



# Attacking the Last Line of Defence

Judicial Independence in Hungary in Jeopardy



**Hungarian Helsinki Committee**

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## EXECUTIVE SUMMARY

A new draft legislative package that limits judicial independence and restricts the freedom of judges to interpret the law is a serious threat to the rule of law in Hungary and runs counter to values Hungary signed up to when it joined the European Union. If amendments to the Fundamental Law are passed by Parliament on 20 June, a new court that may be dominated by judges arriving from the state's public administration will rule on cases involving elections, taxes and public procurement, among many other key issues. Its head will be a political appointee selected by Parliament. Unless European institutions challenge the Hungarian government's campaign of centralizing power over the judiciary, the rule of law will be deeply undermined.

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 early May, Prime Minister Viktor Orbán attacked a decision by Hungary's highest court on an election-related matter: "The Kúria has clearly and seriously interfered in the elections", he said on 5 May via his press officer. "After reading the decision of the Constitutional Court, it is obvious that the Kúria was not intellectually up to this task." This was the opening shot for a renewed assault on the rule of law.

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, may have precedents in the constitutional orders of other European jurisdictions. The Hungarian government, however, has a track record of reengineering of 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 powers to review the constitutionality of laws, by packing the Court with supporters, and by curbing the powers of judicial self-administration. Now, a set of new constitutional amendments, Bill T/332, is scheduled for a final vote in Parliament by 20 June 2018. As in earlier cases, the government has given no genuine explanation as to why changes to the court system are needed. Once the constitutional amendment is passed, judicial independence in Hungary will be critically weakened, if not mortally wounded. 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 [previously](#) documented.

The changes will expand government control over courts that up to now have been one of

the last bastions of the rule of law in Hungary, despite their many shortcomings. Judges have exercised largely impartial and independent decision-making at the level of individual cases, resisting both political interference and pressure from an overly centralised judicial administration.

The boundaries between executive and judicial power in Hungary will be blurred through constitutional changes, which the government submitted to Parliament on 29 May 2018 and which are expected to be adopted by 20 June 2018. Bill T/332 proposes splitting the current 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 deal with all legal disputes about decisions taken by Hungary's public administration, which because of the fully centralised power in the judicial administrative system makes the judiciary even more vulnerable to political interference.

The Administrative High Court 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, 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.

Bill T/332 also undermines the separation of powers and limits the freedom of judges to interpret the law. Under the bill, the starting point in interpreting the law will have to be the reasoning attached to legislative proposals. These reasonings are often nothing but political statements that neglect to explain the necessity, rationale and effectiveness of the policy option proposed by Parliament. Issuing binding and political 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.

The current system of court administration is not without shortcomings. 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. 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.

The sequence and timing of this latest constitutional amendment are ominous. Following Fidesz' overwhelming electoral victory in April 2018 that secured Viktor Orbán his fourth term, many outside observers believed the Prime Minister would curb his voracious appetite for restructuring the Hungarian state into an illiberal state. They have erred most grievously. Having witnessed a full-scale assault on independent media, universities and civil society organizations over the past years, dismantling rule of law institutions, and particularly judicial independence and the separation of powers, is now next on the agenda.

This is the moment when law ends and arbitrary rule begins.

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## URGENT STEPS FOR THE EU AND OTHER INTERNATIONAL INSTITUTIONS

**Armed with a constitutional majority in parliament, the Hungarian government's assault on judicial independence presents not only a clear risk of a serious breach of the rule of law, but also a challenge to the European Union's legal order.** This is weakening the entire European project from within. Quick and resolute action by the European Union and the international community can still avert the major threat to rule of law in Hungary.

**We call on European Union bodies,** and more specifically on

- ▶ the **European Commission**, to closely monitor the legislative process and the extent to which the proposal violates EU law, including Art. 47 of the EU Charter of Fundamental Rights;
- ▶ the **Commission**, to encourage the Hungarian government to request a joint opinion from the Venice Commission of the Council of Europe and from the OSCE Office for Democratic Institutions and Human Rights (ODIHR) regarding the compatibility of the constitutional amendment package with Council of Europe and OSCE standards;
- ▶ the **European Parliament**, to consider the threats to judicial independence in the context of the report to be adopted pursuant to the EP resolution of 17 May 2017 on the situation in Hungary with a view to activating Article 7(1) of the EU Treaty;
- ▶ the **EU Agency for Fundamental Rights**, to engage in further research to document ways in which the judicial independence is increasingly subject to assault in a growing number of EU Member States.

