HUNGARIAN HELSINKI COMMITTEE

TRANSPARENCY INTERNATIONAL HUNGARY

A SAURON'S EYE IN THE HUNGARIAN JUSTICE SYSTEM

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EXECUTIVE SUMMARY

Less than a year after taking remarkable steps to strengthen the independence of courts to gain access to frozen union funds, **the Hungarian government is back again on its decade-long agenda to dismantle the system of checks and balances and undermine the independence of the justice system. In breach of the *non-regression principle* established by the Court of Justice of the European Union (CJEU) under Article 19(1) TEU,** that precludes the adoption of laws on the organisation of justice which constitute a reduction of the protection of the rule of law and guarantees of judicial independence, **a new law** passed by the Hungarian Parliament in April 2024 **eradicates the organisational independence of courts and the prosecution service at a crucial point**. Act XVII of 2024 on the Amendment of Laws related to Justice Matters grants the Minister of Justice (MoJ) unlimited access to decisions delivered by the judiciary, the prosecution service and other autonomous state bodies and government agencies mandated to limit and independently review the exercise of public powers. **This possibility** - like Sauron's eye - **allows the government to acquire protected information to which it would not have access otherwise, interfere in ongoing processes and influence their outcome**. In some cases, the mere possibility of having access to decisions may suffice to influence the outcome of the procedures, in other cases, the government can interfere by immediate law-making. As usual, the Hungarian government used instrumental law-making as a tool and remains technical in reaching its goal of bending independent institutions to its needs. While the new provisions might seem as legal nuances, their detrimental consequences to the independence of the justice system are wide-ranging and severe. The new law is not only a clear response to the judicial reform, but it can also be translated as a reaction to the biggest corruption scandal of the past years (the Schadl-Völner case that has raised the strong suspicion of direct high-level government involvement in a very serious corruption case), providing the executive with tools to prevent effective investigation in similarly high-profile corruption cases in the future.[1]

INTRODUCTION

On 30 April 2024, the Hungarian Parliament adopted Act XVII of 2024 on the Amendment of Laws related to Justice Matters (**Omnibus Act**).[2] With effect from 9 July 2024,[3] the Omnibus Act introduced new provisions modifying Act CLXI of 2011 on the Organisation and Administration of Courts (**OAC**) and Act CLXIII of 2011 on the Prosecution Service (**PSA**). The new provisions grant the MoJ unlimited access to final and binding or conclusive court decisions[4] and decisions taken by the Prosecution Service (**PS**) as well as decisions of investigating agencies.[5] It is important to see that access is not

[1] Transparency International Hungary and the Hungarian Helsinki Committee are responsible for the content of the present legal analysis. K-Monitor Hungary contributed to its preparation by adding valuable insights on the matter.

[2] The Omnibus Act was published in the National Gazette on 9 May 2024. https://magyarkozlony.hu/dokumentumok/25a7a6393a6ca57fb2dc83882ebc11d2e88e85b9/megtekintes

[3] According to Section 102 (5) the provisions relevant to the present paper (subsections 15 and 17) should enter into force on the 61st day after the publication of the law in the National Gazette.

[4] Section 53 of the Omnibus Act supplements Section 76 (8) of the OAC with the following provision: *„In the exercise of its tasks to provide information, the NOJ President* [the President of the National Office for the Judiciary] *should […] g) upon request of the Minister of Justice for the purposes of preparing legislation and examining the effective application of laws, make available to the Minister of Justice the final or conclusive judicial decisions delivered within the scope of the subject matter specified in the request in a form that does not allow identification* [of the persons concerned] *together with the decision taken by courts, other public authorities or other bodies that has been overruled or revised by the final or conclusive judicial decision."*

[5] Section 70 of the Omnibus Act supplements the PSA with a new Section 37/A: *"The Prosecutor General should upon request of the Minister of Justice for the purposes of preparing legislation and examining the effective application of laws, make available to the Minister of Justice the decisions of the prosecution service, the indictment, and all decisions of the prosecution service, other authorities and other bodies that*

only granted to final and binding (in Hungarian *'jogerős'*) court decisions but to all conclusive (in Hungarian *'végleges'*) court decisions, which settle a particular matter in a decisive manner without finally shutting up the whole legal dispute.[6] The newly inserted sections are twin provisions allowing the MoJ unlimited access to court decisions and decisions of the prosecution service, and through both, to decisions of any other autonomous authority and state organ.

I. THE CONTEXT

In order to understand the possible effects of the modifications – which at first sight might seem to be insignificant legal nuances – it is important to take into account the context within which the modifications were adopted: (i) the fact that judicial independence was strengthened by the adoption of a judicial reform to access frozen union funds [see Section I.1. below]; (ii) the Hungarian government's well-established practice and declared policy to "over-legislate" decisions of ordinary courts to achieve its political will at courts [see Section I.2. below]; (iii) the limitlessly renewable state of danger that allows the Hungarian government to rule by decree and override basically any act of Parliament through emergency government decrees [see Section I.3. below]; (iv) the high-profile corruption case that reached the government not only putting on the dock a former deputy Minister of Justice but also raising serious questions regarding several ministers and causing severe political consequences [see Section I.4. below].

