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Rachel Cheng

IIP Paper

Hungary's (Soon to be) New Administrative Courts

I. Introduction

While Hungary has been touted as an example of successful transition from authoritarian communist regime to constitutional democracy, the rise of Fidesz power and re-elections of Prime Minister Victor Orbán have cast serious doubts on the strength and continuity of Hungary's democratic institutions. As Prime Minister elected in 1998, reelected in 2010, and for a third term in 2018, Orbán and the Fidesz party have been able to rewrite the constitution by parliamentary vote, wielding the two-thirds majority needed under Hungarian constitutional law.¹ The political sphere of Hungary currently operates much like an authoritarian government, with controls on media, commerce, and election propaganda, making it difficult if not impossible for any credible opponent of Orbán to successfully run against him.

In December 2018, the Fidesz government passed a law to create a separate administrative court system.² Set to begin operations in January 2020, these new administrative courts will handle all cases arising from administrative law

¹ Viktor Orban: Hungary PM re-elected for third term, BBC News, <https://www.bbc.com/news/world-europe-43693663>

² Lydia Gall, Hungary's Latest Assault on the Judiciary, Human Rights Watch, <https://www.hrw.org/news/2018/12/14/hungarys-latest-assault-judiciary>

questions, including important issues such as elections, asylum, assembly, corruption, antitrust and police violence.³ This is of primary concern because the newly proposed administrative courts will be filled by the Justice Minister, who operates under Orbán. The Justice Minister will also have the power over the court's budget as well as over judicial promotions.⁴ Although publicly the government notes this change was motivated by "efficiency," human rights organizations have charged the government with seriously jeopardizing judicial independence and the separation of powers.⁵

This paper will examine the threat to the independence of the judiciary in Hungary, focusing in particular on the proposed new administrative courts and its relationship to the Couria⁶ and the Constitutional Court. The paper will discuss the court system in Hungary, recent attempts at Hungarian judicial reform, and the law on administrative courts. The paper will also address concerns with the new system as expressed by a current sitting judge in the Couria. The paper will conclude with the Venice Commission's recent opinion issued evaluating the new law, and discuss its recommendations for change, and conflicting overall acceptance of the new legal regime.

³ Id.; see also Teodora Miljojkovic, Hungary Establishes new administrative court system, Jurist, <https://www.jurist.org/news/2018/12/hungary-expands-executive-branches-control-of-its-judicial-system/>

⁴ Miljojkovic, supra note 3.

⁵ Id.

⁶ The Supreme Court of Hungary is also known as the Curia. These terms will be used interchangeably throughout.

II. Court System in Hungary: Constitutional Courts vs. Court of Hungary

The court system in Hungary operates under the principles of the Hungarian Constitution, also known as the Fundamental Law of Hungary. The Fundamental Law espouses the virtue of the distribution of powers, issuing to the courts the task of dispensing justice.⁷ The Fundamental Law entered into force January 1, 2012, replacing the constitution written in 2004, which took Hungary from communism into democracy.⁸ There are four tiers in the system: district courts, administrative and labor courts, regional courts, regional courts of appeal and the Curia, which is the main judicial body, also called the Supreme Court of Hungary.⁹ Interestingly, however, the hierarchy does not indicate subordination between the levels—judges occupying positions “higher” in the hierarchy do not have the right to issue instruction to other judges or courts.¹⁰

Since Hungary operates on a civil law, rather than a common law, system, judges are tasked with independently rendering their decisions given their own beliefs about the case and the applicable laws.¹¹ There are 91 judges in the Curia.¹² They are tasked with making decisions on appeals filed from the Regional Courts and the Regional Court of Appeal, as well as publishing guidance documents.

⁷ Judicial System, Courts of Hungary, <https://birosag.hu/en/judicial-system>

⁸ See Catherine Dupre, Hungary’s Fundamental Law Challenges the EU’s Democratic Ideals, <https://www.theguardian.com/commentisfree/libertycentral/2012/mar/13/hungary-fundamental-law-eu>

⁹ Id.

¹⁰ Id.

¹¹ See id.

