NOW IT'S TIME TO WORRY

A PROFILE OF JUSTICE ANDRÁS ZS. VARGA: A CHIEF JUSTICE AS ILLIBERAL AS CAN BE

7 JANUARY 2021

As of 1 January 2021 a new Chief Justice, András Zs. Varga has taken his seat as the President of the Kúria (the Supreme Court of Hungary) for a period of nine years. Justice Varga is a well-tested loyalist of the Fidesz-led Hungarian Government, as demonstrated by his record as a prosecutor, his decisions as a member of the Constitutional Court, and his academic work. His perceived loyalty towards the executive branch casts a threatening shadow over the independence of the judiciary, the rule of law, and the protection of fundamental rights in Hungary.

The Kúria is the top tier of the Hungarian judicial system. The Kúria serves as the final instance in civil, administrative and criminal cases, and is also entrusted by the Fundamental Law with guaranteeing uniform application of the law. As President of the Kúria, the Chief Justice is vested with excessive powers[1] within the Kúria, including a wide spectrum of administrative, managerial and jurisprudential rights that grant them a decisive role with respect to the whole judicial system. Additionally, as a result of a recent modification of the law, the Chief Justice has gained a privileged position in the adjudication[2] of individual cases on the last instance, and in shaping the mandatory interpretation of the law.

Against manifest opposition by the National Judicial Council (NJC), the judicial self-governing body, Justice Varga was elected as Chief Justice by Parliament on 19 October 2020. Justice Varga has never served as a judge. In turn, he served as Deputy General Prosecutor for 10 years in direct hierarchical link with the current General Prosecutor. During the course of the court-packing process[3] by the ruling majority he became a member of the Constitutional Court (not forming part of the ordinary court system in Hungary) in 2014.

Below, we outline Justice Varga's approach to the most crucial issues in Hungary during the last decade, and his contribution to building an "illiberal" democracy.[4] Taking into account his work in his former positions, his publications as a scholar, and his public statements, it becomes clear what representatives of the judiciary and all those concerned about the rule of law in Hungary are worried about.

[1] See the HHC's related information update: https://www.helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf
[2] See the HHC's related information update: https://www.helsinki.hu/wp-content/uploads/Hungary_potential_amendments_improving_RoL_30112020.pdf p. 3.
[3] See the joint analysis of HHC, EKINT and HCLU from 2015: http://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf
[4] See the HHC's related information update: https://www.helsinki.hu/wp-content/uploads/HHC_State_of_RoL_in_Hungary_2020.pdf

1. ON RULE OF LAW MATTERS

The democratic backsliding process over the last decade, which commenced after the Fidesz-led Government took power in 2010, pushed the state of the rule of law in Hungary into the spotlight on several occasions. Concerns related to the rule of law in Hungary have been raised by various international stakeholders and institutions, and led to the European Parliament triggering an Article 7(1) TEU proceeding in 2018.

1.1. ON THE CONCEPT OF THE RULE OF LAW

Amidst the efforts of the European Union (and Hungarian courts) to secure respect for democracy, fundamental rights and the rule of law, Justice Varga - as an academic - dedicated a book to the concept of the rule of law entitled *From Ideal to Idol?*[5] in which he concluded that: "**the domestic and the EU-interpretation of the rule of law**, despite the endeavour to provide legal security, **yields ground for arbitrary interpretation enforceable by judicial means**"[6] further assuming that "that arbitrariness **has become tyrannical, moreover, totalitarian**."[7] In his view, "[i]n the course of shaping the current domestic and international approaches to the rule of law, **an idol has been carved from it**."[8] "Due to its new status of an idol, the rule of law has grown over its components rationally comprehensible and applicable in actual situations: **it has lost contact with reality**. It can be **summoned in any case, without reasoning** or explanation, **it is an argument by itself** and it has become inviolable, endowed with transcendent value."[9] "[T]he idol of the rule of law in fact mingled the methods of the rule of law and those of the rule by law: initially aspiring to give protection against arbitrary exercise of power, **it has become the instrument of arbitrary exercise of power** in the meantime."[10] "Finally, the rule of law elevated to the status of an idol has another consequence: it becomes more important than its subjects, the persons themselves the behaviour of whom law is mandated to control and protect. This is what we have been attempting to demonstrate on the pages of this book: **the idol of the rule of law is jealous (it does not recognize any other value than itself), therefore it is totalitarian**: it must-needs control everything."[11]

