



BLURRING THE BOUNDARIES

New Laws on Administrative Courts Undermine Judicial Independence



Hungarian Helsinki Committee

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SUMMARY

Judicial independence is now in jeopardy in Hungary. A new package of legislative proposals that limits judicial independence 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. 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 re-engineering of the rule of law. Given the present collapse of the legislature into an overpowering executive, significant changes to the judicial organization are snowballing into a real and serious threat to the rule of law in an EU member state.

Our June 2018 analysis, *Attacking the Last Line of Defence: Judicial Independence in Hungary in Jeopardy*¹, already highlighted how these 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.

On 6 November 2018, the Government submitted a [Bill](#) to Parliament that will set up special courts for administrative cases.² The vote on the Bill is scheduled to take place in the week of 10 December 2018. If it is adopted in its current form, the independence of the judiciary will be significantly undermined in Hungary. The boundaries between the executive and judicial power in Hungary will be blurred as the Bill undermines the separation of powers and paves the way for the government's political interference both in individual cases and on a systemic level. The stakes are high. The new courts' decisions will affect fundamental rights such as matters related to elections, administrative decisions by the police, asylum or the exercise of the right to peaceful assembly. Administrative courts will also decide cases with significant economic relevance: disputes over taxation and customs, media, public procurement, construction and building permits, cases of land and forest ownership, land and real estate public records or even market competition matters. The Parliament is scheduled to vote on the Bill by 15 December 2018. The new administrative courts will be operational on 1 January 2020.

The proposed system will give excessive powers to the Minister of Justice without effective oversight of any judicial self-administration body. The Minister, who is a member of the executive

¹Hungarian Helsinki Committee: *Attacking the Last Line of Defence: Judicial Independence in Hungary in Jeopardy*, 15 June 2018 <https://www.helsinki.hu/en/attacking-the-last-line-of-defence/>

² <http://www.parlament.hu/irom41/03353/03353.pdf>

power, will have stronger powers than the President of the National Judiciary Office. These powers include:

- selecting and appointing new judges to the Administrative High Court and lower administrative courts;
- appointing court presidents and judges to senior positions as well as promotions;
- determining the administrative court's budgets;
- shaping the new court system during the transitional period of 2019 when new judges, new court presidents and senior judges will be appointed, which will have a long-term impact on the system.

The concept for the Bill was prepared behind closed doors and the public had only three workdays to comment on the proposal. To date, the legislative process has been flawed and both domestic legislation and the Council of Europe's Venice Commission's standards on the legislative process were breached on several occasions.

The Minister of Justice argued that Hungary used to have an Administrative High Court before 1949, hence this institution should be restored. Hungary already provides for the judicial review of decisions of the public administration within its ordinary court system. The Government failed to provide any professional arguments why the new court system is needed and how the new system will increase the efficiency and impartiality of judicial decision-making.³ In 2016, the National Judiciary Office opposed splitting up the court system, arguing that it may violate the Fundamental Law and that Hungary's administrative courts are among the most efficient in the EU.⁴

CONTEXT AND BACKGROUND

In November 2018, the Government submitted a legislative package concerning the restructuring of the judiciary authorized to decide in administrative matters. The package on administrative courts consists of two bills: Bill T/3353 is the proposal on administrative courts itself,⁵ and Bill T/3354 regulates 'the entering into force of the law on administrative courts and certain transitional provisions'.⁶ The latter piece of legislation settles questions regarding the setting up of administrative courts and regulates the transition period before 1 January 2020, when the new administrative courts begin to operate. Below we are presenting the context of the proposed legislation (referred to, for the sake of simplicity, jointly as "the Bill"), and analyze how it undermines judicial independence and the system of checks and balances.