¹² About the Hungarian Legal System, The Constitutional Court, <https://hunconcourt.hu/about-the-hungarian-legal-system/>

Within the Curia, there are three departments: criminal, civil, and administrative-labor. Unlike Article III judges in the U.S., judges in the Curia hear cases only on limited areas of law. Examples of cases handled by the administrative-labor law judges include cases on tax evasion, employment equality, refugee status, drunk driving and license removal, antitrust, product safety and medicines.¹³ Evidently, adjudication in this field is expansive across many substantive areas of law and touching on important rights issues.

The Constitutional Court of Hungary operates separately from this four-tiered court system. The Constitutional Court was established by the Fundamental Law in 2011, is elected by Parliament, and reviews the constitutionality of laws.¹⁴ It is also charged with protecting constitutional civil rights as well as the rights of national and ethnic minorities.¹⁵ On its website, the Constitutional Court has a long list of competencies, including ex ante review of conformity with the fundamental law, ex post review of conformity with the fundamental law, constitutional complaint, and interpretation of the fundamental law.

III. Recent History on Attempts at Hungarian Judicial Reform

To put the new law on administrative courts in context, it is necessary to address the Fidesz party's previous efforts to influence the composition of the judiciary. Since its election in 2010, the Fidesz party has implemented major

¹³ Administrative and labour law cases, Kuria of Hungary, <https://kuria-birosag.hu/en/administrative-and-labour-law-cases?page=1>.

¹⁴ Government And Society: Constitutional Framework, Encyclopedia Britannica, <https://www.britannica.com/place/Hungary/Government-and-society>

¹⁵ Id.

changes to Hungary's constitution and court system with its two-third majority in Parliament.¹⁶ Among these changes included curbing the independence of the judiciary through forcing sitting judges to retire by lowering the retirement age, and creating limits on the kinds of complaints that the Constitutional Court may hear.¹⁷ While these measures significantly compromised judicial independence, the Venice Commission and the European Commission intervened during the attempted reforms to temper the drastic reforms that might otherwise have occurred in the judiciary.¹⁸

In 2016, Fidesz proposed the idea of creating a separate system of administrative courts.¹⁹ Although the government tried to accomplish this objective through passing a statute, the Constitutional Court found the statute invalid because the change required an amendment to the constitution.²⁰ Because Fidesz at the time did not have a two-thirds majority in Parliament, it could not legitimately create this separate court system.²¹

According to Professor Renata Uitz, the new law is Fidesz's second attempt to accomplish a court-packing maneuver which was thwarted in 2011.²² While the official explanation for the administrative courts law was that it was intended to

¹⁶ Wrong Direction on Rights, Human Rights Watch, <https://www.hrw.org/report/2013/05/16/wrong-direction-rights/assessing-impact-hungarys-new-constitution-and-laws>

¹⁷ See id.

¹⁸ Renata Uitz, An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts, Verfassungsblog, <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>

¹⁹ Id.

²⁰ Id. President Ader also voiced his agreement with this position.

²¹ Id.

²² Id.

enforce the Seventh Amendment of the Fundamental Law and align Hungary's constitutional regime with those of its European neighbors, the text of the law suggests that this explanation is mere pretext. The new law essentially sidelines the Curia as the Supreme Court of the land by creating a separate Supreme Administrative Court running concurrent to the Curia.

IV. The Law on the Administrative Courts

On December 12, 2018, the Hungarian Parliament adopted, the Law on the Administrative Courts.²³ In spite of protests, the Law was passed and created a new and independent regime of administrative courts, separate from the regular justice system in which the Curia sits.²⁴ These courts will be a self-standing branch of administrative courts, “nominally within the Hungarian judiciary, yet, placed under the direction of a separate newly established Supreme Administrative Court alongside the existing Supreme Court (Kuria).”²⁵ These courts would essentially replace the administrative-labor courts currently in the Curia by moving jurisdiction of all administrative matters to these new courts. Notably, the courts will be situated in Esztergom, located in northern Hungary about 29 miles northwest of Budapest.²⁶

²³ Hungary: ICJ Calls for Re-Consideration of the Law on the Administrative Courts, International Commission of Jurists, <https://www.icj.org/hungary-icj-calls-for-re-consideration-of-the-law-on-the-administrative-courts/>

²⁴ Csaba Kiss, What will the new Hungarian law on administrative courts bring for access to justice? Client Earth, <https://www.clientearth.org/what-will-the-new-hungarian-law-on-administrative-courts-bring-for-access-to-justice/>

²⁵ Uitz, supra note 18.

