



Hungarian Helsinki Committee

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PROPOSED NEW LAW THREATENS JUDICIAL INDEPENDENCE IN HUNGARY – AGAIN

ANALYSIS BY THE HUNGARIAN HELSINKI COMMITTEE

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Judicial independence has been under constant threat in Hungary since 2012. The Government recently abandoned its plan to set up a separate, heavily government-controlled administrative court system,¹ but Bill T/8016² submitted by the Government to the Parliament on 12 November 2019 seems to be yet another attempt to make sure that politically sensitive court cases are decided in a way that is favourable for the executive power. If adopted, this substantial omnibus Bill (amending several pieces of legislation) will have a **significant negative impact on judicial independence**, however, in a much more covert and technical way than the earlier, withdrawn plan to put administrative courts under the Minister of Justice. Bill T/8016 would not only make it possible to channel politically sensitive cases out of the ordinary court system and put them into the hands of Constitutional Court judges nominated and elected by the ruling majority, but **would also make it harder in practice for individuals to enforce their rights vis a vis the state**.

In its recent statement regarding the Bill, the **Commissioner for Human Rights of the Council of Europe** expressed the view that “the Bill in its current form may have a negative effect on the internal independence of courts and judges and fair trial guarantees for individuals”, and **urged the Hungarian Parliament to modify it**.³ The Hungarian Helsinki Committee (HHC) joins the Commissioner in her concerns and is of the view that **Bill T/8016 should not be adopted in its current form**, among others for the reasons detailed below.

1. LACK OF STATUTORY PUBLIC CONSULTATION

The Minister of Justice **submitted the 200-page long Bill to the Parliament without any prior consultation with key stakeholders or the general public, even though this would have been a statutory obligation**. The respective legal provisions⁴ set out that the requirement of public consultation applies to Bills prepared by the Ministers of the Government. “General” public consultation shall include the publication of the draft Bills on the Government’s website before they are submitted to Parliament, allowing the public to comment on them via e-mail. Bill T/8016 was submitted to the Parliament by the Minister of Justice, so the above rules applied. However, **in direct contravention with the law, the Minister failed to publish the Bill’s draft text on the central Government website prior to its submission to the Parliament**. Accordingly, the first time the wider public (including key stakeholders of the justice system) was made aware of the Government’s plans was when the Bill got published on the Parliament’s website after having been submitted by the Government. Thus, **the Government, once again, failed to consult with society and professionals on a proposed new law that impacts key areas in terms of the rule of law**.

This is all the more problematic, because one of the shortcomings the Venice Commission criticised earlier this year with regard to the withdrawn law establishing a separate administrative court system was the short

¹ See e.g.: https://index.hu/english/2019/11/04/administrative_courts_scrapped/.

² Available in Hungarian at: <https://www.parlament.hu/irom41/08016/08016.pdf>.

³ See: <https://www.coe.int/en/web/commissioner/-/the-commissioner-urges-the-hungarian-parliament-to-modify-a-bill-affecting-the-independence-of-the-judiciary>.

⁴ Act CXXXI of 2010 on Public Participation in Preparing Laws, Article 1 and 8(1)–(2)



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period for consultation. In its opinion,⁵ the Venice Commission raised the following: “the legislative process [...] was not backed up by an impact study, as required under Hungarian law”, and “the consultations held by the Hungarian authorities and in particular the period of time allowed for the debate of the draft legislation – amounting to a few days – were rather short”. The period found too short by the Venice Commission was three working days back then. This time, however, not even three days were provided.

It shall be added furthermore, that two NGOs actively dealing with the independence of the judiciary, the HHC and Amnesty International Hungary, requested both Justice Minister Trócsányi (in June 2019) and Justice Minister Varga (in August 2019)⁶ to provide an opportunity for discussing plans concerning the reform of the judiciary. The NGOs have not received any response, which, as it seems now, was not due to the lack of the existence of such plans, but due to a **continued lack of will to enter into professional dialogue with civil society**.

