis of professional expertise, reliability, and political preferences, which allowed him often to keep the most delicate ones for himself.[63] This practice was codified in 2011, and the most politically sensitive cases overwhelmingly end up on the President's desk. One of the best examples is probably the invention of constitutional identity, as a possible shield against the primacy of EU law. The President appointed himself as judge rapporteur for a far-reaching decision, although he was no expert on European constitutional law, did not publish in this field, and, in general, had a rather poor academic record.[64]

III. Sticks and Carrots

1. Disciplinary Mechanisms—Formal and Informal

Court presidents have the power to initiate disciplinary proceedings, and only a few vague criteria govern the exercise of those powers. A ground for initiating disciplinary proceedings might be

[55]*See* Vadász & Kovács, *supra* note 6 (arguing that such organizational measures are adopted on purpose).

[56]*Handó rendel, bíró végez?*, NEPSZAVA (June 1, 2016), https://nepszava.hu/1095646_hando-rendel-biro-vegez.

[57]*See* Amnesty Int'l, *supra* note 16, at 24–25.

[58]*See infra* Part C.V.1.

[59]Very critically, see Vadász & Kovács, *supra* note 6.

[60]Venice Comm'n, *Opinion on the Amendments to the Act on the Legal Status and Renumeration of Judges Adopted by the Hungarian Parliament in December 2020*, 128th Sess., Doc. No. 1050 (2021).

[61]It is worth mentioning that the President, Andras Zs. Varga, and the Vice-President, Andras Patyi, held public office thanks to governmental backing—the first as deputy to the Prosecutor General and Justice of the Constitutional Court, the second as President of the National Electoral Commission.

[62]*See* Vincze, *supra* note 34, at 1172.

[63]*Id.* at 1159.

[64]Tamás Sulyok earned his PhD in 2013, at the age of 57, a year before his election to the Constitutional Court. His supervisor was the then Minister of Justice, Mr. Trócsányi. He wrote his thesis about advocacy and had a few articles about commercial matters. Generally, he was not exceptionally qualified for the position.

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flagrant disregard of a judge's official duties, including deadlines or violation of the Judicial Code of Ethics or the Code of Integrity, which are soft-law instruments filling gaps in the law, but they may also have negative effects on judicial behavior. A very telling example was a roundtable talk about the situation of the judiciary in Poland to which a judge of the NJC was invited. The Chief Justice hinted that such activity might be seen as a political one triggering disciplinary proceedings.[65]

On the one hand, apart from the official mechanisms, there are also several tools "under the radar": Flooding judges with expeditious, urgent, or voluminous cases—especially before the evaluation of their work—in order to persuade them to mind their own business and not care about other activities;[66] withholding appointments; not allowing extra-judicial activities like education; and not extending deadlines reconsidering home office, which can make life uncomfortable and can be used as a quasi-disciplinary measure. On the other hand, these informal tools are often used as reasonable warning signals that the judges primarily focus on their own work and keep professional standards—deadlines or caseload.

The link between formality and informality shows how judges were punished for requesting preliminary rulings from the Court of Justice of the European Union (CJEU) in sensitive issues. First, Gabriella Szabó's temporary tenure was not made permanent after she questioned the legality of the government's migration policy before the CJEU. The topic dominated politics since 2015, prompted open conflict with the EU, and was the central topic of the 2018 election. Under these political circumstances, as a freshly appointed administrative judge, she requested a preliminary ruling on the Hungarian push-back migration system.[67] She claimed that her judicial appointment was not confirmed after the probation period precisely because of that request.[68] Her allegations seemed to be justified by the political importance of the issue: She was harassed by government-friendly media and labeled as a foreign agent,[69] and the Government asserted that a ruling of the CJEU on the same issue[70] was incompatible with Hungary's constitutional identity.[71] Although the failure to confirm her appointment was formally legal, many judges took note of her fate and understood the lesson.[72]

Second, Csaba Vasvári requested a preliminary ruling regarding his own independence.[73] The General Attorney wanted to annul that request, which succeeded, and the President of the *Fővárosi Törvényszék* (Metropolitan Court) initiated disciplinary proceedings against the judge.[74]

[65]Attila Rovó, *Majdnem részt vehetett egy bíró egy pódiumbeszélgetésen a lengyel jogállamiság leépítéséről, de aztán jött az államtitkár és a Kúria elnöke,* Telex (Jan. 31, 2021), https://telex.hu/belfold/2022/01/31/orszagos-biroi-tanacs-leszavaz-lengyel-dokumentumfilm-birok-politizalas.