In an interview, Justice Varga went further by **comparing the idea of the rule of law to Communism and Nazism,** claiming that: "The same happened to the rule of law as usually happens to the 'isms'. The 'isms' find themselves a very abstract, well-defined aim, which otherwise sounds good, and everyone accepts. After that, the 'ism' goes much further even for those who initially supported it. Then in the name of the 'ism' we liquidate everything in the name of which the whole ideological movement was originally constituted."[12]

Heading towards the above conclusions, Justice Varga also evaluated the activity of several domestic and international stakeholders in shaping the interpretation of the rule of law, amongst others, EU institutions as well as domestic and international courts. Below, we outline and summarise some of these assessments.

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[5] András Zs. Varga, *From ideal to idol?* (Budapest: Dialóg Campus, 2019). Available in English at: https://www.academia.edu/39139158/Web_PDF_From_Ideal_to_Idol
[6] Ibid, p. 19.
[7] ibid, p. 19.
[8] Ibid, p. 153.
[9] Ibid, p. 154.
[10] Ibid, p. 155.
[11] Ibid, p. 156.
[12] András Zs. Varga, 'It was Never Possible to be Hungarian without a Strong Executive, Nor is it Now', an interview by Attila Palkó, *Madiner*, October 29, 2018. https://precedens.mandiner.hu/cikk/20181029_eros_vegrehajto_hatalom_nelkul_magyarnak_lenni_kozep_europaban_soha_nem_lehetett_es_most_sem_lehet_beszelgetes_varga_zs_andrassal ('Erős végrehajtó hatalom nélkül magyarnak lenni Közép-Európában soha nem lehetett, és most sem lehet').

1.2. On the European Union as defender of the rule of law

Justice Varga strongly criticises all institutions that have attempted to prevent the further dismantling of Hungarian democracy, in particular the European Union. He claims that "[i]nternational and supranational organizations have also **recognized the benefits of unlimited (primarily judicial) extension of the rule of law clause**. A most spectacular example of this is the European Union."[13] In his view, "Article 2 of the TEU, together with Article 7 threatens the member states that do not respect the undefined principle of the rule of law. [...B]y elevating the abstract principle of the rule of law to normative rank, a gate was opened which might not be possible to close again. It created **a device that can be used unlimitedly by the bodies of the European Union**. The power is vested ultimately to the ECJ [the Court of Justice of the European Union], a court that is per definitionem beyond political (i.e. democratic) control."[14] "Accordingly, **the rule of law can become an arbitrary means of discipline** due to its content which is not delimited."[15]

Concerning the strong correlation between the interpretation of the rule of law amongst the European Union and the Council of Europe commissioned Venice Commission, Justice Varga assumes that "[w]e are witness to an unprecedented **institutional networking** (the European Commission + the Venice Commission, then the ECtHR + the European Parliament + the ECJ) which **allows for the magic wand interpretation and utilisation of the rule of law**."[16]

1.3. On the reports of the European Parliament adopted regarding Hungary

The European Parliament adopted the ***Tavares Report***[17] in 2013. The report raised serious concerns regarding the state of democracy, the rule of law, the respect and protection of human and social rights, the system of checks and balances, and equality and non-discrimination in Hungary. In Justice Varga's view, "[i]n fact, **the *Tavares Report* charging Hungary with violation of human rights can be perceived as testing the applicability of the rule of law as a whip**."[18] "As regards Hungary, the rule of law as a mean of discipline is not a presumption, but a fact. In order to sustain this, it is enough to refer to the so-called Tavares Report, mentioning 39 times the rule of law; the less one can state about this is that **it is a political text in the camouflage of legal evaluation**, **without an endeavour for professionalism**. [...] **The rule of law perceived in this manner is an instrument, applying it leads straight to tyranny**."[19]

