



Judicial Independence (Still) Under Threat in Hungary

Since coming to power in 2010, the Fidesz Party led by Prime Minister Victor Orbán has enacted a series of far-reaching reforms representing a significant threat to democratic checks and balances by targeting the independence of the judiciary, and other institutions empowered to constrain majoritarian action, raising in turn serious concerns about respect for fundamental EU principles, chief among them the rule of law and human rights. In this context, the European Parliament triggered the procedure laid down in Article 7 of the Treaty on European Union (TEU) with respect to Hungary in September 2018, calling on the Council to scrutinize the Hungarian government's respect for those principles. Ahead of the discussions that are set to take place in the Council, this brief addresses concerns about recent developments on judicial independence in Hungary of relevance to the ongoing Article 7 TEU procedure. These complement those raised by the European Parliament and by civil society organisations¹ since 2010. The brief points to a continued deterioration of judicial independence and of the rule of law in Hungary consistent with the grounds cited by the EP in triggering the Article 7 procedure. It calls on the Council to take these latest developments into account when examining the situation and to question the Hungarian government on its conformity with the principles laid down in Article 2 TEU.

Overview of Recent Judicial Reform Efforts

On 12 December 2018, the Hungarian Parliament tabled legislation to establish a separate system of administrative justice. While nominally situated within the existing judiciary, the composition and functioning of the proposed system of courts, including a Supreme Administrative Court (SAC), would under the terms of the legislation be subject to extensive ministerial control, and thereby particularly vulnerable to political interference. This law raised a new round of concerns about continued judicial independence in Hungary, and drew heavy criticism both domestically and abroad, in particular from regional and international rule of law and human rights protection mechanisms, fellow European Union (EU) and Council of Europe (CoE) member states and civil society organizations. The proposed reforms sought to significantly narrow the competence of the existing Hungarian judiciary, and to insulate the new parallel system from review or oversight by ordinary courts and independent judicial self-governing bodies. Further, the jurisdiction of the new court system over administrative law would have encompassed cases challenging government action, as well as politically sensitive matters like electoral law, taxation, public procurement, corruption and the right to protest.

¹ https://www.fidh.org/IMG/pdf/hungary_democracy_under_threat.pdf

These 2018 efforts to reform the courts fit within a broader push by the Orbán government to incrementally capture the Hungarian judiciary, including the Constitutional Court and the Supreme Court, as well as previous attempts to reform the system of ordinary courts and repeated public malignment of Hungary's judges coupled with the routine decrying of the "judicial state - all of which featured among the reasons which warranted the activation of the procedure laid down in Article 7.1 TEU with regard to Hungary in September 2018.

Following strong European and international condemnation, the Orbán government walked back the reforms announcing a suspension of the proposed new courts, with a full repeal of the law on 2 July 2019. However, Speaker of the Hungarian Parliament and Chairman of Fidesz's governing board, László Kövér, subsequently went on to publicly state in an interview that postponing the law "ha[d] nothing to do with the quality of the regulation, but only with the irrational pressure and series of attacks against Hungary on account of the judicial reforms"² and that "if the time is ripe"³ the Parliament will retable the matter. The Deputy Minister of Justice also later confirmed in a separate interview that initiatives to amend the Fundamental Law relating to the judiciary were underway.

On 12 November 2019, the Hungarian government followed through on its above commitment to revisit these controversial measures by submitting a 200-page omnibus Bill to Parliament seeking among other things extensive amendment to the structure and operation of the judiciary. Although the draft legislation now under consideration is different in form from the withdrawn 2018 administrative courts proposal, detailed legal analysis from Amnesty International⁴ and FIDH's member organization in Hungary, the Hungarian Helsinki Committee (HHC),⁵ reveals that, if passed into law, it would operate to achieve the very same ends that drew such widespread criticism of the 2018 proposal, notably violating European and international rule-of-law and fair trial standards.

Claims that these recent reforms are principally aimed at enhancing efficiency or alignment with European practice do not stand up to closer scrutiny. Both the 2018 and 2019 Bills target judicial independence, provide for the further consolidation of government power over public action and politically sensitive areas of law and, if enacted, would make it harder in practice for individuals to enforce their rights against the state, thus fundamentally undermining their right to an effective remedy before an independent and impartial court, among other derivative and related rights.