²⁶ Kiss, supra note 24.

Eight days after its passage, the International Commission of Jurists called on Hungarian President János Áder not to sign the Law. The Law was voted on although the opinion of the Council of Europe Venice Commission was still pending.²⁷ By the text of the Law, the Minister of Justice will have power of appointment of administrative judges, and the Minister of Justice and Parliament will have control over the court's annual budget as well.²⁸ Although a newly-established National Administrative Judicial Council will be tasked with advising the Minister of Justice on judicial appointments, the Minister has ultimate discretion and can refuse to appoint the Council's first choice nominee.²⁹

As the Law currently stands, there are pressing concerns with its structure and composition. While the Hungarian government expressed desire to comply with the Venice Commission's recommendations for change, the finalized version of the law only complied with roughly one third of those recommendations.³⁰ The serious remaining concerns involved the expertise and independence of the judges from political influence. While the new courts will need 300 judges, the President of the Supreme Court has stated that only 120 currently sitting judges in the Curia will move.³¹ This indicates that the remaining judges will be appointed by the Minister. The consequence of this is that new judges, who may be politically motivated and

²⁷ Id.

²⁸ Id.

²⁹ Id.

³⁰ Hungary's Laws on Administrative Courts Comply with Only 30% of Venice Commission Recommendations, Hungarian Helsinki Committee, <https://www.helsinki.hu/en/hungarys-laws-on-administrative-courts-comply-with-only-30-of-venice-commission-recommendations/>

³¹ Id.

have little or no judicial experience, will outnumber the former Curia judges who are generally regarded as more independent and experienced.

For example, under the law, it is still possible that judges with no experience can adjudicate cases. Under the law, there is no requirement of expertise for the judges that will be appointed by the Minister of Justice, even for the chief administrative judge, who would serve as the President of the Supreme Administrative Court.³² Although the Venice Commission recommended a minimum of five years of judicial experience for candidates for the Presidential position, it does not appear that Hungarian Parliament will change this law to reflect this concern.³³

Further, since judges in these courts are expected to come from public administration, there is a genuine concern with judicial independence and partisan loyalty. One judge, who requested to be interviewed anonymously under the name Gipsz, has stated that those coming from public administration are “socialized differently.”³⁴ The judge continued, explaining that those in the administration “come from a system of subordination, [and] subjection, where the orders of the boss cannot be challenged.”³⁵ As such, judges that come from the administration pose a risk of compromised independence, especially when deciding cases related to the

³² Id.

³³ See id.

³⁴ Benjamin Novak, “We are no longer bastions of the rule of law,” says Hungarian judge, The Budapest Beacon, March 1, 2018, <https://budapestbeacon.com/we-are-no-longer-bastions-of-the-rule-of-law-says-hungarian-judge/>

³⁵ Id.

government, state or other significant cases.³⁶ This is particularly concerning because cases pertinent to the government or state are precisely the kinds of cases that need an independent judicial decision to uphold constitutional integrity. In a time when the courts are effectively the only source of non-politicized accountability left to keep the Fidesz-dominated executive and legislative powers in check, changing the composition of the courts is a serious threat to Hungary's continuing legacy of constitutional democracy.

As Judge Gipsz notes, creating a separate system of administrative courts will lead to the filtering of important cases to those courts:

If these separate courts are created and filled with judges who were socialized in a setting where judicial independence is not of paramount importance, it can easily happen that these courts will get the sensitive cases because they can be expected to deliver *appropriate* rulings. I can say a few examples: lawsuits involving freedom of information requests typically target governmental decisions.³⁷

V. Staffing the Administrative Court of Law: Concerns from the Current Curia Bench

Judge Andras Kovas, an administrative law judge who specializes in antitrust currently in the Curia, has stated that administrative law judges in his position face a difficult decision in determining whether to move to the new

³⁶ Id.

