

Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 35/11.

In this connection, I would like to bring to the attention of your Excellency's Government information I have received concerning the **new legislative package on administrative courts, adopted by the Parliament on 12 December 2018, which will create a new system of courts by January 2020 to handle issues related to State administration.** It is feared that the new administrative court system would be placed under the control of the Minister of Justice, which might undermine the rule of law, and in particular the principles of judicial independence and the separation of powers.

According to the information received:

In 2016, the Government of Hungary revealed a plan to reform the administrative justice system of the country. The plan foresaw the establishment of a new court system to deal with administrative law cases and the creation of a new Administrative High Court as the highest judicial administrative authority. As the governing party lacked the two-thirds majority required by article T, para. 4, of the Constitution to carry out the plan, the changes necessary to set up the new administrative court system were incorporated into the Bill on the Administrative Procedure, which could be adopted by simple majority.

In August 2016, the National Judiciary Office (NJO), the national self-governing body entrusted with the administration of courts, issued an opinion about the Government's plan to establish a new Administrative High Court. The assessment allegedly questioned the rationale for establishing the new court system, and concluded that its creation would undermine the independence of the judiciary, recognised in the Fundamental Law.

In January 2017, the Constitutional Court declared the Bill on the Administrative Procedure unconstitutional, due to the fact that modifications to the Constitution of Hungary require a two-thirds majority and cannot be introduced by ordinary legislation (Constitutional Court decision 1/2017).

In December 2017, the Hungarian Parliament adopted the Administrative Procedural Act and the Administrative Court Procedural Act. The two Acts, which entered into force on 1st January 2018, introduced a new procedure for administrative law cases. Previously, administrative court procedures were regulated in Chapter XX of Act III of 1952 on the Code of Civil Procedure.

On 14 May 2018, the Minister of Justice announced that the Government would move ahead with the establishment of the Administrative High Court, having secured the necessary majority in the Parliament. Allegedly, the Government's main argument to reform the administrative justice system was that Hungary used to have a system of independent administrative courts prior to the advent of the communist regime in 1949. The Government also observed that there were separate administrative courts in most countries of the European Union.

On 20 June 2018, the Parliament adopted the Seventh Amendment to the Fundamental Law (Bill T/332). The Amendment replaced Article 25(1)-(3) of the Fundamental Law with a new provision, which introduces a clear distinction between ordinary and administrative courts. This would replace the current structure of administrative chambers that were set up in 2011 within the ordinary court system. According to this new provision, administrative courts would decide "on administrative disputes and other matters specified in an Act."

The provision also introduced a new supreme judicial organ of the administrative courts, the Administrative High Court. The Administrative High Court would have a status similar to the Kúria (Supreme Court). In particular, the Court would have the task of ensuring "uniformity in the application of the law by the administrative courts," and would adopt "uniformity decisions which shall be binding on the administrative courts."

On 6 November 2018, the Government submitted a draft legislative package to reform the administrative justice system to the Parliament. The package on administrative courts consisted of two bills: Bill T/3353, which would establish the new administrative court system, and Bill T/3354, which would regulate the entering into force of the law on administrative courts and introduce certain transitional provisions to regulate the period before 1st January 2020, when the new administrative courts would begin to operate.

On 12 December 2018, the Parliament of Hungary adopted the legislative package to establish a new administrative justice system and a new Administrative High Court. Bill T/3353 and T/3354 passed with 131 votes in favour and two against and 130 votes in favour and 3 against, respectively.

According to the information received, the two-level administrative court system would feature eight first-instance administrative courts and an Administrative High Court.

The new administrative courts would have jurisdiction on a number of human rights-related issues, such as political elections, freedom of information, human rights violations perpetrated by the police and other law enforcement officials, asylum and the legitimate exercise of the right to peaceful assembly. Administrative courts would also adjudicate on issues with significant economic relevance, such as 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 Administrative High Court would be at the same level of the Kúria, the supreme judicial body of the country. With its establishment, significant judicial powers previously conferred to the Supreme Court would be transferred to the new Administrative High Court.