The recent retableing of these measures and the manner in which they have been repackaged, including procedural loopholes by which regular channels for decision-making

² https://index.hu/english/2019/07/10/laszlo_kover_administrative_courts_rule_of_law/

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<https://www.reuters.com/article/us-hungary-courts/hungary-could-resurrect-court-plan-that-worried-eu-parliament-speaker-idUSKCN1U518L>

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https://www.amnesty.hu/data/file/4721-nothingeverdisappearsitonlychanges_independenceofjudiciary_amnesty_hungary_20191119.pdf?version=1415642342

⁵ https://www.helsinki.hu/wp-content/uploads/HHC_2019_Bill_on_judiciary_analysis_

have been bypassed, are significant and betray some degree of calculation on the part of the Hungarian government. The timing, in particular, immediately ahead of the forthcoming discussions in the General Affairs Council (GAC) under Article 7.1 TEU, has left no room for meaningful political debate or stakeholder consultation over the proposed law and has left the GAC scant opportunity to conduct a thorough review of the bill as would be necessary to develop a sufficiently informed position and prepare well-reasoned lines of questioning in time for the hearing scheduled on 10 December 2019.

In the light of this recent move, and the preceding eight years of repeated judicial reform efforts, the withdrawal of the 2018 Bill actually appears irrelevant and gestures rather *to a clear pattern* of the Orbán government to deploy artifice and underhanded tactics with its international, especially EU, counterparts. Rather than affirming its intention to comply with EU requirements, it signals here its motivation to openly defy EU criticism, while continuing to undermine judicial independence and democratic checks and balances in Hungary.

November 2019 Reform Efforts: Omnibus Bill Affecting Judicial Independence

On 12 November 2019, the Hungarian government submitted a new omnibus Bill to Parliament seeking, *inter alia*, substantial amendment to the ordinary functioning of the judiciary, **conferring on public authorities an extraordinary and novel right of action to file complaints with the Constitutional Court challenging adverse lower-court rulings.** The legal theory offered in support of this new right of action is based on the controversial notion that *fair trial rights* extend not only to individuals, but to state organs as well, and in situations where an administrative authority believes that a court decision unconstitutionally limits its scope of competence, this Bill provides a new constitutional hook to bring cases directly before the Constitutional Court, thereby creating a unique path to overcome unfavorable results in the ordinary courts.

We note that the Constitutional Court faces very credible accusations of political capture, having been subjected to multiple rounds of Fidesz-led reforms, resulting finally in the Court's expansion to fifteen judges, eleven of which were subsequently appointed by the Fidesz majority without any opposition party consultations or ascent. Since at least 2014 there has been wide consensus that the Constitutional Court functions largely as a rubber stamp for the ruling Fidesz government.⁶⁷⁸⁹ The recent submission of this Bill to Parliament therefore represents another clear attempt by the government to unduly insulate its agenda from independent judicial review by giving state authorities the power to effectively bypass the decisions issued by independent courts whenever these appear at odds with their own political program, in blatant contravention of democratic checks and balances. It also has the effect of tightening the captured Constitutional Court's influence over the ordinary court system. Insofar as this bill limits the competence of the ordinary

⁶ https://helsinki.hu/wp-content/uploads/EKINT-HCLU-HHC_Analysing_CC_judges_performances_2015.pdf

⁷ <https://www.helsinki.hu/en/hungarys-government-has-taken-control-of-the-constitutional-court/>

⁸ <https://reconnect-europe.eu/blog/no-checks-no-balances-bard-pech/>

⁹ <https://budapestbeacon.com/hungarys-constitutional-identity-is-whatever-viktor-orban-says-it-its/>

courts to fulfill their proper autonomous function, and expands the scope of unchecked partisan control over public action, the ruling party takes yet a further step to undercut both the separation of powers and the rule of law, principles core to democratic systems of government.

In addition to the foregoing, the Bill also relaxes the requirements for judges to sit on Hungary's Supreme Court (the Curia), in particular **establishing a simple process for the transfer of Constitutional Court judges directly to the Curia (and ordinary court system)**, thereby ensuring a gradual accumulation of loyal judges on that Court.

