

Continued Attacks against the Independence of the Judiciary in Hungary

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Amnesty International wishes to draw the attention of the Organisation for the Security and Cooperation in Europe (OSCE) to the constitutional crisis in the Hungarian judiciary and the increasing attacks against the independence of the judiciary in Hungary.

1. A Constitutional Crisis in the Hungarian Judiciary

The independence of the judiciary in Hungary is under severe threat. The European Association of Judges and the European Commission recently found that “the Hungarian judiciary is facing a kind of ‘constitutional crisis’ since May 2018”¹ while “checks and balances, which are crucial to ensuring judicial independence, have been further weakened within the ordinary court system”.²

The NJC³ and the European Association of Judges, which carried out a fact-finding mission to Hungary on 17-19 April 2019,⁴ both found that the President of the National Judiciary Office violated laws on judicial appointments and obstructed the National Judiciary Council’s supervisory work by denying it access to documents and not cooperating with it.

In its 2019 European Semester country report, the European Commission found that “checks and balances, which are crucial to ensuring judicial independence, have been further weakened within the ordinary court system. The National Judicial Council faces increasing difficulties in counter-balancing the powers of the President of the National Office for the Judiciary. This gives rise to concerns regarding judicial independence” and called on Hungary to “strengthen judicial independence”.⁵

Beyond growing attempts by Hungarian authorities to exert political control over independent institutions, including courts, the independence of the judiciary in Hungary is severely threatened by a prolonged conflict between key judicial actors that is jeopardizing the effective oversight of court administration. The person responsible for court administration, the President of the National Judicial Office (NJO) is not cooperating with the judicial oversight body, resulting in a “constitutional crisis”. This oversight body, the National Judicial Council, found that the NJO President

¹ Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, available: <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>, p. 5.

² European Commission Recommendation for a Council Recommendation, COM(2019) 517 final, available: <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-517-F1-EN-MAIN-PART-1.PDF>, para. 17.

³ Report by the Committee established by NJC Decision 101/2018 (X.03.), English translation available: <https://www.dropbox.com/s/w3gv9qjonr3b76r/OBT%20Report%2006.02.2019.pdf?dl=0>.

⁴ Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, available: <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>, pp. 7-8, 10-11.

⁵ European Commission Recommendation for a Council Recommendation, COM(2019) 517 final, available: <https://ec.europa.eu/transparency/regdoc/rep/1/2019/EN/COM-2019-517-F1-EN-MAIN-PART-1.PDF>, para. 17 and Recommendation 4.

had breached the law multiple times regarding recruitment and promotion of judges, hence it requested the Parliament to dismiss the NJO President. However, on 11 June 2019, the Parliament's ruling Fidesz-KDNP majority voted to keep her in office.

2. Growing Number of Attacks against Judges

The 2018-2019 survey of the European Networks of Councils for the Judiciary of judges found that "Hungary ... face[s] issues across a range of aspects of independence". The survey showed that respondents in Hungary gave worrying responses on pressure experienced by judges from court leaders, recruitment of judges and promotion to leadership positions, and on the National Judicial Council's ability to defend the independence of judges.⁶ Not only judges but the general public and companies also signal problems: both groups reported a decrease in perceived judicial independence, according to the 2019 EU Justice Scoreboard.⁷

Following a years-long campaign against independent civil society and human rights defenders, the pressure on individual judges has further increased. In 2018, the Prime Minister claimed⁸, that the Supreme Court, the "Kúria was not intellectually up to its task". In 2019, as the conflict between the National Judiciary Office and the National Judiciary Council has escalated, the government-aligned media has targeted the president of the National Judiciary Council as well as its members.⁹ The aim of the attacks was to discredit the members of the National Judiciary Council as well as individual judges who have publicly criticized the judicial administration.¹⁰

On 17 July 2019, the Hungarian National Authority for Data Protection and Freedom of Information (DPA)¹¹ found that in February 2019 a regional court president illegally black-listed 51 judges in his district who were members in a judges' association. He also reportedly tried to persuade court leaders at his court to encourage judges to end their membership in the association. The DPA fined the court for breach of privacy rights.