I.1. The judicial reform of 2023

One year ago, in May 2023, the Hungarian Parliament adopted Act X of 2023 on the Amendment of Certain Laws on Justice Matters related to the Hungarian Recovery and Resilience Plan (Judicial Reform), which entered into force on 1 June 2023. The Judicial Reform strengthened the supervisory functions within the court system and the organisational independence of the judiciary. It was a vital first step toward restoring the independence of the judiciary and widely seen as a solid foundation for reconstructing an independent judicial system in Hungary after more than a decade of persisting attacks against the judiciary.[7] While with one hand the Hungarian government worked on the implementation of the reforms tied to union funds, with the other hand, it started to look for new ways to control independent judges. The foundations of the government's political narrative were outlined barely one month after the entry into force of the Judicial Reform by the Kúria President. On 3 July 2023, in a radio interview András Zs. Varga criticised the Judicial Reform claiming that it was externally driven and forced on Hungarians, inapplicable, causing legal instability in the operation of the Kúria and was ultimately *"ordered"* to petrify the Hungarian judicial system.[8] According to this new political narrative, the sovereignty of Hungary needs to be protected against the actors requiring the country to adopt the Judicial Reform.

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has been overruled or revised by the decision of the prosecution service which is not open for further appeal and taken in criminal proceedings terminated by a final and binding court decision, or a final non-conclusive court order, or a decision by the prosecution service or the investigating authority which is not open for further appeal delivered within the scope of the subject matter specified in the request in a form that does not allow identification [of the persons concerned].

[6] Conclusive court decisions include for example the decision of criminal courts on ordering a closed hearing, appointment of a defence lawyer, disqualification of a judge or other court orders, such as decisions on secret information gathering or use of covert means.

[7] [...] https://helsinki.hu/en/assessment-of-hungarys-judicial-reforms/

[8] See the radio interview 'The Forced Judicial Reform and the Kúria' of 3 July 2023 on InfoRádió with the Kúria President at https://www.youtube.com/watch?v=EspkKuhO4Zo

I.2. Systematic overruling as the Government's response to the Judicial Reform

On 3 July 2023, the same day when the Kúria President publicly criticised the Judicial Reform, Bence Tuzson was heard before the Justice Committee of the Parliament for the position of MoJ. At his hearing, he emphasised that as MoJ he would consider the protection of sovereignty to be one of his most important tasks. He claimed that Hungary is under constant pressure through the regulations of the European Union and that he wishes to defend and strengthen Hungarian interests in the field of legislation. In his opinion, while judicial independence must be guaranteed, the jurisprudence must be monitored continuously. It should be examined whether judicial decisions align with the legislator's original intentions, and where they do not, the legislator should intervene.[9] For the above reasons, he claimed that the MoJ will pay attention to the content of the judgments delivered by Hungarian courts and *"if the judgments do not serve the interests of Hungarian citizens and institutions"* the MoJ will amend the legislation.[10] **This way, as a response to the Judicial Reform, the Government declared as a political program the close monitoring of final and binding decisions of ordinary courts and the tightened control of the content of judicial (and prosecutorial) decision-making.[11]**

The Hungarian government has a long track record of exerting undue pressure on the judiciary to enforce its political will against the decisions of independent courts.[12] Illustrative examples from recent years for this exercise include cases where the Hungarian government (and the governing majority)

(i) **put under pressure judges in cases pending before them by excessive public criticism of judicial acts and decisions** (an illustrative example of that was the pressure exerted on judges in the criminal proceeding initiated with respect to the toxic red sludge spillage, an industrial disaster of national significance causing the death of ten persons); [13]

(ii) **used its parliamentary majority to "over-legislate" unfavourable court decisions in politically sensitive cases** (an illustrative example of that was the well-known Gyöngyöspata case in 2020, where the Prime Minister publicly put the Kúria under pressure questioning the "justness" of the second-instance judgment which granted non-pecuniary compensation to Roma victims of educational segregation while the procedure was still pending before the Kúria, and after the Kúria

[9] See: https://telex.hu/belfold/2023/07/03/tuzson-bence-igazsagugyi-miniszterjelolti-meghallgatas-parlament
[10] See: https://444.hu/2023/07/03/tuzson-bence-mar-a-miniszterjelolti-meghallgatasan-nyomas-ala-helyezte-a-birosagokat
[11] As a first example of threatening courts with "over-legislating" a final and binding judgment was a case, where a transgender woman's right to pension after 40 years of employment was acknowledged by the court. Ruling party politician Gabriella Selmeczi claimed the ruling to be proof of the LGBTQ propaganda in Hungary and a provocation against the legislature and envisaged the modification of the law. Ten days later, a draft law was submitted to the Parliament, excluding the possibility of trans women's right to pension after 40 years. According to the explanatory memorandum attached to the draft law, *"the amendment clarifies what the legislator's original intention was, and what had not been in doubt under common sense until now: that the 'women 40' preferential pension entitlement is for those who have worked as women for 40 years […] The Fundamental Law clearly states that Hungary takes into account the sex at birth, so it is not possible to take into account any change contrary to biological determination, but even in countries other than Hungary, which allow gender reassignment almost at will, it is inconceivable that an entitlement which recognises the prominent role played by women in society could be abused by those who, after 39 years of employment as men, suddenly feel themselves to be women."* The draft law was drawn up to be applicable with immediate effect, also in pending cases ensuring that the merit of the decision of ordinary courts is overturned.
[12] See: https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/HHC_Non-Execution_of_Court_Judgments_2021.pdf p. 20.
[13] https://helsinki.hu/wp-content/uploads/HHC_Hun_Gov_undue_influence_judiciary_29072020.pdf p. 3.