2. FAILURE TO REMEDY DEFICIENCIES LEADING TO THE “CONSTITUTIONAL CRISIS” WITHIN THE JUDICIARY

If the Government wanted to have another change in the laws pertaining to the judiciary, it should have begun with adopting legal amendments remedying the structural and systemic deficiencies regarding the administration of courts, in line with what many domestic and international stakeholders have recommended. However, **the Bill does not contain any remedies to the structural deficiencies that created the constitutional crisis⁷ within the system of judicial administration, between the President of the National Judicial Office⁸ (NJO) and the National Judicial Council⁹ (NJC).**

For example, the Bill could have reinforced the NJC structurally, in order to ensure that the NJC can effectively carry out its task set by the Fundamental Law and be able to supervise and counterbalance the powers of the NJO President. To that end, among others, the Bill could have re-regulated the co-decision powers shared between the NJC and the NJO President in a way that strengthens the position of the NJC and requires consensus; it could have provided the NJC with a legal personality and full budgetary autonomy. Furthermore, the Government could have closed the loophole through which the NJO President repeatedly circumvented the vote of the judges when appointing court presidents and other court officials. The list of desired legislative steps could go on. However, the Bill has done none of the above.

First, this shows that the Fidesz-led **government is still disinterested in empowering the NJC** and enable it, as a judicial self-governing body, to exercise meaningful control over the Parliament-elected NJO President. Second, it also shows a **complete disregard for the specific recommendations on the situation of the Hungarian judiciary by international stakeholders**, such as the Venice Commission,¹⁰

⁵ Venice Commission, *Opinion on the Law on Administrative Courts and on the Law on the Entry into Force of the Law on Administrative Courts and Certain Transitional Rules*, Opinion no. 943/2018, 19 March 2019, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e), § 31.

⁶ See: <https://www.helsinki.hu/levelet-irtunk-a-miniszternek/>.

⁷ See e.g.: <https://www.helsinki.hu/en/constitutional-crisis-in-the-judiciary-july2019/>.

⁸ According to the Fundamental Law, the “central responsibilities of the administration of the ordinary courts shall be performed” by the President of the National Judicial Office (also referred to as National Office for the Judiciary), who is elected by the Parliament without the involvement of any judicial body.

⁹ The National Judicial Council is a judicial self-governing body comprised of judges elected by their peers and vested with the task of controlling how the President of the NJO exercises his/her rights. According to the Fundamental Law, the NJC shall “supervise the central administration of the ordinary courts”.

¹⁰ Venice Commission, *Opinion on the cardinal acts on the judiciary that were amended following the adoption of Opinion CDL-AD(2012)001 on Hungary*, Opinion no. 683/2012, 15 October 2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e)



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the Council of the European Union,¹¹ the Council of Europe Commissioner for Human Rights,¹² or GRECO.¹³ Third, it also shows **a disregard towards the ongoing procedure launched under Article 7(1) TEU against Hungary**, in which the independence of the judiciary features heavily.

3. CHANNELLING POLITICALLY SENSITIVE CASES TO A GOVERNMENT-FRIENDLY CONSTITUTIONAL COURT

Bill T/8016 would, if adopted, **enable the Government to circumvent the ordinary court system in politically sensitive or otherwise important cases**. Many decisions handed down by ordinary courts in the past years have shown that Hungarian judges take their role and independence seriously, and are not afraid to deliver judgments against the interests of the Government. The governing majority seems to aim at overcoming this “obstacle” by attempting to provide state bodies with an escape route from the ordinary court system to the Constitutional Court.

Article 56 of the Bill would make this possible by **granting state/public authorities the right to submit constitutional complaints to the Constitutional Court**. The Bill would enable “organisations exercising public authority” (i.e. state/public authorities and bodies) to submit a constitutional complaint if in their view their fundamental rights enshrined in the Fundamental Law have been violated or if their scope of competence has been unconstitutionally limited by an ordinary court decision. This would **enable the state to channel the review of unfavourable court decisions outside of the ordinary court system, to the Constitutional Court**.