Regarding the adoption of the ***Sargentini Report***[20] in 2018 that triggered the Article 7(1) proceeding against Hungary, Justice Varga took the opinion that "[t]he **principle of the rule of law served as an instrument of repression** not as a very legal requirement in this report. By this, the rule of law, created to be a fair antidote of autocracy, has been replaced by an arbitrary, if not a **totalitarian rule of law**."[21]

[13] Varga, 2019, (see note 5 above), p. 16.
[14] Ibid, p. 121.
[15] Ibid, p. 122.
[16] Ibid, p. 131.
[17] See: https://www.europarl.europa.eu/doceo/document/A-7-2013-0229_EN.html?redirect
[18] Ibid, p. 122.
[19] Ibid, p. 18.
[20] See: https://www.europarl.europa.eu/doceo/document/A-8-2018-0250_EN.pdf
[21] Ibid, p. 132.

1.4. On the European Commission's rule of law tools

Justice Varga also had an opinion regarding the European Commission's Rule of Law Framework,[22] adopted in 2014 as an early-warning tool allowing it to enter into dialogue with member states to address systemic threats to the rule of law and prevent escalation. He declared that its "wording leaves no doubt that the uncertain content of the rule of law **leaves space to formulate charges of violation without difficulty**"[23] and that "the concept of the systemic level communicated by the European Commission with reference to the framework is relevant as it allows for implied arbitrary accusation."[24] Regarding the possibility to initiate infringement procedures in order to ensure the correct application of EU law at the national level, Justice Varga assumed that "[a] procedure for breach of obligation that can be filed upon prejudice to the rule of law, initiated by the European Commission and pursued by the ECJ, is little favourable for the member state. In fact, **it exposes the country to an activistic procedure, ultimately, to an unpredictable one**."[25]

1.5. On the Venice Commission

Justice Varga has been a member of the Venice Commission since 2013. In an interview in 2018 he claimed: "[w]hat we colloquially and in a somewhat pejorative manner call **double standard is in fact a written principle of the Venice Commission**. Since 2002 it figures amongst the principles of judicial appointments that there is a difference between what can be done by an 'old democracy' and what can be done by a 'new democracy'. In so-called old democracies the executive in theory exerts strong influence on the judiciary, but the political culture and tradition prevent the executive from abusing its powers. Therefore it may remain as is. In new democracies there is no such tradition, consequently in new democracies the executive may not have a role in the administration of the judiciary. This is a scandal!"[26]

1.6. On the ECtHR (and on the instrumental application of law)

Justice Varga inclines to refer to courts as the most dangerous branch of power, especially if it comes to international courts such as the ECtHR. "The Constitutional Court and the powerful international courts are institutions **vested with practically unlimited powers, whatever they decide shall be deemed as the only rule of law solution**, and that is the end of it. In Hungary, the situation is easier, because if ordinary courts move the jurisprudence into one direction, the legislation can rebalance it, in the case of the Constitutional Court, the Parliament as the entity vested with the right to amend the Constitution can fulfil the role of a counterweight by modifying the Fundamental Law. In the international context this is more dangerous, because is it possible to amend the European Convention of Human Rights, if someone does not like the Strasbourg jurisprudence?"[27]

1.7. On the CJEU

Justice Varga criticised several decisions of the CJEU, labelling the jurisprudence of the Luxembourg court as "judicial activism". With respect to the CJEU judgment[28] delivered in the infringement procedure initiated against Hungary for prematurely ending the term served by the Parliamentary