upheld the second-instance judgment, the legislation was amended to exclude the possibility of granting pecuniary compensation for victims of educational segregation in any future case);[14]

(iii) **abused its regulatory power to "over-legislate" court precedents that were unfavourable for state organs and state-owned enterprises in access to information cases** (an illustrative example of this practice was the adoption of an omnibus law in December 2023, which introduced new legal grounds to refuse freedom of information requests, enabling possessors of public interest information *inter alia* to turn down requests for information not directly held by them, but by their subordinate entities, although based on previous practice, the requested data had to be collected in such cases.[15]

(iv) **abused its rule-by-decree powers under the state of danger to directly interfere with ongoing judicial proceedings** (an illustrative example of that was the curbing of teachers' right to strike in the middle of an ongoing court case, by passing an emergency decree preventing teachers' unions from seeking meaningful judicial remedy: after the decree was adopted, the court could only conclude that since the level of necessary minimum services had been determined in a government decree, it was not any more in the position to decide on the issue otherwise.)[16]

The new provisions adopted are the technical elements built in the legislation that create a new mechanism enabling the Government to elevate the possibility of Governmental intervention in court proceedings to a systematic level.

I.3. Rule by decree system

The intention of the Hungarian government to monitor and control the content of decisions of courts and the prosecution service is particularly concerning in light of the fact that for over four years the Government has been holding a carte blanche mandate to override any Act of Parliament via emergency government decrees under a state of danger.[17] As also criticised by the European Commission, the Government has been using its emergency powers "extensively", [18] and in an abusive manner, for purposes not related to the ground for the state of danger (previously the pandemic, presently the war).[19] **The continuous monitoring of the decisions of independent institutions is particularly concerning in light of the rule-by-decree system which allows the**

[14] See the description of the case in detail:
https://helsinki.hu/wp-content/uploads/Assessment_NHRI_Hungary_18022021_HHC.pdf
section 4.2 page 12.
[15] https://k.blog.hu/2024/01/18/a_birosagok_donteseit_felulirva_szukiti_az_atlathatosagot_a_kormany
[16] https://helsinki.hu/en/wp-content/uploads/sites/2/2023/03/HHC_Hungary_teachers_23032023.pdf Another shocking example for the abuse of the rule-by-decree power of the Government was the Kartonpack case https://helsinki.hu/wp-content/uploads/HHC_Update_on_military_supervision_of_private_companies_under_COVID-19_26062020.pdf p. 6.
[17] Since the spring of 2020, the Government has been holding excessive powers under the "state of danger", a special legal order regime allowing the Government to rule by decree. While at first the pandemic served as a reason to maintain the "rule by decree" system, lately the war in Ukraine has been used as a pretext for keeping the excessive emergency powers. For a full overview, see: Hungarian Helsinki Committee, Overview of Hungary's Emergency Regimes Introduced due to the COVID-19 Pandemic. Update of 1 June 2022, https://helsinki.hu/en/wpcontent/uploads/sites/2/2022/06/HHC_Hungary_emergency_measures_overview_01062022.pdf
[18] European Commission, 2022 Rule of Law Report – Country Chapter on the rule of law situation in Hungary, https://commission.europa.eu/system/files/2022-07/40_1_193993_coun_chap_hungary_en.pdf, p. 25.
[19] For details about the main concerns regarding the state of danger, the current legal framework and its evolution, further examples of the inappropriate use of emergency government decrees, and recommendations to remedy shortcomings, see: Hungarian Helsinki Committee, Government gains excessive powers from forever renewable state of danger, 24 February 2023, https://helsinki.hu/en/wp-content/uploads/sites/2/2023/02/HHC_Hungary_state_of_danger_24022023.pdf.

Government to abuse its powers and interfere with judicial decisions, even in proceedings pending before courts. This means that the Government can directly and with immediate effect overturn (or create a legal basis to modify) judicial decisions by a decree adopted under the state of danger.

I.4. High-profile corruption case reaching the Government

The new legislation can also be interpreted as a reaction to the biggest corruption scandal of past years, the Schadl-Völner case which points to very high-level government involvement[20] (and also reached leaders of the judiciary),[21] not only putting on the dock a former deputy MoJ Pál Völner, but raising serious questions regarding several ministers (including former MoJ Judit Varga and the Minister Leading the Cabinet of the Prime Minister, Antal Rogán) and causing severe political consequences to the ruling majority. In March 2024, immediately before the adoption of the new legislation that allows access for the government to decisions of courts and the prosecution service, a recording was released by Péter Magyar,[22] the ex-husband of former MoJ Judit Varga, which – in the interpretation of Magyar – proves that the government was aware of the secret surveillance ordered in the Schadl-Völner case as part of the investigation even before the case became public, and Völner was also informed about it. Magyar also claimed that people from the Prime Minister's Cabinet had allegedly visited the prosecutor's office in an attempt to manipulate evidence or to instruct the prosecution service to remove or delete things from the documents. In the recording published by Magyar, former MoJ Varga claims with respect to the whole Schadl-Völner case that "*This clearly shows that this could happen because Polt* [the Prosecutor General] *is not in control of the situation within the prosecutor's office."*[23] Varga also confirms in the recording that the secret surveillance went on even after the people of Rogán had looked through the documents, piling up evidence that could not be removed any more from the investigation documents.

