Decision 3154/2017 (VI. 21.) AB

on the dismissal of a judicial initiative

In the matter of a judicial initiative seeking a finding of unconstitutionality by non-conformity with the Fundamental Law of a legal act, with the concurring reasoning by Justice Dr. Ágnes Czine, the panel of the Constitutional Court has rendered the following

decision:

The Constitutional Court hereby dismisses the petition seeking a finding of unconstitutionality by non-conformity with the Fundamental Law and annulment of the normative text reading "and courts" in Section 86 (3) (b) of Act CLXI of 2011 on the Organisation and Administration of Courts, and the disapplication of such normative text in the proceedings pending before Budapest-Capital Regional Court under No 28.P.22447/2014.

Reasoning

I

[1] 1. The Judge of Budapest-Capital Regional Court (hereinafter referred to as the "petitioner") applied to the Constitutional Court on the basis of Article 24 (2) (b) of the Fundamental Law and Section 25 of Act CLI of 2011 on the Constitutional Court (hereinafter referred to as the Constitutional Court Act). The petitioner ordered a stay in the proceedings pending before him under No 28.P.22447/2014 and sought a finding that the normative text reading "and courts" in Section 86 (3) (b) of Act CLXI of 2011 on the Organisation and Administration of Courts (hereinafter referred to as the "Courts Organisation Act") is contrary to the Fundamental Law, and therefore requested its annulment and disapplication in the specific case. In the civil action which formed the basis of the judicial initiative, the claimant, a private individual, brought a claim for damages against the defendant, Budapest Environs Regional Court, alleging that the court, and the district courts in its area of territorial competence, had been delayed in their proceedings initiated by the claimant. The defendant was represented in the proceedings by the National Office for the Judiciary pursuant to Section 86 (3) (b) of the Courts Organisation Act. In the petitioner's view, this legal provision violates Article XXVIII (1) (right to an independent and impartial tribunal) and Article 26 (1) (judicial independence) of the Fundamental Law. The petitioner stressed that he had not observed any "indications of unfair influence" in the proceedings and that his concerns were not based on actual influence on the judgement but on considerations of principle. In his view, it is not enough to declare judicial independence and impartiality of the proceedings, the legislator must also create constitutional guarantees for this. The petition relied on two decisions of the Constitutional

Court [Decision 19/1999 (25.VI.) AB, ABH 1999, 150, and Decision 34/2013 (22.XI.) AB, ABH 2013, 999], which, also analysing the relevant case law of the European Court of Human Rights (hereinafter referred to as the "ECtHR"), formulated the essential elements of the requirement of judicial independence and impartiality. In the petitioner's view, the cited decisions of the Constitutional Court also establish that the judge must also be protected from influence from within the judicial organisation. The possibility of internal influence must therefore be objectively excluded, but that is not the case with the contested legislative provision. The judges are in a subordinate relationship with the President of the National Office for the Judiciary, whose person, under the Courts Organisation Act, is formally separate from the office he heads, but who nevertheless forms a single institution from the point of view of the system of relationships. According to the petitioner, this is supported by Section 76 (5) of the Courts Organisation Act, which regulates the duties of the President of the National Office for the Judiciary in relation to staff matters. In the exercise of those functions, the President of the National Office for the Judiciary may, inter alia, assign judges to the Curia, to the National Office for the Judiciary and to the ministry headed by the Minister responsible for justice, and may also decide on the transfer of judges. The President of the National Office for the Judiciary therefore has considerable influence on the working conditions and career development of judges. The hierarchical relationship outlined above is, according to the petition, liable to give rise to doubts as to the impartiality of judges, which raises the question of a breach of the right to an impartial tribunal guaranteed by Article XXVIII (1) of the Fundamental Law. The petition refers to the fact that the Constitutional Court pointed out in Decision 34/2013 (XI. 22.) AB that the requirement of impartiality is ensured, inter alia, by the rules of disqualification laid down in the procedural laws. According to the petitioner, the challenged rule is therefore constitutionally objectionable, since it contradicts the logic of the rules of disqualification in the procedural laws, which ensure the impartiality of judges, pursuant to which the court cannot act if the president of the court acts as a representative (the petitioner cited as an example Section 14 of Act III of 1952 on the Code of Civil Procedure).

[2] 2. The petitioner also alleged a violation of judicial independence. In his view, if the judge acting as the judge in the case takes a different legal position from the National Office for the Judiciary, which acts as a representative in the case, this leads to a manifestly incorrect result from the point of view of the National Office for the Judiciary. While this does not in itself affect the impartiality of the proceedings or the independence of the judge, if the judge is perceived as handing down the wrong judgement', his professional career may be adversely affected. At present, there are no institutionalised safeguards to protect judges against this, so it is up to the "wisdom of the appointing authority" to ensure that the judge concerned, when judging the professional work of the judge concerned, can disassociate himself from the fact that the judge has made decisions he does not find to his liking. There is therefore a clear breach of judicial independence where institutional guarantees do not prevent the judge from being prejudiced by his or her decisions.

[3] 2.1 The petitioner supplemented his order by stating that his request is based on Article 24 (2) (b) of the Fundamental Law and Section 25 (1) of the Constitutional Court Act.

II.

[4] 1. The provisions of the Fundamental Law affected by the petition read as follows:

"Article XXVIII (1) Everyone shall have the right to have any indictment brought against him or her, or his or her rights and obligations in any court action, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act."

"Article 26 (1) Judges shall be independent and only subordinated to Acts; they shall not be instructed in relation to their judicial activities. Judges may only be removed from office for the reasons and in a procedure specified in a cardinal Act. Judges may not be members of political parties or engage in political activities."