[22] See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0158&from=EN
[23] Ibid, p. 123.
[24] Ibid, p. 131.
[25] Ibid, p. 124.
[26] See note 12 above.
[27] András Zs. Varga, 'In Life, Most of the Decisions were not Taken by me'. An interview by Aranka Sávuly, *Jogaszvilag*, November 24, 2016. ('Az életben a legtöbb döntést nem én hoztam meg') https://jogaszvilag.hu/szakma/az-eletben-a-legtobb-dontest-nem-en-hoztam-meg/
[28] See: https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140053en.pdf

Commissioner for Data Protection and Freedom of Information, he raised the following criticism: "[b]y doing so, the ECJ not only declared that the law of the EU has primacy over the constitution of the member states (with regard to the scope of authority transferred to the EU, this is undoubtedly true). By so doing, the ECJ also questioned the [Fundamental Law] in its constitutional quality. The only way the decision can be interpreted in is this: the [Fundamental Law] as a new constitution should have been adjusted to the provisions of the Act on data protection as of 1992. To take such a decision, that is **to question the constitutional quality of a source of law (even if that was due to simple lack of attention) nobody ever empowered the ECJ**. Alas, the decision was this – naturally, with the aim to protect the value of the rule of law principle."[29]

Most recently, he raised concerns about the CJEU judgment[30] delivered with respect to Polish disciplinary courts: "At first sight, the decision of the CJEU may seem to be fully in order, yet it is not at all. There is no authorization for an EU institution to determine the judicial system of a member state, but it is an even greater problem, that **the judgment is a clear challenge against judicial independence, even if apparently it was delivered in the name of judicial independence**."[31] In the opinion of Justice Varga, "[t]he position taken by the CJEU is a challenge that prompts the urgent duty to re-discover and apply the natural limits of judicial independence. **Absolute limits include the legislation from which courts cannot defer.**"[32]

2. ON SPECIFIC RULE OF LAW ISSUES IN HUNGARY

2.1. ON THE INSTRUMENTAL USE OF THE CONSTITUTION

Furthermore, the Venice Commission observed that the governing majority adopted a "systematic approach" in reintroducing provisions of ordinary laws at the constitutional level which had been previously found unconstitutional and annulled by the Constitutional Court, thus overruling the Constitutional Court.[33] Against this concern of "instrumental use" of the Fundamental Law of Hungary,[34] Justice Varga claims that "[m]any consider it dangerous if the decision of the Constitutional Court is overruled by the constituent power. I am more permissive. If this does not become an everyday practice, I see no significant problem. That is to say, **the constituent power is constituent power as it can determine what type of constitution it will have**."[35]

2.2. ON THE INDEPENDENCE OF THE JUDICIARY

Judicial independence has been under constant threat and has been systematically undermined[36] by the governing majority in Hungary since 2011–2012. Justice Varga summarised his position regarding the role of the judiciary in a study published in 2020, entitled: *Is it Really the Least Dangerous Power? Is there a Natural Limit to Judicial Independence?*[37] It is hardly surprising that Justice Varga has come to the conclusion that the **judiciary is the most dangerous branch of power**: "[t]he **judiciary**, coupled with a closed system of legal positivism and activism is not simply arbitrary, but it **may become**

[29] Varga, 2019 (see note 5 above), p. 126.
[30] See: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62018CJ0585&qid=1607953572095&from=EN
[31] András Zs. Varga, 'Does the Court of the EU Protect or Undermine Judicial Independence?,' *Madiner*, April 10, 2020 ('Védi vagy kiüresíti a bírói függetlenséget az EU bírósága?').
https://precedens.mandiner.hu/cikk/20200410_vedi_vagy_kiuresiti_a_biroi_fuggetlenseget_az_eu_birosaga
[32] Ibid.
[33] See: http://helsinki.hu/wp-content/uploads/Constitutional-Court-vs-Fourth-Amendment.pdf
[34] See: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)012-e p. 30.
[35] See note 27 above.
[36] See: https://www.helsinki.hu/wp-content/uploads/Hungary_judicary_timeline_AI-HHC_2012-2019.pdf
[37] András Zs. Varga: 'Valóban a legkevésbé veszélyes hatalom? Létezik-e természetes korlátja a bírói függetlenségnek?' in: 'A jog többrétegűsége', Acta Caroliensia Conventorum Scientiarum Iuridico-Politicarum XXX., (2020.), available in Hungarian at: https://ajk.kre.hu/images/doc6/kiadvanyok/A_jog_tobbretegusege.pdf , p. 91.