Hungary already provides for the judicial review of decisions of the public administration within

³ <https://www.helsinki.hu/en/un-faking-the-governments-claims-on-administrative-courts/>

⁴ <https://birosag.hu/media/aktualis/magyar-igazsagszolgalatas-europa-elvonalaban>, , <https://birosag.hu/hirek/kategoria/az-oroszagos-birosagi-hivatal-kozlemenye>

⁵ Bill T/3353, <http://www.parlament.hu/irom41/03353/03353.pdf>

⁶ Bill T/3354, <http://www.parlament.hu/irom41/03354/03354.pdf>

the ordinary court system. Citizens and anyone affected may challenge all administrative decisions, contracts with public bodies and also the public administration's failure to act. As early as in 1990, the Constitutional Court ruled that all administrative acts should be under judicial review.⁷ Ever since the legality of administrative decisions have been supervised by judges on a comparatively high level.⁸

Over the last six years, the organisation and legal status of administrative courts in Hungary have been reformed on two occasions. The Bill is the third reform in a short timeframe. The first reform was the setting up of administrative and employment courts in January 2013, and the second the adoption of the new administrative procedure which took effect on 1 January 2018. The Bill proposes a third major change within just six years.

In 2016, the Government revealed that it planned to establish a special court system dealing with administrative cases and to set up an Administrative High Court. As the governing party lacked a two-thirds majority to carry out the plan, the organizational changes were incorporated into the Bill on the Administrative Procedure, which could be adopted with a simple majority. However, the Constitutional Court declared the relevant provisions unconstitutional in January 2017 because they had not adopted with the required two-thirds majority.⁹

In August 2016 the National Judiciary Office (NJO) issued an opinion on the Government's plan on the Administrative High Court. The 32-page long assessment principally questioned the need to set up that court and argued that the separation of the court system would undermine the independence of the judiciary and thus violate the Fundamental Law. The NJO-opinion argued that "there is no need to set up an administrative judiciary, we may only talk about its development". The NJO made it clear that "cases with significant economic relevance, oftentimes those with a political factor, would be adjudicated by the Administrative High Court", the proposed solution is not in line with the Hungarian legal tradition and the development of administrative procedural law and it aims to change the institutional and staffing circumstances of the court system in an unprecedented way.¹⁰

In the meantime, a decree of the Minister of Justice changed the rules on the evaluation system of applications to become an administrative judge¹¹ and consequently increased the number of points an applicant may get for earlier practice acquired in public administration.¹² This allows

⁷ CC decision 32/1990. (XII. 22.)

⁸ EU studies found that there are no serious problems with Hungarian administrative justice, compared to other member states and to other branches of the Hungarian judiciary. EU justice scoreboard, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en.

⁹ Constitutional Court decision [1/2017](#) (I. 17).

¹⁰ The opinion was never made public, yet it was reported and cited in the media by investigative journalists. HHC submitted an FOI request, but both the Minister of Justice and the NJO declined disclosure. <https://444.hu/2016/09/05/pontosan-tudjak-hogy-politikai-ugyeket-tenenek-a-kulonbirosagok-ele>

¹¹ Prior to these changes experience gained as an active judge were evaluated favourably, but the scoring system allowed for gaining points for experience in the public administration too. The new scoring system grants equal points for work experience within the public administration and the judiciary.

¹² Decree 7/2011. (III.4.) KIM, Annex 1, 1.2: applicants are given points based on – among others – experience. As a result of the amendment, judicial and administrative experience earns the same number of points for an applicant.

for the influx of new judges who were not trained and socialized in courts, but in the hierarchical executive system of state administration.

On 14 May 2018, the Minister of Justice announced that the Government would move forward with the establishment of the Administrative High Court since the necessary majority in Parliament had been secured to adopt the changes.¹³ The Minister of Justice has not given any meaningful reasoning why separate administrative courts would be necessary. The Government's main argument is that Hungary used to have an Administrative High Court that was abolished by the communist regime in 1949. Although this argument might sound compelling politically, it is not a real one: many aspects of public life have not been restored to its pre-1940's state.

On 29 June 2018, the Seventh Amendment to the Fundamental Law was adopted by the Parliament.¹⁴ The Amendment replaced Article 25(1)-(3) of the Fundamental Law with a new provision, which made a distinction between ordinary and administrative courts. As the Amendment 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 Amendment has made it clear that the new body will not only deal with administrative cases but will also have a similar status to the Kúria (Supreme Court). This includes the powers to make "uniformity decisions", which are binding on lower courts and are meant to ensure uniform court practices. Further changes assure the further separation of administrative courts from the ordinary court system, for example, a separate judicial council will be established for administrative courts.

