Nothing ever disappears, it only changes

The Hungarian Government switches to higher gear to curb judicial independence

On 12 November 2019, the Hungarian Government submitted to the Parliament a 200-page long *"omnibus bill",* which might extend political influence over the judiciary. The Bill would guarantee judicial decisions favourable to the government in politically sensitive cases even without setting up a separate administrative court system.

A brief analysis of Amnesty International Hungary on the draft law and what needs to be done.

Unlawful legislative process

On 12 November 2019, the Hungarian Government submitted Bill T/8016 *on the changes made to certain laws with regard to introducing a one-level procedure by local government offices* (hereinafter Bill) to the Parliament. The Bill is lengthy and is of great importance as it makes changes to many laws *inter alia* to the Act on the Constitutional Court and to the cardinal Acts on the Organisation and Administration of Courts and on the Legal Status and Remuneration of Judges.

Despite of its importance, the government incorporated the new provisions on courts into a so-called *"omnibus bill",* which aims to modify dozens of other laws. This lengthy Bill was not included in the 2019 autumn legislative programme of the government, no impact assessment has been published, so it is unclear how the newly introduced one-level procedure and the corresponding constraints on the right to legal remedy will affect citizens. The plan concerns the reorganization of the administrative court system, and the burden it might impose on the judiciary is not foreseeable either.

It could be a significant change that courts would adjudicate in family contact disputes previously handled by family and child protection offices, though the government has not yet assessed the possible impact of the increasing workload on the activity of courts (Art. 241). The Government has failed to carry out a general consultation required by the Act CXXXI of 2010 on Social Participation in the Preparation of Legislation and, therefore, violated the Act CXXX of 2010 on Law-Making. Amnesty International, along with the Hungarian Helsinki Committee has requested a meeting with the previous Minister of Justice László Trócsányi on June 17, 2019 and with current Minister of Justice Judit Varga on August 29, 2019 to discuss

the state of the judiciary and the ideas on the court reform. Neither Minister Trócsányi, nor Minister Varga have responded to the requests.

The Government's "solution": A Constitutional Court under governmental control instead of setting up the new Administrative High Court

By opening up new paths for constitutional complaints, the Bill would allow the Constitutional Court to exercise tightened control over the ordinary judiciary. The Bill would establish new rules which entitle public authorities to file a constitutional complaint with the Constitutional Court on the ground that their competences have been unconstitutionally constrained. [Art. 56(3)]

The Bill reflects a shift towards an approach in which it is not only the individual who is entitled to human rights protection vis-à-vis the state, but under certain circumstances, public authorities may also claim fundamental rights protection from the Constitutional Court. According to the explanatory memorandum of the Bill, not only persons but state organs can have a right to a fair trial, which means that their rights and obligations in any litigation must be adjudicated by an independent and impartial court established by law, in a fair and public trial, within a reasonable time. This absurd approach provides a possibility for an administrative authority to file a constitutional complaint with the Constitutional Court, based, for instance, on the right to a fair trial, in case its decision had been challenged before courts and the ordinary court decided against the authority.

According to Article R (4) of the Fundamental Law, *"The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State*." The Bill provides a fairly broad possibility for public authorities to turn to the Constitutional Court and submit a constitutional complaint on the basis of the above vague provision of the Fundamental Law after the final verdict, that is unfavourable to the public authority, has been rendered by an ordinary court. The explanatory memorandum to Art. 56-57 of the Bill states that an alleged infringement of public authorities' competence makes them "affected" for the purposes of declaring their complaint admissible. Before 2010 members of the Constitutional Court were elected by the Parliament following a bipartisan nomination. This practice has changed, and all current judges of the Constitutional Court have been nominated only by the governing majority in Parliament. Following the adoption of the Fundamental Law in 2011, the Venice Commission has noted several shortcomings with regards to the provisions of the Fundamental Law on the Constitutional Court. According to our assessment, given the above changes, it is concerning that the Constitutional Court will not be able to resist the political pressure in cases of significant political importance. Furthermore, it is alarming that -by opening up the path for constitutional complaint for state organs- authorities will be in a position to challenge decisions that have been adjudicated against them by ordinary courts with an extraordinary appeal.

The proposed amendments might pave the way for the Constitutional Court to review the decisions of ordinary court in a wide range of situation, which can be problematic in human rights-related cases decided by administrative courts (such as electoral cases, freedom of assembly cases, ill-treatment by the police, asylum cases) or in other cases where public authorities are involved. This approach provides the possibility for public authorities to bring these cases, already decided by ordinary courts, before the Constitutional Court. This might appear as an approach aiming to strengthen human rights protection, but based on the above it seems that the government has changed course and instead of setting up as separate

administrative court system subject to the administration of the Ministry of Justice, it opens up the possibility to bring politically sensitive cases before the already captured Constitutional Court.