At the time of assessing the relevance of the legal provisions allowing the Government to have unlimited access to decisions of courts and the prosecution service, the Schadl-Völner case and its consequences to the Government should also be taken into consideration along with the fact that – as pointed out by former MoJ in the recording revealed – the case unfolded as a consequence of decisions of the prosecution service and the judiciary allowing the investigative authorities to generate evidence in the case. **It is clear that if the MoJ gains full access to decisions delivered within the wider judicial system, it will provide the Government with the possibility of gaining – in a procedurally lawful way – access to up-to-date information on decisions related to high-profile corruption cases (for example to the court decisions allowing for the application of secret surveillance tools against high-level officials of the executive), impeding the effective investigation in similar corruption cases.**

[20] Telex: The biggest corruption case of recent times in Hungary: the Schadl-Völner case
[21] https://helsinki.hu/en/the-schadl-volner-case-and-the-battered-independence-of-hungarian-courts/
[22] https://telex.hu/english/2024/03/26/damning-recording-about-orbans-right-hand-man-trying-to-cover-up-involvement-in-corruption-published-by-former-justice-ministers-ex-husband
[23] See the recording published with English subtitles here: https://www.youtube.com/watch?v=pO5e8s7-omA&t=5s

Gaining access to court documents without authorisation is otherwise a criminal act punishable by the Criminal Code (illicit data acquisition),[24] as also established by Hungarian courts in a case concerning a judicial staff who worked at a rural court as a cleaning staff, where she repeatedly accessed and copied court documents without authorisation. According to the final and binding judgment, *"the act is particularly capable of undermining public confidence in the functioning of the courts, as* ***persons involved in criminal or civil proceedings at courts have a legitimate expectation that their data and case information should not be accessed by unauthorised persons****, either out of mere curiosity or for other unknown purposes so that their case and personal data are inaccessible to unauthorised persons in the courts."* The case is also of particular interest, because after the judicial staff was sentenced to 1 year and 10 months in prison in 2022, the President of the Republic, Katalin Novák granted her pardon in 2023, for non-transparent reasons.[25]

II. THE GOVERNMENT'S UNLIMITED ACCESS TO COURT DECISIONS

II.1. Legal evaluation of the provisions granting access to court decisions

Below, we briefly evaluate the adopted legislation explaining why the new provisions (i) are unnecessary, (ii) disproportionate, (iii) undermine the system of checks and balances, (iv) violate the independence of the judiciary, and (v) allow the government to exert control over the content of decisions of courts, the prosecution service and other autonomous state bodies and the outcome of their proceedings.

For the reasons below, the Omnibus Act is in clear breach of the non-regression principle established by the CJEU under Article 2 and 19(1) TEU, which requires member states to refrain from adopting rules which undermine the protection of the rule of law and the independence of the judiciary.[26]

ad (i) The new provisions are unnecessary for their legislative purpose

Under the new Section 76 (8) point g) of the OAC, the NOJ President must, upon request of the MoJ, make available requested decisions of ordinary courts to the MoJ *"for the purposes of preparing legislation and examining the effective application of laws."*

This declared legislative purpose, however, is already fully covered by pre-existing current legislation. Mechanisms are already in place to ensure that the MoJ has sufficient access to case law in a way that guarantees the transparency of court decisions and access to all information necessary for preparing legislation, and at the same time complies with the principle of the separation of powers, respects the independence of courts, protects personal data and the integrity of court proceedings and provides for a reasonable margin of professional dialogue between the judiciary and the government.

[24] Under Section 422 of Act X of 2012 on the Criminal Code. See the final and binding judgment of the Kaposvár District Court no. 10.B.251/2021/8., the order of the Kaposvár Court of Appeal no. 2.Bf.44/2022/8. and the Kúria Bfv.III.1.175/2022/10.

[25] https://telex.hu/belfold/2024/02/07/birosag-takarito-iratok-jogtalan-megismeres-novak-katalin-elnoki-kegyelem

[26] See: Judgment of 20 April 2021, Repubblika v Il-Prim Ministru, Case C-896/19, ECLI:EU:C:2021:311, paragraph 62-65.

Under the legislation currently in place, the NOJ President, in the exercise of its tasks to provide information must, at the request of the MoJ, *"order the courts to collect the data necessary for the preparation of legislation and for examining the effective application of the legislation"*[27] and provide information to the MoJ (if necessary, obtaining the opinion of courts) *"on matters related to the organisation and administration of the courts and the application of laws necessary for the drafting of legislation."*[28] The explanatory memorandum attached to the above two provisions confirms, that their aim is to ensure transparency of courts and the effective application of laws.[29] In addition to that, the Kúria President is assigned with the right to set up a group for the analysis of jurisprudence to look into problems arising in the application of certain legal provisions. The analysis of the working group should be based on a thorough evaluation of the jurisprudence of courts and can serve as a ground to initiate the modification of the laws at the MoJ.[30] Neither the explanatory document attached to the first draft of the Omnibus Act as introduced to the Parliament,[31] nor the explanatory memorandum attached to its finally adopted text published in the National Gazette[32] provides a reasonable explanation why the existing rules – which were adopted with the same legislative purpose – proved to be insufficient.