The Hungarian government has a track record of taking over independent institutions, the media or retaliating judges for criticism. The European Parliament has found that there is a clear risk of a serious breach by Hungary of the common European values, partially based on the inadequate independence of state bodies.¹⁵ Against this background and taking into account the legislative history of the proposal, the content of the changes gives rise to serious concerns regarding the rule of law.

¹³ Reuters, '[Hungary says to set up new administrative high court despite criticism](#)' (14 May 2018).

¹⁴ An unofficial translation of Bill T/332 can be found here: <https://www.helsinki.hu/wp-content/uploads/T332-Constitution-Amendment-29-May-2018-ENG.pdf>. This is a translation of the Bill, and the final adopted text differs from it on certain points.

¹⁵ P8_TA(2018)0340, European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN>

A FLAWED LEGISLATIVE PROCESS

In the following, we analyse the two Bills together, as they are closely interconnected.

The Government did not obey its legal obligations on public consultation and submitted the draft laws to Parliament in a way which excluded the possibility of any meaningful input from outside sources, including from NGOs. The Government failed to notify the Parliament and the public in time on its legislative plan and sent out mixed messages. While in June 2018 the Minister of Justice announced that the detailed regulations on administrative courts would be developed only in the Spring of 2019,¹⁶ and the Government's legislative plan also did not include any reference to an adoption of the law in 2018,¹⁷ in an October interview he noted that the Government had already adopted the concept of the laws.¹⁸ The Hungarian Helsinki Committee requested the Ministry of Justice and the Prime Minister's Office to publish the concept in order to allow for a careful public debate. Both requests were denied on 24 October 2018.

On 20 September 2018, the Ministry of Justice co-organised a conference on the administrative justice system at Andrásy University. The Hungarian Helsinki Committee, a prominent human rights and rule of law NGO in Hungary, was denied access to attend.

The draft bills were published on a Government website on 25 October with a consultation deadline of 30 October, i.e. only three working days later.¹⁹ It was impossible to meaningfully review and comment the 68-page and 20-page long legal texts on topics of crucial importance for judicial independence and democracy. With such extremely short deadlines, it is no surprise that the two drafts attracted only a total of one comment from the public.²⁰ The five days deadline is even shorter than the average number of seven days granted by the Government for public consultation.²¹

Furthermore, despite a legal obligation, the Government failed to publish an impact assessment of the drafts.²²

On 5 November, the Ministry of Justice invited political parties for a consultation. On the next day, the Government submitted to Parliament both Bills. A comparison of the texts published on the Government website and submitted to Parliament ten days later shows that no meaningful

¹⁶ <http://www.lb.hu/hu/sajto/darak-peter-meg-kell-orizni-jelenlegi-kozigazgatasi-biraskodas-ertekeit>

¹⁷ According to Act XXXVI of 2012 on the Parliament, the Government is obliged to regularly submit its legislative plan to the Parliament (Art. 38). The Government's legislative plan for the http://www.parlament.hu/documents/10181/56621/Tvalk_program_2018_osz.pdf/5db0f555-cfa0-6b75-629f-fb1091e6bfff,

¹⁸ <https://magyaridok.hu/belfold/tobb-mint-igazsagugyi-reform-3549749/>

¹⁹ http://www.kormany.hu/download/b/1e/71000/kb_20181024_honlapra.pdf#!DocumentBrowse,
http://www.kormany.hu/download/c/1e/71000/atmeneti_20181024_honlapra.pdf#!DocumentBrowse

²⁰ <http://www.kormany.hu/download/b/c1/81000/tipizaltosszefoglalo.zip#!DocumentBrowse>

²¹ László Vértesy (2016): Public Participation in the Drafting of Legislation in Hungary. In: International Public Administration Review, 14(4), 115–135. According to data collected, the mean (average) number available for consultation was 7.09 days for the 2011-2014 period.

²² Act CXXXI of 2010 on public participation in the legislative process, Art. 8(3)

changes were adopted. The revisions affected only technicalities and typos in the first draft.