**We call on Council of Europe (CoE) bodies, and more specifically on**

- ▶ the **CoE Secretary General**, to publicly voice concern about the constitutional amendment package and the intimidation of judges and other independent legal professionals and to encourage Hungary to once again engage the CoE's expertise in thoroughly reviewing its compliance with CoE standards, thus avoiding unnecessary interference with the independence of the judiciary, the right to a fair trial, and the prohibition of discrimination;
- ▶ the **CoE Parliamentary Assembly**, to follow the legislative procedures in which subsequent modifications to the cardinal laws on the judiciary will be adopted in the coming months and raise concern and discuss the constitutional amendment package and the cardinal laws at the next meeting of its Committee on Legal Affairs and Human Rights, and request an opinion of the CoE Venice Commission;
- ▶ the **CoE Committee of Ministers**, to make these laws and their compliance with CoE standards, in particular with Art. 6 of the European Convention on Human Rights and Articles 4. and 7. (with regards to the independence of the judiciary as an organization and the separation of powers), Article 5. (with regards to the new rules on interpretation) and Article 8. (with regards to the NJC's powers and its functionality) of Recommendation CM/Rec(2010)12 on judges a subject of urgent discussion at the earliest possible meeting on the Deputies Level, as well as its next Ministerial session;
- ▶ the **CoE Committee of Ministers**, to review as to whether the set up of the administrative court system, the limitations of judges' powers to interpret the law and the shortcomings with regards to supervising the NJO President are in line with the values and standards of the CoE Plan of Action on Strengthening Judicial Independence and Impartiality (CM(2016)36) and discuss ways in which the CoE can assist Hungary in achieving these aims at the earliest possible meeting on the Deputies Level, as well as at its next Ministerial session;
- ▶ the **CoE Committee of Ministers**, to request the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Human Rights (CDDH) to provide advice on ways how to support Hungary in the implementation of the relevant legal reforms, particularly with regard to safeguarding the independence of the administrative court system as well as the supervision of the administration of these courts by an independent body of self-administration;
- ▶ the **CoE Commissioner for Human Rights**, to raise concern with regard to the interference in the independence and impartiality of the Hungarian judiciary and

recommend actions to prevent violations of the rights guaranteed by the Convention;

- ▶ the **European Committee on Legal Cooperation**, to prepare an opinion concerning the specific situation of judges and judicial independence in Hungary;
- ▶ the **Consultative Council of European Judges** to provide specific guidance to Hungary with regards to the implementation of its standards, in particular Opinion No. 1 (2001) on standards concerning the independence of the judiciary and the irremovability of judges, Opinion No. 18 (2015) on the position of the judiciary and its relation with the other powers of state in a modern democracy and its European Charter for the Statute of Judges.

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

- ▶ 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;
- ▶ review the proposed constitutional amendment package and the 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**

- ▶ 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.

**We call on the UN Office of the High Commissioner for Human Rights (OHCHR) to**

- ▶ communicate, without delay, strong concern about the recent proposals that will, if adopted, undermine the independence of the judiciary and the rule of law to the Hungarian government and report back to the UN Human Rights Council;
- ▶ follow the upcoming amendments to cardinal laws on the judiciary in Hungary and review the proposed constitutional amendments and the amendments to cardinal laws in light with the rights guaranteed in UN treaties, in particular the

Universal Declaration on Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) and engage in a dialogue with the Government of Hungary to ensure that it adheres to recommendations of UN bodies, including the Concluding Observations on Hungary adopted by the Human Rights Committee at its 122nd session in 2018.

**We call on the UN Special Rapporteur on the independence of judges and lawyers to**

- ▶ raise concern with regard to the growing intimidation of judges and other independent legal professionals, the legislative steps that pave the way to political interference of the judiciary and recommend actions to prevent violations of the rights guaranteed by the UDHR, in particular its Art. 10, the rights guaranteed in the ICCPR and other standards as endorsed by the General Assembly in its resolution on the Basic Principles on the Independence of the Judiciary.