3. Prospects of a new Administrative Court System

On 29 June 2018, the Seventh Amendment to the Fundamental Law entered into force. It incorporated administrative courts into the Fundamental Law and states that administrative cases are to be decided by administrative courts as soon as these courts are established. At this time, it is the ordinary courts that issue decisions on administrative matters. On 12 December 2018, Parliament adopted the laws on administrative courts which were subsequently heavily criticised by the Venice Commission,¹² the First Vice-President of the European Commission,¹³ the Council of Europe Commissioner for Human Rights,¹⁴ the UN Special Rapporteur on the

⁶ ENCI, Independence, Accountability and Quality of the Judiciary, available: <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/2019-06/ENCI%20IAQ%20report%202018-2019%20adopted%207%20June%202019%20final.pdf>, pp. 56, 39-41, 42, 56.

⁷ 2019 EU Justice Scoreboard, available: https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2019_en.pdf, pp. 44-45.

⁸ Article on 888.hu, available: <https://888.hu/ketharmad/orban-a-kuria-intellektualisan-nem-nott-fel-a-feladatahoz-4143131/>

⁹ <https://magyarnemzet.hu/belfold/sertettsegbol-tamadhatak-meg-hando-tundet-6927755/>

¹⁰ <https://tuzfalcsoport.blogstar.hu/2019/07/01/hableany-tragedia-kettos-merce-az-itelkezesben-/75425/>

¹¹ Press Release of the MABIE, available: <http://www.mabie.hu/index.php/1464-harommillio-forint-birsag-a-mabie-tagok-listazasaert>

¹² CDL-AD(2019)004, Opinion no. 943/2018, available: [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).

¹³ "Opening remarks by First Vice-President Frans Timmermans at the LIBE Committee in the European Parliament on the reasoned proposal under Article 7(1) TEU regarding Hungary: state of play", available: https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/opening-remarks-first-vice-president-frans-timmermans-libe-committee-european-parliament-reasoned_en.

¹⁴ "Commissioner calls on Hungary's President to return to the Parliament the legislative package on administrative courts", available: <https://www.coe.int/en/web/commissioner/-/commissioner-calls-on-hungary-s-president-to-return-to-the-parliament-the-legislative-package-on-administrative-courts>.

Independence of Judges and Lawyers¹⁵ and also by thousands of protesters on the streets of Budapest and other Hungarian towns as the laws provide for wider risks of political interference in the independence of the judiciary.¹⁶ The 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.

The laws envisaged a new court system where "very extensive powers are concentrated in the hands of a few stakeholders and there are no effective checks and balances to counteract those powers", as the Venice Commission put it.¹⁷ The Minister of Justice (a political member of the Government) and the President of the Supreme Administrative Court (elected by the Parliament) alone could have decisive power over the recruitment and the promotion of judges, budgeting and case allocation without a sufficiently strong judicial council to counterbalance these powers.

On 5 February 2019 Members of the Parliament referred the adopted laws on administrative courts to the Constitutional Court, arguing, among others, that the new laws would allow extensive government control over administrative judges and courts.¹⁸ On 20 June 2019, the Court decided that the laws are in line with the constitution.¹⁹

On 30 May 2019 just one day before the deadline for the President of the Republic to nominate the President of the Supreme Administrative Courts expired, Prime Minister Chief of Staff Gergely Gulyás announced that the setting up of administrative courts would be "indefinitely postponed".²⁰ On the same day, the Government tabled Bill T/6295 on "postponing the entry into force of the law on administrative courts" ("the Postponement Law") in Parliament. On 2 July 2019 Parliament adopted the Postponement Law, and it entered into force on 9 July 2019 as Act LXI of 2019.²¹

On May 31 2019, although he would have been obliged by the existing law to nominate the President of the Supreme Administrative Court, President Áder informed the Speaker of the House that "in the absence of any suitable candidate" he would refrain from doing so.²² Hence, the President followed the request of the government rather than comply with his legal obligation, which raises serious questions about the prospective independence of all actors, should the Government decide to relaunch the administrative court project

The hasty adoption of the Postponement Law on 2 July 2019 is a signal of a quickly made decision that lacked consultation with affected parties and undermines legal certainty, as now it remains fully unclear if and when the public administrative court system will ever enter into force. The government has not made any publicly available statement to date about new plans regarding the public administrative courts.