Separately, the Bill **makes no provision addressing the defects in current legislation that sparked the ongoing constitutional crisis between the President of the National Judicial Office (NJO) and the National Judicial Council (NJC)**, and the absence of any such provision in this Bill illustrates the government's interest in allowing the NJO President to continue exerting a partisan influence over court appointments by way of a loophole that enables her to disregard mandated judge participation in the selection / appointment process.

Relatedly, and as the HHC's analysis elaborates in greater detail,¹⁰ this Bill **fails to incorporate any of the specific recommendations in relation to judicial independence** and European standards previously put forward by the Council of the European Union,¹¹ the CoE's Commissioner for Human Rights,¹² the CoE's Venice Commission¹³ or the CoE's Group of States Against Corruption¹⁴ and appears to disregard the recommendations made by the Committee of Ministers of the Council of Europe regarding the execution of judgments of the European Court of Human Rights, notably in cases regarding judicial independence. In view of the substance and timing of this current Bill, the Orbán government also shows its continuing and overt disregard for the specific concerns set out in the European Parliament's 2018 reasoned proposal, and for the ongoing Article 7.1 TEU procedure now before the Council.

It should be additionally noted that **this Bill has been tabled without any prior notice** (nor did it appear on the government's legislative agenda), **without any stakeholder consultations or impact assessment**, as is legally required, **and therefore without any broader political deliberation or debate**, which is indispensable to the formulation of

¹⁰ https://www.helsinki.hu/wp-content/uploads/HHC_2019_Bill_on_judiciary_analysis_01122019.pdf

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 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)

¹⁴ 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

effective and rational policy in a democratic state. Together these facts fit into a broader and clearly identifiable *pattern of efforts* on the part of the Orbán government *to systematically concentrate control* over the various levers of state power such as to foreclose any possibility of effective or meaningful opposition to the government's agenda. The antidemocratic ends the Orbán government sought to achieve in its 2018 push to establish a parallel system of administrative courts, it now seeks here to achieve by other means.¹⁵

A Step Back: December 2018 Reform Efforts

Administrative Courts Bill

The now-withdrawn 2018 judicial reform package ran a substantial risk of undermining the separation of powers and democratic checks and balances--fundamental principles of the rule of law--and, if enacted, would have contributed to the further consolidation of political and executive branch power in Hungary. A detailed analysis of both the substance of those reform efforts and their anticipated operation within Hungary's legal order exposes key deficits from the standpoint of continued judicial independence, which is an essential component of the right to a fair trial and a precondition for the enjoyment of the right to an effective remedy and other fundamental rights.

In contrast to similar models of judicial administration within other EU and CoE states, particularly where decision-making authority over the judiciary is vested in part at the executive or ministerial level, **the proposed 2018 reforms would have conferred on the Minister of Justice an unprecedented degree of unchecked influence over the new system of administrative courts.** While under this scheme the National Administrative Judicial Council (NAJC) would have possessed putative authority as the "consultative, advisory and decision-making body" over the broader situation of administrative justice, with governance functions substantially affecting the operation of the courts, its decision-making could not be reasonably characterised as independent, as the Minister of Justice would have retained key prerogatives regarding:

1. Fixing the number of judges at each level
2. Deciding on recruitment and appointment of administrative judges
3. Deciding on promotions and appointment of judges to positions of responsibility (e.g. Court President)
4. Decisions on disciplinary action
5. Some control over salary increases
6. Setting the budget for the administrative court system
7. Supervising rules of procedure
8. Decisions on transferring judges

¹⁵ For more detailed analysis, see "Nothing ever disappears, it only changes: The Hungarian Government switches to higher gear to curb judicial independence" Amnesty International, 2019 ; "Proposed new law threatens judicial independence in Hungary - Again" Hungarian Helsinki Committee, 2019 ; "One Step Back, Two Steps Forward The Hungarian judiciary's independence is still in danger" by Viktor Z. Kazai, Verfassungsblog, 2019.

9. Power to shape the system during the transition period

There was a clear absence of exclusive NAJC authorities or of other safeguards to counterbalance the powers that the law committed to the Minister of Justice. Such counterbalances would have been necessary to ensure that the Minister properly fulfilled the function of system manager without encroaching on judicial independence.

