



Hungarian Helsinki Committee

Bill T/5241 on Administrative Courts Does Not Comply with the Venice Commission's Recommendations

21 March 2019

Bill [T/5241](#) on "Further guarantees ensuring the independence of administrative courts" was submitted on 12 March 2019 to the Hungarian Parliament as an initiative by Fidesz MPs in response to recommendations made by the Venice Commission in its [Opinion](#) of 15 March 2019.ⁱ The Hungarian Government claims that the Bill addresses all critical remarks and fully meets the Venice Commission's recommendations. However, the Hungarian Helsinki Committee's analysis below shows that the Bill falls short of the recommendations and further substantial changes are necessary to meet European standards on the independence of the judiciary and the rule of law.

Compliance with Venice Commission main recommendations: 30% – very poorⁱⁱ	
Venice Commission main recommendations (§118)	Does Bill T/5241 comply?
1. Recruitment procedure ⁱⁱⁱ	Compliance level: 12,5 %
a. Providing criteria for the Minister to change the ranking of candidates established by the personnel council of the National Administrative Judicial Council (NAJC)	For judges appointed in 2019: no proposal to amend For judges appointed later: partial compliance^{iv}
b. Introduce a requirement of consent from the council for that change and, at the very least, a judicial remedy enabling candidates to challenge the Minister's decision	For judges appointed in 2019: no proposal to amend For judges appointed later: no consent requirement,^v partial compliance on judicial remedy^{vi}
c. Provide for stricter and more precise legal supervision of the conditions in which the Minister may declare the recruitment procedure unsuccessful	For judges appointed in 2019: no proposal to amend For judges appointed later: no proposal to amend
2. The "judges" component in the personnel council of the NAJC	Compliance level: 75 %
Strengthening the "judges" component within the personnel council of the NAJC	For judges appointed in 2019: partial compliance^{vii} For judges appointed later: complies^{vii}
3. Appointment of heads of court (presidents)	Compliance level: 12,5 %
Involve, in an effective role, the personnel council of the NAJC in the Minister's final decision in the same way as for the initial appointment of judges, and to provide, at the very least, for a judicial remedy against that decision	For presidents appointed in 2019: no proposal to amend For presidents appointed later: no consent requirement, partial compliance on judicial remedy^{viii}
4. Selection criteria for candidates to the post of President of the Supreme Administrative Court	Compliance level: 0 %
The requirement of fairly extensive experience (of at least five years for example) of working as a judge	No compliance^{ix}
5. Counterbalancing the prerogatives of the presidents (heads of courts)	Compliance level: 50 %
a. More heavily involving the judges or their elected representatives, the administrative judicial councils and/or the NAJC	Low level of compliance^x
b. Provide for a legal remedy against certain binding decisions of the President	Partial compliance^{xi}

Most important concerns of the HHC in light of the Opinion of the Venice Commission

- 1. The paramount concern is that half of the new administrative judges will be selected in a process with total ministerial control and Bill T/5241 does not propose any changes to it.** Half of the new administrative judges will be selected in 2019 and the other half later on:¹ Bill T/5241 only proposes to add further guarantees for the second recruitment round, but none to the first. This is particularly concerning for the following reasons:
 - a. A high number of judges will be recruited in 2019. According to information received by the Venice Commission, as much as almost one-third of all administrative judges might be appointed this year without effective controls over the Minister's appointment powers (footnote 33).
 - b. Recruitment rules for administrative judicial positions were recently changed to aid candidates coming from the public service without judicial experience. According to the European Commission European Semester Country Report Hungary 2019, "the ratio of civil servants among new judges appointed to the bench to review administrative decisions rose from 4,8 % to 43,6 %."² The risk is that a high number of new judges might not have judicial experience which might adversely affect judicial work at the new administrative courts (see below).
 - c. The judges appointed this year will take part in the election of the members of the National Administrative Judicial Council (NAJC). The elected NAJC members will serve for six years,³ which means that the judges appointed by the Minister will shape judicial self-governance for several years.

The same guarantees should be applied to the recruitment of all administrative judges regardless they apply in 2019 or later. The guarantees recommended by the Venice Commission regarding the recruitment process should be fully met at all times.