**We call on the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association to**

- ▶ closely follow the developments with regards to the establishment of the administrative court system and the Administrative High Court vis-à-vis its powers to adjudicate in cases in which it supervises police decisions regarding assemblies.

## **1. A SHORT HISTORY OF THE RULE OF LAW UNDERMINED**

Since 2010, law has been used as a instrument of power which has seriously undermined the rule of law. The Constitutional Court's competences to review the constitutionality of laws has been restricted after 2010, primarily by abolishing the *actio popularis* that enabled the review of regulations based on public interest lawsuits. In the same year, the Court's jurisdiction over certain taxation-related issues was limited. After 2011, the Constitutional Court [has been packed with judges](#) supportive of the governing majority's agenda.<sup>1</sup> Through appointing new judges, amending the rules of competences and on the appointment procedure and increasing the court's size, the ruling Fidesz government succeeded in shaping the Constitutional Court into a loyal body, as opposed to the independent and genuine counterbalance to government power it should represent.

The governing majority, without the support of any other political forces, has repeatedly amended the Fundamental Law to serve its partisan political aims, and, in certain cases, to overrule earlier decisions of the Constitutional Court. These resulted in limitations to fundamental freedoms, such as the right to freedom and security of persons, and in the

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<sup>1</sup> Hungarian Helsinki Committee, Eötvös Károly Public Policy Institute, Hungarian Civil Liberties Union, '[Analysis of the performance of Hungary's "one-party elected" Constitutional Court judges between 2011 and 2014](#)' (2015).

Fourth Amendment of the Fundamental Law itself to avoid a subsequent review by the Constitutional Court.

The government has [systematically undermined the role of other independent institutions](#) which served as checks and balances of political power by means of restructuring as well as re-staffing these institutions.<sup>2</sup> 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 expression,<sup>3</sup> as the termination took place after and because the President had publicly expressed concerns on legislative changes relating to the judiciary.

As these examples demonstrate, the Hungarian government, now with the backing of its two-thirds majority in Parliament, [has consistently disregarded constitutional limits](#) in exercising political power since 2010.<sup>4</sup> This is the context in which the current constitutional amendments need to be viewed. The planned judicial reforms target an institution that has so far largely maintained the independence of the judges and has mostly resisted political pressures, consequently preserving and ensuring fair and impartial judicial proceedings.

## 2. CURRENT AREAS OF CONCERN

### 2.a. A glass half full?

Hungary's Fundamental Law nominally states the independence of individual judges, but it lacks a clear statement that courts constitute a separate branch of power and shall be independent.<sup>5</sup> It also does not provide a basic guarantee for the independence of the organization of the judiciary. Nevertheless, the cardinal law on the organization and administration of the courts stipulates that judges are independent and shall not be influenced or instructed in relation to their judicial activities.

Furthermore, the NJO President, issued the so-called Integrity Code in 2016 that regulates several aspects of judicial behavior and thus affects the independence of the individual

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<sup>2</sup> Eötvös Károly Policy Institute, Hungarian Helsinki Committee, Hungarian Civil Liberties Union, Mérték Media Monitor, '[Disrespect for European Values in Hungary, 2010-2014](#)' (November 2014).

<sup>3</sup> European Court of Human Rights, Grand Chamber judgment in the case of [Baka v. Hungary](#), Application no. 20261/12, 23 June 2016.

<sup>4</sup> Centre for Peace Studies (Croatia), Helsinki Foundation for Human Rights (Poland), Hungarian Civil Liberties Union, Hungarian Helsinki Committee, Yucom – Lawyers' Committee for Human Rights (Serbia), Human Rights House Zagreb, Human Rights House Foundation, '[Resisting Ill Democracies in Europe](#)' (November 2017).

<sup>5</sup> European Commission for Democracy through Law (Venice Commission), '[Opinion on the new Constitution of Hungary](#)', CDL-AD(2011)016 (20 June 2011), para. 102.

judges. Many judges felt that these norms lacked any legitimate ground and were dangerously uncertain.<sup>6</sup>

Recently, an increasing number of judges have spoken up critically.<sup>7</sup> Behind these criticisms lurk sensitive issues concerning judicial independence: the appointment of judges, selecting judicial leaders and the NJO President carrying out other administrative tasks without meaningful control by the court organization. Despite these shortcomings, judges have exercised largely impartial and independent decision-making at the level of individual cases, resisting both political interference and pressure from an overly centralised judicial administration.