National Administrative Judicial Council (NAJC)

The NAJC was a body envisaged in the 2018 legislation to manage the administrative court system with regard to judge and non-judge personnel, their status/title, compensation, allocation of tasks, and the development of practices and rules. The body would have also retained budgetary functions, and acted as advisor to the Minister of Justice on matters related to the administrative court system.

Under this proposed system, **the NAJC would have had substantially fewer powers than its counterpart in the ordinary court system**, the National Judicial Council. Indeed, the only decision-making authority the NAJC would have had, which itself was only a matter of giving or withholding consent, concerned establishing honorary titles to recognize outstanding work, validating a third term for an administrative court president or vice president, and amending the budget *after* the fiscal year has already begun. The NAJC would not have had decision-making authority with regard to core issues, such as the recruitment of judges, their career, disciplinary actions, remuneration, the budget of the administrative courts, the courts' training systems, and so forth. The Minister of Justice would have held the ultimate decision-making power over these matters.

Powers Regarding Administrative Court Personnel

Existing standards in this field reflect a preference for the recruitment and appointment of judges to be undertaken by an independent, self-governing body, such as a judicial council. Although systems in which appointments are made by the government or parliament are not *per se* objectionable, as they are legitimated by a democratic process, such systems should implement careful safeguards to ensure that political appointment does not equate to political interference. These safeguards would include guarantees that appointees meet certain minimum professional and/or academic standards, and not have an overly political background. Further, where a Judicial Council exists, it should have *actual influence* on decision-making, and should bring its juridical expertise to bear as an essential complement, if not counterbalance, to the political considerations playing into the nominations/appointments. Recalling that **the power to initiate disciplinary action against judges would have rested with the Minister of Justice**, it should be noted that the judge members of the NAJC would have faced strong disincentives under this scheme to deviate from the prevailing political will, as it would have been enough for disciplinary proceedings to be pending against them for their membership in the Council to be terminated. In the same vein, **the Minister would have also retained substantial prerogatives regarding the promotion of judges.**

The transition to **the new system as mapped out in the 2018 law assigned a further set of powers to the Minister**, namely that of setting the number of judges (and non-judges with experience in public authority) to fill the new courts, in addition to those judges who would have elected to transfer from the ordinary courts to the new courts. **The law thus left the ultimate size and composition of the new courts largely at the discretion of the Minister.**¹⁶

Relation of the SAC to the Curia

The SAC would have sat at the apex of the judicial hierarchy of the administrative court system, just as the Curia does for the ordinary judiciary. While the partitioning of administrative justice from other areas of law does not in itself raise objections (this is indeed a model shared by several other European states), the **establishment of the new parallel supreme court**, whose decisions would have been insulated from review by the Curia, on its face **appeared to violate the principle of a “single judiciary” as enshrined in the Hungarian Constitution, and also would have had the impact of substantially reducing the competence of the ordinary courts.** The rationale for the establishment of the SAC itself, as against leaving the relevant competences vested with the Curia, therefore raised questions from a constitutional law perspective. And, in light of the particular characteristics of the new system as detailed here, if the SAC and the administrative court system more broadly had been politically captured in any degree, of which the foregoing analysis shows a strong probability, there would have been no oversight or review available by the ordinary courts, and thus no institutional mechanism for reasserting judicial independence and ensuring an autonomous and impartial judicial review over a wide range of matters relating to public interest and the exercise of fundamental human rights and freedoms.

Furthermore, the law’s stipulation that **no Curia or lower court decision regarding administrative law “shall be issued” following the establishment of the new courts, and that such decisions previously issued “shall cease to have effect”**, raised additional concerns from a continuity and legal certainty perspective. This could have created legal and regulatory gaps, generating uncertainty on the part of stakeholders as to the legal status of their activities, which activities, if challenged, would have then been subject to administrative review as a matter of first impression by the new courts. This would have afforded the new court system a unique opportunity to develop and apply new interpretations, revisit settled areas of law, and significantly reshape the landscape of administrative justice in Hungary.

