

Enclosed information material is submitted by Hungarian Helsinki Committee

Hungarian Helsinki Committee



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JUDICIAL INDEPENDENCE UNDER ATTACK IN HUNGARY Statement by the Hungarian Helsinki Committee

OSCE HDIM 2019

Working Session 10: Rule of Law I.

Including: Independence of the judiciary, Democratic law-making, Ensuring equal enjoyment of rights and equal participation in political and public life

1. The general situation in brief

Gaining a landslide victory in 2010 and using its constitutional supermajority, the Fidesz-KDNP government started to systematically and consciously undermine the system of checks and balances by weakening, eliminating or occupying those institutions and actors that can exercise any form of control over the executive branch of power:

- **State institutions:** There are several examples of steps aimed at taking over state institutions playing an important role in checking the executive branch. For instance, by amending the previously existing consensual provisions for nominating Constitutional Court justices, the ruling majority packed the Court with loyal people, including former government ministers or MP's of the ruling party.¹ After voicing criticism of certain government measures, the President of the Supreme Court was removed from his position. Although the European Court of Human Rights concluded that this had amounted to a violation of his freedom of expression, he was never reinstated.²
- **The media:** Through channeling advertising by government agencies, state-owned companies and ventures of government-linked business owners into loyal media outlets, the ruling elite financially undermined and eventually bought up numerous independent media organs. In the fall of 2018, several government-linked business persons "donated" their media portfolios (altogether close to 480 media outlets) to one mammoth media holding, the Central European Press and Media Foundation headed by government-loyalists.³

¹ For more details see: "fact sheets on some cardinal changes related to the rule of law in Hungary", https://www.helsinki.hu/wp-content/uploads/Hungary_NGO_Fact_sheets_February2012.pdf.

² See European Court of Human Rights *Baka v Hungary*, 20261/12 [GC], <http://hudoc.echr.coe.int/eng?i=002-11088>.

³ "Sudden cataclysm in Hungarian media: Almost all pro-government outlets in one hand", https://index.hu/english/2018/11/28/fidesz_media_unification_meszaros_habony_vajna_lizskay/ "Data visualization: this is how the pro-government media empire owning 476 outlets was formed",



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In order to exempt the transaction from inspection by the competition and the media authorities, the government issued a decree declaring it to be a "merger of strategic importance at a national level" without any further explanation.⁴ As a 2019 report on media freedom in Europe states, "the few independent outlets that remain face a host of obstacles, including lack of advertising revenue, a restrictive regulatory environment, and public campaigns to discredit independent journalists".⁵

- **Elections:** Electoral rules were also amended in favour of the ruling party, which amplified the distorted media landscape's impact on the fairness of the elections. After coming to similar conclusions in relation to the 2014 general elections,⁶ the OSCE/ODIHR Limited Election Observation Mission stated about the 2018 general elections that they "were characterized by a pervasive overlap between state and ruling party resources, undermining contestants' ability to compete on an equal basis. Voters had a wide range of political options but intimidating and xenophobic rhetoric, media bias and opaque campaign financing constricted the space for genuine political debate, hindering voters' ability to make a fully-informed choice."⁷
- **The academia:** Legislative amendments eventually forced the American branch of the George Soros-founded Central European University out of Hungary.⁸ In the summer of 2019, the legislature voted to remove 15 academic research institutes from the Hungarian Academy of Sciences and place them in a newly established state research network supervised by a board dominated by the Ministry of Innovation. This puts research under government control,

<https://english.atlatszo.hu/2018/11/30/data-visualization-this-is-how-the-pro-government-media-empire-owning-476-outlets-was-formed/>.

⁴ "Hungary: Parliament puts Academy of Sciences institutes under government control", <https://www.dw.com/en/hungary-parliament-puts-academy-of-sciences-institutes-under-government-control/a-49440144>, "Orbán exempts new propaganda conglomerate from competition law", https://index.hu/english/2018/12/05/propaganda_hungary_media_national_interest_competition_authority_exempt_viktor_orban/.

⁵ "Democracy at risk: Threats and attacks against media freedom in Europe", <https://rm.coe.int/annual-report-2018-democracy-in-danger-threats-and-attacks-media-freed/1680926453>, pp. 25-26.