## **2.b. Overcentralization of court administration**

In 2011-2012, the government introduced fundamental changes to the judicial system. Although 30 separate provisions of the relevant laws were later amended in response to the serious concerns raised by the Council of Europe's Venice Commission (VC),<sup>8</sup> the organization of the judicial system has remained centralized and still endangers the independence of the judges and the fairness of court proceedings.

The central administration of courts is based on a unique institutional solution: all responsibilities belong to the President of the NJO who is elected for nine years by Parliament. The current President, Ms Tünde Handó, is a close friend of PM Orbán's family and is married to Mr József Szájer, a member of the European Parliament (EPP), who is a founder of Fidesz and drafted the Fundamental Law.

The NJO President has wide-ranging powers over the appointment, evaluation and promotion of judges, the launch of disciplinary procedures and the case allocation scheme is overly centralized and non-transparent. The effective supervision of these powers remains difficult. The President of the NJO had been entitled to transfer cases from the competent court to another one, allegedly aimed at ensuring the timeliness of justice and the balanced workload of courts. This practice violated fair trial principles (e.g. impartiality of courts or the right to a lawful judge), and the lack of detailed and objective criteria for case transfer provided significant discretion for the NJO President in this regard. Despite the strong international criticism,<sup>9</sup> the government was highly committed to preserving this practice – hence the rule on case transfers was enshrined in the Fourth Amendment to the Fundamental Law to establish the constitutional basis of the system. In 2013, the practice

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<sup>6</sup> Budapest Beacon, '[Handó's Integrity Code used to bust judge for allowing cousin to bring lunch to the office](#)', 5 September 2017.

<sup>7</sup> Budapest Beacon, "[These fears are totally legitimate](#)" – Update to our judge interview series, 8 March 2018.

<sup>8</sup> Venice Commission, [Opinion on the Cardinal Acts on the Judiciary that were amended following the adoption of Opinion CDL-AD\(2012\)001 on Hungary](#), CDL-AD(2012)020-e, (15 July 2015).

<sup>9</sup> Venice Commission, [Opinion on Act CL XII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary](#), CDL-AD(2012)001-e (19 March 2012).

was finally repealed. However, a special practice still exists today. The NJO President can designate specific judges to cases that otherwise belong to the competence of other courts. Many times, it is not the judges but rather the cases that are in fact transferred from one court to another. The designated judges adjudicate in their original court but proceed in the name of the other court. In the Hungarian system, where case allocation is not fully automatic, this practice may pose risks to compromise the right to a fair trial.

### **2.c. Limited powers for judicial self-administration**

The autonomous judicial self-governing body, the National Judicial Council (NJC) remained weak: it only has the right to consent regarding the appointment of court presidents who did not receive the approval of the reviewing judges of the court in question. It has also the right of consent in deciding on applications for judicial positions where the NJO President wishes to appoint the applicant in the second or third position in the rankings established by the reviewing board (consisting of judges). However, the NJO President can circumvent this right by declaring a call for applications unsuccessful.<sup>10</sup> Judges and the members of the NJC as employees of the court system are still dependent on the NJO President.

In May 2018, the NJC evaluated the practice of the NJO President with regard to the appointment of judges and judges to senior positions and found that her decisions were not transparent and were not adequately reasoned in writing, in particular when she declared a call for application unsuccessful.<sup>11</sup> The NJC called on 2 May the NJO President to change her practice and give written reasoning for her decisions and make the decisions transparent.<sup>12</sup>

The NJC's evaluation and report signaled critical fault lines in the relationship between the President and the Council. Following the NJC elections, since January 2018 the NJC included new members who have publicly criticized the NJO President before. This showed that the judiciary, who is electing the NJC members became more critical to the NJO President. Between the general elections in April 2018 and the 2 May NJC meeting on which the critical report was adopted, 6 members and 6 substitute members of the NJC resigned.<sup>13</sup> Several resigned NJC members referred to family affairs or their present commitments as judges or court leaders as a reason behind the resignation, however, the large number of resignations before a critical NJC report was adopted, lead into allegations about other underlying factors, such as the fear from being a member of an overly critical NJC<sup>14</sup> or even the prevention of the NJC to take actions against the President.<sup>15</sup>

