



European Network of Councils
for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Address Filippo Donati, President of the ENCJ

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Meeting with OBT

Ladies and gentlemen, esteemed colleagues,

1. It is a great honour and it gives me great pleasure to speak here today to the esteemed members of the Hungarian Council. Your Council started its mandate in 2018 and immediately it was clear that this Council had ambition. Despite a lack of human and financial resources your Council played an active role in the ENCJ by participating in all projects, by being a member of the Executive Board and by feeding into the agenda and mission of our Association. For that I wish to commend you.
2. I would like to kick off this meeting between the ENCJ delegation and the Member of the OBT by explaining why the Executive Board decided to send a delegation to Hungary. At the 2022 ENCJ General Assembly the ENCJ adopted the Athens declaration on Judicial Solidarity in times of crisis. Judicial solidarity is an important value in Europe. European judiciaries share common values. Judicial solidarity contributes to the stability of democratic institutions and the Rule of Law in Europe. Judicial solidarity is based on the belief that there is shared sense of destiny and a common identity. It is closely related to the promotion, preservation and defence of the Rule of Law and Judicial Independence.
3. Judicial solidarity entails an understanding that assistance should be offered within the European Judicial community in response to attacks on or challenges to Judicial Independence and the Rule of Law. If a national judiciary is under significant pressure from governmental or other domestic

actors, international support is critical. Judiciaries should support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard. The ENCJ believes that acts of judicial solidarity may take many forms including support visits such as organised today.

4. The ENCJ has been following the developments in Hungary and more specifically the judiciary and the Judicial Council since 2012. Several visits have taken place in the last ten years and the ENCJ has spoken out in defence of judicial independence in Hungary on several occasions. In 2020 upon the appointment of the current President of the Kuria the ENCJ wrote a letter to the European Commission pointing out that there is an increasing risk of state capture of the entire judiciary in Hungary. The powers of the President of the Kuria are broad and would allow him to control the functioning of the Kuria. The recently acquired powers of the Kuria to promote uniformity of law adds to ENCJ's concern.
5. In addition the Board found that that it is a long established standard in Europe that the selection of judges should be conducted by an independent judicial appointment body consisting of at least a majority of judges elected by their peers. Should the other State powers or the Head of State be involved in the appointment procedure, this should not undermine the principles of independence, fairness, openness and transparency. If a recommendation by a judicial appointment body or judicial council is not followed, this decisions and the reasons should be clearly stated.
6. Since 2020 more reasons for grave concern in relation to Judicial Independence in Hungary have occurred. The OBT continues to face difficulties in counterbalancing the powers of the President of the National Office for the Judiciary. There is a lack of transparency of the case allocation scheme which does not allow parties to verify whether any undue discretion has been applied. Questions have been raised regarding the role of the Constitutional Court, composed of members elected by Parliament without the involvement of the judiciary, in reviewing judgments of the ordinary

courts. In addition the procedure of appointing justices to the Supreme Court has raised questions and the OBT still has not been endowed with the powers to counterbalance the powers of the President of the National Judicial Office (OBH).

7. In the same vein it could be argued that the powers of the OBT should also include oversight of the functioning of the President of the Kuria. The President of the Kuria is endowed with powers for the Supreme Court that are similar to the powers of the President of the OBH for the ordinary judiciary but he does not seem to be accountable to anyone. If the OBT would be endowed with these powers it would be self-evident that the president of the Kuria could not be an ex-officio member of the OBT.
8. On the issue of the powers of the Council, the ENCJ has developed a framework of standards that should apply (see also the ENCJ Compendium on Councils for the Judiciary, adopted October 2021). A Council for the Judiciary must be an independent body, which operates in a transparent and an accountable manner. The structure, powers and processes of Judicial Councils must be designed to safeguard and promote judicial independence and an efficient judicial system. If adequate checks and balances are not in place, the Council for the Judiciary may become a pawn in the hands of the executive, legislative or powerful groups, thereby undermining judicial independence.
9. To guarantee that the Council can act independently a Council for the Judiciary must manage its budget impartially from the executive power. Councils for the Judiciary must have adequate financial and administrative resources to properly carry out their function. The Council must have the power and capacity to negotiate and organise its own budget effectively and, in this regard, to participate in consultation or representation procedures at local and national level as well as the right to engage in formal dialogue with the legislative and the executive in relation to the allocation of resources necessary for the administration of justice. Legal personality, or equivalent

arrangements, assist the Councils in managing their resources and budget and should therefore be granted.

10. The ENCJ would hope that a reform of the Council would be considered by the Hungarian authorities to bring it more in line with European Standards and to enable it to fulfil its mission of promoting and preserving the Rule of Law and an independent, accountable and high quality judiciary. If that would be the case some other issues such as the composition, structure and presidency may also have to be taken into account.

11. One of the core competences of the Councils is their role in the selection and appointment of judges. Whichever system is put into place, the selection and appointment of judges should meet the European Standards (Council of Europe and ENCJ Standards). These standards can be found in the ENCJ report on Selection, Appointment and Promotion of Judges (2012) and in the ENCJ Dublin Declaration.

12. These Standards include that:

- Judicial appointments should only be based on merit and capability.
- Selection competencies should include intellectual and personal skills of a high quality, as well as a proper work ethic and the ability of the candidates to express themselves.
- The intellectual requirement should comprise the adequate cultural and legal knowledge, analytical capacities and the ability independently to make judgments.
- There should be personal skills of a high quality, such as the ability to assume responsibility in the performance of his/her duties as well as qualities of equanimity, independence, persuasiveness, sensibility, sociability, integrity, unflappability and the ability to co-operate.
- Whether the appointment process involves formal examination or examinations or the assessment and interview of candidates, the selection process should be conducted by an independent judicial appointment body.