Although it is *conceivable* that an administrative court system, such as the one envisaged in

¹⁶ Venice Commission Op. 943 pg. 13: *The Minister of Justice believes that 220 judges will request transfer, whereas the President of the Curia thinks that the figure will be only 100 judges from the lower courts and 18 judges from the Curia. The Minister was aiming for a total of 300 judges over the next two years, with 40 newly appointed judges in 2019 and 40 more in 2020. If only around 120 judges request transfer, the number of vacancies (up to 300) will rise considerably to almost twice the number of judges transferred from the ordinary courts. This would allow the Minister to fill the majority of judge positions – and all the court leader positions – over a two-year period.*

the 2018 legislation, could operate with some independence and according to established standards, this possibility would depend entirely on the character of the incumbent administration and the self-restraint of the Minister of Justice, a partisan, political official. Protection and observance of such fundamental principles as judicial independence, however, should not depend on any one individual officeholder. Indeed, the protection of judicial independence is seen as fundamental because, *inter alia*, it is indispensable to securing impartiality, respect for other fair trial standards, and the enjoyment of the right to an effective remedy. Furthermore, it is not enough for a judiciary to be *de facto* independent; international fair trial standards require courts to also *appear* independent before those whom they are called upon to sit in judgment. Respect for such principles should therefore be entrenched into the structure of the legal-political order, anchored in law and praxis by a careful and considered distribution of powers, safeguards and system of counterbalances.

Conclusion

As outlined, the reforms tabled in December of last year and in November of this year both present a substantial risk to the autonomy and unitary nature of Hungary's judiciary, and are manifestly inconsistent with well-established European and international rule-of-law standards and practice. The new court system envisaged by the 2018 legislation would have possessed exclusive jurisdiction over wide-ranging areas of the law, and would have committed a key set of decisive powers over this system to the executive branch of government, without sufficient guarantees in place to ensure that this did not result in undue political interference in the judicial process. Similarly, the November 2019 draft legislation would empower the politically captured Constitutional Court to intervene more freely in the government's behalf in cases related to administrative authorities. By facilitating the transfer of Constitutional Court judges to the Curia, and failing to resolve the dispute between the President of the NJO and the NJC, thus leaving overly broad court appointment powers in the hands of the former, it would also ensure a gradual packing of the ordinary court system, including the Supreme Court, with government appointed judges. Lastly, by failing to execute ECtHR judgments related to Hungarian judges' freedom of expression and independence, the recently proposed reform tightens the government's grip on the judiciary, reaffirming its power to control its members and perpetuating the chilling effect that this is bound to have on them. Should these pending reforms be enacted, fundamental democratic and rule of law principles, such as judicial independence and the separation and balance of powers, would be compromised to an equivalent or possibly greater extent than under the 2018 draft law, and fundamental rights such as the right to a fair trial and to an effective remedy would be undermined.

This most recent round of reform efforts, in particular the November 2019 Omnibus Bill currently under consideration, can be understood and assessed within the broader context of the Orbán government's near decade of open hostility and incisive rhetoric against judges and the courts, together with successive political, legislative and constitutional efforts¹⁷ to weaken the judiciary's ability to challenge or impede the government's agenda.

¹⁷ FIDH Report N. 684a, 2016; Annex II, Annex III

As the November 2019 Bill pursues the same fundamental aims as the 2018 administrative court legislation, and indeed raises further concerns regarding its possible effects on judicial independence in Hungary, should it pass into law, it would constitute an ever deeper erosion in this member state of the essential institutional constraints and practices that characterize robust, consolidated democracy - a measure that, even when not seen in combination with other overarching reforms undermining checks and balances across areas, would warrant in its own right the conclusion by the Council that there is in Hungary a clear risk of a serious breach of the principles on which the European Union is founded.

We therefore urge member states to take these latest developments into account when examining the situation of the Hungarian judiciary and questioning the Hungarian government on their conformity with EU standards, particularly the principles of respect for democracy, the rule of law and human rights, enshrined in Article 2 TEU.

We also urge member states to address recommendations to the Hungarian government, pursuant to Article 7.1 TEU, in order to resolve the above concerns and restore respect for Article 2 TEU values in Hungary.

December 2019