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<sup>10</sup> [Tasks and duties of the National Judicial Council.](#)

<sup>11</sup> National Judicial Council, [Report of the special committee established for reviewing the decisions, rules and recommendations taken by the National Judicial Council between 15 March 2012 and 30 January 2018.](#)

<sup>12</sup> National Judicial Council, [Summary of the meeting held on 2 May 2018.](#)

<sup>13</sup> National Judicial Council, [Summary of the meeting held on 2 May 2018.](#)

<sup>14</sup> Független Hírügynökség, [Eleeing the purge. One-third of Judicial Council resigns](#) (19 April 2018).

<sup>15</sup> Patrick Kingsley, [Viktor Orban's Victory. Hungary's Judges Start to Tumble](#), The New York Times (1 May 2018).

Nevertheless, immediately after the resignations, the NJO President claimed in a written statement that the NJC is unable to operate because the quorum is not met. In contrary, at the meeting on 2 May, the President of the Kúria claimed that the NJC is able to function and the NJC unanimously declared at the session that the NJC is indeed functional and quorum requirements are met. On its 16 May meeting, the NJC explained to the members of the judiciary in an open statement the lawfulness of its operation and called the NJO President to comply with NJC requests otherwise it will launch a procedure at the end which the Parliament may vote on removing her.<sup>16</sup> On 29 May, all but one presidents of regional courts and regional courts of appeal (who were mostly appointed by the President of the NJO) demonstrated their support to the NJO President and criticized the NJC.<sup>17</sup>

This dispute has significant implications as to whether the NJC can exercise its supervisory powers. The summary of the 6 June meeting of the NJC shows that it turned to the NJO President for detailed, publicly not available data which would enable the NJC to effectively monitor the President's practice with regards to the appointments to senior positions, the distribution of the workload and the evaluation of the court president's work in 2017. This is not the first case when the NJC turns to the NJO for data or information, but to no avail. On 25 May, three members of the NJC went in person to the NJO office to study documents that they previously requested. Access was denied on this day too, but consequently a disciplinary procedure was initiated against these three NJC members.<sup>18</sup> The minutes on what happened on that day were not made public, but were allegedly distributed within the court system.<sup>19</sup> According to media reports, there are judges who claim that this is used by the NJO President to further discredit members of the NJC and the NJC as a whole.

If the disputes on the functional operations and the legality of the NJC continue and the NJO President continues to question the legitimacy of the NJC arguing that there is no quorum, it will undermine even the weak powers the NJC has to supervise the NJO President.

#### **2.d. Judiciary under increasing political pressure**

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 college leaders who largely came 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 274 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

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<sup>16</sup> National Judicial Council, [Summary of the meeting held on 16 May 2018](#).

<sup>17</sup> Jogászvilág, '[Court leaders write open letter to National Judicial Council](#)' (30 May 2018).

<sup>18</sup> 444.hu, '[Disciplinary procedures against judges perceived as siding with opposition](#)' (14 June 2018).

<sup>19</sup> National Judicial Council, [Summary of the meeting held on 6 June 2018](#)

at the workplace on grounds of age.<sup>20</sup> However, the judges were never reinstated into their senior previous positions.

MPs belonging to the governing party and senior government officials have fiercely and publicly criticized courts and individual judges for their decisions and have done so in a threatening and intimidating manner. For example, in 2016, after a first instance court judge acquitted all 15 defendants in the case of an environmental disaster caused by the toxic red sludge in 2010, Szilárd Németh, Fidesz MP, told the press that some judges are “running abroad to complain and to ask for changing the arguably successful legislation” and, although Fidesz respected the “liberal requirement of judicial independence”, they would also intend to give effect to such democratic principles as transparency and the accountability of judges.<sup>21</sup>

In April 2018, the Kúria upheld the decision of the National Election Commission (NEC) certifying the results of absentee ballots casted by mail-in parliamentary elections and found that 4,360 ballots were invalid.<sup>22</sup> 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. After reading the decision of the Constitutional Court, it is obvious that the Kúria was not intellectually up to this task”.<sup>23</sup>

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,<sup>24</sup> Csaba Hende, President of the Parliament’s Committee on Legislative Affairs<sup>25</sup> and István Hollik, spokesperson of the governing majority’s parliamentary group<sup>26</sup> 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 were took part in these trainings as instructors or participants.