The Minister of Justice requested the opinion of the Venice Commission on the law in November 2018,²³ but did so that the opinion will arrive only after the laws will have been adopted in Parliament. According to the Parliament's draft agenda, the laws are expected to be adopted between 10-13 December 2018²⁴ while the opinion is expected only next year, in 2019.²⁵

In the procedure, not only domestic rules have been breached, but also the Venice Commission's standards on the legislative procedure, including the Venice Commission's Rule of Law Checklist,²⁶ which provides that proposed legislation should be adequately justified, the public should have a meaningful opportunity to provide input and an impact assessments should be made on the proposed legislation.

EXCESSIVE POWERS FOR THE MINISTER OF JUSTICE

According to the proposal, the Minister of Justice will have extremely wide-ranging powers over administrative courts. This undermines the separation of powers and the system of checks and balances. The Minister, as a member of the executive branch of government, among his/her other powers, would decide on who gets to become an administrative judge, would supervise the budget of administrative courts, would be able to promote individual judges, supervise internal regulations and carry out internal investigations. These powers of the Minister would allow the executive branch to unduly interfere with the independence of the administrative judiciary, which supervises the legality of the executive branch's acts.

Decision on appointments

The single biggest risk of the Bill is the Minister's unchecked power to appoint judges. According to the Bill, the Minister would decide who gets to be appointed as an administrative judge. From the publication of the call for applications to the final decision, the process is supervised by the Minister.²⁷ Although the proposal involves the National Administrative Judicial Council (NAJC), the self-governing body of administrative judges in the decision making, the Minister would be able to disregard the ranking of applicants by the NAJC. The Minister would be able to alter the

²³ <http://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/benyujtottak-a-kozigazgatasi-birosagokrol-szolo-torvenyjavaslatot> and <http://www.kormany.hu/hu/igazsagugyi-miniszterium/hirek/magyarorszag-erdeket-szolgalja-a-kozigazgatasi-birosagokrol-szolo-javaslat>

²⁴ http://www.parlament.hu/documents/10181/56621/UT_20181126_elfogadott.pdf/4d29f704-735a-c2c3-6cca-550682411fc5

²⁵ https://www.venice.coe.int/WebForms/documents/by_opinion.aspx?v=ongoing&lang=EN

²⁶ Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf

²⁷ T/3353, Art. 67(1)

order of applicants suggested by the NAJC,²⁸ thus may appoint almost anyone.²⁹ This power allows the full and unchecked control over the inflow of new judges by the Minister.

The Minister of Justice would have similar, and in some aspect, even broader powers during the one year transitional period before the Bill on administrative courts enters into force. The Minister of Justice will have an appointment power over judges in the transitional period similar to the one explained above. The bottom line of the rules is that the Minister will be free to deviate from the ranking of applicant judges and appoint whoever he wishes. The applications will be reviewed by an ad hoc committee, consisting of four randomly selected judges and four other members that are nominated by the Parliamentary Committee for Justice, the Chief Prosecutor, the minister responsible for public administration and the President of the Bar Association. This committee recommends the top candidates for each position for the Minister but this recommendation does not bind the Minister and he may decide to recommend another person on the list for appointment by the President of the Republic.³⁰

The number of judges at each level of the new administrative court system will be decided by the Minister, which is a broad power to influence these courts. This might be a tool in the hands of the Minister to marginalize judges currently ruling in administrative cases. The transitional provisions stipulate that all current administrative judges may continue to serve in the new administrative court system.³¹ Following this, the Minister of Justice will determine the number of judicial positions for each court.³² Yet, the maximum number of judicial positions is not determined, hence the Minister has powers to fill important courts, such as the Administrative High Court with newly appointed judges and consequently marginalize the judges who have transferred from the current court system.

The unchecked power of the Minister to decide on judicial appointments is unacceptable and is similar to a previously failed attempt of the Hungarian Government to put judicial appointments in one hand. In 2012, the Government wished to introduce a system where the President of the National Judiciary Office, a judge elected by Parliament, would have had the right to freely deviate from the ranking of the National Judicial Council (NJC), the democratically elected self-governing body of the judiciary. This would have allowed her, in effect, to freely decide on who gets to be a judge and who does not. After pressure from the Venice Commission,³³ a co-decision procedure

²⁸ T/3353, Art. 72(2)

²⁹ The regulation stipulates that at least 85 % of the maximum points needed to be gained, however, based on the scoring system failing to do so is highly unlikely for a serious candidate. The reasoning of the legislative proposal contradicts the text of the law: according to the reasoning, the NAJC sends the top three candidate to the Minister, but the text of the Bill does not provides so. [T/3353, Art. 70(7) and Reasoning to Article 67-73 in the same document].