- 2. Bill T/5241 does not strengthen judicial self-governance and does not grant real powers to the NAJC.** The NAJC has more limited competences than its counterpart, the currently existing National Judicial Council.⁴ The Minister must be requested to ask for the consent of the NAJC for changing candidate ranking in the appointment procedure⁵ and the NAJC must have a significant role in the appointment of presidents (heads of courts).⁶ The NAJC should have an important role in the accountability of presidents (heads of courts)⁷ and the NAJC should have a decisive role in deciding on case assignment schemes.⁸ In the transitional period of 2019, members of the Evaluation Committee should be elected and not drawn by lot.⁹

Judicial self-governance should be strengthened in line with Venice Commission recommendations to counterbalance the prerogatives of the Minister, the President of the Supreme Administrative Court and presidents (heads of courts).

- 3. Bill T/5241 was submitted to Parliament three days *before* the Venice Commission adopted its Opinion before any public consultation.** This way the public, NGOs, experts and opposition MPs were barred from analysing Bill T/5241 or from having an opportunity to submit further proposals. There was no public consultation on Bill T/5241 because it was submitted by three Fidesz MPs, instead of a government proposal where public consultation is mandatory. The Venice Commission already raised concerns on the legislative process of the laws on administrative courts because of the lack of real public consultation.¹⁰

Laws on administrative courts should be revised and amended after consultation with all parties concerned.¹¹

¹ §9(4) of Act CXXXI of 2018 on the Transitional Provisions.

² Country Report Hungary 2019, available at: https://ec.europa.eu/info/sites/info/files/file_import/2019-european-semester-country-report-hungary_en.pdf, page 42.

³ §26(1) of Act CXXX of 2018 on Administrative Courts (the Law).

⁴ §44 of the Opinion.

⁵ §59 of the Opinion.

⁶ §64 of the Opinion.

⁷ §90 and 101 of the Opinion.

⁸ §108 of the Opinion.

⁹ §75 of the Opinion.

¹⁰ §§30-31 of the Opinion

¹¹ §118 of the Opinion of the Venice Commission

Other Concerns of the Hungarian Helsinki Committee

1. **Bill T/5241 does not guarantee that a majority of administrative judges are coming from the judiciary.** It would still be possible that candidates coming from the public service become administrative judges without any judicial experience. While it is beneficial if former civil servants are also represented among administrative judges because it provides the courts with greater insight and experience, it is highly dangerous if a big number of judges have no judicial experience at all. It is even more so in a newly established institution, without a fully developed organizational culture.
It should be guaranteed that a majority of administrative judges have significant judicial experience.
2. **Bill T/5241 still does not fully clarify the jurisdiction of the new courts.** The Government did not make clear, for example, whether the new courts will decide election or freedom of information cases. Legislative proposals or statements by high-ranking politicians suggested that both of these types of cases will be decided by administrative courts but this has not yet been legislated.¹²
The jurisdiction of the administrative courts should be clarified as soon as possible, before judicial recruitment starts in May-July 2019.

Summary of recent legislative developments regarding administrative courts in Hungary

2018	Laws adopted establishing new administrative courts in Hungary operational from 2020 with a transition period of around one year (during 2019). Most importantly, half of the new administrative judges and the President of the Supreme Administrative Court will be selected in 2019. The Minister of Justice requested an opinion of the Venice Commission on the laws.
12 March 2019	Bill T/5241 tabled to modify the Hungarian laws on the new administrative courts claiming to strengthen the independence of administrative courts in light of the expected Venice Commission Opinion. At this time, there was no adopted Venice Commission Opinion yet.
15-16 March 2019	The Venice Commission adopted its Opinion on Hungarian administrative courts finding that the laws on administrative courts "lack effective checks and balances" and suggests several substantial recommendations.
16 March 2019	The Minister of Justice issued a statement (reinforced later in an interview) claiming: "The Venice Commission welcomed the proposal ... adding [in the press statement] that if the proposal ... is adopted, the criticism of the Venice Commission becomes moot." The press statement of the Venice Commission, however, did not contain such language, it only stated that "if the draft amendments were to be adopted, then <i>some</i> of the criticism of the commission would be moot."
18 March 2019	The legislative process for Bill T/5241 started in Parliament in the Justice Committee.
20 March 2019	Fidesz MP Csaba Hende (one of the supporter of Bill T/5241) said in the committee debate that Bill T/5241 would address all of the criticism of the Venice Commission.