⁶ "OSCE/ODIHR Limited Election Observation Mission Final Report, Hungary, Parliamentary Elections 6 April 2014", <https://www.osce.org/odihr/elections/hungary/121098?download=true>, p. 1.

⁷ "OSCE/ODIHR Limited Election Observation Mission Preliminary Findings and Conclusions, Hungary, Parliamentary Elections 8 April 2018", <https://www.osce.org/odihr/elections/hungary/377410?download=true>, p. 1.

⁸ "George Soros-Founded University Is Forced Out of Hungary", <https://www.nytimes.com/2018/12/03/world/europe/soros-hungary-central-european-university.html> and "Dark day for freedom: Soros-affiliated university quits Hungary", <https://www.theguardian.com/world/2018/dec/03/dark-day-freedom-george-soros-affiliated-central-european-university-quits-hungary>.



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with the executive having a decisive say as to the type of research that gets funded.⁹

- **Civil society:** The incumbent government has also been attacking human rights, anti-corruption and environmental NGOs. The government has attempted to stifle civil society organizations by conducting a smear campaign and passing hostile legislation threatening NGOs and their staff members with severe sanctions. The campaign against NGOs was linked to the government's fierce anti-migrant propaganda.¹⁰ The rhetoric was followed by intimidating legislation, including (i) a law requiring NGOs receiving funds from abroad to register as "foreign-funded",¹¹ (ii) an amendment to the Criminal Code threatening the organisation of assistance to asylum seekers with incarceration,¹² and (iii) a 25% tax imposed on funding provided or used for activities that are deemed to support migration (regular migration included). Several international organisations urged the Hungarian legislature to repeal these laws¹³ due to their chilling effect on the right to association and the freedom of expression – to no avail.

⁹ "Hungary: Parliament puts Academy of Sciences institutes under government control", <https://www.dw.com/en/hungary-parliament-puts-academy-of-sciences-institutes-under-government-control/a-49440144>.

¹⁰ See for example the Prime Minister's "state of the nation" speech in February 2017: "in 2017 we will also need to take up the struggle against international organisations' increasingly strong activists. [...] We are not talking [here] about non-governmental organisations fighting to promote an important cause, but about paid activists from international organisations and their branch offices in Hungary. [...] The organisations of George Soros are working tirelessly to bring hundreds of thousands of migrants into Europe", <https://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-state-of-the-nation-address-20170214>.

¹¹ For an analysis of the law, see: "Short Analysis of the Proposed Hungarian Bill on Foreign Funded Non-Governmental Organizations", <https://www.helsinki.hu/wp-content/uploads/NGO-Bill-HU-short-analysis-0411-final.pdf>.

¹² For a detailed analysis see: "What Is The Problem With The Hungarian Law On Foreign Funded NGOs?", <https://www.helsinki.hu/wp-content/uploads/What-is-the-Problem-with-the-Law-on-Foreign-Funded-NGOs.pdf>.

¹³ See for instance: "What Is The Problem With The Hungarian Law On Foreign Funded NGOs?", <https://www.helsinki.hu/wp-content/uploads/What-is-the-Problem-with-the-Law-on-Foreign-Funded-NGOs.pdf>, Venice Commission/OSCE ODIHR Joint Opinion No. 919/2018, NGO-HUN/326/2018, on the so-called 'stop-soros' legislative package, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)013-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)013-e); Venice Commission/OSCE ODIHR Joint Opinion No. 941/2018, NGO-HUN/336/2018, on the immigration tax and related issues, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2018\)035-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)035-e).



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2. Judicial Independence under attack

Now the ordinary courts are under attack. But as judicial independence is in the focus of international scrutiny, this is done very cautiously, subtly and incrementally through the administration of the judiciary.

The OSCE's recommendations on judicial independence warn that judicial administration must be transparent and enhance judicial independence.¹⁴ However, as the Council of the European Union,¹⁵ the Council of Europe Human Rights Commissioner,¹⁶ and others¹⁷ have warned, the independence of the Hungarian judiciary is undermined by the judicial administration.