Lex Handó?

The Act on the Constitutional Court is clear on the rules of conflict of interest related to the Constitutional Court justices: today a judicial mandate is not compatible with a membership in the Constitutional Court. The Bill changes this rule, and states that membership in a Constitutional Court is no longer incompatible with judicial mandate in the ordinary court system [Art. 56(1)]. According to the Bill, a person elected to the Constitutional Court can make a request within 30 days from taking office to be appointed as a judge. The Bill orders the suspension of the judicial mandate for someone who has already been elected to the Constitution Court but does not take office before the Bill enters into force. It can be reasonably assumed that this rule has been established for and tailored to the current President of the National Judicial Office (NJO), who is also a judge, and it aims to ensure that she can be transferred to the Curia right after her mandate in the Constitutional Court has expired or otherwise terminated. On November 4, 2019, the Parliament elected Tünde Handó as a member of the Constitutional Court for a twelve-year term. She has served as the President of the National Judiciary Office (NJO) since 2012.

Constitutional Court justices may become chamber presidents at the Supreme Court

The Bill makes it possible for newly elected Constitutional Court justices, and for those already on the bench, to become judges simply on their request (Art. 56). The President of Hungary appoints Constitutional Court justices to judicial positions *"without checking the qualifications required for appointment and without an application process"* (Art. 92). Moreover, these judges may be appointed to the Kúria (Supreme Court) as chamber presidents, right after their mandate in the Constitutional Court expires.

This rule raises concerns, as the law normally requires different competences to qualify as an ordinary judge than to become a Constitutional Court justice. Legal scholars with high-level professional knowledge (university professors or doctors of the Hungarian Academy of Sciences) may become Constitutional Court justices while, for a judicial appointment, one must gain practical experience as a judge, a court clerk, or as a legal professional in other fields. Justices on the Constitutional Court will not be required to prove this kind of experience and to compete with other experienced candidates for the prestigious posts of chamber presidents at the Kúria.

Although the explanatory memorandum of the Bill states that a justice of the Constitutional Court must meet the requirements for judicial appointment, the text of the Bill does not contain such rules. Moreover, it states explicitly that in the above-mentioned cases, appointments may take place without assessing the requirements for a judicial position (Art. 92). Furthermore, the Bill is completely silent on the assessment of the qualifications required to be appointed as a chamber president of the Kúria. This can be relevant for incumbent justices on the Constitutional Court for whom the Government aims to provide a position in the Kúria after the expiry of their mandate. More importantly, the Bill opens the way for Constitutional Court justices without any judicial experience in the ordinary court system to be elected by the Parliament as the next President of the Kúria in 2020, when the term of office of the current President, Péter Darák, will expire.

The system of case allocation

According to the Act CLXI of 2011 on the Organization and Administration of Courts, the annual case allocation plan is determined by the president of the courts until 10 December each year, for the upcoming year. The Bill removes the deadline and this guarantee from the law, therefore the deadline for establishing the annual case allocation plan remains unclear, which may undermine the right to a fair trial.

Furthermore, it is concerning that the Bill transfers the task of determining the case allocation plan from the president of the district court to the president of the regional court. Thus it violates the principle of subsidiarity and allows for regional court presidents, who are appointed by the NJO President, to determine case allocation schemes for lower courts as well. Nevertheless -as a positive development- the Bill introduces a new rule stating that the case allocation plan must be established in a way that makes it clear in advance which panel will adjudicate in a particular case.

More judges under national security vetting

The Bill expands the number of judges that are subject to national security screening. Currently, the judges who are subject to national security vetting are the following: (1) judges authorising intelligence information collection (Art. 74 of the Act CXXV of 1995 on the National Security Services), (2) judges adjudicating in lawsuits filed against decisions rejecting the complaint on the findings of the national security control (Art. 72/D (12) of the Act CXXV of 1995 on the National Security Services), (3) judges adjudicating in lawsuits brought against decisions refusing the license to access to classified information (Art. 11 (3) of the Act CLV of 2009 on the Protection of Classified Information), and (4) judges adjudicating in cases in which the classifier has challenged the decisions made in proceedings for the supervision of data classification (Art. 63 (6) of the Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information).

The Bill (Art. 108) significantly expands the number of judges subjected to this measure. For instance, the vice-presidents of the Kúria, presidents and vice-presidents of regional courts and regional courts of appeal, certain head of departments in the NJO, and judges in charge of specific tasks (e. g. in the fields of defence, civil protection, system security, system administration) will also be subjected to national security vetting.

The explanatory memorandum lacks any justification for the necessity of national security vetting in some judicial positions and limiting the fundamental rights of the affected judges thereof.

Blurring the lines between courts and the public administration

The President of the NJO will be able to second judges more widely to administrative organs, such as the State Audit Office, the Public Prosecutor Office, organs of state administration, Budapest-capital and county government offices, the Office of the Constitutional Court, and the Office of the Human Rights Commissioner.

