



## Band aid for rule of law wounds – actionable recommendations for legislative amendments improving the system of checks and balances in Hungary

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The rule of law and a well-functioning system of checks and balances require more than the existence of certain laws and institutions however carefully they are designed. Without an ethos of true respect for these and the acknowledgment of their importance in maintaining democracy even an apparently bullet-proof set of legal provisions may be circumvented or used by those holding public power for their own purposes. The instrumental use or rather abuse of legislation has been a characteristic feature of the incumbent government in Hungary, and therefore it is clear that a full-fledged system of checks and balances cannot be simply restored by amending a handful of legal amendments. We are however of the view that there are relatively straightforward legislative changes that would be capable of limiting the system's capacity for abuse and thus slow down the deterioration of the rule of law in Hungary.

### Constitutional Court

- Right to submit constitutional complaints by state agencies: An amendment adopted in late 2019 granted state/public authorities the right to submit constitutional complaints to the Constitutional Court. This means that constitutional complaints can be used not only to protect people's rights against state powers, but also to provide constitutional protection to public authorities. This enables the state to channel the review of unfavourable court decisions in cases important for the Government out of the ordinary court system, to the already packed Constitutional Court. Thus, the amendment opens a way for politically sensitive court cases to be decided in a way that is favourable for the executive power.<sup>1</sup> → **The rules allowing state/public authorities to submit a constitutional complaint should be withdrawn.**
- Rules of nominating and electing Constitutional Court justices: By amending the previously existing provisions for nominating Constitutional Court judges on a consensual basis, and by raising their number, the ruling majority packed the Constitutional Court e.g. with former MPs, and has shaped it into a loyal body supportive of the governing majority's agenda. →

<sup>1</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Act\\_CXXVII\\_of\\_2019\\_on\\_judiciary\\_analysis\\_2020Jan.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf), p. 3.

**Nomination and election rules should be amended to require consensus between governing and opposition parties when nominating Constitutional Court judges, and adequate conflict of interest rules should be introduced. Revised nomination and election rules should be applied already when electing the replacement of András Zs. Varga, who was recently elected as President of the Kúria (Hungary's supreme court).**

## Judiciary

- Excessive powers of the President of the National Judicial Office in relation to judicial leadership appointments: The President of the National Judicial Office (the body responsible for the administration of courts, NJO), elected by the Parliament, continues to have excessive powers. In 2018–2019, the abuse of power by the President of the NJO in relation to judicial leadership appointments resulted in a prolonged conflict between the NJO President and the National Judicial Council (NJC), the judicial self-governing body. Although this constitutional crisis seems to have been averted by replacing the NJO President, all of the structural issues that had led to the crisis still prevail, and the provisions that allowed the abuse of power are still in force.<sup>2</sup> → **The NJC should be structurally reinforced. Provisions allowing the President of the NJO to annul calls and render appointment procedures for judicial leadership positions unsuccessful without the consent of any judicial body should be repealed.**
- Deficiencies of the case allocation system: The case allocation system of ordinary courts has serious deficiencies with respect to guarantees against undue intervention. The process of case allocation is neither computerized, nor automated but reliant on direct human intervention, carried out by judicial leaders under specific case allocation schemes. The right to establish the case allocation scheme lies exclusively in the hands of court presidents, without effective control of judicial self-governing bodies. A recent amendment of the law removed the safeguard clause prescribing a fixed one-year term as temporal scope of schemes, therefore the court presidents' right to modify schemes has become unlimited in time and modifications can be carried out without any transparent and objectively justifiable reason. The legislation regulating the establishment of case allocation schemes allows for simultaneous application of various parallel grounds of case allocation resulting in a complicated and non-transparent matrix of competitive grounds and thus granting wide discretion in the final decision. The legislation also contains a wide range of exceptional rules without establishing guarantees against their inappropriate application.<sup>3</sup> → **The case allocation system shall be automated and based on transparent grounds. Rules of case allocation shall be defined for a fixed term in a process involving judicial self-governing bodies. Any modification of the scheme or exceptions allowed under the scheme shall be objectively justifiable and transparent.**
- Excessive powers of the President of the Kúria in relation to appointments to the Kúria: The President of the Kúria elected by the Parliament against the manifest opposition of the National Judicial Council holds the same powers in relation to judicial appointments to the Kúria as the President of the NJO holds with regard to judicial appointments for lower tier courts. The structural problems that led to the crisis between the President of the NJO and the NJC may at any time reappear within the top tier of the judiciary. → **The NJC should be structurally reinforced and provisions allowing the President of the Kúria to annul calls and render appointment procedures for judicial positions at the Kúria unsuccessful without the consent of any judicial body should be repealed.**

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<sup>2</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/AIHU\\_HHC\\_Rule\\_9\\_Baka\\_v\\_Hungary\\_29072020.pdf](https://www.helsinki.hu/wp-content/uploads/AIHU_HHC_Rule_9_Baka_v_Hungary_29072020.pdf), pp. 3-4.