[66]*See* Amnesty Int'l, *supra* note 16, at 43.

[67]Case C-564/18, LH v. Bevándorlási és Menekültügyi Hivatal, ECLI:EU:C:2020:218 (Mar. 19, 2020), https://curia.europa.eu/juris/document/document.jsf?text=&docid=224585&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2133910.

[68]Eszter Zalán, *Hungarian Judge Claims She Was Pushed Out for Political Reasons*, EUObserver (July 6, 2021), https://euobserver.com/rule-of-law/152349.

[69]She was labeled as an agent of Brussels. *Megvan a hvg legújabb kedvenc bírója!*, Demokrata (Sept. 3, 2018), https://demokrata.hu/blog/megvan-a-hvg-legujabb-kedvenc-biroja-107985/.

[70]Case C-808/18, *Commission v. Hungary*, ECLI:EU:C:2020:1029 (Dec. 17, 2020), https://curia.europa.eu/juris/document/document.jsf;jsessionid=77C7CFEBCF8057271C96842DA43D27D1?text=&docid=235738&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2133765.

[71]Alkotmánybíróság (AB) [Constitutional Court], Dec. 20, 2021, 32/2021 MK 2021, 11067 (Hung.).

[72]Szilárd Teczár, *A rendszer alkalmatlan*, Magyar Narancs (Dec. 15, 2021), https://magyarnarancs.hu/belpol/a-rendszer-alkalmatlan-244367.

[73]Case C-564/19, Crim. Proc. Against IS, ECLI:EU:C:2021:949 (Nov. 23, 2012), https://curia.europa.eu/juris/document/document.jsf?text=&docid=249861&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2133935; Kim Lane Scheppele, *The Law Requires Translation*, 59 Common Mkt. L. Rev. 1107 (2022).

[74]All the relevant materials are available at *A szolgálati bíróság megszüntette a fegyelmi eljárást a PKKB bírájával szemben*, Magyar Bírói Egyesület [Hungarian Association of Judges], (Dec. 17, 2019), http://mabie.hu/index.php/1501-a-szolgalati-birosag-megszuntette-a-fegyelmi-eljarast-a-pkkb-birajaval-szemben.

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Interestingly enough, he was the judge whose promotion had several times been invalidated by the Head of the NJO, who had also circumvented the regular appointment procedure as she temporarily—later permanently—appointed the President of the *Fővárosi Törvényszék*. The connection between disciplinary proceedings, the temporary appointment, and the invalidated application cannot be proven. Nonetheless, the coincidences are suspicious, and it is doubtful whether the disciplinary measure against such a very well-qualified judge could have been initiated without some support from the NJO.[75]

These cases received wide attention and illustrate very well how judges may face serious consequences for not toeing the line, and they may also justify other allegations of the arbitrary treatment of judges.

2. Bonuses, Rewards, Acknowledgements

The reverse side of disciplinary measures is pay. The same court presidents who can initiate disciplinary measures are also entitled to reward extraordinary effort or achievement, like advanced university degrees, something which it is reported they often do secretly. Requests for information on this subject are usually declined by invoking the *ex gratia* nature of the rewards or the privacy of the beneficiaries.[76] This gives the impression of arbitrariness and the purchase of loyalty. The financial rewards are kept in check only by the Head of the NJO, a fact which shows the close interconnectedness of the NJO and the regional court presidents.[77] In 2023, the NJC obtained access to the files and influence over the distribution of bonuses, so that will probably weaken the informal influence.

3. Commenting on Cases—Pressure from Outside

Commenting on current judicial procedures, anticipating the course of a trial, and predicting or expecting a given outcome may be subject to the *sub judice* rule in common law jurisdictions, which aim to protect judges from extraneous influences or becoming biased. This is not observed in Hungary.