One of the most important indicators of the rule of law is the extent to which "the law imposes limits on the exercise of power by the state and its agents".¹⁸ This function of the law can only be fulfilled if there is an independent judiciary to enforce it. The fair administration of the judiciary is a key to judicial independence, since enormous pressure can be put on individual judges through administrative measures, such as recruitment and promotion, judicial working conditions, remuneration. Hungary's example shows how the maladministration of the judiciary can threaten judicial independence.¹⁹

In Hungary, the administration of the judiciary is in the hands of one person: the President of the National Judicial Office (NJO). The NJO President is a political actor

¹⁴ 1991 Moscow Document, 19.2 (iii)-(vii), <https://www.osce.org/odihr/elections/14310?download=true>; Kyiv Recommendations, Part I and Part II, <https://www.osce.org/odihr/KyivRec?download=true>. In a broader sense: 1990 Copenhagen Document, 5.5, <https://www.osce.org/odihr/elections/14304?download=true>.

¹⁵ Council Recommendation within the European Semester framework, (17) and 4., <http://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf>.

¹⁶ "The independence of judges and the judiciary under threat", <https://www.coe.int/en/web/commissioner/-/the-independence-of-judges-and-the-judiciary-under-threat>.

¹⁷ Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>.

¹⁸ World Justice Project Rule of Law Index 2016, p19, https://worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf. In a broader sense, see: Venice Commission Rule of Law Checklist, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e).

¹⁹ A survey among judges show that Hungarian judges see serious problems with judicial administration, the survey concludes: "Examining the answers to all questions, Hungary and Romania, in particular, face issues across a range of aspects of independence." European Network of Councils for the Judiciary (ENCJ), "Independence, Accountability and Quality of the Judiciary", Figures 10, 20-23, 35 and page 58, <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/2019-06/ENCJ%20IAQ%20report%202018-2019%20adopted%20%20June%202019%20final.pdf>.



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who is external to the judiciary, because he or she is elected by the Parliament without any judicial participation. Also, only the legislature can remove the President if he or she neglects the duties stemming from the position. As a consequence, despite the fact that the NJO President must be elected from among judges, the judiciary cannot exercise effective overview over his or her activities.

Moreover, the current President, Ms Tünde Handó, has very close personal ties to the ruling party as the wife of MEP Mr József Szájer, who was one of the key figures in the overhaul of the constitutional system in Hungary.

The NJO President is supposed to be supervised by the National Judicial Council (NJC), a body comprised of judges elected by their peers plus the President of the Supreme Court (the *Kúria*). But the Council is weak, with limited powers and is unable to counterbalance the powers of the one-headed judicial administration. The Council does not even have its own independent budget. The Venice Commission warned against the weakness of the NJC already in 2012, but to no avail.²⁰

The problems stemming from this became obvious when in April 2018, a new council was elected by the judges, which pledged to investigate some alleged violations of the President of the NJO. One of the core issues was that in the past years, the NJO President has regularly circumvented the laws and appointed court presidents against the will of the judges. This is a problem as court presidents can put a lot of pressure on individual judges through deciding on their promotion, bonuses, working conditions, which is exactly why ODIHR's Kyiv recommendations on judicial independence emphasise the importance of selecting court presidents transparently with strong judicial participation.

Within a couple of months after the NJC launched its examination into the practice of appointments, two thirds of the members and substitute members of the NJC resigned from the body (17 out of 27). Some quoted personal or professional reasons, but some reported that they had been threatened with consequences if they remained on the Council.²¹ As the number of the NJC's members had fallen below 15 and not all court types were represented in it any more, the President declared the Council illegitimate and refused to cooperate with it, depriving the NJC from its ability to effectively supervise the President.

²⁰ Venice Commission Opinion no. 683/2012, CDL-AD(2012)020, 32, 35, 93.14 and many others, [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).

²¹ European Association of Judges, Report on the fact-finding mission of the EAJ to Hungary, May 2019, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>



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In October 2018, court presidents loyal to the NJO President sabotaged an election of new members and substitute members to the NJC.²² After the Hungarian Association of Judges criticised this and other moves, a Budapest court president, appointed by the NJO President, unlawfully black-listed 51 members of the association in his district and tried to persuade court leaders at his court to encourage judges to end their membership in the association. The Data Protection Authority imposed a fine of EUR 9000 on the concerned court for the privacy violation, but the case illustrates well what kind of power is concentrated in the hands of court presidents and how this power can be abused.