<sup>3</sup> Further information: <https://www.helsinki.hu/wp-content/uploads/Practice-of-the-case-allocation-system-in-Hungary-Szonja-Navratil.pdf>.

- “Complaint for the unification of jurisprudence” procedure: With effect of 1 July 2020, an additional level of judicial review was inserted in the system of jurisdiction. The new procedure named “complaint for the unification of jurisprudence” is claimed to be designed to guarantee the uniform application of the law and may be initiated before the Kúria in case a final and binding court decision deviates from judgments previously published by the Kúria. If a complaint is lodged and the Kúria establishes a deviation from published jurisprudence, the final and binding court resolution can be quashed. The Kúria may also establish the mandatory interpretation of the law as a result of the procedure. While the aim of the new procedure is in line with the constitutional requirement of the unity of law, the rules governing the procedure grant a key role to the President of the Kúria (a political appointee, elected by the Parliament against the clear opposition of the judicial self-governing body) in the process. The President of the Kúria is entitled to appoint judges who can participate in unification procedures, can become head of the unification panel and select the members of the panel. These rights provide the President of the Kúria a privileged role both in the adjudication of individual cases and in shaping the mandatory interpretation of the law. → **Rules governing the unification complaint procedure shall be modified in order to eliminate the privileged position of the President of the Kúria. Members of the unification panel shall be elected by judicial peers and the president of the unification panel shall be elected by the panel.**
- Constitutional justices can be appointed judges without the otherwise required application procedure and any involvement of judicial self-governing bodies and judges. In addition, they are transferred immediately to the Kúria after their mandate as constitutional justices comes to an end. Since constitutional justices are political appointees elected by the Parliament, this means an interference into judicial independence by other branches of power, which is especially problematic due to the newly introduced semi-precedent system that increases the Kúria’s weight within the judicial system even further. This kind of dilution of the Kúria’s body of judges with political appointees is not a theoretical possibility as shown by the fact that in the summer of 2020, eight constitutional justices were granted judicial appointment, one of whom became the Kúria’s president shortly after.<sup>4</sup> → **The possibility of appointing members of the Constitutional Court as ordinary judges shall be abolished. The legislation shall be amended to prevent the judges already appointed under the new regulation from becoming judges at the Kúria, court leaders or members of the unification panel without going through the procedures that ordinary judges are required to complete in order to fill such positions.**

## Corruption / prosecution

- High-level corruption and the failure to join EPPO: Corruption in Hungary has reached systemic proportions, and has become an integral part of the functioning of the system. At the same time, state authorities, most notably the prosecutor’s office, fail to counter corruption and to effectively launch procedures in a number of high-level corruption cases involving the ruling political elite. The European Commission’s Rule of Law Report also noted that when “serious allegations arise, there is a systematic lack of determined action to investigate and prosecute corruption cases involving high-level officials or their immediate circle”. On the top of that, the Government maintains that Hungary will not join the European Public Prosecutor’s Office. → **Hungary should join the European Public Prosecutor’s Office.**

<sup>4</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Act\\_CXXVII\\_of\\_2019\\_on\\_judiciary\\_analysis\\_2020Jan.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Act_CXXVII_of_2019_on_judiciary_analysis_2020Jan.pdf), p. 5; [https://www.helsinki.hu/wp-content/uploads/The\\_New\\_President\\_of\\_the\\_Kuria\\_20201022.pdf](https://www.helsinki.hu/wp-content/uploads/The_New_President_of_the_Kuria_20201022.pdf).

- Restricting the notion of public funds: The proposed 9<sup>th</sup> Amendment to the Fundamental Law, submitted on 10 November 2020 without any prior public consultation, would restrict the notion of public funds by inserting into the constitution that public funds are “the revenues, expenditures and receivables of the State”. Most probably, this is a reaction to a series of cases in which entities using funds originating from the state budget attempted to refuse freedom of information requests regarding how the funds had been spent on the basis that those funds “had lost their public nature”. However, the Hungarian courts repeatedly rejected this argument and obliged them to disclose the requested information. Consequently, the proposed amendment would undermine the state’s transparency and freedom of information.<sup>5</sup> → **The proposed 9<sup>th</sup> Amendment to the Fundamental Law should be withdrawn; any constitutional amendment should be preceded by consultation with the Venice Commission.**