The Prime Minister is ready to openly criticize a judgment, to question the intellectual capacity of judges, or to describe a decision as incorrect and not to respect it.[78] He is also keen to welcome a decision as "an enormous amount of help in the battle . . . in Brussels,"[79] or to air his preferred outcome.[80] Government-friendly think tanks or media outlets often condemn judges, courts, or decisions, and label them as politically influenced.[81] These comments go beyond the sensationalist journalism of tabloid newspapers and create an atmosphere in which judges know what is expected of them or simply face massive pressure from social media to decide a case in a particular way. Such behavior undermines trust in the judiciary.

[75] *A bíróságok függetlenségének letörésében csak most fognak "rálépni a gázra,"* 444.hu (Dec. 18, 2019), https://444.hu/2019/11/18/a-birosagok-fuggetlensegenek-letoreseben-csak-most-fognak-ralepni-a-gazra.

[76] The Head of the NJO declined to inform the NJC what remuneration was paid and for what kind of extra work. *Újabb fontos pernyerés: ki kell adni, hogy mennyi jutalmat kaptak az Országos Bírósági Hivatal vezetői*, Transparency International (June 16, 2022), https://transparency.hu/hirek/ujabb-fontos-pernyeres-ki-kell-adni-hogy-mennyi-jutalmat-kaptak-az-orszagos-birosagi-hivatal-vezetoi/. This story is nonetheless only the tip of the iceberg.

[77] György Kerényi, *"Bezárkózás, félelem, önként vállalt némaság"—Vadász Viktor és Vasvári Csaba bírók a bíróságokról,* Szabad Európa (Dec. 24, 2021), https://www.szabadeuropa.hu/a/bezarkozas-felelem-onkent-vallalt-nemasag-vadasz-viktor-es-vasvari-csaba-birok-a-birosagokrol/31623412.html.

[78] *See* Bencze, *supra* note 3, at 1284–85.

[79] Beáta Bakó, *The Zauberlehrling Unchained?*, 78 ZaöRV 863, 901–02 (2018).

[80] *Prime Minister Viktor Orbán on the Kossuth Radio Programme "Good Morning Hungary,"* Miniszterelnok (Dec. 10, 2021), https://miniszterelnok.hu/prime-minister-viktor-orban-on-the-kossuth-radio-programme-good-morning-hungary-66/.

[81] *See* Amnesty Int'l, *supra* note 16, at 29. *See also* Demokrata, *supra* note 69. In line with governmental communication, the influence of George Soros or the former socialist PM Gyurcsány was repeatedly suggested to have been involved.

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Moreover, judges are rarely protected from such attacks,[82] and those who should protect them—the Head of the NJO or the President of the *Kúria*[83]—are appointed by the Parliament and are apparently not eager to do so because that could lead to the end of a promising career. These attacks may even be useful to them to suppress opposition within the judiciary.

IV. Emergency Brakes

Because there needs to be some appearance of judicial independence, not every case can be routed to conformist judges, and some hard-nosed judges are impervious to sticks and carrots—cases sometimes do not turn out as expected. Nonetheless, the judiciary is a hierarchical organization after all, with a Supreme Court at its apex. If the Supreme Court is captured, the "judicial mishaps" can be corrected there. The same applies for the Constitutional Court.

Therefore, special remedies are created which direct the cases to trustworthy and reliable persons. These mechanisms—at least at first glance—serve legitimate aims or are similar to legitimate mechanisms known in other countries.[84] Their abuse for political aims can usually be detected by a timely coincidence between the amendment of some technicalities and the composition of the court. Two such mechanisms can be detected in Hungary: The misuse of law uniformity procedures and that of the constitutional complaint.

1. Uniform Application of the Law

Equal and uniform application of the law is a legitimate objective,[85] and many legal systems have some remedy with this aim.[86] Uniformity in Hungary has a very strong tradition going back to Soviet law,[87] and different tools and mechanisms have been adopted to achieve it which have also served political aims.[88] These were called guidelines (*irányelv*) and decisions in principal matters (*elvi döntés*). Besides these political instruments, some purely professional or apolitical ones also evolved under the radar of the politburo. These were the so-called college statements (*kollégiumi állásfoglalás*) or college opinions (*kollégiumi vélemény*).[89] These were the results of purely professional discussions between judges, which were published and had their existence officially acknowledged in the 1970s, but were never legally formalized: They were informal institutions of the judiciary.