Laws have already provided the opportunity for judicial secondment to Ministries or to the NJO, and experiences in public administration proved to be useful within the court system. Besides, in the proposed system, judges may be seconded only with their own consent. Nevertheless, the lack of rules on conflict of interest can easily lead to situations when judicial independence is compromised; thus the right to fair trial may be violated.

Attorneys are subject to strict constraints and rules on conflict of interest in this regard, especially if a lawyer previously worked as a judge. In this case, an attorney cannot be a legal representative or a defence attorney in certain public authority procedures for a period of two years following the termination of their judicial mandate [See Art. 20 (3) Act LXXVIII of 2017 on the professional activities of attorneys-at-law]. It is concerning that for instance such rule does not apply to judges seconded to the public administration. Therefore, the Bill makes it possible for a seconded judge to deal with a case in which he/she or their fellow judges adjudicates, or to deal with a case which is adjudicated in a court presided by his/her previous employer. The Public Prosecutor, the government office or the state administration organ can be a party to an administrative court procedure, however the Bill does not exclude or limit the participation of the seconded judges on the part of that party. Hence it blurs the boundaries between the courts and public administration and may result in the violation of the right to fair trial.

Administrative court judges again left with uncertainty

In December 2018, the Parliament adopted a law on the separate administrative court system, which required administrative judges to decide until spring 2019 whether to continue with their activity in the new court system or to remain within the ordinary court system. The Venice Commission reported fear among judges adjudicating in administrative issues and found that they were reluctant to submit a request for being transferred to the new court system. Finally, at the end of May this year, after the judges had already submitted their request, the government suddenly postponed the planned judicial reform on the administrative court system, then, at the end of October, the Minister of Justice announced that the Government dropped the idea of the new separate administrative court system.

Only two weeks have passed since the Minister's statement, but the administrative judges can, yet again, find themselves in a precarious situation. The Bill aims to establish a new court system for administrative cases and, accordingly (Art. 81), administrative and labour courts will be terminated on 31 March 2020. Judges of regional administrative and labour colleges can submit their requests until 20 February 2020 to be transferred to regional courts having jurisdiction to decide administrative cases in the future – but the regional court is not necessarily located in the area the judges have so far worked. The respective judges are again under pressure to decide where to continue their judicial activity, which can result in a growing uncertainty and insecurity among them.

Hands tied: judicial discretion is further limited

The legislator would tie the hands of the judges with regards to departing from the previous case-law and thus send a chilling message to discourage judicial reasoning that diverts from the present case law. This may result in curbing judicial independence, particularly in matters where judges aim to use rule of law principles or principles of constitutionality. The Bill introduces a new procedure, called "uniformity complaint" (Art. 73), which can be submitted if, regarding questions of law, a chamber of the Kúria deviates from the published decision of the Kúria without initiating a so-called "uniformity procedure," and the deviation does not appear in the lower courts' decisions. Consequently, for instance, the newly introduced "uniformity complaint" makes it possible to challenge decisions in which a chamber of the Kúria applies rule of law standards and arrives at a different conclusion which is unfavourable to authorities. The Bill would modify (Art. 179) the Code of Civil Procedure and (Art. 236) the Code of Criminal Procedure, and would impose an obligation on the individual judge to provide

reasons for a decision in case of departing from the non-binding jurisprudence published by the Kúria. This can lead to an even more serious interference into the independence of individual judges. According to the Bill, *"legal reasoning shall contain the reasons which justifies the judges' departure from the edited cases of the Kúria published in the Collection of Judicial Decisions (Bírósági Határozatok Gyűjteménye) in questions of law, or the reasons for rejecting the request for the departure*." If a judge fails to give reasons for departing from the previous decisions, it can affect their professional evaluation and career (promotion). Furthermore, in criminal cases, the Bill introduces a new reason for extraordinary appeal, so if the court's reasoning has diverted from the non-binding jurisprudence published by the Kúria, the parties may challenge the decision at the Kúria. The rules above would therefore constrain the autonomy and independence of the judge in judicial reasoning, which may have a chilling effect on judges and negative consequences for legal reasoning. Furthermore, if the Kúria's jurisprudence will be shifting, this may further constrain individual judge's discretion at lower lever courts in the future.

Important and necessary changes missing from the Bill: What needs to be done

The Bill and its explanatory memorandum are overall 200 pages long, yet they lack any provisions strengthening judicial independence and the rule of law. The Fundamental Law should be amended, as the Seventh Amendment -adopted in 2018- has established a separate administrative and ordinary court system instead of the current unified system. This new Bill reflects a commitment to a unified court system, consequently the Fundamental Law should be changed accordingly. The government should take measures to solve the long-standing problems of low judicial salaries, especially since in September 2018 the salary of prosecutors became higher than the salary of judges.