[5] 2. The provision of the Courts Organisation Act concerned by the petition:

"Section 86 (3) The National Office for the Judiciary shall

(b) represent the National Office for the Judiciary and the judiciary in court proceedings,"

III

[6] 1. The Constitutional Court first reviewed whether the petition complied with the statutory requirements for a judicial initiative. Pursuant to Section 25 (1) of the Constitutional Court Act, a judge may, under Article 24 (2) (b) of the Fundamental Law, initiate a petition for a finding of unconstitutionality by non-compliance with the Fundamental Law, or disapplication of a statute or statutory provision that is contrary to the Fundamental Law, if, in the course of the adjudication of an individual case pending before the judge, he or she has to apply a statute which he or she finds to be contrary to the Fundamental Law or the Constitutional Court has already found to be contrary to the Fundamental Law. A judicial petition initiating specific norm control procedure must be submitted in accordance with the provisions of the Constitutional Court Act shall contain an explicit request within the meaning of Section 52 (1) of the Act. The petition shall be explicit if it contains a reference to the competence of the Constitutional Court and the petitioner's entitlement, indicates the essence of the violation of the rights guaranteed by the Fundamental Law, the provisions of the Fundamental Law that have been violated and contains an appropriate statement of reasons. In addition, it identifies the provision of the law that is being infringed and requests that it be declared unconstitutional and annulled and that the law found to be contrary to the Fundamental Law be disapplied {Decision 2/2016 (II. 8.) AB, Reasoning [27] and [28]}. The judicial initiative fulfils the above conditions, the petitioner has indicated the reasons for the violation of the Fundamental Law [Article 24 (2) (b)] and the provisions of the Constitutional Court Act [Section 25 (1)] of the Constitutional Court Act, which establish the competence of the Constitutional Court and the petitioner's entitlement. The petition sets out the legal provision challenged [Section 86 (3) (b) of the Courts Organisation Act, the normative text reading 'and courts'), the substance of the right guaranteed by the Constitution and allegedly infringed [Articles XXVIII (1) and 26 (1)] and the reasons why and to what extent there is an infringement of the Fundamental Law. The petitioner expressly requested the annulment of the contested provision and its disapplication in the proceedings before the petitioner.

[7] 1.1 Pursuant to Subsection (1) of Section 25 of the Constitutional Court Act, a judge may initiate a review of constitutionality only in respect of a statute or a statutory provision which

he / she is required to apply in the case pending before him / her. The legal provision found by the judge to be prejudicial, and applicable in the given case, may be both a substantive and a procedural provision, thus procedural rules may also be challenged which, although not directly forming the basis of the court decision concluding the case, affect the procedural position of the parties through their application { Decision 3192/2014 AB, Reasoning[18], confirmed by Decision 35/2015 (XII. 16.) AB, Reasoning [23] and [24]}. In the present case, the Constitutional Court therefore had to decide first of all whether the judge in the case had to apply the provisions of Section 86 (3) (b) of the Courts Organisation Act , in accordance with which the court is represented by the National Office for the Judiciary, and, in the alternative, whether that rule constituted a procedural rule the application of which could have affected the procedural position of the parties in the case.

[8] 1.2 The answer to the first question is provided by Act III of 1952 on the Code of Civil Procedure (hereinafter referred to as the "Code of Civil Procedure"), Section 135 (1) of which provides that after the opening of the hearing the presiding judge of the special panel shall ascertain whether the parties have appeared in person or by representatives (taking of the roll). It follows from the foregoing that the petitioner was required to apply the contested provision of the Courts Organisation Act in the proceedings when, after the opening of the hearing, the petitioner verified the entitlement to representation of the person who appeared for the respondent court during the roll call.

[9] 1.3 The Constitutional Court further reviewed whether the procedural rule applied could have affected the procedural status of the parties. Pursuant to Section 86 (3) (b), of the Courts Organisation Act, the President of the National Office for the Judiciary and the courts are represented by the National Office for the Judiciary in litigation. In the Constitutional Court's view, this rule concerning representation is clearly a procedural provision which the judge had to apply directly and which clearly affects the procedural status of the parties, whether they act independently or with legal representation, whether the right to representation is based on a power of attorney or is provided for by law. On the basis of the above, the Constitutional Court found that the petition complied with the requirements of Section 25 of the Constitutional Court Act and the condiditons set out in Section 52 (1b) (a) to (f) of the Constitutional Court Act.

[10] 2. The Constitutional Court reviewed whether the petition could not be regarded as a matter judged. In its Decision 339/B/2003 AB {ABH 2009, 1605, hereinafter referred to as the "2003 Court Decision", reaffirmed by Decision 3268/2012 (X. 4.) AB, Reasoning [31]}, the Constitutional Court had already reviewed Section 39 (j) of Act LXVI of 1997 on the Organisation and Administration of the Courts (hereinafter referred to as the "former Courts Organisation Act"), which provided that the National Judicial Council was to represent the courts. In the 2003 Court Decision, the Constitutional Court dismissed the petition that the challenged provision of the former Courts Organisation Act violated the independence of the judiciary [Article 50 (3) of the Constitution] and the right to an independent and impartial tribunal [Article 57 (1) of the Constitution]. Under Section 31 (1) of the Constitutional Court Act, if the Constitutional Court has already ruled on the conformity of an applied statute or statutory provision with the Fundamental Law on the basis of a constitutional complaint or a judicial

initiative, there is no place for a constitutional complaint for a finding of the incompatibility of the statute or statutory provision with the Fundamental Law and for an examination of a judicial initiative seeking a finding of the incompatibility with the Fundamental Law on the basis of the same statute or statutory provision and the same right guaranteed by the Fundamental Law and the same constitutional context, if the circumstances have not fundamentally changed. However, the petition in the present case cannot be regarded as a matter judged, given, first, that the Constitutional Court reviewed the rules of the former Constitution from the outset and, second, that the former Constitution and not the Fundamental Law was the standard of review. It should also be noted that the provisions of the former Courts Organisation Act on the representation of courts are only partially in line with the rules of the current Courts Organisation Act.