On paper, both the political and the professional instruments of uniform interpretation have survived the transition to democracy, but the political ones are no longer applied—an atrophy.[90] The hasty parliamentary legislation left several lacunae open, explaining the need for uniform application and the survival of the informal tools.[91] The judicial reform of 1997 aimed also to root out the instruments inherited from the communist era and introduced one special binding form of

[82]There were some verbal protests by the President of the Kúria (Péter Darák) between 2012-2021. *See* Ligeti, *supra* note 15, at 747. *See also A bírókkal kapcsolatos sajtóban megjelenő vélemények margójára*, Hungarian Association of Judges (Sept. 2, 2022), http://mabie.hu/index.php/1661-a-birokkal-kapcsolatos-sajtoban-megjeleno-velemenyek-margojara.

[83]*See* Bencze & Badó, *supra* note 21, at 440.

[84]Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work,* 26 Governance 559 (2013).

[85]Consultative Council Eur. Judges, The Role of Courts with Respect to the Uniform Application of the Law (2017), https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3.

[86]For example, *pourvoi en cassation dans l'intérêt de la loi* in France or *Nichtigkeitsbeschwerde zur Wahrung des Gesetzes* in Austria. For Hungarian historical examples see András Lichtenstein, *A törvényesség érdekében bejelentett jogorvoslat elmélete és gyakorlata*, 3 Eljárásjogi Szemle 31 (2018).

[87]Herbert Küpper, *A magyar jogi kultúra egyes jellegzetességei ésszehasonlító perspektívából, in* A magyar jogrendszer állapota [The Status of the Hungarian Legal System] 745 (András Jakab & György Gajduschek eds., 2016).

[88]Zsolt Ződi, *Búcsú a kollégiumi véleménytől?*, 61 Magyar Jog 609, 610 (2014).

[89]*See id.* at 611. After Stalin's death the Hungarian judiciary was reorganized (Act II of 1954 on the Judiciary), and so-called colleges [*kollégium*] composed of judges of the same branches—private, criminal, military—were set up at the Supreme and regional courts to discuss questions of legal interpretation among themselves.

[90]*See* Vermeule, *supra* note 33.

[91]*See* Ződi, *supra* note 88, at 612.

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interpretative judicial decision, the so-called Law Uniformity Decisions (*jogegységi határozat*). Although these should have replaced all informal or semi-formal opinions, guidelines, declarations, this did not happen, and Law Uniformity Decisions were simply added to the patchwork of other interpretative tools without eradicating them. Their coexistence continued after the judicial reform of 2011 as well, and after the 2019 attempt to eliminate informal judicial interpretative tools.[92]

The uniform application of the law is part of legal socialization in Hungary. It is a very important driving force for the judiciary. Nonetheless, it has been gradually instrumentalized since 2010. This happened in three steps. First, access to the *Kúria* was reduced to deviations from judgments made after the establishment of the *Kúria* in 2012, which stressed conformity with the newly established regime.[93] Second, in a timely coincidence with the appointment of a new Chief Justice, a hybrid form of the *stare decisis* doctrine was introduced[94] in 2019. Decisions of the *Kúria* were declared binding on lower courts and a deviation from them requires explicit reasoning.[95] Third, they can be overturned by a special chamber responsible for law uniformity [96]chaired by the President or Vice President of the *Kúria*. Because there is no guidance on what a deviation is and how to compare cases, the admissibility criteria to this special chamber are rather arbitrary, and this special remedy serves to control or even micromanage the decision-making of the *Kúria*. All these circumstances foster conformity at the expense of other virtues of the judiciary.

2. Misuse of the Constitutional Complaint

The constitutional complaint introduced in 1989 proved to be ineffective because it was not available against judicial decisions, and hence the reform remedying that deficiency in 2012 was welcome. [97] Unfortunately, this was redesigned in favor of the governmental bodies as the Constitutional Court in 2018 declared a complaint by the National Bank against a judgment of the *Kúria* to be admissible.[98] Although this was simply contrary to the black letter of the law,[99] it enabled government bodies to seek a remedy against final decisions of the *Kúria* at the captured and hence politically more reliable Constitutional Court,[100] which quashed several decisions unfavorable to the government. Here again, the interplay between institutional design and personal appointments is hard to overlook. Apart from the correction of individual cases, this has a negative effect on the judiciary as a whole. Precisely, because the Constitutional Court usually corrects judgments unfavored by the government, the ordinary judges do not make those decisions at all.