Lack of meaningful consultation

Allegedly, the two bills were submitted to the Parliament without any meaningful consultation with the judiciary and civil society organisations. The Government posted the two bills in a Government website only on 25 October 2018, and the general public was given only three working days to provide comments on the new legislation. As a result, only one civil society organisation provided comments on the bills. Reportedly, the analysis and the opinions expressed by civil society on the administrative justice reform were not published and disseminated by the Government, despite a legal obligation to do so.

As to the involvement of the opposition parties in discussions concerning the development of a new administrative justice system, it appears that on 5 November 2018, the Ministry of Justice invited political parties to a public consultation on the administrative reform. The draft legislative package that the Government submitted to the Parliament the following day reportedly did not include any of the substantive comments made by participants in the consultation.

Also in November, the Minister of Justice requested the Venice Commission to provide an advisory opinion on the legislative package. This opinion will not be adopted sooner than next year. It is alleged that the reason behind such a late request was to avoid receiving the views of the Venice Commission prior to the adoption of the package. The Government, however, said that it would assess the Venice Commission's opinion, and carry out corrections to the law if required.

Discretionary powers of the Minister of Justice over administrative courts

According to the legislative package, the Minister of Justice would have wide-ranging powers over administrative courts, particularly with regard to the appointment and promotion of administrative judges.

From the publication of the call for applications to the final decision on appointments, the entire process would reportedly take place under the supervision of the Minister. The legislative package provides for the involvement of the newly-established National Administrative Judicial Council (NAJC) in the selection of administrative judges, but apparently enables the Minister of Justice to disregard, or alter, the ranking of applicants suggested by the Judicial Council. Although the Minister must provide an explanation for his/her decision to

disregard the recommendations of the NAJC, the legislative package neither indicates the circumstances in which the Minister can disregard the order suggested by the Judicial Council, nor provides for any mechanism to challenge the decision of the Minister. As a result, the Minister of Justice appears to have an almost unfettered power to decide on who to appoint as administrative judge.

During the transitional period prior to the entry into force of the administrative court system, the powers of the Minister of Justice would be even broader. The Minister would choose candidates from a list of three candidates provided 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 the Public Administration and the President of the Bar Association. He or she would be able to disregard the ranking of applicant judges presented by the ad hoc committee and de facto recommend any person on the list for appointment by the President of the Republic.

The Minister of Justice would have similarly wide discretionary powers in relation to the promotion of administrative judges. The Minister would be granted the power to decide on the appointment of court presidents, as well as the power to decide on the promotion of judges of a regional administrative court to the Administrative High Court. Together with the President of the Administrative High Court, the Minister would also have the power to increase the salary of individual judges by promoting them to the position of a “titular judge of the Administrative High Court”.

Since all senior judicial positions within the existing system of administrative courts are to be terminated once the new administrative court system enters into force on 1st January 2020, the Minister would be entirely free to decide on the appointment and promotion of senior judges within the administrative court system, including court presidents and college leaders. The Minister would appoint new judges to these senior positions for an interim period of up to one year. Following this interim period, the Minister would retain the power to appoint court presidents, who would in turn appoint college leaders.

The powers entrusted to the Minister of Justice in relation to the appointment and promotion of administrative judges raise significant concerns in relation to the principles of independence of the judiciary and separation of powers. Taken together, these provisions appear to make it easier for the Minister of Justice to exert pressure on individual judges, whose independence and impartiality would be seriously undermined. In practice, individual judges responsible for issuing a judgment on a politically sensitive case may feel pressured to decide in favour of the State authorities in order to show their gratitude for the appointment or maximise their chances of being promoted in the future.

The reform package allegedly provides wide discretionary powers to the Minister of Justice in relation to the preparation and allocation of the budget of

administrative courts. Such powers would be almost absolute, since the NAJC apparently would have almost no power to make decisions on budgetary issues.

The involvement of the executive branch of power in the determination and allocation of budgetary resources to administrative courts would be of serious concern, since effective judicial independence presupposes necessarily the independence of the judiciary in identifying the resources needed and the way in which they are allocated to individual courts.