The purpose of the currently effective provisions is the same (*"preparing legislation and examining the effective application of the laws"*), but there is a remarkable difference between the two solutions: while the currently effective legislation entrusts the NOJ President with collecting the necessary data, allows the NOJ President to obtain the opinion of courts, leaving a certain room for professional dialogue in the matter without requiring unlimited access to court decisions, **the new provision practically downgrades the NOJ President to an extended hand of the executive to scan court documents, eliminating the possibility of the NOJ President to select the relevant data on behalf of the judiciary, take a stand and channel the opinion of courts towards the MoJ.** Although this new obligation is packaged as an obligation of the NOJ President to "inform", it goes far beyond a simple obligation to "inform": **the NOJ President is practically mandated to execute the requests of the MoJ with no further considerations**, tearing down the otherwise imperative walls between the judiciary and the executive, converting the NOJ President into a tool in the hands of the Government within courts.

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[27] Section 76 (8) point e) of the OAC.
[28] Section 76 (8) point f) of the OAC.
[29] According to the explanatory memorandum attached to Section 76 (8) points e) and f) of the OAC *"One important requirement for the functioning of the courts is to ensure transparency. In order to ensure that the courts themselves, the legislature and the public can follow the situation of the courts, their results, possible problems and the activities of the central administration, the NOJ President has a number of information obligations. […] In connection with this task, where data are required for the preparation of legislation and for the examination of the effective application of laws, the NOJ President should order the collection of relevant data at the request of the MoJ. In addition, the MoJ may, where necessary for the purposes of legislation, consult the NOJ President on matters relating to the organisation and administration of the courts and the application of the law, who shall provide the necessary information."*
[30] See Sections 29-30 of the OAC.
[31] https://cdn.kormany.hu/uploads/document/7/72/72c/72c04b93f7575546g2b28aa05a63dde6f38b019b.pdf
[32] According to the Explanatory Memorandum: *„For the effective performance of the Ministry of Justice's task under the Legislation Act to examine the effective application of laws, while respecting the protection of personal data, it is essential to know the decisions of law enforcement authorities and to carry out a comprehensive examination of the decisions of law enforcement authorities, in particular the judiciary. […] Chapter VI of Act CXXX of 2010 on Legislation obliges the Government to continuously review the legal system, in the framework of which the effectiveness of legislation must be monitored in the context of ex-post impact assessment and the review of the content of legislation. In many cases, it is essential to familiarise oneself with the decisions of the legal authorities and to examine the decisions of the legal authorities, in particular the judiciary, in order to assess the effective application of the legislation. In many cases, this is the only way to consider how the legislation is enforced and to understand the legal reasons for any changes that may be necessary in order to achieve the right result."* See: https://magyarkozlony.hu/dokumentumok/9564d18aff850a1fc68a4c224fe3b3f3b24bc88c/megtekintes p. 37.

ad (ii) The new provisions are disproportionate to the legislative purpose

Besides being unnecessary, the new provisions are also disproportionate for several reasons.

First, **the law does not limit the frequency, the scope or the subject of requests by the MoJ.** It grants unlimited power to the MoJ to access judges' final decisions with the only restriction of the obligation to anonymise them. The **lack of legal limits to this discretionary power opens the door to abusive application of the provision**. This is paired with a total lack of oversight or mechanisms to prevent, correct and sanction abusive application of the discretionary powers, allowing for arbitrariness without legal consequences. Both aspects (lack of legal limits to discretionary power and lack of meaningful oversight and control over discretionary power) contradict core principles of the rule of law which require protection against arbitrary application of laws and abuse of powers.[33] Possibilities of abusive application are endless: profiling judges, putting pressure on judges dealing with hand-picked high-profile cases, obtaining up-to-date information on the status of ongoing investigations, obstructing investigation in corruption cases where ruling party politicians are involved, obtaining sensitive personal information with respect to individuals [see the illustrative examples below under Section II.2.]

Second, **the law does not protect the integrity of court proceedings allowing the government to gain access to decisions delivered in pending cases**. The possibility to peek into ongoing proceedings not only puts judges under pressure but also provides a possibility to interfere with the proceedings by legislation (which, as already explained, can also be in the form of a government decree, even overruling legislative acts of Parliament). **The requirement that court decisions made available to the Government should be final, does not mean that these cannot be subject to modification during the course of the proceeding**. The majority of court decisions are procedural orders delivered in the course of the proceeding. Although these do not decide on the merit of the case, they can have a decisive impact on the outcome of the proceedings (e.g. interim measures ordered in property lawsuits, decisions delivered by the court in criminal cases before charges are brought, relating to e.g.: detention, witness protection measures or secret surveillance, etc.).