Minister of Justice László Trócsányi at his hearing in Parliament on 14 May 2018

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<sup>20</sup> European Commission, [‘European Commission closes infringement procedure on forced retirement of Hungarian judges’](#) (20 November 2013).

<sup>21</sup> 444.hu, [‘Szilárd Németh wants to hold courts accountable’](#) (31 January 2016).

<sup>22</sup> Kúria, [Judgment no. Kvk.III.37.503/2018/6](#) re *Fidesz v. National Election Commission* (2018).

<sup>23</sup> 888.hu, [‘Orbán: Kúria not intellectually up to this task’](#) (5 May 2018).

<sup>24</sup> Fidesz, [‘Soros Network Characterised by Mafia Methods’](#) (1 February 2018).

<sup>25</sup> Hírtv, [‘Further changes likely in justice system’](#) (6 June 2018).

<sup>26</sup> Origo, [‘Soros-network interfering in justice system’](#) (26 May 2018).

announced that the government will move forward with establishing a separate administrative court system to deal with cases related to elections, asylum, procurement and more. Hence, a bill on [amending the Fundamental Law was submitted to the Parliament](#) on 29 May 2018. This new separate court system will pave the way for political interference in judicial independence in cases relating to public administration.

### 3. CHANGES AND CHALLENGES

#### 3.a. Establishing the Administrative High Court

Hungary provides for the judicial review of decisions of the public administration within its ordinary court system. In cases that were started before 2018, 20 county administrative and labour courts have jurisdiction. In most cases started after 1 January 2018, only seven regional administrative and labour courts have jurisdiction. The Kúria (the Supreme Court of Hungary) has a department for administrative and labour law cases. In 2016, the government revealed its plan for establishing a special court system dealing with administrative cases and setting up an Administrative High Court. As the governing party lacked a two-third majority to carry out its plan, the organizational changes were incorporated into the Bill on the Administrative Procedure Act, which could be adopted with a single majority. However, the Constitutional Court declared the relevant provisions on entrusting the Budapest Capital Regional Court with the powers of an administrative high court unconstitutional on 13 January 2017 because they were not adopted with the requisite two-thirds majority.<sup>27</sup> In the meantime, a decree of the Minister of Justice changed the rules on the evaluation system of judicial applications and consequently increased the number of points an applicant may get for earlier practice acquired in public administration.

<sup>28</sup> Due to the changes in the administrative court procedure that were introduced in 2018 by a new law, about 200 new judicial positions are supposed to be filled, now on the basis of the recently altered evaluation system which allows new judges to be recruited from the state apparatus.<sup>29</sup> This practice can also compromise the independence of the judiciary as according to the Act on Public Servants, loyalty is a condition for working for the government.<sup>30</sup>

The Minister of Justice announced on 14 May 2018 that the government will move on with the establishment of the Administrative High Court and the necessary majority in Parliament is secured to adopt the changes.<sup>31</sup> The entire separation of the administrative court system from the ordinary courts with the increased preference for selecting judges

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<sup>27</sup> Constitutional Court decision [1/2017](#) (I. 17).

<sup>28</sup> Minister of Justice, Decree 14/2017 (X. 31.), section 2, paras. (8)-(9).

<sup>29</sup> Association of Hungarian Judges, '[NJO President expected to announce 200 new vacancies](#)',

<sup>30</sup> Section 83(1) of Act CXCIX of 2011 on public servants provides that "The fundamental principles of professional ethics for public servants shall be, in particular, loyalty and commitment, giving priority to the national interest ...".

<sup>31</sup> Reuters, '[Hungary says to set up new administrative high court despite criticism](#)' (14 May 2018).

with experience acquired within the public administration may raise concerns with regards to the risks of political interference in sensitive cases, e.g. cases involving public assemblies, police misconduct or ill-treatment, asylum, public procurement, or cases regarding acquiring classified or public interest information.

