

INDEPENDENCE OF THE JUDICIARY UNDER ATTACK IN HUNGARY
Statement by Hungarian Helsinki Committee

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The Hungarian Helsinki Committee wishes to draw the attention of the Organisation for the Security and Cooperation in Europe (OSCE) to the growing number of attacks against the independence of the judiciary in Hungary.

1. New Laws Jeopardise Independent Courts in Hungary

With no prior public consultation and merely three weeks after the bills were proposed, the Hungarian Parliament adopted the Seventh Amendment to the Fundamental Law on 20 June 2018. Given the present collapse of the legislature into an overpowering executive, **incremental changes to the judicial organization are snowballing into a real and serious threat to the rule of law.** The latest constitutional amendment further blurs the boundaries between executive and judicial power, and expands government control over the courts.

- **By further limiting judicial independence and restricting the freedom of judges to interpret the law, one of the last bastions of the rule of law is diminished**

The Seventh Amendment to the Fundamental Law undermines the separation of powers and limits the freedom of judges to interpret the law. Under the new provisions, the starting point in interpreting the law will have to be the reasoning attached to legislative proposals. These reasonings are often political statements that fail to explain the necessity, rationale and effectiveness of the policy option proposed by Parliament. By way of example, the reasoning of the new law criminalising legal assistance to asylum seekers states that the purpose of the law is to „prevent Hungary from becoming an immigrant country”. Under the new constitutional provision, a judge shall interpret the new law in compliance with this professed purpose”.

Issuing binding and politically interpretative guidance to judges fails to insulate them from the politics of the legislature and thus presents a major threat to their own independence and impartiality. This measure also reduces the independency of judicial decision-making by restricting judges’ discretion in interpreting the law.

Furthermore, the reasoning is prepared by the competent minister or even an individual MP and is not part of the law, thus not a normative act, therefore it cannot be subject to constitutional review. Consequently, the governing majority can instruct judges to interpret a law with regards to a political aim that can be even unconstitutional.

- **A new administrative court system may be dominated by judges who, arriving from the state's public administration, will rule on cases involving elections, taxes and public procurement, among many other key civil liberties issues. Its head will be a political appointee selected by Parliament.**

The Seventh Amendment splits the court system in two by setting up an Administrative High Court to take over all of the powers of Hungary's Supreme Court (the Kúria) in administrative cases. The new Administrative High Court (Közigazgatási Felsőbíróság) will be the final forum for all legal disputes about decisions taken by Hungary's public administration. This, due to the fully centralised power in the judicial administrative system, makes the judiciary even more vulnerable to political interference.

The separated administrative court system will deal with all legal challenges of decisions taken by state authorities, such as cases on public procurement, civil liberties (including electoral rights and freedom of assembly), tax decisions, complaints against police action, freedom of information requests and asylum cases. The Administrative High Court will also issue interpretative guidance on the uniform application of the law that will be binding on lower administrative courts. The Administrative High Court's president will be elected directly by Parliament. With a strong supermajority of Fidesz and its track record of appointing loyal allies to independent positions there is a good reason to believe that the President would be a political appointee.

- **After months of aggressive campaigning against civil society and the political opposition, senior politicians and the government's media machinery began to discredit individual judges.**

After months of aggressive campaigning against civil society and the political opposition, senior politicians and the government's media machinery began trying to discredit judges and courts.

In April 2018, the Kúria upheld the decision of the National Election Commission (NEC) certifying the results of absentee ballots casted by mail during the parliamentary elections and found that 4,360 ballots were invalid.¹ If the contested ballots were counted, it would have resulted in one additional seat for Fidesz in Parliament, strengthening the two-third majority of the ruling party. On 5 May, the press secretary of the Prime Minister communicated Viktor Orbán's statement: "I think the Kúria has taken away one mandate from our voters with this decision. The Kúria has clearly and seriously interfered in the election. [...] it is obvious that the Kúria was not intellectually up to this task".²

¹ Kúria, [Judgment no. Kvk.III.37.503/2018/6](#) re *Fidesz v. National Election Commission* (2018).

² 888.hu, ['Orbán: Kúria not intellectually up to this task'](#) (5 May 2018).

Members of the government and the governing party have repeatedly claimed that human rights NGOs and their networks are trying to unduly influence the judiciary. These included statements by Deputy Justice Minister Pál Völner,³ Csaba Hende, President of the Parliament's Committee on Legislative Affairs⁴ and István Hollik, spokesperson of the governing majority's parliamentary group⁵ who claimed that trainings, supported by the European Commission through action grants on international human rights law, asylum law and hate crime prevention, pose serious risks to the independence of the judiciary. These statements, which are boosted by government-aligned media, aim to deter the judicial training program from involving NGO expertise and discredit even those legal professionals, including judges and attorneys, who took part in these trainings as instructors or participants. Discrediting statements against members of the National Judicial Council who spoke publicly about problematic areas related to the administration of the courts intensified in August 2018, when government-aligned media published a series of articles that aggressively discredited members of the Council.

2. Previous attacks on the courts that made the system vulnerable to political interference

Since 2010, most organizational changes, including the establishment of new institutions, have served the aim of eliminating checks on political power. Many of these changes, if taken each on their own merit, have precedents in the constitutional orders of other European countries. The Hungarian government, however, has a track record of reengineering the rule of law. Given the present collapse of the legislature into an overpowering executive, incremental changes to the judicial organization are snowballing into a real and serious threat to the rule of law in an EU member state.

