



HUNGARIAN
HELSINKI
COMMITTEE

RECOVERY AND RESILIENCE FOR JUDICIAL INDEPENDENCE IN HUNGARY

RECOMMENDATIONS FOR PROTECTING THE RULE OF LAW

18 July 2022

The [European Commission's 2022 Rule of Law Report](#), released on 13 July 2022, repeated the stark findings of previous years and found no progress as regards judicial independence in Hungary:

As regards judicial independence, concerns expressed in the context of the Article 7(1) TEU procedure initiated by the European Parliament, as well as in previous Rule of Law Reports, remain unaddressed. This is also the case for the relevant recommendation made under the European Semester. These concerns relate in particular to the challenges faced by the independent National Judicial Council in counter-balancing the powers of the President of the National Office for the Judiciary, the rules on electing the President of the Supreme Court, and the possibility of discretionary decisions as regards judicial appointments and promotions, case allocation as well as bonuses to judges and court executives.

Two out of the Commission's eight recommendations to Hungary in the 2022 Rule of Law Report focus on the independence of the judiciary:

Strengthen the role of the National Judicial Council, while safeguarding its independence, to effectively counterbalance the powers of the President of the National Office for the Judiciary.

Adapt the rules related to the Kúria to remove judicial appointments outside the normal procedure, to strengthen eligibility criteria for the Kúria President, and to strengthen control by judicial bodies over the Kúria President, taking into account European standards, and to remove the possibility of reviewing the necessity of preliminary references, in line with EU law requirements.

The ongoing negotiations between the Government of Hungary and the European Commission regarding the conditions for Hungary's access to the EU's Recovery and Resilience Facility as well as the conditionality procedure under the Regulation to protect the EU budget, triggered by the European Commission in April 2022, provide **an exceptional momentum to be seized to recover fundamental rule of law safeguards and build institutional resilience against further backsliding in Hungary**. The Hungarian Helsinki Committee proposes a set of concrete recommendations to this effect in the field of judicial independence.

Our recommendations:

1. Restore effective constitutional review of laws and the Constitutional Court's independence
 - 1.1. Change the rules for nominating and electing Constitutional Court judges
 - 1.2. Repeal the right to submit constitutional complaints by state agencies
2. Depoliticize and decentralize court administration powers
 - 2.1. Ensure that court management powers are not held by political appointees
 - 2.2. Strengthen the National Judicial Council
3. Remove unfettered discretionary powers with respect to judicial careers
 - 3.1. Establish effective supervision over administrative powers as regards the career of judges
 - 3.2. Abolish all appointments to judicial positions that circumvent ordinary application procedures
4. Fix deficiencies in the case allocation system and ensure the right to a tribunal established by law

Recommendation 1: Restore the effective constitutional review of laws and the Constitutional Court's independence

1.1. Change the rules for nominating and electing Constitutional Court judges

The independence of the Constitutional Court (CC) has been severely undermined in recent years. The governing Fidesz-KDNP coalition changed the long-established consensus-based process for nominating judges to the Constitutional Court to ensure that the governing parties, having a two-thirds majority in parliament, could fill vacancies on the bench on their own, without support from the opposition parties. The size of the CC was also increased, from 11 to 15 judges. As a result, of the 19 new justices who have been elected to the CC since 2010, only 4 judges needed the opposition's support in 2016 when Fidesz-KDNP had temporarily lost its parliamentary supermajority. The governing majority packed the CC with loyal judges, including their former MPs, and has transformed the CC into a loyal body that is supportive of the government's agenda.

- a) The rules for nominating and electing CC justices should be changed to a consensus-based process between governing and opposition parties.**
- b) Adequate conflict of interest rules should be introduced.**

1.2. Repeal the right to submit constitutional complaints by state agencies

Since December 2019, state and public authorities and bodies have the right to submit constitutional complaints to the CC against final and binding court decisions. Organisations exercising public authority may submit a constitutional complaint if, in their view, their fundamental rights enshrined in the Fundamental Law have been violated, or if their scope of competence has been unconstitutionally curtailed by a court decision. As a result of the amendment, constitutional complaints can be used not only to protect people's rights against state power but also to provide constitutional protection to public authorities in their lawsuits vis-à-vis individuals. Thus, the possibility for entities exercising public authority, such as the government itself, to bring cases before the CC opens a way for judgments delivered in politically sensitive cases to be overruled by the CC in a way that is favourable for the executive branch.