This is all the more problematic because the governing majority has seriously undermined the independence of the Constitutional Court in the past years. For example, they amended the rules on the nomination and status of judges in a way that led to a situation where **the majority of the current Constitutional Court judges were nominated and elected exclusively by the governing parties** (without any involvement of the parliamentary opposition). Through this “**court-packing**” exercise, the governing majority succeeded in shaping the Constitutional Court into a **loyal body, which has been rather helpful towards the Government in recent years**, protecting the Government’s interests in many of its decisions. This means that the Bill **provides state authorities with the possibility of channelling politically sensitive cases to a body whose members were almost exclusively nominated and elected by the governing parties**.

Article 56 of the Bill diverts radically from the approach according to which the aim of constitutional complaints is **to protect the fundamental rights of individuals and non-governmental entities against unconstitutional court decisions and unconstitutional actions of bodies exercising public power**.

The type of constitutional complaint the Bill would introduce is unique, no such complaint is available in any other country of the world. While there are examples when state bodies can turn to the Constitutional Court if a clash of competencies arises, and for instance the German system recognises the right of municipalities to request the constitutional protection of some of their specific rights, nowhere have public authorities the right to file a constitutional complaint on the basis that their fundamental rights have been violated.

¹¹ <http://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf>

¹² Commissioner for Human Rights of the Council Of Europe Dunja Mijatović, *Report Following her Visit to Hungary from 4 to 8 February 2019*, CommDH(2019)13, 21 May 2019, <https://rm.coe.int/report-on-the-visit-to-hungary-from-4-to-8-february-2019-by-dunja-mija/1680942f0d>, §§ 87–134.

¹³ Group of States against Corruption, *Fourth Evaluation Round – Corruption prevention in respect of members of parliament, judges and prosecutors. Interim Compliance Report – Hungary*, GrecoRC4(2018)16, <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680969483>, §§ 13–18.



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In line with the idea that the function of fundamental rights protection is the protection of private actors from the arbitrariness and abuses of actors exercising public power, Article 34 of the European Convention on Human Rights prescribes that the European Court of Human Rights may only receive applications from persons, non-governmental organisations or groups of individuals (including civil society organisations, trade unions, churches, etc.), but not from state authorities. In the European Court of Human Rights' case-law, "the term 'governmental organisations', as opposed to 'non-governmental organisations' [...] applies not only to the central organs of the State, but also to decentralised authorities that exercise 'public functions', regardless of their autonomy *vis-à-vis* the central organs; [...] none of which are entitled to make an application on the basis of Article 34 [...]. The category of 'governmental organisation' includes legal entities which participate in the exercise of governmental powers or run a public service under government control [...]."¹⁴

It is worth mentioning that extending the right to submit constitutional complaints beyond private parties (individuals or organisations) originates in the Hungarian Constitutional Court's recent practice, in particular Decision 23/2018. (XII. 28.) of the Constitutional Court, which the law now codifies, at least partly. The constitutional complaint underlying Decision 23/2018. (XII. 28.) was submitted by the Hungarian National Bank, which claimed that its right to a fair trial was violated by a decision of the Curia (Hungary's supreme court). The Constitutional Court agreed, and annulled the Curia's decision. Four Constitutional Court justices out of the 15 wrote dissenting opinions on this issue, pointing to the **decade-long case-law of the Constitutional Court according to which state bodies vested with public authority do not have constitutionally protected fundamental rights that would entitle them to submit a constitutional complaint**. As put by one of the dissenting judges, if public authorities such as the Hungarian National Bank would have fundamental rights when they act in their public capacity, the protection of their fundamental rights would mean that **"the state defends itself from itself"** in constitutional complaint procedures launched by state authorities against ordinary court decisions, which would raise serious questions in terms of both logic and procedure.

We fully share the dissenting opinion, and are of the view that instead of codifying the erroneous practice the legislature should adopt a law that reorients the Constitutional Court to its original interpretation. We are however afraid that since the new provisions would provide state bodies with an escape route from the independent court system to a forum that is more understanding of the executive's interests than the ordinary judiciary, there is no will on the part of the ruling majority to address this deficiency.