expressly totalitarian."[38] "[T]he total freedom of interpreting [the law] resulted in that the judiciary **has grown over the political branches**. As a last step the judges now have taken up political flags and individually or institutionally confronted the actual winner of the political competition and started to challenge the articulated political will. As a consequence of this, judges got detached from the legislation, and even started to contest the binding nature of the law (as a matter of fact, the decision of the Court of Justice of the European Union delivered in case of Poland was initiated by Polish judges). Under extreme circumstances, **judges not only weaken the law by interpretation, but consider it as a harm to their independence**, if the Parliament passes a legislation that they disagree with. This - if applied consistently - results in a resignation of their independence."[39] "The interpretation according to which judges or rather judicial organisations do not undertake (as they shall not undertake) to enter the political competition, they rely on their own independence, yet seek to influence public opinion, what more, the legislative power, cannot be correct. And if the legislative - or the executive - power responds to that with its own tools, it qualifies as a breach of judicial independence and shall be granted domestic or international (European) judicial protection. **This phenomenon converts the judiciary into the most dangerous branch** without any doubt."[40] "Separation of powers should not imply that in the name of the rule of law judicial bodies gain the right to take final and unlimited decisions."[41]

2.3. On judicial self-governing bodies

As part of the judicial reform introduced in 2012, the administration of courts has become centralised. The former self-governing judicial body in charge of court administration was replaced by a one-person decision-making mechanism, the President of the National Judicial Office (NJO). The lack of cooperation between the NJO President and the National Judicial Council (NJC, the judicial self-governing body assigned to control the NJO President) culminated in a constitutional crisis[42] of the judiciary in 2018. As highlighted by the European Commission's *2020 Rule of Law Report*'s Chapter on Hungary,[43] one of the most pressing issues regarding the independence of the judiciary is the difficulty the NJC faces in counter-balancing the powers of the NJO President. While empowering the NJC[44] seems inevitable in order to restore the independence of the judiciary, Justice Varga disagrees. In his view "the concept of **judicial self-administration is a consequence of a misunderstanding**"[45] as "judicial councils pose more risk than the benefits they provide" and "[t]heir only 'benefit' is to politicize the judiciary."[46] As he suggests "[i]t is worth reconsidering the domestic legislation in order to eliminate the weird misunderstanding of the role of judicial councils, **the delusion of judicial self-governance**."[47]

2.3. On the enforcement of judgments

While Hungary has an extremely poor record regarding the implementation of ECtHR judgments,[48] refuses to execute CJEU judgments[49] and state authorities repeatedly disobey the enforcement of

[38] Varga, 2019 (see note 5 above), p. 18.
[39] Varga, 2020 (see note 37 above), p. 91.
[40] Varga, 2020 (see note 37 above), p. 92.
[41] See note 27 above.
[42] See: https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf
[43] See: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020SC0316&from=EN, p. 2.
[44] See: https://www.helsinki.hu/wp-content/uploads/Hungary_rec_judiciary_AI-HHC_01122019.pdf
[45] Varga, 2020 (see note 37 above), p. 94.
[46] András Zs. Varga, 'Administrative Adjudication is the Crown Jewel of the Rule of Law,' an interview by Csoma Kecskés, *Mandiner*, April 23, 2019. https://mandiner.hu/cikk/20190423_kozigazgatasi_birosagok_varga_zs_andras_a_mandinernek
[47] Varga, 2020 (see note 37 above), p. 94.
[48] See: http://www.einnetwork.org/hungary-echr
[49] See: https://autocracyanalyst.net/hungarian-ngo-foreign-agent-law/

domestic judgments,[50] Justice Varga is satisfied: "As far as I am concerned, Hungary has without exception executed the judgments of the EU or any other international body. For the most part, Hungary also accepted the recommendations provided, if the legal reasoning proposed was in fact well-founded and it was proven that the given legislation did not fit into the domestic, EU or international legal order. Thus with respect to the execution, **Hungary is an exemplary state**, we were open to change even in matters concerning our national identity, including our Fundamental Law. **Such is a compliant attitude, such is a compliant state, an old democracy!**"[51]