Gergely Gulyás, the Minister heading the Prime Minister's Office, announced the decisions of the government to initiate constitutional amendments to establish the Administrative High Court on 24 May 2018.<sup>32</sup> Gulyás did not give any genuine reasons for the establishment of the new court, but he announced that it would "occupy the same hierarchical position as the Kúria". This would indicate that the president of that court will be elected by the Parliament with a qualified majority. With the establishment of the new court, significant judicial powers will likely be transferred from the Kúria to this special judicial body. As explained above, the modification of the ranking system of newly appointed judges gives preference to experience gained within the public administration system. This may mean in practice that judges to be appointed to the new Administrative High Court will likely arrive from the central administration.

On 29 May 2018, [Bill T/332 on the Seventh Amendment](#) to the Fundamental Law was submitted to Parliament.<sup>33</sup> The Bill proposed the replacement of Article 25(1)-(3) with a new provision, which makes a distinction between ordinary and administrative courts. As the Bill states, "Administrative courts shall decide on administrative disputes and other matters specified in an Act. The supreme judicial organ of the administrative courts shall be the Administrative High Court which shall ensure uniformity of the application of the law by the administrative courts, and shall take uniformity decisions which shall be binding on the administrative courts." The Bill makes clear that the new body will not only consider the legality of decisions of public administration, but the full scope of powers of the Kúria in administrative cases will be transferred to the new court. This includes the powers to make so-called "uniformity decisions" which are binding on lower courts and serve the purpose of the ensuring uniform court practice.

On 13 June 2018, governing majority MPs in the Parliament's Committee on Legislative Affairs submitted further amendments to Bill T/332. The Bill stipulates that after setting up the separate administrative court system, the National Judicial Council will only exercise its powers to oversee the administration of the courts with regards to ordinary courts. Consequently, the oversight of the administration of the administrative courts, including the new Administrative High Court will be taken away from the NJC. The amendments confirmed that the President of the Administrative High Court will be nominated by the President of Hungary and will be elected with qualified majority for nine years by the Parliament.

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<sup>32</sup> Government of Hungary, '[Government to submit tightened Stop Soros legislative package on Tuesday](#)' (24 May 2018).

<sup>33</sup> An unofficial translation of Bill T/332 can be found [here](#).

### **3.b. Administrative superiority of the government over the judiciary**

After the 2018 parliamentary elections, news surfaced about a plan on reorganizing court administration and reestablishing the ministerial supervision of the administration of courts which prevailed in Hungary before the 1997 judicial reform. This model exists in some European countries and as such is not incompatible with judicial independence. However, in light of recent related political developments and given the lack of established traditions of autonomy within the judiciary itself, this reform can also entail significant risks for the independence of the judicial branch. The NJC does not have powers to effectively control the administration of the judiciary, hence if the limited powers of the NJC remain untouched, the executive takeover would further deepen the crisis of an unbalanced administration. Where the minister has administrative responsibilities over the courts, a judicial council should have strong responsibilities to counterbalance it. A system where the possible controls of the NJC on governmental powers are paralysed, would leave significant risks for political interference with the functioning of the court system.

### **3.c. A new rule for the interpretation of law**

Bill T/332 also undermines the separation of powers and limits the freedom of judges to interpret the law. Under the bill, the starting point in interpreting the law will have to be the reasoning attached to legislative proposals. These reasonings are often nothing but political statements that neglect to explain the necessity, rationale and effectiveness of the policy option proposed by Parliament. Issuing binding and political 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 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.

### **3.d. Further plans**

Rumors about other proposed measures have circulated in the press. The two most important are a possible plan to merge the Kúria and the Constitutional Court, and the mandatory retirement of judges who had been active before 1990 (or later). The Minister of Justice refuted both plans on a parliamentary hearing on 14 May 2018. Merging the Kúria and the Constitutional Court would be equivalent to liquidating the autonomy and political intactness of the judiciary, since the judges of the Constitutional Court are selected by the

ruling majority in Parliament and their activity are [adapted to this political function](#). Quite recently, in some politically sensitive cases, the Kúria decided against the interest of the government, when for example it ruled that votes arriving by post from citizens living abroad, which are not in the designated, high-security envelopes, are invalid.<sup>34</sup>

According to media reports,<sup>35</sup> those judges who started their professional career before 1990 (or even later, before 1992 or 1994), were educated and/or graduated in the Socialist era, would be forced to retire. Such a provision violates both the prohibition of discrimination based on age, and infringes upon the principle of the irremovability of judges. As per the report of the President of the NJO in the first half of 2017 there were 227 judges (approx. 8 percent of the judiciary) who had spent over 31 years in office, and thereby fall into the category for retirement.<sup>36</sup>