When in the summer of 2018, the NJC invited the president of the European Network of Councils for the Judiciary to visit Hungary, the NJO President said publicly that NJC members are “traitors of the homeland”.²³ In line with this, pro-government media also started a smear campaign accusing NJC members of being politically biased, trying to undermine the Hungarian Government, unfairly getting away with disciplinary offences, etc. Although the concerned judges have so far all won the defamation lawsuits they launched,²⁴ the discrediting articles keep appearing.

When, as a measure of last resort, in May 2019, the NJC requested the Parliament to remove the NJO President for not complying with her statutory obligations, the governing majority voted down the motion after spending less than five minutes on the matter.²⁵

To sum it up: the NJC has been prevented from performing its constitutional task of supervising the NJO President and effectively offsetting the extensive powers over judges of an actor who is external to the judiciary. The European Association of Judges described it as a “constitutional crisis”,²⁶ while the Council of the European Union warned that the “checks and balances, which are crucial to ensuring judicial

²² A summary of events with references is available in “A Constitutional Crisis in the Hungarian Judiciary”, p2-4, <https://www.helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf>.

²³ “Judges Replied Who Were Named as Traitors of the Homeland by Tünde Handó” (in Hungarian), <https://444.hu/2018/06/19/visszaszoltak-a-birak-akiket-lehazaarulozott-hando-tunde>.

²⁴ Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, p5, <https://www.iaj-uim.org/iuw/wp-content/uploads/2019/05/Report-on-the-factfinding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>. “Lied About Judges, Magyar Idők Has To Pay 1,6 Million”, <https://444.Hu/2019/09/24/Birokrol-Hazudozott-A-Magyar-Idok-16-Millio-Forintja-Banja>

²⁵ “A Constitutional Crisis in the Hungarian Judiciary”, p4, <https://www.helsinki.hu/wp-content/uploads/A-Constitutional-Crisis-in-the-Hungarian-Judiciary-09072019.pdf>.

²⁶ Report on the fact-finding mission of the EAJ to Hungary, European Association of Judges, p5, <https://www.iaj-uim.org/iuw/wpcontent/uploads/2019/05/Report-on-the-fact-finding-mission-of-a-delegation-of-the-EAJ-to-Hungary.pdf>.



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independence, have been further weakened".²⁷ In a system where all checks and balances have been weakened or occupied by the executive and the legislative branch, the NJC as a judicial self-governing body is alone in its struggle to reinstate a situation whereby the judiciary has sufficient control over the administrative management of courts, the lack of which can be a hotbed of pressuring judges indirectly but still efficiently.

²⁷ Council Recommendation within the European Semester framework, (17), <http://data.consilium.europa.eu/doc/document/ST-10170-2019-REV-2/en/pdf>.



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RECOMMENDATIONS

For these reasons, the Hungarian Helsinki Committee calls on the OSCE, OSCE Participating States and ODIHR to

1. Urge the Government of Hungary to fully comply with its Human Dimension commitments, including the 1990 Copenhagen and 1991 Moscow Document as well as to fully implement OSCE-ODIHR's 2010 Kyiv Recommendations on the independence of the judiciary. Most notably, the Hungarian Government should be urged to publicly condemn accusatory and labelling rhetoric against judges and independent civil society organisations who speak up for the protection of judicial independence; moreover, it should be encouraged to take proactive steps to counter discrediting of judges by political leaders and the media.
2. Engage with the Government of Hungary to enhance the setting up of a fully functional Judicial Council, including the filling of vacancies through a lawful and inclusive election, and making sure that its rights and prerogatives are respected by all, most importantly by the NJO President.
3. Continue monitoring the situation of judges and the independence of the judiciary in Hungary and support judicial self-administration bodies as well as members of the judiciary who take actions to protect judicial independence.
4. Monitor the impact of legislation as well as other measures and related actions, including communication, by state actors and the media targeting judges and judicial self-administration in Hungary.