Besides, we urge the Government of Hungary to start without delay a meaningful and substantial consultation with all parties affected, and only move ahead with the parliamentary debated of the Bill after the consultation will have been concluded. The Association of Judges (MABIE), the National Judicial Council and civil society shall be included at least in the consultation.

Furthermore, the provisions analysed in the present briefing that may result in curbing judicial independence and violating the right to fair trial shall be immediately withdrawn.

Furthermore, as it has been suggested by the Venice Commission and the Council of Europe Commissioner for Human Rights that the role of the National Judicial Council (NJC, which is the self-governing body of the judges) should be strengthened in order to balance the powers of the President of the NJO effectively:

- The NJC should be provided legal personality and greater budgetary autonomy in order to effectively carry out its tasks determined by the Fundamental Law.
- The current system of rotating presidency within the NJC should be reformed, and the president of the NJC should change not in every 6 months but in a longer time frame which can serve important purposes, such as responsible management of the budget and exercising employer rights.
- The NJC should have broader powers and tools to take the necessary measures if the President of the NJO fails to carry out his/her statutory obligations and follows an unlawful practice despite of the notice made by the NJC about the irregularities.

- A new rule of conflict of interest should be introduced to prevent court leaders to be subjected directly to the President of the NJO, and their relatives to become members of the NJC.
- Integrity of the members of the NJC should be protected more effectively against disciplinary procedures and against other procedures targeting their immunity or initiated on the ground of incompetence.
- The workload of the members of the NJC should be reduced with the extent necessary to allow sufficient worktime to carry out their tasks of judicial administration in the NJC.
- Court clerks or other administrative staff assisting the activity of the members of the NJC should be guaranteed at a statutory level.
- The President of the NJO should not be involved, in any form, in the process of electing the body (and its substitute members) exercising supervisory power over her/him. A clear deadline should be set for electing the substitute members of the NJC.
- The co-decision-making powers between the NJC and the NJO President shall be regulated in a way that strengthens the position of the NJC and requires consensus from both parties upon disagreement
    - The consent of the NJC should be required for an application procedure to be declared unsuccessful, and strict deadlines should be set for these purposes.
    - If the NJO President declares the application procedure unsuccessful, the law shall prescribe a deadline for the President to publish a new call, so that selection procedures are not unnecessarily delayed.
    - In order to challenge the NJO President's unlawful practices in declaring appointment procedures unsuccessful, the NJC should be given a right to consent to the declaration if a candidate is supported by the judicial staff.
    - The NJO President's powers to mandate interim court leaders shall be modified to restrict the interim appointments of court leaders.

The Parliament is expected to vote on the Bill in its sitting between 9 December and 11 December 2019.

Timeline of relevant recent events

28 June 2018 – The Hungarian Parliament includes the new system of administrative courts in the Constitution.

6 November 2018 – The Government filed its detailed plan with the Parliament to introduce the new system of administrative courts.

12 December 2018 – The governing majority passed the Act to set up a separate, heavily government-controlled administrative court system that was about to have jurisdiction over environmental protection, taxation, public procurement, elections, freedom of assembly, asylum, and other human rights issues, providing for a wider risk of political interference in these cases.

19 March 2019 – The Venice Commission found that, according to the respective new Act, "very extensive powers" would have been concentrated in the hands of a few stakeholders, and there were "no effective checks and balances to counteract those powers" in the system.

30 May 2019 – Chief of staff Gergely Gulyás announced that the Government indefinitely postpones to set up the new administrative courts.

3 June 2019 – The Parliament indefinitely postponed the entry into force of the Act establishing the administrative courts.

17 June 2019– Amnesty International Hungary and the Hungarian Helsinki Committee sent a letter to previous Minister of Justice László Trócsányi to initiate a discussion about the court system and judiciary independence.

9 July 2019 – Speaker of the Hungarian Parliament and chairman of Fidesz's governing board László Kövér said that the establishment of administrative courts was only taken off the agenda temporarily, until the international disputes around Hungary's rule-of-law situation settle.

29 August 2019 – Amnesty International Hungary and the Hungarian Helsinki Committee sent a letter to the newly appointed Minister of Justice Judit Varga to initiate a discussion about the court system and judiciary independence.

31 October 2019 – Minister of Justice Judit Varga announced that the Government decided to scrap the idea of a separate administrative court system for good.

4 November 2019 – Tünde Handó is elected by the Parliament as a new judge at the Constitutional Court, meaning she has to resign from her position as NJO president.

12 November 2019 – The Ministry of Justice submitted to the Parliament a 200-page long "omnibus bill", which might extend political influence over the judiciary.

Further Information:

Amnesty International Hungary

office@amnesty.hu

+3613214799