#### 4. IMPACT ON THE INDEPENDENCE OF THE JUDICIARY

Non-democratic regimes can exist with some degree of judicial autonomy as long as the political aims of the elite remain achievable, and a seemingly independent judiciary continues to preserve and build the political legitimacy of the regime. This independence is relative as authoritarian regimes try to influence important decisions routinely by economic, political, ideological or punitive means. The tools of interference that may be used include subtle and legalized means that are applied even in the absence of pressure, such as

1. the appointment of judges and court leaders in a non-transparent and unaccountable way,
2. changing the composition of the judiciary by, e.g., forcing senior judges to retire or dismissing judges who go against the aims of the government,
3. changing the competences of courts and establishing special courts,
4. using open and ideological criticism, frightening and degrading statements by officials of the ruling party or the executive branch, and
5. enabling government influence over court administration without effective oversight.

These tools have been put or will shortly be put to work in Hungary. Once this happens, the rule of law will be deeply undermined. The immediate consequences are as follows:

The ongoing debate on the NJC's ability to operate lawfully after several of its members had unexpectedly resigned further weakens and undermines its powers to effectively control the President of the NJO. The President claimed in a public statement on 3 May

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<sup>34</sup> see Footnote 22.

<sup>35</sup> <http://nepszava.hu/cikk/1161497-kivasarolja-a-biroi-kart-a-kormany>

<sup>36</sup> Reports of the President of the National Judicial Office are available [here](#).

that conditions currently were not met for the NJC to operate lawfully.<sup>37</sup> In practice, if she claims that the NJC operates unlawfully, she might not submit any of her decisions for approval, including decisions on appointments, hence the powers for supervision will be effectively undermined. This will undermine even the weak powers the NJC has to supervise the NJO President.

The concerns around the judicial appointments to leadership positions (e.g. court presidents) affected the largest court of Hungary, the Budapest Capital Regional Court which handled 28,3 percent of cases of the total 20 regional courts in Hungary.<sup>38</sup> The Budapest Capital Regional Court lacked a president since January 2018. After the president of the NJO declared unsuccessful two calls for appointment for the president of the court, she announced on 28 May that she mandated Judit Polgárné Vida as an acting court president for a year. Ms. Vida became known for plagiarism for 2013 for which [she resigned](#), but subsequently worked in the NJO as a commissioner for its President. These developments significantly risk the effective operations and the independence of the most important court of the country.

The establishment of a new Administrative High Court, combined with the election of a new president with significant powers over the selection and appointment of judges for that court, the court's powers to issue binding decisions on the unification of court practice poses significant risks for political interference on the (1) organization and administration of the new Administrative High Court and (2) the decisions judges will make in individual cases.

## CONCLUSION

A new draft legislative package that limits judicial independence and restricts the freedom of judges to interpret the law is a serious threat to the rule of law in Hungary and runs counter to values Hungary signed up to when it joined the European Union. If amendments to the Fundamental Law are passed by Parliament on 20 June, a new court may be dominated by judges arriving from the state's public administration will rule on cases involving elections, taxes and public procurement, among many other key issues. Its head will be a political appointee selected by Parliament. Unless European institutions challenge the Hungarian government's campaign of centralizing power over the judiciary, the rule of law will be deeply undermined.

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<sup>37</sup> National Judicial Office, '[National Judicial Council functioning unlawfully](#)' (3 May 2018).

<sup>38</sup> Case data available [here](#).

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Dr Mátyás BENCZE, Professor, Debrecen University, Faculty of Law, Debrecen

Dr Zoltán FLECK, Professor, ELTE Faculty of Law, Budapest

Dániel G. SZABÓ, independent expert

Dr Bernhard KNOLL-TUDOR, Adjunct Professor (International Law), Central European University, Budapest

Dr Ágnes KOVÁCS, Assistant Professor, Debrecen University, Faculty of Law, Debrecen

Dr Szonja NAVRATIL, Assistant Professor, ELTE Faculty of Law, Budapest

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Hungarian Helsinki Committee  
Hungary, 1074 Budapest, Dohány utca 20.  
[www.helsinki.hu](http://www.helsinki.hu)