2.4. ON THE FREEDOM OF ASSOCIATION AND RIGHT TO PEACEFUL ASSEMBLY OF JUDGES

Referring to the landmark solidarity march[52] organised by Polish and international associations of judges and prosecutors in defence of the independent judiciary in Poland, Justice Varga held that "**it is incompatible with the independence of the judiciary** if judicial organisations or informal groups of judges request help from other social groups or the justices of other countries, or at least accept support of public (and politically sensitive) movements, or if justices participate in such actions in foreign countries. However, this is what happened in Poland and 'in the interest of' Poland."[53]

3. FUNDAMENTAL RIGHTS

Before his appointment as a justice at the Kúria, Justice Varga was a member of the Constitutional Court for six years. He was judge-rapporteur for several particularly important cases where the Constitutional Court ruled in a manner favourable to the Government, often applying enforced creativity or a distorted argumentation in order to reach the expected outcome and contravene constitutional principles. In Justice Varga's view there is a "**self-certification in the process of the continuous enlargement of human rights**"[54] and "**in the name of the rule of law and human rights some extraordinary cases gain protection, whereas the average issues of average people are never protected** by the state."[55]

This general approach towards fundamental rights and full-loyalty towards the ruling majority is also reflected in the outcome of some high-profile cases he dealt with, including, but not limited to (i) the decision[56] that legitimised sanctions to be introduced for storing movable property on public grounds and contributed to consolidating the **criminalisation of homelessness**;[57] (ii) a decision[58] where the ruling party's electoral complaint had to be rejected without examining the merits of the case, but Justice Varga as judge-rapporteur still inserted a few sentences expressing his agreement with the ruling party's accusative argumentation criticising the Kúria; (iii) the decision[59] confirming the constitutionality of the 'Stop Soros' Act which **threatens those providing assistance to asylum-seekers with criminal sanctions**;[60] (iv) the decision[61] approving a **heavily Government-controlled administrative court** system[62] (the idea was finally abandoned by the Government under

[50] See: https://www.helsinki.hu/wp-content/uploads/HUN_NGO_contribution_EC_RoL_Report_2020.pdf p. 20-21.
[51] See note 12 above.
[52] See: https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers?CMP=Share_iOSApp_Other
[53] Varga, 2020 (see note 37 above), p. 91.
[54] Varga, 2019 (see note 5 above), p. 155.
[55] See note 12 above.
[56] Decision no. 29/2015. (X. 2.) AB.
[57] See: http://utcajogasz.hu/en/resources/information-materials/the-criminalisation-of-homelessness-in-hungary/
[58] Decision no. 3156/2018 (V. 11.) AB.
[59] Decision no. 3/2019. (III. 7.) AB.
[60] See: https://www.helsinki.hu/wp-content/uploads/Attacks_against_civil_society_in_the_context_of_building_an_illiberal_democracy_20191014.pdf
[61] Decision no. 22/2019 (VII. 5.) AB
[62] See: https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf

heavy international criticism); (v) the decision[63] that upheld the modification of the Criminal Code related to a **specific form of scaremongering** during a special legal order that also served as a basis for unfounded accusations against civilians[64] during the COVID-19 pandemic; and most recently, (vi) the decision[65] delivered in connection with land transactions which further strengthened the concept of **constitutional identity against the application of EU law**.

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[63] Decision no. 15/2020. (VII. 8.) AB.
[64] See: https://www.helsinki.hu/en/courageous-civilian-defies-scaremongering-accusation-during-covid-19/
[65] Decision no. 11/2020. (VI. 3.) AB.