¹² See „Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards“ (4-5 February 2019), available at: https://www.helsinki.hu/wp-content/uploads/HHC_VC_Prep_doc_4_5_Febr_2019-FINAL.pdf

Future developments

The legislative process of Bill T/5241 is expected to last one or two weeks maximum, and this is the time when the laws on administrative courts are most likely to be modified. It is less likely that the laws will be modified once this round of changes are completed.

Bill T/5241 might be significantly modified during the legislative process.

Further information

Earlier analyses of the Hungarian Helsinki Committee on laws on administrative courts are to be found below.

- Most Pressing Issues of the Hungarian Law on Administrative Courts and Relevant International Standards (4-5 February 2019), available at https://www.helsinki.hu/wp-content/uploads/HHC_VC_Prep_doc_4_5_Febr_2019-FINAL.pdf
- Blurring The Boundaries: New Laws on Administrative Courts Undermine Judicial Independence (9 December 2018), available at <https://www.helsinki.hu/wp-content/uploads/Blurring-the-Boundaries-Admin-Courts-HHC-20181208-final.pdf>

Endnotes

ⁱ CDL-AD(2019)004-e Hungary - Opinion on the law on administrative courts and the law on the entry into force of the law on administrative courts and certain transitional rules, available at [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)004-e)

ⁱⁱ Compliance was evaluated on a 0-100 % scale where 0 % meant no compliance or no proposal to comply and 100% a full compliance. The overall compliance level was calculated as the mathematical mean (average) of the compliance level of each of the five main recommendations of the Venice Commission. The compliance level of each of the recommendations were calculated as the average of the level of compliance of the sub-recommendations (e.g. 1.a., 1.b., and 1.c.), where “no compliance” or “no proposal to amend” meant a 0 %, “partial compliance” a 50 % and “compliance” a 100 %.

ⁱⁱⁱ The recruitment process of new judges consists of two parts: half of the new judges will be recruited in 2019, the other half later, as discussed above. Although the recommendations only mention the Personnel Council of the NAJC which is not existing in 2019, it is clear from the text of the Opinion of the Venice Commission, that the recommendations apply also to the 2019 recruitment period: “Of course, the key questions – the existence (or lack) of initial criteria or principles for any amendment of the ranking by the Minister, and the consent of the evaluation committee to, or judicial review of, the Minister’s decisions in the recruitment procedure – *also apply to the transition period*” (§75).

^{iv} Bill T/5241 would not provide clear criteria for the Minister when he/she may change the ranking of candidates, so the Minister remains free to do so. The Venice Commission requires this list of criteria when the Minister might change the ranking: “The most problematic provisions, in practice giving the Minister the final decision in the appointment procedure, are those allowing the Minister ... to amend the ranking submitted by the Personnel Council of the NAJC. While it is of course positive that the Law requires the Minister to provide a written justification for changing the ranking and to organise candidate interviews in a transparent manner, the fact remains that *it contains no conditions or criteria specifying when the Minister can deviate from the ranking*” (§56).

Bill T/5241 would only add examples of reasons the Minister might rely on, consisting of: “professional competence, way of self-expression, and decision-making competence and insightfulness” (“*szakmai felkészültségét, kifejezőmódját, valamint döntésképeségét és lényeglátását*”). §11 of Bill T/5241 modifying §71(3) of the Law.

^v The requirement of the NAJC’s consent for the change of ranking by the Minister will not be included. The Venice Commission commented: “This is an unfortunate step backwards, since in their dialogue with the Venice Commission the Hungarian authorities had amended the legislation in 2011-2012 to allow for stricter legal control of the powers of the President of the NJO in the area of appointments. Thus, in the ordinary court system the NJC lays down the criteria and principles that the President of the NJO must follow when appointing judges without regard to the ranking; the President of the NJO can only amend the ranking of candidates for a judge’s position if he or she applies the general principles established by the NJC, *and the NJC must agree to the amendment in each case*. ... It is a matter of concern to find that these safeguards have not been taken on board in the procedure applying to administrative judges.”