- a) Legal provisions allowing state/public authorities to submit a constitutional complaint against ordinary court decisions referring to the violation of their fundamental rights or their scope of competence should be repealed.**

Recommendation 2: Depoliticize and decentralize court administration powers

2.1. Ensure that court management powers are not held by political appointees

Court administration is highly centralized in Hungary. Management functions are concentrated in the hands of two powerful judicial leaders, the President of the National Office for the Judiciary (NOJ President) and the Kúria (Supreme Court) President, who are appointed by the governing majority. The judicial self-governing body (National Judicial Council, NJC) cannot counterbalance the powers of these judicial leaders or control the selection process for either of these positions. In fact, their opinion rejecting the current Kúria President has been fully disregarded. Appointees are nominated by the head of state and elected by a qualified majority of the Parliament for a period of nine years. Their mandate does not expire with the statutory retirement age of judges and the Kúria President can remain in office after the expiry of his/her term by the decision of one-third of MPs.

- a) The selection and election of the NOJ President and the Kúria President should require the consent of the National Judicial Council.**
- b) The term of office of the NOJ President and the Kúria President should also end when they reach the statutory retirement age of judges.**
- c) The possibility for the Kúria President to remain in office after the expiry of his/her mandate should be removed.**
- d) The National Judicial Council should have the right to initiate the disqualification from the office of the Kúria President.**

2.2. Strengthen the National Judicial Council

The National Judicial Council is a constitutional body mandated to supervise the central administration of courts. Assigned with this task, the NJC must be capable to monitor and supervise the activities of the NOJ President and the Kúria President. While the Fundamental Law requires that the NJC should supervise the administration of courts, this may only be considered legitimate when the law allows for the NJC to properly exercise its supervisory functions. However, the legislation has serious deficiencies that prevent the NJC from fulfilling its constitutional role, and at the same time, it raises serious doubts about the legitimacy of decisions taken by the Presidents of the NOJ or the Kúria. Recommendations to remedy the systemic problems that obstruct the effective operation of the NJC have not been addressed.

- a) **The NJC should be granted legal personality, greater budgetary autonomy, an independent apparatus, and more resources.**
- b) **The NJC should have the power to propose legislation and should be consulted before laws concerning the judiciary are adopted.**
- c) **The NJC should have broader powers and tools to take the necessary measures if the NOJ President or the Kúria President fail to carry out their statutory duties or follow an unlawful practice despite the notice made by the NJC about the irregularities.**
- d) **NJC members elected by the judges themselves should constitute the majority of NJC members. The president of the NJC should be elected by and from among its members.**

Recommendation 3: Remove unfettered discretionary powers with respect to judicial careers

3.1. Establish effective supervision over administrative powers as regards the career of judges

The administrative leaders of the Hungarian judiciary are vested with excessively wide discretionary powers in many areas, most importantly, as regards decisions about judges' careers. The NOJ President and the Kúria President have full discretion to decide to render any call for appointments for judicial or judicial leadership positions unsuccessful without the consent of any judicial body; to publish a call for applications for judicial posts or leave it vacant; to fill a judicial post by secondment; to select judges who can hear administrative cases; and to award salary bonuses without clear criteria set out by law as to its basis. These very wide discretionary powers are not limited by clear criteria and cannot be supervised by judicial self-governing bodies. The long track record of the abusive application of powers by the NOJ President, and most recently also by the Kúria President, signals that the regulatory environment governing the appointment and promotion of judges is prone to abuse.