Third, the Government can have access to a disproportionate amount of personal information. The law does not protect the legitimate interests of parties and other persons (especially witnesses) involved in the proceeding when obliging the NOJ President to make available the requested court decisions in full (except for personal data). **Sharing court decisions in full will necessarily entail forwarding plenty of highly sensitive information to the executive which was shared for the purposes of an individual court proceeding and is otherwise protected by secrecy provisions.** Sharing full court decisions is completely unnecessary for the declared legislative purpose (assessing the effective application of a certain legal provision). The assessment of the effective application of laws can be carried out on the basis of only relevant parts of the decision. In contrast to that, the NOJ President is not only obliged to share the legal reasoning needed for such an assessment but will have to share all the relevant facts of the case, including sensitive data, information and evidence (for

[33] See The Rule of Law Checklist of the Venice Commission of the Council of Europe https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf
"It would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion and the manner of its exercise with sufficient clarity, to give the individual adequate protection against arbitrariness. (Malone, 2.8.1984, § 68)."

example statements of witnesses as summarised by the court decisions). The protection of personal information cannot be guaranteed by simply anonymising the decisions. Often, the facts and circumstances of the case make the persons involved identifiable even after the anonymization of the decision. A telling example is the decision delivered in the pardoning scandal, which was published anonymised, but still allowed the identification of the convict.[34] In order to guarantee the security and privacy of persons involved in a court case, the law should ensure that any element which could be used to identify the parties, third parties, witnesses, and even the judge or clerk dealing with the case is also concealed.

Fourth, while the access of the Government to court decisions is justified with the need for transparency, the transparency of the Government's powers is not ensured in any way. **The new provisions do not guarantee that parties to a case acquire information on whether the Government has had access to their case pending at courts**. Access to court decisions is also one-sided as the Government can look into court decisions that otherwise should not be available to third parties or the general public. Under the rules governing the publication of court decisions, the wider public gets access to only a restricted circle of court decisions.[35] Additionally, certain procedural rules provide for a higher level of protection of certain sensitive information, yet no legislative provisions guarantee the secrecy of decisions that contain such information against the request of the MoJ (e.g. it is not clear how the secrecy of court decisions delivered in court proceedings related to unlawful disclosure of business secrets is guaranteed and the legislation does not provide for the secrecy of court decisions delivered under specific rules governing closed court proceedings).

ad (iii) The new provisions undermine the system of checks and balances

While the new provisions might seem like technical nuances, they eradicate important institutional walls between two power branches: the executive and the judicial branches. As already explained above, the obligation of the NOJ President to provide court decisions is unconditional, which converts the NOJ President into an instrument in the hands of the Government to get unlimited insight into ongoing court proceedings. This unconditional obligation *de facto* **merges the two separate branches in an institutional manner, liquidating the institutional independence of the judiciary and allowing severe interference with the exercise of judicial functions**. **While formally the function of judicial decision-making remains the task of courts, the Government has up-to-date access to decisions and may interfere with ongoing proceedings by immediate effect law-making, reducing the judiciary to an irrelevant actor within the system of checks and balances.**

ad (iv) The new provisions violate the independence of the judiciary

The close observation (or, better said, secret surveillance) of the decision-making of courts – even in the absence of any direct intervention via legislation by the Government – undermines the

[34] https://vsquare.org/zoltan-balog-katalin-novak-pardon-hungary-church/ and https://444.hu/2024/02/02/novak-katalin-kegyelmet-adott-a-bicskei-gyerekotthon-pedofil-exigazgatojat-fedezo-buntarsnak

[35] Section 163 of the OAC expressly lists the type of decisions that can be published in the collection of court decisions. Exceptions include decisions in matrimonial proceedings, proceedings initiated to establish paternity and parentage, proceedings to terminate parental authority or proceedings for the taking into care of a child (if requested by any party that it not be published); as well as decisions in criminal proceedings based on an offence against sexual liberty and sexual morality (if the victim has not consented to disclosure in response to an invitation by the court to give consent).

independence of judges. According to international standards, *"judicial proceedings and matters concerning the administration of justice are of public interest. The right to information about judicial matters should, however, be exercised having regard to the limits imposed by judicial independence."*[36] *"Independence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch."*[37]

The legislation fails to provide guarantees for the protection of judges dealing with the case in which the Government exercises its newly created right to access (e.g. the obligation to remove the name of judges or clerks involved in the decision). **This way, the identity of the judges delivering the decision will be revealed as part of the information disclosed to the MoJ allowing the creation of profiles of judges with respect to their judicial decision-making** (evaluate, analyse, compare and predict their supposed professional practice). The possibility to profile judges might expose them to undue external influence even without concrete legislative interference and the possibility of sanctioning "wrong" judgments by administrative means.

ad (v) The new provisions allow the government to invalidate decisions of courts

As already explained above, the new legislation creates a high potential for the Government to invalidate judicial decisions, even in individual cases, contradicting international standards of judicial independence, according to which *"decisions of judges should not be subject to any revision other than appellate or re-opening proceedings, as provided for by law."*[38] **Independence protects judicial decision making from improper influence from outside the proceedings, including an intervention by legislation.** *"With the exception of decisions on amnesty, pardon or similar measures, the executive and the legislative powers should not take decisions which invalidate judicial decisions."*[39] Revision of decisions outside the legal framework, by the executive or legislative organs or by the administration, should not be allowed. This does not remove the power of the legislature to change existing laws or enact new ones which judges must then apply. **The administration and executive or legislative organs should not invalidate, in individual cases, decisions of judges**.[40] As established by the Court of Justice of the European Union (CJEU), *"the legal order of the Member State concerned must include guarantees capable of preventing any risk of such rules or decisions being used as a system of political control of the content of judicial decisions or as an instrument of pressure and intimidation against judges which could, inter alia, lead to an appearance of a lack of independence or impartiality on their part capable of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in individuals."*[41] It is clear that in its current form, the legislation does not include guarantees against the possibility of political control of the content of judicial decisions. While the practical application of the new provisions will be seen after the entry into force of the law, the below fictional "requests" by the MoJ provide an illustrative example of the possible abuse of the legislation.