[11] 3. On the basis of Section 57 (2) of the Constitutional Court Act and Section 36 (3) to (4) of the Rules of Procedure, the Constitutional Court contacted the Minister responsible for legislation, requesting him to state his position on the petition. The Minister of Justice has complied with the Constitutional Court's order. The Constitutional Court has taken the Minister's opinion into account in its assessment of the petition. In another case closely related to the present case, the Constitutional Court also contacted the President of the National Office for the Judiciary for his opinion on the petition. In view of the similarity of the subject matter, the Constitutional Court has taken the opinion of the President of the National Office for the Judiciary into account in the present case.

IV

[12] The petition is unfounded.

[13] 1. The Constitutional Court briefly reviewed the existing legal rules on the representation of the courts. The representation of the courts can be understood in various ways, including the representation of the court system as a whole, the representation of individual courts as subjects of civil law relationships, and the representation of courts in litigation and other official proceedings.

[14] 1.1 Pursuant to Section 76 (1) (c) of the Courts Organisation Act, the President of the National Office for the Judiciary shall act as the joint representative of the court body. Within the court system, the regional courts, the regional courts of appeal and the Curia are independent legal entities and budgetary bodies, whose representation is regulated by Act CXCV of 2011 on Public Finance (hereinafter referred to as the "Act on Public Finances"). Pursuant to Section 10 (6) of the Act on Public Finances, the representation of a budgetary body shall be carried out by the head of the budgetary body, the exercise of which competence may be delegated to the deputy head of the budgetary body or to other employees of the budgetary body, on a case-by-case basis or for a specific category of cases, in accordance with the law or the rules of organisation and operation of the budgetary body. According to the President of the National Office for the Judiciary, in accordance with the above provision of the Act on Public Finances, the rules of organisation and operation of all courts with legal personality provide for the general representation of the court as a budgetary body and for its representation in legal proceedings. The representation of courts in court is regulated at the

statutory level by Section 86 (3) of the Courts Organisation Act , and the Instruction No 6/2014 (IV. 30.) OBH of the National Office for the Judiciary on the Rules on the Legal Representation of Courts in Court (hereinafter referred to as the "Instruction or Rules"), based on the authorisation granted by the Courts Organisation Act as well as Uniformity Decision 1/2016 KJE of the Public Administrative, Labour and Civil Law Panel on the Uniformity of Law on the statutory representation of the court as a legal person. The subject matter of the present case is only the latter, that is, the rules on the representation of courts in court, and therefore only its conformity with the Fundamental Law was reviewed by the Constitutional Court.

[15] 1.2 Pursuant to the original wording of Section 86 (3) of the Courts Organisation Act, the National Office for the Judiciary represented the courts in court proceedings on the basis of a power of attorney. The wording on the power of attorney was repealed by Section 14 (2) of Act XX of 2013 on the Amendments to the Act on the Upper Age Limit in Certain Judicial Legal Relations, effective as of 2 April 2013.

[16] 1.3 One year following the amendment to the law, the National Office for the Judiciary Instruction regulating the representation of courts in litigation was issued, the scope of which covers the courts, the tribunals and the National Office for the Judiciary itself. The scope of the Instruction covers litigation involving the courts (civil litigation, civil enforcement in criminal matters, labour and administrative litigation). The main rules for the exercise of representation are set out in Section 4 of the Instruction of the National Office for the Judiciary. Pursuant to this provision, the President of the court decides whether to represent the court as a party to the court proceedings on his own authority or to grant a power of attorney to the National Office for the Judiciary. However, in the case of employment actions brought by or against judges, the right of representation of the National Office for the Judiciary is exclusive and there can be no question of the court being represented independently. The actual representation is, as a general rule, carried out by the Department of Legal Representation of the National Office for the Judiciary as a specialised unit of the National Office for the Judiciary, but in exceptional cases the President of the National Office for the Judiciary may authorise a law office to carry out the representation. The Instruction also defines the tasks of the representation, both for the court represented and for the National Office for the Judiciary, with a specific reference to the case where the court is represented by its own authority. In this context, the courts are obliged to cooperate with the National Office for the Judiciary by providing information on the proceedings concerning them, by sending the National Office for the Judiciary the documents relating to the proceedings (e.g. application initiating the proceedings, summons, statement of defence) and, at the request of the National Office for the Judiciary, by actively participating in the development of the proceedings (e.g. by making statements, submitting evidence, providing documents, or proposing the lodging of an appeal and / or request for review, together with the grounds for the appeal and / or request for review). In principle, the Curia will represent itself in its own capacity, but it must send the case file to the National Office for the Judiciary without delay. In the context of the representation of the court in court proceedings, the Department of Legal Representation, inter alia, announces the representation to the court seised, submits the statement of defence on the merits, participates in the hearings, complies with the request of the court seised, notifies the court represented of the actions and decisions on the merits, and, at the request of the court

represented, appeals against the decision on the merits. In accordance with the instructions of the National Office for the Judiciary, the Department of Legal Representation, in addition to representing the court in the proceedings, informs the President of the National Office for the Judiciary of the commencement of the proceedings, the essential aspects of the proceedings and the decision on the merits in justified cases. In addition, the Department of Legal Representation analyses and summarises the experience gained in the proceedings every six months and prepares an annual report for the President of the National Office for the Judiciary. On the basis of the report, the President of the National Office for the Judiciary may take measures to improve the judiciary's work, reflecting on and benefiting from the experience gained. The experience gained may be used in the training and education of law clerks, secretaries and judges, or may form the basis for the initiation of a legal uniformity procedure or for the amendment or drafting of new legislation.