¹⁵ "Hungary: more needs to be done to bring legislation on administrative courts in line with international standards, UN Expert says", available: <https://www.ohchr.org/Documents/Issues/Judiciary/InfoNoteHungary8Apr2019.docx>.

¹⁶ "An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts", available: <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>.

¹⁷ CDL-AD(2019)004, Opinion no. 943/2018, available: [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), para. 113.

¹⁸ The case details are available at (in Hungarian): <http://public.mkab.hu/dev/dontesek.nsf/0/1FEF3A097A029452C1258398005F4FA2?OpenDocument>.

¹⁹ Case II/242/2019. Available (in Hungarian): https://alkotmanybirosag.hu/uploads/2019/06/sz_ii_242_2019.pdf.

²⁰ "Hungarian Government Postpones The Introduction Of Administrative Courts Due To International Pressure", available: https://index.hu/english/2019/06/03/administrative_courts_postponed_hungary_fidesz_government_eu_epp/.

²¹ Act LXI of 2019 on the postponing of the entry into force of the laws on the public administrative courts was promulgated in the Official Journal on 8 July 2019 and entered into force on 9 July 2019.

²² https://www.keh.hu/pic/upload/files/20190531_level_hazelnoknek.pdf

Despite the adoption of the Postponement Law, there are signs that the government will eventually aim to introduce the administrative courts. In July, the Speaker of Parliament, László Kövér told a radio news channel²³ that the postponement is only temporary and when “the time is ready” the Parliament will relaunch the Act. In July, the Deputy Minister of Justice confirmed in an interview²⁴ that the revision of the Fundamental Law is on its way and it may affect the area of courts and prosecution among others.

Furthermore, the Fundamental Law of Hungary as amended in June 2018 remains unchanged and still obliges the state to establish administrative courts in the future. Article 25(1) sets out that “Courts are ordinary and administrative courts.” Article 25(3) adds that “administrative courts decide administrative disputes and cases referred to in laws. The highest authority of administrative courts is the Supreme Administrative Court”.²⁵ For this reason, the Government is obliged by law to establish administrative courts, otherwise, it would violate a constitutional obligation. Thus, it is believed that “postponing” the introduction of the administrative court system will not mean that the Government has given up on setting up special courts with less oversight and increased risk of political interference.

If the Fundamental Law remains unchanged and administrative courts are not established for a longer time, the Constitutional Court has the power to find a violation of the Fundamental Law and order Parliament to set up the administrative courts.²⁶ While this is not likely to happen in the near future, in the long run, either the Fundamental Law must be amended, or administrative courts must be established in a way that fully meets the requirement of legal certainty. In order to fully restore the independence of the judiciary in administrative matters, we recommend to Hungary that it amends the Fundamental Law and deletes the provisions on administrative courts.

To address the concerns, 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 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;

²³ Index.hu report, available: https://index.hu/english/2019/07/10/laszlo_kover_administrative_courts_rule_of_law/

²⁴ Index.hu report, available: https://index.hu/english/2019/07/03/viktor_orban_constitutional_overhaul_hungary_fidesz_budapest_municipal_elections_istvan_tarlos/

²⁵ The Fundamental Law (in Hungarian) is available: <https://net.jogtar.hu/jogszabaly?docid=A1100425.ATV>.

²⁶ The Constitutional Court has the power to find a “constitutional omission” and set a deadline for Parliament to fulfil its obligation [Article 46(1) of Law CLI of 2011 on the Constitutional Court]. This is possible regardless of Article 27-28 of the Closing and Miscellaneous Provisions of the Fundamental Law which allows for a transition.

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.
3. Support the monitoring or jointly with the Hungarian judiciary and authorities undertake the monitoring of administrative justice in Hungary according to the OSCE/ODIHR Handbook for Monitoring Administrative Justice²⁷ to determine whether the current system of administrative justice is in line with Hungary's OSCE commitments, and eventually the areas for further development.

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 should the governing majority move ahead with setting up the new administrative court system.

²⁷ OSCE/ODIHR: Handbook for Monitoring Administrative Justice, available: <https://www.osce.org/albania/105271?download=true>