[36] See: https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d

[37] See The Rule of Law Checklist of the Venice Commission of the Council of Europe https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf point 74.

[38] Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d para 16.

[39] Recommendation CM/Rec(2010)12 of the Commitee of Ministers to member states on judges: independence, efficiency and responsibilities
https://rm.coe.int/cmrec-2010-12-on-independence-efficiency-responsibilites-of-judges/16809f007d para 17.

[40] Explanatory memorandum para 25.

[41] See to that effect, judgment of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, EU:C:2021:393, paragraph 216).

II.2. Examples of possible abuse of the legislation

To illustrate the wide possibility of arbitrary application of the new provisions, below we compile scenarios for possible misuse of the new powers of the MoJ. Below we provide a list of fictional examples for the possible abuse of the new power gained by the MoJ.

- The MoJ can verify whether there is an investigation that may have an impact on someone who belongs to the government's inner circle by requesting the NOJ President to make available on a regular basis the decisions handed down by judges in the investigative phase of criminal proceedings (such as the application of covert means and secret surveillance tools[42], witness protection measures or the reopening of proceedings previously closed by the prosecution service. The MoJ can verify the application of covert tools of surveillance ordered against high-level government officials or other inner circle members (who, despite the anonymization of their names will necessarily be identifiable based on their positions) even in cases where the issuance of a warrant to employ tools of secret surveillance does not belong to the MoJ's competence.

- Effective investigation in high-profile cases of grand corruption and serious mismanagement can be hindered because if so requested by the MoJ, the NOJ President is obliged to simultaneously forward decisions taken by investigative judges, thus exposing potential evidence.

- The MoJ may profile judges by requesting the decisions of all judges dealing with the same case types, or may put pressure on handpicked individual judges and request all their decisions to closely monitor their work.

- The MoJ can gain sensitive information with respect to anyone by requesting decisions delivered in highly sensitive cases (e.g.: decisions in criminal proceedings based on an offence against sexual liberty and sexual morality, offences against a child, or court cases involving a minor, decisions that involve highly relevant business information or legally protected secrets).

III. THE GOVERNMENT'S UNLIMITED ACCESS TO DECISIONS OF THE PROSECTUION SERVICE

III.1. Legal evaluation of the provisions granting access to decisions of the prosecution service

The provisions granting access to the MoJ to final decisions of the prosecution service can be deemed as twin provisions to the ones related the judiciary, raising the same systematic problems already explained above. The MoJ can get access to prosecutorial decisions relating to criminal procedures that have been adjudicated by the court's final instance (1) or have been terminated by either a judicial decision that cannot be appealed against (2) or by a non-appealable decision by the prosecutor or by an investigating authority (3). Besides decisions of the prosecution service and letters of indictment, all other decisions, made by either a prosecutor or by any other state shall be shared with the MoJ on condition that such decisions have been reviewed by the prosecution service.

[42] The application of secret surveillance of an information system, secret search, secret surveillance of a locality, secret interception of a consignment, interception of communications ordered by the courts under Section 231 and 464 (3) of the Criminal Code.

Particular concerns results when access to decisions is granted to the MoJ in relation to criminal procedures terminated by the prosecutor or by an investigating authority, as in such cases the procedure can be reopened until the case is time-barred due to statute of limitation. A judicial decision to reopen previously terminated processes is only required if two conditions are conjunctively fulfilled: six months have elapsed from the termination (i) and charges were communicated to a suspect during the previously terminated process. This means that within six months of the termination, the prosecutor may decide on the reopening of previously terminated cases. It is particularly troublesome that the MoJ can get access to decisions of the prosecutor and of the investigating authorities generated in criminal processes that can be reopened without judicial intervention. This invokes the concern that the MoJ exerts political influence while reviewing decisions or can otherwise pressurise the prosecution service, which is prone to act leniently in politically sensitive cases, to relaunch the investigation in previously discontinued criminal cases.

Besides, granting the MoJ access to a wide range of decisions resulting from criminal proceedings that contain a plethora of highly sensitive personal information, which can potentially be extrapolated despite anonymisation, is particularly disquieting.

Another talkative nuance is that the Prosecutor General may only ask to negotiate with the MoJ in cases when fulfilling the request of access would result in disproportionate burden to the prosecution service. This means that the Prosecutor General may not oppose the MoJ's request and may not raise concerns except for the cumbersome nature of the request.