³⁰ T/3354, Art. 13(2)

³¹ T/3354, Art. 2(1)

³² T/3354, Art. 9(2), this number has to reach at least the number of judges who submitted their request for transfer to that court.

³³ Venice Commission Opinion Opinion no. 683/2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)020-e), §§18, 38 and Venice Commission Opinion 663/2012, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2012\)001-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)001-e), §§34-36

was introduced where the NJO President must seek the consent of the NJC to alter the ranking of applicant judges.³⁴

In the currently proposed new system for administrative courts, the Minister would be completely free: there is no co-decision process if the Minister disregards the ranking by the NAJC. The only limitation is that the Minister must provide reasons for the decision, however, this solution is vague and lacks guarantees. The reasons given may not be challenged by any other actor. This way, the governing majority in Parliament reintroduces the unchecked power to appoint judges by a single person (in the previously failed draft, the President of the NJO, in the current draft, the Minister). This is clearly against common European standards, as established by the Venice Commission.

The solution proposed by the Bill that a member of the Government, thus a politically appointed member of the executive has the final say on judicial appointments is unacceptable. The proposed powers of the Minister of Justice are wider than those of the President of NJO, the current head of the court system. Such influence of the Government over the judiciary is dangerous and has the potential to render judicial oversight of administrative acts theoretical and illusory, rather than practical and effective.

Promotion of individual judges and appointment to senior positions

The Minister not only has the final say on who gets to become an administrative judge, but also decides on the promotion of judges to higher positions. According to the Bill, the Minister would decide which judge of a regional administrative court might become a judge at the Administrative High Court.³⁵ This, in fact, is an incredibly wide-ranging power: it would require an extremely bold judge to annul a decision of a government agency (possibly supervised by the very same Ministry) if he or she ever wants to become a judge on a higher judicial instance. This kind of influence of the executive over the judiciary is unacceptable and has a chilling effect on judges at lower courts.

The Minister will also decide on the appointment of court presidents, which puts him on the top of the judicial administrative hierarchy. The Minister will be fully unhindered by previous appointments to judicial leadership positions, since all appointments to senior judicial positions within administrative courts will be terminated when the new administrative court system starts to function on 1 January 2020.³⁶ These senior positions include court presidents and college leaders.³⁷ The Minister will appoint new judges to these senior positions for an interim period of

³⁴ Act CLXI. of 2011 on the organisation and administration of the judiciary, Art. 132(6)

³⁵ T/3353, Art. 73(1)

³⁶ T/3354, Art. 5(1). An exception is that unit leaders should be re-appointed as unit leaders [Art. 5(3)]. College leaders should be appointed as a unit leaders, which is a much lower position [Art. 5(4)].

³⁷ A college is a professional group of judges dealing with similar issues (there are colleges for civil, economic, criminal, administrative and labour law matters). Colleges also give opinions on important legal questions, take part in assessing judges' performance and give opinions on the case allocation scheme (Art. 154 and 155 of Act CLXI of 2011).

up to one year.³⁸ Following this interim period, court presidents will be appointed by the Minister, while college leaders by these presidents.³⁹ This system allows the Minister to unduly interfere with administrative courts and influence them via hierarchical means. This is similar to what happened after the mandatory retirement of 274 judges and prosecutors in 2012, who were never reinstated to their senior leadership positions.⁴⁰ It is highly possible that almost all new administrative courts will be led by newly appointed court presidents.