V. Selection, Appointment, and Promotion of Judges

Hungary, as a country of the German legal tradition, follows the concept of *Einheitsjurist*,[101] requiring candidates for the judiciary to pass the same examination, which serves as a universal ticket to the legal profession on the bench or at the bar and enables holders to travel between

[92]András Osztovits, *Törvénymódosítás a bírósági joggyakorlat egységesítése érdekében—jó irányba tett rossz lépés?* 67 Magyar Jog 72 (2020).

[93]This quite important change was only hinted at in an explanatory note to the Act on the Judiciary of 2011, and was later codified in the code of civil procedure and that of administrative court proceedings.

[94]Szabolcs Tahin, *Korlátozott precedensrendszer – alulnézetből*, 67 Magyar Jog 266 (2020). Although the most important decisions of the Supreme Court have always been published and respected *stare decisis* did not apply.

[95]Csaba Virág & Balázs Völcsey, *A korlátozott precedensrendszer és a polgári perjog kapcsolata*, 67 Magyar Jog 125 (2020).

[96]See Amnesty Int'l, supra note 16, at 34.

[97]Attila Vincze, Herbert Küpper, & Claudia Fuchs, *Die Beziehungen zwischen der Verfassungsgerichtsbarkeit und den Obergerichten in Mitteleuropa: eine vergleichende Analyse*, 67 Jahrbuch des öffentlichen Rechts der Gegenwart 601, 615–19 (2019).

[98]It was later legalized by omnibus legislation. Act XXIV of 2019, *supra* note 29.

[99]*See* Chronowski & Vincze, *supra* note 38. *See* Kovács, *supra* note 38.

[100]Several judges addressed this issue: *See* Amnesty Int'l, *supra* note 16, at 34.

[101]Annette Keilmann, *The Einheitsjurist: A German Phenomenon,* 7 German L.J, 293 (2006).

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different jobs. For a long time, this was a mainly theoretical possibility and the typical way to the bench was traineeship at a court.[102] External candidates appeared very rarely.[103]

This was changed in the last decade, and a points-based system was established, opening up judicial careers and widening the requirement base. Although reform was necessary because, first, the earlier forms of selection and promotion were arcane and enabled favoritism; second, this in reality works much less well than one would expect; and third, it also contains loopholes and emergency brakes in order to assist the favored and to impede unfavored candidates.

1. The Dysfunctional Selection System Inherited from Communism

Judgeship was not a dream job for high flyers during the communist regime, but it offered a good work/life balance.[104] The creation of junior judicial positions leading to judgeships and selecting candidates for them depended very much on the discretion of regional court presidents and the Ministry of Justice. This cooperation lingered on after the transition and until 1997,[105] fostering informal networks and favoritism.[106] Although open and competitive appointment and promotion were required by the Act on Judges of 1997, the selection criteria were not set or standardized, and the whole procedure remained rather opaque.[107] As a reaction to criticisms from the EU,[108] a competitive examination was introduced,[109] but its outcome was not binding when appointments were being considered. This led to a dysfunctional selection process in which judicial corporativism and personal connections counted for more than skill and aptitude.[110]

2. The Points-Based System—A Meritless Meritocracy?

The supranational criticism laid the groundwork for a new and more meritocratic selection mechanism:[111] The Hungarian points-based system takes into account professional experience, bar exams, scholarly and further professional qualifications—PhD., LLM or scholarly articles—and a command of languages, but still leaves some room for subjective criteria and endorsements. The outcome of the points-based assessment binds the Head of the NJO inasmuch as they must propose a candidate, who is one of the three best applicants, and if the best performing one is not nominated the decision needs to be justified, which sounds merit-based but deserves a closer look.

First, the system is known in advance and candidates know which qualifications count and how to obtain the points necessary for a judicial appointment by polishing their language skills or writing scholarly articles.[112] This is much more transparent than anything else that has been in operation since the Second World War.[113] Second, it nevertheless raises the question of the

[102] *See* Bencze & Badó, *supra* note 21, at 433.

[103] After the democratic transition in 1989 when a review of administrative acts was established, some former public servants switched to the judiciary, and unfortunately took their former behavioral patterns and basic deference towards the government with them.

[104] *See* Bencze & Badó, *supra* note 21, at 431.

[105] *Id.* at 433.

[106] *Id.*

[107] *Id.* at 434.