^{vi} The proposed appeal mechanism does not make it clear whether it results in a repeated selection process or just the finding of an unlawful activity without any further consequence. It still serves a guarantee against the broad powers of the Minister, but it is not a remedy as required by the Venice Commission. No full judicial remedy is proposed by the Bill T/5241 only a special appeal mechanism would be established, but its real effect is questionable. In this special appeal, the rejected applicant might turn to a court, but the court may only “establish” (“*megállapít*”) the unlawful activity of the Minister but the Bill T/5241 does not make it clear whether it means that the recruitment process should be repeated or not. Merely establishing the wrongdoing does not equal to a full remedy, where the unlawfully appointed judge should be replaced by a judge selected in a lawful process. §13 of Bill T/5241 modifying §72/A(3).

^{vii} §4 and §17 of Bill T/5241 modifying §28(1)(a) of the Law and §10(2)(a) of the Transitional Provisions respectively increases the number of judge-members from four (out of nine) to six (out of eleven). The members of the evaluation committee are drawn by lot and not elected, criticised by the Venice Commission in §75 stating: “the fact that it has no peer-elected judges raises questions. It might well be asked whether, instead of making a random selection from judges having opted to transfer to the new system, it would not be *preferable to have judge members elected by their peers*, since they will already be known and it is between them that lots are to be drawn.”

^{viii} §14 of Bill T/5241 modifying §76 of the Law would provide that in the procedure of appointing heads of court, the same rules should apply as during the initial appointment of judges. Therefore, the same applies as written for point 1. b. above.

^{ix} Bill T/5241 would provide for at least five years of experience as a judge but then interprets judicial work broadly, including work at a “international judicial body” or at the Constitutional Court as “senior adviser”. Note that the Hungarian word used (“*főtanácsadó*”) might also mean advocate-general in, for example, in a CJEU-context, but may also mean lower-level jobs. The Hungarian Constitutional Court does not have a system of advocate-generals similar to the CJEU. At the Constitutional Court each individual judge has a senior adviser who drafts opinions for and advises that judge only (similar to “*référéndaires*” at the CJEU).

^x Bill T/5241 does not substantially strengthen judges’ elected representatives vis-à-vis heads of courts. The Venice Commission severely criticised the powers of court presidents and particularly the broad powers of the President of the Supreme Administrative Court (§§98-108). The Venice Commission notes that “*Taken individually*, most of these powers should not raise any problem regarding the independence of justice and the assignment of powers. *That said, however, when they are taken together*, and above all considered in combination with the election of the President of the SAC by the National Assembly and the broad powers of the Minister of Justice, with whom the President acts in concertation on many matters, *these powers may raise questions*. It would be useful to examine means of counterbalancing the powers of the President through more substantial involvement of the judges or their elected representatives, the administrative judicial councils and/or the NAJC in dealing with the different matters” (§101).

The main concerns of the Venice Commission are the following – *none of them is addressed by Bill T/5241*:

- Powers of the President of the Supreme Administrative Court, particularly regarding:
 - A wide number of powers (E.g. convening local plenary meetings of judges, presiding over the NAJC, establishing the organisational and operational regulations for the Supreme Administrative Court, personnel powers.)
 - Uniformity procedure (A unique Hungarian procedure giving the power for the Supreme Administrative Court to issue binding decisions on the interpretation of laws. Court presidents ensure the application of these decisions.)
 - Referral to the Constitutional Court (The President of the Supreme Administrative Court may initiate an abstract review of laws, which – according to the Venice Commission – puts him/her into a political position.)
- Power of court presidents to issue rules on case assignment (Case assignment rules will be established by court presidents without the involvement of any judicial council.)

Some minor modifications, however, are proposed by Bill T/5241:

- The Minister will not be a permanent attendee at NAJC meetings, he/she only might be invited. §3 of Bill T/5241 modifying §27(1).
- Judges will form a majority of the NAJC Personnel Council, and the evaluation committee as discussed above at point 2.
- The NAJC will have slightly stronger powers in the selection of heads of courts as discussed above at point 3.

^{xi} Bill T/5241 would not introduce a remedy, but only a special appeal mechanism to protect judges against measures of the President of the Supreme Administrative Court. The same is true here as discussed regarding the appeal against the decision of the Minister in the appointment procedure in point 1.b. above. §7 of Bill T/5241 modifying §47(6) of the Law