[17] 1.4 Judicial practice has not been uniform in the interpretation of Section 86 (3) (b) of the Courts Organisation Act, some courts held that on the basis of the above provision of the Act the National Office for the Judiciary represents the courts in litigation without a power of attorney and exclusively, while other courts took the view that, as a rule, the president of the court (or the person authorised by the president) represents the courts in litigation and that the National Office for the Judiciary is only entitled to represent the courts if it has a power of attorney. The Curia decided in Uniformity Decision 1/2016 KJE that the president of the court and not the National Office for the Judiciary is the legal representative of the courts being a legal person and that the National Office for the Judiciary can therefore only represent them by power of attorney. Consequently, the president of the court is entitled to decide whether to represent the court that is a party to the proceedings on his own authority or to grant a power of attorney to the National Office for the Judiciary. However, the question of constitutionality in the present case is not the method of representation, but the question of whether the statutory rule establishing the capacity of the National Office for the Judiciary to represent the courts in litigation is compatible with the Constitution. The petitioner submits that the statutory provision in accordance with which the National Office for the Judiciary represents the courts in court proceedings infringes both the independence of the judiciary [Article 26 (1) of the Fundamental Law] and the right to a fair trial, or a part of that right, the right to an independent and impartial tribunal [Article XXVIII (1) of the Fundamental Law].

[18] 2. The Constitutional Court has therefore briefly reviewed the constitutional rules and the relevant practice of the Constitutional Court in relation to judicial independence and the right to an independent and impartial judiciary. In doing so, the Constitutional Court also took into account the Fourth Amendment to the Fundamental Law and the provisions of Decision 13/2013 (VI. 17.) AB. The Constitutional Court noted that the Constitution and the Fundamental Law regulate the independence of the judiciary and the right to an independent and impartial court with the same content, and therefore, in assessing the petition, it also took into account the provisions of its previous decisions {Decision 7/2013 (III. 1.) AB, Reasoning [24], Decision 24/2013 (IX. 4.) AB, Reasoning [36]}. The independence and subordination to the law of judges is enshrined in Article 26 (1) of the Fundamental Law, which emphasises that judges cannot be instructed in their judicial activity. A further characteristic of the status of judges is that they can only be removed on the basis of grounds and procedures laid down in a cardinal Act.

Independence is also guaranteed by the fact that judges are not allowed to engage in political activities, and thus their membership of political parties is excluded under the Fundamental Law. Section 36 of Act CLXII of 2011 on the Legal Status and Remuneration of Judges (hereinafter referred to as the "Act on the Status and Remuneration of Judges") prescribes that judges must act in all cases without bias and without partiality, must prevent any attempt to influence them and must inform the President of the court. The Act on the Status and Remuneration of Judges also imposes a duty on judges to act fairly and impartially towards their clients.

[19] 2.1 The Constitutional Court derived the independence of the judiciary from the system of relations between the branches of power, the principle of separation of powers, while the Constitution was in force [Decision 53/1991 (X. 31.) AB, ABH 1991, 266, 267]. In this approach, judicial power is both independent of the legislative and executive branches and politically neutral. The latter implies that while the legislative and executive are mutually (politically) dependent on each other, the judicial power exists outside this political field, independent of its changes. Judicial independence is not unlimited, however, and its most important constitutional limitation, and the basis for the functioning of the judiciary, is the subordination of judicial activity to the law. However, it is also a guarantee of independence, since the judiciary interprets the laws defined and established by the political sphere. The courts' judicial practice is, however, independent of political changes and represents a kind of continuity and constancy, in contrast to the dynamism of the other two branches of power. Consequently, the principle of judicial independence in the early practice of the Constitutional Court was essentially the independence of the judiciary. The other guarantees of status and organisation are (only) intended to guarantee the independence of the judiciary. Judges must be independent not only from the representatives of the other two branches of power, but also from other judges. This internal independence (within the judicial organisation) is also a two-way street: on the one hand, the independence of the judiciary must be guaranteed vis-à-vis the other judges, that is, it must be guaranteed that judges can judge on the basis of their own professional convictions, and on the other hand, the possibility of administrative influence must be excluded [Decision 38/1993 (VI. 11.) AB, ABH 1993, 256, 261-262]. The Constitutional Court has assumed judicial independence, embodied in the judgement free from any influence, as an unconditional requirement, which is subject to absolute constitutional protection {more recently in Decision 13/2013 (VI. 17.) AB, Reasoning [117], and before that, in summary, in Decision 19/1999 (VI. 25.) AB, ABH 1999, 150, 153}. After the entry into force of the Fundamental Law, the practice of the Constitutional Court went beyond the previous framework and established that the independence of judges, as provided for in Article 26 (1) of the Fundamental Law, is not only a constitutional principle, but also a right (guaranteed by the Fundamental Law) for judges {Decision 4/2014 (I. 30.) AB, Reasoning [44] and [45]}.

[20] 2.2 The right to an independent and impartial tribunal is part of the right to a fair trial, under which everyone has the right to have his or her rights and obligations in a case against him or her or in a lawsuit adjudicated by an independent and impartial tribunal established by law. In line with the practice of the Constitutional Court, the independence and impartiality of the court are two separate constitutional requirements, but they are specific in that they can only be understood in relation to each other {Decision 3/2013 (XI. 22.) AB, Reasoning [26]}. As