- The procedures for the recruitment, selection or (where relevant) promotion of members of the judiciary ought to be placed in the hands of a body or bodies independent of government in which a relevant number of members of the judiciary are directly involved and that the membership of this body should comprise a majority of individuals independent of government influence.
- The body in charge of selecting and appointing judges must provide the utmost guarantee of autonomy and independence when making proposals for appointment.
- It must be guaranteed that decisions made by the body are free from any influences other than the serious and in-depth examination of the candidate's competencies against which the candidate is to be assessed.
- The entire appointment and selection process must be open to public scrutiny, since the public has a right to know how its judges are selected.
- An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process.

13. Unfortunately in Hungary the effects of opaque judicial appointments are visible in the recent ENCJ survey among judges where it was found that 42% of the responding judges in Hungary believed that the first appointment of judges was not based on merit and ability alone. As to appointment to the Supreme Court / Court of Cassation, the percentage is even worse where 52% of the Hungarian respondents express the view that these appointments are not only based on ability and experience. Even more worrying is the fact that in the same survey among judges almost all responding judges in Hungary feel that their independence has deteriorated since the beginning of their judicial career.

14. In the latest EU barometer on perceived judicial independence among the public the main reason mentioned for a negative perception is that people feel that politicians interfere in the courts. Unclear judicial appointments procedures are surely contributing to this perception.

15. Another issue that seem to have caused discussion in Hungary is the recently adopted Code of ethics. The ENCJ has also reflected on the question of judicial ethics in particular in relation to society's expectations of judges. A balance needs to be in place between the independence of the judiciary [as a prerequisite of Rule of Law and not as a judicial privilege], the transparency of institutions, the freedom of the press and the public's right to information.
16. The ENCJ standards on Judicial ethics have been addressed in a positive manner, so that the duties of the judge encompass the common, founding values of the judge's work, preventive principles and personal qualities, in response to the public's expectations.
17. Independence, integrity, impartiality, reserve and discretion, diligence, respect and the ability to listen, equality of treatment, competence and transparency are the common values identified (as essential to the judicial role). The judge also demonstrates personal qualities of wisdom, loyalty, a sense of humanity, courage, seriousness and prudence, an ability to work and an ability to listen and to communicate effectively. A judge is aware that his professional behaviour, his private life and his conduct in society have an influence on the image of justice and public confidence.
18. As to the reserve and discretion that a judge need to practice in public life the ENCJ has stated:

A judge, like any citizen, has the right to have a political opinion. His task, by showing this reserve, is to ensure that individuals can have every confidence in justice, without worrying about the opinions of the judge. A judge exercises the same reserve in his dealings with the media. He cannot, in the name of freedom of expression, appear to be partial or in favour of one party. In facing criticism or attacks, a judge exercises the same caution. A judge will refrain from commenting on his decisions, even if they are criticised by the media or by academic commentators and even if they

are overturned on appeal. The way in which he expresses his opinion is in the reasoning of his decisions.

At the same time, the obligation of reserve cannot provide a judge with an excuse for inactivity. While he should not speak on cases with which he deals personally, the judge is nonetheless ideally placed to explain the legal rules and their application. The judge has an educational role to play in support of the law, together with other institutions which have the same mission. Judges have a specific responsibility to reach out and explain the importance of the Rule of Law and an independent judiciary.

When democracy and fundamental freedoms are in peril, a judge's reserve may yield to the duty to speak out.

19. In connection to the judges' duty to speak out when the Rule of Law or Judicial Independence is in peril the ENCJ is extremely disturbed by the stories of a smear campaign against the spokesperson of the Council for the Judiciary after having been interviewed by the British press. Smear campaigns by public authorities or through their proxies (such as media outlets close to the government) aim to create a climate of self-censorship and cause a chilling effect.

20. In a democratic state there should be a proper understanding of the respective roles and responsibilities of each of the branches of the state and the need for them to work together – a form of interdependence. The judiciary is responsible for the effective delivery of justice, and that is a grave responsibility. To achieve it, they must work with their governments to understand the necessary barriers between the pillars of state. There is an inevitable tension between the executive and judicial power, such tension exists even in politically quiet times. The balance of powers implies that there is effort involved. Finding and maintaining an equilibrium between the three arms of the state demands continuous work by all state powers involved. This equilibrium can only be achieved, when there is a healthy measure of mutual

respect between the judiciary on the one hand and the executive and the legislature on the other hand.

21. Unfortunately, the example of the smear campaign against the spokesperson of the OBT show that the other state powers not only not maintain and strengthen the judicial power, but do not protect the judiciary against attacks by the media, members of Parliament or even the government.
22. Turning back to the reasons of our visit to Budapest, the ENCJ firmly believes that Councils for the Judiciary should show solidarity and support any judiciary which is under attack and do all they can to persuade the executive and legislature to support the action which they are taking in this regard. The prudent convention that judges should remain silent on matters of political controversy should not apply when the integrity and independence of the judiciary is threatened. There is now a collective duty on the European judiciary to state clearly and cogently its opposition to proposals from government which tend to undermine the independence of individual judges or Councils for the Judiciary.
23. The ENCJ stands in solidarity with the Hungarian judiciary and its judges defending the Rule of Law and independent courts that guarantee the respect for fundamental rights and freedoms. The ENCJ Board admires the way the OBT continues to protect judicial independence, opposes the attempts to erode it and speaks out in favour of independent and impartial courts for the benefit of all citizens.

I thank you for your time.