- a) **Provisions allowing the NOJ President/the Kúria President to annul calls and render application procedures for judicial positions unsuccessful without the consent of any judicial body should be repealed.**
- b) **The NOJ President should be obliged by law to publish a call for applications for vacant judicial posts within a brief fixed term after the post has been vacated.**
- c) **The NOJ President's right to second judges should be limited by law and supervised by the NJC. The legislation should set objective criteria justifying the applied legal grounds of secondment with respect to the selection of judges to be seconded, the direction and grade of secondment, and the period of secondment to ensure that the NOJ President may not exercise their discretionary powers in an abusive manner.**
- d) **The NOJ President and the Kúria President should not have the right to assign judges dealing with administrative cases and to unilaterally withdraw the assignment. Administrative judges should be selected and appointed in the same manner as judges of other (civil or criminal) judicial sections**
- e) **Administrative judicial leaders should not have the right to award discretionary bonuses to judges. The NJC's powers should extend to all questions related to the remuneration of judges.**
- f) **The NJC should be empowered to effectively exercise its supervisory powers over the decisions of NOJ President/the Kúria President as regards judicial appointments and promotions, including the right to challenge the decisions of the NOJ President/the Kúria President in court.**

3.2. Abolish all appointments to judicial positions that circumvent ordinary application procedures

As a rule, judicial appointments should be granted in the framework of an appointment procedure. Nevertheless, the law permits a wide range of exceptions from a public appointment procedure. The list of circumstances under which an individual may obtain a judicial appointment without an application procedure includes cases where the judicial appointment should be granted merely upon the request of the person concerned. As a result of a recently introduced and politically motivated change, the members of the Constitutional Court will be automatically appointed to the Kúria at their own request once their mandate as CC judges ends (including when they resign). Furthermore, a wide range of other legal grounds for judicial appointments without an application procedure can lead to permanent transfers from one court or one judicial position to another. The NOJ President has full discretion to award higher positions within the ordinary court system without an application procedure for judges who had been previously mandated to fulfil specific temporary assignments.

- a) All avenues of appointments to judicial positions that circumvent the ordinary application procedure, including the possibility of Constitutional Court members to obtain an appointment to the Kúria at their request, should be abolished.**
- b) Involuntary secondments should be abolished.**
- c) The discretionary power of the NOJ President to award higher judicial positions to judges previously mandated with specific assignments should be abolished.**

Recommendation 4: Remedy deficiencies in the case allocation system and ensure the right to a tribunal established by law

The system and practice of case allocations is essential for safeguarding the impartiality and transparency of court decisions and the right to a tribunal established by law. However, the legal framework of the judicial case allocation system is seriously deficient with respect to guarantees against undue intervention. As the European Council's [2022 European Semester Report's Country Specific Recommendations for Hungary](#) stated, "[t]he lack of transparency of the case allocation scheme does not allow parties to verify whether any undue discretion has been applied".

Despite the ongoing digitalisation of court procedures, the process of case allocation is neither digitalised, nor automated, and is still reliant on direct human intervention. Case allocation is carried out by judicial leaders without any effective supervision by judicial self-governing bodies. The general rules on case allocation are too vague to sufficiently delimit the decisions of court presidents, who have full discretion to establish the case allocation scheme. The case allocation scheme can be changed without time limits, as a recent legal change removed an important safeguard prescribing a fixed one-year term for such schemes. The process of adopting or modifying the case allocation scheme is not regulated by law; procedural rules concerning the modification process fail to provide sufficient safeguards against manipulative changes. The legal framework allows for a variety of exceptions without establishing guarantees against their inappropriate application. In addition, these rules permit the simultaneous application of various parallel grounds of case allocation, which results in a complicated and non-transparent matrix of competitive grounds, granting wide discretion in the final decision. Finally, parties to a particular court proceeding cannot verify whether the case allocation scheme had been properly applied or whether there was a derogation from it, hence derogations from the scheme cannot be effectively challenged.

- a) The case allocation system should be automated and based on transparent grounds.**
- b) Rules relating to the allocation of cases should be defined for a fixed time in a process involving judicial self-governing bodies.**
- c) Any changes to the case allocation scheme or exceptions it allows should be objectively justifiable and transparent.**
- d) Parties to a case should be informed of and allowed to challenge derogations from the case allocation scheme.**