The Minister and the President of the Administrative High Court would jointly be able to increase the salary of individual judges by promoting them to the position of a “titular judge of the Administrative High Court”.⁴¹ This is a flagrant violation of judicial independence, as it makes it possible to put financial pressure on judges who may need to decide in cases directly concerning the Ministry of Justice or any other government body. The president of a regional administrative court may also increase the salary of judges by appointing them to the position of “titular president of a chamber”.⁴² This also puts judges in a more hierarchical setup, thus undermines their independence. It is no surprise that in the current system only the judicial self-governing body, the National Judicial Council, has the discretionary power to promote a judge to become a titular judge of a higher court.⁴³

Budgetary powers

The present rules on preparing the courts’ budget provide that the NJO President prepares the budget and the Government submits it to Parliament without any modifications;⁴⁴ therefore, the separation of powers is ensured in the phase of the budget preparation. In the proposed new system, the Minister would control the budget of the administrative courts.⁴⁵ The Minister would be again free to disregard the opinion of the NAJC, as that body has no powers to make decisions

³⁸ T/3354, Art. 15(1) and (2). Even though judicial leaders shall receive the same salary in their new positions, they are not entitled to continue in their leadership positions in the new administrative court system [T/3354, Art. 5(2)].

³⁹ T/3353, Art. 74(1), 74(4), 76(4) and 77(3)

⁴⁰ Similar changes to court leadership were forced in 2012. In 2012 around 10 percent of judges were forced into mandatory retirement due to the rapid lowering of judges’ retirement age from 70 to 62 years. This served the political aim of changing 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 at the workplace on grounds of age. However, the judges were never reinstated into their previous senior positions.

⁴¹ T/3353, Art. 83(1) It means that the judge remains at the region level, but his or her salary increases and may use the title of “titular judge of the Administrative High Court”.

⁴² T/3353, Art. 83(2)

⁴³ Act CLXI of 2011 on the organisation and administration of the judiciary, Art. 174 After twenty years of service the judge is automatically gets promoted to a higher titular position by the President of the NJO. Because it is automatic and involves no discretionary element from the President, it is not a tool for undue influence.

⁴⁴ Act CLXI. of 2011 on the organisation and administration of the judiciary, Art. 76(3)

⁴⁵ T/3353, Art. 29(1)

on budgetary matters.⁴⁶ The NAJC would only have the power to block the modification of the regional administrative courts' budget during the fiscal year.⁴⁷

If the Bill is adopted, administrative courts would lose their own agent in the budgetary process, who is currently the NJO President.⁴⁸ Unlike the NJO President who is solely responsible for the judiciary, the Minister is responsible for a wide range of other topics and thus administrative courts would be represented on a lower level in the budgetary process as the Minister is not elected by the Parliament, but appointed by the Prime Minister, while the President of the NJO is directly elected by the Parliament. Moreover, the Minister is a political appointee in the executive branch and these wide budgetary powers grant the Minister undue interference with the administrative judicial system.

Supervising internal regulations and conducting internal investigations

According to the proposal, from a legal point of view, the Minister would supervise the general internal regulations of the regional administrative courts.⁴⁹ With the exception of the Administrative High Court, the Minister would thus supervise the general internal regulations of all regional administrative courts. Such a deep intrusion into the internal organisation of regional administrative courts is unnecessary and allows the Minister to influence the internal structure of these courts. Moreover, it is unreasonable that the Minister would exercise legal supervision over a product of the courts, who are, by definition, the final arbiters of what is lawful and what is not.

The Minister of Justice would have broad powers to supervise and investigate the internal arrangements of the administrative courts. Copied from the rights of the President of the NJO,⁵⁰ the Minister would supervise the administrative tasks of court presidents, might order internal investigations of them and might initiate disciplinary procedures against some high-ranking judges.⁵¹ These powers allow the Minister to gather broad information about the administrative judiciary, and to influence high-ranking judges by investigations.

⁴⁶ T/3353, Art. 31(1) Note that the Minister of Justice is in such a dominant position that he or she would even have the power to set a deadline for the NAJC without any limits to its brevity.

⁴⁷ T/3353, Art. 32

⁴⁸ For the current situation see Act CLXI of 2011 on the organisation and administration of the judiciary, Art. 65

⁴⁹ T/3353, Art. 34(4)

⁵⁰ Act CLXI of 2011 on the organisation and administration of the judiciary, Art. 76(6)

⁵¹ T/3353, Art. 61(5)

JUDICIAL SELF-ADMINISTRATION WEAKENED

Judicial self-governance is the bedrock and guarantee of judicial independence: without it there might be no impartial organisation of the judiciary. According to the proposal, the NAJC would have no real power over the judicial organisation or administration. All the important powers are vested with the Minister, a member of the executive branch, or, in the case of a smaller number of powers, with the President of the Administrative High Court. As a consequence, the administrative judicial branch will be organized into a highly hierarchical structure where the influence of other branches of government is stronger than the will of the representatives of judges elected by their peers. This structure allows primarily the Minister to indirectly influence the decision-making of administrative judges on such important cases as taxation, public procurement and human rights, among others.