³⁷ Id.

administrative courts.³⁸ All Curia judges have been given the option to move over to the administrative law courts. However, notable factors weigh against exercising this option. First, Curia administrative law judges will be likely face a status degrade when moving over to the new courts. Due to both the sheer number, as well as the political nature of the appointments, former-Curia judges will likely be treated as outsiders to the new system. Altogether, the Curia only has 83 justices, including its President and Vice-President.³⁹ Twenty serve as administrative law judges, and eleven work in the labor section.⁴⁰ Even if all the administrative and labor court judges were to move to the new administrative law courts, that would still only constitute 31 out of 300 of the judges, about 10% of the courts.

Further, Judge Kovas expressed concern over the distribution of Curia judges were they to move to the new administrative court system. As currently designed, the new administrative courts will hear cases in panels, with a selected number of judges consistently sitting on a panel together to hear cases. According to Judge Kovas, judges are uncertain what the method or constitution of panel selection will be. For example, it is possible that the Minister of Justice and other political appointees may constitute the panels so as to distribute the Curia-judges and other judges with experience widely. This would have the negative effect of diluting the expertise and independent decisions of these judges, whom we might consider to be more trustworthy. Diluting their experience may also result in a dilution of the

³⁸ This information came from the personal meeting of the Hungary IIP group with the judge, as facilitated by his assistant and translator.

³⁹ Organigram of the Curia, Curia of Hungary, <https://kuria-birosag.hu/en/english/organigram-curia>

⁴⁰ Judges, Curia of Hungary, <https://kuria-birosag.hu/en/english/judges>

independent check on executive power or political influence which is a concern with judges that will be appointed by the Minister of Justice.

On the other hand, distributing these judges across different panels may also benefit the new court system by disseminating their expertise and knowledge. However, in Judge Kovas's mind, having no control over whom he would work with is a serious downside of transferring to the new court system because it potentially compromises his independent decision-making function. Sitting on a panel with other judges who may vote contrary to him may essentially nullify his decisions, and those of other experienced judges'. This is a serious concern with judicial independence as well as accuracy and expertise.

Judge Kovas also expressed concern with the expertise and knowledge aspect of the new administrative law courts. He seemed to believe that the new appointees would likely be civil servants, with no judicial experience whatsoever, resulting in an extensive court system adjudicating important cases with very little practical understanding of how to adjudicate the cases. Judge Kovas acknowledged that there may be some benefit to former-Curia or other judges in this respect—new appointees may be looking to the experienced judges for advice and guidance as they navigate new terrain. This may counteract the fear of status relegation which might accompany judges who move from the Curia to the new administrative law courts. Which way this power imbalance ultimately tips will remain to be seen.

Administrative law judges at the Curia will be forced to choose between moving to the new courts, or resigning from their current positions as

administrative law judges. If they choose not to move, they will either retire, transition into another legal field (such as private practice), or learn a new field of law and remain a Curia judge. For some judges, the choice to remain at the Curia is tempting—however, the challenge of having to transition into the civil or criminal law departments is daunting, especially in a legal regime where being an administrative law judge may be the only profession these judges have ever known. Learning a new area of law and developing expertise in a new area of law seems an almost insurmountable task. Realistically, then, the choice appears to be between moving to the new administrative law courts, or moving out of a judicial role.

VI. The Venice Commission's March 2019 Opinion

On March 19, 2019, the European Commission for Democracy Through Law (Venice Commission) issued its opinion on Hungary's proposed laws on administrative courts.⁴¹ In its report, it raised concerns over the broad powers reserved for the Minister of Justice to set up and shape the administrative court system, the broad powers conferred on the President of the future Supreme Court and future heads of court.⁴² However, the Commission nevertheless issued commendation for the proposed measures of the law as well. In particular, the opinion praised the fact that all current administrative judges would be permitted to transfer to the new administrative court system if they wished, and that the

⁴¹Hungary Opinion On the Law on Administrative Courts and On the Law On the Entry into Force of the Law on Administrative Courts and Certain Transitional Rules, European Commission for Democracy Through Law (Venice Commission), March 19, 2019, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)

⁴² Id. at 25.

courts would be opened to “individuals with substantial experience of working in public administration”—in other words, to current public officials in the administration.⁴³

Of interest, the report reported certain positive points about the law which are concerning. First, it noted that there was no reason to oppose the “sovereign decision of the Hungarian legislature” to create a new administrative court system.⁴⁴ In support of this contention, the Commission declared that the “principle of creating a new separate legal order in the area of administrative law” is fully within the “sovereign right” of the national legislature, and completely in line with European standards.⁴⁵ The Commission further acknowledged that having administrative judges from “more diverse professional backgrounds” was “a positive point.”⁴⁶ What is more, it stated that the possibility of appointing individuals who had worked in the administration or as an administrative court judge was a “guarantee of effectiveness.”⁴⁷

Thus, the Venice Commission, while stating general concerns with the law, simultaneously affirmed the overall scheme to create a distinct body of courts. This is in spite of one of the biggest criticisms of the new administrative court system, that is, its lacking of judicial independence. While the Commission observed that a

⁴³ Id.