the Constitutional Court has already summarised the previous Constitutional Court decisions on judicial independence above, it is only necessary to refer to the Constitutional Court's practice on impartiality. The Constitutional Court first dealt with the issue of judicial impartiality in Decision 67/1995 (XII. 7.) AB and stated that "[t]he fundamental constitutional right to an impartial tribunal requires that the tribunal be free from prejudice and impartiality towards the person subject to proceedings. This is both an expectation of the judge himself, his conduct and his attitude, and an objective requirement relating to the regulation of the procedure: any situation which might give rise to justifiable doubts as to the impartiality of the judge must be avoided. The [criminal] procedural rules on the disqualification of judges provide an institutional guarantee of this." (ABH 1995, 346, 347.) Decision 17/2001 (VI. 1.) AB stated that "[t]he fundamental constitutional right to an impartial tribunal is also guaranteed by judicial independence, in accordance with which judges are subject to the law and their own conscience alone in their judicial activity, that is, they act free from any external influence" (ABH 2001, 222). Decision 25/2013 (X. 4.) AB, which reaffirms and elaborates on the previous practice of the Constitutional Court, states that "the requirement of impartiality is intended to ensure that the judge adjudicates the case and render his decision without bias or prejudice against the parties involved in the case. The requirement of impartiality is, on the one hand, an expectation of the conduct and attitude of the judge. On the other hand, it also sets a benchmark for the regulatory environment. According to this benchmark, procedural rules must seek to avoid any situation which might give rise to legitimate doubts as to the impartiality of the judge. It follows that, in a particular case, the judge must not only adjudicate the matter objectively, but must also preserve the appearance of impartiality" (Reasoning [26]). According to the requirement of impartiality, any situation which gives rise to legitimate doubts as to the impartiality of the judge must therefore be avoided {Decision 3242/2012 (IX. 28.) AB, Reasoning [13]}.

[21] 3. The Constitutional Court went on to review whether the normative text reading "and courts" in Section 86 (3) (b) of the Courts Organisation Act violates Article 26 (1) of the Fundamental Law.

[22] 3.1 There are many aspects of judicial independence, but in the case at hand the petition basically raised doubts about the violation of personal (status) and professional independence of individual judges. Personal independence means that a judge cannot be dismissed or removed against his or her will, except for reasons and as a result of a procedure laid down in a cardinal Act. Furthermore, personal independence implies that the office of a professional judge is for life [Decision 33/2012 (VII. 17.) AB, ABH 2012, 99, 110]. And professional independence means that the judge cannot be instructed in his or her judicial activity, that is, that he or she can make his or her decision in the course of the adjudication of a specific case free from any influence. Professional independence protects judges from external influence (from public and non-public bodies) on the one hand and from internal influence (within the court) on the other. Internal (professional) independence can be further broken down to exclude the possibility of influence from other judges on the one hand, and from the judicial administration on the other. In the case at hand, a constitutional doubt has been raised with regard to the latter. The Constitutional Court therefore had to answer the question whether

the judges are indeed in a relationship of dependence with the President of the National Office for the Judiciary which calls into question their independence as judges.

[23] 3.2 The Constitutional Court first of all states that, in its view, it is irrelevant for the professional independence of judges whether the central administration of the courts is carried out by a body or by a single head, if his powers do not extend to influencing the judicial activity of the courts. However, precisely in view of the fact that the administrative tasks of the single head of the central administration are significantly increased, the Constitutional Court has separated the supreme administrative and the supreme professional management of the courts. In accordance with the Fundamental Law, the supreme judicial body is the Curia and, accordingly, the professional management of the courts as a whole is the responsibility of the President of the Curia, while the central administration of the courts - the single responsible head of administration elected by Parliament from among the judges - is the responsibility of the President of the National Office for the Judiciary. Although Section 65 of the Courts Organisation Act makes it clear that the President of the National Office for the Judiciary performs the central functions of the administration of the courts, while respecting the constitutional principle of judicial independence, the Constitutional Court has reviewed the powers of the President of the National Office for the Judiciary granted by the Courts Organisation Act [Section 76 of the Courts Organisation Act] and the relevant provisions of the Act on the Status and Remuneration of Judges, from the point of view of whether they affect or may affect judicial independence.

[24] 3.2.1 The question regarding the status of judges is therefore whether the President of the National Office for the Judiciary, acting in the exercise of his or her functions and powers, has a decisive influence on the legal status of judges. This includes, by definition, the appointment of judges and court managers, the dismissal of judges, the initiation of disciplinary and incompetence proceedings, and therefore the relevant legal provisions must be reviewed. Section 76 (5) of the Courts Organisation Act is relevant to the status of judges, as the legislator has regulated the powers of the President of the National Office for the Judiciary in relation to personnel matters. This provision of the Courts Organisation Act, however, only sets out the powers of the President of the National Office for the Judiciary concerning the status of judges - to issue calls for applications for judges, to propose to the President of the Republic the appointment and dismissal of judges, to assign and appoint judges, to transfer judges, to appoint heads of courts - but these are then developed in detail in the Act on the Status and Remuneration of Judges.

[25] Pursuant to Article 26 (2) of the Fundamental Law, the appointment of (professional) judges is the responsibility of the President of the Republic, and this is regulated by law in the Section 3 (2) of the Act on the Status and Remuneration of Judges. Although the President of the National Office for the Judiciary invites applications for the post of judge, they must be submitted to the President of the court concerned and the Special Panel of the court will rank the applications received on the basis of criteria laid down by law. The applications are assessed by the President of the National Office for the Judiciary, which means that, as a rule, the first-ranked candidate is submitted to the President of the Republic for appointment. Although the President of the National Office for the Judiciary may deviate from the ranking, he is obliged

to state the reasons for this and requires the agreement of the National Office for the Judiciary to propose the second or third ranked candidate for appointment. However, judges are only assigned to a particular court by the President of the National Office for the Judiciary on their first appointment, after which it is the President of the court who is responsible for this (Section 26 of the Act on the Status and Remuneration of Judges).