[108] *Comprehensive Monitoring Report on Hungary's Preparation for Membership*, COM (2003) 675 final (Nov. 5, 2003).

[109] *See* Bencze & Badó, *supra* note 21, at 434.

[110] *Id.* at 435; Fleck, *supra* note 17.

[111] The criteria are set by a decree of the Ministry of Justice. 7/2011. (III. 4.) KIM r. a bírói álláspályázatok elbírálásának részletes szabályairól és a pályázati rangsor kialakítása során adható pontszámokról (Decree of the Ministry of Justice and Administration No. 7/2011. (III. 4.) on the Rules of Assessment of Applications for Judicial Positions and on the Points Distributable for those Applications) (Hung.).

[112] *See* Bencze & Badó, *supra* note 21, at 436.

[113] *Id.*

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comparability of different types of experience: Time spent at the bar, in public administration, or in academia has become more and more interchangeable or even better evaluated than actual judicial work. This works in favor of external candidates and especially those from the public administration or the NJO,[114] where—at least so it appears—attitudes, capabilities, and loyalties could have been tested.[115] Moreover, public servants often have a bureaucratic mentality and are accustomed to an organizational culture fostering deference to government institutions and interests. Third, a PhD, an LLM, or a study trip in a foreign country can easily be a substitute for several years of actual judicial work. Although this encourages judges to broaden their horizons, it also begs the question how those time-consuming extrajudicial activities can be pursued; these scholarly endeavors require the support, permission, and flexibility of the court president as regards to their primary duties of judging. And precisely because this is a discretionary power, the court presidents can push their favorite candidates to obtain those valuable extra points and make headway or administratively block those in disfavor. Fourth, there are several activities within the judiciary like mentoring or participation in legislative activities or in the administration of the judiciary, which are rewarded by extra points, but selection for these activities is also in the hands of the court presidents. So, points may be merit-based, but not necessarily selection for judicial positions. Fifth, actual judicial work counts less overall than other factors, a fact which surely fosters some competitiveness, but also facilitates appointment of people without any previous judicial experience and socialization to the bench, begging the question of how they can acquire them later, how to handle eventual personal loyalties towards earlier employers—revolving doors—and, of course, how to maintain the attractiveness of judicial clerkships if external candidates are fast-tracked into them.

Sixth, personal endorsement still matters and can influence appointment or promotion. The evaluation of judicial work takes place according to quantitative—speed, keeping deadlines, number of finished cases, and so on—and qualitative—legal skills, conduct of trials, decision-making ability—criteria,[116] and are assessed by the judge's immediate professional superiors, which is a considerable incentive to align himself with their viewpoint for a smoother career while hard-nosed ones have a bumpier ride.[117] The bureaucratic values of keeping deadlines and performance records also go a long way, although they are attributes of quantity rather than of quality.[118] In promotions, the opinion of a *kollégium*—judges adjudicating in the same branch of law—counts a lot, and senior judges—chamber presidents, college presidents, and their deputies—determine the patterns of voting by endorsing candidates. Therefore, secondments to appellate courts enable the selectors to become familiar with the candidates, select those who fit in, and endorse them later. The call for application remains a mere formality. Seventh, special criteria can always tilt the scales and tailor-make the requirements, as happened with a former deputy secretary of the Ministry of Justice, who was so "lucky" that being outspoken in his special field of expertise—right of assembly—was required at the *Kúria* for a judicial position after he left the Ministry.[119] All in all, the system is less merit-based than it is claimed to be. The role played by personal connections and networks is simply well hidden in the manner in which extra points can be earned.

[114] *See* Amnesty Int'l, *supra* note 16, at 37.

[115] One of the better known cases is that of Barnabas Hajas, former Secretary of State in the Ministry of Justice, who in 2021 became a judge of the Kúria without having had any judicial experience. Helsinki Figyelő, *supra* note 11.

[116] *See* Bencze, *supra* note 3, at 1290.

[117] *See id.*

[118] Nonetheless, efficiency in terms of bringing cases to a conclusion within a short time also counts for a lot in international benchmarking. For example, the Rule of Law report of 2020 praises Hungary in this respect. *Country Chapter on the Rule of Law Situation in Hungary*, COM (2020) 316 final (Sept. 30, 2020).