III.2. Examples of possible abuse of the legislation

In addition to the risk of exertion of political influence by the MoJ vis-á-vis the reopening of previously terminated criminal procedures, it is equally disturbing that the MoJ will have access to all decisions reviewed by the prosecutor in the case concerned. This may result in a situation where the MoJ learns about different kinds of information relating to for example the business interests of persons and entities involved in the previously terminated criminal procedure, or to their status of health. The more severe and unique the criminal offence for which the previously closed investigation had been started, the weaker is the chance that anonymisation will effectively prevent the identification of the persons or entities targeted. For instance, in high level cases of corruption, as well as in homicide and rape cases and in drug related offences, anonymisation will not suffice to exclude the identification of the supposed perpetrator and of the victim. Therefore, the continuous screening by the MoJ of terminated criminal processes and the almost unhindered access to highly sensitive information seems a reasonable yet alarming prospect.

The sheer fact that the MoJ has unlimited access to criminal dossiers is in itself a cause for serious concern, even if no political influence is exercised in order to restart previously terminated processes. For instance information relating to plea bargains included in decisions by the prosecution service will be shared by the MoJ, enabling a member of the government to reveal the informants and the types of information shared with the authorities in cases of grand corruption, which, by nature, are unique and therefore, anonymisation cannot exclude the identification of the story and the persons involved.

IV. OTHER REMARKS

IV.1. Critically low remuneration of judges jeopardises judicial independence

The Omnibus Act does not tackle the prolonged financial crisis of the judiciary caused by the critically low remuneration of judges and judicial staff. The current situation jeopardises judicial independence and the operability of courts.[43] Since June 2023, the National Judicial Council (NJC) and judicial associations have been urging the modification of laws for a salary raise, in vain.[44] The inactivity of the ruling majority is a clear political message towards the judiciary from the legislative and executive branches, in breach of the principle of separation of powers.[45] The situation clearly contradicts the Union law and the practice of the CJEU according to which the remuneration of judges is directly linked to judicial independence, it must be adequate and preclude exposing judges to the risk of inappropriate pressures and corruption.[46] The Hungarian legislation lacks proper guarantees for the financial security of judges.[47] To resolve the crisis, the salary base of judges should be raised with immediate effect and guarantees should be included in the law to protect judicial salaries against inflation, in accordance with the dignity of the judicial profession.

IV.2. Cementing five-member panels at the Kúria in the civil section of adjudication

The Omnibus Act introduces five-member panels in the civil section of adjudication at the Kúria.[48] Contrary to the recommendation of the Venice Commission, which advised *"to determine in the law itself what are the criteria for increasing to five the number of judges sitting in the panel for certain types of cases"*[49] the Omnibus Act establishes as a general rule the application of five-member panels. This modification not only legitimises the former practice of the Kúria President,[50] but also protects the increased number of judges at the Kúria against the general requirement within the judiciary to attach the number of judicial positions to the workload of different courts, giving more weight to the Kúria and the status of Kúria judges within the court system regardless of the actual workload.

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[43] While the annual inflation was over 24% in 2022 and over 17% in 2023, judicial salaries remained unchanged throughout the whole period. Under the current regime, a freshly appointed judge earns around a gross HUF 790,000 (approximately EUR 1,900). This amount cannot be in any way considered commensurate with the dignity of the profession and the burden of responsibilities of a judge, and this affects the operability of courts.

[44] See: https://24.hu/belfold/2024/05/02/europabol-kernek-haladektalan-fizetesemelest-a-magyar-biraknak/

[45] In Hungary, judicial salaries are determined by legislation. According to Article 66 of the Act LV of 2023 on the Central Budget, the salary base ("illetményalap") of judges is approximately gross HUF 560,000 (which approximately equals EUR 1,400). This amount serves as the basis for establishing the ground salary ("alapilletmény") of judges and judicial staff by applying a certain multiplier set out by law. The multiplier is established in accordance with the years spent in service as a judge. To this ground salary, further allowances ("pótlék") are added (also calculated on the basis of the salary base and a multiplier) depending on the court level and position where the judge serves.

[46] see: ASJP case,46 C-64/16: *"the receipt by those members of a level of remuneration commensurate with the importance of the functions they carry out constitutes a guarantee essential to judicial independence"* [para. 45]

[47] The law only contains one single guarantee according to which the salary base should be established on an annual basis by the Act on the Central Budget and the amount cannot be lower than the year before [Article 169(2) of Act CLXII of 2011 on the Legal Status and Remuneration of Judges].

[48] See Section 100 of the Omnibus Act which modifies Sections 9 (5) and 158 (3) of Act CXXX of 2016 on the Code of Civil Procedure.

[49] See Venice Commission, Opinion on the Amendments to the Act on the Organisation and Administration of the Courts and the Act on the Legal Status and Remuneration of Judges Adopted by the Hungarian Parliament in December 2020, CDL_AD(2021)036, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e# p. 7.

[50] As of 1 January 2021, the Kúria President was granted the power to raise the number of members of the adjudicating chambers of the Kúria from three to five, which also provided a pretext for increasing the number of judges within the Kúria and opening new positions to be filled in by the new Kúria President elected as of 1 January 2021. (At the time of the election of the current Kúria President in 2020, the number of posts at the Kúria was raised by 23% opening 21 new vacant positions). Until the adoption of the Omnibus Act, the number of judges sitting in panels was determined by the Kúria President. This solution was criticised by the Venice Commission for not meeting the requirement of a 'tribunal established by law'.