[26] It is important to stress that if the appointment of a judge is not made on the basis of a call for applications, the written consent of the judge concerned is required. Similarly, written consent is required for the assignment of a judge to the Supreme Court, the Curia or the Ministry of Justice. The assignment and appointment of military judges (Section 27 of the Act on the Status and Remuneration of Judges) and of judges in administrative and labour matters (Section 30 of the Act on the Status and Remuneration of Judges) is also the responsibility of the President of the National Office for the Judiciary, but again only on the basis of a proposal from the President of the court concerned, and only if the judges concerned have expressly applied for the post in question. The transfer of judges also falls within the competence of the President of the National Office for the Judiciary (Section 34 of the Act on the Status and Remuneration of Judges), but this may be done following a successful application or where the court has been dissolved or where judicial posts have been abolished because of a change in its material or territorial competence. However, the President of the National Office for the Judiciary is responsible for appointing some of the heads of courts, and he appoints the President and Vice-President of the regional courts and the regional courts of appeal, the Head of the Special Panel of the regional courts and the regional courts of appeal, the Head of the Special Panel and Deputy Head of the Regional Administrative and Labour Special Panel [Section 128 (2) of the Courts Organisation Act]. These senior posts are also subject to a call for applications, the evaluation of which is similar to that of the judges, that is, the judicial body established by law evaluates the applications and establishes the order of the candidates. The President of the National Office for the Judiciary may also deviate from the ranking, but he must give reasons for his decision and the appointment must be approved by the National Judicial Council.

[27] The dismissal of judges may be initiated by the president of the court having the status of employer, on the basis of his own decision on the one hand, and on the other hand, following disciplinary proceedings, on the basis of the decision of the service court (Section 96 of the Act on the Status and Remuneration of Judges). However, the president of the National Office for the Judiciary has no statutory power to instruct the person exercising the employer's rights either to initiate disciplinary proceedings or to dismiss individual judges. As in the case of disciplinary proceedings, the President of the court is responsible for ordering an examination of professional competence (Section 70 of the Act on the Status and Remuneration of Judges), which is conducted by the competent head of the special panel or a judge designated by him and the results of which are assessed by the President of the court. Both the result of the assessment (Sections 79 to 80 of the Act on the Status and Remuneration of Judges) and the decision to declare a person unfit (Sections 84 to 85 of the Act on the Status and Remuneration of Judges) may be challenged before the service court. Medical fitness proceedings may also be instituted only on the initiative of the President of the court (Section 86 of the Act on the Status and Remuneration of Judges). The President of the National Office for the Judiciary has

no legal power to order either a professional or a medical fitness procedure or to conduct an examination.

[28] On the basis of the above, the Constitutional Court found that there is no connection between the personal powers of the President of the National Office for the Judiciary and the remuneration of judges and the evaluation of their work, and that the President of the National Office for the Judiciary has only limited powers with regard to the evaluation of applications for judges. The rules governing the appointment, dismissal, fitness to practise and disciplinary proceedings against judges also confer only limited powers on the President of the National Office for the Judiciary. Only the appointment of senior judicial officers is directly within the powers of the President of the National Office for the Judiciary, but neither the initiation of incompetence nor disciplinary proceedings are within his remit, nor does he have direct influence over them. The President of the National Office for the Judiciary makes a proposal to the President of the Republic for the dismissal of a judge only on the basis of a document from the court of employment or the employer initiating the dismissal of the judge. It follows from the above that the President of the National Office for the Judiciary has no means, in conceptual terms, of 'retaliating' against a judgement of which he is aware and which he does not like. Nor does he have the power to "reward" a judge who, from the point of view of the National Office for the Judiciary, takes a decision "favourable" to the judicial organisation.

[29] 3.2.2 The Constitutional Court also reviewed Article 76 (1) of the Courts Organisation Act, which provides for the functions of the President of the National Office for the Judiciaryin relation to the central administration of the courts. These include the establishment of a programme defining the long-term tasks of the administration of the courts; the drafting of regulations, recommendations and decisions binding on the courts as regards administrative tasks; the initiation of legislation affecting the courts and the giving of opinions on draft legislation affecting the courts, as well as participation in the deliberations of parliamentary committees on the agenda items relating to such legislation and the representation of the courts. The above administrative powers of the President of the National Office for the Judiciary are aimed at the entire judicial system and are therefore comprehensive and general in nature, and do not directly apply to individual courts or individual judges. The other tasks of the President of the National Office for the Judiciary (e.g. collection of statistical data, training tasks) do not concern the judicial activity at all or only remotely and indirectly.

[30] 3.3 On the basis of the above, the Constitutional Court concluded that the powers of the President of the National Office for the Judiciary concerning the status of judges are mostly indirect, and if they are direct (e.g. the appointment of the heads of the courts), they can be exercised within strong limits, which provides a sufficient guarantee against the possibility of arbitrary decisions. Furthermore, there is no hierarchical relationship between the President of the National Office for the Judiciary and the individual judges, and the President of the National Office for the Judiciary cannot be considered as a superior body of the judges, either administratively or professionally, and therefore has no direct or indirect influence on the judiciary. It follows, therefore, from the above (points 3.2 to 3.2.1) that the powers and responsibilities of the President of the National Office for the Judiciary only affect the status of judges to a limited extent and that in this area the legal guarantees ensure the independence

of the judiciary. As regards the professional independence of the judges, the President of the National Office for the Judiciary has no influence on the judges' judicial activity and, in that regard, there is no infringement of Article 26 (1) of the Fundamental Law. In the light of the above, the Constitutional Court concluded that the contested provision of the Courts Organisation Act does not infringe the independence of judges as declared in Article 26 (1) of the Fundamental Law and therefore dismissed the petition in this respect.

[31] 4. The petitioner also claimed a violation of Article XXVIII (1) of the Fundamental Law, therefore the Constitutional Court also reviewed whether the challenged provision of the Courts Organisation Act violates the right to an independent and impartial court. Given that the Constitutional Court had stated in the previous point that the impugned legal provision did not infringe judicial independence, it now only dealt with the possible infringement of the right to an impartial judiciary.