## Elections

- Sham parties and latest election omnibus bill: The Minister of Justice submitted an omnibus bill (T/13679) on 10 November 2020 without any prior consultation. Apart from technical changes, the bill would raise the minimum number of candidates in single constituencies from 27 to 50 out of 106 for a party to be able to have a party list, which in turn is the requirement for the collection of compensation votes and eventually seats in Parliament. An amendment to the proposal was approved by the Parliamentary Committee on Justice, further raising the minimum number of candidates from the proposed 50 to 71 in at least 14 counties out of 19 and the capital.<sup>6</sup> The proposal claims that these changes aim to tackle the phenomenon of sham parties, legal entities registered as political parties for the sole purpose of misusing funds allocated from the central budget to parties during national elections as well as to weaken the chances of opposition candidates winning single constituencies. The amendment would not make it significantly difficult in the future to establish sham parties, which started to flourish after the introduction of a generous state campaign finance scheme that lacks any meaningful scrutiny of how funds are spent and the abolition of the requirement that one citizen can provide a so-called “recommendation” (a pre-condition for running in elections) to only one candidate, both voted by the Fidesz majority. Transparency International Hungary and the Hungarian non-partisan think-tank Political Capital have recommended concrete steps that would hinder the establishment of sham parties, but none of their proposals are included in the draft bill.<sup>7</sup> → **Hungary should amend the election laws following consultations with at least all parties in Parliament and assess existing expert proposals in order to fight sham parties.**

## Media

- Transparency of frequency tenders: Radio frequencies are distributed through tendering by the Media Council, a politically homogeneous authority. The politically biased decisions in awarding frequencies are almost impossible to contest at courts as tender applications are never made public, leaving those wishing to contest the result without supporting evidence. → **Amend legislation so that frequency tenders enjoy transparency through prescribing the publication of the entirety of applications, including points granted to applicants, by the Media Council.**

<sup>5</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_RoL\\_flash\\_report\\_Hungary\\_12112020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_RoL_flash_report_Hungary_12112020.pdf), pp. 4-5.

<sup>6</sup> See the list of approved amendments: <https://www.parlament.hu/irom41/13679/13679-0012.pdf>.

<sup>7</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_RoL\\_flash\\_report\\_Hungary\\_12112020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_RoL_flash_report_Hungary_12112020.pdf), pp. 6-7; Transparency International Hungary – Political Capital proposals: <https://transparency.hu/en/news/ujabb-visszaelesi-lehetoseg-a-kampanyfinanszirozasan/>.

## Municipalities

- Weakening municipalities: After the opposition's victories in the 2019 municipal elections, the Government started to starve and strangle municipalities, which "became actors potentially able to show political alternatives to the ruling party". Local self-governments' funds were cut referring to the pandemic. Municipalities also had to "extend their basic social services [...] due to the extra tasks conferred upon them" by the Government, but were not provided with extra resources for that. Certain measures helped the Government "to specifically target opposition-led municipalities. For instance, the government can designate special economic zones in certain settlements, and the properties and local taxes from these zones are transferred [from the municipalities] to county-level bodies dominated by the ruling party. Another such opportunity is cutting central development funds from certain local self-governments referring to the epidemic, which predominantly affected opposition-led municipalities."<sup>8</sup> → **Adequate level of funds for local self-governments should be ensured. Guarantees shall be introduced in order to prevent that the central government may cut funding discriminatively.**

## Academic freedom

- Undermining university autonomy: As the latest chapter of the systemic undermining of academic freedom, the University of Theatre and Film Arts was privatized in a way that undermines its autonomy. In an unduly accelerated procedure, the governance of the university was transferred to a public trust fund, to which the Government appointed a board of trustees unilaterally, without taking into consideration the university's recommendations. This and the board of trustees issuing a bylaw unilaterally that restricted the rights of the senate and taking other hostile steps against the university community led to significant protests by the students, a strike, and the resignation of the university's senate. → **The Government should enter into consultation with the teachers and students of the University of Theatre and Film Arts, and should ensure that any transformation is conducted in a way that respects university autonomy. Legal provisions pertaining to the privatization of universities in general should be revised in a way that prevents interference with university autonomy.**<sup>9</sup>
- Cementing public trust funds: The proposed 9<sup>th</sup> Amendment to the Fundamental Law stipulates that rules on public trust funds should be included in a "cardinal law" (requiring the two-thirds of the votes of the MPs present). Since public trust funds were introduced into the Hungarian law in 2019, several have been established and endowed by the Government, according to critics often with the purpose of channelling public assets into private hands. Public trust funds have also been used as the institutional framework for recasting the management of universities: several universities have been transferred to such funds, enabling the Government to appoint boards with loyal members, thus decreasing the independence of higher education institutions. (See the example of the University of Theatre and Film Arts above.) Against this background, the 9<sup>th</sup> Amendment seems to serve the purpose of making it very difficult to reclaim the transferred public assets and reorganise the management of the privatised universities. → **The proposed 9<sup>th</sup> Amendment to the Fundamental Law should be withdrawn; any constitutional amendment should be preceded by consultation with the Venice Commission.**<sup>10</sup>