The Minister of Justice would reportedly have broad powers with regard to the internal organisation of all regional administrative courts. Such interference with the internal organisation of regional administrative courts is unnecessary and run counter existing standards on judicial independence, which require that courts be autonomous from other branches of power and provide that the administration of the justice system be entrusted to the national judicial council, if any, or to another equivalent body independent from the legislative and executive branches of powers.

Finally, the Minister of Justice would have the power to supervise the presidents of administrative courts in the discharge of their administrative tasks, as well as the power to initiate investigations and disciplinary proceedings against them. As is the case for the powers conferred to the Minister in relation to the court administration and budget control, the extensive powers that the new legislation confer to the Minister of Justice vis-à-vis the administrative court presidents would be inconsistent with widely accepted principles relating to the independence of the judiciary and the separation of powers.

Establishment of a National Administrative Judicial Council (NAJC)

The new legislative package provides for the creation of a new National Administrative Judicial Council (NAJC) as a self-governing body aimed to ensuring the independence of the administrative justice system. However, it is alleged that the NAJC would have no real power over judicial organisation or administration, since all the important powers are vested either with the Minister of Justice or with the President of the Administrative High Court.

According to the new legislation, the NAJC would only be able to provide opinions, but would have no decision-making powers on several issues related to the administrative justice system, such as the allocation of budgetary resources to the administrative courts or the appointment of administrative judges.

Despite the limited powers entrusted to the NAJC, the reform package provides for indirect means of control over the membership of the judicial council. Thus, a judge may not become a member of the NAJC if a disciplinary procedure is pending against him or her. Since the legislative package confers the power of initiate disciplinary proceedings to the Minister of Justice, he or she would have

the power to prevent critical or independent voices from becoming members of the council. The new NAJC would also have no real powers in relation to disciplinary proceedings against administrative judges, since such proceedings can be initiated, according to the new legislative package, without the NAJC's consent. In effect, this could permit the silencing of critical voices in the NAJC through disciplinary procedures.

Appointment of the President of the Administrative High Court

According to the legislative package, the President of the Administrative High Court will be elected by a two-third majority of members of the Parliament for a period of 9 years. However, if the Parliament fails to agree on a new President of the Administrative High Court at the end of the mandate of the previous President, he or she would continue to exercise his or her functions until a new President is elected. According to the information received, the aim of this provision is to allow the current majority to keep control over the administrative court system regardless the outcome of future political elections.

Without prejudging the accuracy of the information received, concern is expressed at the ongoing reform of the administrative justice system. If implemented in its current form, the independence of the judiciary would be significantly undermined in Hungary, since the legislative package paves the way for the Government's political interference with the actual composition and functioning of the new administrative courts, which will adjudicate on a wide number of issues affecting fundamental rights or issues with significant economic relevance.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and comments which you may have on the above mentioned allegations.
2. Please provide an official translation of the legislative package on the creation of a new administrative justice system and the creation of a new Administrative High Court, adopted by the Parliament of Hungary on 12 December 2018.
3. Please provide detailed information on whether, and the extent to which, the Government has engaged in a meaningful consultation process on the reform of the administrative justice system with members of the opposition, the judiciary and its representative organisations, and civil society as a whole.

4. Please provide detailed information on the powers that the new legislation confers to the Minister of Justice, and explain to what extent is the conferment of such wide and discretionary over the composition and functioning of administrative courts in line with international standards relating to the independence of the judiciary and the separation of powers.
5. Please provide detailed information on the composition and functioning of the National Administrative Judicial Council (NAJC), and indicate whether, and to what extent, the new legislation can ensure the independence and the impartiality functioning of this body.
6. Please provide detailed information on the competences of the NAJC in relation to (1) the selection, appointment and promotion of administrative judges; (2) court administration and budget control; and (3) disciplinary proceedings against administrative judges.
7. Please provide detailed information on the procedure for the appointment of the President of the Administrative High Court, and indicate what measures has the Government adopted, or intend to take, to ensure that a minority of members of the Parliament be prevented from blocking the election of a new President following the expiration of the previous President's 9-year term.

This communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#) within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Diego García-Sayán
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

The independence of the judiciary is prescribed in article 14 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Hungary on 17 January 1974, which establishes the right a fair and public hearing by a competent, independent and impartial tribunal established by law.

In its General Comment No. 32 (2007), the Human Rights Committee noted that the requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. A situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal (para. 19).

The Human Rights Committee also stated that judges may be dismissed only on serious grounds of misconduct or incompetence, and in accordance with fair procedures ensuring objectivity and impartiality. The dismissal of judges without following the procedures provided for by the law and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary (para. 20).

The Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), which Your Excellency's Government ratified on 5 November 1992, includes similar provisions. According to article 6, in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

As a Member State of the European Union, Hungary is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (article 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is legally binding on Hungary, reflects fair trial requirements relating to an independent and impartial tribunal previously established by law.

The principle of the independence of the judiciary has also been enshrined in a large number of United Nations legal instruments, including the Basic Principles on the Independence of the Judiciary. The Principles provide, inter alia, that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1); that judges shall decide matters before them impartially (...) without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2); and that

there shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision (principle 4).

With regard to the accountability of judges, the Basic Principles provide that judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions (principle 18). Any decision to suspend or remove a judge from office should be taken in accordance with a fair procedure (principle 17), and be taken in accordance with established standards of judicial conduct (principle 19).

The Human Rights Committee considers that “the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary” (General comment No. 32, para. 20).

The general functions, composition and core competencies of judicial councils are dealt with in a number of principles, guidelines and recommendations adopted under the aegis of the Council of Europe. These instruments include opinion No. 10 (2007) of the Consultative Council of European Judges on “the council for the judiciary at the service of society”, and the Magna Carta of Judges (Fundamental Principles), adopted at the 11th plenary meeting of the Consultative Council of European Judges, held in Strasbourg, France, from 17 to 19 November 2010.

In a recent report on national judicial councils (A/HRC/38/38), the Special Rapporteur on the independence of judges and lawyers highlighted the essential role that judicial councils play in guaranteeing the independence and the autonomy of the judiciary, and included a number of recommendations relating to the establishment, composition and functions of judicial councils aimed at ensuring the independence of such bodies and their effectiveness in the discharge of their functions as guarantors of judicial independence.

The Special Rapporteur considers that in order to guarantee their independence from the executive and legislative branches and ensure effective self-governance for the judiciary, judicial councils should be established under the Constitution in those countries having a written Constitution, or in the equivalent basic law or constitutional instrument in other countries. The Constitution or the equivalent basic law should include detailed provisions regarding the setting-up of such a body and its composition and functions, and guarantee the autonomy of the council vis-à-vis the executive and legislative branches of power (para. 92).

With regard to the duties and responsibilities of judicial councils, the Special Rapporteur considered that these bodies should be endowed with the widest powers in the field of selection, promotion, training, professional evaluation and discipline of judges. They should have general responsibilities with regard to the administration of the court system and/or the allocation of budgetary resources to the various courts (para. 94).

In relation to the selection and appointment of judges, the Special Rapporteur recommended that decisions on the appointment and promotion of judges should be taken through a transparent process by a judicial council or an equivalent body independent of the legislative and executive branches of powers (para. 97), and warned against the involvement of the legislative or executive branches of power in judicial appointments, which may lead to the politicization of judicial appointments (para. 99). In cases in which judges are formally appointed by the Government, the appointment should be made on the basis of the recommendation of the judicial council that the relevant appointing authorities follow in practice.

With regard to Court administration and budget control, the Special Rapporteur is of the view that judicial councils should be entrusted with general responsibilities with regard to the administration of the court system, the preparation of the judicial budget and the allocation of budgetary resources to the various courts (para. 100). Entrusting judicial councils with general competences in this field constitutes an essential tool to safeguard the independence of the judiciary. The rationale behind the transfer of managerial functions from the Ministry of Justice or the Supreme Court to the judicial council is to reduce external interference, especially from the executive branch, in judicial affairs.

Finally, the Special Rapporteur considers that the responsibility for disciplinary proceedings against judges should be vested in an independent authority composed primarily of judges, such as a judicial council or a court (para. 101).