[119] The person in question, Barnabas Hajas, happens to work at the university department chaired by the President of the Kúria. *See* Helsinki Figyelő, *supra* note 11.

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3. Emergency Brakes and Loopholes

Although the points-based system can be tilted to some extent, it may still produce unwanted results which need to be dealt with. One option is for the whole call to be annulled by the Head of the NJO. This is brute force, makes a great noise,[120] and is of only limited use because it can only hinder an appointment but not be used to pick and choose the "right chap." Nonetheless, it also demonstrates the possible far-reaching influence of the Head of the NJO.[121] An annulment or invalidation can, of course, serve legitimate aims if the position turns out to be superfluous—because of a shrinking caseload, for example. Therefore, it should happen only exceptionally; otherwise, it shows dysfunctionality or even abuse, especially if it happens even if suitable candidates apply, without proper explanation, or if a new call for the same position is announced after an annulment.[122] Because actions against an annulment are non-justiciable,[123] the Head of the NJO can unaccountably make and does make decisions, making it possible to fill strategically important positions and foster her own personal network. Since 2023, these decisions have had to be confirmed by the NJC.

Moreover, the whole merit-based selection mechanism can be circumvented by temporary presidential appointments made solely by the Head of the Judicial Office.[124] These temporarily appointed persons are later usually the only candidates for the permanent positions.[125] Some of them simply purchase the loyalty of the most influential judges at the court by targeted bonuses or better treatment. In other cases, the temporarily appointed presidents are not challenged by their colleagues, either because they learn to live with the status quo or the futility of the challenge is signaled clearly. If the results of an open call are annulled for several times if not the favored candidate wins, nobody dares to challenge the chosen one. Temporary appointments in themselves can serve a legitimate aim in the case of emergencies, but they can also obviously be abused in order to handpick loyalists. This possibility was again reduced in 2023 for unlocking EU money.

Nonetheless, it would also be an overstatement to say that only those who are loyal to the Head of the NJO or to the Government are appointed. This is demonstrated by the previously mentioned case of Gabriella Szabó who, as a former public servant, was appointed as an administrative judge, but her appointment was not made permanent following her request for a preliminary ruling. This can be interpreted in several ways: Her position as a rank-and-file judge was not important enough to test her loyalty, or she was able to fool the appointment procedure but, after that crucial error, she had to be fired regardless of her other skills.

[120]Antónia Rádi, *Tiltakozó talárosok: lemondott a Vas megyei bírói tanács,* ÁTLÁTSZÓ (Sept. 3, 2015), https://atlatszo.hu/kozugy/2015/09/03/tiltakozo-talarosok-lemondott-a-vas-megyei-biroi-tanacs/. Csaba Vasvári was, for example, twice assessed to be the best candidate, but the appointment procedure was invalidated in both cases rather than he should be nominated. The claim against the Head of the NJO for misuse of powers was declined because of a lack of justiciability. Amnesty Int'l, *supra* note 16, at 20. Simon Zoltán, *Handó Tünde visszaélt a hatalmával—Jogellenesen akadályozta egy bíró kinevezését*, NEPSZAVA (Mar. 6, 2021), https://nepszava.hu/3112109_hando-tunde-visszaelt-a-hatalmaval-jogellenesen-akadalyozta-egy-biro-kinevezeset.

[121]Péter Sólyom, *Az Alkotmánybíróság határozata a bírósági törvények felülvizsgálatáról*, 5 JOGESETEK MAGYARÁZATA 13, 25–26 (2014).

[122]There are however different assessments of what counts as an abusive or dysfunctional exercise of power: Ágnes Kovács, Új modell a bírósági igazgatásban: bírák központi nyomás alatt, 31 BUDAPESTI KÖNYVSZEMLE 240 (2019); Viktor Vadász, Krízis a bírósági igazgatásban? (MTA L. Working Paper No. 13, 2018); Csaba Virág, Észrevételek Vadász Viktor "Krízis a bírósági igazgatásban?" című írásához, (MTA L. Working Paper No. 13, 2018). Country Chapter on the Rule of Law Situation in Hungary, COM (2021) 714 final (July 20, 2021).

[123]Kúria [Curia of Hungary] Mfv.X.10 049/2021/16 (Hung.).