The independence of the judiciary has been restricted in several significant ways in the past eight years, such as by limiting the Constitutional Court's (CC) powers to review the constitutionality of laws, by packing the Court with supporters, and by curbing the powers of judicial self-administration. As in earlier cases, the government has given no genuine explanation as to why changes to the court system are needed. These new threats to judicial independence come in the wake of the governing majority's systemic crackdown on the rule of law, the system of checks and balances and on fundamental rights which the Hungarian Helsinki Committee has documented.⁶

In 2012 around 10% of judges were forced into mandatory retirement due to the rapid lowering of the retirement age of judges from 70 to 62 years. This served the political aim to change the leadership of courts, including court presidents and leaders of departments, who largely came

³ Fidesz, '[Soros Network Characterised by Mafia Methods](#)' (1 February 2018).

⁴ Hírtv, '[Further changes likely in justice system](#)' (6 June 2018).

⁵ Origo, '[Soros-network interfering in justice system](#)' (26 May 2018).

⁶ <https://www.helsinki.hu/en/an-illiberal-state-in-the-heart-of-europe/%20https://www.helsinki.hu/wp-content/uploads/OPERATION-STARVE-AND-STRANGLE-01022018.pdf>

from the most senior members of the judiciary. The European Commission launched an infringement procedure against Hungary in 2012 over the forced early retirement of around 270 judges and public prosecutors. The EU Court of Justice held that these steps were incompatible with EU law as they violated the prohibition of discrimination at the workplace on grounds of age.⁷ However, the judges were never reinstated into their previous senior positions.

The term of office of the President of the Supreme Court was terminated at the end of 2011, long before the expiry of his mandate, on the ground that the name of the highest court was changed from Supreme Court to Kúria, and the powers and functions of the court were also slightly modified. The case was ultimately decided by the Grand Chamber of the European Court of Human Rights, which found that Hungary breached the court president's right to have access to a court and his freedom of expression⁸ as the termination took place after and because the President had publicly expressed concerns on legislative changes relating to the judiciary.

The court system is overly centralized. It is led by a single person, the President of the National Judicial Office (NJO), who controls court administration, the appointment and promotion of judges, including to the critical positions of court presidents. These powers are exercised without effective control or accountability; however, the National Judicial Council (NJC), the self-governing body of judges, has some limited powers to supervise the practice of judicial appointments. There is an ongoing debate between the NJO President who is elected by Parliament and the National Judicial Council whose members are elected by the judges themselves. For instance the NJC evaluated and consequently criticised the President's practice of appointing judges to senior positions. The prolonged debate is likely to prompt further legislative changes that may jeopardize even the Council's weak power to exercise control over the NJO President.

RECOMMENDATIONS

We call on the OSCE and OSCE Participating States to:

1. Continue monitoring the situation of judges and the independence of the judiciary in Hungary and support judicial self-administration bodies as well as members of the judiciary who face public shaming for publicly criticizing interference into the independence of the judiciary.
2. Urge the Government of Hungary to fully comply to its Human Dimension commitments, including the 1991 Moscow Document as well as to fully implement

⁷ European Commission, '[European Commission closes infringement procedure on forced retirement of Hungarian judges](#)' (20 November 2013).

⁸ European Court of Human Rights, Grand Chamber judgment in the case of [Baka v. Hungary](#), Application no. 20261/12, 23 June 2016.

OSCE-ODIHR's 2010 Kyiv Recommendations on the independence of the judiciary. Most notably, the government should be urged to (1) make meaningful public consultations on new laws on courts inclusive and open for all affected parties (including the general public, members of the judicial self-administration bodies and civil society) and (2) publicly condemn accusatory and labelling rhetoric against judges and independent civil society organisations who speak up for the protection of judicial independence; moreover, it should be encouraged to take proactive steps to counter discrediting of judges and human rights defenders by political leaders and the media.

3. Engage with the Government of Hungary to encourage meaningful dialogue between the Government, all affected parties within the judiciary, legal professionals and civil society, in order to ensure that institution-building, development and other programmes are human rights compliant.
4. Monitor the impact of legislation as well as other measures and related actions (including communication) by state actors and the media targeting judges, judicial self-administration and operations of civil society organisations in Hungary.

We call on the OSCE Office for Democratic Institutions and Human Rights (ODIHR) to:

1. closely follow the developments with regards to judicial self-administration as well as the establishment of a separate court system on administrative justice, and provide support and assistance to Hungary to promote a system for judicial administration that is in compliance with Hungary's OSCE human dimension commitments, including by observing the extent to which the right to a fair trial, the separation of powers and the independence of the judiciary are safeguarded;
2. review upcoming amendments to cardinal laws on the judiciary in light of Hungary's OSCE human dimension commitments and, more specifically, the OSCE-ODIHR Kyiv Recommendation on Judicial Independence;

We call on the OSCE Representative on Freedom of the Media to

1. closely follow the developments with regard to the establishment of the administrative court system and the Administrative High Court vis-à-vis its powers to adjudicate in cases relating to decisions made by the National Media and Infocommunications Authority, especially those that affect the allocation of broadcasting licenses and media pluralism.