⁴⁴ Id. at 7.

⁴⁵ Id. at 24.

⁴⁶ Id. at 8.

⁴⁷ Hungary Opinion On the Law on Administrative Courts and On the Law On the Entry into Force of the Law on Administrative Courts and Certain Transitional Rules, European Commission for Democracy Through Law (Venice Commission), March 19, 2019, at 8, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2019\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2019)004-e)

major drawback of the plan is that “extensive power” is concentrated in the hands of few stakeholders and there are “no effective checks and balances” to counter those powers, it nevertheless concedes that Hungary’s proposal can fully comply with European requirements if it made recommended adjustments.⁴⁸

To conclude the report, the Commission made five specific recommendations. First, to amend the recruitment procedure for judges, providing criteria for the Minister to change candidates rankings established by the personnel council of the National Administrative Judicial Council (NAJC), require council’s consent for any change, and “at the very least” provide a judicial remedy enabling candidates to challenge the Minister’s decision.⁴⁹ Second, to “examine the possibility of” strengthening the judges part of the NAJC council. Third, to amend the procedure for appointing heads of court to involve the NAJC in the Minister’s final decision. Fourth, to provide “fairly extensive experience (of at least five years for example) of working as a judge” for candidates nominated for the President of the Supreme Administrative Court.⁵⁰ Fifth and finally, to identify ways to counter the presidents’ powers, including those of the President of the Supreme Administrative Court by involving judges, elected representatives, administrative judicial councils, or the NAJC in dealing with various issues. The report concludes noting that if the draft amendments were adopted, some of the Commission’s criticism would be “moot.”⁵¹

⁴⁸ Id. at 25.

⁴⁹ Id.

⁵⁰ Id. at 26.

⁵¹ Id.

While the Commission’s 26-page opinion goes to lengths to analyze the provisions of the law and its shortcomings, it nevertheless affirms the legitimacy and validity of the Hungarian legislature’s clear attempt to usurp judicial independence. The Venice Commission’s failure to contextualize the act in light of the Fidesz party’s long-term plan to skirt constitutional limits is a serious problem. Rather than viewing the Act as another move to erode checks against the Fidesz party’s agenda, the Commission takes a middle ground, appearing neutral but ultimately handing down an opinion that is naively hopeful at best, and irresponsibly enabling at worst.

The Hungarian government had pledged to amend its law in the ways recommended by the Venice Commission, although it failed to do so at the beginning of April.⁵² As mentioned earlier, it complied only with about 30% of the Venice Commission’s recommendations, proving that faith in the Hungarian government was ill-placed. The Commission’s condonement of Hungary’s attempt to create this system without acknowledging the problematic context in which it arises bears negatively on the Commission’s responsibility to call out threats to constitutional democracy when it rears its ugly head. In spite of the careful, rule-of-law analysis that deems that the new legal order “cannot *a priori* be called into

⁵² See *supra* note 30.

question,” the Commission’s gentle approach toward Hungary ultimately proved a naïve and ineffective move.⁵³

VII. Conclusion

This paper has presented the recent developments with respect to Hungary’s new administrative courts law set to go into effect January 2020. The events surrounding and leading up to the passage of the law have been mired in party politics and insinuations of democratic erosion. While the context of the law provides much reason to fear the takeover of the judiciary’s independence, there is possibly hope that Hungary will take the Commission’s recommendations. Doing so would provide some safeguards against the unchecked powers of the new President of the Supreme Administrative Court, as well as the Minister of Justice. Only time will tell whether the Commission’s overall sanction of the program, rather than outright condemnation, will pave the way for greater democratic backsliding.

⁵³ Venice Commission, *supra* note 41, 7.