[124]Critically, see Sajó, *supra* note 21, at 78. The call for candidates for the position of President of the Regional Court of Szombathely was, for example, annulled although three judges applied. Surprisingly somebody completely different was temporarily appointed to the position. *Kézi vezérlés: Handó Tünde leléptette a neki nem tetsző elnökjelöltet,* HVG (Feb. 26, 2013), https://hvg.hu/itthon/20130226_Kezi_vezerles_Hando_Tunde_leleptette_a_ne.

[125]*See* Virág, *supra* note 122, at 8.

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One of the larger loopholes in the merit-based selection system was the possibility of parachuting judges from the Constitutional Court to the *Kúria* at their request after their tenure at the Constitutional Court had ended. Taking into account that judges are appointed to the Constitutional Court in a highly politicized procedure and several of them have not sat for the bar exam, their appointment to the *Kúria* was an obvious attempt to capture that court. In order to unlock some EU funds, the rule was amended cosmetically, and the former constitutional justices can only be appointed to the Higher Appeal Courts (*Ítélőtábla*).

D. Is the Cat Dead or Alive?

As with the famous cat, the answer relies on what happens when you open the box. According to the prevailing governmental narrative, everything is *stricto sensu* legal on paper, which should suggest a live cat. Legalism is, of course, a powerful weapon in a country with a strong formalist/positivist legal tradition, where the overwhelming majority of textbooks are of a descriptive nature and scholarship has not paid much attention to practices, usages, or conventions because of their lack of normative value.[126]

What is more, the abused legal provisions are also not absurd, and most of them have a rational core, making them harder to challenge: Sickness or an unmanageable caseload are reasonable grounds for case reallocation; administrative duties may justify temporary appointments; and special expertise may be required at a particular court. Formality serves purely to disguise informality and true intentions. Whether that causes the cat to be alive is hard to answer.

Drilling deeper, however, one can barely escape the impression that the formal rules were enacted not to strengthen institutions but to capture strategically important positions, such as those of presidents of the regional courts and the Supreme Court or of members of the Constitutional Court. In these cases, personal changes coincide with the ebb and flow of power: The friendlier the relations, the wider are the powers—the powers of the Constitutional Court and those of the President of the Supreme Court have changed a lot during the last decade. The formal rules follow changes in the informal structure and the web of personal connections. Rules were enacted precisely because it was clear that a close friend, a loyal ally, or a trusted longtime colleague would be appointed to the key positions. These people understand perfectly what is expected from them and need no instructions. Moreover, the lack of internal and external accountability mechanisms strengthens the key actors' positions and paves the way for abusing their discretionary powers. This makes the cat mortally ill. This illness became apparent to the EU, as well, and required several changes to the judiciary in order to cure the poor cat. It is not yet clear, however, how effective the medicine is.

On the one hand, the tailor-made extraordinary remedies and control mechanisms show that the government deeply distrusts the judiciary and fears that judicial decisions may turn out to be unfavorable to it, and, therefore, it needs to appoint some guardians of its interests. This, on the other hand, also means that the judiciary as a whole is in rather decent shape, which again gives the impression of a fairly alive cat. Nonetheless, the questionable selection and appointment mechanisms may also result in the poor cat taking a long time to die.

It is also clear that the judiciary has not developed strong immunity to encroachments into its independence. Many questionable practices and techniques—case allocation, judicial appointments, law uniformity decisions, and so on—can be traced back to the communist regime and have survived even the democratic transition, suggesting that very few democratic values actually

[126]András Jakab, *A jogforrási rendszer, in* A magyar közjog alapintézményei 913–15 (Lóránt Csink, Balázs Schanda, & András Zs. Varga eds., 2020); József Petrétei, Magyarország alkotmányjoga 161–62 (2013). László Sólyom, Az Alkotmánybíráskodás kezdetei Magyarországon, 296–99 (2001). The gap between the normative and real or actual constitutions has only very recently been examined thoroughly in legal literature. *See* Jakab, *supra* note 10; *see also* Vincze, *supra* note 33.

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penetrated deep into the behavioral patterns of the judiciary after transition.[127] The missing conventional standards of democratic normality in combination with learned helplessness, a bureaucratic mentality, and a lack of solidarity among judges lowered their resistance to abusive techniques. This again leads to the unpleasant question of how healthy the cat was at all before we put it into that box.

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[127] *See* Jakab, *supra* note 10, at 785–89.

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