According to the proposal, the NAJC may only give an opinion, but may not decide on the vast majority of issues. Among others, the NAJC only provides an opinion on the budget of the administrative courts (prepared by the Minister) and on the appointment or exemption of administrative judges (ultimately decided by the Minister).⁵² The NAJC would not have a decisive say in even such soft-power issues as training and education.⁵³ The only real power of the NAJC is the right to consent to the modification and realignment of the regional administrative courts' budget during the fiscal year. Another co-decision power of the NAJC is that if the president and vice president of a regional administrative court already have served two terms in office, the NAJC's consent is required for a third term⁵⁴ which is quite a negligible authority.

Even though the NAJC would have extremely weak powers, the Bill would moreover allow its members to be controlled by superior judges through disciplinary procedures. According to the proposal, a judge may not be elected to the NAJC if a disciplinary procedure is pending against him or her.⁵⁵ The disciplinary procedure might be initiated by the supervising judge, or in some cases the Minister of Justice, thus it would allow the barring of critical voices from even running for a membership in the NAJC.

The proposal also lacks a guarantee that currently protects the members of the equivalent body of the NAJC, the National Judicial Council against disciplinary procedures. Under the current system, a disciplinary procedure may only be initiated against an NJC member with the consent of that body.⁵⁶ There is no similar protection against disciplinary procedures in the proposal, thus a disciplinary procedure may be initiated even without the NAJC's consent. The membership in the special NAJC subgroup dealing with judicial promotions would be terminated if a disciplinary

⁵² T/3353, Art. 25(2) c), e) and f)

⁵³ T/3353, Art. 25(2) g) and 40. § (1)

⁵⁴ T/3353, Art. 43(5)

⁵⁵ T/3353, Art. 26(3) and Art 8(5) c)

⁵⁶ Act CLXI of 2011 on the organisation and administration of the judiciary, Art. 110 (3)

procedure is initiated against the member.⁵⁷ Thus, a judge might lose his/her appointment if a disciplinary procedure is launched against him/her as a member of NAJC. In effect, this could permit the silencing of critical voices in the NAJC through disciplinary procedures.

Disciplinary procedures against elected members of the judicial self-governing body are not without precedent in Hungary: in June 2018, disciplinary procedures were started against three NJC members and the required consent for such procedures was an important protection in these procedures.⁵⁸ Without the protection of their peers, judges serving in the NAJC would be defenceless against their superiors in a disciplinary procedure and thus unable to properly protect the interests of the administrative judiciary.

OTHER ISSUES

There are further provisions of the Bill and the transitional provisions which are not in line with the principle of judicial independence and other principles.

Possible indefinite appointment of the President of the Administrative High Court

The President of the Administrative High Court will be elected for a period of 9 years by the Parliament, but a blocking minority of as little as one-third of MPs may prolong this appointment indefinitely. According to the Bill, the President will be elected by two-thirds of the MPs, but if the 9 years term passes and the Parliament fails to elect a new President by the same margin, the previous President may continue to exercise his or her powers.⁵⁹ Similar rules might be found elsewhere,⁶⁰ but in the Hungarian context it serves the interest of those in power. This solution assures that even if the current majority loses an election in the future, it might keep an extremely important official in position with as few as one third of the seats in Parliament. This is not a novelty in Hungarian legal system: a similar solution is applied with regard to the Prosecutor General, whose position might be prolonged indefinitely with the same one third minority.⁶¹

According to media reports, András Patyi is a likely candidate for the position.⁶² On 25 July 2018, a seemingly minor modification was made to the law that regulates judicial appointments. Only

⁵⁷ T/3353, Art. 28(6) and Art. 8(5) c)