[32] 4.1 According to the petitioner, the objective aspect of judicial impartiality is affected by the fact that the office headed by the President of the National Office for the Judiciary is responsible for the representation of the courts in litigation. This calls into question the impartiality of the judge, as it may give the impression to society that the judge acting in a case is not impartial, since if he does not rule in favour of the court, his career may be affected. The Constitutional Court has already held above that the President of the National Office for the Judiciary has no power, within the limits of the law, to retaliate against the judge who is presiding over the case for judgements he does not like or to "reward" a judge who has given judgements favourable to the court as an organisational system.

[33] 4.1.1 It is important to note here that the subject of the analysis is essentially a representative rule. It is important to underline this because, if it is not the National Office for the Judiciary that represents the court in the proceedings, but the president of the legal person court, or possibly another legal representative by proxy, it cannot be excluded that the president of the National Office for the Judiciary is informed of both the role of the court in the proceedings and the decision on the merits of the case. If only because it is clear from Section 9 of the National Office for the Judiciary Instruction that, even if the court is represented by a person acting in his own capacity, he is obliged to notify the National Office for the Judiciary of the litigation in which the court is involved and to send it the decision on the merits or the final decision. Thus, irrespective of the identity of the representative of the court which is a party to the action, the judge acting in the matter could, according to the logic of the petitioner, fear that an unfavourable decision of the court would also have a negative impact on the perception of his judicial work. However, if we accept this point of departure, we would have to consider all judges acting in litigation before the courts or before a particular judge as biased. This chain of reasoning ultimately leads to the conclusion that only an entity separate from the courts could act as a judge of the courts, as this is the only way to ensure impartiality. This, however, contradicts on the one hand the legal certainty guaranteed by Article B (1) of the Fundamental Law, the principle of separation of powers enshrined in Article C (1), and the provisions of Article 25 (1) of the Fundamental Law, in accordance with which the courts in Hungary are to perform a judicial function. The 2003 Court Decision has also held (ABH 2009, 1605, 1622) that legal certainty requires, on the one hand, that court proceedings must bring

legal disputes to a final conclusion and cannot be continued without end, even if substantive justice would so require.

[34] The institution of finality of court decisions is thus also a constitutional interest, from which the immutability and the binding character of final decisions derive. It follows from the principle of the separation of powers and the judicial monopoly of the courts that the courts are also competent to decide on litigation. The courts fulfil their constitutional function when they decide a specific dispute with a claim to finality, and a final judicial decision is binding on everyone, including the other court, even if it has been a party to the proceedings. Consequently, it should also be borne in mind that a court decision is the final conclusion of the dispute for all parties involved, including the opposing litigant. The Constitutional Court notes that it cannot be considered an exceptional situation where a court is a party to a civil action, since courts may be subject to a number of legal relationships. Consequently, there is no legislative imperative justifying the creation of special courts to hear cases involving the courts as parties to the litigation. It follows from all this that the mere fact that courts adjudicate cases where courts act as parties to the litigation does not in itself violate the requirement of impartiality.

[35] 4.1.2 According to the settled practice of the Constitutional Court, impartiality is violated, inter alia, if the legislation grants one of the parties to the proceedings additional rights or consolidates procedural positions, thereby violating equality before the court [*see* in summary in Decision 166/2011 (XII. 20.) AB, ABH 2011, 545, 559-560.]. The Constitutional Court upholds the cited statement of principle in Decision 166/2011 (XII. 20.) AB, which was repealed by the Fourth Amendment to the Fundamental Law, in accordance with the criteria set out in Decision 13/2013 (VI. 17.) AB, with the addition that the principle originally applicable to criminal proceedings is also applicable to civil proceedings, albeit with restrictions. The Constitutional Court has held that the impugned statutory rule does not confer any additional rights on the National Office for the Judiciary, since the Department of Legal Representation has the same rights and obligations as other representatives. In the 2003 Court Decision, the Constitutional Court also stated that the rules on legal representation in litigation do not affect the requirement of equality before the courts (ABH 2009, 1605, 1624). Nor can there be any question of a mixing of procedural functions, since the staff of the Department of Legal Representation do not act as judges but as employees of the National Office for the Judiciary, and do not exercise judicial functions. On the basis of the above, the Constitutional Court held that the legal provision challenged in the petition does not violate the objective requirement of judicial impartiality, that is, it does not create a situation that would raise legitimate doubts as to the impartiality of the judge acting in a given case.

[36] 4.2 The subjective test of judicial impartiality requires that the judge acting in a given case must be impartial both towards the party to the proceedings or the person subject to the proceedings and towards the case. The Constitutional Court has already explained in several decisions that the effective enforcement of impartiality is ensured primarily by the rules of disqualification laid down in procedural Acts {Decision 25/2013 (X. 4.) AB, Reasoning [29], Decision 34/2013 (XI. 22.) AB, Reasoning [30]}. Here, the Constitutional Court merely points out that the grounds for disqualification may be absolute or relative. The essence of absolute

grounds for disqualification is that the existence of any one of them disqualifies the judge from the proceedings without an examination of whether the judge is in fact biased, whereas in the case of relative grounds for disqualification, the possible bias of the judge must be assessed. All our procedural codes recognise the legal instrument of disqualification; therefore, in cases where the National Office for the Judiciary is the legal representative, if there is any doubt as to the impartiality of the judge, the parties may request the judge to be recused from the case. The contested provision therefore provides sufficient guarantees to ensure judicial impartiality. The Constitutional Court notes that the existence of disqualification rules not only protects the right to an impartial judicial decision in cases of specific bias, but also promotes the image of impartial justice under the rule of law in general, and strengthens public confidence in it, since it suggests that the State will, where appropriate, protect against a judge (court) who is or at least appears to be biased {Decision 34/2013 (XI. 22.) AB, Reasoning [45]}.