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<sup>8</sup> Source of quotations: [https://www.politicalcapital.hu/pc-admin/source/documents/pc\\_flash\\_report\\_nothing\\_is\\_more\\_permanent\\_than\\_a\\_temporary\\_solution\\_20200528.pdf](https://www.politicalcapital.hu/pc-admin/source/documents/pc_flash_report_nothing_is_more_permanent_than_a_temporary_solution_20200528.pdf), p. 3; further information: [http://ekint.org/lib/documents/1595421967-EKINT\\_Concentration\\_of\\_Power\\_Salvaged\\_-\\_Coronavirus\\_Stocktaking\\_\(analysis\).pdf](http://ekint.org/lib/documents/1595421967-EKINT_Concentration_of_Power_Salvaged_-_Coronavirus_Stocktaking_(analysis).pdf), pp. 13-19.

<sup>9</sup> Further information: <https://cz.boell.org/en/2020/09/14/free-country-free-university-students-hungarys-university-theatre-and-film-arts-protest>.

<sup>10</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_RoL\\_flash\\_report\\_Hungary\\_12112020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_RoL_flash_report_Hungary_12112020.pdf), pp. 5-6.

## Civil society organisations

- Continued application of the law stigmatizing NGOs, in violation of EU law: In June 2020, the Court of Justice of the European Union condemned Hungary for introducing discriminatory and unjustified restrictions on foreign donations to civil society organisations, requiring affected CSOs e.g. to register as “foreign-funded organisations”. In spite of the judgment, the Government has not withdrawn the respective law to date. What is more, after the CJEU judgment was handed down, a Government-established public foundation rejected an NGO’s EU grant application over non-compliance with the impugned legislation; and that was not the only instance that a statement on being registered as a foreign-funded organisation was demanded as a precondition for access to EU funds.<sup>11</sup> → **The law stigmatizing NGOs receiving funding from abroad should be repealed.**

## Human rights violations

- Segregation of Roma children in schools: As a reaction to a court judgment in a Roma education segregation case (the Gyöngyöspata case) whereby the municipality and the state institution was obliged to pay damages to the segregated Roma pupils, the Parliament adopted a law that prevents courts from granting pecuniary compensation in similar cases. This amendment amounts to indirect discrimination based on ethnicity, and is in violation of EU law.<sup>12</sup> → **The law should be withdrawn. Cf. also the pending infringement procedure against Hungary over school segregation.**
- Curtailing the rights of the LGBTQI community: In the spring of 2020, the Parliament adopted a law that bans legal gender recognition, and so violates the rights of transgender people as enshrined in international human rights standards. This was followed by the submission to the Parliament of the 9<sup>th</sup> Amendment to the Fundamental Law on 10 November 2020, which would set out not only that “the mother is female, the father is male”, but also that “Hungary shall protect the right of children to their identity in line with their sex by birth, and shall ensure an upbringing in accordance with the values based on our homeland’s constitutional identity and Christian culture”. This proposal is accompanied by provisions in Bill T/13648 that set out that only married couples are allowed to adopt children, and exceptions to that can be granted only on a case-by-case basis by a Minister. This would exclude same-sex couples, single persons and non-married opposite-sex couples from adoption.<sup>13</sup> → **The right of transgender people to legal gender recognition should be restored. The proposed 9<sup>th</sup> Amendment to the Fundamental Law and the proposed rules restricting adoption should be withdrawn; any constitutional amendment should be preceded by consultation with the Venice Commission.**

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<sup>11</sup> Further information: <https://autocracyanalyst.net/hungarian-ngo-foreign-agent-law/>.

<sup>12</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_of\\_Law\\_update\\_May-July2020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_of_Law_update_May-July2020.pdf), pp. 3-4 and 14.

<sup>13</sup> Further information: [https://www.helsinki.hu/wp-content/uploads/HHC\\_Rule\\_of\\_Law\\_update\\_May-July2020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_Rule_of_Law_update_May-July2020.pdf), pp. 8 and 14; [https://www.helsinki.hu/wp-content/uploads/HHC\\_RoL\\_flash\\_report\\_Hungary\\_12112020.pdf](https://www.helsinki.hu/wp-content/uploads/HHC_RoL_flash_report_Hungary_12112020.pdf), pp. 3-4.