To give an example of what this could mean in practice, let us refer to a recent case launched by the HHC against the Cabinet Office of the Prime Minister. In October 2017, the HHC sued the Cabinet Office because the "Stop Soros National Consultation" questionnaire that the Cabinet Office had sent to 8 million persons in Hungary contained misleading statements concerning the HHC, accusing it of supporting the committing of unlawful acts by immigrants. The HHC asked the court to conclude that by giving a distorted interpretation to the HHC's stance, the Cabinet Office had violated the HHC's right to good reputation, and to oblige the government to issue a public apology and pay moral damages. The HHC won the case at first and second instance and also before the Curia.¹⁵ In the proceeding, the Cabinet Office repeatedly tried to argue that the misleading statements about the HHC's position are within their freedom of expression, however, the courts concluded that as a body exercising state power the Cabinet Office cannot rely on the freedom of expression argument. In the new system, the Curia's decision could be challenged before the Constitutional Court, and there is a rather significant possibility that the Constitutional Court would hurry to the Government's rescue vis a vis the NGO, whose good reputation the distorted Government communication has infringed.

¹⁴ European Court of Human Rights, *Practical Guide on Admissibility Criteria*, 31 August 2019, https://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf, §§ 13–14.

¹⁵ See: <https://www.helsinki.hu/en/hhc-wins-lawsuit-against-cabinet/> and <https://www.helsinki.hu/en/government-must-apologize/>



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4. CHANNELLING CONSTITUTIONAL COURT JUSTICES TO THE CURIA

In terms of the Bill, **Constitutional Court judges could very easily become judges at the Curia after their judgeship at the Constitutional Court is terminated, even if they were not judges before** they were elected to the Constitutional Court. According to Article 92 of the Bill, if an elected Constitutional Court judge requests so, the President of the Republic will automatically appoint them ordinary court judges as well, without examining the fulfilment of the requirements that a person would otherwise must fulfil if they wish to become a judge. Article 119 provides that while they are Constitutional Court judges, their ordinary judgeship is "suspended", but **when their mandate as Constitutional Court judges terminate**, those who were appointed as ordinary judges this way (or were ordinary judges already before elected to the Constitutional Court), **shall automatically become "presidents of chamber" at the Curia** (i.e. judges presiding over judicial panels deciding on individual cases).

The reasoning attached to the Bill claims that for a person to be elected as a Constitutional Court judge, they shall comply with requirements set for ordinary court judges as well (p. 164). However, that is factually incorrect: prospective Constitutional Court judges do not have to have passed the special legal exam required from ordinary court judges, and it is not examined whether they are psychologically suitable to be an ordinary court judge or not.¹⁶ Disregarding these requirements is not only discriminative towards judges who were appointed in the ordinary way, but will also allow persons to preside over high-level trials without having to comply with the above two important requirements. Being a judge at the Curia has so far been the summit of a judicial career, reached by judges after several years of exemplary work and after getting to know the various levels of the court system. This will certainly change if this kind of preparation is no longer needed.

However, the new system would also mean that political considerations can override professional qualities, and the highest judicial positions (or at least a part of those) would be – albeit indirectly – filled by another branch of power, the legislature. This is especially problematic because the legislature is dominated by one party, so this way persons **nominated and elected by one political party** (without any involvement by the opposition in the Parliament) **can be parachuted into the highest judicial positions** and the ruling majority **can gradually increase the number of loyal judges at the Curia**.

5. INTRODUCING A LIMITED PRECEDENT SYSTEM

The above is all the more problematic because **the composition of the Curia will have an even larger significance in the long run than currently**, since – according to Article 179 of the Bill – **it would become more difficult for judges to depart from the interpretations of the so-called leading judgments of the Curia**. Until now, leading judgments have been seen as a source of orientation for judges, but – in line with the general interpretation of judicial independence – it has not been made expressly mandatory to follow them. The Bill would make it an express obligation for lower level courts to either follow the leading judgments of the Curia or to give express reasons for departing from the interpretations appearing in leading judgments. If the lower level court deviates from a leading judgments of the Curia, its decision could be subject to review.

¹⁶ According to Article 6(1) of Act CLI of 2011 on the Constitutional Court, "Any Hungarian citizen who has no criminal record and has the right to stand as a candidate in parliamentary elections shall be eligible to become a Member of the Constitutional Court, if they:

a) have a law degree;

b) have reached 45 years of age, but have not reached 70 years of age; and

c) are theoretical lawyers of outstanding knowledge (university professor or doctor of the Hungarian Academy of Sciences) or have at least twenty years of professional work experience in the field of law.