[37] 5. In the light of the above, the Constitutional Court dismissed the judicial initiative to find the normative text reading "and courts" of Article 86 (3) (b) contrary to the Fundamental Law and to annul such text, and to declare the prohibition of its application in the proceedings pending before Budapest-Capital Regional Court, as set out in the operative part.

Budapest, 13 June 2017

Dr Imre Juhász, sgd.,

Presiding Justice of the Panel,

Justice-Rapporteur

Dr. István Balsai, sgd.,

Justice of the Constitutional Court

Dr. Ágnes Czine, sgd.,

Justice of the Constitutional Court

Dr. Attila Horváth, sgd.,

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Dr. Tamás Sulyok, sgd.,

Justice of the Constitutional Court

Concurring reasoning by *Dr. Ágnes Czine*, Justice of the Constitutional Court

[38] I agree with the decision in the operative part of the Decision, but I consider it important to supplement the reasoning as follows.

[39] In the practice of the Constitutional Court, the question of the distinction between the principle of judicial independence [Article 26 (1) of the Fundamental Law] and the right to an

independent and impartial tribunal [Article XXVIII (1) of the Fundamental Law], which is part of the right to a fair trial, has arisen in several recent cases. In my view, the significance of the distinction lies in the fact that the infringement of the principle of judicial independence and the right to a fair trial must be assessed on the basis of a different set of criteria. The infringement of the right to a fair trial must be assessed in the light of the criteria based on Article I (3) of the Fundamental Law. The Constitutional Court acted accordingly in its Decision 3031/2017 (III. 7.) AB. It pointed out that "[i]n line with the practice of the Constitutional Court, the right to a fair trial is an absolute right against which there is no other fundamental right or constitutional objective that can be weighed, because it is itself the result of a balancing exercise. [...] However, the Constitutional Court reviews the exercise of the individual rights of the right to a fair trial and their conformity with the Fundamental Law by applying the general test for the protection of fundamental rights laid down in Article I (3) of the Fundamental Law. Pursuant to Article I (3) of the Fundamental Law, a fundamental right may be restricted to the extent strictly necessary and proportionate to the aim pursued, while respecting the essential content of the fundamental right, in order to ensure the exercise of another fundamental right or to protect a constitutional value" (Reasoning [61]).

[40] The principle of judicial independence, based on Article 26 (1) of the Fundamental Law, and the requirement of an independent and impartial tribunal are closely linked. However, even though they are closely related, they involve different constitutional requirements. I see one of the main aspects of the distinction as being whether the constitutional requirements need to be reviewed in the context of fundamental rights, or whether the constitutional problem raises a violation of the principle of judicial independence without any relevance to fundamental rights.

[41] In the present case, the petitioner judge brought a case before the Constitutional Court in the context of a specific legal proceeding. In his application, he stressed that his "concerns [...] are not based on an actual influence on the judgement [...] but on a lack of constitutional guarantees of internal judicial independence and of compliance with generally accepted international standards of impartiality of the proceedings". For this reason, he alleged a violation of Article XXVIII (1) of the Fundamental Law. In the light of the foregoing, I consider that, on the basis of the grounds set out in the petition, it was necessary to consider whether there had been a breach of two of the fundamental guarantees of a fair trial, namely the right to an independent and impartial tribunal.

[42] In its decision, the Constitutional Court held, on the basis of the objective and subjective tests of the constitutional requirement of judicial impartiality, taking into account the criteria developed in the case law of the ECtHR, that the contested provision of the Courts Organisation Act provided sufficient guarantees of judicial impartiality under the rules of procedural Acts.

[43] The decision did not review the right to an independent judiciary in isolation, but considered the infringement of that right in the context of Article 26 (1) of the Fundamental Law. In my view, however, the Constitutional Court should have assessed the right to an independent court in relation to fundamental rights, as set out in the above-mentioned Decision 3031/2017 (III. 7.) AB, separately from the principle of judicial independence. In doing

so, it should also have taken into account the criteria developed by the ECtHR when developing the criteria for the assessment.

[44] In its case law, the ECtHR requires that judges should be free from both external and internal influence in the exercise of the right to an independent judiciary. The condition of independence within the organisation is that the judge must be free from expectations, which implies that there must be no pressure from those who have an administrative role in the court. The lack of safeguards for the independence of judges within the court system, and in particular against the judiciary, may lead the ECtHR to find a violation of the right to an independent judiciary [Agrokompleks v Ukraine (23465/03), 6 October 2011].

[45] In another case, the ECtHR held that there was no violation of judicial independence in relation to a judge assigned to a county court because he was sufficiently independent of the president of the court. The president of the court performed only administrative (management and organisation) functions which were strictly separated from the judicial function. The legal system contained adequate safeguards to ensure that the President of the Court could not exercise his power to allocate cases arbitrarily [Parlov-Tkalèiæ v Croatia (24810/06), 22 December 2009].

[46] In my view, the concerns raised by the petitioner in relation to the infringement of Article XXVIII (1) of the Fundamental Law should also have been assessed in the light of those considerations. Indeed, this system of considerations makes it clear that not only the direct influence on the judgment infringes the right to an independent judiciary, but also the imposition of 'expectations' (indirect effects) on the judge acting in a given case.

[47] In the present case, the petitioner submits that his professional judgements may also be 'prejudicial to his career development'. In my view, however, the legislation described in detail in the decision, in particular Sections 36, 70, 79 to 80 and 84 to 85 of the Act on the Status and Remuneration of Judges, are sufficient legal guarantees and provide adequate safeguards to ensure that the petitioner judge is not placed at such a disadvantage in the course of his professional career.

Budapest, 13 June 2017

Dr. Ágnes Czine, sgd.,

Justice of the Constitutional Court