⁵⁸ „Disciplinary procedures are being launched against judges thought to be favouring the opposition”
<https://444.hu/2018/06/14/fegyelmi-eljarasokat-kezdemenyeznek-ellenzekinek-gondolt-birak-ellen>

⁵⁹ Fundamental Law of Hungary, Art. 26(3) and T/3353. Art. 45 (4)

⁶⁰ For example Article 23(3) of the European Convention on Human Rights

⁶¹ Act CLXIV of 2011, Art. 22(2)

⁶² <https://444.hu/2018/08/06/hivatalos-paty-i-andras-birokent-visszater-a-kuriara>, Mr Patyi exposed himself as an expert of administrative judiciary in September 2018 in an interview to the pro-government newspaper Magyar Idők: <https://magyaridok.hu/belfold/paty-i-a-kozigazgatasi-birosagot-mar-reg-vissza-kellett-volna-allitani-3486581/>.

one word was changed,⁶³ but this guaranteed that Mr Patyi, who had served as the rector of the National University of Public Service could resign and be appointed to the Kúria (where he worked in 2009-2011) without an application procedure and a competition. In his CV⁶⁴, Mr Patyi states that he had been appointed as a judge in 2009 and previous to that, he had not worked as a judge. Mr Patyi used to work as a notary for the Budapest 12th district mayor's office under Fidesz leadership in 1997- 2006. Mr Patyi has become publicly known for his loyalty to Prime Minister Viktor Orbán in a video that showed him apologising to Orbán because the National Election Commission, which he had chaired, had fined the Prime Minister during the 2018 election campaign.⁶⁵ On 4 September 2018, Mr Patyi was appointed as a judge again without participating in any selection process; he was appointed as a chamber president on the following day.⁶⁶ He was the closing speaker at a conference on 30 September 2018 co-organised by the Ministry of Justice on administrative judiciary, which reinforced speculation about his possible further role as President of the Administrative High Court.

Breach of the right for the case to be heard by an impartial tribunal established by law

There is no guarantee in the Bill that the cases pending at the time of the starting date of the operation of the new administrative courts will be handled by the same judge who started to hear them. To the contrary, the transitional provisions explicitly regulate that all pending cases should be halted and re-allocated between 15 December 2019 and 15 January 2020.⁶⁷ As a sole exception, the Bill provides for the judges to continue adjudicating their previous cases, provided they are also transferred to the respective courts, but it will be rather an exception than the rule. Should they be transferred to another court, the litigants' right to their case being heard by a tribunal established by law may be violated.⁶⁸ The right to a lawful judge would be much better served if judges could keep their cases and finish all ongoing trials regardless of the new system. Such a solution is applied, for example, to the judges of the European Court of Human Rights, where previous judges finish all cases they have started, regardless that their term has expired and a new judge has been elected.⁶⁹

⁶³ The former text of the law provided that a judge on leave for rectorship at a university might come back to serve as a judge again, after his or her term as rector has "expired". Mr Patyi's term, however, did not "expire" because he resigned before the end of his term as rector to become a judge. The new text of the law provides that a former rector can easily become a judge again if his or her rectorship "terminated", a term referring also to resignations, <http://www.parlament.hu/irom41/00711/00711.pdf>.

⁶⁴ http://archiv.akk.uni-nke.hu/uploads/media_items/paty-i-oneletraiz-pdf.original.pdf

"Úgy nyertem határozatlan idejű bírói kinevezést és úgy kerültem a Legfelsőbb Bíróságra beosztásra, hogy korábban bíróként nem dolgoztam. Kinevezésem a közigazgatási bíráskodás témakörében végzett kutató munkám és az alkotmányosság terén szerzett szakmai tapasztalataim elismerése volt."

⁶⁵

https://hvg.hu/itthon/20180413_Te_Toni_tenyleg_megbuntett_engem_a_Paty_i_Sajnalom_miniszterelnok_ur

⁶⁶ https://hvg.hu/itthon/20180905_Villamkarrier_egy_napja_biro_Paty_i_de_egybol_tanacselnok lett

⁶⁷ T/3354, Art. 18(3) and 16(1)

⁶⁸ T/3354, Art. 18(5)

⁶⁹ Article 23(3) of the European Convention on Human Rights