(2) The professional work experience in the field of law referred to in paragraph (1) shall be from a position for which a law degree is required."



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In principle, introducing a limited form of precedent system would not be problematic in itself, because, in theory, it could increase legal certainty and foreseeability, while respecting judicial independence (given that the judge may depart from the legal case if giving express reasons). However, the current body of the Curia's leading judgments is not suitable for providing a sound basis for such a system: there is no official list of leading judgments to be applied in the various instances and certain leading judgments contradict each other. These technical issues could be handled in various ways, but they should be addressed before introducing such a new rule. However, the Bill does nothing of the sort.

6. RESTRICTING THE ACCESS TO JUSTICE

According to the reasoning attached to it, the Bill aims to speed up administrative cases. This aim is welcome, however, a closer look at the proposed changes shows that they would instead **make it more difficult for individuals to enforce their rights and would restrict access to justice – primarily for the indigent or less wealthy ones.**

According to the current rules, first instance administrative decisions reached by local authorities can be appealed against within the administrative system, and a judicial review is only available against the second instance administrative decision. The first instance court decision can further be challenged before the regionalised tribunals (*törvényszék*) acting as second instance courts in administrative cases. As opposed to that, **the Bill would abolish the possibility of submitting an appeal against a first instance (local) administrative decision, the first instance judicial review would be conducted by certain, designated tribunals**, while the second instance judicial review would be performed by the Curia (in a restricted number of cases).

To illustrate the effect of the changes, let us take the simple example that somebody wants to add an extension to their house and needs a permit. Under the current system, if their request for a permit is denied by the local government's notary, they can first appeal to the so-called governmental office (*kormányhivatal*), which is located either at the party's place of residence or in a neighbouring city. The party needs to request a judicial review only if the governmental office rejects the appeal. If the Bill is adopted, the decision of the local notary will have to be challenged before the court instantly. The envisaged new system **would restrict access to justice for individuals** for the following reasons.

First, only eight tribunals (out of the 20 nationally) would be entitled to carry out first instance judicial review in administrative cases, and so some tribunals will have to cover as much as three counties. This would result that the **courts where the cases are tried will be in many cases far away from where the parties live.** Accordingly, in the example above, the individual whose request to add an extension to their home has been denied by the notary will not be able to turn to the nearby local governmental office, but will have to request a judicial review from a court which might be two counties away. As a result, **obtaining a remedy will cost people more time, money and other resources.**

Second, writing a court submission is significantly more difficult and complex than drafting an administrative appeal, and so **the chances that individuals seeking remedy can get by without the help of an attorney will diminish.** This is again a restriction of the access to justice, **especially affecting low-income or indigent persons** who are not able to retain a lawyer.

According to the reasoning attached to the Bill, the aim of these changes is to speed up the administrative cases, but it is hard to see how it envisages to achieve that, especially since **there are no impact studies or detailed statistics attached to the Bill** in this regard. Numbers provided by the reasoning actually



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suggest that the changes introduced will increase the workload of the courts, and that is unlikely to speed up the procedures.

According to the reasoning, parties appealed only against 0.5% of the first instance administrative decisions, and requested a judicial review against 25% of the second instance administrative decision. In other words, 75% of second instance administrative procedures were actually able to remedy the problems arising at first instance, thus, the Bill would abolish a forum for remedies which seems to have solved the problematic issues in three out of four cases. Moreover, the Bill would result that all those who would otherwise appeal the first instance administrative decision before the second instance administrative authority will now have to go to court right away, even if the issue revolves around less significant procedural mistakes or a simple substantive issue, resulting in **a significant increase in the workload of tribunals**, which is **unlikely to speed up procedures**.

Finally, experience suggests that judicial review processes tend to be longer than second instance administrative procedures, and if the courts' workload grows in the extent the above numbers suggest (i.e. fourfold), court procedures **are likely to get even more protracted. Thus, the proposed changes would not speed up, but would slow down the adjudication of these cases in addition to making access to justice system more difficult for less well-to-do parties.**